

# Colombia's Victims Law and the Liability of Corporations for Human Rights Violations



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## ABSTRACT

In 2011, after four years of lobbying and political wrangling, Colombia approved Law 1448, commonly known as the Victims Law. Its aims are broad: to be the comprehensive body of law to address civilian population claims related to the armed conflict, and therefore to include the necessary legal reforms to restore the rule of law through the enforcement of victims' rights. Currently, government, civil society and scholars are focused on the major issues of the Law, specifically land restitution and assistance for victims. However, this new body of Law, with its 208 provisions, is broader than that, and a close review of its articles is urgently needed. One little-studied and apparently forgotten provision is Article 46, which appears to put in place a specific directive to enhance the prosecution of juridical persons for violations of human rights and international humanitarian law in the context of the Colombian armed conflict. However, a thorough analysis of its wording and history reveals that Article 46 is incapable of establishing links between businesses and human rights and humanitarian law violations in Colombia. This article specifically exam-

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ines the scope and shortcomings of Article 46, and sets forth some possible solutions that require further investigation to fill the lacuna that already exist in the country in this subject.

**Key words:** Victims Law, business and human rights violations, juridical persons, international law, civil law.

## *Ley de Víctimas de Colombia y la responsabilidad de las personas jurídicas por violaciones de derechos humanos*

### **RESUMEN**

En el año 2011, después de cuatro años de cabildeo y forcejeo político, Colombia aprobó la Ley 1448, más conocida como la Ley de Víctimas. Los objetivos perseguidos por esta ley son bastante amplios, en la medida en que pretende ser una regulación comprensiva para enfrentar los efectos que el conflicto armado ha infligido en la población civil. En este sentido, la ley incluye las reformas legales que fueron consideradas como necesarias para restablecer el estado de derecho a través de la protección y cumplimiento de los derechos de las víctimas. Actualmente, el gobierno, la sociedad civil y la academia se han enfocado en el análisis de los dilemas y grandes temas de la ley. Sin embargo, esta nueva regulación, con sus 208 artículos, es más amplia y compleja, razón por la cual es indispensable hacer un análisis más detenido de sus múltiples provisiones. Una de estas, que parece no haber llamado la atención y que, por lo tanto, no ha sido objeto de estudio pormenorizado es el artículo 46. A primera vista, este parece estar encaminado a reforzar la investigación y juzgamiento de las personas jurídicas relacionadas con violaciones de derechos humanos y derecho internacional humanitario en el contexto colombiano. Este texto examina específicamente los alcances reales y dilemas del artículo, y propone algunas soluciones para llenar la laguna que existe actualmente en el país en la materia.

**Palabras clave:** Ley de Víctimas, empresas y derechos humanos, personas jurídicas, derecho internacional, derecho civil.

## *Lei de Vitimas da Colômbia e a responsabilidades das pessoas jurídicas por violações dos Direitos Humanos*

### **RESUMO**

No ano 2011, depois de quatro anos de lóbi e forcejo político, a Colômbia aprovou a Lei 1448, mais conhecida como a Lei de Vitimas. Os objetivos perseguidos por esta

lei são bastante amplos, conforme pretende ser uma regulação compreensiva para enfrentar os efeitos que o conflito armado tem infligido na população civil. Neste sentido, a lei inclui as reformas legais que foram consideradas como necessárias para restabelecer o estado de direito através da proteção e cumprimento dos direitos das vítimas. Atualmente, o governo, a sociedade civil e a academia se têm focado na análise dos dilemas e grandes temas da lei. No entanto, esta nova regulação, com seus 208 artigos, é mais ampla e complexa, razão pela qual é indispensável fazer uma análise mais cuidadosa de suas múltiplas provisões. Uma destas, que parece não ter chamado a atenção e que, portanto, não tem sido objeto de estudo pormenorizado é o artigo 46. A primeira vista, este parece estar encaminhado a reforçar a pesquisa e julgamento das pessoas jurídicas relacionadas com violações dos direitos humanos e direito internacional humanitário no contexto colombiano. Este artigo examina especificamente os alcances reais e dilemas do artigo e propõe algumas soluções para encher a lacuna que existe atualmente no país na matéria.

**Palavras chave:** Lei de Vitimas, empresas e direitos humanos, pessoas jurídicas, direito internacional, direito civil.

## INTRODUCTION

In 2011, after four years of lobbying and political wrangling, Colombia approved Law 1448, (By which measures for attention, assistance, and integral reparation of victims of the internal armed conflict victims are enacted), commonly known as the Victims Law, a statute aimed at the redress of the victims of the internal armed conflict.<sup>1</sup> The Victims Law marks a turning point in the way the State had been addressing the consequences of violence in the country, shifting the focus from the perpetrator – the person charged for criminal activity – to one based on the civilian population that has suffered the consequences of the confrontation. The Victims Law is considered critical to the country's reconciliation, much more since 2005, when President Uribe's Government approved Law 975/05 (Peace and Justice Law) in order to make possible the paramilitary demobilization. The Peace and Justice Law was highly criticized because it did not address the victims' rights<sup>2</sup> and focused instead on offering substantial benefits and alternative punishments for demobilized paramilitaries.



<sup>1</sup> According to article 3 of the Victims Law, "victims" are those persons who individually or collectively have suffered harm for events dating from January 1, 1985, as a result of international humanitarian law breaches or gross violations to the rules of international human rights, within the Colombian internal armed conflict.

<sup>2</sup> Law 975 was challenged before the Constitutional Court because of its flaws regarding guarantees for victims' rights and other issues. In its decision, the Constitutional Court made a serious effort to improve the interpretation of the law to preserve victims' rights. Specifically, the Court tried to open the door for greater participation of the victims during the process. However, the Court was limited by the scope of the law, and did not have the competence to change the whole judicial process created by Congress, where the leading role was given to demobilized paramilitaries. See, Corte Constitucional, Decisión C-370/06, M. P. Manuel José Cepeda y otros.

The Victims Law will be a subject matter of research for many years to come. Its aims are broad: to be the comprehensive body of law to address civil population claims related to the armed conflict, and in that sense, it purports to include the necessary legal reforms to restore the rule of law in the country through the enforcement of victims' rights.<sup>3</sup> This new law requires important changes in the executive and judicial branches at the national and local levels, puts in place an additional civil procedure to deal with land dispossession, and sets up lenient rules of evidence to benefit the victims. The Law also incorporates a broader definition of victim, leaving aside the stress on the forced displaced population and its regulation in Law 387/97, through the inclusion of numerous other different wrongs and harms. In brief, the enactment of the Law has meant reforms to Administrative, Criminal and Civil Law. Therefore, it is not hard to see why the Law has awakened at the same time hope, anxiety, and skepticism.

Currently, the attention of the government, civil society and scholars has focused on the major issues of the Law, specifically land restitution and assistance for victims. However, this new body of Law, with its 208 provisions, is broader than that, and a close look at its articles is urgently needed. A careful review of the law provision by provision is critical to envision its impacts in specific areas, for example in the prosecution of sexual violence crimes, reconciliation or the broadening of the Colombian state bureaucracy.

One little-studied and apparently forgotten provision is article 46,<sup>4</sup> which seems to put in place a specific directive to enhance the prosecution of



<sup>3</sup> See, Imprenta Nacional, Gaceta del Congreso Nos. 865/10, 953/10, 1004/10, 1139/10, 063/11, 178/11, 247/11, 294/11, 338/11, 339/11, 340/11, 479/11, 483/11, 590/11.

<sup>4</sup> "Article 46. When it is reasonable to infer from the physical evidence, legally obtained information, or other evidence gathered during a criminal investigation to establish the harm to the rights of victims covered by this law, that the illegal structure or organization which the person under investigation belonged to received financial support on a voluntary basis, of a natural or legal person, national or foreign, branch or subsidiary in the country, or that public servants promoted actions to further the violation of international human rights standards or international humanitarian law by the respective illegal structure, the prosecutor shall refer the record and the evidence collected to a general prosecutor, in accordance with the Criminal Procedure Code and the rules governing the matter.

In the event that during the procedure regulated by Law 975 of 2005, the Justice and Peace Prosecutor notice any of the circumstances mentioned in the preceding paragraph, he shall refer the record and the evidence collected to a general prosecutor, in accordance with the Criminal Procedure Code and the rules governing the matter.

When the criminal responsibility of the individual or of the representative of the legal entity, national or foreign, branch or subsidiary in the country or the public servant is declared, the trial judge at the request of prosecutor or the Attorney General, will immediately open a special repair incident, in accordance with the provisions of the Criminal Procedure Code, without the need to identify the victims, since the judge or magistrate will take into consideration the damage caused by the illegal armed group which has been supported.

In deciding the incident repair the Judge or Magistrate will order, by way of reparation to victims, the same amount of money the convicted or sentenced party provided or contributed to the financing of the illegal structure or organization, or cash equivalent if the support was in kind, or the amount the judge or

juridical persons<sup>5</sup> for violations of human rights and international humanitarian law in the context of the Colombian armed conflict. Located in Title II, Victims' Rights during Judicial Procedures, the article orders the investigation of the probable nexus between illegal armed groups and juridical persons through voluntary economic support. Although the Law has elicited a great deal of commentaries and studies, this prescription has attracted little, if any attention. In fact, the drafts of the decrees that will regulate the implementation of the Law so far have been silent about it.

This paper aims (i) to understand how Article 46 was included in the Victims Law, (ii) to analyze its real capacity to grasp the dimension of the ongoing relationship between business and human rights in Colombia, (iii) to determine its compliance with international law standards on the subject, and (iv) to envision different alternatives to litigate in Colombia cases against national and international corporations engaged in gross human rights violations in the context of the Colombian armed conflict if article 46 application demonstrates no efficacy. This last objective will be considered only briefly as it is part of ongoing research at Universidad del Rosario, the conclusions of which will be addressed in a future article.<sup>6</sup>

This article does not aim to be a comprehensive account of the political negotiations sustained to approve the law, nor the article under study, but

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magistrate deems appropriate in cases where it has not been determined in the process, and that amount will be given to the Fund for the Reparations of Victims.

The judge or magistrate may also order the convicted person to implement measures of satisfaction, which should be made directly by him. This provision will have no effect for subsidiary liability of the State which shall be governed by the provisions of Article 10 of this Law.

PARAGRAPH 1. When in the course of criminal proceedings the trial judge finds appropriate reasons to think that the illegal structure or organization to which the defendant belonged received financial support on a voluntary basis of a natural or legal person, national or foreign, branch or subsidiary within the national territory, he must refer the case and the evidence collected to a general prosecutor, in accordance with the Code of Criminal Procedure and the rules governing the matter.

PARAGRAPH 2. The legal person whose legal representative is convicted under the terms of this Article, shall concur as a third party liable to the repair incident in terms of the Criminal Procedure Code. Likewise, the judge or magistrate may also order the execution of measures of satisfaction for victims by the legal persons referred to in this article.

PARAGRAPH 3. Under the terms of this Article, the judge or magistrate may not order under any circumstance a legal person, by way of reparation, to give in more than one occasion to the Fund for the Reparations of Victims the same amount of money.

<sup>5</sup> In this paper the term "non-state actor" will be used sporadically. As many scholars have noted, it is not a useful term of art because it contains dissimilar international participants whose legal regimes are clearly divergent. The emphasis on this paper will be put on juridical persons, specifically corporations. See, Nijman, Janne E. *Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality*. At: Noortmann, Math and Ryngaert, Cedric (eds.). *Non State Actor Dynamics in International Law. From Law-Maker to Law-Makers*. Ashgate Publishing Limited, England, 2010, pp. 91-124.

<sup>6</sup> Currently, the Legal Theory Area at Universidad del Rosario Law School is conducting research on the possibility of litigating cases against corporations for human rights violations in the context of the Colombian armed conflict before the civil jurisdiction. The idea is to use tort theory to present these kinds of cases before civil judges. The research is directed by Professor Lina M. Céspedes-Báez.

instead to comprehend the history of article 46 in order to draw some legal conclusions about the legal understanding of the problem by members of Congress, and the provision's adequacy to judicially tackle the involvement of corporations in the internal armed conflict. In this sense, this article does not consider other non-judicial tools and institutions that can contribute to establishing the real connections between corporations and grave human rights violations in the internal armed conflict. We recognize the value of such initiatives and alternative ways to redress the victims; however they are beyond the scope of this research. We were interested in the direct interrelation between corporations, human rights violations and the available judicial procedures in Colombia, which called our attention to article 46. The responsibility of the Colombian State for third parties' human rights or humanitarian law breaches will therefore not be studied in this paper.

The methodology used in this paper was based on document reviews, focusing on the different drafts of the Victims Law, and transcripts of the congressional debates. When the document review left some points of the law-making procedure unclear, interviews were held with assistants and advisors to members of Congress who introduced the proposition of what today is article 46.

This evaluation will show how the inclusion of article 46 was part of a scheme to provide the Colombian State with more economic resources to cover reparations, and was not envisaged as a means to comply with international law standards. The scarce debates<sup>7</sup> about the provision illustrate how the discussion taking place in the country regarding Chiquita Brands and other corporations' involvement in gross human rights violations in Colombia concerned some members of Congress, especially those of the left wing. Legislators also expressed some uneasiness regarding the first judicial decision issued within the Peace and Justice process, where the State ended up being held subsidiarily responsible for a considerable amount of money to compensate the victims in cases where the investigation bodies were unable to identify the perpetrator and the perpetrator's group's assets.<sup>8</sup> The transcripts of the Congressional debates and the interviews held shed some light on its genesis, essentially on the fact that the article was part of



<sup>7</sup> To enact an ordinary law (*ley ordinaria*) in Colombia, the project should have four debates, two in each commission of the House of Representatives and the Senate, and two before the House, and the Senate in full, respectively.

<sup>8</sup> In the Victims Law first debate, held on the First Commission of the House of Representatives, Congressman Guillermo Rivera made clear his concern with the judicial decision of Mampuján, in which it was concluded that the Colombian State bore subsidiary responsibility for payment of damages of approximately 15 million Colombian pesos (around 8 million United States of America dollars). See, *Gaceta del Congreso* No. 178/11, pp. 9-16.

a more comprehensive proposal that was discussed and then tabled in the first of the four required debates.

This article sets forth the history of Article 46, its lack of capacity to unveil the connections between business and human rights and humanitarian law violations in Colombia, and sets forth some probable solutions that will need further investigation to fill out the lacuna that already exist in the country on this subject. Part I provides an overview of the main features of the Victims Law and describes the national and international environment in which it was approved. Part II analyzes in depth the shortcomings of article 46, drawing attention to its wording and framework. Additionally, this section will advance some preliminary observations on Colombia's predilection for criminal procedures to ensure the transition to democracy, and will open a discussion about the adequacy of the Colombian torts regime to support this goal. This latter debate will be addressed in depth in another article.<sup>9</sup> Part III explores the international law standards regarding corporations and their involvement in human rights violations. It establishes that international law places an obligation on States to provide judicial and/or non-judicial ways to determine corporate responsibility in these situations, and evaluates if article 46 complies with this duty. Finally, Part IV proposes some conclusions and matters for further investigation.

### **1. A LAW FOR THE VICTIMS OF COLOMBIA'S INTERNAL ARMED CONFLICT: WHERE TO BEGIN AND WHERE TO END?**

On June 10, 2011, the Victims Law approved by the Colombian Congress was officially published; it represents an ambitious body of law intended to redress the harms suffered by the victims of the Colombian armed conflict. President Juan Manuel Santos, elected in June 2010, had made its enactment one of the main goals of his administration. He ran on a platform that claimed that his Government would be one of the centre and of national unity, and the approval of the Victims' Law would be the way to prove it. The Law would also be a symbol of his departure from his predecessor, Álvaro Uribe Vélez, and of what he represents: the Colombian extreme right. After six months of intense debates, President Santos's Government could claim a victory with its enactment. To stress the legal and political importance of the event he signed the Victims' Law in a public ceremony to which he invited the United Nations Secretary General, Ban Ki-moon, among other personalities.

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<sup>9</sup> See, footnote 6.

President Santos joined UN officials, legal experts, and domestic and international media in declaring the Victims' Law a landmark in Colombia's recent history. And, indeed it is: the first and most comprehensive effort to regulate the consequences of the internal armed conflict on the civil population.

The Victims' Law is the product of several processes at the domestic and international level. In Colombia, relevant legal developments include Law 201, enacted in 1959 with the aim of preventing land dispossession during the period known as the *classic violence*,<sup>10</sup> and Law 387 (1997), whose main goal was to prevent forced displacement and to address its consequences, and the follow-up process that the Colombian Constitutional Court has carried out to ensure its implementation.<sup>11</sup> During Álvaro Uribe Vélez's presidency (2002-2010), the Colombian government shifted its focus from the victims to the armed actors, and decided to invest its legislative efforts in creating a framework to induce demobilization.<sup>12</sup> This required granting benefits to illegal armed actors in order to encourage them to participate in the judicial procedures. Although the Uribe Administration enacted a decree on administrative reparations,<sup>13</sup> its policy overall did not translate into enhanced protection of victims' rights or into mechanisms to facilitate their access to justice.

During Álvaro Uribe's second term, the Liberal Party presented a bill to provide a more comprehensive policy to address the situation of victims in Colombia. This bill enjoyed broad support, and was expected to be approved by Congress. In 2009, however, the Executive Government sent a clear message to Congress withdrawing its support because the law recognized as victims the individuals affected by operations or unlawful activities performed



<sup>10</sup> The *classic violence* (Violencia Clásica) ranges from 1945 to 1965 approximately and it refers to the violence fueled by the confrontation between the liberal and the conservative parties. This period ended with a political arrangement among those parties, called the *National Front* (Frente Nacional), that excluded the rural population from political power. It has been stated that this deal was one of the main causes of the ongoing armed conflict in Colombia. See, Salamanca, Manuel E. *Un Ajedrez del Conflicto Armado Colombiano*. In: Gómez Isa, Felipe (Dir.) *Colombia en su Laberinto. Una Mirada al Conflicto*. Los Libros de la Catarata, Madrid, 2008, p. 20.

<sup>11</sup> In 2004, the Constitutional Court decided on a legal action filed by hundreds of forcibly displaced individuals in which they argued the Government's inertia and unwillingness to implement Law 387/97. The landmark decision declared that not only a few Governmental agencies had failed to meet their obligations, but that the entire executive branch had done so as well. The Court therefore initiated a follow-up process to ensure compliance with its orders, according to which it has issued decisions on specific subjects to set standards to respond adequately to the forced displacement phenomenon.

<sup>12</sup> The basic demobilization legal framework is found in Law 975/05, known as the Justice and Peace Law (Ley de Justicia y Paz). As several scholars have observed, by the time it was issued, the Law had several problems in terms of ensuring the protection and guarantee of victims' rights, given that the victims barely have any participation during the process. See, Uprimny, Rodrigo et al. *¿Justicia Transicional sin Transición? Verdad, Justicia y Reparación para Colombia*. Ediciones Antropos, 2006.

<sup>13</sup> Decree 1290, 2008.

by the state.<sup>14</sup> Although that specific project was rejected, Colombia's political momentum showed that the country was ready to discuss an ambitious regulation on the subject, and Juan Manuel Santos, as a candidate running for presidency, and as president, did not miss the opportunity to back this initiative. In fact, a project to redress the victims would enhance the country's international reputation, and would help to advance some free trade agreements that Colombia had been eager to sign since Uribe's administration.<sup>15</sup>

Several changes had occurred in the international arena since the establishment of the ad-hoc international tribunals for Ex-Yugoslavia and Rwanda, and since the beginning of Uribe's administration Colombia had come under pressure to keep pace of these developments. Internal armed conflicts have been the order of the day since the end of Second World War, and international law seemed not to have specific provisions to deal with their occurrence and repercussions. Facing this challenge, the transitional justice movement gained international prominence after different civil society initiatives against impunity were put in place in the Southern Cone and South Africa,<sup>16</sup> and as they advocated before the international organizations, such as the United Nations, to obtain official statements and instruments to prevent amnesties for mass atrocities. The international bodies were receptive to this trend and put into motion a process in which prominent academics were appointed to analyze international law standards applicable to those armed conflicts, including the issues of forced displacement, prevention of impunity and victims' reparation.<sup>17</sup> In brief, the international community underwent a gradual change<sup>18</sup> to demand that states take into account



<sup>14</sup> See, *Revista Semana*, Cuatro Años Ocupó al Congreso una Ley para las Víctimas, <http://www.semana.com/nacion/cuatro-anos-ocupo-congreso-ley-para-victimas/157319-3.aspx> (Accessed on December 12, 2011).

<sup>15</sup> See, *El Espectador*, El nuevo lío para el TLC: las ONG y sus reparos a la ley de víctimas, <http://m.elespectador.com/noticias/politica/articulo90533-el-nuevo-lío-el-tlc-ong-y-sus-reparos-ley-de-victimas> (Accessed on February 21, 2012)

*La Silla Vacía*, Tres razones para que Santos lograra el TLC y tres razones para que esté preocupado de haberlo logrado, <http://www.lasillavacia.com/node/28513> (Accessed on February 21, 2012)

<sup>16</sup> See, De Greiff, Pablo (Ed.). *The Handbook of Reparations*. Oxford University Press, New York, 2006.

<sup>17</sup> It is usual that some of these studies end up being recognized by the United Nations through General Assembly resolutions. That was the case of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of December 16, 2005, after twenty years of research that started with the appointment of Professor Louis Joinet by the Subcommission on the Prevention of Discrimination and the Protection of Minorities (E/CN.4/Sub.2/1985/16/Rev.1). The Guiding Principles of Internal Displacement have a similar story, which after being submitted to the then United Nations Commission on Human Rights (E/CN.4/1998/53/Add.2) were expressly and overtly supported by the General Assembly in 2005 (A/60/L.1 para. 132).

<sup>18</sup> It has to be recognized that there is some discussions around the nature and status of the resolutions and declarations that surpasses the aim of this paper. However, generally when such official endorsements are made through resolutions and not treaties, their content constitutes soft law, a useful tool for the interpretation and judicial adjudication, but difficult to use in terms of establishing specific obligations to international law legal subjects. See, Chinkin, C. M. *The Challenge of Soft Law: Development and Change*

more than politics in their transition to democracy. In addition, the Rome Statute was adopted in 1998, and came into effect in 2002, making clear that States have the primary obligation to investigate, prosecute and remedy gross human rights violations. By the beginning of the 21st century, soft law and mandatory prescriptions populated the set of standards and norms to be followed by state agencies and government officials in order to address internal armed conflicts, political violence, and dictatorships.<sup>19</sup> In this light, the Victims Law draft was an opportunity for Colombia to recognize and incorporate the new developments in international law into its own body of law, and to improve its image as a human rights compliant country.

The Victims Law deals with two main topics: measures to address the humanitarian emergency and reparations in general, and instruments to reverse the consequences of land dispossession.<sup>20</sup> The Law acknowledges that the country is in a situation of armed conflict, an explicit statement that puts to an end at least 20 years of discussion about the regime of law applicable to Colombia's situation.<sup>21</sup> The main obstacles that stood in the way of its approval, and that now define the discussion about its future implementation, were its economic sustainability and the required security conditions to achieve its effectiveness.

These basic features of the Law explain why it has been called groundbreaking and ambitious. Moreover, it helps to envisage the complexity of Colombia's internal armed conflict and its non-easy solutions. The debates held in the Senate and the House of Representatives are just a minor indication of what was at stake for the country. Reviewing the transcripts of the debates,<sup>22</sup> one can identify the most difficult issues, such as the concept of victim, the amount of the reparations, and the specific starting date from

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in International Law. 38 Int'l & Comp. L.Q. 850 1989. At: <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1513152>

<sup>19</sup> See, Botero, Catalina y Restrepo, Esteban. *Estándares Internacionales y Procesos de Transición en Colombia*. En: *Entre el Perdón y el Paredón: Preguntas y Dilemas de la Justicia Transicional*, Universidad de los Andes, Bogotá, 2005, pp. 19-66.

<sup>20</sup> In its genesis, the Victim's Law was two separate draft bills, one addressing the land dispossession problem, and the other one directed to the required institutional reforms to attend the humanitarian emergency and reparation in general of the victims. The drafts were merged during the Congressional debates, since a majority of Congressmen and Congresswomen, along with the Government, thought it was advisable to have only one body of law. In practice, after a few months of being enacted, the two main themes of the Law seem to have taken different paths, as different government agencies, with dissimilar experiences working on armed conflict, are in charge of each part of the statute. As many experts have expressed, this would be one of the main challenges for implementing the law. (Work Meeting, December 6, 2011, Universidad del Rosario, Bogota, Colombia).

<sup>21</sup> However certain NGOs, and members of Congress declared that the use of the concept of armed conflict inappropriately narrows the scope of the law, leaving without due reparation the victims of the war against drug trafficking and of the emergent criminal bands, known as BACRIM. See, *Gaceta del Congreso* Nos. 63/2011, 247/2011, 253/2011, 294/2011, 339/2011, 469/2011 and 483/2011.

<sup>22</sup> See, note 3.

where the State would recognize the violation as a harm to be compensated. The silence (absence of debate) in the transcripts also reveals that some of those complex subjects were negotiated in private, in the Conciliation Commissions,<sup>23</sup> or simply outside of the public discussions. Interviews with experts with first-hand knowledge of the debates, including Congressional staff, lobbyists, and NGO legal experts, confirm this conclusion.<sup>24</sup>

In a broad sense, the merged draft bills did not change substantially during the public discussions held in the Senate and House of Representatives. As noted above, the interventions and disagreements revolved around the economic capacity of the State to fund the Law and the date to be chosen to recognize the compensable harms. However, between the first and the second debate in the House, a new topic appeared as article 44, now article 46 of the approved Law:<sup>25</sup> the responsibility of juridical persons in violations of international humanitarian law and international human rights law.

The original draft bill written and backed by Santos's Government did not have any provision on this subject, nor did its antecedent, the bill that Uribe's Government refused to support on 2009.<sup>26</sup> Both of them, following a tradition in Colombian law, focused on criminal procedures to prosecute natural persons, especially those who have taken up arms, and the design of a new civil judicial process to remedy illegal land seizures. This feature might be particular to Civil Law systems like Colombia's, or a consequence of the specific way Colombian attorneys litigate their cases.<sup>27</sup> Regardless, the exclusive attention given to criminal law and to armed perpetrators in the quest for justice and reconciliation in the Colombian armed conflict has left aside the debate around the responsibility of other actors besides the State and the members of the illegal armed groups.

This has meant that transitional justice has been understood in Colombia mainly as an administrative and judicial process where three main



<sup>23</sup> "[B]icameral disagreements over on legislation are resolved through a parliamentary committee that has the power and responsibility to craft a consensual alternative." Those committees or commissions do not have the obligation to record their discussions and agreements in accordance to Colombian Law. Some scholars have said that those political spheres are like black holes, unavailable to the people and protected by the absence of records. See, Aleman, Eduardo and Pachón, Mónica. *Las Comisiones de conciliación en los Procesos Legislativos de Chile y Colombia. Política y Gobierno*, Vol. XV, no. 1, México, 2008, pp. 3-35. Lombana de la Calle, Humberto. *La Caja Negra del Congreso. El Espectador*, Colombia, 2011, <http://www.elespectador.com/impreso/opinion/columna-299949-caja-negra-del-congreso> (Accessed on December 13, 2011).

<sup>24</sup> Interviews were held with Fátima Esparza, from the Colombian Commission of Jurists; and with the Working Team of Representative Iván Cepeda. Also, some informal talks were held with persons involved with the Government in the writing of the first draft of the land restitution bill.

<sup>25</sup> Compare *Gaceta del Congreso* Nos. 865/10, 1004/10, 116/11, 178/11, and 338/11.

<sup>26</sup> Draft Bill 044, 2008, House of Representatives and 157, 2007, Senate.

<sup>27</sup> See, Stephens, Beth. *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*. 27 *Yale J. Intl L.* 1, at 37, 2002.

actors – perpetrators, victims and the State - interact in highly institutionalized legal environments. The framework that defines this interaction has been defined through (i) reforms to criminal law to encourage demobilization, such as providing benefits and alternative punishment; (ii) minor changes to private law to address the illegal seizure of land by armed groups and perpetrators, and (iii) administrative and judicial reparations assumed by the Colombian government to redress victims. As a result, criminal responsibility and liability have been seen as a causal and direct connection between the perpetrators' (natural persons) acts or omissions, the State's complicity and/or omission and the harm or injury to the victim.

Although it can be said that this excessively orthodox view has begun to change with the *parapolítica* scandal,<sup>28</sup> it is true that the link between the victim and actors not belonging to illegal armed groups responsible for gross violations of international humanitarian law and international human rights law has been hard to accept and to establish by the authorities. In this context, liability is seen mainly as a link between individuals who took up arms and used them, or between the State that did not protect the civilian population, and the victim. The liability of actors aside from armed groups has been a neglected issue in the Colombian armed conflict, and there are no traces of serious and systematic legal discussions at the State level on the matter. The topic has been on the agenda as an indirect consequence of land dispossession or as a residual litigation strategy of Colombian cases by some public interest groups in the United States of America.<sup>29</sup> When it comes to land dispossession, those actors have been involved as third parties in possession or ownership of the land, and in litigation they have been targeted as defendants.

Certainly in this setting the inclusion of an article on juridical persons and their involvement in gross violation of international humanitarian and human rights law seems unexpected. Neither the executive nor members of Congress had it in mind, since the topic was not included in the origi-



<sup>28</sup> "A scandal alleging paramilitary ties to politicians, especially members of the Colombian Congress, erupted in November 2006. On November 9, 2006, the Colombian Supreme Court ordered the arrest of three congressmen for their alleged role in establishing paramilitary groups in the department of Sucre on the Caribbean coast." Beittel, June S. Colombia: Issues for Congress. Congressional Research Service, March, 2011, <http://www.fas.org/sgp/crs/row/RL32250.pdf> (Accessed on December 13, 2011).

<sup>29</sup> At least three lawsuits have been filed against Drummond and Chiquita Brands International before United States of America courts, for their alleged involvement with paramilitaries in Colombia. The claims were brought under the US Alien Tort Claim Act (ATCA), which states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." See, Romero, Mauricio y Torres, Diana Fernanda. Drummond, Chiquita y Paramilitares: Adaptación y Negociación de Ventajas en Medio del Conflicto. En: Romero, Mauricio. La Economía de los Paramilitares. Redes de Corrupción, Negocios y Política. Random House Mondadori, Colombia, 2011, pp.149-190.

nal drafts.<sup>30</sup> However during the first debate in the First Commission of the House of Representatives, a proposal on the subject was introduced by Guillermo Rivera, from the Liberal Party, and was supported by the Polo Democrático party,<sup>31</sup> represented by Iván Cepeda.<sup>32</sup>

Representative Iván Cepeda, as many other of his colleagues, was concerned with the provision on subsidiary condemnations (article 9 in the draft bill, now article 10), by which the Colombian state would have the obligation to compensate victims when the direct perpetrator, or its armed group, did not have the economic resources to do so. The idea was to order the state to take on those reparations, taking into account the limit for the administrative reparations that would be enacted by the executive branch through a decree.<sup>33</sup> The concern was widespread within the left and the right wing parties, but for different reasons. The right wing parties did not want the state to be held as subsidiarily responsible, and the left wing parties were concerned by limits that would be imposed to that obligation in order to protect the state's budget.

Accordingly, the Liberal and Polo Democrático Parties decided to propose two major changes in that provision with the aim of eliminating or, at least, alleviating the limits imposed to that subsidiary condemnation. The latter presented a proposition to eliminate the limit; the former, the addition of a paragraph to create a new division within the national agency in charge of the investigations (National Technical Investigation Corps, –CTI by its acronym in Spanish) that would be responsible for the identification of the perpetrators' hidden assets, and to stress the obligation of the judge to determine the involvement of the juridical persons with the illegal armed groups through their economic contributions. This provision was conceived as a mandatory step to be included in every criminal procedure against illegal armed actors. The establishment of the existence of the hidden assets and the legal persons' involvement was meant to be determined in that very same procedure.<sup>34</sup>



<sup>30</sup> The Victims Law is the outcome of two different drafts filed by the government before Congress for their approval. On one hand there was the land restitution bill, and on the other hand the draft about victims and their reparation. The drafts were merged into one, for the sake of coherence.

<sup>31</sup> The Polo Democrático is a left wing Colombian party. Some of its most important members came from the M-19 guerrilla, demobilized in 1990.

<sup>32</sup> Representative Iván Cepeda is not part of the First Commission of the House of Representatives; nevertheless, he was admitted to the debates with voice but without vote.

<sup>33</sup> Article 9 of the draft bill, currently article 10 of the Victims Law.

<sup>34</sup> According to the Working Group of Representative Cepeda, and the testimony of Fátima Esparza of the Colombian Commission of Jurists, the Liberal Party's proposition was not only supported by Polo Democrático, but it was discussed and written jointly with them. Nonetheless, as Representative Iván Cepeda's proposals had faced opposition in the past, it was decided that the addition on legal persons

As was explained by Representative Rivera, the pursuit of the properties and assets of the perpetrators and the juridical persons involved with illegal armed groups would increase the resources of the state's Reparation Fund, and in turn, the possibility for the victims to be repaired. In that fashion, the objective was to encourage prosecutors and judges to collect evidence on the contributions made by the juridical persons to the illegal groups, in order to condemn them to pay the same amount to the victims. As expected, the provision met substantial opposition from the right wing parties, in particular from the Government's Partido Social de la Unidad Nacional.<sup>35</sup>

The main argument in opposition was that most of the legal persons had been subject to extortion and had not contributed willingly to the maintenance of the illegal armed groups. In that sense, some Congressmen insisted on adding a provision requiring that legal persons' criminal responsibility be established in a separate judicial decision before they were condemned to pay the amount of their contributions to the illegal armed groups to the Fund for Reparations of Victims (Fondo de Reparación para las Víctimas de la Violencia). Nevertheless, as the Government and the Government's party were very interested in getting the law approved, the discussion on the subject did not go further, and it was settled with the addition of the word "voluntary", in order to make clear that the legal person's contribution to the illegal armed group had to have that characteristic.<sup>36</sup> According to the transcripts, the First Commission never held a debate on the criminal liability of the juridical person in itself, or about the international law standards regarding this subject. The discussion was brief and revolved around the importance of establishing the voluntariness or not of the legal person's contribution to the illegal armed group.

Between the first and the second debate in the House, the addition to article 9 changed radically into article 43 and 44 (now 45 and 46).<sup>37</sup> The

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was going to be presented as a Liberal Party proposition. (Interview held on December 23, 2011, and work meeting held at Universidad del Rosario on November 23, 2011, respectively)

<sup>35</sup> See, *Gaceta del Congreso* 178/2011.

<sup>36</sup> Rivera's proposition stated that "[I]n legal proceedings in which the perpetrator is convicted, when the harm is not attributable to the State by act or omission, before deciding whether the state should attend the alternative to indemnify the victim, the trial judge should insist to the division for the pursuit of goods for repair from the National Technical Investigation Corps in the identification of assets and fraudulent concealment of assets by the perpetrators, and in the same ruling the judge must determine whether the group or front to which the condemned belonged were supported by a legally recognized business, in which case these should participate in the reparations of the victims covered in the respective providence, in the same proportion as the support given to the respective illegal organization (...)" As it can be seen, the contributions made by the companies were not classified as voluntary. The compromise reached by the members of the First Commission was to include the word "voluntary" within the proposition.

<sup>37</sup> "Article 45. Agencies with permanent judicial police functions will create from its current plant staff a specialized group of agents to work on the identification of goods and assets that have been concealed by the people accused of violating the rights of victims covered by this Act".

text of the draft bill for the second debate did not have the additional paragraph on legal persons in article 9, as had been approved in the first debate, but two new articles located in Title II, Victims' Rights in Judicial Procedures. Those articles came from the additional paragraph of article 9. Article 43 was concerned with the creation of a specialized group within the National Technical Investigation Corps –CTI- to pursue perpetrators' hidden assets and properties. Article 44 was about the legal persons' involvement in the armed conflict through their voluntary contributions to the illegal armed groups. This latter provision's wording is quite different from the one that resulted from the first debate as the addition to article 9. Basically, the new article describes in more detail the judicial procedure to hold legal persons accountable, and stated that the money collected through this procedure would enlarge the Fund for the Reparation of Victims and would not be used to repair the specific wrongs caused by the illegal armed group to which the legal person contributed to.

In the next stages in the Senate, article 44 evolved into what is today article 46, an intricate provision that tries to address the concerns exposed during its first debate in the House. What was conceived as a means to obligate legal persons to contribute to redress a violation of human rights or humanitarian law, simply because of their nexus with illegal armed group through economical contributions, was transformed into a provision that requires the establishment of criminal liability by their legal representative in a separate process. The amendments made to this provision throughout the four debates and the private negotiations did not represent any improvement to the original phrasing. Indeed, according to some legal experts, these amendments transformed article 46 into an unnecessary provision that only reiterates what the criminal code already said about conspiracy, funding of terrorism, complicity and other criminal activities related to collaboration with criminal enterprises. In this view, although the provision expressly indicates the already existent implicit obligation to unveil the connection between enterprises and human rights and humanitarian law violations, it also duplicates the burdens already in place to prosecute them.

Rivera's proposition was intended to bring the legal persons into the criminal proceedings in order to collect money without establishing their criminal responsibility. Then, the redrafting in article 44 for the second debate in the House stated that the juridical persons would have the opportunity to defend themselves within the supplementary proceedings for reparation, but their obligation to deliver the money was based on the criminal responsibility of the direct perpetrator, in most cases the demobilized natural person. The changes introduced during the Senate debates were focused in what some criminal lawyers define as redundancy, since they established the need to

open a separate criminal investigation to define the legal representative's criminal responsibility, something that was already stated in the criminal procedure and criminal codes, and was confirmed by the Supreme Court's Criminal Chamber.<sup>38</sup>

It is unclear from the official transcripts of the debates how the proposed addition to article 9 was transformed into article 46. They are referred to explicitly only once, in a succinct paragraph in the explanatory memorandum for the second debate in the House. In this opportunity, the speaker stated that, among others, a new provision on the relationship between juridical persons and individual perpetrators was going to be proposed.<sup>39</sup> In the seventy or so pages of transcripts of the second debate in the House it is not possible to find any mention of this proposal. In page 32 of the *Gaceta del Congreso* No. 116/11 there is only a reference to its voting, and consequent approval. No discussion was held during the public hearing, and no members of Congress touched on the subject. Afterwards, in the final pages of the *Gaceta*, where proposals to add, suppress or make changes to the bill by every member of Congress are published, a proposition by Congressman Ivan Cepeda is found. There he states that he intended the Law to establish a truth commission on the involvement of the juridical persons in the Colombian armed conflict. Iván Cepeda's proposal was never discussed in the public debates, though it indicates that the negotiations around this topic were held in private, and that article 46 was part of a more comprehensive scheme to unveil the links between corporations and illegal armed groups.

Regarding the debates in the Senate, there is no official analysis on the subject registered in the official transcripts, nor is there any attempt to reintroduce the debate around the truth commission. These silences demonstrate that the implications of the legal persons' involvement in the Colombian armed conflict and Colombia's international law obligations on the subject were never seriously discussed. Article 46 was part of a political negotiation and a strategy to collect more money to make available for the victims' reparation. However, the article's original wording was drastically transformed in the course of the congressional procedure, and it ended up in a provision that will be difficult to implement.



<sup>38</sup> Interview with Camilo Bernal, December 29, 2011. Also, see, Corte Suprema de Justicia, Sala de Casación Penal, Expediente No. 110016000253200680281, Magistrado Ponente Dr. Alfredo Gómez Quintero, marzo 11 de 2010.

<sup>39</sup> *Gaceta del Congreso* No. 1004/10, p. 55.

## **2. WHAT WAS ACCOMPLISHED BY ARTICLE 46? FROM PURE EXPECTATIONS TO THE HARSH REALITY**

Article 46 has complex wording, which implies that it is essential to analyze its language carefully in order to derive its true meaning. First of all, it is worth noting that it is placed in Title II, which is concerned with victims' rights during judicial proceedings. This heading includes guarantees such as the right to be informed of what is happening in the pertinent judicial procedures, the rules of evidence in sexual violence cases, and attorneys' legal fees. When placed in this context, the aforesaid article seems to be considered another right the victims are entitled to in connection with the rules of evidence. But its scope goes far beyond an evidence issue or a right entitlement. Second, this provision belongs exclusively to the criminal procedure, given the logic of the title and what is stated expressly in its language. Finally, the complicated way in which the responsibility of juridical persons was conceived seems to condemn it to complete irrelevance, or in the best case to a difficult application. In the following paragraphs these 3 features will be studied in depth. The international law analysis of article 46 will be conducted in the next section.

Firstly, some brief notes on the provision itself. As indicated earlier, article 46 was meant to be applied during criminal proceedings against armed actors for grave violations of international humanitarian and human rights law. There, when the gathered evidence leads to infer that the armed group of the accused party received voluntary economic support from a juridical person, national or international, with a subsidiary in Colombia, to promote those violations, the prosecutor should refer the situation to a general prosecutor to open an investigation into this conduct. If the juridical person's legal representative is found guilty, the judge will condemn it to pay the same amount that he or she contributed to support the illegal actions. These sums will be added to the Fund for the Reparation of Victims. The juridical person itself should appear as a responsible third party to these proceedings.

The framework in which the article is set is one of guarantees for the victims. One of the main critiques to the Peace and Justice Law and the entire process of demobilization of paramilitaries had been the lack of protection for victims' rights, especially during the judicial procedures<sup>40</sup>. Although the



<sup>40</sup> See, Comisión Colombiana de Juristas. *Anotaciones Sobre la Ley de Justicia y Paz. Una Mirada desde los Derechos de las víctimas*. Opciones Gráficas Editores Ltda., Bogotá, 2007. Comisión Colombiana de Juristas. *Colombia: La Metáfora del Desmantelamiento de los Grupos Paramilitares*. Segundo Informe de Balance sobre la Aplicación de la Ley 975 de 2005. Opciones Gráficas Editores Ltda., Bogotá, 2010. Díaz, Catalina; Sánchez, Camilo y Uprimny, Rodrigo. *Reparar en Colombia. Los Dilemas en Contextos de Conflictos, Pobreza y Exclusión*. Centro Internacional para la Justicia Transicional, Opciones

Constitutional Court improved some of the provisions related to the subject<sup>41</sup> the Peace and Justice Law process is focused on offenders' confessions and on the benefits granted to them if they declare the full truth about their illegal actions.<sup>42</sup> Victims and NGOs advocated specific mechanisms to ensure access to justice, participation during the process and specific standards for individual and collective reparation. Title II of the Victims Law was a response to that unconformity. Although a lot can be said of its coherence, pertinence and effectiveness, what matters here is that Title II was intended to supply tools to enhance victims' participation in the proceedings.

Article 46 surpasses that goal and seems poorly located in that title. Overall, this provision was at odds with the entire regulation, so it must have been difficult to find it a proper place in the statute. It is not clear whether this subject was discussed at all, and if it was, the discussions were certainly held outside the public hearings. Furthermore, article 46 seems to be related exclusively with the debates on the economic sustainability of the bill. Members of Congress were deeply concerned with Colombia's financial capacity to implement this Law. Several times, they demanded the presence of the Finance Ministry to clarify the plans and commitments of the executive branch to fund the Victims Law.

Indeed, article 46, construed along with article 45,<sup>43</sup> shows an intention to unveil the connections between business and gross violations of international human rights and humanitarian law in order to identify assets and money related to those illegal acts. That purpose is more evident when article 46 states that the eventually collected money and assets are not to be destined to repair the wrongs directly caused by that accused person, but will be added to the general Fund for the Reparation of Victims.

The focus of Article 46 is on criminal responsibility, since it was written to ensure that evidence regarding juridical persons' voluntary involvement in grave violations of human rights and international humanitarian law, gathered in criminal proceedings against illegal armed perpetrators, will be used to further investigations to establish the criminal responsibility of their legal representatives. As noted in paragraphs above, the Colombian demobilization process and victims redress has been characterized by its criminal emphasis. No significant reforms have been made regarding other areas of

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Gráficas Editores Ltda., Bogotá, 2009. Human Rights Watch. *Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia*. Human Rights Watch, United States of America, 2008.

<sup>41</sup> See, note 2.

<sup>42</sup> See, articles 17, 19, 25, and 29 of Law 975/05.

<sup>43</sup> This article, directed to the Judicial Police, orders to create a special group to identify accused persons' hidden goods and money.

the law, except for land restitutions at the civil level, and litigators seem uninterested in exploring them. Liability for grave violations of human rights and humanitarian law has been dealt with at the national level through criminal and administrative proceedings. Both the State and the activists have been encouraging and fomenting this kind of litigation, the former through the said legal reforms, and the latter through their understanding of the symbolic efficacy of those proceedings. This has signified that the whole process of conveying truth, justice and reparation through litigation has been rooted on criminal and administrative responsibility, criminal for the armed actors, administrative for the State.<sup>44</sup>

In the end, other kinds of responsibility fall out of the radar of the human rights activists and litigators, such as civil liability, which could be very useful to prosecute non armed actors involved in the armed conflict. Behind this attitude, one can find a few prejudices toward civil proceedings, and real burdens to victims and lawyers to use them. Regarding prejudices, the most recurrent ones are that civil proceedings do not promote legal reforms; they privatize public wrongs, and establish a higher burden of proof. With respect to real hurdles, some of them could be the excessive formalism of the proceedings before the Supreme Court, the unlikelihood of collecting punitive damages, and the absence of a pro-bono tradition in Colombia.<sup>45</sup>

These prejudices generally are based on a poor understanding of civil law. For instance, it is true that the burden of proof in civil law is higher than in administrative law, where the state could be held liable if both the legal duty plus non-compliance with it are proved. There is no need to establish the state of mind of the State or its agent.<sup>46</sup> However, it is not true that the burden of proof of civil law is higher than the one in criminal law, since the latter requires to establish the *mens rea* of every offense, which can be very difficult regarding some conducts, for example, complicity, aiding and abetting, white collar crimes, statutory rape and, of course, crimes against humanity. Additionally, the guilt has to be proved beyond reasonable doubt, and the presumption of innocence is present throughout the entire procedure.

The Colombian torts regime is based on establishing the harm, the agent's fault and the link between them. When it comes to the fault, generally the



<sup>44</sup> Although there are some non-judicial tools and institutions to convey the truth about the Colombian armed conflict, such as the one set out in Law 1424, they are beyond the scope of this paper, since its objective is to analyze judicial procedures in place to unveil the connections between business and human rights violations in Colombia.

<sup>45</sup> See, Stephens, Beth. Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations. 27 Yale J. Intl L. 1, at 37, 2002.

<sup>46</sup> See, Hernández, Alíer Eduardo y Franco, Catalina. Responsabilidad del Estado: Análisis Jurisprudencial del Consejo de Estado. Ediciones Nueva Jurídica, Bogotá, 2007.

plaintiff does not have to prove special knowledge of the defendant; it suffices to prove its negligence (*culpa*). Proving the intentional infliction of the harm will only augment the award. Furthermore, the Colombian Supreme Court since 1930 has been broadening the scenarios where responsibility can be established without proving fault, for example in cases related to dangerous activities and with obligations of result.<sup>47</sup> Although this topic will be treated in another article, it will suffice to say that doing business in an armed conflict zone could be framed as a dangerous activity that demands a higher standard of due diligence, and that profiting by taking advantage of the deinstitutionalization of a specific zone could amount to an undue exercise of rights (*abuso del derecho*).<sup>48</sup>

Regarding real hurdles, it is worth noting that some of them exist simply because neither the government nor human rights groups have understood the civil procedure as an avenue to redress the harms produced by the internal armed conflict. Therefore, nobody has advocated changes in its structure, as has happened with the criminal procedure. For instance, although the cassation process has been adjusted by the justices in recent years to respond to the parties in a more flexible way, it is still one the most rigid procedure in Colombian Law.<sup>49</sup> The lasting rigidity has not been addressed by activists or interest groups; it is as though the civil procedures were a forbidden land where only the initiated were allowed in.

Another burden would be the impossibility to collect punitive damages. That means that the tort reparation awarded through the civil or criminal procedure will have to take into account this constraint. In other words, the award will only indemnify the harm caused and proved during the judicial proceedings, and it will not be used as an exemplary punishment valued in money, since compensations are not a way to sanction the defendant or a deterrence tool. This limitation is not exclusive of the civil procedure, but it is a foundation of Civil law systems and Colombian tort law.<sup>50</sup> However, human rights litigators are more prone to using the criminal procedure, among other reasons because the perpetrator's punishment, being most of the time



<sup>47</sup> See, Mantilla, Fabricio. El Principio de Responsabilidad por Culpa del Derecho Privado Colombiano. *Revista Opinión Jurídica*, Vol. 6, No. 11, Colombia, pp.129-150.

<sup>48</sup> Rosario University's Research Program on Public Law is now finishing a study on the subject.

<sup>49</sup> See, Corte Suprema de Justicia, Sala de Casación Civil, M.P. Carlos Ignacio Jaramillo Jaramillo, febrero 14 de 2006.

<sup>50</sup> Aristizábal, David. Apuntes sobre el Daño Punitivo en la Responsabilidad Patrimonial Colombiana. *Revista Facultad de Derecho y Ciencias Políticas*, Vol. 40, No. 112. Universidad Pontificia Bolivariana, Medellín, 2010, pp.175-201.

García, Laura Victoria y Herrera, María Carolina. El Concepto de los Daños Punitivos o Punitive Damages. *Revista de Estudios Socio-Jurídicos*, enero-junio, año/vol. 5, número 001, Universidad del Rosario, Bogotá, Colombia, pp. 211-229.

imprisonment, is seen as dissuasive enough as to balance the absence of punitive damages. Therefore, as civil procedure does not allow punishing the defendant, human rights activists and victims tend to underestimate its potential because of a lack of exemplary redress.

A further obstacle would be that the pro-bono tradition is not well honored in Colombian litigation, so it is difficult to find specialized lawyers to litigate complex cases before the civil jurisdiction when the plaintiff does not have resources. The pro-bono work has been delegated to NGOs and universities. Private firms have tended to avoid the litigation of controversial cases involving human rights and humanitarian law, since for almost a decade the Government has sent confusing messages regarding this kind of litigation. Specifically, Uribe's Government labeled NGO's work on the subject as a terrorist plot.<sup>51</sup> Recently, the Mapiripan and Las Pavas scandals<sup>52</sup> have further blurred the panorama of human rights litigation, and deterred any initiative of the private sector to advance those cases before the judiciary. The way the Government and the media have dealt with the discovery of false witnesses and victims have casted a veil of doubt on every effort to redress the harms caused by the Colombian armed conflict.

Lastly, some comments on the content of the provision. Apart from its grammatical complexity, it is essential to highlight that its wording can be deceiving. What is referred to in the first paragraph as the probable liability of the juridical person for supporting illegal armed groups, ends in the third paragraph as the criminal liability of its legal representative. Indeed, the article begins with what could be the legal grounds to assert the legal responsibility of a juridical person for its involvement in the internal armed conflict. However, it is not clear what kind of responsibility –civil or criminal– that would be, because it only mandates to refer of the case to a general prosecutor. Abruptly, in the third paragraph, the concept “legal representative” is introduced in order to make clear that it is necessary to establish his or her criminal responsibility to proceed to order the reparations derived from the civil liability. Then, the article states that the legal representative's juridical



<sup>51</sup> See, Latorre, Héctor. Colombia/Uribe: críticas de DDHH. En: [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_3092000/3092222.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_3092000/3092222.stm) (Accessed on December 16, 2011).

Amnesty International. Informe Anual, 2011. En: <http://www.amnesty.org/es/region/colombia/report-2011> (Accessed on December 16, 2011).

Caracol Radio. ONG responsabiliza al presidente Uribe por haberla calificado como “nuevos colonos”. En: <http://www.caracol.com.co/noticias/actualidad/ong-responsabiliza-al-presidente-uribe-por-haberla-calificado-como-nuevos-colonos/20100522/nota/1302224.aspx> (Accessed on December 16, 2011).

<sup>52</sup> See, Vargas, Carlos Julio. Las implicaciones del caso Mapiripán ante el Sistema Interamericano. En: <http://www.lasillavacia.com/historia-invitado/29364/cvargasvelandia/las-implicaciones-del-caso-mapiripan-ante-el-sistema-interam> (Accessed on December 16, 2011).

Revista Semana. La Lección de las Pavas. En: <http://www.semana.com/nacion/leccion-pavas/168576-3.aspx> (Accessed on December 16, 2011).

person should concur to the supplementary proceedings to determine the amount of the reparation as a third liable party.

In conclusion, what was set out as a way to unveil business participation in human rights and humanitarian law violations, as had been stated in the succinct allusion to this article in the explanatory memorandum written by the speakers at the House of Representatives, turned out to be a reaffirmation of individual criminal responsibility of natural persons related to enterprises. That is so because without attributing criminal liability to the legal representative, the juridical person cannot be reached, not even as a third liable party. That takes back the discussion of enterprise involvement to the behavior of one natural person, and to the difficult task of determining the *mens rea* required of the specific conduct, generally complicity, aiding and abetting, or in some cases, the establishment of conspiracy or funding of terrorist activities. In addition, the standard to establish the amount of reparation will be the contribution given by the juridical person to the illegal armed group, or the amount established by the judge when this amount is not determined, but not based on the amount of the damages. That would mean in some cases that effective reparation would not be achieved, since the amount of the contribution could be significantly inferior to the damage caused.

Also, saying that the juridical person may only concur to the process as a third liable party is a clear statement in the line of disregarding that juridical persons as themselves could be liable for torts when they produce a harm or wrong, which is exactly what happens when they contribute to or produce human rights and humanitarian law violations.<sup>53</sup> This position brushes aside at least of 70 years of decisions by the Supreme Court's Civil Chamber where the direct liability of the juridical persons has been acknowledged and confirmed.<sup>54</sup> Of course, the impossibility of integrating the direct liability of juridical persons in the supplementary proceedings within the criminal process is grounded in the negative to acknowledge their criminal liability in Colombian Law.

In summary, Congress has maintained its erratic ambivalence regarding the involvement of juridical persons in criminal activity. Although the topic of criminal liability of legal persons in Colombia is not unknown, legislators have been reticent to recognize that possibility as a whole and have turned to a case by case basis that has caused confusion on the subject.<sup>55</sup> It



<sup>53</sup> According to article 107 of the Criminal Procedure Code, and article 2347 of the Civil Code, the third party liability is a form of indirect liability where some persons may be held liable for the actions of another.

<sup>54</sup> See, Corte Suprema de Justicia, Sala de Casación Civil, junio 30 de 1962, M.P. José J. Gómez.

<sup>55</sup> For instance, Congress has tried to establish criminal liability for legal persons when they have contributed to damages to the environment. However that specific provision of Law 491/99 was declared unconstitutional due to its lack of precise definition of the illegal conduct. Regarding smuggling, the

is clear that in general the Colombian criminal code itself does not acknowledge the possibility of prosecuting an enterprise or corporation. Instead it has chosen an indirect avenue to dissuade legal persons from committing crimes by putting in place some preventive measures during the criminal proceedings against an individual, such as the cancellation or suspension of the authorization to operate when there is proof of its involvement in the criminal scheme.<sup>56</sup>

To some degree, article 46 embodies the tensions and discussion around the best way to handle corporate participation in grave human rights and humanitarian law violations. The international community and several countries have put in place certain standards, methods and proceedings to address such situations. In fact, there is an ongoing debate on what international law states on this subject that it is worth exploring to determine if there are any standards Colombia should comply with and in which manner.

### **3. BEING A CORPORATION DOES NOT MEAN 'OFF THE HOOK'**

The international law system that resulted from the Westphalia Peace in 1648, known as Classic International Law, was minted only for states, specifically European colonial states. In spite of the independence movements in the Eighteenth Century and the Bolshevik Revolution in the Twentieth Century that ended up with the inclusion of new countries in the international community, and the revaluation of the capitalist model, classical international law remained an exclusive club of sovereign states for almost three centuries, with its basic foundation being the recognition and defense of state sovereignty. In other words, states were acknowledged as the only international legal persons.

A natural consequence of this legal order was the non-recognition of other actors by international law, and the strengthening of state power to regulate the behavior of its citizens and corporations without international interference.<sup>57</sup> International rules and principles were addressed to facilitate

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approach is based again on the natural person and not in the juridical one. See, Bazzani, Darío. Análisis Constitucional de la Responsabilidad Penal de las Personas Jurídicas. Derecho Penal y Criminología, Vol. 22, No. 71, Universidad Externado de Colombia, 2001. At: <http://foros.uexternado.edu.co/ecoinstitucional/index.php/derpen/article/view/1094> (Accessed on December 21, 2011).

<sup>56</sup> Law 906/04, article 91.

<sup>57</sup> In this sense, if a foreign corporation caused harm in its host state, the primary legal avenue was the host state's domestic law and its judicial system. However, if the host state did not have a viable and reliable avenue to deal with this kind of disputes, international law offered, and still offers, the diplomatic protection to enable the two involved states to settle the dispute. Nevertheless, when diplomatic protection is invoked the states are exercising their own rights, thus they are not acting on behalf of the private actors. See, Blanco, Damaso Vicente Javier. La protección de las inversiones extranjeras y la codificación

the relationships and solve the eventual problems between states, and they were silent on phenomena that included other entities or actors, such as in commerce and trade, although they had an international presence at least since the Seventeenth Century.<sup>58</sup> Therefore, domestic jurisdiction was traditionally in charge of establishing the grounds for liability of private actors, and had the autonomy to decide what type of responsibility to adjudicate to them, whether criminal or civil.

The Twentieth Century, with the horrors of the two world wars, caused a change in the fundamentals of the international legal order. After the acknowledgment of the disaster the Second World War had caused to the civilian population caught in the cross-fire, and to those imprisoned in concentration camps, the human rights movement started its long road to impose limitations on state sovereignty, and to address from an international point of view the harms and wrongs caused to individuals by ensuring them a limited international legal personality. The United Nations and other international organizations appeared as non-state actors with specific missions, and as international subjects with precise rights and duties.<sup>59</sup> Additionally, the national liberation movements, present at least since the Nineteenth century, increased their presence through the recognition of the rights of peoples to self-determination through the United Nations General Assembly Resolution 2625, and the International Court of Justice opinions on *Namibia*<sup>60</sup> and *Western Sahara*,<sup>61</sup> and its decision on *East Timor*.<sup>62</sup>

The Twentieth Century also witnessed the growth of transnational and multinational corporations, and of their influence in international relations and developing countries as well. Their way of doing business meant a high level of diversification of resources and markets, the fragmentation of the production chain in different countries, and in the end, the difficulty of establishing the legislation applicable to their operations.<sup>63</sup> Moreover, the

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internacional del arbitraje. *Anales de Estudios Económicos y Empresariales*, No. 7, 1992, Universidad de Valladolid, España, 1992, pp. 353-390.

<sup>58</sup> As Nick Robins stated, the East Indian Company, established at the beginning of the Seventeenth Century, changed forever the relationship between developed and developing countries. See, Robins, Nick. *The Corporation that Changed the World: How the East Indian Company Shaped the Modern Multinational*. Pluto Press, London, 2006

<sup>59</sup> See, International Court of Justice, Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations* (1949).

<sup>60</sup> International Court of Justice, Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1971).

<sup>61</sup> International Court of Justice, Advisory Opinion, *Western Sahara* (1975).

<sup>62</sup> International Court of Justice, Judgment, *East Timor (Portugal v. Australia)* (1995).

<sup>63</sup> "Transnational corporations now dominate international flows of goods and services. The identity of the headquarters country once was a significant factor to explain the international behavior of those enterprises; but transnational corporations from different countries are rapidly losing their distinctive national

eagerness of developing states to attract foreign investment has often resulted in lenient regulation of their activities in the host states.<sup>64</sup> This situation has raised several questions regarding the interaction between international human rights law, transnational and multinational corporations' behavior, and domestic jurisdictions. The bottom line question is how far international law should and could go in demanding states and corporations to take certain actions to ensure compliance with international human rights and humanitarian law. Specifically, if international law could mandate states to regulate their own corporations, and foreign ones with presence in their jurisdiction, according to universally accepted standards; and if international law could attribute human rights and humanitarian law obligations to corporations.

The issue of non-state actors is not an easy one, because it deals with the foundations of international law, basically with the attribution of the international legal personality, therefore, with the entitlement of rights and duties. Thus, the dilemma lays in the paradox of whether a consensual legal system created by states (international law), where sovereignty has undergone minor ameliorations in the Twentieth in favor of human rights, can create rights and duties for other actors without their consent. Nowhere in the international legal system is there a standard to determine who is and who is not an international legal person, or even how international law could attribute personality to entities different from the states. Apart from the outdated Montevideo Convention (1933), where some criteria are outlined regarding what it is needed to be a state, international law only counts on scarce advisory opinions from the International Court of Justice, specially the *Reparations Case*,<sup>65</sup> and other soft law instruments.<sup>66</sup> In short, the issue has been handled on a case by case basis, and it has been difficult to draw a general rule from that practice.

Besides, the virtual recognition of new international legal persons has promoted a debate to determine if it is important to differentiate the nature

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pattern of behavior." Vernon, Raymond. *Transnational Corporations: Where are They Coming From, Where are They Headed?* Transnational Corporation Journal, Vol. 1 No. 2, United Nations, at <http://www.unctad.org/templates/webflyer.asp?docid=5862&intItemID=2926&lang=1> (Accessed on December 18, 2011).

<sup>64</sup> Colombia has not been an exception. The recent work of Mauricio Romero Vidal explores the strong nexus between business and the paramilitaries. See, Romero, Mauricio. *La Economía de los Paramilitares. Redes de Corrupción, Negocios y Política*. Random House Mondadori, Colombia, 2011.

<sup>65</sup> International Court of Justice, Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations* (1949).

<sup>66</sup> See, Nijman, Janne E. *Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality*. At: Noortmann, Math and Ryngaert, Cedric (ed.). *Non State Actor Dynamics in International Law. From Law-Maker to Law-Makers*. Ashgate Publishing Limited, England, 2010, pp. 91-124.

of the state and the non-state actor in order to establish their rights and duties at the international level. Regarding corporations, this has meant a developing body of soft law and voluntary initiatives that have evolved from initial proposals of complete identification with the state,<sup>67</sup> to others where the distinction between the two entities is essential to outline their obligations and responsibilities.<sup>68</sup> For the purposes of this paper, the outcome of that discussion is highly relevant in the sense that it can affect the duties of the states and corporations toward the observance, promotion, protection and fulfillment of international human rights and humanitarian law.

Starting in 1970s, efforts to undertake the responsibility of corporations in international human rights violations have moved from the voluntary approach, which relied on the adoption of voluntary codes by every corporation, to another where the assessment of the existing standards of international law by the United Nations bodies is key to drawing a framework for their activities.<sup>69</sup> Nonetheless, this shift in approach has not meant the adoption of compulsory norms for corporations, or the attribution of international legal personality. On the contrary, the latest developments have reinforced the idea that states are the main actors in the international law system, and the basic guarantors of international human rights and humanitarian law.

Currently, John Ruggie's work as the United Nations Secretary-General Special Representative on Business and Human Rights constitutes the most authoritative voice regarding transnational corporations and their human rights responsibilities. Although the stress of the United Nations work has



<sup>67</sup> In 1999, the Working Group on the Working Methods and Activities of Transnational Corporations, created by the United Nations Sub-Commission on the Promotion and Protection of Human Rights two years before, drafted a code of conduct for transnational corporations named "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights". Its provisions could be considered an example of the identification of the states' obligations with the ones set out for transnational corporations, since they attribute them with direct responsibility to promote and secure the recognition of human rights. The Norms were not approved by the United Nations Commission on Human Rights, therefore they never acquired legal standing in international law. See, Mantilla, Giovanni. *Emerging International Human Rights Norms for Transnational Corporations*. *Global Governance* 15: 2, 279-298. At: <http://www.polisci.umn.edu/people/profile.php?UID=manti020>.

<sup>68</sup> John Ruggie's appointment, in 2005, as the United Nations Secretary-General Special Representative on Business and Human Rights could be seen as the starting point of this trend. Indeed, he was appointed "to identify and clarify standards of corporate responsibility and accountability regarding human rights". Ruggie, John. Introduction by the Special Representative. At: <http://www.business-humanrights.org/SpecialRepPortal/Home/Introduction> (Accessed on December 19, 2011).

<sup>69</sup> "Indeed, as recently as 1996, international legal scholars were still 'unclear whether transnational corporations [were] bound to respect these [international human] rights,' and it was not until 1998 that the idea that transnational corporations could bear legal responsibility under international law actually started to gain currency. The late entrance of international law into the debate of transnational corporations and human rights would nevertheless eventually be redressed by the dynamism of legal experts, which acting within or outside the UN started to promote the need to go 'beyond voluntarism'". See, Mantilla, Giovanni. *Emerging International Human Rights Norms for Transnational Corporations*. *Global Governance* 15: 2, 284-285. At: <http://www.polisci.umn.edu/people/profile.php?UID=manti020>.

been put on identifying and clarifying existing international law standards applicable to transnational corporations, nothing stands in the way of using them as minimum rules of conduct for every type of corporation.<sup>70</sup> Even though national corporations regularly do not have operations beyond the borders of their state, this does not mean that they remain unconnected with international law, specifically with international human rights and humanitarian law. Their relationship with this set of norms could be indirect, when their state incorporates the international provisions through national legislation; or direct, when the state fails to incorporate, or incorporates them in a non comprehensive way, peremptory norms that every person, natural or juridical, has to observe regardless of their state's unwillingness or inefficacy to translate them into domestic norms.<sup>71</sup> This legal view has been endorsed by a growing body of literature on the subject,<sup>72</sup> and with legal cases litigated in the United States, first against natural persons acting in no official capacity, as in *Kadic v. Karadzic II* (1995), and then against corporations, as in *Doe v. Unocal* (2002). As a result, there is an understanding that when it comes to peremptory international law, there is no distinction between national and international, natural or juridical, private or public persons.<sup>73</sup>

In fact, in June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights (hereinafter "Principles") submitted by John Ruggie and his team. The Principles' scope was not limited to transnational corporations and states, but expressly covered "all business enterprises, both transnational and others, regardless of their size, sector, location ownership and structure".<sup>74</sup> They are based on the recognition of differentiated roles and obligations for states and corporations in the international human rights law area. Therefore, the Principles are an ascertainment of the states' obligation to "respect, protect and fulfill



<sup>70</sup> "One might ask why purely national corporations seem to be excluded from the titles of the regimes seeking to ensure compliance with international standards by multinational corporations (MNCs), transnational corporations (TNCs), and multinational enterprises (MNEs). It is suggested here that, while larger companies may have greater responsibilities with regard to human rights obligations, there is no reason to exclude purely national companies from the realm of such obligations." Clapham, Andrew. *Human Rights Obligations for Non-State Actors*. Oxford University Press, New York, 2006, p. 201.

<sup>71</sup> Peremptory norms, also known as *ius cogens* norms, are norms where derogation is permitted, since they constitute the basic and fundamental values of the international community as a whole. See, Hosain, Kamrul. *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*. Santa Clara Journal of International Law, 2005. At: <http://www.scujil.org/volumes/v3n1/3> (Accessed December 19, 2011).

<sup>72</sup> See, De Wet, Erika. *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*. EJIL (2004), Vol. 15, No. 1, 97-121. At: <http://www.ejil.org/issue.php?issue=19> (Accessed on December 19, 2011).

<sup>73</sup> See, Portmann, Roland. *Legal Personality in International Law*. Cambridge University Press, United Kingdom, 2010, pp. 165-167

<sup>74</sup> Human Rights Council, A/HRC/17/31, 21 March 2011, p. 6. At: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (Accessed on December 19, 2011).

human rights”, and of the enterprises’ duty to comply and respect “all the applicable laws” on the subject.<sup>75</sup>

According to Ruggie’s Principles, states are the main bearers of the international obligation to protect their populations against human rights violations, and to take the appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (Principle 1). This entails, not only to refrain from illegal conduct themselves, but to issue laws and policies to prevent, investigate, punish and redress violations caused by national, transnational and multinational corporations. However, international law does not establish a specific way to comply with those duties; in other words, it does not interfere with the states’ discretion to privilege judicial or non-judicial mechanisms, criminal over civil procedures, collective actions over individual actions, as long as those measures are effective and available to everybody (commentary to Principle 1).

There is no doubt that the Principles confirmed the duty of the states to impede the participation of enterprises in human rights and humanitarian law violations. That obligation is born out directly from the primary state obligation to fulfill human rights and to offer mechanisms to redress their violations. John Ruggie was aware of the importance of remedies, which was the reason he stressed remediation.<sup>76</sup> Now, the question is what that means for the states, and if compliance with those Principles would entail major changes in national law.

On the one hand, some countries around the world have undergone some accommodations in criminal law to address corporate misconduct. States like Australia, Belgium, Canada, France, India, Japan, United States, among others, have attached criminal liability to juridical persons. The common ground of such legislation is the necessity to prove the involvement and certain state of mind of an employee of a certain rank. Although criminal law has increasingly become a somewhat popular tool to tackle corporate misbehavior, it is still not the most widely accepted way to do so in the states of the civil law tradition. Other countries, like Spain, leave aside the liability of legal entities in themselves, and push instead for the prosecution of directors,



<sup>75</sup> “The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. Each Principle is accompanied by a commentary, further clarifying its meaning and implications.” Human Rights Council, A/HRC/17/31, 21 March 2011, p. 5. At: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (Accessed on December 19, 2011).

<sup>76</sup> De la Vega, Connie et al. Holding Businesses Accountable for Human Rights Violations. Recent Developments and Next Steps. Friedrich Ebert Stiftung, International Policy Analysis, July 2011. At: [http://www.fes.de/gpol/en/human\\_rights.htm](http://www.fes.de/gpol/en/human_rights.htm) (Accessed on December 19, 2011).

legal representatives and management personnel.<sup>77</sup> What is true is that international law does not mandate exclusive or joint liability of juridical persons, or the establishment of a certain state of mind to find corporations or their individuals guilty of international crimes.<sup>78</sup>

Colombia seems to have followed this last approach in the Victims Law. In general, the countries that have turned to that choice have met some criticism. Basically, as noted above, the outcome would be a heightened burden of proof and the invisibility of the corporate practices and policies as a whole, beyond the individuals' behavior. As Kyriakakis has noted,

corporate crime cannot always be reduced to an individual actor. (...) individual actors in a corporate structure may commonly contribute to collective decision-making processes, without a full consciousness of the totality of that process. In this sense, no single individual may properly embody a corporate decision and its outcomes. (...) Even where the conduct (...) might be reducible to an individual (...) features such as the commonly opaque nature of accountability within the corporate structures, the expendability of individuals, the practice of corporate separation of those responsible for past violations and those responsible for preventing future offenses, as well as the safe harboring within the corporations of individual suspects, can all contribute to the difficulty of locating individual wrongdoers, as well undermining any deterrent value of prosecution.<sup>79</sup>

On the other hand, the preferred and classic way for states to handle harms produced by legal persons has been tort law. In a sense, almost every domestic law system around the world has developed a body of tort law to address wrongs caused by natural and juridical persons. The level of sophistication may fluctuate, but it can be affirmed that national systems have incorporated and perfected subjective and objective regimes of liability.<sup>80</sup> The question is if those domestic frameworks are sufficient to prevent and redress human rights and international law violations. International law does not



<sup>77</sup> Ramasastry, Anita and Thompson, Robert C. *Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey in Sixteen Countries.* FAFO Institute of Applied International Studies 2006. At: <http://www.fafon.no/pub/rapp/536/536.pdf> (Accessed on December 19, 2011).

<sup>78</sup> Clapham, Andrew. *Extending International Criminal Law beyond Individual to Corporations and Armed Opposition Groups.* *Journal of International Criminal Justice* 6 (2008), Oxford University Press, pp. 916–917. At: <http://jicj.oxfordjournals.org/content/6/5/899.short> (Accessed on December 19, 2011).

<sup>79</sup> Kyriakakis, Joanna. *Australian Prosecutions of Corporations for International Crimes. The Potential of the Commonwealth Criminal Code.* *Journal of International Criminal Justice*, 5 (2007), 824–825. At: [http://www.adh-geneva.ch/RULAC/pdf\\_state/Joanna-Kyriakakis-paper.pdf](http://www.adh-geneva.ch/RULAC/pdf_state/Joanna-Kyriakakis-paper.pdf) (Accessed on December 19, 2011).

<sup>80</sup> For some comparative studies see, *International Comparative Legal Guide Series*, at: <http://www.iclg.co.uk/index.php> (Accessed on December 19, 2011). Also, the website of the Institute for European Tort Law, at: <http://www.etl.oeaw.ac.at/> (Accessed on December 19, 2011).

Additionally, see, Besalu Parkinson, Aurora. *La Responsabilidad Civil: Tendencias Actuales. La Experiencia Argentina y su Posible Proyección al Derecho Mexicano.* *Boletín Mexicano de Derecho Comparado*, Año 1998, No. 91, Enero-Abril. At: <http://biblio.juridicas.unam.mx/revista/DerechoComparado/indice.htm?n=91> (Accessed on December 19, 2011).

give a straightforward answer; it only highlights the basic parameters and duties states have to honor in order to judge if their actions are sufficient to that end. Also, the Principles affirm that corporations should behave with due diligence in order to assess the potential and actual human rights risks in their area of operation (Principle 17). Then, the next question would be if the tort law in force would be the appropriate law to deal with the proof of due diligence and the consequences of its absence.

Apart from United States law, where tort litigation against human rights violators has proved effective through the Alien Torts Claims Act, there is little evidence or data on the success of this kind of practice to redress these wrongs. Aside from a few reviews and papers on the subject,<sup>81</sup> not much is known about the use civil redress of gross violations of international human rights and humanitarian law around the world. It seems that this kind of litigation is not widespread, and the reasons for that could vary widely, as pointed out by Beth Stephens,<sup>82</sup> ranging from inadequate legislation to human rights litigators' prejudices regarding the civil procedure. Nevertheless, as international law is reaching everyday a more common understanding of the importance of remedies and dissuasive methods to deter corporate misbehavior, the responsibility of the states will be examined in the future under that standard. Within this context, tort law could embody for the state a proper way to deal with liability of legal persons through minor changes in legislation, especially when the legislative bodies are not so inclined to incorporate criminal liability for enterprises. In the Colombian case, it would be advisable to harmonize civil and criminal liability, because, as was noted above, the third party liability of corporations in the Victims Law produces certain incoherencies with what the Supreme Court has stated regarding the direct responsibility of juridical persons in tort law.<sup>83</sup>

In summary, international law does not privilege criminal liability over civil liability when it comes to tackling the wrongs caused by corporations and other enterprises. John Ruggie's Principles have established some minimum standards, where the main role is preserved for the state as the one that should respect, protect and fulfill human rights and provide adequate remedy. Criminal liability of corporations has been the choice for some states, but it



<sup>81</sup> See, Scott, Craig. *Torture as a Tort*. Hart Publishing, United States of America, 2001.

Van Schaack, Beth. In *Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*. Harvard International Law Journal, 42, 141, Winter, 2001.

Donovan, Donald Francis and Roberts, Anthea. Note and Comment: The Emerging Recognition of Universal Civil Jurisdiction. *American Journal of International Law*, 100, 142, January, 2006.

<sup>82</sup> See, Stephens, Beth. Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations. *27 Yale J. Intl L.* 1, at 37, 2002.

<sup>83</sup> See, Corte Suprema de Justicia, Sala de Casación Civil, M.P. José J. Gómez, junio 30 de 1962.

is not a widespread trend. An intermediate approach has been used where the prosecution is against the management, the board of directors or the legal representative.

The Colombian Victims Law has chosen this latter approach, although in a more narrow fashion since article 46 only covers the legal representative and limits the so called reparation to the amount of the contribution and does not take into account the damage caused, and therefore establishes a parameter that can curtail the implementation of the Law, since conduct of other agents within the corporation will not be taken into account, heightening in consequence the burden of proof for the victims. This will imply not only an almost unsurpassable obstacle to achieve redress, but a violation of international law by the Colombian State. Envisioning those hurdles, the use of Colombian tort law to hold corporations accountable could be a solution, but it would mean the essential harmonization of criminal and civil law, and putting in place some incentives to the use of the civil procedure, such as benefits for pro-bono litigation by private firms, and more flexible standards for the cassation process. Nonetheless, as has happened with Administrative and Criminal litigation, it would take a long time for those changes to take place, as human rights litigation moves forward its claims in that context and the judges and Justices have to solve those issues. Nevertheless, waiting a long period of time is not a desirable option for the victims and would only reinforce the lack of compliance and due diligence of the Colombian State. In that sense, it would be advisable for the Colombian government to promote some changes in the civil procedure to enable the establishment of juridical persons' liability in the context of the internal armed conflict. In brief, the Government can push Congress to enact some reforms, or human rights activists could venture themselves to produce them through pure litigation.

### **CONCLUSIONS: ENTERPRISES STILL OFF THE HOOK**

This article focuses on the analysis of article 46 of the Victims Law, which establishes the obligation to determine whether legal persons contributed voluntarily to grave violations of international humanitarian and human rights law through their contributions to the perpetrators' armed groups. The study shows how this article's genesis is rooted in the discussion around the Colombian state's economic capacity to implement the Law and to ensure the reparation of the victims. There is no evidence that members of Congress held any discussion on the criminal liability of corporations or related to the international standards on the subject. On the contrary, it was very clearly established that the provision faced some opposition from the Government's party, and to overcome those critiques it ended up simply

rephrasing what the criminal code had already mandated: the criminal liability of the legal representatives, but not of the juridical persons themselves.

International law has determined that the states are the main bearers of the international obligation to protect their population against human rights violations, and to take the appropriate steps to prevent, investigate, punish and redress such abuses. Regarding corporations, it has been said that they should behave with due diligence in order to assess the potential and actual human rights risks in their area of operation. Article 46 does not meet these international law standards, and does not represent an improvement on any of the existing Colombian regulations on the subject. In this sense, it is possible to advance the hypothesis that Colombia is not complying with its international obligations on the matter.

As the debate on the criminal liability of legal persons has proved very difficult in Congress, it would be possible to take advantage of the regulation already in place regarding tort law. The direct liability of corporations has been established since 1962; however, it has not been used to redress human rights violations. There are multiple possible explanations for this situation, and further research on the subject is needed to understand them. Nonetheless, it seems that civil litigation against legal persons may be a faster and more reasonable approach to investigate, punish and deter corporate involvement in the internal armed conflict in the near future.

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