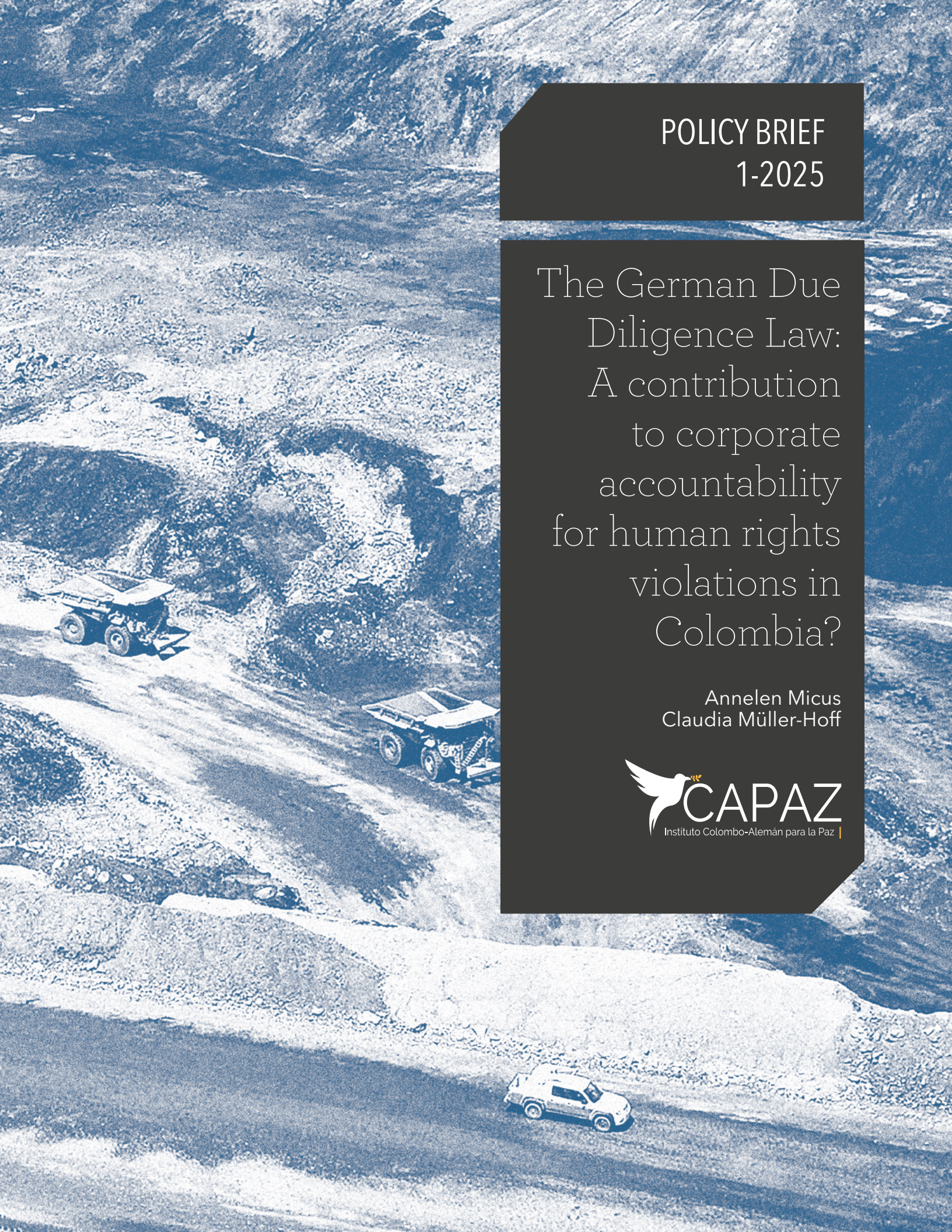

POLICY BRIEF
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The German Due Diligence Law: A contribution to corporate accountability for human rights violations in Colombia?

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Summary
This policy brief explores avenues to address corporate accountability for human rights abuses in Colombia, in particular the potential of the recent German Act on Human Rights Due Diligence in Supply Chains. It presents international experiences of civil and criminal law litigation pursuing corporate accountability. It also shows how due diligence standards create significant opportunities for public policy, regulation and judicial avenues. The policy brief particularly assesses the German Supply Chain Act regarding its perspectives for corporate accountability in Colombia. Using a case study of Colombian coal exports to Germany, it explores how German corporations might positively influence the transition in Colombia by implementing their due diligence obligations. It closes with recommendations to relevant economic and policy actors in Colombia and Germany.

Keywords:
corporate accountability; human rights; mandatory human rights due diligence; supply chains; transitional justice

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The importance of corporate accountability in the context of transitional justice

Human rights violations rarely occur as isolated incidents but often in a context of systemic discrimination and inequality. Global economic injustice and the uneven distribution of resources lend themselves to the structural conditions for many human rights abuses. Corporations play powerful roles in societies, especially those representing traditional elites or transnational business. In situations of conflict, economic interests are often at stake. Many conflicts evolve around resources and territories. Conflicts require financing, and they constitute business opportunities. Hence, corporations are part and parcel of conflict dynamics, and their actions are not without impact (UN Working Group BHR, 2020). Corporations might be forced to pay or want to pay for protection. Their staff may suffer human rights violations or be drawn into the conflict. Corporations might make use of weak governance to pursue their corporate interests and profit from human rights abuses. They also may actively collaborate with illegal or legal armed actors to repress the civilian population and abuse their rights. The military dictatorships in Chile and Argentina, for instance, were to a large degree concerned with imposing a neoliberal economic model (cf. Basualdo et al., 2021). Economic interests even play a role in violations amounting to international crimes. In places like Colombia, access to land and natural resources plays a key role in the commission of crimes against humanity.

In order to understand dynamics of mass violence and to prevent these from occurring in the future, it is important to analyse underlying socio-economic conflicts. The role of corporate actors must be investigated and addressed. There are recurrent types of business involvement in human rights violations. One such scenario concerns corporate complicity in the repression of trade unionists, environmental activists or affected communities who are critical of a corporate project through threats, torture, disappearances or murders, often carried out by state, private or illegal armed actors. Companies have financed such groups, provided them with information that led to such violations or with logistical assistance. Other scenarios concern business practices that involve abusive labor conditions, environmental damages or forced displacement of communities. Finally, corporations provide products or services, such as weapons or surveillance technology, which may then be used to commit human rights abuses.

Understanding the importance of corporate involvement in human rights abuses has led in the past decades to an evolution of a new field of human rights law and policy, "Business and Human Rights", to address corporate actors where human rights were initially seen as only incumbent on states. The 2011 United Nations Guiding Principles on Business and Human Rights (UNGP) set out a framework that recognizes the primary burden of active human rights protection on states, but also the responsibility of corporations to respect human rights along their supply chains and to apply due diligence in order to prevent negative impacts, or to minimize and remedy them should they still occur. National Action Plans for Business and Human Rights were passed in many countries, including Colombia and Germany, to specify and implement these obligations. In a number of countries and the European Union (EU), legislation establishing due diligence obligations on corporations is being developed, with laws already passed

in France and Germany,[1] while a Working Group at the United Nations is negotiating a Binding Treaty on Business and Human Rights.[2]

Accountability has been sought before courts, from the individual criminal responsibility of decision-makers within the corporation, to criminal responsibility of the corporation as such, to administrative proceedings or civil lawsuits for compensation against corporations and individuals (though from a victims' perspective, many cases have yielded disappointing results, largely due to procedural barriers and conditions of structural discrimination). In addition to cases brought in the courts of the states in which human rights violations occurred, cases have been filed in the home states of transnational corporations, including of its financial, supplier and customer companies. A recent landmark is the US verdict against Chiquita for financing paramilitary groups and thereby knowingly contributing to egregious human rights abuses in Colombia. In today's globalized economy, multinational corporations are active through business networks and supply chains that span the world. This increases the expectation that they ensure that human rights are respected across the breadth of their business activities and related networks. Mandatory due diligence laws can play an important role in setting necessary standards and ensuring compliance and accountability.

Truth commissions or other types of inquiry have shed some light on the business sector's involvement in human rights abuses (Payne et al., 2022). However, it has been difficult to hold corporate actors to account due to persisting impunity and victims' ineffective access to justice and reparation in the face of legal hurdles and political manoeuvring. In some contexts, political reluctance might be related to the need to provide some stability and appearance of prosperity to a society undergoing a fragile transition, toward which corporations can play an important role. However, in order for a country to achieve sustainable peace and build a more just and equal society, it is necessary to understand and address the root causes of conflict and systemic rights violations, including economic practices that reproduce inequality and exclusion, and those responsible should be held to account. The need to address corporate accountability in the context of transitional justice processes has been increasingly recognized (Michalowski, 2013; Sánchez León et al., 2018; Pietropaoli, 2020; Payne et al., 2022; IACHR, 2019; UN Working Group BHR, 2020).

This is particularly true for a country such as Colombia slowly coming out of a decades-long armed and socio-political conflict which affected all Colombians and resulted in millions of victims and survivors of forced displacement, torture, sexual violence, enforced disappearances and assassinations. The transitional justice mechanisms established by the 2016 Peace Agreement between the FARC guerrilla and Colombian government, in particular the Special Jurisdiction for Peace, as well as potential future processes in the context of the Total Peace policy of President Petro's administration, constitute a window of opportunity for addressing these violations, the underlying root causes of the conflict and to achieve change through accountability.

This policy brief first presents an overview of international experiences where corporate accountability was sought for international crimes and human rights abuses, showcasing different strategic avenues in the struggle to hold powerful economic actors to account. Secondly, it will assess the German Supply Chain Law as a recent instrument for human rights due diligence, intended to prevent abuses from ever occurring. Thirdly, the brief will turn to Colombia and assess the current state of the business and human rights debate, as well as perspectives for corporate accountability in the Colombian transitional justice context, to prevent business conduct that violates human rights standards as well as repair past harm. It focuses on legal economies in Colombia since these fall under the purview of international standards for business and human rights, such as the UNGP, and on their implementation at the national level. The policy brief will also discuss a case scenario of how German corporations might positively influence the transition in Colombia by implementing their due diligence obligations under the German Supply Chain Law. Finally, it will conclude with recommendations to relevant economic and policy actors in Colombia and Germany.

1 See French Law No. 2017-399 on the duty of vigilance of parent companies - (*Loi 2017-399*, 2017) and the German Act on Corporate Due Diligence in Supply Chains (SCA) (Federal Ministry of Labour and Social Affairs, 2021). See furthermore the recently approved EU Directive 2024/1760 on Corporate Sustainability Due Diligence (European Parliament & Council, 2024), which each EU member state will have to convert into national law within two years after its coming into effect at the end of July 2024.

2 See reports and drafts by the UN Working Group BHR: https://tinyurl.com/2bytncdf.

Pursuing corporate accountability: international experiences

The field of Business & Human Rights is a relatively new, dynamic area of international law, yet the question at its heart – whether corporations must respect human rights and humanitarian law and answer for violations – was on the international agenda even before the Universal Declaration of Human Rights (1948). There exist different trends in the pursuit of corporate accountability: individual criminal accountability, civil liability of corporate entities and the setting of standards for corporate human rights management.[3]

Individual criminal responsibility

In the aftermath of World War II, the Nuremberg and Tokyo trials addressed major war criminals from the political and military sectors, while the so-called "subsequent trials" further targeted civil society supporters of the Nazi regime and war, including industrialists. High-ranking businessmen were criminally charged for their complicity in Nazi war crimes; for example, for having supplied the chemical Cyclone B for concentration camp gas chambers or subjecting prisoners of war and civilians to forced labor. The trials recognized that business activities can amount to international crimes, and that international norms, designed for military operations and inspired by international humanitarian law, may be applied in such cases. In the decades that followed, only a few attempts were made at criminal accountability of corporate actors for international crimes.

In 1999, a criminal complaint was filed in Germany against a German national and former director of Mercedes Benz Argentina for his participation in crimes against 14 trade unionists. Investigations did not proceed on formal grounds; nonetheless, the case was an innovative attempt at transnational accountability, as a response to the state of impunity in Argentina at the time. After many years of activist struggle in Argentina, whether legally, in the streets and through the arts, as well as at the Inter-American level and transnationally in European jurisdictions, the Argentinean amnesty laws were overturned in 2005. Proceedings over dictatorship-era crimes were re-opened in Argentina and have resulted in over 300 judgments with more than 1,100 perpetrators convicted thus far. The question of corporate accountability, however, was only taken up by the courts in recent years (for selected jurisprudence see Cámara Federal de Casación Penal, 2024). More than 30 criminal cases remain open against company representatives for their active involvement with the civil-military dictatorship (1976-1983). To date, important milestones include the 2016 conviction, the first of its kind,[4] of businessman Marcos Levin, the former owner of transport company *La Veloz del Norte,* for facilitating the kidnapping and torture of a trade unionist, amounting to crimes against humanity, and, in 2021, the confirmation of prison sentences against two former directors of Ford Argentina for crimes against humanity for permitting a clandestine torture center on factory premises (Bertoia, 2021). In August 2023, 45 years after the events, an appeals court in Argentina confirmed the indictment of a former Mercedes Benz Argentina manager, with the case slated for trial (Cámara Federal de Casación Penal, 2023; Bertoia, 2023).

While the Argentinian cases highlight the direct participation) of companies or company staff in the repressive strategy of a regime against its critics, a different, but no less egregious mode of participation is that of providing regimes with the products or services it needs to carry out repressive activities. In May 2023, four former managers of German-British company FinFisher were indicted in a case concerning the provision of surveillance software to the Turkish secret service to repress the civil protest movement. Similarly, three managers of German weapons manufacturer Sig Sauer were criminally sanctioned for selling small arms to Colombia via the US to bypass export controls.[5]

Other important criminal cases include the ongoing case against Ian Lundin and Alex Schneiter, former executives of Lundin oil company on trial since September 2023 for their complicity in war crimes in Sudan. Moreover, some jurisdictions allow criminal cases to be brought against not only individuals but also legal persons, such as corporations, as in the ongoing case against French cement company Lafarge (today LafargeHolcim) for aiding and abetting crimes against humanity in the Syrian civil war by making payments to illegal

3 For an overview, see Kaleck and Saage-Maaß (2010).

4 Confirmed and followed by a second conviction in November 2023, see Corvalan (2023).

5 Both cases can be found in the case database of the Business & Human Rights Resource Centre ([BHRRC], n.d.) (FinFisher: https://tinyurl.com/26x569ms; Sig Sauer: https://tinyurl.com/2dzxjtm7).

armed groups such as the Islamic State (PAX & European Center for Constitutional and Human Rights [ECCHR], 2023).

Civil liability

A second trend in corporate accountability strategy, which took off from the late 1990s onwards, focuses on civil litigation, aiming for financial compensation for victims of human rights abuses. This trend shifts the focus from the individual to the company and even to the entire corporate group, taking internal functional divisions for conglomerate responsibility in the commission of human rights violations. It was inspired by the Alien Tort Claims Act (ATCA) in the US, a statute that allows for tort claims over international crimes, irrespective of where they were committed.[6] Nonetheless, while initial cases seemed promising, in recent years this avenue was decisively narrowed for transnational corporate constellations, thus hampering cases against Chiquita and the coal company Drummond for crimes committed in connection with the Colombian armed conflict.

More dynamic developments in corporate accountability can now be found elsewhere. The case against Chevron in Ecuador was one of the first cases to put the environment at the center. The UK cases of *Lungowe v Vedanta Resources plc* ([2019] UKSC 20) and *Okpabi v Shell* ([2021] UKSC 3) established important guidance for the accountability of parent companies in the event of subsidiary misconduct. In Germany, clothing discounter KiK was sued as the almost exclusive buyer of a textile producer in Pakistan where hundreds of workers died in a factory fire in 2012. The case argued that liability should extend beyond the corporate group to the supply chain where a lead company has determining influence over another, but the court rejected the case in 2019 on procedural grounds (Saage-Maaß et al., 2021). Broadly perceived as an unjust outcome, the case became instrumental in pushing for the regulation of supply chain responsibility in Germany.

A distinctive feature of this second trend is that it endeavors to respond to the transnational reality of corporate human rights abuses. Suing multinational parent companies in the "home states" where their headquarters are based means addressing those responsible for the design of corporate policies, overseeing compliance and deciding global operational strategies; in other words, getting at the structural roots of corporate human rights abuses,[7] the intention of which is not to replace, but complement the accountability efforts of local actors at the host state domestic level.[8]

Setting standards for managing human rights risks

The modest results of criminal prosecution and civil litigation have led to a third trend to establish corporate accountability, namely new legal standards for managing corporate human rights risks.[9] This trend can be understood as a response to early globalization, characterized by the outsourcing of costs and risks to the periphery and the general concentration of gains and benefits to the Global North. This is increasingly perceived as unjust and unsustainable, against growing expectations that the globalized economy adhere to equally globalized universal human, labor and environmental standards. An important landmark was the approval of the UN Guiding Principles for Business and Human Rights (UNGP) by the UN Human Rights Council in 2011.[10] The UNGP set out the international standards for human rights in business, highlighting three pillars: (1) the state duty to protect human rights, (2) the corporate responsibility to respect

6 Some further US statutes might also offer interesting avenues for litigation, such as in foreign forced labour cases covered by the Trafficking Victims Protection Act (TVPA).

7 This trend also calls on the home states of multinationals, particularly in the Global North, to act upon their duty to protect human rights against abuses by the companies headquartered there. These companies represent their home states' economic and political interests, visible in economic policy and trade agreements, bilateral investment protection treaties, state-backed export credit and investment guarantees, as well as customs and visa politics.

8 An important example of the latter is the case against Volkswagen in Brazil initiated by trade unionists persecuted and tortured by the military dictatorship. The complaint led to a settlement between the public prosecutor and Volkswagen do Brazil in 2020 that laid out worker compensation as well as military dictatorship research and a memorial.

9 Most relevant still today are the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (last updated in 2023) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (last updated in 2022), next to the UNGP.

10 These broadly recognized standards mark a turn away from voluntary so-called Corporate Social Responsibility (CSR) programs and private standard-setting and certification initiatives, that are not human-rights based and avoid accountability.

human rights and (3) access to remedy for victims of business-related human rights abuses. The UNGP understand the corporate responsibility to respect from a management approach inspired by classic business risk management models. They foresee a risk management and due diligence process that covers the entire supply chain. Such a process starts with a human rights risk analysis and the development of measures to prevent and stop or mitigate ongoing human rights abuses, as well as to remedy any damages caused. Furthermore, continuous improvement is sought through monitoring and evaluation, public reporting, and a complaint mechanism.

Heightened due diligence in conflict-affected contexts

Companies must adapt their due diligence measures proportionally to the specific risks of their operations. Conflict contexts present heightened risks, and companies must respond with heightened due diligence. The same applies in post-conflict and transitional contexts that remain fragile as long as territorial control, public services, a strong economy and a resilient civil society are being re-constituted.

Heightened due diligence first demands the understanding that, far from neutral, business activities in a conflict context have an impact on the conflict dynamic, be it because of resource competition, the payment of royalties and taxes to the state, job creation, contracting with local partners or corporate social responsibility projects in communities. Companies must apply a conflict-sensitive approach, understanding the conflict and its causes, actors, interests, triggers, and the potentially negative impacts of their own activities. Simple actions can constitute risks that require a company to act preventively, such as in the hiring of a security service with a potential record of abuses, or the acquisition of land which was made available through forced displacement.

A state that is considered weak or absent and does not meet its obligations to protect civil society is no excuse for a company to lower its due diligence standards. On the contrary, it represents a heightened risk and need to protect persons within the company's sphere of influence and, therefore, a need for heightened engagement, without replacing state functions (UN Working Group BHR, 2020).[11]

Companies have a responsibility to provide or contribute to the effective remediation of human rights violations (UNGP, 2011). This is of particular relevance in transitional contexts, where each of the four pillars of transitional justice – truth, justice, reparation and guarantees of non-repetition – is a form of remediation. Therefore, collaborating with a transitional justice system and contributing to truth, reparation and guarantees of non-recurrence can in fact be considered a responsibility of companies (Michalowski, 2013; Pietropaoli, 2020; Payne et al., 2020). The motivation of companies to do so will further depend on whether or not crimes can be attributed to them through other corporate accountability mechanisms (UN Working Group BHR, 2020).

The UNGP cover human rights but not explicitly environmental or climate protection. Neither do they provide an enforcement mechanism. Yet, courts have started to incorporate the UNGP as a standard to interpret existing laws, in particular tort law. A prominent example is the Dutch case against Shell (C/09/571932): the Hague District Court used the UNGP as one of several considerations to establish an applicable "standard of care" and justify a corporate obligation to reduce its entire group's CO_2 emissions, in line with the Paris Climate Agreement. Another case of Indonesian fisher people against the Swiss Cement company Holcim, currently proceeding in Switzerland, also addresses climate-related damages in reference to the UNGP's corporate human rights standards (BHRRC, n.d.).

We can also observe a growing trend to create binding norms that impose human rights obligations on companies[12] and, more recently, to transform the UNGP into binding law, as has happened in France and Germany. The EU passed a directive in May 2024 that will create a human rights

11 Details of heightened due diligence in business operations in conflict zones or high-risk areas are spelled out in the OECD *Due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas* (2016), the EU Commission Recommendation 2018/1149 on Guidelines for the Identification of Conflict-affected and High-risk Areas and other Supply Chain Risks with regard to Conflict Minerals (2018) and recommendations by the UN Working Group BHR (2020).

12 See for example the California Transparency Act (2010), the UK Modern Slavery Act (2015), the US Dodd Frank Act (2010), the EU Conflict Minerals Regulation (2017, in force since 2021) and the EU Regulation on Deforestation-Free Supply Chains (2023) or the binding standards within contractual relationships, such as the sustainability standards of international development banks.

and environmental due diligence regime for companies operating in the EU. At the behest of several states from the Global South and with strong civil society support, a UN Intergovernmental Working Group is discussing a binding treaty for international corporate human rights obligations.

In conclusion, corporate accountability developments originated from a focus on conflict-related crimes and transitional contexts. From there, the perspective broadened to take into account the roots and structural conditions of corporate human rights abuses, closely related to the outsourcing of risks in a globalized economic structure. Such outsourcing ought to be matched by a globalized agreement about human rights and their relevance both for states and businesses. After setting important standards with the UNGP, the current momentum is one of converting these into binding and enforceable frameworks, aimed at making the economy human-rights compatible, including in its transnational dimension. One recent example which also served partly as a model for the new EU directive is the German law of 2021 on the corporate duty of care for human rights in supply chains, which will be analysed in the following chapter in regard to its impact on transnational business relationships.

The German Supply Chain Act: content and transnational implications

In January 2023, the German Act for Corporate Due Diligence Obligations in Supply Chains (in short: Supply Chain Act – SCA) entered into force. Its aim is to translate the UNGP, and in particular corporate responsibilities, into mandatory domestic norms. Following the French Loi de vigilance of 2017, it is the second law of its kind and an important forerunner for a European Directive on Corporate Sustainability Due Diligence at the European Union level. The SCA places large companies (>1,000 employees) under the obligation of respecting human rights by implementing specified due diligence obligations (Sections 3-10). It covers a catalogue of certain human and labor rights and a limited list of environmental risks (Section 2). The Act covers risks and violations that occurred after January 2023 as well as ongoing violations even if they started earlier.

Core elements of the due diligence obligations include the establishment of a risk management system (Section 4), comprising the following elements (Sections 5-10):

1. to regularly identify and prioritize human rights risks, not only to the company and its workers, but also to surrounding communities, consumers etc., and risks to the selected environmental aspects covered by the Act;
2. to immediately adopt prevention measures, including a human rights and environmental strategy and contractual agreements with direct suppliers;
3. to cease or minimize negative human rights and environmental impacts and, where this is not possible, to develop, together with the concerned supplier, a plan of how and when to end the negative impact; this might include the suspension and, only as a last resort, the termination of a business relationship;
4. to provide an independent and accessible complaint and whistleblower mechanism;
5. to document all these measures and evaluate their impact regularly and
6. to publicly report each year about their human rights and environmental due diligence performance.

These obligations apply along the supply chain, which includes: an enterprise's own business, including controlled subsidiaries and direct suppliers, i.e. contractual partners. Actions by other (indirect) suppliers further along the supply chain only trigger due diligence obligations on an ad hoc basis if a company has actual indications (so-called substantiated knowledge) of human rights risks or violations (Section 9, para. 3).

The Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle – BAFA) is in charge of monitoring and enforcing the SCA's implementation. It monitors due diligence reports of companies and can initiate investigations into suspicions of non-compliance with its own initiatives or if it receives complaints by (potentially) affected persons. The Federal Office has wide investigative powers and can order a company to take specific actions to comply with its duties (Sections 13 to 16). It can also impose administrative fines (amounting to up to 8 million euros or 2% of annual global turnover) if companies fail to comply with their legal obligations (Section 24). Companies that have been fined can also be excluded from public procurement (Section 22).

Passing the Supply Chain Act was an important signal to Germany. Nonetheless, it has a

number of limitations, such as only a few selected environmental due diligence obligations, coverage of only large companies and of only upstream, not downstream, activities such as the sale or disposal of products. The rights of affected persons, trade unions and civil society organizations should also have been further bolstered. The SCA does not comprise rules for civil liability; however, general tort norms may apply.

Several of these points, such as civil liability, and obligations with respect to the environment and climate, are addressed in the recently passed EU mandatory due diligence directive. This is an important opportunity to have a common EU-wide standard and to strengthen legal corporate accountability for human rights. However, at the very last moment the EU directive was also watered down, in particular in regard to the limited number of companies covered (starting in 2027 with companies with more than 5,000 employees and a worldwide annual net turnover of more than 1.5 billion Euros).[13]

The impact of these due diligence obligations on European companies will be felt in Colombia and worldwide, as they extend beyond their own business area into their supply chain. European buyers will request from their suppliers in Colombia and elsewhere not only a risk analysis and risk management system, but also documentation and transparent communications about it. They will prefer to select as business partners those companies who can show how they minimize and mitigate risks to human and labor rights and the environment. The SCA suggests integrating these standards as contractual clauses in business relationships. They will become criteria of competitiveness for the EU markets and potentially beyond, and also present opportunities for constructive engagement with and support from European partner companies, which should engage actively with their international business partners in order to prevent incurring liability themselves (Amaya-Castro & Henao, 2022). For civil society organizations, trade unions and affected persons, international due diligence laws offer additional pressure points, not only after problems occur, but especially for pushing for effective prevention. They can turn directly to the European buyers who will be obliged to act and follow-up on justified complaints, as will their home state monitoring authorities.

13 See for example statement by the European Coalition for Corporate Justice (2024).

In conclusion, suppliers in Colombia should take these new regulations into account. While markets outside the EU with fewer requirements could offer an alternative in the short term, these may potentially be sought after by many international competitors, making it challenging to gain access as a new supplier. Europe will remain a large, consumption-intensive and lucrative market. It is likely that in the long run these new regulatory regimes will expand over the globe, since "markets integrate better when there is regulatory integration" (Amaya-Castro & Henao, 2022, authors' translation). As a result – not only in Colombia but anywhere in the world – companies that manage to adapt their processes to these standards will be able to compete in attractive markets and will be one step ahead in responding to the opportunities and challenges of the globalized markets of the future. It would be in the interest of countries like Colombia to follow this regulatory trend, supporting Colombian businesses and ensuring a level playing field for their continued integration into international markets.

Addressing the responsibility of corporations for human rights violations in Colombia

This section assesses the business and human rights debate in Colombia as well as perspectives on corporate accountability in a transitional justice context.

In Colombia, human rights violations are particularly widespread and severe in regions subjected to the armed conflict which continues to claim many civilian victims of violence and displacement, land concentration and resource extraction and contamination as armed actors seek to enforce social, territorial or economic control in areas that are often rich in natural resources or fertile land.[14]

The case against Chiquita Brands for financing illegal armed structures, which was recently won by Colombian victims of paramilitary crimes in a US court (Earth Rights International, 2024), is exemplary for showing how both illegal "war economies" and legal businesses operate in conflict

14 In Colombia, this is true for traditionally conflict-struck regions such as Arauca/Meta/Casanare, Magdalena Medio (oil, palm oil), Cesar/Cordoba (coal, livestock farming), La Guajira (coal and gas, renewables), Nariño/Putumayo (oil), Cauca and Urabá (agroindustry), Antioquia (mineral resources), to name but a few.

areas and hence in high-risk situations for human rights abuses. These illegal and legal enterprises work in an environment of competing economic interests, with a high degree of militarization and violence and a state that – unwilling or unable, or sometimes corrupt – inadequately oversees economic actors while failing to protect the rights of the civilian population. This poses particular challenges to a company's due diligence practice.

Colombia has no specific legislation on human rights in supply chains. It started to implement the UNGP in its first National Action Plan (NAP) in 2015. The most recent NAP (2020-2022[15]), regarding the corporate responsibility to respect human rights, focuses on promotion, awareness-raising, consultation, and capacity-building. It fails, however, to address corporate accountability or the role of companies in Colombia's transitional justice process. Nevertheless, Colombian jurisprudence has started to integrate the UNGP as an interpretative standard for national and constitutional law, in particular for fundamental rights and their direct effect on non-state actors (FIP & Zuleta, 2021). For example, in decision T-614 of 2019, the Constitutional Court concluded that coal company Cerrejón had failed to comply with the UNGP standards to identify the impact of its operations on the complainants' rights to health and a healthy environment, and ordered the company to adopt reparative measures to control its coal dust emissions and clean up the area.

Doing business in conflict situations where human rights are at high risk requires the special attention of both companies and the state. Identified patterns of corporate involvement in conflict-related crimes and human rights violations are as follows: the use or financing of public or private security forces, including illegal actors, who practice human rights abuses; the violent persecution of local resistance against corporate projects that cause, for example, environmental damage; the criminalization of social and community protest; and land grabbing through violent displacement and corruption (CCAJAR, 2021). Criminal prosecutions of economic actors for gross, conflict-related human rights violations are an important element of access to remedy (UN Working Group BHR, 2020).

In Colombia, there are several well-documented examples of how legal businesses have sought to use, incite or benefit from violent conflict dynamics. In several exemplary – though counted – cases, accountability was sought for business involvement in the commission of crimes related to the armed conflict. One of those few cases is US-based coal company Drummond, active in the department of Cesar. In 2013, a mine contractor was convicted for the murder of two trade unionists at the hands of paramilitary groups. In May 2023, two (former) directors were indicted for crimes against humanity related to the promotion and financing of paramilitary groups between 1996 and 2001 (BHRRC, n.d.). Beyond criminal proceedings, the company has also been ordered under the land restitution scheme related to Law No. 1448/2011 to return land in eight instances to the original owners who were forcibly displaced (Forjando Futuros, 2023).

In the case of Chiquita Brands and its Colombian subsidiaries Banadex and Banacol, it was only after human rights organizations had denounced leading company officials before the International Criminal Court in 2019 that Colombian authorities confirmed the accusations against ten former employees for financing a paramilitary group and crimes against humanity between 1997 and 2004 (BHRRC, n.d.). In the US, Chiquita was found guilty of financing a terrorist organization and paid a 25 million dollar fine to the US Government. Yet, it took 17 years for the company to be sentenced to pay compensation to some of the victims of paramilitary crimes including massacres, sexual violence and forced disappearances that had been financed by Chiquita with more than 1.7 million USD between 1994 and 2007 (Earth Rights International, 2024).

In Switzerland, a criminal complaint was filed in 2012 against Nestlé and several of its managers for not having acted to prevent its Colombian subsidiary from presumably exposing its former employee, trade unionist Luciano Romero, to false stigmatizations that were followed by a deadly attack by paramilitaries. Neither Swiss nor Colombian prosecutors substantially investigated the case; the company's role remains inconclusive, despite incriminating witness statements (ECCHR, n.d.).[16]

The Special Jurisdiction for Peace (JEP) is the transitional judicial entity of the Integral System

15 With an update in 2024, see Consejería Presidencial para los DDHH y el DIH (2024).

16 The engagement of companies with anti-trade union violence constitutes a pattern of repression that is not unique to Colombia. While not a result of armed conflict, such violence is catalysed by it in keeping with a tradition of controlling and disciplining the work force (CCAJAR, 2021).

for Truth, Justice, Reparation and Non-Repetition, established through the Peace Accords of 2016. It is tasked with judging the most serious and representative crimes committed by the parties of the agreement during the armed conflict. Economic actors are not obliged to appear before the JEP, though civilians are invited to collaborate voluntarily. In this way, corporate actors could benefit from less severe sanctions in comparison to the ordinary justice system if they contribute to truth and reparations. However, few economic actors have made use of this option to date.[17] Notably the most notorious suspects from companies like Drummond or Chiquita have not yet applied for admission to the JEP, despite ongoing investigations and processes in the ordinary justice system (Ávila et al., 2019). However, it remains to be seen how the emblematic case 08 evolves, which investigates crimes committed by the security forces or other state agents, in association with paramilitaries or civilian third parties, including contexts in which economic interests, such as mining, play an important role. As such, the JEP offers interesting avenues and lessons learnt on how to include economic actors in criminal transitional justice mechanisms (Michalowski, 2024).

The Colombian Truth Commission (CEV) emphasized that if profound changes are not made to the country's economic development model, it will be impossible to achieve non-repetition of the armed conflict (CEV, 2022). Such change should start with corporations contributing their share to truth, justice, reparation and non-repetition. After its recent visit to Colombia, the UN Working Group on Business and Human Rights similarly concluded that Colombia suffers from long-standing structural problems, including its economic model based on large-scale natural resource exploitation, that have led to serious human rights violations and abuses in the context of business operations.[18]

In conclusion, there are enormous problems with corporate human rights compliance in Colombia, in particular in resource-rich and conflict-affected areas. Yet, there are hardly any examples of economic actors being effectively held to account. Such impunity encourages companies to continue operating with a concerning disregard for human rights and environmental due diligence. Therefore, more efforts are needed to push companies to take the environment and human rights more seriously. The German SCA can significantly contribute to the resolution of this challenge. The next section will utilize a case study to analyse these challenges and opportunities in greater detail.

17 One of them being Jaime Blanco Maya, the former Drummond contractor convicted of the murder of two trade unionists.

18 See Statement by the UN Working Group BHR (2024) after its visit to Colombia, 9 August 2024.

Case study: coal imports from Colombia

The coal sector in Colombia

Colombian coal is mainly produced in the northern departments of Cesar and La Guajira. Both departments depend economically on the coal industry, with royalties making up more than 40% of their respective budgets. The largest companies in the sector are multinationals: Glencore (Swiss) – which owns Prodeco (Cesar) and a major share in Carbones del Cerrejón (La Guajira) – and US-based companies Drummond and Colombian Natural Resources (also in Cesar, the latter of which is being liquidated). Around 90% of Colombian coal, amounting to some 55 million tons a year, is exported. This coal wealth does not, however, trickle down to the population. Local leaders complain that mining has brought them violence, expulsion from their land and territories and the coal dust pollution of water and plants, but not development. Only 1.8% of the workforce in La Guajira is employed by the mining companies. In Cesar, more than 20% of the population lives without the satisfaction of their basic needs (Bonilla, 2023; Monsalve, 2022; Oidhaco, 2016).

Mining in both departments happens in a context of past and ongoing armed conflict, widespread violence, corruption and low state institutional capacity. Mining companies benefited from the paramilitary incursion in the late 1990s and early 2000s. Several companies in the region, including Drummond and Prodeco, were signaled by a former high-ranking member of the paramilitaries for having financed paramilitary groups (BHRRC, n.d.) who committed massacres, killed trade unionists, displaced farmers from their lands and sold them to the mining companies with the help of front agents. Leading Drummond officials are accused in the ordinary justice system of crimes against humanity (BHRRC, n.d.). So far, the company has been ordered to return land acquired in bad faith in eight cases (Forjando Futuros, 2023). Tens of thousands of Colombians, many of whom belong to indigenous and Afro-Colombian

communities, were forcibly displaced and their territories lost to mining and pollution (Asamblea Campesina del Cesar, 2021; Oidhaco, 2016; Constitutional Court T-614, 2019). Illegal armed groups continue to dispute territories in both departments today (Pares, 2023).

The state has failed to hold not only armed actors but also the companies to account and has left the population defenseless. In La Guajira, affected communities, with the support of lawyers and NGOs, have filed numerous legal actions over the years to protect their land, revindicate consultation rights, and demand environmental reparation. Yet, many decisions in their favor are not implemented by the companies and their non-compliance is ignored by the state.

In 2021, Prodeco withdrew from three of its mining titles and stopped operating its Calenturitas and La Jagua mines without following a proper closure protocol. In so doing, it left many workers jobless, the region without economic alternatives, and the environment without rehabilitation. This raises urgent questions about a just transition from coal to economic alternatives that will not do further harm to the local population and environment (Monsalve, 2022).

The Colombian coal sector faces two transitional challenges: the transition to peace as well as transition to a climate-resilient economy and energy model, both of which will require that the sector fundamentally change. It is not enough for coal companies to clarify and assume their responsibility for their presumed involvement in conflict-related crimes; the question at stake is more fundamental. The Truth Commission has affirmed that economic inequality and exclusion are at the heart of the armed conflict, as expressed, in particular, in the exclusion of indigenous and Afro-Colombian territories and populations, and the imposition of mining and agro-industrial projects that destroy their cultural and ecological livelihoods (CEV, 2022). Part of the dynamics of conflict also reside in the mismanagement of public resources, such as of royalties, from which the population is excluded, precluding their benefitting in spite of need and inequality.

In relation to the climate change-related transition, a Colombian court stated in July 2023 that the Colombian state has failed to comply with its domestic legal obligations in relation to fighting climate change, in particular in relation to the coal industry (AIDA, 2023). Transition efforts must focus on the coal mining regions of Cesar and La Guajira and offer sustainable, participatory and inclusive economic and energy alternatives.

German coal importers and their human rights obligations under the SCA

Germany is an important buyer of Colombian coal and has even increased its imports after the gas supply from Russia diminished because of the war against Ukraine. In 2022, Germany increased its total hard coal imports by 8%, compared to 2021, to 44 million tons (Reuters, 27 February, 2023). Colombia directly or indirectly supplies almost 30% of that demand (Verein der Kohlenimporteure [VDKI], 2023; Port of Rotterdam, n.d.).

The most important German coal importers are large companies, such as EnBW, Uniper, RWE und Steag (Pieper 2023). Those with more than 1,000 employees are subject to the German SCA. By way of example, we will illustrate what human rights due diligence means concretely when it follows a conflict-sensitive approach. Since Cesar and La Guajira are conflict and weak governance areas in transition, a coal importer under the SCA will have to respond to heightened risks with heightened care, and adapt its business operations accordingly. A German coal importer subject to the SCA must implement prevention and remediation measures in response to a regular risk analysis, provide a complaint and whistleblower mechanism, document, and report and evaluate the impact of its due diligence efforts.

In the exemplary case of a large German company importing coal from Colombia, the following risk factors demand action, both in relation to its direct suppliers and, in the event of concrete indication of risk, also to indirect suppliers:

1) Risk factor of supply chain traceability: German buyers acquire Colombian coal either directly from the producer or through intermediaries, including coal exchanges and futures markets. In the latter cases, tracing the supply chain back to its original producers in Colombia might seem more difficult. Nonetheless, due diligence means that a company may not willfully look away from a suppliers' human rights and environmental risks and violations. If it has actual indications of such risks regarding indirect suppliers, it must carry out a risk analysis and trace its supply chain back to the origin of said risks in order to understand whether and how to act upon them. Some coal importers have chosen to disclose their suppliers which allows civil society to identify risks and make the company aware of them.

2) Risk factor of armed conflict and relations with armed actors: in conflict areas, a company needs to develop an understanding of the conflict, its causes, actors, and triggers, and understand how its business activities interact with them. For example, the acquisition of land with a history of forced displacement, or the hiring or financing of – legal or illegal – armed groups involved in the armed conflict are risks or indications of human rights violations. Section 2, para. 2, no. 11 of the SCA addresses the risk of employing public or private security forces where, due to a lack of corporate control, the prohibition of torture, the right to life or freedom of assembly are violated.

In cases of particularly grave and obviously illegal human rights abuses (under Section 2, para. 2, no. 12, SCA), risks of violations to the right to life also need to be addressed by corporations, even when they relate to *illegal* armed actors. There exist testimonies (against Prodeco) and accusations (against Drummond) of past collaboration with illegal armed actors who committed extorsion, kidnapping, displacement and murder against mine employees and neighboring communities, environmental rights defenders and social activists. The accusations refer to periods prior to the validity of the SCA, but the current presence of illegal armed groups in both departments constitutes a risk of recurrence of such illegal collaborations, especially as long as the accusations are neither clarified nor accounted for.

Here, a buyer must act preventively, and cannot invoke a "presumption of innocence" in relation to their suppliers. Instead, it must counteract risks by directly and indirectly engaging with and supporting suppliers to develop strategies of resilience against pressures from armed groups and undue influence.

Remediation in transitional processes includes truth, justice, reparation and guarantees of non-repetition. As long as the mentioned accusations against suppliers such as Drummond and Prodeco are not clarified, this hinders the transition to peace and constitutes a risk of recurrence. Both from a remedial and a preventive perspective, companies in Colombia as well as their international business partners have a responsibility to collaborate with or support the transitional justice processes, whether or not they were found to be legally liable. A German buyer should – alone or as part of a collective initiative – communicate to its suppliers, be they direct or indirect, of the expectation that they collaborate with transitional justice mechanisms and voluntarily contribute to the truth. The buyer should make clear that it will not consider this detrimental to the business relationship, but to the contrary, a positive contribution to social peace that it should incentivize accordingly.

3) Risk factor of corruption, weak governance and socio-environmental conflicts: a buyer company should take note of the stark contrast between the consistently high level of poverty in Cesar and La Guajira, which constitutes an ongoing and multiple human rights violation, and the high level of state income that the coal industry has generated over four decades. Such contrast is rooted in pervasive corruption and lack of institutional control. A German buyer company will have to show how it engages with suppliers to address corruption risks, for example by communicating, and ideally contractually anchoring, a zero-tolerance expectation coupled with support in implementing anti-corruption policies and consequences for non-compliance, such as suspension of the relationship. With respect to indirect suppliers, this might be best done through a collective effort among various buyers.

Corruption and the lack of state governance and control have led to the maladministration of public resources and services, provoking inequality and ongoing social and environmental conflicts. Despite people's recourse to legal action, supplier companies ignore domestic norms and state orders, and go unpunished. The result is ongoing violations of the rights to water, food, sanitation and standards of living, prohibited under Section 2, para. 2, no. 9 and 10 of the SCA, and severe violations of the right to housing and cultural rights, prohibited under Section 2, para. 2, no. 12 of the SCA. The right to effective remedy is also continuously violated through non-compliance with legislation and judicial orders which could also be considered a particularly grave and obviously illegal human rights abuse prohibited under Section 2, para. 2, no. 12 of the SCA. At the same time, repeated corporate non-compliance coupled with state inaction constitute risk factors for future transgressions and human rights abuses.

It is worth noting here that where causality between mining operations and environmental damages is up for debate, a company is in the wrong if it remains inactive until causality between operations and damages is proven. In environmental and public health matters, given the potential severity and irreversibility of the damage, a company must employ a precautionary approach

and respond to risks, even if scientific proof is not (yet) available. This also follows from its obligations regarding preventive measures under Section 5, para. 4.

A German buyer should respond to these risk factors by encouraging business partners to address root causes of inequality, poverty, and conflicts, such as a lack of employment opportunities. Correspondingly, and as demanded as a preventive measure under Section 6, para. 3, no. 2 of the SCA, buyers should also adapt their own purchasing policies to ensure suppliers can afford to hire and train the local workforce, benefit men and women equally, and in particular members of marginalized communities who historically lack access to economic opportunities. It is also important that a German business partner insist that its suppliers fully comply with laws and administrative and court orders on the protection of social rights and the environment. Until compliance is achieved it should consider suspending purchases. Existing contracts might have to be renegotiated to allow for a suspension on human rights grounds.

4) Risk factor of indigenous land rights conflicts: indigenous and Afro-Colombian communities in La Guajira and Cesar have been claiming for years that mining operations have deprived them of their land, water and territory, their cultural rights and livelihood. Section 2, para. 2, no. 10 of the SCA prohibits unlawful evictions and deprivations of the land and resources from which livelihoods are derived. This should include land taken without the free, prior and informed consent (FPIC) of the communities in question. This right has been repeatedly violated in these situations in Colombia despite FPIC being constitutionally recognized in a number of judgments on behalf of indigenous, Afro-Colombian and peasant communities.

These are ongoing rights violations, which a German buyer needs to address, whether alone or collectively, through remedial and preventive actions that guarantee adequate participation from affected communities. Community land must be returned even if it lies within a licensed mining area. To encourage real steps towards remedial action, the temporary suspension of purchases should be considered.

5) Risk factor of divestment and energy transition: Prodeco has returned several mining titles rather than proposing a proper mine closure. This raises several human rights concerns about environmental restoration and job perspectives for the mine's former direct and indirect workforce. If unresolved, environmental degradation might affect people's access to water, food, sanitation or health, as prohibited under Section 2, para. 2, no. 9 of the SCA. It also represents a harbinger of risk related to the energy transition process that will progressively push coal production out of global energy markets while alternative energy models are developed in a rights-compatible, inclusive and sustainable way.

Prodeco's German business partners need to urgently communicate expectations – and consequences should they not be met – that Prodeco must produce, within a reasonable timeframe and in consultation with affected groups and communities, concrete commitments and actions to prevent human rights harm as a result of their retreat. A buyer should listen to affected parties to ensure their rights and interests are respected in the exit negotiations between the company and authorities.

The climate crisis in Colombia already provokes numerous human rights impacts, such as severe droughts and floods, that affect people's livelihoods, health, access to housing, work, water, land and cultural rights. Companies need to understand the climate crisis from a human rights perspective and make sure they do not invest in economic models that continue to accelerate climate change. The Colombian and German states are both legally obligated to intensify their efforts to mitigate the climate crisis and phase out coal, as confirmed by courts in both jurisdictions. Stopping climate change is the most all-encompassing human rights imperative we face globally today, and is therefore integral to human rights due diligence under the SCA, even barring an explicit mention of climate obligations. It is in the mutual interest of German coal buyers and Colombian coal producers to collaborate in developing alternative business models that allow for such reduction and transition towards renewable energies.

Conclusion

This case study shows that German business partners can not only play an important role in supporting Colombian enterprises to collaborate with the transition to peace, but that they also have a responsibility to do so, just as their Colombian counterparts. If not compelled to do so by Colombian constitutional law, at least by international standards, German business partners must constructively participate in the transition to a peace economy that is inclusive towards those groups that historically suffered exclusion, and protect the climate.

If all business actors were to carry out such a proper risk assessment and manage identified risks to human rights and the environment accordingly, violations could be prevented. As previous attempts at corporate accountability in Colombia and internationally demonstrate, these processes take time and face lots of obstacles. The idea of due diligence laws is to not only review past violations, but prevent them from ever occurring, while contributing to climate and social justice. Aiming for broader social change, a preventive framework needs to be combined with enforcement mechanisms and further options for seeking accountability, as shown by past reliance on voluntary schemes and a lack of implementation.

Outlook and policy recommendations

Both home and host states have a responsibility to ensure the effective protection against and remediation of human rights abuses related to business activities. To foster justice in transitions, including corporate accountability, multiple avenues can and should be pursued on domestic, transnational and international levels. A bottom-up approach in a variety of jurisdictions can shift the balance towards accountability (PAX, 2017; Payne et al., 2022; ECCHR et al., 2023). At the same time, international legal developments, in particular mandatory due diligence standards, are essential for setting clear obligations for corporations and preventing human rights violations from ever occurring. Companies must adapt their business models to reduce the human rights and environmental risks they create for workers and communities.

With green energy projects already being envisaged in Colombia with Germany's cooperation, human rights standards need to be secured and enforced from the get-go. Human rights and environmental factors need to be anchored both in corporate operations and governmental agreements, such as the agreed Climate Partnership. Only then can neocolonial, green extractivism (Tornel, 2023; Kingsbury, 2021) be avoided, which would entail the continuation of human rights abuses and the exploitation of nature.

By adopting the SCA, Germany has recognized its responsibility to ensure that German corporations respect human rights, whether in Germany or abroad, including the German buyers importing coal from Colombia. Those affected as well as civil society in Colombia and Germany have an important role to play in using the law and making it effective. They can use the complaint mechanisms offered by the Act (Sections 8 and 14) to bring the urgent issues discussed in this policy brief to the attention of the companies concerned and the competent German authorities.[19]

Recommendations

To Colombian corporations and their German business partners: undertake risk-based human rights due diligence with particular attention to the challenges posed by the ongoing situation of conflict and weak governance, as well as of the transition to peace and towards climate justice, under the guidance of the relevant international standards, such as those provided by the UNGP and OECD, in order to ensure adequate participation and appropriate consideration of the interests of affected communities and other civil society stakeholders in regions of concern.

To the JEP and all justice institutions in Colombia: consider the important positive contributions economic actors can make to current and future transitional justice processes in Colombia, in particular with regard to truth and integral reparation, and seek a dialogue with such actors.

To the German SCA-monitoring body, BAFA: provide German corporations with country-specific guidance, specifically for countries in armed conflict and/or transition to peace such as Colombia, and integrate in such guidance the relevant international standards, such as those of the OECD as well as local expertise, including from civil society, from the respective countries.

To German legislators: assess the impact of the SCA in preventing and remediating human rights violations in supply chains and revise the German SCA to include further human rights and environmental risks as well as the whole activity chain of corporations. Add civil liability according to the EU Directive on Corporate Sustainability Due Diligence (without reducing the applicability of the SCA).

To the German and Colombian governments: include human rights standards and references to corporate due diligence obligations in the implementation of the Climate Partnership

19 Complaints to the BAFA can be lodged in German, English, French or Spanish via an online form (https://tinyurl.com/2xm3zcab). Further information by the BAFA on its interpretation of the SCA is provided here: https://www.bafa.de/EN/Supply_Chain_Act/supply_chain_act_node.html

Agreement with Colombia agreed to in June 2023, both with regard to a just transition away from coal and for green energy projects.

While the impact of the SCA in preventing and remediating human rights violations remains to be seen, it offers a potentially significant, additional instrument to the toolbox that merits use to protect workers, communities and the environment from corporate abuse and to hold companies to account. Looking at previous international experiences, we know that the road to accountability has always been difficult and long. Different forms of remedy and declarations of responsibility need to be brought together in litigation and advocacy strategies. Recent advances in accountability laws as well as international due diligence standards may open interesting avenues for litigants in ordinary courts and transitional justice mechanisms. Transnational human rights networks and clear international standards on the human rights obligations of corporations, including heightened due diligence in situations of conflict, can pave the way for business to ensure greater respect for human rights and the environment in their corporate activities, helping them to foster climate and social justice and the quest for sustainable peace.

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