

THE ROLE OF THE PRIVATE SECTOR IN TRANSITIONAL JUSTICE PROCESSES IN AFRICA

Regional Report

June 2021



GIJTR

Global Initiative for Justice
Truth & Reconciliation

ABOUT THE INTERNATIONAL COALITION OF SITES OF CONSCIENCE

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Cover photo caption: Wolframite and Casserite mining in the Democratic Republic of the Congo in 2007. Credit: Julien Harneis

ABOUT THIS REPORT

The present report is the product of a 2021 GITJR consortium project led by the International Coalition of Sites of Conscience (ICSC), which sought to examine past and present transitional justice processes involving private actors, with a focus on accountability for grave human rights violations and grassroots interventions in Africa and Latin America. The primary aim of the project was to learn from past experiences while seeking to inform the design of future formal and informal processes that consider private sector actors' roles and responsibilities in transitional justice.

Central to the project has been the preparation of regional reports for Africa and Latin America, respectively, that examine the private sector's role in transitional justice, notably grassroots interventions focused on private sector accountability. ABA ROLI led the regional study on the *Role and Responsibilities of Private Sector Actors in Transitional Justice Processes in Africa*. The findings and recommendations in the report were further informed by an online consultation in April 2021 with experts and practitioners across both regions who have been involved in transitional justice initiatives that include private sector actors or have examined the roles and responsibilities of private sector actors.

The Africa region in particular has witnessed multiple transitional justice processes over the past two decades; meanwhile, it is also one of the most resource-rich continents that has attracted considerable interest by the private sector leading to its involvement in egregious violations of human rights, economic and environmental crimes with devastating effects on already struggling societies. Attempts to identify and address the role of private sector actors in human rights violations have occurred in some settings, yet there has been a general lack of information and research done to fully interrogate the challenges and opportunities for holding private sector actors accountable for their actions. Gaining a better understanding of the role of these actors and looking at the attempts to hold private sector actors accountable for their actions is a principal objective of this study and can help in identifying the challenges, strategies, lessons learned and best practices in addressing the private sector role in the context of conflict and post-conflict justice initiatives. The report therefore seeks to fill a notable gap in understanding the how and why of private sector involvement in the commission of human rights violations in the context of conflict and to make proposals for institutional and legal measures to pursue accountability and enhance prevention of these practices.

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ABOUT THE GLOBAL INITIATIVE FOR JUSTICE, TRUTH AND RECONCILIATION (GIJTR)

Founded by the International Coalition of Sites of Conscience, the Global Initiative for Justice, Truth and Reconciliation (GIJTR) is a Consortium of nine organizations around the globe dedicated to multi-disciplinary, integrated and holistic approaches to transitional justice.

Around the world, there is an increasing call for justice, truth and reconciliation in countries where legacies of grave human rights violations cast a shadow on transitions. To meet this need, the International Coalition of Sites of Conscience (ICSC) launched the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in August 2014. The goal of GIJTR is to address new challenges in countries in conflict or transition that are struggling with their legacies of past or ongoing grave human rights violations.

The GIJTR Consortium (“the Consortium”) is comprised of the following nine partner organizations:

- International Coalition of Sites of Conscience, in the United States (lead partner);
- American Bar Association Rule of Law Initiative (ABA ROLI), in the United States;
- Asia Justice and Rights (AJAR), in Indonesia;
- Centre for the Study of Violence and Reconciliation (CSV), in South Africa;
- Documentation Center of Cambodia (DC-Cam), in Cambodia;
- Due Process of Law Foundation (DPLF), in the United States;
- Forensic Anthropology Foundation of Guatemala (Fundación de Antropología Forense de Guatemala – FAFG), in Guatemala;

- Humanitarian Law Center (HLC), in Serbia; and
- Public International Law & Policy Group (PILPG), in the United States.

In addition to leveraging the different areas of expertise of the Consortium partners, the ICSC draws on the knowledge and longstanding community connections of its 275-plus members in 65 countries in order to strengthen and broaden the Consortium's work.

The Consortium partners, along with the ICSC's network members, develop and implement a range of rapid response and high-impact programs, utilizing both restorative and retributive approaches to criminal justice and accountability for grave human rights violations. The Consortium takes an interdisciplinary approach to justice, truth and accountability. On the whole, the Consortium partners possess expertise in the following areas:

- Truth-telling, memorialization and other forms of historical memory and reconciliation;
- Documenting human rights violations for transitional justice purposes;
- Forensic analysis and other efforts related to missing or disappeared persons;
- Advocating for victims, including for their right to access justice, psychosocial support and trauma mitigation activities;
- Providing technical assistance to and building the capacity of civil society activists and organizations to promote and engage with transitional justice processes;
- Reparative justice initiatives; and
- Ensuring and integrating gender justice into these and all other transitional justice processes.

Given the diversity of experiences, knowledge, and skills within the Consortium and the ICSC's network members, the Consortium's programming offers post-conflict countries and countries emerging from repressive regimes a unique opportunity to address transitional justice needs in a timely manner while simultaneously promoting local participation and building the capacity of community partners.



Through an ABA ROLI program, rural South Kivu residents displaced by mining discuss the environmental and social harms they face in the DRC.

ABOUT THE AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE

ABA ROLI, a member of the GITJR consortium, has implemented projects globally and across Africa with a particular focus on governance and justice system strengthening, human rights and access to justice, justice sector reform and the promotion of the rule of law, transitions, conflict mitigation and peacebuilding. Several projects have focused on atrocity prevention and supporting transitional justice processes, especially in fragile, post-conflict states in the region. ABA ROLI currently implements projects in Benin, Burkina Faso, Central African Republic, Democratic Republic of Congo, eSwatini, the Gambia, Liberia, Niger, Somalia, Sudan, Tanzania, Uganda, and a regional Southern Africa project, with presence in Angola, Mozambique, South Africa and Zambia. For more information, see: https://www.americanbar.org/advocacy/rule_of_law/



AMERICAN BAR ASSOCIATION

Rule of Law Initiative

ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACLED	Armed Conflict and Event Data Project
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
AUTJP	African Union Transitional Justice Policy
CAR	Central African Republic
DAG	Dyck Advisory Group
DRC	Democratic Republic of Congo
EU	European Union
GIJTR	Global Initiative for Justice, Truth and Reconciliation
HRD	Human Rights Defender
IBM	International Business Machines
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
LRA	Lord's Resistance Army
MNC	Multinational Corporation
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
PMC	Private Military Company
RPF	Rwanda Patriotic Front
RTL	Radio-Television Libre des Mille Collines
RUF	Revolutionary United Front
SATRC	South Africa Truth and Reconciliation Commission
SCSL	Special Court for Sierra Leone
TJ	Transitional Justice
TJRC	Truth, Justice and Reconciliation Commission
UN	United Nations
UNITA	National Union for Total Independence
US	United States

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1. INTRODUCTION

The scourge of violent conflicts and the pervasiveness of authoritarian rule have long defined the political and socio-economic history of postcolonial Africa. From North Africa to the Great Lakes region, and from the Lake Chad and the Sahel regions to the Horn of Africa, civil wars have rumbled for decades. Over the years, the continent has become the epicentre of United Nations (UN) peacekeeping operations.¹ In the same vein, it is common for African countries to feature, or even dominate, ACLED's annual list of "Ten conflicts to worry about" or International Crisis Group's "Ten conflicts to watch".² Conflicts in Africa are not unrelated to the fact that many countries in the region have experienced authoritarian rule at some specific points in their histories. For most of Africa, independence from colonial rule in the 1950s and 1960s did not come with meaningful and tangible freedom for local populations. Instead, colonial rule was quickly replaced by dictatorship and state repression. It is no surprise that in the Freedom in the World Report, the majority of African countries have often been categorised as either "partly free" or "not free".³

However, since the late 1980s and early 1990s, when the so-called third wave of democratization swept across the continent, many African countries have undergone some form of political transition. With such transition has come the urgent need to confront past gross human rights violations and crimes under international law committed in the context of violent conflicts and repressive regimes. The upshot is that transitional justice mechanisms, such as prosecutions, truth-telling, reconciliation, amnesty, reparations, memorialization, and guarantees of non-repetition, have proliferated in the continent, albeit with varying degrees of success. Dark legacies and past episodes of state repression compelled countries such as Ethiopia, the Gambia, South Africa and Tunisia to resort to transitional justice. In Côte d'Ivoire, Kenya, and Zimbabwe, transitional justice mechanisms were initiated after electoral violence threatened national stability. In other countries, including Burundi, Central African Republic (CAR), Democratic Republic of Congo (DRC), Liberia, Sierra Leone, South Sudan, Sudan, Uganda, and Rwanda, the trigger was or is an all-out civil war.

Three decades of experimenting and implementing transitional justice in Africa has generated a relatively huge body of knowledge and lessons for state and non-state actors alike. Yet, there still remains gaps in the study and interrogation of the subject. This report deals with one such gap, that is, the place and role of private sector actors in transitional justice processes in the continent. This is a particularly salient issue in Africa. Private sector actors, including private military companies and multinational corporations, have been actively involved in many of the continent's intractable conflicts, often for economic gain or with the ulterior motive of illegally exploiting and plundering the natural resources of the countries concerned. In the process, private actors have been responsible for egregious human rights violations, massive environmental degradation, and economic crimes. Several transitional justice mechanisms across Africa have sought to address violations and crimes committed by private actors, but these experiences are yet to be thoroughly systematized and comprehensively studied. This report seeks to undertake such kind of a study and in so doing contribute to a better understanding of the strategies, challenges, lessons learned and best practices in holding private actors accountable.

This report draws upon an extensive analysis of literature on transitional justice in Africa, including reports of truth commissions, peace agreements, national statutes, reports of relevant African Union (AU) bodies, and judgments and decisions of courts and tribunals at national, regional and international levels. The report is also based on review of relevant academic literature. The report also incorporates insights from a two-day virtual workshop held on 26-27 April 2021 on *"The Roles and Responsibilities of Private Sector Actors in Transitional Justice in Africa and Latin America: An Interregional Exchange"*. Convened by the Global Initiative for Justice, Truth and Reconciliation (GIJTR), the workshop sought to create a platform for developing a set of best practices and lessons learned relating to private sector accountability for the commission of various types of human rights abuses across the two regions, as well as raise awareness of the roles that private sector actors have played in transitional justice processes.

In terms of structure, the second part of the report looks into the concept of transitional justice with a focus on an African framing and approach to the subject. The third section documents and analyses the involvement of private sector actors in violent conflicts and state repression in Africa. It highlights their motives, extent of involvement, and patterns of violations. The fourth part is an analysis of the extent to which transitional justice processes in Africa have been sites for pursuing accountability for private sector actors and the extent to which these actors have been engaged in these processes. The fifth section explores the lessons, opportunities and challenges in pursuing corporate accountability through transitional justice in Africa. The sixth section concludes the report with a set of recommendations.

2. TRANSITIONAL JUSTICE IN AFRICA: CONCEPTUAL AND NORMATIVE UNDERPINNINGS

Transitional justice essentially refers to the policy choices that societies emerging from violence conflict and repressive regimes adopt in order to reckon with the legacies of mass atrocities and gross human rights violations. Along these lines, the United Nations (UN) defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.⁴ The UN adds that these processes and mechanisms “may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”.⁵

Although the definition of transitional justice seems straightforward, practice and experience has shown that different regions and societies around the world place emphasis on different processes and mechanisms in their conceptualization of the term. In Africa, the pivotal role of international actors in promoting transitional justice in the continent has meant that the term is often seen as externally defined and imported. For this reason, it has been argued that the dominant framing of transitional justice does not adequately capture the imagination and cultural conceptions of justice within African societies.

2.1 An African Approach to Transitional Justice

The 2019 study on transitional justice by the African Commission on Human and Peoples’ Rights (ACHPR) identifies some of the limits of the mainstream understanding of transitional justice. For instance, the report notes that mainstream definition of transitional justice has a strong legalistic bias that gives preference to

retributive or criminal justice as opposed to restorative justice. In this context, the ACHPR notes that a holistic conception of transitional justice should be based on a “contextual determination of both the balance between various dimensions of TJ and the particular aspect which a transitional society may choose to emphasise”.⁶ The ACHPR also faults the dominant discourse on transitional justice insofar as it mostly addresses violations of civil and political rights. The report notes that transitional justice should also address societal inequalities, violations of socio-economic rights, embezzlement of public funds, and corruption.⁷

In order to articulate an African framing of transitional justice, the AU Transitional Justice Policy (AUTJP) was adopted in February 2019. The need and case for such an articulation was made in the 2013 report of the AU Panel of the Wise entitled “Peace, justice and reconciliation in Africa: Opportunities and challenges in the fight against impunity”.⁸ The AUTJP defines transitional justice as the “various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions, and inequalities and to create conditions for both security and democratic and socio-economic transformation”.⁹ The Policy goes on to make the following clarification:

Going beyond retribution and drawing on traditional justice approaches emphasizing conciliation, community participation and restitution, the conception of TJ advanced in this Policy seeks to address African concerns on violent conflicts and impunity through a holistic policy that considers the particular context and cultural nuances of affected societies, as well as the gender, generational, ethno cultural, socio-economic and development dimensions of both peace and justice.¹⁰

In addition to a definition, the AUTJP outlines nine principles that should inform transitional justice processes in Africa. These are:¹¹

- i. Transitional justice processes are the responsibility of African governments and other stakeholders should respect this leadership;
- ii. Transitional justice processes should be nationally and locally owned to ensure they are aligned to local needs and aspirations, ensure a common understanding of a shared vision, and maximise public support and ownership;
- iii. Transitional justice processes should address exclusion and inequitable distribution of power and wealth;

- iv. Transitional justice processes should be premised on African shared values relating to peace and security, justice or non-impunity, reconciliation, and human and peoples' rights elaborated in various AU instruments;
- v. Transitional justice processes should be context-specific, drawing on society's conceptions and needs of justice and reconciliation;
- vi. Transitional justice processes should strike a balance and compromise between peace and reconciliation on the one hand and responsibility and accountability on the other;
- vii. Transitional justice processes should give particular attention to sexual and gender-based violence as well as patterns of gender inequality in the society that enable gender-based violence;
- viii. Transitional justice processes should be implemented through cooperation and coherence amongst all actors; and
- ix. Transitional justice processes should build and strengthen national and local capacities.

In defining an African understanding of the concept, the AUTJP serves as an official regional embrace and endorsement of transitional justice. As has been observed, “[r]ather than rejecting transitional justice as yet another externally imposed agenda, African institutions are articulating their own values and norms that draw on African human rights frameworks and reflections on national experiences within the continent”.¹²

2.2 Normative Framework for Corporate Accountability

The AUTJP does not explicitly address the question of accountability for human rights violations and related crimes committed by private sector actors in the context of violent conflicts and repressive regimes. However, the Policy refers to non-state actors, a generic term that is broad enough to cover private sector actors. In this context, one of the state objectives of the AUTJP is to foster “accountability of State and *non-State actors* for serious violations of human rights”.¹³ The Policy also envisages that non-state actors have a role to play in transitional justice processes. To begin with, the Policy seeks to enhance synergy and coordination between and among diverse actors involved in transitional justice processes, including state and non-state actors.¹⁴ It also encourages states to mobilize resources for transitional justice processes from a wide range of stakeholders, including private sector actors.¹⁵

The ACHPR has also issued various normative standards that are applicable to the conduct of private sector actors in conflict situations. For example, the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter

Relating to Extractive Industries, Human Rights and the Environment, provides that “States should adopt legislation and put in place measures particularly on restriction of extraction in conflict-affected areas and criminal liability for involvement of companies in human rights abuses in conflict situations”.¹⁶

At the international level, the UN Guiding Principles on Business and Human Rights to Implement the United Nations Protect, Respect and Remedy Framework (UN Guiding Principles) is the main framework for addressing the human rights responsibilities of private sector actors, as well as the state’s duty to protect against human rights violations committed by private sector actors. . The Guiding Principles were adopted in recognition of, amongst others, ‘[t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights’ and ‘[t]he need for rights and obligations to be matched to appropriate and effective remedies when breached’.¹⁷

Principle 7 of the Guiding Principles specifically addresses the operations of private sector actors in conflict-affected areas. It requires states to ensure that business enterprises operating in conflict-affected areas are not involved in human rights abuses, including by engaging with private sectors actors to identify and mitigate human-rights related risks of their businesses and activities. Principle 7 also require states to deny access to public support and services for business enterprises involved in gross human rights violations. It also requires states to ensure that their policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights violations.

In addition to imposing responsibilities on states, the UN Guiding Principles has a section dedicated to corporate responsibility to respect human rights. Principle 17 requires businesses to exercise due diligence:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Principle 17 is relevant for multinational corporations operating in situations of repression and violent conflicts since they have to apply due diligence in ensuring that they are not contributing to the conflict, be it directly or indirectly.

In addition to the Guiding Principles, the UN Compact Guidance on Responsible Business in Conflict-Affected and High Risk Areas seeks to assist companies and other private sector actors to improve their conduct related to human rights. Other relevant normative frameworks around the world include the following: Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises; OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones; OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas; and International Finance Corporation Performance Standards on Environmental and Social Sustainability.

3. PRIVATE SECTOR ACTORS, STATE REPRESSION AND VIOLENT CONFLICT IN AFRICA

3.1 Range and Variety of Private Sector Actors

To understand the motivations behind the involvement of private sector in the transitional justice system, it is important to elaborate on the role that the private sector has in state repression and violent conflict in Africa. Several private sector actors, including private military companies (PMCs), multi-national corporations, media, transport companies and financial institutions have a role in furthering armed conflicts and repression in Africa. For the purposes of this section, we focus on PMCs and multi-national corporations since these two have disproportionately affected state repression and violent conflicts in Africa.

3.1.1 Private Military Companies

PMCs are ‘individuals or firms’¹⁸ that ‘provide services to replace or back-up an army or armed group or to enhance effectiveness’¹⁹ ‘purely on the basis of profits’.²⁰ They are divided into four categories as follows:²¹

1. The Combat Offensive PMC that engages in direct offensive combat operations;
2. The Combat Defensive PMC that is in combat zones but is defensive in nature such as military security;
3. The Non-Combat Offensive PMC that engages in direct offensive operations but not in a combat capacity such as military advice during a conflict or military training; and
4. The Non-Combat Defensive PMC that performs no combat operations and is oriented toward defensive activities such as logistics.

Across the world, including in Africa, there was a reduction in the military after the Cold War and the ‘collapse of the apartheid regime in South Africa’.²² Hence, there was an increase in the trend to hire private companies to provide military services during armed conflicts.²³ PMCs offer states the opportunity to cut on costs since there is no pension or benefit involved, while at the same time being more flexible, able, and reducing the official number of nationals’ casualty.²⁴

In the earlier days, such services were in the form of clandestine mercenary activities. For instance, European extractions had mercenaries in many African countries such as Congo, Angola and Sierra Leone in their conflicts after independence.²⁵ However, in the contemporary world, they have transformed into businesses in the form of professional private military companies that openly advertise their services.²⁶ The humanitarian actions of Executive Outcomes in Sierra Leone to coordinate the return of schoolchildren and teachers to their homes and to rehabilitate child-soldiers has been considered as a difference between mercenaries and PMCs.²⁷

Nevertheless, PMCs are more profit-motivated which implies that unlike mercenaries, they operate for those who can provide for financial gain, be it the government or the opposing sides.²⁸ For instance, Executive Outcomes, through the South African military, participated in the Angolan conflict on behalf of the government against the National Union for Total Independence (UNITA), and assisted the Sierra Leonean authorities in winning against the Revolutionary United Front.²⁹ Moreover, Geolink provided military support to the Mobutu regime during the Congolese civil war.³⁰ Hence, even if Executive Outcomes engaged in humanitarian actions post the Sierra Leone war, they are profit-driven and such actions are just after thoughts.

In some instances, PMCs have been used as a face for other countries to not interfere in the internal affairs of the country. This was the case of the American PAE in Sierra Leone and Liberia in the 1990s.³¹ The America PAE’s roles in these wars were not defined and hence they were involved in a myriad of activities including, conveying arms and ammunition, construction of roadblocks, reparation of roads, provision of petrol, assistance in medical evacuation and provision of communication devices.

3.1.2 Multinational Corporations

Multinational corporations are ‘firms with foreign subsidiaries that extend production and marketing operations into several countries.’³² Multinational corporations operate in several fields such as mining, manufacturing, telecommunications, service and finance. While governments are the primary actors that have to give answers in conflicts, with globalization and rise in transnational trade, multinational corporations have been identified as an actor that can influence the course

of repressions and conflicts.³³ They can do so by, firstly, using their influence to promote peace and to avoid conflict.³⁴ Secondly, they can support either side and prolong the conflict. Third, they can themselves be complicit to the repression and conflict by engaging in human rights abuses, damaging the environment and creating clashes between locals.

Multinational corporations have played a vital role in furthering state regression and conflicts in Africa. The UN Security Council highlighted this for first time in 2001, which concluded that:³⁵

The role of the private sector in the exploitation of natural resources and the continuation of the war has been vital. A number of companies have been involved and have fueled the war directly, trading arms for natural resources. Others have facilitated access to financial resources, which are used to purchase weapons. Companies trading minerals, which the Panel considered to be “the engine of the conflict in the Democratic Republic of the Congo” have prepared the field for illegal mining activities in the country.

This report requested governments to hold these companies accountable at the domestic level, although till date there is no evidence of such being done.

3.2 Responsibility of Private Sector Actors in Repression and Violent Conflicts

International human rights and humanitarian laws were drafted ‘with states in mind’ thus making them ‘central bearers of rights and responsibilities’ while granting individuals rights that they can claim against states.³⁶ Hence, the status of multinationals and PMCs hired on behalf of states to conduct military operations can be confusing.

3.2.1 Responsibility of PMCs under International Law

While PMCs are sometimes directly involved in armed conflicts, governments insist that they are ‘civilian contractors’ and hence should be considered as individuals and not combatants.³⁷ The *Akayesu* case of the International Criminal Tribunal for Rwanda³⁸ stated as follows:

The duties and responsibilities of the Geneva Conventions and the Additional Protocols ... will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either the belligerent parties, or to individuals who

were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts.

This implies that non-state actors can be considered as perpetrators 'only if their acts can be attributed to a party to the conflict'.³⁹ This would exonerate several PMCs who are not mandated to take part directly in hostilities.⁴⁰ However, subsequent cases at international level established that individuals having a 'factual link to the state, which is party to the conflict' can be considered as state agents.⁴¹ Parties to the conflict should have control over such individuals. Hence, if members of a PMC or the PMC are integrated into the armed forces in line with articles 4A(1) and 4A(2) of Geneva Convention III, and article 43(1) of its Protocol I, and act as combatants, they will not benefit from civilian status.

Nevertheless, there is ambiguity when a mining company or a non-governmental organisation hires the PMC since the latter do not exercise public authority. In 2008, the International Committee of the Red Cross (ICRC), in collaboration with the Swiss Federal Department of Foreign Affairs, adopted the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document).⁴² African countries such as Angola, Sierra Leone and South Africa were part of the drafting process of the Montreux document and since then, Uganda and Madagascar have joined the document.⁴³ Despite not being a legally binding document, the Montreux Document provides for the framework within which PMCs must operate.

In many instances, PMCs are directly involved in conflicts. For instance, Executive Outcomes, which used to be a South African company, drew its forces from the apartheid-era South African Defence Forces and Police Service, and provided 'direct combat services' to Angola, Sierra Leone, Uganda, Kenya and Congo.⁴⁴ Despite Executive Outcomes' claims that they only 'train soldiers and engages in defensive pre-emptive strikes', their direct involvement in the civil wars of Angola and Sierra Leone by engaging in conflicts and introducing 'modern weaponry and tactics with devastating effects' directly impacted the success of these conflicts.⁴⁵

In Mozambique, the PMC, Dyck Advisory Group (DAG), has been hired by the government to assist them in responding to the on-going Al-Shabaab insurgencies in the Cabo Delgado area.⁴⁶ DAG's primary role is to provide training for the Mozambican forces to fight against Al-Shabaab.⁴⁷ However, DAG is also involved in carrying out airstrikes through 'gun-ship' helicopters to attack enemy camps and to target their supplies before they reach Al-Shabaab insurgents.⁴⁸

Hence, PMCs' responsibilities under international law can be 'ambiguous' given their private nature.⁴⁹ However, the fact that they perform the same tasks as 'state militaries' implies that they are also capable of violating international law similar to the latter.⁵⁰

3.2.2 Responsibility of Multinational Corporations under International Law

Multinational corporations can be held accountable in the event they are fueling state repressions and conflict in Africa. Piercing the corporate veil, directors of multi-national companies can face sentencing if it can be proved that they were liable. President-Director of Oriental Timber Company, who supplied weapons to Charles Taylor of Liberia during the war, despite prosecution in Dutch courts, was acquitted because the witnesses were unreliable.⁵¹ Despite the fact that he was acquitted, the case of the President-Director of Oriental Timber Company demonstrates that directors of companies can be prosecuted at national levels in case they have direct responsibility in prolonging wars and state repressions.

Multinational corporations can also have direct responsibility in cases of environmental degradations and human rights violations. This is the case of oil extracting companies in the Niger Delta in Nigeria.

The presence of PMCs in many conflicts in Africa can be linked to the presence of multinational extractive industries.⁵² Although multinational corporations do not directly take part in the armed conflict, they are one of the main actors whose main objectives are private economic gain.⁵³ Then United-Nations Secretary General Kofi Annan accused multinational corporations as being accomplices to conflicts by buying 'diamonds and other minerals' that support rebel groups to buy small arms and to prolong conflicts highlighted this.⁵⁴ Rebel forces benefit from the presence of multinational corporations since the latter pay for the exploitation of natural resources, which is one of the main financial resources for rebel groups.⁵⁵ This was the case for Angola where South African company De Beers bought diamonds from UNITA, which in turn used the revenue to finance the war.⁵⁶ De Beers also dealt in conflict diamonds from Sierra Leone. In the Democratic Republic of Congo, AngloGold Ashanti, which is part of the international mining conglomerate Anglo America, in return for gold exploration activities, supported the Nationalist and Integrationist Front, one of the main 'political' parties, which perpetrate human rights abuses and terror in the northeast of the country.⁵⁷

Similar to rebel groups, governments also benefit from the presence of multinational corporations when there is a conflict and the government can use funds from natural resources, taxes and royalties to finance such conflict.⁵⁸ This is because

multinational corporations, being profit driven, do not adhere to one side, and negotiate with the different sides of the conflicts to obtain the lowest price for the natural resources. Government can then use the revenue from the exploitation of natural resources as a mode of payment for PMCs. This is the case of Angola where the government of Angola used Executive Outcomes that previously fought alongside UNITA, to fight against the rebel group. This demonstrates that PMCs can change sides, depending on who pays them more. PMCs therefore contribute to the militarization of the society and proliferation of arms, and influence ‘the balance of military power, exacerbate tensions among protagonists’.⁵⁹

Multinational corporations have also been responsible for supplying arms to governments to sustain conflicts. One such example is that of the Canadian company Talisman that supplied war equipment to the Khartoum government in Sudan that were used against civilians, including enslavement of women and children.⁶⁰ In Sudan still, Lundin Petroleum, a Swedish oil company has been accused of consequentially contributing to the war where about 10,000 people were killed and over 200,000 people forced to leave their homes.⁶¹ The involvement of these companies prolonged the war in Sudan and even they can incur indirect responsibility.

3.3 Motives for Violations by Private Sector Actors

3.3.1 Economic Motives and Natural Resources

Economic motives has been identified as a ‘familiar theme’ in wars.⁶² In resource rich Africa, such economic motives flow from natural resources, which turn these natural resources into ‘curses’ rather than boons for development.⁶³ Natural resources have been identified as being at the ‘heart of the dynamic’ of conflicts in many countries in Africa such as Angola, DRC, Liberia, Nigeria, and Sierra Leone.⁶⁴

In oil-rich Nigeria, in addition to the ethnic clashes between Nigerians, the presence of multinational companies has fueled the conflict.⁶⁵ Oil is at the heart of the conflict in Niger Delta where the citizens have consistently protested against the government and multinational corporations such as Shell-BBP, Chevron, Elf, Mobil and Texaco for oil extraction.⁶⁶ The reasons for the protests is that the oil extraction and land ownership is against the interests of the local population.⁶⁷ In order to ensure smooth operations, multinational corporations adopted a ‘divide and rule strategy’ where they gave contracts to local leaders to refrain from rebelling against them.⁶⁸ However, this strategy gave rise to conflicts between the communities since more local groups started seeking contracts from these multinational companies.⁶⁹ Moreover, the government, despite obtaining more than 90% of its revenue from

oil extraction from multinational companies, does not address the needs of the local population.⁷⁰ In addition to multinational corporations, ethnic militia have been mining oil illegally to finance their activities.⁷¹

Rebel forces have further used natural resources to attract multinational corporations in the country. For instance, in Angola, the rebel group UNITA used rough diamonds in lieu of cash to sustain its military activities. This revenue was used to 'purchase arms, weapons and military equipment as well as to fund military training from foreign actors and from neighbouring countries such as South Africa and Namibia'.⁷² Once the government in Angola gained control of the oil and mining territory, UNITA could no longer sustain its military activities and hence the civil war ended.⁷³

Sierra Leone has one of the largest reserves of diamonds and rare minerals such as bauxite and rutile.⁷⁴ It is therefore of no surprise that the Revolutionary United Front (RUF), funded by the Taylor regime in Liberia,⁷⁵ occupied the mining territory thus having a stronghold in the conflict.⁷⁶ The government, when hiring the services of Executive Outcomes, could not afford to pay the company immediately and instead proposed mining concessions for its services.⁷⁷ Such a payment method acted as an incentive for Executive Outcomes to free strategic mining areas, such as diamond fields, so that it can collect its due as soon as possible.⁷⁸ Once the war was over, Executive Outcomes, to stop illegal mining and trading of diamonds, made a statement that it would defend the government from any attempt to destabilize it.⁷⁹ This shows that stability in the mining and trade of diamonds in Sierra Leone was essential for political stability. After its contracts in Angola and Sierra Leone, Executive Outcomes was part of the Strategic Resources Group, which include corporations such as 'mining, oil, infrastructure, air transport, hospital construction, demining, water purification, computer software, and other businesses'.⁸⁰ The relationship that Executive Outcomes had with the corporations led to the former being viewed as a 'mercantile company, providing stability in exchange for economic concessions and control of productive territories'.⁸¹ Executive Outcomes was not the only PMC that was providing security for natural resources. Many multinational corporations across Africa use PMCs to provide security for extractive industries such as oil and diamonds.⁸²

In Mozambique, Al-Shabaab's stronghold is in Cabo Delgado, which is home to natural resources such as rubies and liquid gas with high profit potentials.⁸³ Although Al-Shabaab is based on Islamist ideologies, it has been contended that external parties have fueled such sentiments in order to exploit natural gas resources to their advantage.⁸⁴ Moreover, the fact that they operate in the region threaten the country's economic future and give them a stronghold.

Corporations, attracted by natural resources, have fueled armed conflicts in the hope of getting better trade deals. For instance, American Mineral Fields supported rebels to overthrow the now then Mobutu regime with the view of obtaining high profit contracts.⁸⁵

Therefore, natural resources have acted as curses in many instances in Africa, with private sectors such as multinational corporations and PMCs fueling conflicts. Such private actors are motivated by profit and are not interested in the effects of their operations on the citizens of the country.

3.3.2 Politics

Politics is another motivation for the involvement of the private sector in armed conflicts in Africa. For instance, Sir Mark Thatcher pleaded guilty to organizing a coup in Equatorial Guinea with the help of a PMC.⁸⁶ Moreover, in the Niger Delta, the conflict is due to the multi-ethnic composition who each want to be in control of their natural resources.

3.4 Types of Violations by Private Sector Actors

3.4.1 War Crimes

Many PMCs in Africa have committed crimes against civilians and property in the country they were operating. These constitute war crimes, which, according to the Rome Statute of the International Criminal Court,⁸⁷ refer to breaches of the Geneva Conventions of 1949 and include acts such as:

- i. Willful killing;
- ii. Torture or inhuman treatment, including biological experiments;
- iii. Willfully causing great suffering, or serious injury to body or health;
- iv. Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
- v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- vi. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- vii. (vii) Unlawful deportation or transfer or unlawful confinement;
- viii. (viii) Taking of hostages.

The subsequent subsections of article 8(2) of the Rome Statute elaborate on other types of war crimes.

In Angola, although Executive Outcomes was supposed to only train Angola's armed forces, the PMC confessed that it undertook defensive strikes that resulted in about 20 casualties.⁸⁸ Similarly, in Sierra Leone, Executive Outcomes had control over defensives and launched 'air assaults against RUF bases with devastating effects'.⁸⁹ It was further reported by journalists that Executive Outcomes in Sierra Leone killed civilians from their helicopters in pursuit of rebels.⁹⁰

In Cabo Delgado in Mozambique, civilians have reported that 'DAG helicopters and light aircraft direct machine gun fire at civilian infrastructure, including hospitals, schools, and homes made of mud and thatch'.⁹¹ It was further reported that while engaging with Al-Shabaab insurgents, DAG helicopters did not differentiate between civilians and combatants while firing into the crowds or while dropping ordnance.⁹²

3.4.2 Economic Crimes

Private sector actors have been involved in economic crimes when a country is facing armed conflict. For instance, when Zaire (now DRC) was facing its worse political crisis, there was an elaborate operation set up by private actors to exploit its natural resources. For instance, actors in neighbouring countries such as Uganda were major importers of raw materials such as gold or cobalt. Such raw materials were looted and smuggled from former Zaire.⁹³ A bank in Dar-es-Salaam was even reportedly established to 'recycle earnings from smuggled precious minerals'.⁹⁴ In the same vein, a private Ugandan airline was involved in transporting the loots from former Zaire to Uganda and other neighbouring countries.⁹⁵

3.4.3 Environmental Crimes

Environmental crimes are 'illegal acts which directly harm the environment'.⁹⁶ In Niger Delta, one of the major reasons for the conflict is environmental pollution by the multinational corporations which lead to limited access to basic necessities such as potable water and food for the local population.⁹⁷ In addition to the above, farming was also affected since water for irrigation was now contaminated. The operations of multinational corporations in the Niger Delta have also threatened the mangrove forest, which is the largest in Africa and freshwater swamps from which locals obtain their basic sustenance.

In South Africa, despite laws regulating the mining industry, mining companies have, on several occasions, degraded, harmed and contaminated the environment.⁹⁸ Such mining practices have destroyed local ecosystems, forcing locals to be displaced.⁹⁹ This is the case in Mpumalanga where despite opposition from conservation and

tourism authorities, the Department of Mineral Resources granted mining rights. Such mining activities has today ‘resulted into the worst environmental degradation caused by mining activities in the whole of South Africa’ with ‘most of its land is no longer conducive for farming, living and there are water pollution and shortage, as well as a result of destructive mining activities’.¹⁰⁰ Such environmental degradation has an impact on the whole population living in the area.

3.4.4 Human Rights Violations

Private sector actors such as PMCs and multinational corporations, while assisting either sides to a conflict or by participating in conflict, participate in several human rights abuses. Such human rights abuses affect the whole community or population who ‘are under extreme duress and the systems needed to support them have been disrupted or destroyed’.¹⁰¹

Conflicts result into the following:¹⁰²

killing and displacement of civilians and gross and systematic human rights violations, including repression of freedom of expression and media, excessive use of force by armed forces, intimidation of political opponents, rape and other sexual violations, summary executions, disappearances and torture and in some instances mass atrocities.

These lead to a violation of several rights including the right to life, the right to dignity, the right to freedom from torture, the right to education, the right to health, the right to an adequate standard of living, the right to work, the right to a healthy environment and the rights to sustainable development. Violent conflicts often tend to be characterized by violations that affect entire communities or groups, such as forced displacement and mass starvation. Moreover, some violations are specific to conflict settings. These include forced recruitment of child soldiers and rape as a weapon of war.

These rights are protected by regional and international human rights treaties and instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Convention Against Torture, the Refugee Convention, the African Charter on Human and Peoples’ Rights, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child.

3.5 Victims of Violations by Private Sector Actors

Civilians are the main victims of private actors in state repression and armed conflicts in Africa. In DRC, Sierra Leone, Angola, Sudan and Liberia, for instance, while the conflict was/is ongoing, civilians, including women, children, older persons and persons with disabilities have to withstand the worst of the conflict. Not only are they subjected to loss of life, they also face sexual assaults, torture, displacement. Moreover, they are deprived of socio-economic rights such as access to health and education.

In Cabo Delgado in Mozambique, while DAG was carrying out airstrikes and gunning from helicopters, they indiscriminately killed civilians, who were either running from the attacks or were hiding in forests.¹⁰³ In one instance, a witness stated that DAG helicopters in the Chai Sede village shot two persons.¹⁰⁴ Villagers further reported attacks by DAG in the villages of Bilibiza, Mahate, Muidumbe and Quiterajo since they were the only ones carrying out air operations in those areas when these attacks happened.¹⁰⁵ In addition to loss of lives and injury, private actors also destroy civilians' homes during armed conflicts. It has been reported that PMCs, such as DAG,¹⁰⁶ have destroyed civilians' houses during airstrikes, forcing people to leave their villages. Moreover, hospitals have also been targeted by PMCs, thus destroying vital infrastructure and limiting the realization of the right to health of civilians. This was the case in Mocimboa da Praia in Mozambique where when terrorists hid in hospitals, DAG helicopters started bombarding the same, thereby destroying it.¹⁰⁷

In Sierra Leone, Executive Outcomes which had control over defensives and launched 'air assaults against RUF bases' which led to the killings of civilians.¹⁰⁸ In Liberia, during the war, citizens were summarily executed, there was forced recruitment of soldiers, including child soldiers, rape and sexual violence, and displacement.¹⁰⁹

In Nigeria, the local population of the Niger Delta are the main victims since they are affected by environmental pollution caused by multinational corporations.¹¹⁰ Furthermore, the government denies them of their fundamental human rights such as the right to self-determination, basic socio-economic rights, and the right to development.

4. TRANSITIONAL JUSTICE, PRIVATE SECTOR ENGAGEMENT, AND CORPORATE ACCOUNTABILITY

The main objective of this part is to critically analyse the extent to which transitional justice processes in Africa have been sites for pursuing accountability for private sector actors and the extent to which these actors have engaged in these processes. In particular, the section looks into attempts of holding private sector actors accountable through truth commissions, civil and criminal lawsuits, and reparation programs.

4.1 Truth Commissions

Several African countries have had a truth commission in one form or the other.¹¹¹ A truth commission in Africa and elsewhere, is understood to take the general form of ‘official, non-judicial bodies of a limited duration established to determine the facts, causes, and consequences of past human rights violations’.¹¹² Called by any name preferred by the establishing authority such as truth commission; truth and reconciliation commission or commission of inquiry and so on, they have special focus on testimonies in their core mode of operation, which provides victims with recognition, ‘often after prolonged periods of social stigmatization and scepticism’. By so doing, ‘truth-seeking mechanisms attempt to fulfil victims’ right to truth and give the community as complete a version of history as possible’.¹¹³ In some cases, victims get the rare opportunity to confront perpetrators.

Findings and recommendations of truth commissions can contribute to prosecution and reparation initiatives during transitional justice processes. This achievement is a consequence of truth commissions being seen in the first place to be moral, just, representative, consultative, credible, and open to public scrutiny at all stages of executing their mandate. They may also assist ravaged and divided societies

to break away from a culture of silence and distrust, and to identify institutional reforms needed to guarantee recurrence of violations.

Limited in effect if implemented alone, truth commissions are most effective one component of a comprehensive transitional justice strategy. For instance, operating side by side with judicial processes.¹¹⁴ The strategy should include reparation policies, criminal prosecutions, and institutional reforms. Clarity of findings and compelling recommendations may also enrich policy and create political and moral momentum for these initiatives. Having been deployed in more than a dozen countries in Africa, truth commissions are now of ‘the *sine qua non* mechanisms of a transitional justice process’,¹¹⁵ and are a ‘good indicator that a country has adopted a transitional justice policy’.¹¹⁶ They have become synonymous with transitional justice processes even though they have not been a constantly present initiative for countries that have adopted transitional justice policies.

Where established by law¹¹⁷ and deployed as a part of a transitional justice strategy,¹¹⁸ truth commissions have specific objectives, the parameters of which are defined by the constitutive instrument. For example, South African Truth and Reconciliation Commission (SATRC) was established under an Act of Parliament in 1994 to investigate gross human rights violations committed by the state and liberation movements between 21 March 1960 and 10 May 1994. So was the National Unity and Reconciliation Commission of Rwanda established.¹¹⁹

The interests, needs and context of each country determine the scope of objectives. These include establishing the facts about violent events that remain disputed or denied, analysing these facts to determine the historical and social contexts that gave rise to them,¹²⁰ and whether further or criminal investigations is appropriate. In other scenarios, they protect, acknowledge, and empower victims and survivors of violations as rights-holders, partners, and as people whose experiences deserve formal recognition. Yet in others, they are mandated to investigate a particular thematic violation of human rights.¹²¹ Their final recommendations attempt to identify and address the causes of abuse and violations to prevent future recurrence.

In their scope of work, truth commissions have adopted several methods of work in establishing facts giving rise to violations and other terms of their references. While the focus of inquiries is usually on actions of governments and their agents, in some countries such as Liberia, Sierra Leone, Mauritius, Rwanda and South Africa, truth commissions included documenting the actions of business and other non-state actors.¹²²

4.1.1 South Africa Truth and Reconciliation Commission

In South Africa, although the SATRC mandate covered the period between 1960 to 1994, South Africa's conflicts date back to mid-seventeenth century when the European settlers sought to establish a permanent residence on the subcontinent.¹²³ The private sector (non-state actors) played a significant role in perpetuating gross human rights violations during apartheid.

While clarifying their different levels of accountability, the SATRC classified the private sector involvement in gross human rights violations into three categories. The first-order involvement were those businesses who were directly involved; the second order involvement were those business that had foreseeability that their product or service would be used for unacceptable purpose; and finally, third-order involvement refers to those businesses who benefited by virtue of operating in a racially structured economy.¹²⁴ Thus, the levels and scope of the private sector involvement in human rights violations varied depending on several factors: whether it was white-led or black-led business, the size of the business and its relationship with government as well as between its employers and trade unions.¹²⁵

The Commission heard nearly 100 witnesses from business and labour,¹²⁶ yet a number of businesses 'refused' to participate or never delivered the information they promised. Multinational oil corporations that had a huge foreign investment component were conspicuous in their refusal to participate.¹²⁷ 'Questions were raised [during hearings] as to whether business had been involved in the violation of human rights, how business related to the state and whether or not business benefited from apartheid'.¹²⁸ For those businesses that participated their common view was that whether they benefited from apartheid or failed to act in the face of violations that did not amount to them participating in gross human rights violations.¹²⁹

In its findings, the SATRC found, *inter alia*, that 'business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule' yet 'several businesses, in turn, benefited directly from their involvement in the complex web that constituted the military industry'.¹³⁰ The Commission further found that 'certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies',¹³¹ and that 'most businesses benefited from operating in a racially structured context'.¹³² The SATRC also found that 'the denial of trade union rights to black workers constituted a violation of human rights'.¹³³

Looking ahead, the SATRC recommended that 'business could and should play an enormously creative role in the development of new reconstruction

and development programmes' as most business submissions pointed to the important contribution of 'social responsibility investment programmes, support for NGOs, improved employment equity programmes and the like'.¹³⁴ Other recommendations of the SATRC focused on wealth tax, a single levy on corporate and private income, a donation by each company listed in the Johannesburg Stock Exchange, a retrospective surcharge on corporate profits during the Apartheid era, a reconsideration of paying Apartheid-era debt among other things. However, government rejected many of the recommendations leaving it upon victims and their representatives to take action against private sector actors.¹³⁵

4.1.2 Liberia Truth and Reconciliation Commission

The other transitional justice initiative that anticipated business hearings is the Liberian experience. Although Liberia has had a long history of gross human rights violations, the TRC was mandated to investigate gross human rights violations and violations of international humanitarian law as well as abuses that occurred, including massacres, sexual violations, murder, extra-judicial killings and economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts, during the period January 1979 to October 14, 2003.¹³⁶ This period exemplifies the most lawless, chaotic and bloodiest history of Liberia as numerous forces and militia groups emerged in attempt to take control of the economic and political leadership of the country.¹³⁷

The TRC was empowered, inter alia, to "[identify] where possible persons, authorities, institutions and organizations involved in the violations."¹³⁸ This provision, without more, sufficed to bestow upon the TRC mandate over the private sector. Yet, as if to do away with any doubt as to the powers of the TRC over the private sector, the statute granted the TRC the discretion to summon any person, group of persons, organization or institution to provide information.¹³⁹ It also empowered it to investigate and interview, inter alia, any organizations or institutions in public or private.¹⁴⁰

The private sector was central to gross human rights violations and serious economic crimes that resulted from the skewed socio-economic and political imbalances. Accordingly, the Liberian TRC heard testimony from various media groups on the role they played during the armed conflict yet there is no record of any hearings conducted with companies themselves.¹⁴¹ However, the media also became a key actor during the TRC mandate as it reported extensively on the execution of the TRC mandate.¹⁴² The private sector played a key role in its massive interest in exploiting Liberia's natural resources which funds were used to fuel the wars and acquire weapons. According to the TRC report, 'the rubber, timber, gold and

shipping industries served as the sources and means for Taylor to obtain resources and weapons,¹⁴³ often with the collaboration of corporations.

In its determinations, the Liberian TRC found that ‘all institutions and corporations are responsible for the commission of those human rights violations including violations of international humanitarian law, international human rights law, war crimes and egregious domestic laws violations of Liberia’ to the extent that they abetted or aided the warring factions. The TRC authoritatively recommended to government to conduct further investigations to hold them accountable for their part in the violations. However, it appears no efforts have been made in the implementation of these recommendations.

4.1.3 Kenya Truth, Justice and Reconciliation Commission

The Kenya Truth, Justice and Reconciliation Commission (TJRC) was established in 2009 in the aftermath of the post-election violence (PEV) that engulfed the country from December 2007 to February 2008. Triggered by the dispute over the results of the 2007 presidential election, the PEV claimed the lives of 1333 people, according to official estimates.¹⁴⁴ A total of 3561 people were also injured while public and private property worth millions of Kenyan shillings was destroyed.¹⁴⁵ As part of the negotiated political agreement that ended the PEV, the main protagonists agreed to establish a truth commission to examine the root or underlying causes of the violence and as part of implementing broader transitional justice measures in the country. Pursuant to this agreement, the Kenyan parliament enacted the Truth, Justice and Reconciliation Act establishing the TJRC.

The TJRC had one of the widest mandates ever to be granted to a truth commission. Its temporal mandate covered the 45-year period between 1963 and 2008. The material and subject-matter mandate of the TJRC was equally broad. It was tasked to investigate the causes, nature and extent of gross human rights violations and acts of state repression committed during the temporal period, including killings, abductions, disappearances, detentions, and torture. Unlike similar truth commissions established elsewhere, the TJRC had an explicit mandate to investigate economic crimes and grand corruption, thus potentially. Section 6(n) of the Truth, Justice and Reconciliation Act provided that one of the functions of the TJRC was to “investigate economic crimes including grand corruption and the exploitation of natural or public resources and the action, if any, taken in respect thereof”.

With an explicit mandate on economic crimes and grand corruption, the TJRC had the opportunity to reflect on the “larger factual context” that underpinned state repression in Kenya.¹⁴⁶ It also offered a window to the Commission to document

the involvement of private sector actors in violations and injustices of the past. However, in its final report, the TJRC did little more than simply point out some of the major cases of grand corruption and economic crimes that occurred in the country during the concerned period. These included the “Goldenberg Scandal”, the “Charter House Bank Scandal”, and the “Anglo-Leasing Scandal”. On the Goldenberg Scandal, for example, the TJRC noted that the scandal involved “high level conspiracy between senior government officials and unscrupulous well-connected businessmen, to plunder the country’s resources at will”.¹⁴⁷ Indeed, at the heart of the scandal was a private company, the Goldenberg International Limited. The TJRC described the Charter House Bank Scandal as “one of the most profound scandals in Kenya’s banking sector to date”.¹⁴⁸ The bank was implicated in tax evasion, money laundering and suspect offshore money transfers. Like the Goldenberg Scandal, the Anglo-Leasing Scandal involved collusion between state officials and private sector actors in an elaborate scheme to pilferage public funds.¹⁴⁹

Regrettably, the TJRC did not call or summon any of the private sectors actors implicated in the above scandals to testify before it or make submissions. The TJRC also failed to make any specific recommendations regarding the involvement of private sector actors in relation to grand corruption and economic crimes. It is also noteworthy that the TJRC did not investigate the role of private sector actors in perpetrating other forms of violations or their involvement in the 2007/2008 PEV.

4.1.4 Mauritius Truth and Justice Commission

In 2009, Mauritius established the Mauritius Truth and Justice Commission with mandate to inquire into the legacy of slavery and indentured labour, thus focusing on socio-economic class abuses spanning over 370 years, the longest period that a truth commission has ever attempted to cover.¹⁵⁰ The Commission also has the responsibility to determine appropriate measures for descendants of slaves and indentured labourers, and to investigate complaints of the dispossession of land. Following analysis, the Commission Report finds that there is ‘a continuity in the economic system ... which produces exclusion, poverty and unemployment’.¹⁵¹ It recommended the establishment of an audit of public and private employment practices and penalties for unfair discrimination in all employment opportunities. However, no specific entities were identified and targeted for action.

4.1.5 Rwanda National Unity and Reconciliation Commission

In Rwanda, the Transitional National Assembly set up the National Unity and Reconciliation Commission in 1999.¹⁵² The Rwandese Commission was envisaged by Article 16 of the 1993 Arusha Accords, which had provided for the establishment

of a Commission of Inquiry to investigate human rights violations committed during the war. This war had raged between the Tutsi Rwandan Patriotic Front (RPF) and government. The Arusha Accords were signed in 1993. Nonetheless, the assassination of President Habyarimana in 1994 reignited these tensions, triggering a genocide that lasted for 100 days and killed an estimated 800 000 people.

The media played a huge role in the violence. Between 1999 and 2000 Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hasan Ngeze were indicated before the ICTR for conspiracy to commit genocide, public incitement to commit genocide, and other crimes against humanity for their actions as media personnel for Radio-Television Libre des Mille Collines (RTLM) and the Kangura newspaper.¹⁵³ Even though the case inquired into the role of the media in the violence, only individuals were tried and the radio and newspapers involved were not prosecuted.

4.1.6 Sierra Leone Truth and Reconciliation Commission

The Sierra Leone Truth and Reconciliation Commission did not focus on any particular business organization in its inquiry.¹⁵⁴ However, it addressed the diamond industry as an indirect catalyst of the war in Sierra Leone. It recommended, among other measures that the government should work towards conducting a full review of the role played by chiefs in the granting of mining licences.

In view of the above survey of African truth commissions, there is no evidence of substantial focus on establishing the role of the private sector. Various mandates of truth commissions did not expressly require them to consider the role of the private sector yet the law that established them generally allowed such. For those truth commissions that considered the private sector, only South Africa, Liberia and Mauritius made substantial comments, determinations and recommendations on the role of the private sector. However, there is no evidence to show that respective governments took measures to implement these recommendations.

4.2 Trials and Judicial Accountability

As stated above, much as truth commissions have become synonymous with transitional justice processes, it is undesirable that they be implemented in isolation. Criminal prosecution of perpetrators in general or those mostly responsible for gross violations of human rights is an element that can be implemented alongside or in the aftermath of a truth commission process. Making perpetrators, state or private actors, accountable is key to fighting against impunity. It also potentially deters future abuses. In some instances, prosecutions are believed to repair victims, reaffirm the rule of law and contribute toward reconciliation as victims feel justice has been meted on those responsible.

In addition to holding perpetrators responsible, trials and other forms of judicial accountability, whether domestic or international, or a combination, can be important in showing the gravity of human rights abuses as well as their systematic perpetration. The parts below investigate the extent to which African transitional justice initiatives have held business or private sector accountable through criminal prosecutions and other forms of judicial accountability for their role in human rights violations.

4.2.1 Criminal Trials

The record of holding the private sector accountable through criminal trials in Africa is sparse. Examples of such criminal prosecutions are few and far between. In relation to the 2007/2008 post-election violence in Kenya, the only attempt to hold private sector actors accountable for violations have been by the International Criminal Court (ICC). In the case of *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*,¹⁵⁵ the ICC Prosecutor brought charges against the executive officer of a private media company, Joshua Arap Sang, who was accused for, *inter alia*, allowing his show to broadcast hate messages and false information about murders in order to inflame the violent atmosphere.¹⁵⁶ The spread of public hate speech played a very significant role in turning communities into violence. However, the Trial Chamber vacated the charges against Sang on 5 April 2016.¹⁵⁷

In the case of *Prosecutor v Uhuru Muigai Kenyatta*,¹⁵⁸ the ICC Prosecutor accused a private bus company by the name 'City Hoppa' for transporting members of a militia group to carry out attacks against targeted communities. However, the case against the accused persons was withdrawn after the Prosecutor failed to gather sufficient evidence to sustain the charges.

In Liberia, Article VII Section 26 (j) of the TRC Act required that the Commission make recommendations in four specific areas: reparations; legal, institutional and other reforms; continuing investigations and inquiries; and prosecutions. After finding that private companies were involved in serious economic crimes during the conflict, the TRC recommended prosecution of the listed perpetrators.¹⁵⁹ One Gus Kouwenhoven, associated with two companies, namely, Oriental Trading Company and Royal Timber Corporation, was prosecuted in the Netherlands in 2007 suspected of involvement in smuggling arms to Liberia (through his Liberian-based timber factories) during the Second Liberian Civil War - in violation of UN arms trade bans - and accommodating/complicity in the numerous war crimes that were committed with these weapons.¹⁶⁰ Having been convicted by a Dutch trial court, the case is pending in the appeal court on the ground of lack of evidence especially regarding international war crimes. It is, however, unclear whether such

prosecution was triggered by the TRC process or was more linked to violation of UN arms trade ban as opposed to a transitional justice prosecution.

Liberia appears to be seized with the process that will lead to the prosecution of perpetrators.¹⁶¹ There is progress in implementing TRC recommendations through the Strategic Roadmap for National Healing, Peacebuilding, and Reconciliation launched in 2012. However, the focus of the Roadmap is “in particular on those recommendations that are most compatible with restorative justice,” as opposed to criminal accountability.¹⁶² Moreover, private sector accountability does not feature in adopted policy documents and public speeches of political leadership.

In Rwanda, the case of *Prosecutor v. Nahimana et. al* before the International Criminal Tribunal for Rwanda (ICTR) represents some semblance of private sector accountability through criminal prosecution where media personnel for RTLM radio and the Kangura newspaper were indicted and convicted for conspiracy to commit genocide, public incitement to commit genocide, and other crimes against humanity.¹⁶³ It epitomises the role played by the media sector in the commission of international crimes as well as post-conflict accountability for such conduct.

Experiences in Mauritius, South Africa and Sierra Leone, as countries that have roped in the private sector in transitional justice processes, do not have records of prosecutions to hold business or their representatives criminally responsible for private sector role in violations.

4.2.2 Civil Lawsuits: Domestic and Transnational Courts

Civil lawsuits or claims relate to judicial proceedings instituted by victims of human rights violations against private sector actors primarily seeking payment of compensation and other forms of non-state reparations. In view of the absence of an international accountability mechanism for private sector actors, victims have resorted to national or domestic proceedings to hold corporates accountable ‘from below’.¹⁶⁴ This should be understood as “the efforts by domestic institutions in the Global South to hold economic actors accountable for complicity in human rights violations during dictatorships and armed conflict’.¹⁶⁵ In other words, it is “the role of national courts in responding to victims’ demands for corporate accountability’.¹⁶⁶

A number of claims have been filed against South African companies suspected of direct violations of human rights or benefiting from the apartheid regime from 1948 and 1994. For example, in 2002 a group of South Africans, represented by the Khulumani Support Group, sued 20 banks and corporations in US federal court that did business in South Africa during apartheid.¹⁶⁷ These cases had mixed fortunes in that some defendants were found not liable especially based on the non-extra-

territorial application of the US law. Where the law applied, the fine details of the outcome could not be established. For instance, the details of the settlement with General Motors on 27 February 2012 are unknown.

The overview above demonstrates that monumental failure by national government to implement recommendations on holding the private sector accountable has seen prosecution through international courts as the only viable option. In some cases, such as South Africa, the government made public utterances to oppose and undermine individual efforts to hold corporates accountable through lawsuits before USA courts. In other cases, national judiciaries were adjudged weak and not independent such that they could not handle politically charged legal proceedings involving transitional justice measures. Largely, the buck seems to stop with national politicians in deciding the extent to which national institutions such as courts and prosecuting authorities could press for private sector accountability for gross human rights violations.

4.3 Reparation Programs

Just like truth commissions, reparation programs have, in a sense become synonymous with transitional justice processes. Reparations reflect the international legal obligation to repair the negative consequences of the illegal act. These reparations should, as far as possible, reverse the negative consequences of violations of human rights.¹⁶⁸ Full reversal of consequences of violations is not always possible; hence the condition of “as far as possible”. For instance, loss of life or suffering because of sexual abuse cannot be fully reversed. Thus, for them to be effective, reparations require an integrated approach, which may include criminal prosecutions and institutional reform. That way, possible criticism of the efforts at purchasing acquiescence or being short-term in effect, would be allayed.

The tripartite purpose of reparations is ‘to recognize victims as citizens who are owed specific rights’, ‘communicating a message that a violation of such rights deserves action from the state’; to contribute to establishment of civic trust among citizens and between citizens and state institutions.¹⁶⁹ Often requiring the state to mobilise substantial resource outlay, reparations for past violation of rights may take several forms. Although the common form is monetary, a financial payment is not the only form of reparation. Other forms are administrative, symbolic, moral and other. The resource element often delays their deployment as opposed to any opposition or intransigence of public authorities responsible for their payment.

Truth commissions of several African countries had the mandate to consider and recommend reparations at the conclusion of their work.¹⁷⁰ They did so. The

recommendations were comprehensive in identifying the potential recipients of reparations through established criteria; the methods or options for financing these reparations; the institutions or actors with the obligation to pay reparations; a formula for quantifying monetary reparations among other aspects.¹⁷¹

In South Africa, the mandate of the SATRC included consideration and recommendations for reparations to the President.¹⁷² The Act established the Reparations and Rehabilitation Committee (RRC), a committee integral to the Commission, responsible for assessing interim and final reparations. Interim reparations were meant for victims with “urgent medical, emotional, educational and material/or symbolic needs”, as well as final reparations. The reparations framework was based on five principles, namely, redress, restitution, rehabilitation, restoration of human dignity and guarantee of non-recurrence.¹⁷³ At implementation level the RRC proposed a pension scheme known as individual reparations grant (IRG)¹⁷⁴ coupled with non-monetary measures such as symbolic reparations (communal process of remembering and commemorating the pain and victories of the past such as exhumations, tombstones, memorials or monuments, and the renaming of streets or public facilities) and administrative measures.¹⁷⁵

Administrative reparations took the form of issuance of death certificates to people who have not received death certificates for their relatives. Mechanisms to facilitate the declaration of death were to be established and implemented in those cases where the family requests an official declaration of death. Further, exhumations, reburials and solemn ceremonies such as tombstones and headstones were also envisaged. The costs for such would be met from the individual reparation grant. Further still, the SATRC recommended that mechanisms be put in place to expunge the criminal records of the victims who received criminal sentences for their political activities.

The SATRC made three recommendations that have a direct implication on the private sector in South Africa. First, having identified businesses as a beneficiary of apartheid, the SATRC proceeded to call upon all the beneficiaries of the apartheid regimes to make a contribution to the Reparations Fund. Second, it urged the government to impose a once-off wealth tax on South African business and industry. Third, the reparations fund was to be managed by, *inter alia*, national and international business enterprises. In line with these recommendations, some private sector members claim to have made direct monetary contributions towards South Africa’s transitional process. For instance, the Anglo-American mining group argued that it had made ‘extensive contributions’ towards reconciliation and reconstruction in South Africa in spite of opposing the recommendation.

To date, there has not been a comprehensive national policy on reparations adopted. Many challenges were associated with interim reparations.¹⁷⁶ For example, they were paid out very late, nearly two years after the CRR made its recommendations to the government.¹⁷⁷ The amount was also negligible and unable to significantly reverse the consequences of violation on victims, and caused social tensions between recipients and non-recipients.

Given the South African government's persistent reluctance to adopt and initiate a reparations policy, Khulumani, a social pressure group, resolved to pursue the beneficiaries of the apartheid regime in the private sector. With the assistance of the Legal Resource Centre, in November 2002, Khulumani lodged a suit against several companies that benefited from the apartheid regime.¹⁷⁸

In Kenya, the TJRC issued recommendations on individual and collective reparations, the former category being payable to individual victims and the latter to communities or groups.¹⁷⁹ Five categories of violations¹⁸⁰ were eligible for reparations while victims were put in priority groups beginning with individual most vulnerable (recommended for monetary or pension arrangement including medical expenses for rehabilitation), then group victims (restoration of dispossessed land; recognition of communal land; infrastructural development such a roads, boreholes, hospitals, schools etc.) and the non-expedited (monetary compensation; quashing of criminal records for wrongly convicted and conferment of citizenship to those eligible).¹⁸¹

Partly because of the lack of private sector engagement with the TJRC, the reparations framework developed by the TJRC does not mention the private sector actors as key stakeholders. In any event, the recommendations of the TJRC as a whole and on reparations have not been implemented by the state. There have only been isolated acts of government, civil society and international organizations, which are not defined within a structured reparations program.

Providing reparations to ensure restitution and restoration of dignity to the victims was also a central objective of the Liberian TRC in order. The Commission went on to make extensive recommendations on reparations recommending "that the Government of Liberia assumes its full responsibility under international law principles and regimes" to provide reparations and rehabilitation of victims and perpetrators in need of specialized psycho-social and other rehabilitative services".¹⁸² The scope of reparations included "personal cash or material assistance" for individuals, groups and communities (infrastructural development) to be paid from the Reparations Trust Fund seed funded from the disposal of a public building now used for private corrupt activities.¹⁸³

Symbolic and memorial reparations such as proclamation of national holidays and proper burial of former presidents were also recommended. Further, administrative remedies were offered. These included the issuance of death certificates to the war dead; officially declaring as dead those missing for a period in excess of seven years and that the government issues a public apology to the Liberian people; governments and people of West Africa and other nations for wanton killing of their citizens; and to each government that contributed to the peace-keeping force for the wanton loss of soldiers' lives in active duty during the conflict.¹⁸⁴

Yet, despite the TRC's recommendation to the government of Liberia for a reparations program,¹⁸⁵ the government has not initiated a reparations program. With a shattered health sector, infrastructure and country's economy, Liberia could do more to implement this recommendation. In spite of all these, the private sector, particularly those mentioned by the TRC report, has not sought to make their contributions towards reparations.

The Sierra Leone experience is somewhat similar to other countries. Section 15(2) of the TRC Act mandated the Commission to make recommendations concerning the reforms and other measures, whether legal, political, administrative or otherwise, needed to achieve the object of the Commission. This object included "preventing the repetition of the violations or abuses suffered; responding to the needs of the victims; and promoting healing and reconciliation".¹⁸⁶ The TRC interpreted this provision to mean "reparations". The Sierra Leone TRC recommended reparations for everyone injured during the conflict such as amputees, the wounded, women who suffered sexual abuse, children, and war widows. The rationale was that these victims suffered multiple violations and fell in the class of "urgent need of a particular type of assistance to address their current needs, even if this only serves to put them on an equal footing with a larger category of victims".¹⁸⁷

More important, the TRC recommended creating a Special Fund for War Victims, which would take care of amputees, children, and women affected by the war. This was to be established within three months of the publication of the Final Report. To date, the recommended timeline has lapsed and yet the fund has not been established.

All in all, much as every TRC surveyed above had specific terms of reference in its mandate to consider the question of reparations., making them a constant feature of transitional justice processes in Sub-Saharan Africa. However, the non-participation of the private sector is conspicuous.

5. CHALLENGES, OPPORTUNITIES AND LESSONS IN PURSUING CORPORATE ACCOUNTABILITY

The majority transitional justice processes in Africa have not been concerned with private sector actors. Rather these processes have exerted their effort on holding governments and or their agents accountable for past violations. This approach has basis in conventional international law that focused much on the status of states as key players on the international plane. The responsibility of non-state actors would still be imputed on states based on the latter's 'lack of due diligence to prevent the violation or to respond to it' or collusion in such violations. This section looks into the challenges, opportunities and lessons in pursuing corporate accountability through transitional justice processes in Africa.

5.1 Challenges

5.1.1 Challenges Experienced by Truth Commissions

While the role of private sector actors in committing gross human rights violations is well documented and acknowledged, few truth commissions in Africa have sought to hold them accountable. However, one clear lesson that emerges is that granting a truth commission the explicit mandate to investigate grand corruption and economic crimes is an important starting point, but it is not sufficient in and of itself. The Liberian and Kenyan truth commissions had such explicit mandates and their final reports recount, albeit to varying degrees, the involvement of private sector actors in perpetuating economic crimes and other human rights violations. At the same time, the experience of both truth commissions show that comprehensive investigation of private sector actors is quite complex and requires resources that are rarely available to truth commissions.

The challenges that truth commissions have experienced in their pursuit for corporate accountability have been context specific. In South Africa, some businesses openly defied the SATRC, yet others participated. In Liberia, Sierra Leone and Mauritius, indirect inquiries were conducted, and recommendations made without subjecting the private sector to the transitional justice processes. The source of these different approaches seems to lie partly in the definitional parameters accorded to the term 'perpetrator', which is often the single most important decision that determines the scope and depth of truth commissions' work. As shown in the SATRC categorisation of levels of responsibilities, perpetrators can have different degrees of responsibility in orchestrating, perpetrating, or supporting human rights abuses. Terms such as 'masterminding', 'facilitating', 'aiding', 'colluding' or 'abating' are difficult to define. The width and breadth of such definitions will have a congruent impact on the profile of individuals and institutions that make them subjects of investigations by truth commissions.

Thus, there is ambiguity in the definition of perpetrators as some persons or institutions could have been coerced into collaborating with repressive regimes or collaborators who later opposed the regime. Such fluidity of the concept of perpetrator has triggered different approaches by African countries in their approach to transitional justice processes, perhaps explaining the different approaches when dealing with the private sector.

Where truth commissions found the private sector responsible for gross human rights violation such as economic crimes in Liberia, government have not been forthcoming publicly acknowledging such responsibility. This water down the role of truth commissions which are set up with so much agony in terms of convincing various sectors on their necessity. Also challenging is the reality that some named perpetrators remain in political office during the transitional justice period thereby shielding their corporate accomplices from accountability.

Another challenge for truth commissions seems to be the failure of governments to implement the recommendations of truth commissions, especially on reparations and corporate accountability. In South Africa, the government rejected recommendations of the SATRC relating to businesses. In Kenya, the government similarly rejected to accept the findings and recommendations of the report. The rejection of reports of truth commissions by governments in Africa have forced victims, as is the case in South Africa, to resort to self-help by pursuing judicial accountability before national, foreign and international courts. Non-implementation of recommendations by truth commissions is the greatest threat to this transitional justice intuitive.

The trend where governments reject recommendations to hold the private sector accountable calls into question transparency and accountability issues. Governments and private sector actors appear to be often aligned. There seems to be lack of acknowledgment and political will to include private sector actors in the process/picture because politicians have political fortunes at stake.

5.1.2 Challenges in Pursuing Trials and Judicial Accountability

The recorded poor performance in pursuing trials and judicial accountability for private sector actors in Africa could be attributed to a number of factors. To begin with, the absence of domestic legal frameworks has contributed to the failure in many African countries to hold private sector actors accountable for human rights violations, especially where such violations are by collusion. In some cases, private sector actors have 'weaponized' the legal process to silence human rights defenders (HRDs) who help communities pursue accountability for corporations. In other cases, the courts of law lack the necessary formal and substantive independence to execute their role without facing realistic threats thereby undermining the judicial accountability process. For example, the establishment of the Special Court for Sierra Leone was partly a result of inadequate domestic legal system where justice delivery institutions had collapsed post-conflict.

Another daunting challenge experienced in the pursuit of criminal accountability for private sector actors is associated with gathering relevant and sufficient evidence to sustain charges and secure conviction. As is evident from the Kenyan cases before the ICC, efforts at gathering evidence may be frustrated by state authorities, making it difficult to successfully prosecute private sector actors. This challenge is further complicated by the fact that in many countries the political class and individuals wielding state authority usually own major private sector entities. In other words, there is often a blurred line or distinction between state officials and private sector actors. In many African countries, state officials implicated in repression and gross human rights violations usually have deep economic stakes in the private sector and use their public authority to shield both themselves and the company they own from accountability. This intimate relationship between state officials and the private sector also explains the lack of political will in many countries to pursue accountability for past injustices, including in relation to private sector actors.

Cultural factors have also been cited as a reason that some post-conflict states shy away from implementing prosecutions. Local communities have been seen to prefer traditional methods of accountability as opposed to criminal prosecutions. The clear example is that of Uganda where local community leaders in the Acholi area would prefer that accountability of violations by the Lord Resistance Army (LRA)

be dealt with traditionally, yet they also want to see perpetrators held accountable for their actions.¹⁸⁸

For civil suits filed out of the African continent, a major hurdle has often related to the question of jurisdiction. Several cases filed against multinational corporations domiciled in Europe and North America have failed due to jurisdictional and other technical grounds. For instance, a case filed against Anvil, a mining company in the DRC alleging the company's complicity in atrocities committed by the Congolese Army,¹⁸⁹ was rejected by Canadian courts on technical and jurisdiction grounds. Similarly, cases filed by victims of apartheid in the United States (US) against Ford Motor Company (Ford) and International Business Machines Corporations (IBM) were dismissed after a lengthy litigation process because the victims had ostensibly failed to show a close connection between decisions or actions of the two companies in the US and the gross human rights violations in South Africa.

5.2 Opportunities and Lessons

5.2.1 Malabo Protocol

The adoption by the AU of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) in 2014 raises the possibility of a future comprehensive regional legal framework for corporate criminal accountability for conflict-related violations in Africa. The Malabo Protocol, which is yet to be ratified by any AU member, provides for the extension of the jurisdiction of the yet-to-established African Court of Justice and Human Rights (ACJHR) to cover not only crimes under international law but also transnational crimes.¹⁹⁰ If it ever comes into force, the Malabo Protocol will have implications for corporate accountability in Africa in at least three main ways.

First, the ACJHR will have jurisdiction over a wide range of international and transnational crimes, some of which are often directly committed by corporations and private sector actors. These include corruption, money laundering, trafficking in hazardous wastes, and illicit exploitation of natural resources. Second, and perhaps more importantly, the Malabo Protocol expressly provides for the ACJHR to exercise jurisdiction over legal persons, particularly private corporations. Article 46C of the Amended Statute of the ACJHR, which is annexed to the Malabo Protocol, reads as follows:

Article 46C Corporate criminal liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

Article 46C has been lauded as a progressive provision that reflects “empirical evidence of corporate involvement in serious crimes affecting the African continent and the growing appreciation of the distinctive nature of corporate criminality relative to that of individuals therein”.¹⁹¹ In this context, it is noteworthy that the Amended Statute of the ACJHR provides that the available sanctions against convicted legal persons include pecuniary fines and “forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State”.¹⁹² The Statute also empowers the ACJHR to order the transfer of money and other property collected through fines or forfeiture to the Trust Fund,¹⁹³ which is established under the Statute to provide legal aid and reparations to victims of the crimes tried by the ACJHR.¹⁹⁴ Read together with the sanctions regime, the provision on corporate criminal liability in the Malabo Protocol holds the potential of “strengthen[ing] the prospects of meaningful reparative and restitutive sanctions that can be used to repair victim communities”.¹⁹⁵

5.2.2 AU Policy Framework on Business and Human Rights

One of the key opportunities for strengthening corporate accountability in the context of transitional justice in Africa is the ongoing AU process of developing a policy framework on business and human rights for Africa. The policy seeks to develop a regional framework for the implementation of the UN Guidelines on Business and Human Rights. The idea to develop the policy emanated from a human

rights and business seminar that was held by the AU in September 2014. In 2015, the European Union committed to support the AU in developing the policy.¹⁹⁶ About two years later in March 2017, a draft of the policy was considered and validated in a workshop co-organized by the AU and the European Union.¹⁹⁷ The revised draft of the policy was meant to be submitted to the policy organs for consideration and eventual adoption, but this is yet to take place. In the latest EU-AU Dialogue on Human Rights that took place in December 2020, the EU “reiterated its readiness to continue consultations and provide technical assistance as appropriate” in the development of the policy.

The process of developing an AU policy on business and human rights presents the possibility of formulating regional standards on holding private sector actors accountable for gross human rights violations committed in violent conflicts and repressive regimes. The policy will complement the provisions of the UN Guidelines on Business and Human Rights and serve as a reference point for transitional justice processes in Africa.

5.2.3 African Human Rights Treaty Bodies and Mechanisms

The existing African regional human rights treaty bodies and mechanisms also offer entry points pursuing accountability and transitional justice. The African regional human rights system is composed of three main treaty bodies: ACHPR, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), and the African Court on Human and Peoples’ Rights (ACTHPR). Although these bodies are primarily mandated and designed to consider state responsibility for human rights violations, they can be avenues for advancing corporate accountability by focusing on States’ duty to hold private sector actors accountable. In this regard, the ACHPR has held that “[g]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties”.¹⁹⁸

In the 2001 decision in the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, the ACHPR held the Nigerian government was responsible for human rights violations committed by oil companies in the Ogoniland. The ACHPR observed that “[c]ontrary to its Charter obligations and despite such internationally established principles, the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis”.¹⁹⁹ In this context, the ACHPR held that the Nigerian government had violated Article 21 of the African Charter on Human and Peoples’ Rights which provides for the right of all peoples to freely dispose of their wealth and natural resources.

Most recently in the case of *Institute for Human Rights and Development in Africa (IHRDA) and Others v DRC (Kilwa Case)*, the ACHPR found that the government of the DRC was responsible for the 2004 massacre of over 70 people in Kilwa, in the southeast of the country. It went on to grant landmark compensation of US \$2.5 million to the victims and their families.²⁰⁰ The suit followed the massacre by armed forces aided by Anvil Mining, a Canadian-Australian copper and silver mining company, which provided logistical support to soldiers who indiscriminately shelled civilians, summarily executed at least 28 people and disappeared many others after a small group of lightly armed rebels tried to take control of the town. Further, the ACHPR urged the DRC government to institute fresh criminal investigations and “take all due measures to prosecute and punish agents of the state and Anvil Mining Company staff.”²⁰¹

The ACHPR cases of SERAC and Kilwa demonstrate that the regional human rights treaty bodies may be activated to respond to violations committed by private sector actors, albeit indirectly. The ACERWC and the ACtHPR may also be approached with similar cases. Yet, this avenue has not been explored fully thus far. In the same vein, the special mechanisms of the ACHPR and the ACERWC offer valuable platforms for pursuing corporate accountability. However, they have not been used too frequently and robustly. Within the ACHPR, three such mechanisms may be used for this purpose: The Focal Point for the Transitional Justice Study; the Focal Person on Human Rights in Conflict Situations; and the Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI). As an apt illustration of the nexus between these themes, a single commissioner of the ACHPR holds these three offices. It is noteworthy that the WGEI has an express mandate to “inform the African Commission on the possible liability of non-state actors for human and peoples’ rights violations” and to “formulate recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples’ rights by extractive industries in Africa”.

5.2.4 Active Participation of Civil Society

An important lesson to draw from the various experiences across Africa in pursuing corporate accountability in transitional justice contexts relates to the active role of civil society in demanding and pushing for such accountability. In this context, the experience of South Africa Khulumani Support Group is instructive and demonstrates that civil society can collaborate with victims to hold private sector actors accountable for their complicity in perpetration of state repression or gross human rights violations.

5.2.5 Legally Binding Instrument on Transnational Corporations

In June 2014, the UN Human Rights Council established an open-ended intergovernmental working group on transnational corporations and other business enterprises. It tasked the working group to elaborate an internationally legally binding instrument to regulate, in international human rights law, activities of transnational corporations and other business enterprises. This process is still ongoing and offers an opportunity for greater regulation of transnational corporation and other private sector actors operating in conflict areas or repressive regimes. The ACHPR Working Group on Extractive Industries has issued an advisory note to the Africa Group in Geneva on the various aspects relating to the process of developing the substance of the legally binding instrument.²⁰²

6. CONCLUSION AND RECOMMENDATIONS

This report documents some of the efforts by transitional justice mechanisms to hold private sector actors accountable for committing or abetting gross human rights violations and related crimes in contexts of conflicts and repressive regimes. Although such efforts have highlighted the extent and gravity of violations by private sector actors, accountability for their actions remains largely elusive. Most transitional justice mechanisms in Africa have not sought to address complicity of private sector actors. The few mechanisms that have strived to do so have faced a myriad of challenges, including obstruction by state authorities and the private sector actor themselves. However, there are critical developments in the continent and internationally that could give the pursuit of accountability for private sector actors new impetus. These include the ongoing development of an AU Policy Framework on Business and Human Rights and the UN Legally Binding Instrument on Transnational Corporation and Other Business Enterprises.

Based on the analysis of this report, the following recommendations are provided:

1. This research has demonstrated that one of the challenges facing transitional justice mechanisms is the general lack of information and data on the involvement of private sector actors in perpetrating gross human rights violations in the context of violent conflicts and state repression. As the Kenyan TJRC observed in relation to the Anglo-Leasing Scandal, “[s]adly the precise story of the scam cannot, as yet, be conclusively narrated as too much still remains unravelled; the scam is heavily shrouded in secrecy”.²⁰³ In this regard, there is still a need for more research going forward on the challenges, opportunities and strategies for enhancing corporate accountability in the context of violent conflict and state repression in Africa.
2. There is a need for greater public awareness of the role and nexus between private sector actors and transitional justice processes in Africa. Such public awareness is critical in building and generating pressure for public authorities to hold private sector actors accountable. In this context, there is need for governments, civil society and other stakeholders to initiate public awareness campaigns on the role of private sector actors in transitional justice.

3. African states emerging from violent conflict or repressive regimes should, as a matter of practice, explicitly incorporate in the mandate of their transitional justice mechanisms the function of documenting and addressing gross human rights violations committed by private sector actors. African states should also fully comply with and implement the recommendations of transitional justice mechanisms relating to, *inter alia*, investigations, prosecution and policy reforms around accountability for private sector actors.
4. African states should adopt legislation and put in place measures particularly on restriction of extraction in conflict-affected areas and criminal liability for involvement of companies in human rights abuses in conflict situations.
5. Drawing from experiences from other countries, civil society in African states emerging from violent conflict or repressive regimes should proactively advocate for accountability for private sector actors. Development partners and donors should also support and empower CSOs to pursue reparations and accountability for violations perpetrated by private sector actors.
6. The African Union should expedite the development of the AU Policy Framework on Business and Human Rights while the UN Human Rights Council should equally expedite the negotiations and drafting of the legally binding instrument on transnational corporations and other business enterprises.

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ANNEX I: CASE STUDY OF LIBERIA

Accountability of private sector actors and their role in formal and informal transitional justice processes in Liberia

1. Contextual Background

In 1847, Liberia was declared the first independent republic of Africa. Since then, the country witnessed sporadic socio-cultural, economic and political conflicts which polarized the nation.²⁰⁴ Culturally, Liberia was polarized between the minority Americo-Liberians, the descendant of freed African slaves who were repatriated back to Liberia in early 1820s and the indigenous majority Liberians who felt excluded from the political and economic life of the country.²⁰⁵ These conflicts culminated into fierce violence of 1970s which led to a coup in 1980²⁰⁶ and a resurgence of a series of conflicts among militia groups and between government forces and the militia groups in the first Liberian civil war (1989-1997) and the second Liberian civil war (1999-2003). Amidst repression from successive authoritarian regimes Liberians endured gross human rights violations and constant warfare.

Before the arrival of settlers in 1822, and save for the native wars, Liberia is largely portrayed as a peaceful community with rich cultural practices, intensive migrations and long-distance trade.²⁰⁷ The arrival of settlers in the 19th century amidst industrialization and capitalism, meant a search for raw material and labor as their demand was rife. Europe and Americas turned to Africa for labor. The offshoot of slavery as well as anti-slavery movements thus defined Liberia in the 19th century. Post-colonial Liberian leaders were, therefore, confronted with the dilemma of choosing between Christianity and civilization on the one hand or a combination of Africa culture and western practices on the other hand. The choice of the former is what a report attributes to the subsequent conflicts that engulfed the country.²⁰⁸ While colonialism was characterized by numerous settler wars²⁰⁹ and mass killings of unarmed demonstrators,²¹⁰ post-independence Liberia epitomize a legacy of violent conflicts and wars that were accompanied by the bloodiest human rights violations.²¹¹

Discrimination, marginalization, forced labour, mass massacre, constitutional violations and violation of fundamental human rights like arbitrary detentions

define the legacy of post-independence Liberia single party governments. The reign of President William V.S Tubman (1944-1971) has, for instance, been described as autocratic.²¹² His successor in July 1971, William R. Tolbert, has also been said to have presided over an oligarchy. His regime was keen to maintain the legacy of discrimination, arbitrary arrests, suppression of political opponents, killings and constitutional violations. On 14 July 1979, Tolbert was assassinated, and his government overthrown with a military coup d'état. This witnessed the killing and detention of several high-ranking persons in government. The military installed Samuel K. Doe as president of Liberia. The aftermath of a subsequent failed coup in 1985 witnessed fierce fighting and ethnic cleansing of anti-government ethnic groups. Another attempted coup led to the first civil war of 1989-1997. This was mainly between the National Patriotic Front of Liberia (NPFL-then under the leadership of Charles Taylor) and the Independent National Patriotic Front of Liberia (INPFL) and government forces. Upon ascending to power in 1997, the failure of the new Taylor regime to address the underlying problems that led to the first civil war ushered in Liberia's second civil war between 1999-2003. The private sector was a central causal factor to the second civil war.

The creation of propitious conditions for the private accumulation of capital by multinational corporations like Firestone and the ruling class while neglecting ordinary citizens who suffered abject poverty, repression and malaise were some of the major failures by the new Taylor regime.²¹³ This, coupled with Taylor's continued perpetration of gross human rights violations led the Liberians United for Reconciliation and Democracy (LURD), a rebel group, to launch an attack on 21 April 1999. The government forces responded thus sparking the second civil war. The Movement for Democracy in Liberia (MODEL), another rebel group, subsequently joined in the war and soon every rebel militia was on board. Other militia groups involved in the war include: the United Liberation Movement for Democracy in Liberia (ULIMO-K), ULIMO -J, Liberian Peace Council (LPC), Militia forces (owned by the government) and the Lofa Defense Force (LDF). Numerous conflicts among the different forces or between the different forces and the government military was a common phenomenon of the first and second civil wars of Liberia.

Often, the civilian population encountered grave human rights violations. Incidences of numerous public killings of fleeing civilians or those perceived to be supporting opponent groups or civilians as subjects of revenge attacks abound; extra judicial executions; suppression of political opponents; arbitrary arrests and detention; conviction and execution without trial; torture; numerous mass massacre; child abductions for sexual exploitation or torture or recruitment into the fighting forces; domestic slavery of women and girls; murder; rape were a common occurrence

during this period.²¹⁴ No civilian group was spared. The young, elderly, youth, women and children fell victims to these abuses. All the rebel groups mentioned above as well as government forces perpetrated these violations.

Although Liberia has had a long history of gross human rights violations, the TRC was mandated to investigate and document gross human rights violations from January 1979 to October 2003. As demonstrated above, this period exemplifies the most lawless, chaotic and bloodiest history of Liberia as numerous forces and militia groups emerged in attempt to take control of the economic and political leadership of the country.

The private sector was central to gross human rights violations that resulted from the skewed socio-economic and political imbalances. Yet, the government suppressed any criticism towards the sector with the full force of the law as most of those who owned the private sector were either foreigners or close allies and relatives to the president. For example, criticizing the president's brother, Stephen Tolbert, for acquiring a German corporation that was almost concluding a deal with local entrepreneurs earned Albert Porte a heavy fine of \$ 250,000 or a prison term.²¹⁵ During his reign, William Tolbert as an individual as well as his family had extensive business interests extending to fisheries, poultry, heavy equipment, textiles, manufacturing, rubber plantation, rice and oil palm industries.²¹⁶ All the key corporations were either owned by foreign multinational corporations or the presidents close allies and family. In fact, the unsolicited increase in the price of rice in 1979, a Liberian staple food that has no substitute, was a key contributor to the tension that later graduated into violence, "the rice riots" in which more than a hundred people were killed. This increase in price meant that on the one hand, the president, who was a major investor in farming rice, would benefit unfairly from consumption of locally manufactured rice. On the other hand, his brother, Daniel Tolbert, whose business was the major importer of rice would benefit from consumption of imported rice.²¹⁷ At the time, the governments' Ministry of Planning and economic Affairs reported that 4% of the population (mainly foreigners and those aligned to the president) owned more than 60% of the country's wealth.²¹⁸

The private sector also played a key role in its massive interest in exploiting Liberia's natural resources which funds were used to fuel the wars and acquire weapons. According to the TRC report, "the rubber, timber, gold and shipping industries served as the sources and means for Taylor to obtain resources and weapons,"²¹⁹ often with the collaboration from corporations. However, the TRC report notes that this financing was never recorded.²²⁰ Logging companies have also been singled out for shipping or facilitating the shipping of warfare artillery, facilitating the movement of suspicious funds out of Liberia and for seeking protection from local militia

groups who ordinarily perpetuated gross human rights violations on the locals.²²¹ In addition to tax evasion, the security forces of the Oriental Trading Company (OTC), Mohammed Group of Companies (MGC), Maryland Wood Processing Industries (MWPI) and Inland Logging Company (ILC) committed gross violations of human rights similar to those of rebels in a bid to maintain control over their respective logging areas, the local community and their employees.²²² Logging companies and individuals in the logging sector also made illegal payments to government officials and rebel leaders.²²³ Similarly, security forces associated with mining companies perpetrated gross human rights violations.²²⁴ The mining companies also facilitated money laundering, terrorism, bribery of public officials, illegal arms trafficking and tax evasion.²²⁵

Attempts by the media to publish on abusive regimes were thwarted by the repressive arm of government. In 1975 for example, the Supreme Court banned and heavily fined a local newspaper by the name 'Revelation' for publishing content that criticized the president in a matter that was pending in Court in a move that was perceived to be protecting the president.²²⁶ Journalists bore the brunt of arbitrary arrests, arbitrary detention, torture and harassment particularly from government for either publishing offensive information that highlighted some of the violations or for suspicion of working with opponent groups.²²⁷

2. The role of private sector actors in formal and informal transitional justice processes

Although Liberia's transitional justice framework envisaged a robust procedural and substantive role for the private sector, this was only partially achieved. While the private sector actively participated in the TRC hearings, they have been reluctant to undertake reparations as recommended by the TRC. Besides, there has been no forum to reconcile the private sector with the victims of its violations.

The Comprehensive Peace Agreement of 18 August 2003 between the government of Liberia, LURD and MODEL ushered in Liberia's transitional justice process. The Agreement provides for a transitional justice framework which comprises: immediate ceasefire between the then government of Liberia, LURD and MODEL;²²⁸ a deployment of an International Stabilization Force by the UN;²²⁹ disengagement of the forces;²³⁰ cantonment, disarmament, demobilization, rehabilitation and reintegration of the forces;²³¹ institutional reforms among the armed forces, the police, the prison electoral bodies;²³² the establishment of an Independent National Commission on Human Rights;²³³ the establishment of a Truth and Reconciliation Commission;²³⁴ the establishment of a Governance Reform Commission to promote the principles of good governance;²³⁵ and the establishment of an all-inclusive

Transitional Government of Liberia to oversee the transitional agenda.²³⁶ While these measures required the government of Liberia to establish institutions or to carry out certain reform measures that guarantee non-recurrence of gross human rights violations, the TRC had an expansive mandate that provide details on the social, economic and political transition from Liberia's past autocracies to a more democratic future.

On 10 June 2005, Liberia established a Truth and Reconciliation Commission through a parliamentary legislation.²³⁷ The central objective of the TRC was to promote national peace, security, unity and reconciliation.²³⁸ The statute goes further to set out how these objectives were to be achieved: through investigation of gross human rights violations and its antecedents, providing a forum to address impunity, establishing historical truths, adopting mechanisms and procedures to address the plight of women, children and other vulnerable groups.²³⁹ The TRC was empowered, *inter alia*, to "[identify] where possible persons, authorities, institutions and organizations involved in the violations."²⁴⁰ This provision, without more, suffice to bestow upon the TRC mandate over the private sector. Yet, as if to do away with any doubt as to the powers of the TRC over the private sector, the statute grants the TRC the discretion to summon any person, group of persons, organization or institution to provide information.²⁴¹ It also empowers it to investigate and interview, *inter alia*, any organizations or institutions in public or private.²⁴² However, the TRC acknowledged its failure to substantively capture Sexual and Gender Based Violence against women due to its inability to reach out to majority of the victims in this category.²⁴³ The TRC report does not, therefore, document the role of private sector in SGBV related violations. The media too has faced criticism for its failure to comprehensively cover the TRC's public hearings. According to a report, Liberian media focused more on the controversies among the commissioners rather than the hearings.²⁴⁴

In furtherance of national healing and reconciliation, and to encourage full disclosure from alleged perpetrators, the TRC was empowered to grant amnesty to individual persons.²⁴⁵ The failure of this provision to expressly incorporate artificial persons implies that the private legal entities like organizations or institutions were exempt from amnesty and as such, they should be held accountable for their gross human rights violations. Indeed, in addition to natural persons, the TRC found artificial persons responsible for economic crimes which it determined amounted to gross human rights violations.²⁴⁶ In particular, these corporate entities were, *inter alia*, to be held responsible for: aiding and abetting economic criminal actors; corrupt malpractices, bribery; discrimination; environmental crimes; extortion; fraud; government procurement fraud; illegal arms dealings; illegal extraction or sale of

natural resources; indigenous spoliation; misuse of public property/funds; money laundering; narcotic drug trafficking; smuggling and other custom violations; tax evasion and unexplained wealth.²⁴⁷ The TRC further recommended prosecution of all these entities.²⁴⁸ In lieu of this prosecution, a corporation would apply to the National Human Rights Commission to make amends through full restitution of all gain made through such economic crimes.²⁴⁹ Yet, to date, there has been no corporate civil or criminal accountability in Liberia. However, and as demonstrated below, there is an instance where one of the alleged corporates has been held to account through its director in foreign courts.

Reparations was a central objective of the TRC in order to ensure restitution and restoration of dignity to the victims. Yet, despite the TRC's recommendation to the government of Liberia for a reparations program,²⁵⁰ the government has not initiated a reparations program. With a shattered health sector, infrastructure and country's economy, Liberia must do more to implement this recommendation. In addition, with the Ebola epidemic setting in in 2014-2015, the poor country was forced to divert its limited resources to tackle the disease. Despite all these, the private sector, particularly those mentioned by the TRC report, has not sought to make their contributions towards reparations. Nonetheless, Liberia reserves the right to pursue corporate criminal and civil liability either nationally or in foreign courts through lobby groups in order to ensure reparations for the victims.

The TRC also had a mandate to include informal or traditional transitional justice processes. Where it deemed necessary, the TRC had the power to seek assistance from traditional and religious leaders.²⁵¹ These traditional or religious leaders would either facilitate its' public sessions or they would assist in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation. In line with this mandate, the TRC recommended the use of "a Palava Hut" traditional justice mechanism.²⁵² However, the private sector was excluded from this process as it targeted reconciling former combatants who had gone through the disarmament, demobilisation and reintegration process with the community.²⁵³

3. Assessing the impact of the role of private sector actors in informal and formal transitional justice processes

The private sector has had both a positive and negative impact on Liberia's transitional justice process. While its involvement in the TRC proceedings contributed to creating legitimacy of the process and also a comprehensive record of past atrocities, its failure to heed to the TRC recommendations on reparations undermined the process. The absence of the private sector from prosecution has also weakened the ability of Liberia's transitional justice process in its reconciliation and accountability efforts.

3.1 The Impact of private sector actors on the TRC goals

The involvement of the civil society and individuals from the private sector in the TRC process strengthened the TRC's mandate over developing a comprehensive report that clearly paints the role of, among others, the private sector in gross human rights violations. This enabled the TRC to detail the different roles played by different entities by name, and also to identify those whose involvement warrant prosecution. It also enabled the TRC to make expansive recommendations towards their role in making contributions towards reparations, which recommendations have never been pursued.

Reparations as a central objective of the TRC remains unfulfilled. The government's failure to adopt a national policy on reparations, coupled with the silence of the private sector over the matter has negatively impacted on the TRC's ability to fulfil its mandate over reparations. In fact, this has been a source of tension in Liberia's transitional justice process. While the former combatants who were disarmed and demobilized were paid substantive allowance, given access to education and skill development opportunities, to facilitate their reintegration into the society,²⁵⁴ the actual victims who suffered from their actions were awarded nothing. This created an impression of a transitional process that was rewarding the perpetrators as the victims were left to languish in abject poverty. Thus, undermining the legitimacy of the transitional process to the society.

3.2 The Impact of private sector actors on prosecution goals

To date, there has been no prosecution of corporate entities despite the TRC's express recommendations to prosecute identified corporate entities that were responsible for gross human rights violations. This undermines the prosecution objectives of transitional justice as well as its healing process that leads to reconciliation.

3.3 The Impact of private sector actors on individual or collective rights of victims

The absence of the private sector in Liberia's transitional justice process, particularly the reparations, has enhanced poverty levels among the victims of its gross human rights violations. This undermines the legitimacy of the transitional justice process especially given the fact that the private sector was an exclusive club owned by 4% of the population, mainly foreign corporations and those allied to the government. Remarkably, those who owned these corporations evaded tax to government that would have been utilized to ameliorate the poverty of the communities; facilitated the government with money to fuel the war, smuggled weapons of war, and worse

still, by themselves committed gruesome violations to the members of communities within which they were established. The failure of the private sector to undertake any reparation measures also undermines reconciliation efforts between the sector and the community of victims. The need for initiatives to bring these entities to account for both their civil and criminal wrongs cannot be underestimated.

4. Initiatives used to hold private sector actors accountable for human rights violations

Although corporations in violation of gross human rights can be held accountable under Liberian civil and criminal law, as already indicated above, there has been no such initiatives at the domestic level. Nonetheless, there has been attempts to hold the private sector accountable in foreign national courts. In 2017, a Dutch appeals Court convicted Guus Kouwenhoven, a timber trader who used his business, Oriental Timber company, as cover to smuggle weapons to Liberia between 2000 to 2003.²⁵⁵ Guus Kouwenhoven was prosecuted for being an accessory to war crimes and arms trafficking and sentenced to 19 years in prison.²⁵⁶ The Court argued that not only was Kouwenhoven liable for directly violating a UN arms embargo that was in place at the time, but equally for aiding and abetting war crimes that were committed using the resources he provided. Upon becoming president, Charles Taylor gave Oriental Timber Company trading concessions. This was at the heights of conflict between militia groups.

5. Conclusion

5.1 Challenges in holding the private sector accountable for human rights violations

As indicated above, 4% of the Liberian population—mostly foreign corporations and persons closely allied to the government, controlled 60% of the country's economy. The complex intercourse between the private sector and government poses a great challenge in holding the sector accountable for its role in gross human rights violations in domestic courts.

5.2 Challenges in examining the extent to which private sector actors can strengthen transitional justice processes in Liberia

Reparations and reconciliation mandate of the TRC remains largely unaddressed amidst a victim perception of a transitional justice process that is more rewarding to ex combatants while the victims languish in abject poverty and malaise. The private sector can make a contribution towards strengthening these two aspects of the

transitional justice process. concerning reparations, the private sector should make contributions towards reparations in accordance to the TRC recommendations. The private sector could also contribute towards reconciliation through engaging in structured community development projects. The sector could also seek a forum that reconciles it to the victims and the community at large. For instance, the private sector could advocate for its incorporation within the Palava Hut reconciliation mechanism. This traditional mechanism will provide a forum where aggrieved victims and society at large can be reconciled with the private sector.

ANNEX II: CASE STUDY OF KENYA

Accountability of private sector actors and their role in formal and informal transitional justice processes in Kenya

1. Contextual Background

Post-independence conflicts or authoritarian rule in Kenya transcends different historical epochs. The victims of grave human rights violations, therefore, include a wide range of categories of persons. The post-independence government of Jomo Kenyatta (from 1963-1978) presided over a government that has been accused of political assassinations, killings, torture, collective punishment, denial of basic needs, arbitrary detention of political opponents and activists and illegal confiscation of land.²⁵⁷ The second regime after independence (the Daniel Arap Moi regime, 1978-2002) was also responsible for mass massacre, unlawful detention and widespread torture, political assassinations, illegal and irregular allocation of land, economic crimes and grand corruption.²⁵⁸ The third government under President Mwai Kibaki (2002-2008) has similarly been accused of unlawful detention, extra judicial killings, economic crimes and grand corruption.²⁵⁹ Acts of violence and grave human rights abuses have been committed along ethnic lines, if not geographical, political and socio-economic. Political murder, enforced disappearance and displacement due to 'ethnic clashes' were a common occurrence in all these governments. Ethnic clashes were often characterised by massive human rights violations before, during and after elections. This was experienced in between 1991 and 1994²⁶⁰ and 1997-98.²⁶¹ All these culminated in the Post-Election Violence (PEV) of 2007/8. This historical context presents an interesting phenomenon where, in some instances, yesterday's perpetrator is today's victim and vice versa. Kenya's transitional justice efforts are, therefore, located within a broader context characterised by inter-ethnic tensions. Though a multi-party democracy, Kenya's democratic electoral processes is a stark depiction of the wishes of ethnic groups. Ethnic patrons have personified, both in substance and form, government institutions that are ideally meant to be democratic.

The 2007/8 general elections marked the climax of election violence. On 27 December 2007, Kenya held its fourth general elections since the re-introduction of multi-party politics in 1991. The then opposition political party (The National

Alliance Rainbow of Kenya [NARK]) had broken up into two factions: the Orange Democratic Party (ODM) led by the opposition leader Raila Amollo Odinga and Party of National Unity (PNU) led by the then president Mwai Kibaki. The two were the main contestants for the presidency. Violence erupted in many parts of the country soon after the announcement of the presidential election results, sparked by allegations of widespread electoral malpractices.²⁶² Although the exact statistics of all the victims have never been established, it is estimated that about 1300 people lost their lives and not less than 650,000 were displaced following this chaos.²⁶³ A Commission of Inquiry into the PEV puts the figure of persons displaced as a result of this violence at 350,000.²⁶⁴ While transitional justice in Kenya responds predominantly to the two-month period of violence that devastated Kenya in the aftermath of disputed presidential elections in December 2007, the Truth Justice and Reconciliation Commission of Kenya's (TJRC) temporal mandate was between 12 December 1963 to 28 February 2008. The analysis in this paper is anchored on the 2007/8 post-election violence.

Consistently overlooked, is the role of private sector in the perpetration of grave human rights violations during these conflicts. In a country where the private sector has direct access and influence over national politics, their involvement in grave human rights violations that accompany electoral violence cannot be ignored. An accusing figure has been pointed to small scale, medium, and large-scale business enterprises for their role in perpetrating the 2007/8 PEV violence. In the Kenyan case of *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*,²⁶⁵ the International Criminal Court (ICC) prosecutor brought charges against the executive officer of a media company (KASS FM-a radio station in venacular), Joshua Arap Sang. Joshua Arap Sang was accused for inter alia, allowing his show to broadcast hate messages and false murders in order to inflame the violent atmosphere.²⁶⁶ The spread of public hate speech played a very significant role in turning communities into violence. It should, however, be noted that on 5 April 2016, the Trial Chamber vacated the charges against Ruto and Sang.²⁶⁷

Transport companies have also been accused for transporting ethnic militia to fight in different parts of the country. In the case of *The Prosecutor V Uhuru Muigai Kenyatta*,²⁶⁸ the prosecutor accused a bus company by the name 'City Hoppa' for transporting recruited Mungiki militia from different parts of the country to orchestrate attacks in Naivasha. Small scale businesses too facilitated their accommodation and food while executing the attacks.

Concerning isolated grand economic crimes, private businesses like the Goldenberg International Limited have been mentioned for engaging in massive economic scams that cost the Kenyan government approximately \$750 million in dubious export

compensation awards based on fictitious gold and diamond jewellery exports.²⁶⁹ In some instances the government extorted public funds through fictitious private companies. The famous Anglo Leasing scandal involved what was later revealed to be a fictitious company by the name Anglo Leasing and Finance Limited which was contracted at a sum of \$443.36 million by the Moi government to re-print Kenyan passports.²⁷⁰ This contract was renewed under Kibaki's regime and an additional \$ 277.7 million paid out.²⁷¹ Charter House Bank, in collusion with Nakumatt Holdings, a group of supermarkets, has also been accused of tax evasion, money laundering and off-shore money transfers.²⁷²

Because of the influence wielded by the private sector actors in national politics, their direct or indirect involvement in PEV or human rights violations is not information readily documented. The natural urge of self-preservation seemingly impeded such publications. Besides, the documented reality that it is the political class that owns most of the private sector²⁷³ or, if otherwise, it must pledge allegiance through financial contribution to the political class lends credence to the clandestine manner in which this sector operates in Kenya. This explains the major challenge that compromised the ability of this contribution to effectively exploit all the possible ways the private sector might have been involved in the 2007/8 PEV. For example, although the private sector acknowledges the fact that they made financial contribution to political leaders in the 2007 general elections,²⁷⁴ it is almost impossible to get precise information on which private sector directly funded the 2007/8 PEV. It is, nonetheless, anonymously argued that some private sector directly funded the purchase of crude weapons that were later used to attack communities. The covert manner in which the private sector participated in 2007/8 electoral malpractices resonates with the long-standing culture of impunity that then reigned in the country, where those who maim, kill or commit any crimes for political ends would never be brought to justice.²⁷⁵

2. The role of private sector actors in formal and informal transitional justice processes

Although Kenya's transitional justice framework envisages a role for the private sector, the private sector was completely absent in the entire process. Neither were they procedurally involved in financing the establishment and operations of any transitional justice mechanisms nor were they substantively subjected to account before these mechanisms.

The formal transitional justice processes in Kenya corresponds to the government's enactment of two legislations: The Truth, Justice and Reconciliation Act (TJR Act),²⁷⁶ establishing a Truth Justice and Reconciliation Commission (TJRC) and the

International Crimes Act²⁷⁷ to provide a legal basis in the prosecution of alleged perpetrators of grave human rights violations during PEV. The PEV mediation process through the Kenya National Dialogue and Reconciliation Committee (KNDRC) also recommended for a comprehensive constitutional, legal and institutional reform process.²⁷⁸ Although all these processes were eventually implemented, the private sector did not play any visible role in their initiation, or facilitation. They were all government sponsored measures. Notably, the structure of transitional justice process in Kenya did not embody informal mechanisms.

The TJRC Act sets out the mandate of the Commission. This includes: to promote peace, justice, national unity, healing and reconciliation among the people of Kenya.²⁷⁹ The statute further identifies ways through which to fulfil this mandate: through establishing an accurate, complete historical record of gross human rights and economic rights and their causes, determine those responsible, recommend for prosecution of the perpetrators, determine ways to redress the violations, facilitate the granting of amnesty to those who make full disclosure, and to provide a forum of truth -telling.²⁸⁰ In this regard, the TJRC had the powers to, inter alia, investigate violations of gross human rights and economic crimes.²⁸¹ While the architects of the TJRC legal framework process situate the private sector within the mandate of the TJRC, its implementation, either deliberately or inadvertently overlooked the comprehensive role of the private sector. This is evidenced by the TJRC process which never summoned the private sector to account for their involvement in the perpetration of grave human rights breaches during the 2007/8 PEV. Its final report too is silent on this aspect. The TJRC process focused more on the role of government and its institutions in documenting historical human rights violations. To the extent that the report captures the involvement of non-state actors, this is primarily centred on the role of militia groups in perpetrating human rights violations. In so far as economic crimes are concerned, the TJRC narrowed its focus on the role of the private sector in corruption scandals,²⁸² which despite its grave impact on the socio-economic rights of the citizens, it does not paint a complete picture of the role of private sector, particularly in PEV. It is also noteworthy that the private sector was not involved in funding the TJRC process. The government of Kenya funded the process. Generally, there has been no effort to hold the private sector to account for its role in gross human rights violations and in particular, its involvement in PEV.

Although not structured within the framework of transitional justice, the private sector has initiated certain informal measures meant to act as a guarantee to non-recurrence of the 2007/8 PEV. Some of these measures include: multiple donations to political parties, media sensitization and public commitment to

peaceful elections. According to the private sector, making of multiple donations to all political parties guarantees them access to their leaders for negotiation in times of crisis.²⁸³ This is an essential strategy that comes in handy when the need to fuse out any probable conflict arises. Media groups have also taken the initiative to train and sensitize media owners, journalists and community radio hosts on peaceful ways of reporting political issues that does not turn communities against each other into violence.²⁸⁴ The Kenya Private Sector Alliance (KEPSA), the national umbrella business organization initiated a local campaign within the communities and the political elite on their commitment to peaceful elections.²⁸⁵ This campaign entailed the use of various communication outlets to send out peaceful messages, community-based activities promoting peace, peaceful walks, concerts, et cetera. It also got the political leaders to commit themselves to peaceful elections ahead of the 2013 general elections.

3. Assessing the impact of the role of private sector actors in formal and informal transitional justice processes

Save in the case of the ICC prosecutor sourcing for information from Safaricom company limited and Airtel company limited, the leading telecommunication companies in Kenya, the Kenyan private sector was both procedurally and substantively absent from the formal framework of transitional justice programs. This absence has had far reaching implications as analysed below:

3.1 The Impact of the private sector actors on the TJRC goals

The absence of the private sector in the TJRC process denied the Kenyan Commission the opportunity to develop a complete historical record of gross human rights violations during PEV and also the ability to reconcile the private sector and the victims of PEV. It also compromised the competence of the TJRC to recommend their involvement in funding the reparations program.

The Kenyan Truth Commission sought to achieve the following goals: establishing historical records, truth-telling, healing and reconciliation of the victims with the perpetrators.²⁸⁶ International law protects the right of victims and survivors to know about the circumstances of gross violations of their human rights, including who was responsible for the violations.²⁸⁷ Therefore, an effective truth-seeking process must therefore make a contribution of creating a historical record of the 'whole truth' and not 'one-truth' or 'half-truth'.²⁸⁸ The failure of the private sector to appear before the TJRC and also to account for their participation in PEV denies the victims and future generations key historical facts. In fact, this omission compromises the ability of victims to reconcile with the perpetrators of their abuses. Telling the truth

facilitates an understanding of the events and creates an atmosphere of forgiveness thus enabling reconciliation.

The involvement of the private sector could also have given the TJRC opportunity to make far-reaching recommendations on their participation in reparations. To date, there has been no discernible comprehensive national framework on reparations for PEV victims. What exists on the ground are isolated acts of government, civil society and international organizations that are not defined within a structured reparations program. Yet, the various business enterprises that were implicated in the violence have the financial muscle to fund the entire program. The TJRC report limits the source of reparations fund to the government's consolidated funds²⁸⁹ leaving the private sector, especially those implicated in PEV, to go scot free. Arguably, had they been incorporated in the TJRC recommendations as financiers of reparations, local pressure from civil society and judicial processes would have compelled them to fund the program. The snarl up at the government fund implies that there is no alternative source of funding the reparations process. This, coupled with the collapse of the Kenyan cases at the ICC implies that neither natural persons nor private sector will be held to account for the harm they caused to the victims through reparations.

However, the role of the media in covering the TJRC process must be commended. Most of the proceedings of the Commission were aired live on both radio and television and experts often invited to media houses to offer deeper understanding of the process and the implication of the various stages of the commission.

3.2 The Impact of private sector actors on prosecution goals

The total absence of the private sector as subjects in both national and ICC prosecution initiatives denied the Kenyan victims and society the healing process that accompany the court proceedings. In addition to its deterrent effect,²⁹⁰ prosecution of grave human rights violations has been said to have a cathartic effect on victims and society at large.²⁹¹ Watching the prosecution process brings comfort and satisfaction to the victims and society thus a closure on the events. To the contrary, the Kenyan private sector played an instrumental role towards frustrating the ICC Office of the Prosecutor access to crucial information. While withdrawing the case against Uhuru Kenyatta,²⁹² the ICC Prosecutor cited inter alia the Kenyan government's non-compliance in producing records.²⁹³ Some of this information comprised communication data that was then in the custody of Safaricom company and Airtel company.²⁹⁴ Preceding this withdrawal was a domestic suit whose subject matter and proceedings were kept secret from the media and the public. The president of Kenya, Uhuru Kenyatta, sued Safaricom company and Airtel company

in what has been speculated to be their attempt to cooperate with the ICC.²⁹⁵ Yet, without such evidence it was almost impossible for the ICC Prosecutor to prove their case to the required threshold of beyond reasonable doubt thus necessitating a withdrawal.

However, the local media coverage of the ICC proceedings offered reprieve to both the victims and the Kenyan society. The fact that the alleged perpetrators were finally being arraigned in Court to account, particularly the fact that this involved the head of state and his deputy must have made it clear to the Kenyan community that every individual's life is important and deserves dignity from all. This has a healing effect on the victims and the society at large.

3.3 The Impact of private sector actors on individual or collective rights of victims

The victims of gross human rights violations in PEV resulting from the direct or indirect involvement of the private sector have to date not had any legal recourse. Without much literature and awareness of the public on the possibility of holding private sector accountable for both their civil and criminal wrongs during PEV, coupled with government's silent strategy not to subject the private sector to any form of accountability has left individual victims and the community at large without remedy. While the Kenyan society focused solely on a TJRC process and prosecution initiatives whose main focus was individual perpetrators, corporate accountability was significantly left unaddressed. In light of the massive influence that the private sector wields in the Kenyan politics, there seems to be an unwritten government policy not to initiate such measures. In fact, all the companies implicated had direct affiliations in government. For example, City hopper bus company was then owned by a Member of Parliament; the government itself is a shareholder in Safaricom company and KASS FM is a broadcasting company in the vernacular language of the Deputy President. Arguably a cost benefit analysis of subjecting these companies to account versus safeguarding individuals and community rights favour a policy of silence over the matter.

4. Initiatives used to hold private sector actors accountable for human rights violations

Every person in Kenya has a constitutional right to enforce the rights and freedoms enshrined in the Constitution of Kenya where there is a denial, a violation or infringement or threat to any of the rights and freedoms.²⁹⁶ The High Court, the Court with the original jurisdiction on constitutional references, has the constitutional mandate to pronounce any of the following reliefs: a declaration of rights, an

injunction, a conservatory order, a declaration of invalidity of any law, compensation and judicial review.²⁹⁷ This is the law that applies to civil proceedings against the private sector. Thus, corporations as legal persons can be held accountable for their civil and criminal conduct.

Concerning corporate criminal accountability, section 23 of the Penal Code of Kenya provides that where an offence is committed by a corporate or none corporate body, every person who is in charge of the control of the management of the affairs of the corporate or the none corporate body is guilty of an offence and is liable to punishment for it. Kenyan law adopts the derivative principle of corporate criminal responsibility. Under Kenyan law, a legal person is defined to include a company or association or body of persons, corporate or unincorporated.²⁹⁸ This definition sets out a very broad understanding of a person which, without more, would suffice to apportion both civil and criminal accountability directly on the private sector. Yet, in practice, while corporates are held accountable for their civil wrongs, their accountability for crimes is apportioned on those who are regarded as the masterminds of the corporations - those who initiate policies - are the ones whose blameworthy state of mind is imputed to the corporation and are held criminally liable as if they are the company itself. As already highlighted above, there has been no single legal action against any private sector representative despite their involvement in PEV as highlighted in this paper.

5. Conclusion

5.1 Challenges in holding the private sector accountable for human rights violations

Major private sector companies in Kenya are either owned by the political class or owe their allegiance to the political class. This becomes a major setback when considering any accountability measures against them. In a country where government institutions are yet to be fully democratized and politics often easily finds its way around judicial and other accountability initiatives, the possibility of subjecting the private sector to effective accountability measures remains blurry.

KEPSA should develop rules of engagement between the private sector and the government. These rules of engagement should regulate some of the controversial practices like funding of political parties which should be done in adherence to the rule of law. While money helps to foster political competition by financing the campaigns and party organizations, it must be done in a transparent manner with full disclosure and subject to oversight mechanisms.

5.2 Examining the extent to which private sector actors can strengthen transitional justice processes in Kenya

The main unfulfilled objectives of the TJRC process are reparations and reconciliation. Civil and criminal accountability against the specific corporations that were involved in PEV also remains unresolved.

KEPSA should initiate efforts towards reparations and reconciliation under the concept of Corporate Social Responsibility. KEPSA could also advocate for and promote informal or cultural reconciliation mechanisms, like the local *Barazas*, at the grassroot levels in order to reconcile the private sector, as perpetrators of gross human rights violations, with the victims of PEV. This will guarantee collective corporate efforts towards reparations and reconciliation thus strengthening the TJRC process. While national prosecution of these corporations remains an open option through national judicial system, the potential challenge of political influence over judicial processes cannot be undermined.

ANNEX III: CASE STUDY OF SOUTH AFRICA

Accountability of private sector actors and their role in formal and informal transitional justice processes in South Africa

1. Contextual Background

South Africa's historical conflicts are founded on divergent views between "a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination."²⁹⁹ These conflicts were characterized by what has been termed as the bloodiest human rights abuses in the region.³⁰⁰ Although the Truth and Reconciliation Commission's (TRCs) mandate covered the period between 1960 to 1994,³⁰¹ South Africa's conflicts date back to mid-seventeenth century when the European settlers sought to establish a permanent residence on the subcontinent.³⁰² In the seventeenth and eighteenth centuries, the colonial governments committed numerous human rights violations which include: slavery, wars of dispossession and conquest, the hunting and elimination of indigenous nomadic people, the South African war of 1899-1902 in which British forces herded Boer women and children into concentration camps where approximately 20,000 died, the genocidal war of early 18th century in which the Herero people of South West Africa were almost driven to extinction, introduction of racial discriminatory laws, mass killing of civilian protestors *et cetera*.³⁰³

Therefore, South Africa's conflicts are a persistent struggle towards decolonization. Although gross human rights violations span over centuries, South Africa's transitional justice period corresponds to the TRC's timeline. The TRC was charged with the responsibility to investigate and document human rights violations from 1960 to 1994. This period was characterized by the 1960 Sharpsville massacre, "Langa killings, Soweto uprising, the Church Street bombing, Magoo's Bar, the Amanzimtoti Wimpy Bar bombing, the St James' Church killings, Boipatong and Sebokeng,... the deaths in detention ...necklacings, and the so-called 'black on black' violence on the East Rand and in KwaZulu Natal which arose from the rivalries between IFP and the UDF at first, and later the ANC"³⁰⁴ as well as systemic human rights violations.

The private sector played a significant role in perpetuating gross human rights violations during apartheid. While clarifying their different levels of accountability, the TRC classified the private sector involvement in gross human rights violations into 3 categories: first-order involvement were those businesses who were directly involved; second order involvement were those business that had foreseeability that their product or service would be used for unacceptable purpose; and finally, third-order involvement refers to those businesses who benefited by virtue of operating in a racially structured economy.³⁰⁵ The first order would ordinarily include businesses that actively took part in gross human rights violations or failed to take action to stop gross human rights violations. For instance, this would include businesses that had a relationship with the apartheid states and through this relationship, helped to shape its policies or the policies of those that actually carried out gross human rights violations. Indeed, the TRC notes that at the heart of its business and labour hearings lay the complex power relations of the apartheid regime.³⁰⁶

Thus, the levels and scope of the private sector involvement in human rights violations varied depending on several factors: whether it was white-led or black-led business, the size of the business and also its relationship with government as well as between its employers and trade unions.³⁰⁷ Thus, while some businesses were charged with directly collaborating with government in perpetuating gross human rights violations or formulating oppressive policies, others, in the second category, were charged with implicitly collaborating with the state by doing business with it or paying taxes and promoting economic growth.³⁰⁸ For instance, it is argued that “[t]he South African Police and Defence Force were armed and equipped by big business. Apartheid’s jails were constructed by big business, as were the buildings housing the vast apartheid bureaucracy. Apartheid’s labour laws, pass laws, forced removals and cheap labour system were all to the advantage of the business community.” This demonstrates the delicate link between the private sector economic activities on the one hand and their implicit collaboration with apartheid governments on the other hand. Persuading the TRC to acknowledge this linkage, a former security officer argued as follows:

‘Our weapons, ammunition, uniforms, vehicles, radios and other equipment were all developed and provided by industry. Our finances and banking were done by bankers who even gave us covert credit cards for covert operations. Our chaplains prayed for our victory and our universities educated us in war. Our propaganda was carried by the media and our political masters were voted back into power time after time with ever increasing majorities.’³⁰⁹

In its testimony before the TRC, the Council of South African Banks acknowledged that “apartheid was a political, social and economic system”.³¹⁰ It further argued that senior bank officials lent credibility to the apartheid government by serving on advisory boards, investing in the debt of the central and homeland governments, and participating in activities to evade sanctions and more so, banks were likely used for money-laundering.³¹¹ Banks acted as intermediaries between licit and illicit finances that sustained corporations and the apartheid regime.³¹² In 1979 for example the United Nations (UN) Special Committee against Apartheid charged Citygroup bank for supplying one-fifth of \$ 5 billion which amount bolstered the apartheid regime ahead of the Soweto uprising.³¹³

In 1980, the then South African president, P.W Botha, appointed corporate representatives from Barclays bank, Standard bank, Anglo American and other firms to serve on the Defence Advisory Board. This group of corporate representatives was integral in formulating apartheid policies. The Development Bank of South Africa for example admitted to having been an “integral part of the system and part and parcel of the apartheid gross violations of human rights.”³¹⁴ Similarly, the Land and Agricultural Bank of South Africa conceded to participating in formulating policies that essentially, through omission, supported rural and agricultural apartheid.³¹⁵ The UN listed Barclays bank for extending one of the nine major loans to the South African government and its corporations, which act was later justified by the bank manager as part of its social responsibility to the country.³¹⁶ The media too was accused of failing to inform their readers about the gross human rights violations of the apartheid system while readily embracing government denials.³¹⁷ Thus, the media served as the propaganda arm of government while it maintained insufficient coverage of black political aspirations and activities of the liberation movement.³¹⁸ Concerning gross human rights violations in labour matters, South Africa’s second largest gold mining company (Gold Fields) was alleged to have tortured its workers, enslaved them, subjected them to unfair and discriminatory labor practices and exposed them to dangerous fumes and radioactive materials.³¹⁹ Fluor, a United States of America (US) engineering and construction company has also been accused of discriminating against its black workers during apartheid. Anglo American, the world’s second biggest mining company was also accused of enslavement and torture of its former black workers. Similar allegations have been levelled against De Beers, a diamond producing company among others.³²⁰

While the private sector was a central pillar that sustained the apartheid regime often, justifications have been raised along the lines of having to deal with a hostile government, dangerous climate and even though many of the officials in this sector may have been opposed to the regime, the majority of them could only mumble about it.³²¹

2. The role of the private sector actors in formal and informal transitional justice processes

South Africa's transitional justice process was predominantly modelled on the TRC.³²² The prosecution framework was fluid, targeting natural persons who either did not apply for amnesty or those who had had their application rejected. There were other institutional reforms initiatives to guarantee nonrecurrence. The Land Claims Court, the Constitutional Court, the Human Rights, Gender and Youth Commission are some of the key institutional reforms undertaken in South Africa's transformation.

The legal framework establishing the TRC envisages its overarching objective to be the promotion of national unity and reconciliation. It further identifies three key ways to achieve this: to establish a complete picture of gross human rights violations from 1960 to 1994, to facilitate the granting of amnesty, to make the whereabouts of the victims known and restore their human and civil dignity.³²³ The scope of this mandate was limited to conducting investigations and making recommendations.³²⁴

The role of other players like the Non-Governmental Organizations (NGOs), faith-based community, Community Based Organizations was significant in assisting the TRC execute this mandate. Some of the notable NGOs include: the Centre for the Study of Violence and Reconciliation (CSV), SAGDA (a group of Wits University graduates), Khulumani Support Group, Legal Resource Centre and an evangelical church group. Khulumani, a non-governmental organization whose membership is drawn from the victims of apartheid political violence, together with the CSV were instrumental links between the victims and the TRC process. While the CSV conducted workshops to educate the public on the TRC and organize for statement taking, Khulumani formed support groups in different parts of the country, educated the victims about the TRC, debriefed them before and after testifying before the TRC, assisted them in filling reparations forms, conducted follow ups and appeal against negative decisions of the Committee on Reparations and Rehabilitations.³²⁵

Concerning the first aspect of creating a complete record of gross human rights violations, the TRC was charged with specific functions which inter alia include to initiate inquiries into "the identity of all persons, authorities, institutions and organisations involved in such violations" as well as accountability for any such violations.³²⁶ The ordinary meaning of this provision situate the private sector within the TRCs mandate. It was on this basis that the TRC conducted hearings of some of the influential sectors of the apartheid regime including the private sector. Although the TRC process summoned the private sector and made specific recommendations regarding them, it should be noted that some of the

private sector members perceived this invitation with disdain and were reluctant to cooperate. The multi-national oil corporations and predominantly white labour organizations such as the Typographical Union, the Public Servants Association and the United Workers Union of South Africa never responded to TRC's invitation.³²⁷ The White Mineworkers' Union and the South African Agricultural Union also refused to participate in the TRC process while the National Council of Trade Unions (NACTU) failed to provide their promised submissions³²⁸ despite the well documented role of the mining sector in shaping and formulating cheap labour policies.³²⁹ The refusal or reluctance by some of the private sector members to fully participate in the TRC process denied their truth being recorded. For instance, the TRC regretted the failure of multinational oil companies to make submissions at the hearing, particularly in light of their prominent role in South Africa's economic growth during apartheid.³³⁰ In this regard, the TRC fell short of establishing a complete or full account of the gross human rights violations as contemplated in its objectives.

In addition, the TRC did not directly seek to reconcile the black South African with the white dominated private sector. The reconciliation work of the TRC focused more on reconciling the government with the black South Africans who had been victims of apartheid. There was no forum where the white dominated private sector reconciled with the majority black population.

The TRC made three recommendations that have a direct implication on the private sector in South Africa. First, having identified businesses as a beneficiary of apartheid,³³¹ the TRC proceeded to call upon all the beneficiaries of the apartheid regimes to make a contribution to the Reparations Fund.³³² Second, it urged the government to impose a once-off wealth tax on South African business and industry.³³³ Third, the reparations fund was to be managed by inter alia, national and international business.³³⁴ In line with these recommendations, some private sector members claim to have made direct monetary contributions towards South Africa's transitional process. While contesting reparations claims, the Anglo-American mining group for instance argued that it had made 'extensive contributions' towards reconciliation and reconstruction in South Africa.³³⁵ To date, there has been no comprehensive national policy on reparations.

The government of South Africa has been adamant concerning the aspect of restoring victims' dignity through reparations. Khulumani launched several campaigns to lobby the government for a comprehensive reparations policy. In addition, Khulumani was compelled to engage in victim support work which included: direct assistance to victims (medical, psycho-social, educational), victim empowerment, et cetera.³³⁶ Given the South African government's persistent reluctance to adopt and initiate a reparations policy, Khulumani resolved to pursue

the beneficiaries of the apartheid regime in the private sector. With the assistance of the Legal Resource Centre, in November 2002, Khulumani lodged a suit against several companies that benefited from the apartheid regime.³³⁷ Other victims represented by advocate Lusingile Ntsebeza launched a similar suit.

Amnesty was another key aspect of South Africa's TRC model. This implied that there was no prosecution for alleged perpetrators of political violence during the apartheid rule who fulfilled the following criteria: a full disclosure of the particulars of their involvement in the past gross human rights violations, that their acts were associated with political objectives and that the conflict fell within the mandated time period.³³⁸ All amnesty applications were submitted to a specialised committee that carried out investigations to enable it establish the genuineness of such an application.³³⁹ The amnesty process was structured to provide some form of public accountability by individual political perpetrators. It focused more on high profile participants like the political leaders – both as perpetrators and survivors – of high-profile incidents and a public display of reconciliation between the parties.³⁴⁰

The nature of the amnesty process did not envisage amnesty for corporate entities. Indeed, the private sector did not subject itself to the process. While being exempt from the amnesty process implied potential civil and criminal corporate responsibility outside the TRC framework, this does not seem to have been contemplated in the fluid civil and criminal accountability structure of the South African transitional justice process. The total lack of formal prosecution of national and international corporations who participated in apartheid within the transitional justice framework affirms this inference. Notably, however, the failure of the private sector to seek amnesty is what contributed to foreign class suits against national and international corporations in a bid to recover reparations.

3. Assessing the impact of the role of private sector actors in informal and formal transitional justice processes

3.1 The Impact of the private sector actors on the TRC goals

As pointed out above, the TRC's main task was to promote national unity and reconciliation through truth telling, facilitation of amnesty, and reparations.³⁴¹

Telling the truth was a necessary tool in promoting reconciliation which in turn restores the dignity of victims and allows the perpetrators an opportunity to come to terms with their own past.³⁴² The failure of some key private sector actors to participate in the TRC hearings, discussed above, compromised the level of truth that was eventually established. Worse still, some of the business representatives

who witnessed before the TRC have been criticised for lying. According to Audrey Chapman, “white businesses tended to use the business and labour sector hearings more as a public relations opportunity than as an exercise in truth telling and acknowledgement.”³⁴³ In fact, the TRC regretted the deliberate failure of the Chamber of Mines to submit on the skewed shaping of migrant labour systems to guarantee cheap African labour force to the mining industry, facts that were well documented.³⁴⁴ Yet, the participation of numerous other members of the private sector, particularly those from the white minority groups in the TRC process lend legitimacy to the process.

Although the government bore the primary responsibility for reparations, the TRC recommended all the beneficiaries, including the private sector, of the apartheid regime to make a contribution to the Reparations Fund.³⁴⁵ However, the government of South Africa not only demonstrated reluctance to enact a comprehensive reparations policy, it also loathed the idea of taking sole responsibility for reparations urging the inclusion of other beneficiaries of the apartheid regime who included inter alia, national and international private sector.³⁴⁶ Save for the Urgent Interim Relief that was paid out to TRC victims, the South African government had no structured reparations in the manner envisaged under the law.³⁴⁷ Without a structured framework on reparations, it becomes difficult to measure the impact of isolated contributions that some sectors may have made. Besides, the failure of the private sector to actively participate in the reparations of victims not only undermined the reparations process but also prompted class action that sought to recover redress for the victims.

3.2 The Impact of the private sector actors on prosecution goals

The molten nature of the South African transitional justice framework did not envision corporate criminal responsibility. As such the private sector was completely exempt from criminal accountability. This weakened the transitional justice process as witnessed by disgruntled victim groups who later sought corporate responsibility for reparations.

3.3 The Impact of the private sector actors on individual or collective rights of victims

Through their participation in the TRC hearings, the private sector contributed some level of information to the victims, communities and South African society at large on their role in gross human rights violations or the championing of their liberation at the individual, communal or societal levels. However, their failure to participate in reparations, coupled with the US Supreme Court’s dismissal of the class suit

against multinational corporations undermined the victims' dignity. While there seems to be a general acknowledgement of the central role of the private sector in perpetrating gross human rights violations or sustaining the apartheid system, the silence or evasion from their civil and criminal accountability over these crimes undermines the victims' dignity as well as the reconciliation process in general.

4. Initiatives used to hold private sector actors accountable for human rights violations

Private sectors in violation of human rights during apartheid could be held accountable through the TRC, civil and criminal legal action.

The TRC offered some form of public accountability for the private sector that attended its hearings. This is founded in the act of corporations appearing in public and narrating the details of their involvement in gross human rights violations during apartheid. However, the sufficiency of this mode of accountability can be questioned given the fact that some members of the private sector refused to attend the hearings and others attended but did not cooperate fully in making submissions to the TRC or lied in their witness.

Under South African domestic law, a corporation can be held liable for both its civil and criminal wrongs. In civil accountability for corporations in violation of human rights, the corporation is cited and sued in its name as a legal person. However, where the human rights violations amount to crimes, necessitating corporate criminal liability, it is the director or servant of such corporations who will be sued as a representative of the corporate body and as the offender.³⁴⁸ As such, the person so cited is dealt with by law as if they are the ones who committed the crimes in question.³⁴⁹ While there is no evidence of initiatives towards corporate criminal accountability for gross human rights violations during apartheid, debate and legal actions with respect to civil accountability abound. In particular, corporations have been sued to recover reparations for victims of apartheid, albeit in foreign jurisdictions. It should be emphasized that these legal suits did not take place within the general framework of transitional justice. Rather, they were a by-product of disgruntled victims resulting from the government's reluctance to adopt a comprehensive reparation policy.

In the aftermath of the TRC, the victims of apartheid filed two class suits in the United States (US): ***Lungisile Ntsebeza, et al. v. Ford Motor Company, and International Business Machines Corporation*** and ***Khulumani v Barclays National Bank Ltd et al*** under the US Alien Tort Claims Act seeking reparations for apartheid victims. The two classes of suits were consolidated into ***re South African Apartheid Litigation***.³⁵⁰

In November 2002, South African human rights activists and Khulumani filed a suit against more than 50 US based and other foreign corporations before the New York Southern District Circuit under the US Alien Tort Claims Act seeking reparations for apartheid victims.³⁵¹ The plaintiff's complaint was not against the corporation's general business activities during apartheid. Instead, they focused on companies that supplied armaments, computerized racial passbook systems, military vehicles and financing of security forces with full knowledge that such facilities would sustain and reinforce the apartheid system.³⁵² Notably, the South African government then under the leadership of Thabo Mbeki opposed the suit.³⁵³ While ruling in favor of the defendants, the Court argued that the US foreign policy and the defendant's domestic policy considerations overruled the Alien Tort Claims Act. The petitioners appealed against this decision to the Second Circuit Court which upheld the petitioner's theory of aiding and abetting liability for international crimes thus finding the defendant liable.³⁵⁴ This decision prompted a further appeal by the defendants to the Supreme Court. At this point, the South African government, now under Jacob Zuma, reversed Mbeki's government position and stated its support for the case.³⁵⁵ However, the Supreme Court reverted the case back to New York courts as some of the judges in the Supreme Court were faced with the challenge of conflict of interest as they held shares in the some of the sued companies.³⁵⁶ On 8 April 2009, the New York Southern District Court ruled that banks should be removed from the lawsuit.³⁵⁷ This had the effect of reducing the number of defendant corporations leaving Ford Motor Company (Ford) and International Business Machines Corporation (IBM) as the remaining defendants. On 17 April 2014, while finding that corporations maybe held liable under the Alien Torts Act, judge Schendlin granted the Plaintiff's leave to file an amended complaint against the remaining American Defendants.³⁵⁸ The Court upheld the viewpoint that the South African TRC Act impliedly recognized the possibility of corporate liability outside the TRC process. As such, international comity did not require dismissal. However, on 29 August 2014, judge Schendlin dismissed the remaining cases against IBM and Ford citing the Plaintiff's failure to show "relevant conduct" to hold the two liable under the Alien Torts Act. Emphasizing on the limited reach of the Alien Torts Act of 1789, Judge Jose Cabranes of the Second Circuit further dismissed an appeal of the cases against IBM and Ford on 31 July 2015. The judge argued that there was no evidence that any of the corporations' alleged offenses occurred in the United States. The Plaintiff's appeal against this decision to the Supreme Court was further dismissed as the Court cited the plaintiff's failure to demonstrate a close connection between decisions made or actions taken by IBM and Ford in the US and the gross human rights violations in South Africa.

It should be noted that despite General Motors, one of the multinational companies

initially sued in 2012, being declared bankrupt and a US Court ruling that Khulumani had no claim against the liquidated company;³⁵⁹ in 2012, GM negotiated a “without prejudice” settlement with the claimants.³⁶⁰ The results were finalized in a US Court on 27 February 2012, with a settlement of \$1.5 million to be split between Khulumani claimants and the claimants represented by Advocate Lusingile Ntsebeza.³⁶¹

5. Conclusion

5.1 Challenges in holding the private sector accountable for human rights violations

The private sector in South Africa, particularly that of the white community controls the nation’s economy. Split along racial lines it has been estimated that the top 10% of the population, mostly from the white community own 70% of national assets while 60%, largely black community, own 7% of the country’s net wealth.³⁶² This kind of set-up presents a complex interplay between business and government, particularly during the apartheid period, and makes it difficult to effectively hold the private sector accountable. Though not evidenced in literature, perhaps, it is the massive influence of the private sector in shaping the transitional justice framework for South Africa that sought to exempt itself from civil and criminal accountability and also in ensuring that there were no sanctions for its members who refused to appear before or to fully cooperate with the TRC. This reinforces Audrey Chapman’s views expressed above that the appearance of the private sector at the TRC hearings was more of a public relations exercise rather than an illustration of the intention to tell the truth and acknowledge what happened. Besides, the victim’s choice of a foreign forum seeking corporate civil accountability in reparations affirm their unspoken fear in the then imbalanced judicial justice system.

5.2 Examining the extent to which private sector actors can strengthen transitional justice processes in South Africa

Two ways stand out as major gaps that the private sector can utilize in order to strengthen the transitional justice process in South Africa. This is with respect to reparations and corporate apology. Although the government of South Africa is hesitant to enact a comprehensive policy on reparations, the private sector can exert their influence towards this initiative and make effective contributions to victims of apartheid. This should be accompanied by a corporate apology on behalf of all the private sector that may have either directly or indirectly committed gross violations of human rights during apartheid.

5.3 Best practices, successes and contributions of private sector actors in transitional justice processes that stakeholders should consider

Although not solely a private sector initiative, the Retail, Reconciliation and Development Bonds project offers one of the best practices that stakeholders can consider. The project's target was to promote development and reconciliation by raising funds (mainly from South African white community) for small revenue generating projects that would provide jobs, services and opportunities for the poor and historically disadvantaged black South Africans.³⁶³ Although a charitable entity towards this end was created, the project failed due to small number of contributions it received.³⁶⁴ If implemented, such a project has the potential to promote reconciliation between the victims of apartheid and the generally majority black community of South Africa with the minority white private sector.

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