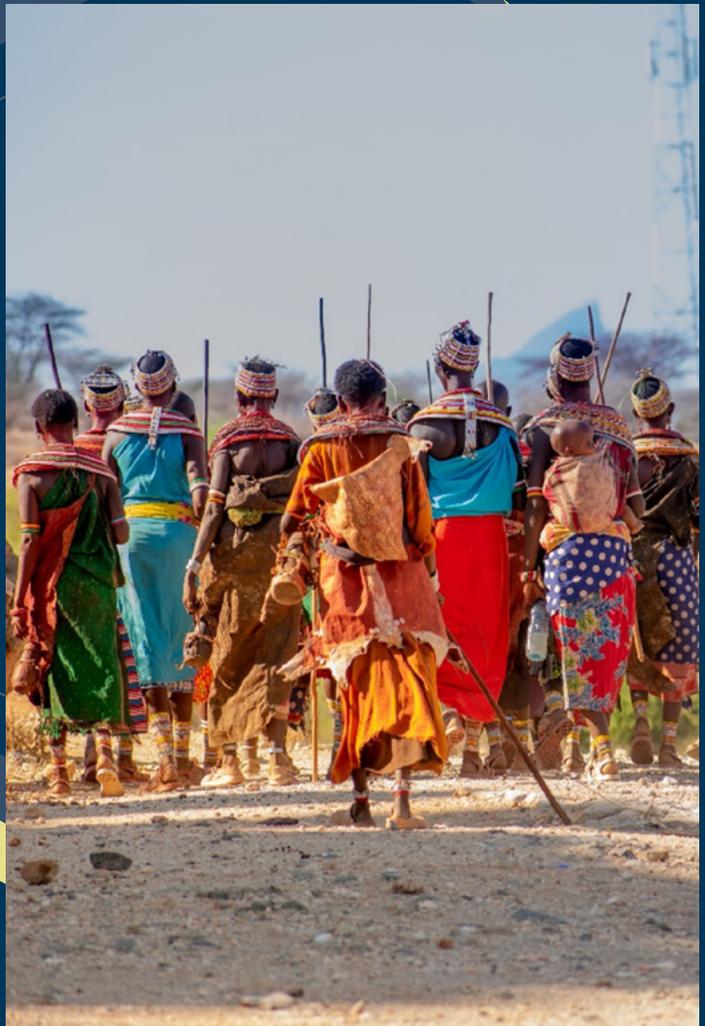


THE ROLES AND RESPONSIBILITIES OF PRIVATE SECTOR ACTORS IN TRANSITIONAL JUSTICE IN AFRICA AND LATIN AMERICA

A BRIEFING PAPER



GIJTR

Global Initiative for Justice
Truth & Reconciliation



International Coalition of
SITES of CONSCIENCE

The International Coalition of Sites of Conscience (ICSC or the Coalition) is a global network of museums, historic sites and grassroots initiatives dedicated to building a more just and peaceful future through engaging communities in remembering struggles for human rights and addressing their modern repercussions. Founded in 1999, the Coalition now includes more than 300 Sites of Conscience members in 65 countries. The Coalition supports these members through seven regional networks that encourage collaboration and international exchange of knowledge and best practices. The Global Initiative for Justice, Truth and Reconciliation is a flagship program of the Coalition.

Learn more at www.sitesofconscience.org



AMERICAN **BAR** ASSOCIATION

Rule of Law Initiative

The American Bar Association Rule of Law Initiative (ABA ROLI) 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 and Uganda and a regional Southern Africa project, with presence in Angola, Mozambique, South Africa and Zambia.

For more information, see www.americanbar.org/advocacy/rule_of_law



The Due Process of Law Foundation (DPLF) is a non-profit organization dedicated to human rights and the rule of law in Latin America. DPLF is headquartered in Washington DC, with an office in El Salvador and a multinational team of professionals based throughout the region. Working alongside civil society organizations throughout Latin America, DPLF provides technical legal assistance, promotes dialogue with government representatives, and creates opportunities for the exchange of information and experience. DPLF also conducts research and produces publications that analyze and discuss the major human rights challenges in the region, in light of international law and comparative perspectives. Founded in 1996 by Professor Thomas Buergenthal and his colleagues from the United Nations Truth Commission for El Salvador, DPLF has worked on transitional justice issues since its inception, promoting compliance with international standards and the use of Inter-American and international law to improve legislation, policies, and practices through comparative research and the sharing of lessons learned in the Americas and other regions of the world.

www.dplf.org

Cover: Women walking together in Samburu, Kenya

ABOUT THIS REPORT

Released in September 2021, this briefing paper on *The Roles and Responsibilities of Private Sector Actors in Transitional Justice in Africa and Latin America* is part of a larger initiative led by the International Coalition of Sites of Conscience (ICSC), which seeks to examine past and present transitional justice processes involving private sector actors, with a focus on accountability for grave human rights violations and grassroots interventions across the two regions. Global Initiative for Justice, Truth and Reconciliation (GIJTR) Consortium partners, the American Bar Association Rule of Law Initiative (ABA ROLI) and the Due Process of Law Foundation (DPLF) contributed immensely to this project through the initial regional research on transitional justice processes in Africa and Latin America, which were released in separate publications earlier this year.

This briefing paper, which is intended to support civil society and practitioners in the field of transitional justice, synthesizes key points exchanged during a remote interregional workshop convened in April 2021 by Consortium partners and Tatiana Devia from the Corporate Accountability Lab. The discussions were framed by the regional research on private sector actors and transitional justice processes in Africa and Latin America, as well as dedicated case studies and presentations with examples from Argentina, Brazil, Guatemala, Kenya, Liberia, Peru, Sierra Leone and South Africa. A dynamic group of approximately 70 participants representing academia, grassroots civil society organizations, intergovernmental and interregional organizations, national ministries, truth commissions, human rights commissions, memorialization initiatives, the media, private law firms, faith-based organizations, women's rights groups, and human rights defenders joined the exchange across the two continents, the United States and the United Kingdom. Pioneers in the field, Diane Orentlicher and Joseph Rahall, delivered the keynote addresses, which are published alongside this report, while Anita Ramasastry offered closing remarks.

Consortium partners wish to thank all participants who contributed tremendously to the interregional exchange by offering their perspectives on the relationship between private sector actors and transitional justice from their own rich experiences, research and observations. GIJTR also wishes to recognize communities that have experienced harm by the private sector, as well as those human rights defenders whose persistent efforts have highlighted the various means by which the private sector can engage with transitional justice, providing inroads for further collaboration toward justice, accountability and redress.

ACKNOWLEDGEMENTS

Principle Author:

Tatiana Devia, Staff Attorney, Corporate Accountability Lab

Contributor:

Pratima T. Narayan, Deputy Program Director, ICSC

Editors:

Leonor Arteaga, Program Director, DPLF

Katharine Valencia, Senior Legal Advisor, DPLF

Ismene Zarifis, Senior Technical Advisor, ABA ROLI

Learn more about GIJTR at
www.gijtr.org

TABLE OF CONTENTS

About the Global Initiative for Justice, Truth and Reconciliation (GIJTR)..... 4

Keynote Address Day 1:

Transitional Justice and Private Actors: Harnessing Business Incentives to Advance Victims’ Priorities? 8

Keynote Address Day 2:

The Missing Piece 14

Background:

The Roles and Responsibilities of Private Sector Actors in Transitional Justice in Africa and Latin America25

Guiding Questions for Analyzing the Role of the Private Sector in Transitional Justice Contexts27

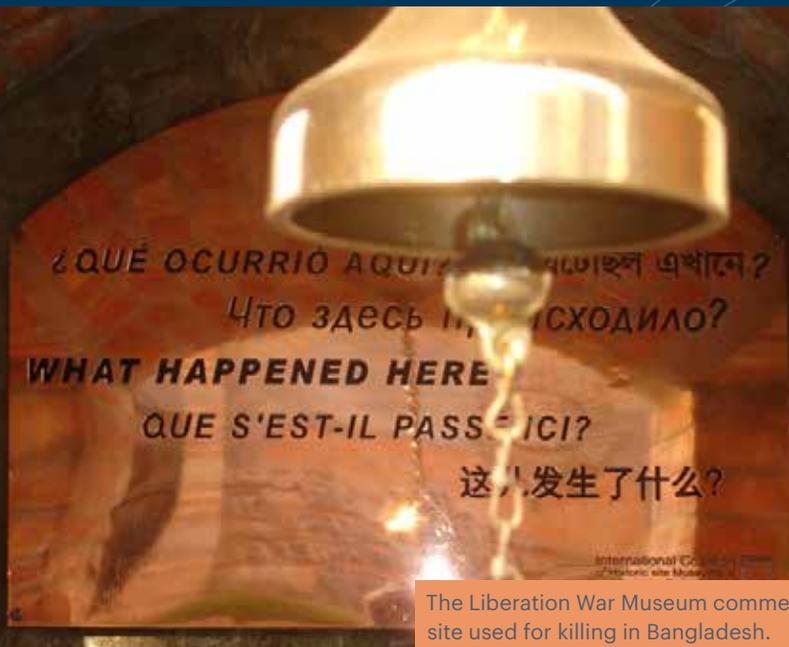
The Scope and Meaning of the Private Sector28

Private Sector Conduct in Conflict 30

Formal and Informal Transitional Justice Mechanisms and Private Sector Engagement	34
Transitional Justice Frameworks	35
Truth-Seeking	36
Mandates	37
Private Sector Involvement in Truth-Seeking Proceedings	38
Final Reports.....	40
Transitional Tribunals and Judicial Accountability	42
Remedy-Seeking Processes Outside Transitional Justice Settings	44
International and Regional Mechanisms.....	48
Guarantees of Non-Recurrence	51
Identified Challenges to Private Sector Accountability and Engagement with Transitional Justice Mechanisms.....	52
Victim Participation, Rights and Reparation	56
Participation	56
Marginalized Groups	58
Reparations.....	60
Recommendations	63
Conclusion	67
References.....	68

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

Around the world, an increasing call exists for justice, truth and reconciliation in countries where legacies of gross human rights violations cast a shadow on transitions from repressive regimes to participatory and democratic forms of governance. To meet this need, the International Coalition of Sites of Conscience (ICSC or the Coalition) launched the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in August 2014.



The Liberation War Museum commemorates a site used for killing in Bangladesh.

The GIJTR seeks to address new challenges in countries in conflict or transition that are struggling with legacies of or ongoing gross human rights abuses. The Coalition leads the GIJTR, which includes eight other organizational partners:

- American Bar Association Rule of Law Initiative (ABA ROLI), United States;
- Asia Justice and Rights (AJAR), Indonesia;
- Centre for the Study of Violence and Reconciliation (CSV), South Africa;
- Documentation Center of Cambodia (DC-Cam), Cambodia;
- Due Process of Law Foundation (DPLF), United States;
- Fundación de Antropología Forense de Guatemala (FAFG), Guatemala;
- Humanitarian Law Center (HLC), Serbia; and
- Public International Law & Policy Group (PILPG), United States.

In addition to leveraging the expertise of GIJTR members, the Coalition taps into the knowledge and longstanding community connections of its 300-plus members in 65 countries to strengthen and broaden the GIJTR's work. GIJTR

partners, along with members of the Coalition, develop and implement a range of rapid-response and high-impact program activities, using both restorative and retributive approaches to justice and accountability for gross human rights violations. The expertise of the organizations under the GIJTR includes:

- Truth telling, reconciliation, memorialization and other forms of historical memory;
- Documenting human rights abuses for transitional justice purposes;
- Forensic analysis and other efforts related to missing and disappeared persons;
- Victims' advocacy such as improving access to 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 in transitional justice processes;
- Reparative justice initiatives; and
- Ensuring gender justice in all these processes.

To date, the GIJTR has led civil society actors in multiple countries in the development and implementation of documentation and truth-telling projects; undertaken assessments of the memorialization, documentation and psychosocial support capacities of local organizations; and provided survivors in the Asia, Africa and the Middle East and North Africa regions with training, support and opportunities to participate in the design and implementation of community-driven transitional justice approaches. Given the diversity of experience and skills among GIJTR partners and Coalition network members, the program offers post-conflict countries and countries emerging from repressive regimes a unique opportunity to address transitional justice needs in a timely manner while promoting local participation and building the capacity of community partners.



“Walking on Sunshine” street mural, Hout Bay, Cape Town, South Africa.

KEYNOTE ADDRESS DAY 1:

TRANSITIONAL JUSTICE AND PRIVATE ACTORS: HARNESSING BUSINESS INCENTIVES TO ADVANCE VICTIMS' PRIORITIES

DIANE ORENTLICHER,
PROFESSOR OF INTERNATIONAL LAW
AT AMERICAN UNIVERSITY

This workshop explores issues that arise in the space where two deeply important subjects – transitional justice and the human rights responsibilities of corporate and other private actors – engage each other.



Diane Orentlicher, Professor of
International Law at American University

Each of these subject areas presents complex challenges and dilemmas in its own right. The field of transitional justice, which is concerned with how societies reckon with legacies of grievous harm, has been forged on the anvil of high-stakes dilemmas and profoundly difficult decisions. As for the business and human rights space, its complexities are captured by challenges surrounding social media platforms, which have presented extraordinary threats to human rights and yet, in countless other ways, have been a powerful tool for human rights advocacy.

Some of the most daunting challenges in each of these subject areas arise precisely in the space where they overlap. We can see this by considering the literal space of post-conflict societies, which in recent years have been common sites of transitional justice efforts. (In contrast, the field first took shape in the vastly different setting of countries emerging from periods of authoritarian rule.) In the words of the former Special Representative of the UN Secretary-General on business and human rights issues, John Ruggie, conflict and post-conflict settings have been the site of some of “the most egregious business-related human rights abuses.” Yet the imperatives post-conflict governments confront typically translate into heightened challenges in establishing accountability for the egregious abuses Ruggie mentioned.

Some of those challenges are by now well known: Countries emerging from devastating conflict are hardly likely to have robust institutions that can effectively regulate business enterprises and hold them accountable for human rights harms.

At least equally important, attracting foreign investment may be among a post-conflict government’s highest priorities. Many such governments have been concerned that efforts to hold the business sector accountable for human rights depredations will disincentivize the investments they hope to attract. It is small wonder, then, that many victims and advocates have sought justice in foreign courts for the harms business enterprises have caused or facilitated in their countries.

Other factors, including conceptual disagreements about the substantive domain of transitional justice, have meant this field was relatively slow to address the legacy of violations of economic, social and cultural rights, which have been profoundly affected by the policies and practices of private actors.

The crucial question is how to address these and other challenges in a way that

recognizes their complexities without inviting paralysis or retrenchment. To this end, three overarching approaches provide a useful starting point.

First, we would do well to deepen our understanding, and with some granularity, of not only why past efforts to establish accountability for business-related human rights harms have often faltered but also when, why and how they have produced meaningful progress. In the spirit of this workshop, insights derived from these inquiries should be shared with a wider community of practice.

Practice in this sphere is more extensive than many realize. Relatively recent research led by Leigh Payne at Oxford University assessed 39 final reports of truth commissions in 30 countries. The resulting study found that over half of these bodies recognized business involvement in gross violations of human rights during dictatorships and armed conflicts. Those commissions' reports named specific companies, business associations or individual members of the business community involved in human rights violations.

Unfortunately, recommendations of truth commissions that relate to the business sector have often been ignored by the governments to which they are addressed. But the reports may have had positive knock-on effects. The Oxford study found that 22 companies named in the reports of ten truth commissions faced subsequent judicial action in domestic and foreign courts.

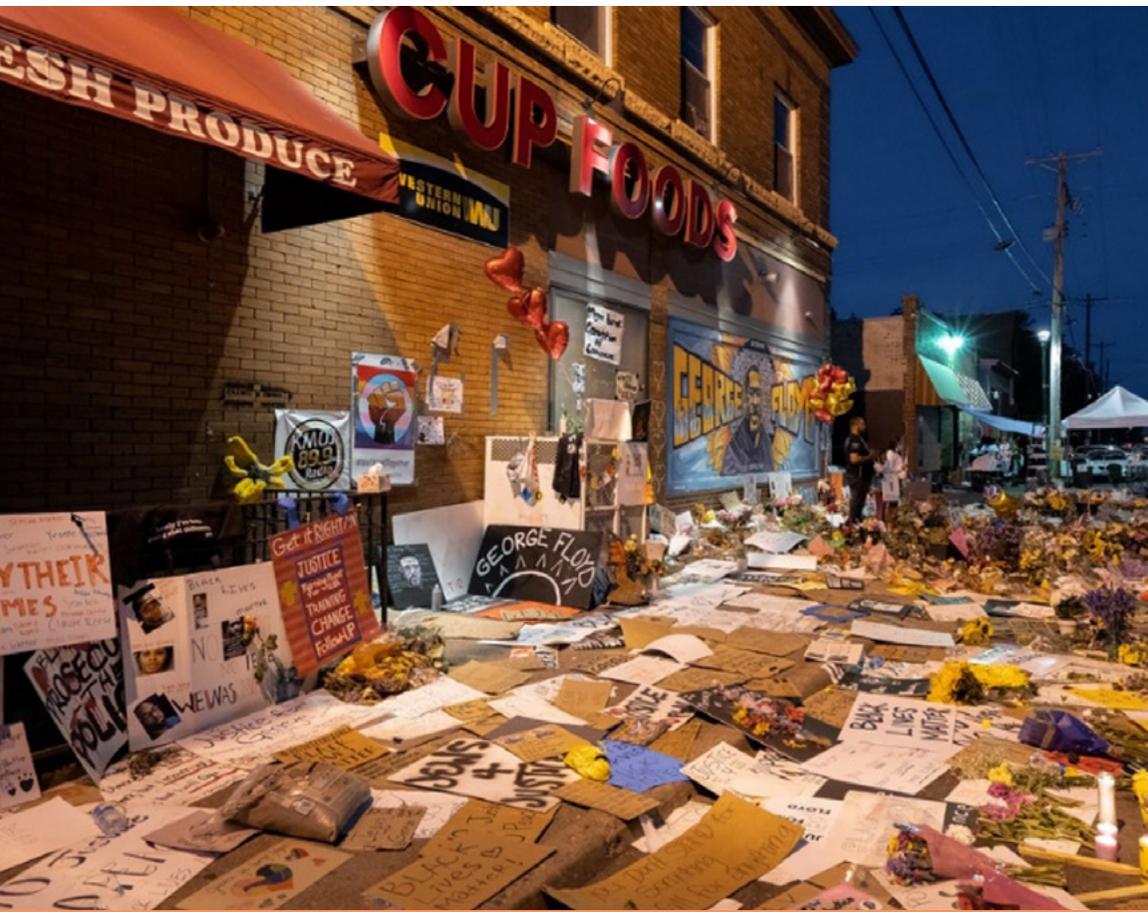
Among the most notable developments in recent years are agreements concluded with companies that were complicit in past violations. For example, an investigation jointly conducted by three Brazilian government agencies into Volkswagen's role in past repression, which was undertaken in response to a request by Brazil's National Truth Commission and trade unions, culminated in a landmark agreement with Volkswagen. In addition to publicly recognizing key facts about its shameful role, Volkswagen agreed to pay \$36.3 million in damages.

Turning to civil litigation seeking redress in foreign countries for corporations' role in past atrocities, to date these cases have very rarely culminated in a final judgment against the defendants. But here, too, we can find productive knock-on effects. For example, a recent study found that most companies that had been sued for their role in human rights abuses in another country either adopted a human rights policy or strengthened the one they had, while other companies in the same sector as the defendants often followed suit. Notably, some cases against corporate defendants included claims of economic and

social rights, embracing a set of human rights violations that early transitional justice programs tended to sideline.

Cases brought against foreign companies in national courts have at times culminated in financial settlements with survivors of past atrocities. For example, pursuant to an out-of-court settlement of litigation in U.S. courts against Swiss banks for their conduct during the Holocaust, the banks paid \$1.25 billion to victims. Holocaust-related suits that were dismissed on legal grounds or settled out of court also contributed to pressure that led a number of German companies to acknowledge and act upon their “moral responsibility” to provide funds to victims of slave-labor practices.

An important point here is that when victims can institute civil actions against corporations for past violations of human rights, settlement negotiations might



Memorial for George Perry Floyd, Jr. at Cup Foods on Chicago Avenue, Minneapolis, Minnesota, USA

provide an opportunity to transform claims for reparation into vehicles for more systemic reform.

Beyond monetary compensation, for example, might defendants agree to adopt employment policies that combat previously systemic discrimination against women and minorities who experienced particular harm during a period of systemic violations? Can victims secure enforceable guarantees of non-repetition from companies that previously supported heinous abuses?

Also worth attention are instances in which companies have been induced by business incentives to do something many corporations have been loath to do – research, disclose and apologize for their roles in past atrocities. For example, a Chicago ordinance requiring companies that do business with the city to disclose whether they profited from slavery led Wachovia Corporation to research its relationship to slavery. The research it commissioned found that Wachovia's predecessor companies owned at least 162 slaves and accepted at least 529 slaves as collateral on mortgaged properties and loans; in 2005, Wachovia issued a report detailing these findings, and its chairman and CEO apologized. The same ordinance prompted J.P. Morgan to undertake similar research and issue an apology.

Business interests also prompted France to provide reparations to American survivors of a French government-owned railway company's transport of 76,000 individuals to concentration camps during World War II. A French-owned rail company wanted to bid on a lucrative contract with the government of Maryland; negative publicity about France's failure to include this group of survivors in past reparations provided the impetus for a new agreement in 2014, which ultimately led the French government to provide \$402,000 to each of 49 survivors of the French transports.

Parenthetically, as we mine past experience for valuable lessons, we would do well to pay special attention to moments in which specific actions and developments palpably shifted normative assumptions in ways that in turn changed practice, for socializing vital truths about the past – truths that all too many are loath to accept – is essential to lasting change.

Second, particularly in light of the complexities, challenges and compromises that may have to be made in the pursuit of justice for business-related abuses, it is important for those on the front lines of advocacy efforts to

clarify their objectives and priorities to the greatest extent possible, while recognizing that priorities evolve, and then to develop, seek out and seize opportunities to advance their goals. Opportunities to advance goals can and do emerge unexpectedly, and clarity about priorities can enable advocates for accountability to maximize these opportunities when they present themselves.

Indeed, achieving justice in the aftermath of systemic violations of human rights is an iterative process, whose overarching goals cannot be achieved in a brief period. But the takeaway can be a hopeful one: Windows of opportunity to advance justice close, but they also open, often unexpectedly. In fact, the passage of time often enlarges the possibility to achieve justice in forms previously unimaginable.

Third, when clarifying goals and priorities, it is deeply important to place victims at the center. Often, what matters most to many victims may not be as elusive as is often assumed. But we will not know this unless we make substantial efforts to understand their priorities and build strategies that are informed by victims' understanding of justice while recognizing that it is often difficult to gain consensus about goals.

* * *

The initiatives that will be explored and conceived in this workshop will power future progress in the interlocking spheres of transitional justice and human rights accountability for corporate wrongs. As Pablo de Greiff has observed, the field of transitional justice "started not as the unfurling of positions that were formally articulated in any theory. This is a field that started through practice, by people, ... trying to redress and to prevent violations that had taken place during their corresponding dictatorships."

So, too, will today's frontline advocates build new paradigms and advance progress through practice. The efforts of participants in this workshop will build the foundation from which future advocates will demand – and achieve – further progress.

KEYNOTE ADDRESS DAY 2:

THE MISSING PIECE

JOSEPH RAHALL

Many years ago, I read a preface done by Timothy Garton Ash of a must-read book, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, written by Priscilla Hayner. According to him, he was asked by a Burmese girl how to make a truth commission. Following that preface, Hayner herself asked a Rwandan government official a year after the genocide that left over half a million people dead whether he wanted to remember or to forget. Both questions merited sophisticated answers. To put together a transitional justice frame like a truth commission is just as complex as the matters it would have to deal with.



Joseph Rahall, Human Rights Defender, Climate Change Advocate and Executive Director of Green Scenery Sierra Leone

WHY DO WE NEED TRANSITIONAL JUSTICE?

Transitional justice is programmed in a country that has gone through gross violations of human rights by state authorities or has experienced a brutal war or a prolonged authoritarian rule with very severe consequences of state repression. In Neil Kritz's 1995 three-volume *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, focusing on Latin America and Eastern Europe, the authors struggled with the question of "settling past accounts" (Hayner, 2002) of gross human rights violations from repressive or authoritarian regimes and now most recently brutal civil wars involving states. Because there are usually many "facts" or "truths" about the excesses and blatant disregard for human rights by repressive regimes or during violent conflicts, it becomes a desire for victims, their families and citizens to be informed of the facts and truths of actions of the regime.

THE DILEMMA FOR JUSTICE DURING TRANSITIONS

Different approaches have been adopted in the past to reckon with repressive regimes once they are removed from power. These approaches largely would depend on political restrictions. A popularly defeated regime with a strong hold on the military will be very carefully handled in a transition, and thus application of justice may be thought out differently by the new regime with authority over the military.

Given these considerations, countries – particularly those in Latin America – that had gone through gruesome dictatorial rules applied different measures of justice. For instance, without going through the histories, Latin American countries had very unfortunate eras that were marred with brutal military regimes that perpetuated human rights violations against their own people, whom they had a duty to protect. These military regimes fell one after the other, leaving behind transitions that were extremely difficult to manage by young, emerging democracies.

How has LATIN AMERICA fared?

ARGENTINA: National Commission on the Disappeared, commenced 1983

CHILE: National Commission for Truth and Reconciliation, commenced 1990

EL SALVADOR: UN-administered Commission on the Truth for El Salvador, commenced 1992-1993

GUATEMALA: Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer, commenced 1994

URUGUAY: Investigative Commission on the Situation of Disappeared People and Its Causes, commenced 1985

ARGENTINA

In Argentina, Raúl Alfonsín, after taking democratic power from the military and its “dirt war,” in addition to levels of judicial measures, set up the National Commission on the Disappeared, aimed at establishing the truth. Alfonsín’s government was relatively weak in the face of contending with the powerful military (Kritz, 1995). A similar situation arose in Uruguay, as indicated by Kritz, with the nuance that most torture victims in Uruguay survived and would recount their ordeals.

CHILE

A case in Latin America had a completely different situation when Patricio Aylwin won the presidency only to realize that the bloody military regime of Augusto Pinochet had constitutional guarantees that were difficult to maneuver. Pinochet kept his hold on power by maintaining himself as commander-in-chief of the

army. This amnesty condition led Aylwin to proceed with a National Commission for Truth and Reconciliation (Hayner, 2001).

Despicable human rights violations requiring prosecutions were committed by repressive governments (often military juntas) in the Latin American countries. Changes in the leadership of those countries (i.e., emerging democracies) were embroiled in controversial transitional justice decisions following Samuel Huntington's *The Third Wave: Democratization in the Late Twentieth Century* which contained guidelines for dealing with authoritarian regimes such as prosecute high ranks swiftly and ensure dispassionate public accounting. Huntington also cautioned to "recognize that on the issue 'prosecute and punish vs. forgive and forget', each alternative presents grave problems, and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and above all, do not forget." (Kritz, 1995).

The Missing Piece

Interestingly, the earlier literature on transitional justice ostensibly has very little or no mention of private sector players and their roles in dictatorial regimes or violent conflicts. Yet it is well known that private sector players actively engage bad regimes through providing services and supplies of varying types and presenting financial advantages. The exploitation of natural resources such as minerals, oil and gas, and diamonds has served the wealth interest of the private sector, and revenue from these has firmly kept such regimes in power.

In a paper by Pion-Berlin (1994), he came close to it when he mentioned that medical and paramedical personnel in Chile contributed to the torture of victims. He also mentioned the medical profession's complicity in Argentina's human rights abuses (Kritz, 1995).

But why could this have been the missing piece? The affirmation by international treaty bodies and conventions has placed the protection of citizens' human rights with governments. Therefore, it is the sole responsibility of the dictatorship to account for human rights violations it committed. Equally so, it becomes incumbent on the emerging regime to ensure that it delivers on justice through accountability mechanisms for the protection of human rights.

AFRICA – How has it fared?

Africa, too, has gone through its own experiences with transitional justice. Like Latin America, some African countries have attempted to apply transitional justice when a regime assumes power after a bitter and violent conflict or from a repressive and torturing regime. Here are some African countries that have taken measures at justice in transition.

ETHIOPIA: The Special Prosecution Process of War Criminals and Human Rights Violators, commenced 1994

NIGERIA: Human Rights Violations Investigation Commission (HRVIC) (commonly known as the Oputa Panel, after its Chairman), commenced 1999

RWANDA: International Commission of Investigation on Human Rights Violations in Rwanda, commenced 1990

SOUTH AFRICA: The Truth and Reconciliation Commission, commenced 1995

SIERRA LEONE: Truth and Reconciliation Commission, commenced 2000

UGANDA: Commission of Inquiry into Violations of Human Rights, commenced in 1986

SOUTH AFRICA

The South African Truth and Reconciliation Commission (TRC) emerged out of a struggle with apartheid rule. The country grappled with 45 years of apartheid, and the majority of those who suffered from apartheid (Black South Africans)



Cassava farming in Sierra Leone.

eventually resorted to armed resistance. For 30 years, the armed wing of the African National Congress and others fought the apartheid state. In this period, South Africa was known for its massacres, indiscriminate killings, torture, social discrimination against Blacks and other colored South Africans and lengthy imprisonment of dissenting voices.

The end of the apartheid rule came upon the election of Nelson Mandela as president of South Africa in 1994. The discussions that had started in 1993 of whether an amnesty would be granted intensified once Mandela took office. There are many accounts of the South African TRC from writers and academia, such as Hayner (2001), Villa-Vicencio and Verwoerd (2000), Krog (1998) and Boraine (2000), which present varied perspectives of the same entity. Like Richard Goldstone mentioned in his foreword of a book by Villa-Vicencio and Verwoerd, the chapters in the book focused on many important but less obvious problems associated with the South African TRC – the challenges of granting amnesty upon application for amnesty, judicial prosecutions and full public confessions of guilt. On the whole, more than 20,000 victims testified before the commission, and over 7,000 applications from perpetrators for amnesty were recorded. As part of its effort to establish the nexus between business and the state’s violation of human rights – and by extension human rights violations by the private sector – was the Commission’s attempt to hold a session on the private sector. Krog (1998; 239-242) documented this well, pointing out that “Captains of Industry” sat opposite the TRC just like ordinary mortals to account for their deeds in the apartheid era.

It was argued that businesses benefited from the trappings of apartheid, citing low wages, bad housing and appalling working conditions that increased profit for white businesses. Comparative checks between white- and Black-owned businesses also showed how white business benefited. What eventually emerged was the private sector’s acceptance of benefiting from apartheid and apologizing while committing itself to setting things right and the TRC making several recommendations for the private sector (Krog, 1998).

SIERRA LEONE

The genesis of the Sierra Leone TRC is the Lomé Peace Accord of 1999, which in itself was an outcome of some 10 years of violent conflict, second to none in the

Western African subregion between government and rebel forces. The TRC was then constituted by an act of Parliament in 2000.

Prior to the outbreak of the conflict and during their tenure, several governments – some legitimate like the All People’s Congress, Sierra Leone People’s Party and other illegitimate military regimes like the National Provisional Ruling Council and Armed Forces Revolutionary Council – came onstage and were sucked into the war machine. All these regimes exploited the country’s vast natural resources to either support the war effort or plunder it for personal wealth. On the other hand, rebel Revolutionary United Front (RUF) also used its pillage of diamonds from the diamond fields of the country to sustain its war campaign against innocent citizens of Sierra Leone. There are ample accounts of this claim in published records. Lansana Gberie’s *A Dirty War in West Africa* (2005), Greg Campbell’s *Blood Diamonds* (2002), Ian Smillie et al., *The Heart of the Matter* (2000) and the *Witness to Truth: Final Report of the Truth and Reconciliation Commission* (2004) are just a few.

Sierra Leone, unlike South Africa, did not conduct a hearing specifically for private sector actors, even though it was clear that private sector actors, especially internationals, played a leading role in fueling the conflict by way of providing military weaponry and other hardware and keeping regimes in power through networks that absorbed legitimate or illicit natural resources such as gem diamonds. Names such as Executive Outcomes, Branch Energy, Sandline International, El-Ndine, Charles Taylor, Lifeguard Security and ArmSec International (SL) featured prominently as entities involved as private sector actors – legitimate or not during the 10 years of conflict in Sierra Leone. While it failed to carry hearings, however, the TRC recognized external actors, as well as the mineral resources and their impact on the conflict. It further allocated two separate chapters in its Volume 3b, extensively covering the roles of the private sector and its impact.

The mandate, structure and resource constraints of the TRC delimited the extent to which the TRC conducted its business. Political expedience was also a strong countenance, as the major parties were reluctant to take responsibility for the outcome of the conflict. This was evidenced in the manner in which they narrated their stories, as well as the way they have related to the recommendations of the TRC. To date, none of the government that acceded power has related to the TRC’s recommendations.

Interestingly, at the signing of the Peace Agreement, the United Nations added a caveat, stating, “The United Nations holds the understanding that the amnesty provisions of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” At the moment when the country was warming up to the TRC, a new twist evolved after it was alleged that the RUF had reneged on the Peace Agreement by resorting to violence. This allegation led to the establishment of the Special Court for Sierra Leone, which was intended to be a judicial trial with international and national laws targeting persons bearing the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone. Effectively, just a handful of persons on all sides of the conflict fell within this bracket.

Both the TRC and the Special Court ran side by side with different mandates and jurisdiction. This experiment was one of its kind, different from the South African model with different impacts. The Special Court did have considerable impact on the outcome of the TRC by undermining its credibility in the face of overturning more or less the amnesty clause in the agreement. The two establishments completed their work with different outcomes of imprisonment of those found guilty by the court and reprieve for the rest of mankind brought to the TRC.

Synthesis and Conclusion

Not much was achieved in the transitional justice procedures in either Latin America or Africa to deliberately target the private sector into the kind of justice emerging democracies wish to undertake. Ostensibly, this is because international standards or laws are lacking, and emerging governments can tap into these when they are confronted with this dilemma. Generally, governments are the duty bearers to ensuring citizens’ human rights are protected and preserved. It is not the business of the private sector. However, there is increasingly more and more evidence pointing to the impact of corporate entities in governance. These situations are glaring in the extractive sector and more recently in the land sector for agricultural purposes.

But there is enormous progress now as the world has become even more conscious about the way in which private sector players help fuel violent conflicts or perpetuate regimes in power for prolonged periods. There are many

efforts ongoing, some of which are in much more advanced stages even as they are inching forward slowly. One example is the ongoing work by the United Nations on the Guiding Principles on Business and Human Rights and ongoing work to develop a binding treaty on business and human rights. The African Union has also undertaken work on policies to advance African transitional justice and a framework to address business and human rights. I want to presume these are still relatively a long way off from their destinations and likely to be resisted by private sector players, as well as their countries of origin.

So, before we get to that destination, there are vital things we can do. We need to prepare the national conditions for buy-in for desired outcomes of these current developments. At the national level, citizens and governments must be aware of these developments and their status. Hence, we should:

- Engage civil society to understand the essentials for this outcome and encourage them to popularize it at the various country levels.
- Raise it as part of the discourse in classroom discussion on peace and conflict and other programs where students are made to engage with the issues.
- Bring the media on board so that its members can present different perspectives on the issues, even as they conduct their own investigations.
- Conduct further research that can bring compelling results to the table, to build consensus locally and internationally on the need to have related international standards.
- Consider the need to integrate the issue of land grabbing as a special mechanism into the African Commission on Human and Peoples' Rights.
- Undertake dialogue at various levels in country (e.g., human rights commissions, parliaments).
- Engage the private sector regularly to remind businesses of their obligation to respect human rights and avoid other such violations and encourage them to internalize a human rights-based approach to their operations. This will ultimately help the sector to start preparing for the United Nations treaty on business and human rights.

References for *The Missing Piece*

Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, New York, 2002).

Antjie Krog, *Country of My Skull*, 2nd ed. (Random House [Pty] Ltd. South Africa, 2002).

Legally Binding Instrument to Regulate, in *International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises*: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (University of Cape Town Press and Zed Books Ltd., London, 2000).

Charles Villa-Vicencio, *Rwanda and South Africa in Dialogue: Addressing the Legacies of Genocide and Crimes Against Humanity* (Institute for Justice and Reconciliation, Cape Town, 2001).

Charles Villa-Vicencio and Erik Doxtader, *The Provocations of Amnesty: Memory, Justice and Impunity* (David Philips Publisher, 2003).

Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World's Most Precious Stones* (Westview Press, USA, 2002).

Lansana Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Indiana University Press, Indiana, 2005).

Luc Huyse, *Young Democracies and the Choice Between Amnesty, Truth Commissions and Prosecutions* (University of Leuven, Belgium, 1998).

Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge, New York and London, 2001).

Sarah Nuttall and Carli Coetzee, *Negotiating the Past: The Making of Memory in South Africa* (Oxford University Press, New York, 1998).

Truth and Reconciliation Commission, Witness to Truth; Report of the Sierra Leone Truth and Reconciliation Commission (Graphic Packaging Ltd. GCGL, 2004).

BACKGROUND: THE ROLES AND RESPONSIBILITIES OF PRIVATE SECTOR ACTORS IN TRANSITIONAL JUSTICE IN AFRICA AND LATIN AMERICA: A BRIEFING PAPER

Conflicts in Africa and Latin America are generally characterized by intense periods of repression, civil unrest and systematic or wide-scale human rights violations, followed by negotiated peace accords or the adoption of relevant legislation. The periods of transition into peace and democracy that follow mass violence can be intense and lengthy, and reconciliation may be fleeting. During the course of this volatility, the conditions favorable to development may also erode, stoking new grievances. After all, the processes that occur in the wake of a transition aim to address decades-long

structural violence and legacies of war involving a wide range of actors and interests.

When discussing the significant role played by private sector actors in conflict, post-conflict and authoritarian settings, participants to the interregional exchange convened by the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in April 2021 identified several commonalities between Africa and Latin America. First, there has been an inextricable relationship between armed conflict, the private sector and natural resources or land with strategic economic value across both regions. Second, political elites have prioritized economic interests, effectively bolstering the connections between the government and the private sector. Finally, across Africa and Latin America, marginalized communities — namely women, children and indigenous, Afro-descendent and *campesino* communities — have been disproportionately harmed by pervasive patterns of violence, frequently involving sexual and gender-based violence (SGBV) and large-scale displacement.

Within Latin America, most nations have experienced some form of armed conflict lasting years or even decades. Dictatorships, military governments, coups and authoritarian regimes have been accused of perpetuating gross human rights violations. In some countries, armed conflict has intensified following the emergence of multiple armed groups, including left-wing guerrillas and right-wing paramilitary groups, as well as high degrees of government spending on the military and police. These long periods of civil unrest have frequently been plagued by the repression of marginalized population groups and all others perceived to be a threat to the government or affiliated with dissidents. In the case of Guatemala, for example, the violence that occurred during a 36-year civil war targeted indigenous Mayan communities and escalated to what eventually came to be known as the Mayan Genocide.¹ A notable pattern of violence targeting labor union members and social leaders also swept the region.

Similarly, in Africa, authoritarian regimes and electoral violence have been exacerbated by inter-ethnic tension, weak electoral systems and a persistent struggle toward decolonization, which has perpetuated systemic violence. While the relationship between armed conflict and natural resource wealth is significant in both regions, conflicts in Liberia, Sierra Leone and the Democratic Republic of Congo were particularly fueled and financed by illicit mineral export

industries where the private sector played a significant role in exporting gold, diamonds and other natural resources.

As participants in the consultation delved into further exploration of the roles and responsibilities of the private sector in transitional justice contexts in Africa and Latin America, they were guided by these questions:

- *How does one define “the private sector”?*
- *What roles has the private sector played in the commission of human rights violations and other atrocities?*
- *What does it mean to push for the inclusion of private sector actors in formal and informal transitional justice systems?*
- *What are the most significant barriers to accountability for private sector actors’ involvement in the commission of human rights violations during conflict — from the perspective of victims, survivors, marginalized groups and affected communities?*
- *What would make a truth commission an effective mechanism to address the role of private sector actors during conflict?*
- *Why has it been challenging to hold private sector actors liable for their conduct during conflict under past and current transitional justice mechanisms?*
- *How can transitional justice mechanisms ensure a representative victim-centered approach where victims and affected communities participate in all stages of transitional justice involving private sector actors?*
- *What does a victim-centered remedy mean in the context of private sector accountability and transitional justice?*
- *How can private sector actors advocate for and promote formal and informal transitional justice processes?*
- *For deterrence purposes and to avoid the recurrence of atrocities where the private sector is involved, what measures should be prioritized in a transitional or post-transitional context?*

THE SCOPE AND MEANING OF THE PRIVATE SECTOR

When considering the term *private sector* within transitional justice in Africa and Latin America, it is important to first clarify that the term has not exclusively referred to businesses or corporate legal entities. Rather, private sector actors may comprise *businesses, companies* and *private* and *economic actors*, as these terms have all been used interchangeably and in a manner consistent with international standards and academic literature.

Further, within the context of transitional justice, *private sector* may refer to corporate non-state actors and individual businesspersons who are not part of an armed group and receive a private gain as part of their engagement in the economic sector. However, particular attention should be given to instances in which the lines between private and public actors have become blurred because of their close interaction or mutually beneficial participation in illicit networks. In the Africa region, for example, private military companies have played a prominent role in the commission of human rights violations and other atrocities. However, these actors have often been recognized as “state militaries” or agents of the state that could generate some confusion when determining whether they have acted as private or state actors.

The term *private sector* might also have a narrower or broader scope based on the context in which it is used. In general, the following terms have

predominantly been applied across the two regions to refer to the private sector: *domestic businesses, multinational corporations, foreign-owned businesses, banks, financial institutions, mining companies, parent companies, subsidiaries, religious groups, and university organizations*, among others. When considering the private sector, one may also consider the role of the media or technology companies in inciting conflict, as well as their potential for supporting the development and implementation of transitional justice mechanisms.

The role of international companies (also referred to as parent companies or foreign-owned companies) that have played a role in atrocities committed in other nations has also been a prevalent theme across transitional justice initiatives in Africa and Latin America. For example, in Sierra Leone,² European-owned diamond businesses are perceived as a key component of the transitional context and a target sector when seeking accountability for atrocities fueled by the illicit diamond trade. In Brazil, the role of Volkswagen's German-based parent company has also been discussed in relation to a recent settlement seeking compensation for the company's involvement in anti-union violence during the military dictatorship that lasted from 1964 through 1985.



"Armonización indígena," an indigenous ceremony held at Centro de Memoria, Paz y Reconciliación, a Sites of Conscience member in Colombia.

PRIVATE SECTOR CONDUCT IN CONFLICT

In his opening remarks, keynote speaker Joseph Rahall described the role of the private sector as “the missing piece” in transitional justice. As participants to the consultation agreed, this is often the case despite egregious conduct on the part of private sector actors involving human rights violations such as torture, enforced disappearance, extrajudicial executions and forced displacement. In addition, land grabbing, or large-scale land acquisition by companies, has also often been examined within a human rights framework.

Participants further identified that private sector actors have enjoyed relative impunity given their close relationship to the state and the relentless pursuit of profit. The private sector’s responsibility for conflict-related conduct has typically fallen into one of the following three categories: direct involvement in the crimes perpetrated, complicity or foreseeability that the conduct would support the proliferation of conflict, or a benefit gained by virtue of the conflict itself.

Another prevalent theme identified in Africa and Latin America is the relationship between the brutal politics of authoritarian regimes and economic policies that directly benefited private actors. In several contexts, the financial incentives provided by governments — in the form of subsidies, tax breaks and the creation of favorable market conditions — in exchange for financial contributions or kickbacks have been perceived as one of the driving forces behind the private sectors' involvement in gross human rights violations. Owning or controlling resource-rich land or suppressing labor rights and trade unions that could compromise the private sector's economic standing has been a consistent motivation for its support of repressive state conduct and the facilitation of oppressive policies. Participants noted that oil- and mineral-rich countries in Africa have been particularly affected by the commission of atrocities during war where authoritarian governments have provided multinationals and the extractive industry profitable concessions.

In both Africa and Latin America, private sector actors have benefited from government-sponsored land grabs, in which they have been allowed to control natural resources and obtain multiyear concessions in these territories. For example, in Guatemala, the government abstained from passing any land reform legislation in exchange for financial contributions that would benefit the dictatorship (including donations toward eliminating subversive groups). In fact, in most of the countries analyzed within the context of the interregional exchange, land grabs, forced evictions and large-scale displacement benefiting the private sector occurred quite frequently.³

Another common issue participants identified within the Latin American context was the suppression of labor rights, unions and other social movements that denounced abusive labor practices or opposed despotic regimes. For example, in Argentina and Brazil,⁴ companies such as Ford Motor Co., Mercedes-Benz and Volkswagen, among others, were accused of providing personal information, including pictures, about trade union members and workers who spoke out against the government to the military. As a result, hundreds of workers were abducted, unlawfully arrested or detained, tortured and disappeared in both countries. Similarly, in Colombia and Guatemala, private sector actors were accused of engaging paramilitaries and other illegal armed actors to suppress labor rights and intimidate or assassinate union leaders.

Corporate actors were accused of facilitating access to resources used to kill targeted groups. In the aforementioned cases in Argentina and Brazil

involving Ford Motor Co., Mercedes-Benz and Volkswagen, members of the private sector provided resources that state actors and armed groups used to commit the violations described. In Guatemala, individual private actors, ranging from small-business owners to bank executives, formed an alliance with the military to support the dictatorship and weaken the opposition.⁵ Under this arrangement, these businessmen assisted the military in acquiring planes and pilots to attack marginalized communities accused of supporting guerrilla groups. The military regime coveted access to these private planes and pilots given the military's limited resources. The private sector also provided financial support to paramilitary groups accused of committing gross human rights violations against indigenous communities and other civilians seen as opposition supporters. In Colombia, similar patterns emerged in which executives from different sectors, including the agricultural and mining sectors, collaborated with and funded paramilitary groups operating as private security. These paramilitary groups, mainly the Autodefensas Unidas de Colombia (AUC), benefited from financial support and access to resources, such as the use of privately owned warehouses and transportation, to commit crimes against marginalized communities.⁶

While participants considered these issues prevalent in several Latin American countries, they noted some similarities in Africa, in that the private sector prolonged conflict through the commission of economic crimes. In the case of Liberia and South Africa, for instance, banks, financial institutions and other private actors were accused of illicit activities, such as laundering money and facilitating the procurement of weapons despite international embargoes. In South Africa, banks acted as intermediaries in illicit transactions that sustained the apartheid regime for years. Corporate executives from several banks served on a government-sponsored Defense Advisory Board, a group that supported the development of apartheid policies. In Liberia, the president of Oriental Timber Company, Guus Kouwenhoven, was prosecuted in a Dutch court for aiding and abetting war crimes and supplying weapons to Charles Taylor's repressive regime despite a United Nations embargo in place at the time.

As previously mentioned, multinational companies operating in Africa have also been linked to natural resources and illicit mining industries that have prolonged wartime atrocities. In fact, the illicit mineral export industry is perceived as one of the main financial resources for authoritarian governments and dissident groups. In Kenya and Sierra Leone, for example, foreign-owned companies were accused of acting as vehicles for illegal diamond and gold trading and financing

schemes. In the Democratic Republic of Congo, AngloGold Ashanti was accused of supporting armed groups in connection with its gold exploration activities. Lundin Petroleum, a Swedish company, and Talisman Energy, Inc., a Canadian company, are also under investigation for aiding and abetting war crimes and crimes against humanity in conjunction with oil exploration activities from the late 1990s through the early 2000s in Sudan (on land that is now South Sudan). In South Africa, mining companies, such as Gold Fields and Anglo American, have been accused of torturing workers, discriminatory labor practices and the enslavement of Black workers during the apartheid regime. The mining sector has also been accused of influencing and benefiting from cheap labor practices.

Another often-overlooked issue has been the role and impact of the mainstream media during armed conflict. For instance, in Kenya, the media have been accused of broadcasting hate speech and misinformation that fueled post-election violence by exacerbating tension among different political parties. The Brazilian national truth commission, *Comissão Nacional da Verdade* (CNV), found that media company O Globo benefited from the military dictatorship and openly supported the Brazilian military coup that instituted the dictatorship in 1964. Upon the release of the CNV's findings, the company issued a public apology. In Rwanda, the National Unity and Reconciliation Commission reported on the role that the media played in aggravating violence in the country during the conflict. As explained later in this report, three individuals were prosecuted and sentenced to prison by the International Criminal Tribunal for Rwanda for these actions. However, the radio and newspaper companies involved were never prosecuted.



Photos of children killed from Rwandan genocide.
Credit: John & Mel Kots (CC BY-NC-ND 2.0)

FORMAL AND INFORMAL TRANSITIONAL JUSTICE MECHANISMS AND PRIVATE SECTOR ENGAGEMENT⁷

While transitional justice mechanisms are traditionally designed to address the roles played by a range of actors during conflict, the inclusion of the private sector in related processes has been limited and highly context specific. In some cases, transitional justice processes completely omitted the private sector from any judicial accountability or truth-seeking processes. Further, some mechanisms have been developed outside formal transitional justice frameworks and function as parallel or derivative processes that complement the formal system.

As a preliminary matter, participants to the interregional exchange expressed some discomfort with traditional transitional justice frameworks, which, according to their views, fail to capture the cultural conceptions of justice within the African system. This was largely attributed to the fact that the transitional justice agenda has been largely influenced by international actors. Adopted in 2019, the *African Union Transitional Justice Policy (TJP)* aims to articulate an African framing of transitional justice. Still, this policy does not explicitly address the question of private sector accountability for human rights violations committed during conflict.

Transitional Justice Frameworks

Generally, transitional justice mechanisms emerge upon the de-escalation of conflict or following the signing and implementation of peace agreements. It is during this stage that stakeholders decide the framework and structure of each of the envisioned formal or informal mechanisms. Some of these processes have resulted in the design and implementation of multiple, parallel systems that aim to address the origin of the conflict — namely through accountability, truth seeking and reconciliation, reparations and guarantees of non-recurrence.

Most of the transitional justice mechanisms discussed in the interregional exchange emerged after the signing of peace accords or the enactment of legislation associated with the end of conflict. In all cases discussed, participation by the private sector in transitional mechanisms has been entirely voluntary and restricted to the private sector's willingness to respond to civil society's requests for their participation or *institutional innovators* that engage private actors in different processes within transitional justice mechanisms.⁸ As will be discussed in further detail, none of the formal transitional justice mechanisms analyzed within the context of the interregional exchange envisioned criminal responsibility for the private sector, nor did they include mandatory participation for private actors within special tribunals or associated judicial processes. Instead, cases seeking judicial accountability for the role of the private sector during conflict have been pursued through ordinary judicial processes that fall outside the scope of transitional justice mechanisms. Still, it is noteworthy that these cases have often been initiated in response to the findings or investigations conducted by transitional mechanisms.

In fact, the role of the private sector during conflict has most frequently been addressed through the mandates and final



Family members of those who disappeared during the uptake and resumption of the Palace of Justice in Colombia commemorated 33 years of searching and fighting for justice.

reports of truth-seeking mechanisms. Truth and reconciliation commissions (also referred to as truth commissions and truth-seeking mechanisms) are temporary mechanisms that investigate and document the atrocities committed over the years of conflict. These mechanisms are usually established as part of a comprehensive transitional justice strategy, which may also consider judicial accountability processes.

In Argentina and Guatemala, despite the creation of a truth commission, subsequent or parallel investigations with truth-seeking purposes were introduced to complement the final reports produced by formal mechanisms. The implementation of the peace agreements in these cases did not provide for formal judicial processes, such as prosecutions. In South Africa, the peace building process anticipated measures outside the traditional truth-seeking mechanisms in the form of institutional reforms such as land reform programs and constitutional reforms that were implemented post apartheid.⁹ Recently, Colombia introduced the most comprehensive contemporary transitional justice framework during the negotiations for the landmark 2016 peace agreement with the Revolutionary Armed Forces of Colombia (FARC).¹⁰ The Colombian transitional system includes a truth commission (*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*, or CEV), a special tribunal for accountability known as the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, or JEP), a national unit to search for the disappeared and several initiatives that promote reparations and guarantees of non-recurrence. The JEP's mandate originally offered a mandatory route to address the role of economic actors during the conflict, but later, through a controversial decision, the Constitutional Court determined that such mandatory jurisdiction over economic actors would be a violation of due process. As a result, economic actors are subject to the JEP's jurisdiction only if they voluntarily submit to it. However, the CEV's mandate provides for truth-seeking processes that address the responsibility of actors that participated in or benefited from the conflict, including economic actors.

Truth-Seeking

Significant advances have been made in the field of transitional justice regarding the inclusion of private actors in transitional truth-seeking mechanisms. Although these have not been accompanied by mandatory judicial proceedings,

the process of evidence collection, documentation and truth telling has paved the way toward subsequent criminal or civil accountability. In general, this was the most widely discussed transitional mechanism for private sector accountability identified during the interregional exchange.

MANDATES

Truth commission mandates have traditionally been silent on the issue of private sector violations. However, participants in the interregional exchange offered several examples in which truth-seeking mandates have been interpreted to include the private sector. The Truth and Reconciliation Commission of Liberia's mandate contained provisions, with an explicit reference to economic crimes, that enabled it to conduct investigations and identify persons, authorities, institutions and organizations involved in the commission of human rights violations during the conflict. Similarly, in South Africa, the interpretation of the Truth and Reconciliation Commission's mandate to "identity all persons, authorities, institutions and organizations involved in [apartheid-related] violations" allowed for the inclusion of the private sector within the scope



Liberia commemorates 2003 Peace Agreement that ended civil war. Credit: United Nations Photo

of its commission. In the case of Colombia, the CEV has a specific mandate to examine the role of all actors, including economic actors, in the atrocities committed during the war.

Bearing this in mind, participants in the interregional exchange also briefly discussed the role that truth commission mandates have had on the overall outcomes of truth-seeking mechanisms. One participant observed that as reflected in the Corporate Accountability and Transitional Justice (CATJ) database,¹¹ an explicit reference to the private sector in a truth commission mandate is not necessarily determinative of whether it has been included in related investigations; some of the countries that have relevant provisions in their truth commission mandates have still failed to include the private sector in their investigations or final reports.

PRIVATE SECTOR INVOLVEMENT IN TRUTH-SEEKING PROCEEDINGS

The majority of truth-seeking mechanisms in Latin America have addressed the role of the private sector during conflict. This is not the case in the Africa region, where the role of the private sector is not as comprehensively addressed within truth-seeking mechanisms. Nevertheless, truth commissions in Sierra Leone, Rwanda, South Africa and Mauritius have considered violations by businesses and other non-state actors. It is still important to note, however, that in both regions, the private sector has still not played a significant role in the development, progress and outcomes of truth-seeking mechanisms.

Argentina has positioned itself as an innovator in addressing the role of the private sector vis-à-vis truth-seeking mechanisms. The Argentinian truth commission, *Comisión Nacional Sobre la Desaparición de Personas* (CONADEP), extensively investigated missing and disappeared persons between 1976 and 1983, uncovering the facts in many of these cases, including the locations of the bodies. Its mandate provided for the investigation of all cases involving disappeared persons in relation to the military dictatorships. Because of a large number of reported cases involving the disappearance of union members, CONADEP's investigations focused on companies allegedly responsible for brutal violence against union members and other workers at their places of work. These investigations shed light on the role that companies such as Ford Motor Company and Mercedes-Benz had in the enforced disappearance,

torture and extrajudicial execution of several of their workers. The private sector, however, did not play a significant role in the evidence collection or documentation stages of the truth-seeking process. Instead, civil society, victims and their families, and survivors came forward with relevant information and evidence, playing an instrumental role in establishing accountability for these violations. Today, Argentina continues to develop other truth-seeking bodies through the establishment of separate institutional mechanisms seeking to collect evidence and document the links between the private sector — notably financial institutions — and violations amounting to crimes against humanity. Nevertheless, the private sector has been largely absent from this process. Similarly, in Guatemala and Brazil, despite the private sector’s absence from transitional processes, truth commissions collected valuable information involving the private sector that was published in the final report.¹²

In some cases, even where the private sector has participated in truth commission hearings and related processes, victims and affected communities have still not received their engagement as a genuine contribution toward truth and reconciliation. In Liberia, for example, the involvement of some private sector actors in the commission’s proceedings helped to provide legitimacy to these processes and construct a comprehensive record of the atrocities committed during the war. Nonetheless, the private sector’s failure to act on the commission’s recommendations with respect to reparations was considered to have undermined the entire process.

Participants to the interregional exchange also shared examples in which private sector actors have been reluctant to participate and rejected the truth commission’s invitation to join in the reconciliation process. In other instances, as in the case of South Africa, where the Truth and Reconciliation Commission found that businesses, particularly those in the mining industry, failed to take responsibility for their involvement in sustaining apartheid, the participation of the private sector in some of the proceedings was perceived as performative. This was particularly the case where nearly 100 witnesses from business and labor testified before the commission, but several businesses declined to continue with the process or deliver the information they promised. As the South African government failed to adopt many of the commission’s recommendations, victims and their families have been forced to pursue action against the private sector independently, mainly in federal courts in the United States. It is also worth noting that decades on, communities and human rights

defenders in mining-affected areas are still experiencing state-sanctioned violations.

Participants in the exchange agreed that the lack of involvement of businesses in these processes denied victims an opportunity to confront past atrocities and exercise their right to truth. As such, truth commissions, in general, fell short of establishing a full account of the violations perpetrated or supported by the private sector. Most participants also agreed on the importance of including the private sector in truth-seeking processes as critical to developing reparations programs and regulatory frameworks for effective corporate governance, as well as the examination of broader social issues, such as corruption.

FINAL REPORTS

Perhaps the most powerful component of the truth-seeking process regarding the private sector has been the final report resulting from a truth commission's mandate. Beyond truth-telling mechanisms, participants often referred to these documents as a source of information and a pathway to initiate follow-up investigations. In some cases, these reports have paved the way for subsequent criminal and civil judicial processes. On the other hand, discussions among participants and regional research point toward a lack of effective follow-up mechanisms to address relevant information in the final reports. There was also a consensus on the lack of adequate systems to implement recommendations included in the final reports, which called for further investigations or the involvement of the private sector in truth-seeking and reparations programs.

The Truth and Reconciliation Commission of Liberia addressed the role of the private sector by listing private actors that participated in or benefited from the conflict, as well as their alleged criminal conduct. The recommendations in the report included the prosecution of private entities, as well as the establishment of a reparation program in which private actors could participate. To date, there has been no action taken against the private sector to enforce these accountability measures, including those mentioned in the final report, nor have the named entities contributed toward the reparations program. Similarly, the final report that Guatemala's *Comisión para el Esclarecimiento Histórico* (CEH) produced contains the second-highest number of companies named for involvement in supporting the dictatorship, at 45 cases involving the private



Drilling in Argentina.

sector. The CEH did not provide any recommendation related to corporate accountability in its report. The only follow-up regarding private sector accountability for atrocities committed during the genocide and dictatorship was a lawsuit against Coca-Cola in a foreign jurisdiction, a U.S. federal court in New York. The company denied any involvement, and the case was later dismissed after the court decided that Guatemala would be a more appropriate forum in which to bring the suit.

In Sierra Leone, the absence of institutions or follow-up committees to monitor the implementation of the truth commission recommendations has been considered detrimental to the truth-seeking process on the whole. In its report, the Sierra Leone Truth and Reconciliation Commission recommended that the government examine the role played by chiefs in granting questionable mining licenses during the conflict. To date, it remains unclear whether follow-up action has been taken in response to the recommendations.

In some cases, the private sector has been completely omitted not only from the development or implementation of transitional mechanisms but also from reports emerging from some truth commissions. In the case of Kenya, for

example, the truth commission's report was silent on the role of businesses and their potential participation in subsequent peace building and reparative initiatives. As in the case of Liberia, this has been perceived as an important missed opportunity for the development of effective and well-funded reparation programs that could be funded by the private sector. **Across both Latin America and Africa, participants in the exchange agreed these omissions have been considered a lost opportunity for victims, survivors and civil society to obtain a comprehensive account of past human rights violations that would include the role of the private sector.**

Several truth commissions' final reports have effectively paved the way for the pursuit of justice outside traditional transitional justice frameworks. Accountability strategies have been initiated in domestic courts, international and regional mechanisms, and foreign jurisdictions. In Argentina, final reports derived from truth-seeking mechanisms have served as tools to initiate criminal and civil proceedings against multiple national and international companies. Similarly, in Brazil, the recent settlement with Volkswagen, for its involvement in crimes against its own workers and complicity in human rights violations, emerged from truth-seeking proceedings that were part of the formal transitional justice system. During the interregional exchange, participants expressed the need to further explore universal jurisdiction as a path to address private sector accountability in conflict settings.¹³ As previously mentioned, in Liberia, information about the role of Oriental Timber's president, Guus Kouwenhoven, in war crimes led to a prosecution in a Dutch court. While expressing some disappointment over the outcome of these reports, participants in the exchange observed that through these past lessons, recent transitional justice systems seeking to advance the accountability and peace building agenda, as in Colombia, have made greater efforts to address the role of the private sector.

Transitional Tribunals and Judicial Accountability

Participants in the interregional exchange agreed that holding private sector actors accountable for their violations is a key step against impunity and toward deterrence. In terms of accountability through transitional justice mechanisms, such as special transitional tribunals, there are very few examples that demonstrate an effective route toward private sector accountability. Most



March 8th protest in honor of Honduran environmental and indigenous rights activist Berta Cáceres. Credit: Cosmopolita (CC BY-NC-SA 2.0)

relevant and emblematic cases addressing the responsibility of the private sector for atrocities committed during the conflict occurred outside the scope of transitional justice frameworks, either through ordinary judicial processes in the country where the conduct occurred or in foreign jurisdictions, usually where the parent company is located.

Some transitional justice mechanisms established special tribunals to hold perpetrators accountable for their crimes, but most of them were completely silent on the issue of private sector accountability. In Sierra Leone, for instance, the Special Court for Sierra Leone was established with the support of the United Nations, but its legal framework was completely silent regarding the private sector despite multiple allegations against the private sector and its role in fueling the conflict through the illicit diamond trade. As previously mentioned, the International Criminal Tribunal for Rwanda prosecuted three individuals who used their position in media companies (radio and newspapers) to allegedly incite genocide and other crimes against humanity. For example, one of the individuals published several writings inciting genocide, including a headline that posed the question “What weapons shall we use to conquer the Inyenzi once and for all?” along with a picture of a machete.¹⁴ These prosecutions resulted in sentences ranging from 30 to 35 years in prison. Participants in the exchange did not identify any other examples of successful prosecutions against the private sector through specialized tribunals related to a transitional justice process.

Perhaps the most promising development is the recently established Colombian JEP. Upon the implementation of the 2016 Peace Agreement, the JEP was intended to exercise mandatory jurisdiction over economic actors; however, a 2017 Constitutional Court ruling transformed the JEP into a voluntary forum for the private sector. Although it is still too early to tell whether this mechanism will be an effective way to hold the private sector accountable, the lack of private sector participation in the Colombian transitional justice system has already signaled concern.

REMEDY-SEEKING PROCESSES OUTSIDE TRANSITIONAL JUSTICE SETTINGS

Where transitional justice mechanisms failed to address the responsibility of the private sector, victims sought justice in forums outside the scope of transitional

justice mechanisms. Some of the discussed forums include national and foreign courts, as well as international mechanisms such as the International Criminal Court (ICC). It is important to emphasize that many of these legal strategies, whether criminal or civil, were triggered in part by the proceedings and investigations conducted within transitional justice mechanisms.



Miners in Bolivia.

In Argentina, prosecutions and civil claims were initiated in national courts as a strategy to seek accountability for atrocities brought to light during truth-seeking processes. One of these cases led to an emblematic 2018 decision against Ford Motor Company executives for labor-related violations, such as wrongful terminations attributed to workers' political ideologies, and crimes against humanity. These executives were sentenced to 10 and 12 years in prison and are currently appealing their cases. Civil claims have also been filed against the private sector in Argentina. Some of these cases have encountered procedural obstacles that have hindered their progress, including those related to the statute of limitations for crimes against humanity and gross human rights violations.

In Colombia, businessman Jaime Blanco Maya was sentenced to over 30 years in prison for his involvement in a financial scheme that included diverting money from Drummond, a coal-producing company based in the United States, to paramilitary death squads to execute union leaders. In 2020, the Colombian prosecutor charged Drummond's former president and its current president for their role in financing the AUC, as well as the killings of union leaders. This case, as well as other similar cases, are the result of investigations initiated during the course of demobilization processes in which former paramilitary members disclosed that members of the private sector funded their activities. However,

these transitional processes lacked the mandate to investigate the private sector and referred thousands of testimonies involving the private sector to the prosecutor's office. To date, the vast majority of these allegations have still not been made public or investigated.

Despite numerous reports identifying the role of private sector actors in the commission of atrocities, there are only a handful of domestic criminal accountability mechanisms that have effectively responded to these findings. However, victims have initiated cases through different foreign jurisdictions, primarily regarding parent companies, and through international forums such as the ICC. In the Oriental Timber case referenced earlier from Liberia, a Dutch appeals court convicted Guus Kouwenhoven, the company's former head, who used the entity to smuggle weapons to Liberia during the conflict. Kouwenhoven was prosecuted for being an accessory to war crimes and arms trafficking. In the Kenyan case, victims and civil society worked together to bring a claim against media executive and journalist Joshua Sang in front of the ICC, a strategy that did not show significant results toward comprehensive accountability or reparations programs. In April 2016, the ICC dismissed the charges without prejudice.

Securing civil awards against the private sector has been particularly challenging. Victims and affected communities have filed civil claims seeking compensation and accountability when traditional transitional mechanisms failed to hold private sector actors accountable and provide adequate reparations. In general, most actions discussed during the interregional exchange referenced strategies seeking accountability for the role of subsidiaries for related crimes through courts in the United States. Claims in the United States have often been filed under the Torture Victim Protection Act of 1991 and the Alien Tort Statute (ATS). The ATS was once seen as a promising avenue toward corporate accountability for human rights violations abroad but has recently lost muster in the courts. Cases from Colombia and Guatemala were filed in courts in the United Kingdom and Canada. To date, none of these matters have reached a decision that has held private sector actors accountable for their conduct.

Similarly, claims against private sector actors that supported the South African apartheid system, through financing security forces and providing weapons and military vehicles, turned into procedural ordeals that were later

dismissed. Multiple claims have been filed against South African companies that participated or benefited from the apartheid regime. In 2002, Khulumani Victims Group, an organization representing victims of the apartheid regime, sued 20 banks and companies in a U.S. federal court. These cases, as well as others against Ford Motor Company and other entities, did not advance through the U.S. judicial system. However, they still held merit as promising advocacy campaigns that shed light on the role of the private sector during the apartheid regime.

Participants in the interregional exchange also emphasized the need to fill gaps where international mechanisms such as the Organisation for Economic Co-operation and Development and the ICC failed to remove obstacles to ensure the right to truth for victims of apartheid. In this case, the complaints filed sought to address the role of banks as intermediaries for illicit activities such as procuring weapons despite an international embargo. A similar situation was also mentioned in the context of Liberia.

More generally, the absence of significant legal recourses for victims has compromised any corresponding deterrence effects within the field of private sector accountability. It is also important to note that local communities in the Africa region seemed to prefer traditional methods of justice, rather than formal judicial accountability processes, which may also explain why these cases have been less prevalent. In the absence of accountability and reparations through courts in Africa, participants in the exchange discussed the need for the ICC and domestic courts to fight corporate impunity for crimes committed by parent and subsidiary companies.

Participants also emphasized the need for further legal innovation, strategic litigation and advocacy, as well as a stronger reliance on measures that promote non-recurrence as discussed further below.

For instance, participants talked about specialized



Farmer in Sudan. Credit: United Nations Photo/ Africa Renewal



Guatemalan women selling produce in market.
Credit: United Nations Entity for Gender Equality and the Empowerment of Women (UN Women)/ Ryan Brown

instruments, such as the Malabo Protocol in Africa, as an effective replicable instrument to promote accountability. The Malabo Protocol raises opportunities for corporate criminal responsibility by including explicit provisions on the exploitation of natural resources and corruption. It is perceived as a promising development that could be used in African courts for cases

involving private sector accountability for crimes committed during armed conflict. However, this tool has not yet entered into force in any African state and is perceived as a controversial instrument because of its provisions referencing individual criminal responsibility for state actors.

Participants in the exchange also identified other relevant paths toward accountability. For instance, in Brazil, the recent settlement with Volkswagen for its role in the military dictatorship and persecution of former employees was recognized as an emblematic case. After years of negotiation with prosecutors, the company acknowledged its involvement in the conflict by facilitating the kidnapping, imprisonment and torture of its workers. The settlement terms established a comprehensive reparation program for different groups of victims, beyond former company workers. On the other hand, participants expressed some concern regarding the effectiveness of settlements and their potential contradictory role regarding guarantees of non-recurrence. It is important to note that union mobilization in Brazil and shareholder activism in Germany, where the parent company is located, played a key role in the journey toward a settlement between the victims and the company.

International and Regional Mechanisms

Although not directly binding on private actors, both regions made several references to international and regional mechanisms that can influence the framing of private sector accountability. As mentioned previously, victims, affected communities and survivors of private sector violations have approached the ICC with cases seeking accountability. Participants in the exchange viewed the African Union Transitional Justice Policy as a tool that could enhance synergies and coordination between diverse actors, including non-state actors. The African Commission on Human and Peoples' Rights (ACHPR) was also mentioned for its potential to introduce normative standards and guidance applicable to the conduct of the private sector in conflict situations. Beyond introducing normative standards, participants also shared the case of DRC in which the ACHPR urged the government to institute a criminal investigation against Anvil Mining Company staff for their role in providing logistical support to state agents.

Participants in the exchange discussed the potential role of the Inter-American System, including the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, in addressing the role of the private sector during military dictatorships and authoritarian regimes that plagued the region for decades. Participants recognize the Inter-American System as a vehicle that could influence governments to investigate the role of the private sector during conflict, as well as establish relevant standards for non-recurrence.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) are also viewed as a tool to improve private sector conduct in conflict situations, particularly through the establishment of regulatory frameworks, as provided for in its foundational principles. The UNGPs expressly state that business enterprises should establish human rights due diligence processes. In addition, the UNGPs contain specific provisions establishing that the states should review whether their policies, legislation and regulations effectively address the heightened risk of business enterprises being involved in human rights violations in conflict-affected areas. Finally, participants also emphasized a common interest in the development of the United Nations Binding Treaty on Transnational Businesses and Human Rights and its potential role in addressing and preventing abusive private sector conduct in conflict settings. Participants consider this treaty a promising avenue toward heightened action by governments and distinct grievance frameworks accessible to victims and affected communities.¹⁵



Survivor Tree at Ebola Treatment Centre in Port Loko, Sierra Leone. Credit: United Nations Photo

GUARANTEES OF NON-RECURRENCE

Although participants to the interregional exchange briefly discussed the role of the private sector in the design and implementation of guarantees of non-recurrence, it was identified as a key issue worth further examination. This area was also identified as one of the most promising spaces within the transitional justice agenda for private sector participation, considering the following:

- The participation of the private sector in the development of institutional reforms and the design of regulatory frameworks for good corporate governance to avoid repetition of violations.
- The examination and development of effective and comprehensive deterrence measures with enforceable mechanisms, including reparation programs and public policies.
- A bottom-up approach in which the private sector and victims jointly participate in the design and implementation of comprehensive measures to promote non-recurrence at a grassroots level.
- Education programs on human rights and armed conflict with a focus on the role of the private sector.
- Further studies on the role of corruption and the strong links between governments and the private sector in perpetuating conflicts.

Participants also discussed a recent initiative in Kenya where the Kenyan Private Sector Alliance developed a local campaign that focuses on its commitment to peaceful elections in light of the atrocities committed in the 2007 post-electoral violence. Through dialogue with communities and the political elite, this initiative has served as a tool to transmit peaceful messages, promote dialogue and organize events to encourage political leaders to make commitments to peaceful elections.

IDENTIFIED CHALLENGES TO PRIVATE SECTOR ACCOUNTABILITY AND ENGAGEMENT WITH TRANSITIONAL JUSTICE MECHANISMS

There are challenges and limitations that may hinder the engagement of the private sector in transitional justice systems and further exacerbate the lack of accountability. These include violence and intimidation against victims and witnesses; statutes of limitations for claims involving human rights violations, mainly involving civil cases; the extensive periods of time between the harms experienced and case investigation; loss of evidence and difficulty in obtaining relevant documentation; lack of political will and institutional capacity; corruption; the absence of the private sector in the development of transitional justice mechanisms; ambiguous

mandates establishing transitional justice mechanisms and lack of enforceable legal frameworks; lack of follow-up mechanisms to implement and monitor the outcomes of transitional mechanisms upon its dissolution;



United Nations Protection of Civilians camp near oil fields, Bentiu, South Sudan. Credit: United Nations Photo

parent company disassociation from its subsidiaries; amnesty laws; absence of domestic legal frameworks for private actor accountability; absence of clear and enforceable international laws; and denial of corporate responsibility through the corporate social responsibility pretext (the CSR excuse).¹⁶

It is important to note that the issue of statute of limitations is a relevant theme across several jurisdictions, particularly as it refers to the application of statute of limitations for civil claims, including labor-related claims, derived from crimes against humanity. For example, in the case of Colombia, the issue of statute of limitations is seen as an obstacle to filing civil cases for actions derived from human rights violations or crimes against humanity during the conflict.

Generally, the private sector is perceived as a strong opponent of transitional efforts involving truth telling and accountability. In Guatemala, for example, the private sector flagrantly obstructed the peace and transitional justice processes. In Colombia, powerful and influential private sector actors supported and financed a campaign against the implementation of the 2016 peace accords between the government and the FARC. As mentioned, in South Africa, some businesses openly defied the South African Truth and Reconciliation

Commission. Despite the participation of a handful of private sector actors in African and Latin American truth commissions, there are no emblematic cases in which the private sector contributed to reparation or reconciliation programs.

Participants in the exchange agreed that the close links between the private sector and governments have been an enormous obstacle that has hindered the development of effective mechanisms for accountability while perpetuating impunity. Hopefully, shedding light on these issues will provide opportunities to influence ongoing efforts to hold the private sector accountable for past abuses. For instance, in Argentina, Congress has not yet taken action to implement an initiative approved in 2015 seeking to create a commission (Comisión de la Verdad sobre las Complicidades Económicas y Financieras) to identify the role of the private sector during the military dictatorship. The recognition that governments have an important role to play in developing and facilitating relevant frameworks remains at the heart of comprehensive peace building and private sector accountability strategies.

Additional challenges identified when examining the development of transitional justice agendas include an overreliance on administrative processes and a lack of incentives to approach transitional mandates. The private sector has attributed its lack of engagement in transitional processes to the role that government institutions have in implementing administrative reparation programs that involve the private sector, such as government-sponsored land restitution cases. This pretext, coupled with a lack of concrete incentives to attract private actors to engage with transitional justice mechanisms, has generated a rift between peace building measures and the private sector in societies emerging from conflict. Generally, successful methods to address the role of private sector actors in transitional justice mechanisms have been driven by civil society and institutional innovators within transitional justice mechanisms.



Protesters denouncing deforestation of the Amazon Rainforest, demanding protection of indigenous peoples, and crying out for justice for activists killed while campaigning in Brazil. Credit: Eric Spiegel (CC BY-NC-ND 2.0)

VICTIM PARTICIPATION, RIGHTS AND REPARATION

PARTICIPATION

Cases across Latin America and Africa highlight the work of affected communities and civil society in pushing for the inclusion of the private sector in the transitional justice agenda. The lack of private actor participation in transitional justice mechanisms has forced victims and affected communities to strongly advocate for a comprehensive approach to transitional justice that ensures an effective framework for accountability, truth seeking, reconciliation, reparations and institutional reform. Despite the key role of victims in different processes, the challenges experienced by victims are still significant.

Participants in the exchange discussed obstacles and approaches toward victim-centered participation in processes involving the private sector. Participants agreed on the social, political and economic power imbalances between private sector actors and victims and discussed the importance of identifying these hindrances early enough in the process to introduce measures to address victims' needs, including:

- The need for an exclusive platform and direct communication channels within each transitional justice mechanism as valuable spaces for victims to

share their stories, provide documentation and participate in all stages of processes involving the role of private actors.

- The establishment of victim and witness protection systems, along with strategic legal and policy frameworks to address obstacles encountered by victims and impacted communities. Challenges include lack of resources, guidance and capacity to efficiently access available mechanisms; security risks coupled with ongoing civil unrest; and lack of context-based knowledge on their rights and available channels for redress and accountability, among others.
- Recognition of the role of institutional innovators — those individuals working within transitional mechanisms who push for the inclusion of the private sector in the institution’s agenda while empowering victims.
- Concerns around the issue of comprehensive representation of victims in transitional justice processes in which the participation of “activists” or nongovernmental organizations has been prioritized without examining whether there is legitimate victim representation. In these cases, representation at the grassroots level is preferred.
- The need to empower and include victims throughout different stages of the process, including the development of laws and relevant public policy initiatives emerging from the transitional justice agenda.
- Partnerships with the public sector that have a legitimate interest in the framework and objectives within a transitional justice mechanism, rather than a strictly



Mining in Kailo, Democratic Republic of Congo.
Credit: Julien Harneis (CC BY-SA 2.0)

corporate social responsibility approach.

- The inclusion and prioritization of intersectional approaches that promote victims with a range of identities (i.e., gender, race, ethnicity, language, sexuality, etc.) participating in the transitional justice process.
- The need for education and informational sessions on the human rights violations at hand and victims' rights given that some victims may not recognize harms and know their rights have been violated.

MARGINALIZED GROUPS

The impact of conflict on marginalized communities is evident. In both Africa and Latin America, the following groups were identified as particularly affected by the conflict: trade union activists, women, children and youth, indigenous and Afro-descendant communities and *campesinos*, or rural farmers. As previously explained, there was a pervasive pattern of violence against trade union activists and social leaders in Latin America. The Guatemalan, Argentinian and Brazilian truth commissions extensively documented the involvement of the private sector in the repression and extermination of union members. These issues were also raised in the African context. For instance, the South African Truth and Reconciliation Commission found that the denial of trade union rights to Black workers constituted a human rights violation. However, no action was taken upon the truth commission's findings.

In DRC, Sierra Leone and Liberia, civilians, namely women, children, older persons and persons with disabilities, seemed to have withstood the worst of the conflict. Women, however, have been particularly marginalized and have experienced sexual violence, including systematic rapes and gang rapes; sexual slavery; human trafficking; forced pregnancy; and child, early and forced marriage; among other violations. In various contexts, connections have been made between these crimes and the geographic locations of profitable business



Memory Day in Argentina. Credit: Longhorndave (CC BY 2.0)

enterprises.

This gender dimension has been recognized in several truth commissions' final reports in Latin America that have discussed the connection between serious crimes and the private sector. For example, in Argentina, the military used business facilities as clandestine detention centers where women were raped and assaulted. In Guatemala, the military, acting in concert with private actors, systematically raped and enslaved *campesina* and indigenous women near the Sepur Zarco outpost. In a 2016 landmark verdict, a Guatemalan court convicted two former military leaders of crimes against humanity on counts of rape, murder and other serious crimes in the context of the civil war. This also marked the first time a domestic court prosecuted sexual slavery as an international crime.

Women have also been particularly affected by systematic land grabs in connection with powerful business interests in natural resources in Africa and Latin America. The armed conflict particularly has exacerbated the rates of displacement of indigenous, Afro-descendant and, where relevant, *campesino* communities from resource-rich regions. Thus, an intersectional approach to address victims' needs is particularly relevant. Several cases highlighted the spiritual and cultural consequences of substantial loss of land for the livelihoods of indigenous groups that have ancestral ties to their land.

Participants also agreed that sexual violence, human trafficking, child labor and child recruitment for war-related purposes have been major tragedies in both Africa and Latin America. These violations have had intergenerational effects, perpetuating poverty and denying future generations of women and children of valuable resources. In Argentina, the military regime kidnapped, tortured and murdered women who were considered part of the opposition. This also affected their children, who were forcibly removed from their mothers and abandoned or transferred to military authorities and their supporters. Today, through investigative work and the tireless efforts of the *Abuelas de Plaza de Mayo*,¹⁷ several survivors who were subjected to child abduction have been reunited with their biological families.

Because of the prevalence of these issues, the *African Union TJP* outlines several principles that should inform transitional justice processes in Africa. Among these principles, transitional justice processes should afford particular attention to SGBV, as well as deeply entrenched gender inequality in a society. Recognizing the disproportionate impact of violence on women, the recently implemented Colombian Peace Accords have also mainstreamed a comprehensive gender perspective throughout its entire framework.

REPARATIONS

As mentioned above, the private sector has not meaningfully contributed to national reparation programs. Across both Africa and Latin America, there has been a general lack of comprehensive reparation policies and programs that could be funded — even if partially — by the private sector. This is also attributed to the fact that the private sector is not considered a key stakeholder in transitional mechanisms. Most countries sought to deal with compensation and other reparation measures through administrative processes initiated and managed by government agencies but did not involve the private sector in any reparation frameworks despite evidence demonstrating the role of specific private actors in the conflict.

For instance, Guatemala's truth commission report found that private sector actors participated in the conflict; however, they were not assigned any responsibility in terms of reparations.

As previously mentioned in this report, the Volkswagen settlement in Brazil gave rise to a comprehensive reparation program that includes individual reparations to former company workers and their families, collective reparations, the construction of a memorial site, and the creation of a fund to support academic research on corporate complicity with the dictatorship and the search for the disappeared. However, it is important to note that one of the main critiques of this case as a replicable model centers on the argument that reparation is not possible when the company has not yet admitted any wrongdoing, as in the Volkswagen case.

In many cases, despite specific recommendations in the truth commission's final reports, in contributing to reparations for their role in the conflict, private actors have still fallen short of making meaningful contributions. These failures have delegitimized the related transitional justice process and hindered reconciliation efforts. In the case of Liberia, the transitional justice mechanism has been perceived as beneficial only for former combatants who received education and financial allowances as part of the reintegration process, whereas victims of the



Painted cooling towers of decommissioned Orlando Power Station, Orlando Towers, Soweto, Johannesburg, South Africa.



The Eye That Cries Memorial in Lima, Peru.
Credit: The Advocacy Project (CC BY-NC-SA 2.0)

conflict were completely neglected, forcing them to seek redress in other forums.

Although some reparation programs are perceived as effective, it is unclear whether the private sector contributed to them. In some cases, symbolic contributions by the private sector are perceived as philanthropic in nature and not as replicable reparations initiatives to contribute toward

reconciliation in the aftermath of conflict. Given the absence of effective or promising reparation models, participants in the exchange identified the importance of developing comprehensive reparation frameworks that promote a victim-centered approach to remedy and reparations, which would prioritize:

- Maintaining victim consultations at the core of the design processes for all reparation programs.
- The development of comprehensive reparation programs that would include provisions on labor and environmental issues.
- The development of victim-driven reparation frameworks that focus on the accountability component of transitional justice to avoid scenarios in which a development framework takes precedence over the acknowledgment of wrongdoings.
- The advancement of collective reparation programs that have the potential for structural transformation.
- A departure from symbolic reparations in which victims are not consulted.

RECOMMENDATIONS

The following recommendations respond to the challenges that participants identified during the interregional exchange, as well as the challenges identified in this briefing paper.

FOR ACADEMIA AND PRACTITIONERS IN THE FIELD OF PRIVATE SECTOR ACCOUNTABILITY:

- Continue to examine alternative sanctions for the private sector and effective replicable public policies for reparation programs that involve businesses and private actors.
- Continue to examine the different types of private actors and sectors involved in conflict by region, including proposals on institutional reforms and atrocity prevention mechanisms and indicators.
- Continue to examine structural violence, the underlying causes of conflict and its impact on marginalized communities (in particular women; children and youth; and indigenous, Afro-descendant and campesino communities).
- Conduct further studies on the relationship between environmental degradation, armed conflict and the private sector; relevant analysis would include concrete recommendations to be included in the transitional justice agenda.
- Conduct further analysis on the issue of corruption and its direct and indirect links to corporate impunity in conflict settings.
- Continue to encourage innovation in the field of transitional justice regarding the private sector, including an analysis of the role and responsibilities of market supply chains and associated private actors that might be enabling corporate impunity or benefiting from conflict.
- Continue to promote interregional dialogues on the issues highlighted in this report to further explore these issues, share experiences, address gaps and identify best practices and replicable strategies.

FOR CIVIL SOCIETY, IMPACTED COMMUNITIES, VICTIMS AND SURVIVORS:

- Continue to proactively advocate for accountability and participate in political and judicial processes, as well as invite others to do the same, as mobilization by civil society, victims and survivors has been an effective tool to push for private sector accountability in transitional settings.
- Document cases and develop mechanisms for archiving and storing information, as evidence collection and documentation are key in the effectiveness of investigations against private actors.
- Actively participate in consultations on the development of the United Nations Binding Treaty on Transnational Businesses and Human Rights.
- Develop national and international strategic partnerships to advance accountability efforts, strengthen advocacy campaigns and cultivate innovative legal and nonlegal strategies.
- Develop global networks and communities of practice to share experiences and identify challenges and replicable strategies.
- In some contexts, affected communities, victims and survivors have a preference for traditional mechanisms as a forum for accountability and reconciliation. For instance, Liberia's Palava Hut, a traditional justice mechanism to reconcile former combatants, is considered a promising space for healing and reconciliation. Where needed, civil society, victims and survivor groups should advocate for the inclusion of the private sector in this type of traditional mechanism.

FOR THE PRIVATE SECTOR:

- Recognize a transitional justice setting as a fundamental part of peace building and promote the development and implementation of transitional justice mechanisms.
- Participate in transitional justice mechanisms when requested and recognize this participation as a practice necessary to demonstrate fundamental respect for human rights and the transitional justice agenda.
- Allow access to archives to support investigations.

- Carefully follow context-based specialized due diligence protocols in conflict settings that recognize social and cultural needs. These protocols should recognize the disproportionate impact of conflict on marginalized communities.
- Parent companies, as well as other multinationals, should participate in the transitional justice agenda when their subsidiaries had a role in a conflict situation.
- Make contributions toward reparations in accordance with transitional justice mechanisms. Memorialization programs and an apology on behalf of the private entity should accompany these contributions. The private sector should also contribute toward peace building by engaging in community development projects.
- The private sector should facilitate or participate in forums in which victims, affected communities and private actors could engage in dialogue to promote or secure reconciliation.

FOR GOVERNMENT INSTITUTIONS AND TRANSITIONAL JUSTICE SYSTEM MECHANISMS:

- Guarantee that transitional justice mechanisms address the role of all actors that supported, participated in or benefited from the conflict.
- Include explicit provisions in these transitional mandates that address the role of private actors during conflict and provide measures for the inclusion of private actors in reparation programs.
- Institutional authorities operating within transitional justice mechanisms should implement lessons learned in transitional contexts and develop innovative strategies to address the role of the private sector during the conflict and provide incentive to private actors to approach transitional mechanisms.
- Transitional justice mechanisms should establish effective systems to monitor recommendations and relevant outcomes involving the private sector.
- Governments should adopt legislation and develop measures that restrict natural resource extraction in conflict-affected areas and introduce criminal liability for the involvement of private actors in human rights violations during conflict.
- Government officials and state representatives involved in peace

negotiations or the development of transitional justice frameworks should guarantee that the private sector is included in these processes.

- Transitional justice mechanisms should have an adequate institutional framework with trained personnel to address victims' needs for truth and accountability for the role of the private sector in the conflict.
- Beyond accountability, governments should promote peace building strategies that include the private sector. Government officials should clarify that, while welcomed, voluntary corporate social responsibility frameworks and philanthropic initiatives are not adequate alternatives to respond to victims and affected communities' needs.
- Governments should guarantee effective collaboration and communication among official government institutions, transitional justice mechanisms and private sector actors to ensure effective investigations and information exchanges between different entities and actors involved.

FOR INTERNATIONAL AND REGIONAL MECHANISMS:

- The African Union should expedite the development of a framework on the issue of business and human rights in conjunction with its African Union Transitional Justice Policy.
- Promote the use of the ACHPR's special mechanisms on transitional justice, extractive industries and conflict situations. Although the ACHPR provides advisory notes and guidelines for African countries to address the role of the private sector in conflict settings, these tools have not been used frequently.
- The United Nations should expedite negotiations and the drafting of the Binding Treaty on Transnational Businesses and Human Rights and ensure proper provisions that address the role of the private sector in conflict settings.
- The Inter-American System of Human Rights should further push states to investigate the role of the private sector in conflict settings, as well as establish adequate accountability mechanisms and regulatory frameworks.
- Conduct further research on the duty of international and regional institutions in addressing the issue of the roles and responsibilities of the private sector in transitional justice.

CONCLUSION

Despite hundreds of findings evidencing the role of the private sector in atrocities committed during conflict in Africa and Latin America, transitional justice mechanisms have still not adequately addressed this issue. On the other hand, the private sector has vehemently opposed and failed to advocate for or participate in these transitional mechanisms. It is rare to find a best practice approach when it comes to the inclusion of the private sector in transitional justice settings.

National and international accountability mechanisms that effectively hold the private sector accountable for its actions are also limited. Despite complex challenges and lack of adequate frameworks for accountability, civil society and victims groups continue to advocate for a transitional justice agenda that addresses the role of the private sector in perpetuating violence. These efforts uncovered innovative strategies to raise awareness of these issues and opened the space toward promising multi-actor collaborations and spaces for accountability and redress.

Although accountability measures are further complicated by the obscure lines between state and non-state private actors, recent research and advocacy strategies continue to fill these gaps. Truth commission findings, civil society reports and judicial strategies in national and foreign courts continue to advance the field of transitional justice even when some of these strategies fall outside the scope of transitional justice mechanisms. These developments are positive steps toward a more robust and comprehensive transitional justice agenda that includes the private sector in its development and implementation.

REFERENCES

- Asaala, E. (2021). Accountability of private sector actors and their role in formal and informal transitional justice processes in South Africa. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.
- Asaala, E. (2021). Accountability of private sector actors and their role in formal and informal transitional justice processes in Kenya. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.
- Asaala, E. (2021). Accountability of private sector actors and their role in formal and informal transitional justice processes in Liberia. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.
- Bernal-Bermudez, L. (2021). Corporate complicity and transitional justice in Brazil. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.
- Biegon, J., Budoo, A., Mutangi, T., & Assalan, E. (2021). The role of private sector in transitional justice processes in Africa: regional report. Available at <https://gijtr.org/wp-content/uploads/2021/06/ABA-ROLI-The-Role-of-the-Private-Sector-in-TJ-Processes-in-Africa-June-2021-Report-Secure.pdf>.
- Campaign for Good Governance. (2021). Accountability of private sector actors and their role in formal and informal transitional justice processes in Sierra Leone. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.
- Center for International Law and Policy. (2016). Briefing report: transitional justice and corporate accountability.
- Meoño, G. (2021). Responsabilidad empresarial en crímenes de lesa humanidad: el caso Argentino. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.

- Paredes, S. (2021). Participación de las empresas en los procesos de justicia transicional en Perú. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.
- Pietropaoli, I. (2021). Private sector accountability and transitional justice in Guatemala. Case study prepared for the interregional exchange on the roles and responsibilities of private sector actors in transitional justice processes.
- Sanchez, N. C. (2021). Roles and responsibilities of the private sector in transitional justice processes in Latin America: the cases of Colombia, Guatemala and Argentina. Available at http://www.dplf.org/sites/default/files/roles_and_responsibilities_of_the_private_sector_in_transitional_justice_processes_in_latam_america_-_the_cases_of_colombia_guatemala_and_argentina_-_dplf_and_gijtr.pdf.

FOOTNOTES

- ¹ Over 200,000 Guatemalans were killed or forcibly disappeared in a civil war that raged from the 1960s to 1996. Guatemala's Commission for Historical Clarification found that 83% of the victims were indigenous Mayan and 93% of these human rights violations were carried out by government forces. The origins of the civil war are complex but, in part, attributed to a conflict around the issue of ambitious land reforms that interfered with the interests of powerful multinational corporations and Guatemala's elite. The U.S. CIA later helped orchestrate a *coup d'état* in 1954, which effectively resulted in a military dictatorship that would last for decades. The left became heavily militarized and launched a civil war against the military government. In 1982, violence against indigenous communities, accused of supporting the left, escalated under Efraín Ríos Montt's authoritarian government as he launched a "scorched earth" operation against Mayan communities.
- ² The armed conflict in Sierra Leone began in 1991 when the armed group Revolutionary United Front, with support of Liberian opposition leader Charles Taylor, attempted to overthrow the government. The Sierra Leone civil war was one of the most violent conflicts in Africa. It resulted in more than fifty thousand people dead and approximately half a million displaced. The conflict was vastly funded by "blood diamonds" mined by forced labor.
- ³ Participants discussed the issue of land grabbing, or large-scale land acquisition such as the buying or leasing of land by the private sector, mainly transnational companies. In this context, land grabs were linked to questionable transactions in which marginalized communities were deprived of the economic, cultural and agricultural benefits of large plots of land, given the powerful influence of the private sector and the state.
- ⁴ Between the 1960s and 1980s, Argentina and Brazil experienced rule by authoritarian governments and military regimes responsible for several human rights violations and crimes against humanity. Several foreign and domestic companies were accused of collaborating with the Argentinian and Brazilian dictatorships in an effort to suppress labor rights and social movements associated with government opposition.
- ⁵ The alliance between businessmen and the dictatorship is well documented. See Martín Rodríguez Pellecer,

2013; “Los Militares y la Élite, la Alianza que Ganó la Guerra.” Available at <https://www.plazapublica.com.gt/content/los-militares-y-la-elite-la-alianza-que-gano-la-guerra>.

- 6 In 2004, Chiquita Brands International, the U.S.-based banana company, pleaded guilty to [financing paramilitary groups in Colombia](#) after a U.S. Department of Justice investigation obtained evidence indicating that the company issued money to the AUC for at least six years. Chiquita agreed to pay a \$25 million fine. However, there are no convictions in the U.S or Colombia against the company’s executives. Currently, a complex multidistrict lawsuit against Chiquita has advanced in a federal court in Florida. The victims and affected communities have not received compensation or any other type of remedies.
- 7 Formal transitional justice mechanisms refer to formal and institutionalized mechanisms such as special tribunals and truth commissions. Informal transitional mechanisms refer to context-specific measures and traditional, customary or indigenous processes, such as community-based reconciliation frameworks that fall outside the scope of dominant judicial or other government-led systems. Although there were no significant cases discussed in the interregional exchange or case studies that illustrate private sector engagement in informal transitional justice frameworks, participants briefly spoke about the importance of considering these frameworks as promising avenues for reconciliation and redress. For instance, Liberia’s Palava Hut, a traditional justice mechanism to reconcile former combatants, is considered a promising space for healing and reconciliation that should include the private sector.
- 8 Institutional innovators, a concept used during the interregional exchange and in case studies, refer to staff, including investigators, researchers, commissioners, lawyers, prosecutors and judges, among others, who advance corporate accountability cases and include the private sectors within transitional justice mechanisms. This concept was often used by participants as reflected in the book *Transitional Justice and Corporate Accountability From Below: Deploying Archimedes’ Lever*, which was written by participants Leigh Payne, Gabriel Pereira and Laura Bernal-Bermudez.
- 9 Some key institutional reforms undertaken in South Africa include the Land Claims Court, the Constitutional Court, the Commission for Gender Equality, the South African Human Rights Commission, and the National Youth Commission. Land reform policies, however, have been criticized as failed policies that did not rectify or address land inequality and the effects of apartheid.
- 10 Since the 1950s, political and violent clashes between Colombia’s left-wing guerrillas, mainly the Revolutionary Armed Forces of Colombia (FARC); right-wing paramilitary groups, particularly the *Autodefensas Unidas de Colombia* (AUC); and official security forces resulted in countless gross human rights violations. The complexity of the conflict was further exacerbated by the role played by third parties, including the private sector. After several failed peace building attempts, the Colombian government and the FARC negotiated a peace agreement in 2016.
- 11 The Corporate Accountability and Transitional Justice (CATJ) Database was developed by participants Leigh Payne, Gabriel Pereira and Laura Bernal-Bermudez. Through their research the authors developed a database with information on direct and indirect abuses carried out by businesses and economic entities and the transitional justice mechanisms used to address these abuses in different countries. The product of this research culminated in the CATJ Database, as well as the book *Transitional Justice and Corporate Accountability From Below: Deploying Archimedes’ Lever*.
- 12 The Guatemalan Truth Commission (Comisión para el Esclarecimiento Histórico) documented several cases involving sugar companies and Coca-Cola in repression against its workers and union members perceived as supporting the left. The Brazilian national truth commission (*Comissão Nacional da Verdade*) documented conflict-related violence against workers by Volkswagen and other companies.
- 13 The concept of universal jurisdiction refers to the ability of a domestic judicial system of a state to investigate and prosecute certain crimes even when such crimes were not committed on its territory or do not involve one of its nationals. Universal jurisdiction is based on the notion that certain crimes affect the fundamental interests of the entire international community. Such crimes include war crimes, genocide and crimes against humanity.
- 14 The term *Inyenzi* was used to refer to the Tutsi population in Rwanda. For more information on these cases, see

United Nations International Residual Mechanism for Criminal Tribunals (2003). “Three Media Leaders Convicted for Genocide” [press release]. Available at <https://unictr.irmct.org/en/news/three-media-leaders-convicted-genocide>.

- ¹⁵ At the time of this writing, a second draft of the United Nations Binding Treaty on Transnational Businesses and Human Rights has been published. In October 2020 the UN open-ended intergovernmental working group held its sixth session of negotiations based on the revised second draft. Negotiations are ongoing and are expected to continue throughout 2021.
- ¹⁶ The corporate social responsibility, or CSR, excuse refers to businesses’ portrayal of themselves as conscientious actors whose main responsibility is to engage in philanthropic initiatives and integrate the language used in instruments such as the United Nations Guiding Principles into their policies. These measures often lack sustainable and meaningful structural changes. The CSR excuse is perceived as an ineffective strategy that enables business to propose voluntary and market-based solutions that usually bolster the company’s public image.
- ¹⁷ The *Abuelas de Plaza de Mayo*, or *las abuelas* (Grandmothers of the Plaza de Mayo), is a group of women united to search for their disappeared daughters and sons. Many of these grandmothers knew that their disappeared children were expecting mothers. From the moment of their disappearance, *las abuelas* began a desperate search for their children and grandchildren. They actively searched for decades while establishing an organization that has methods to identify the missing children. To date, approximately 120 children have been reunited with their biological families.





International Coalition of
SITES of CONSCIENCE

www.sitesofconscience.org

 [Facebook.com/SitesofConscience](https://www.facebook.com/SitesofConscience)

 [@SitesConscience](https://twitter.com/SitesConscience)

 [SitesofConscience](https://www.instagram.com/SitesofConscience)



GIJTR

Global Initiative for Justice,
Truth & Reconciliation

www.gijtr.org

 [@GIJTR](https://twitter.com/GIJTR)

 [@GIJTR](https://www.instagram.com/GIJTR)