

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

PHASE II SUMMARY REPORT



GIJTR

Global Initiative for Justice
Truth & Reconciliation



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.

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The CSVr has continued with the transitional justice work that it began during the life of the South African Truth and Reconciliation Commission. Over the past 15 years, it has engaged, both through regional mechanisms and in global forums, with international partners in order to promote effective transitional justice processes in a range of countries. The CSVr has worked on numerous collaborative projects with African and other international partners with a view to conducting research, engaging in policy development, building the capacity of non-governmental organisations (NGOs), establishing psycho-social support systems, facilitating community and national dialogue, and engaging in policy advocacy and legal cases involving victims' rights.

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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.

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Cover: In the training room. (Activity I: Training workshop for private sector actors and community leaders on the role and responsibilities of private sector actors in the transitional justice process in Uvira from 9 to 10/08/2022.)

Photos used with permission courtesy of Solidarité Echange pour le Développement Integral (SEDI). These are images of the activities of the community awareness project on the role and responsibility of private sector actors in the process of transitional justice.

ABOUT THIS REPORT

Released in January 2022, this summary report, *The Roles and Responsibilities of Private Sector Actors in Transitional Justice in Africa and Latin America: Phase II*, is part of a larger initiative led by the International Coalition of Sites of Conscience (ICSC), which examines 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 Centre for the Study of Violence and Reconciliation (CSVr) and the Due Process of Law Foundation (DPLF) contributed immensely to this second phase of the project, building on lessons learned in Phase I.

In the second phase, participants and partners delved deeper into litigation as a potential means of seeking accountability for human rights abuses committed by the private sector in Latin America and Africa with the goal of influencing and strengthening accountability for private sector violations within transitional justice processes. As described in the case studies and regional reports on trends identified in both regions during Phase I, there have been strong examples of private sector accountability with notable successes thus far, but these gains have mainly come through truth-seeking processes or negotiated settlements. There still remain significant challenges to achieving corporate accountability and victim participation through litigation in formal transitional justice accountability mechanisms and special courts, in part due to evidentiary standards and restrictive legal frameworks or judicial interpretations thereof. Therefore, this second phase followed up on several lines of inquiry presented in the phase I Briefing Report, deepening research and raising awareness among communities and practitioners of some of the most salient issues around private sector actors in transitional contexts, focusing on litigation, remedies and non-recurrence.

This summary report, which is intended to support civil society and practitioners in the field of transitional justice, synthesizes key points exchanged during a second, remote interregional workshop convened in June 2022 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, Colombia, Guatemala, Democratic Republic of the Congo, Nigeria, South Sudan, and South Africa. A dynamic group of approximately 80 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 reconvened from Phase I and joined the exchange across the two continents, the United States and the United Kingdom.

The summary report also incorporates the outcomes and insights from ten small grants awarded to civil society organizations in Africa and Latin America to undertake projects in their communities. Projects were undertaken in Democratic Republic of the Congo, South Africa, Colombia, Uganda,

Guatemala, Argentina, Kenya and Guinea, and this report highlights the outcomes of the community projects.

By incorporating the outcomes of the community projects along with the research from the case studies, the report aims to provide practical guidance to practitioners – including victim and survivor groups, civil society actors and practitioners – who are seeking to promote accountability among the private sector for involvement in the commission of grave human rights violations and related crimes through litigation or other forms of transitional justice.

Consortium partners wish to thank all participants who contributed tremendously to the interregional exchange and community projects 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.

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www.gijtr.org

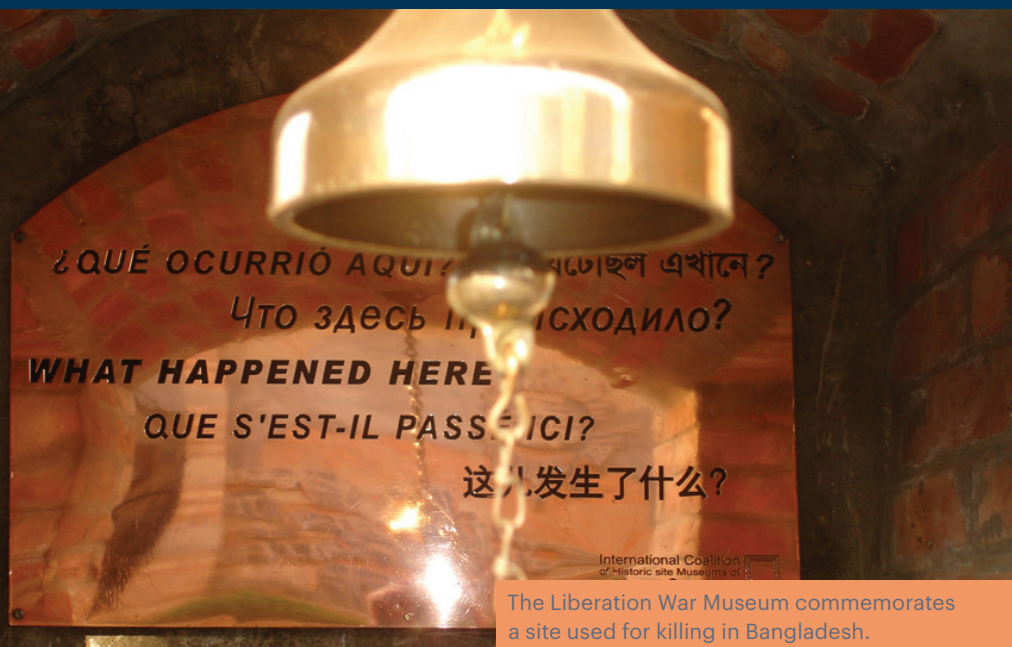
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ABOUT THE GLOBAL INITIATIVE FOR JUSTICE, TRUTH AND RECONCILIATION CONSORTIUM

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



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

The GIJTR Consortium (“the Consortium”) comprises the following nine partner organizations:

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

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

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

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

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



Participants of a GIJTR exhibition of body-maps in Colombo, Sri Lanka.

BACKGROUND

The transitional justice, business and human rights and corporate accountability movements have operated as largely separate fields, although practitioners and academics have recently made notable progress in bridging the divide between these areas in recent years. In 2021, Global Initiative for Justice, Truth and Reconciliation (GIJTR) launched a project exploring the roles private sector actors have played in transitional justice processes in Africa and Latin America, as well as the types of responsibility they should bear for human rights abuses committed during conflict. Phase II project partners International Coalition of Sites of Conscience (ICSC), Centre for the Study of Violence and Reconciliation (CSV) and Due Process of Law Foundation (DPLF) identified several commonalities between Africa and Latin America that explain the significant role played by private sector actors in conflict, post conflict and authoritarian settings. These include a strong relationship between the government and the private sector where political elites have prioritized economic interests; a strong relationship between armed conflict, the private sector and natural resources or land with strategic economic value, which has had devastating impacts on affected communities; and the disproportionate impact these violations have had on already marginalized groups like women, indigenous, Afro-descendent and campesino populations.

Still, despite overwhelming evidence of private sector actors' role in atrocities committed during conflict across the two regions, it became apparent that

transitional justice mechanisms have still not adequately addressed private sector responsibility for these crimes. None of the formal judicial accountability mechanisms analyzed within the context of the interregional exchange held in Phase I of the project provided for corporate criminal responsibility, and very few examples demonstrate an effective route toward private sector accountability within existing transitional justice frameworks. Most relevant and emblematic cases addressing the responsibility of the private sector for atrocities committed during conflict have in fact occurred outside traditional transitional justice frameworks or in foreign jurisdictions.

Further, of the traditional transitional justice mechanisms, truth-seeking mechanisms have most frequently acknowledged the role of the private sector in the commission of human rights violations through their reports and recommendations. Yet there has still been relatively limited follow-up on these findings, even after truth-seeking processes have long been completed. For its part, the private sector has also largely opposed, failed to advocate for or failed to participate in these mechanisms, often rewriting historical narratives or turning a blind eye toward its harmful conduct for continued economic gain. As a result, outside transitional courts, domestic accountability mechanisms have also had difficulty effectively holding private sector actors accountable for their actions. Nevertheless, civil society and victim groups' persistent efforts have revealed innovative means of highlighting these issues, providing inroads for further collaboration toward justice, accountability and redress.

INTRODUCTION

Historically, the private sector's role for direct or indirect involvement in gross human rights violations during conflict and civil unrest has been overlooked in subsequent transitional measures. However, recent developments across multiple jurisdictions indicate an evolution in the field of private sector accountability for human rights violations. Despite numerous challenges, momentum in this field is evident.

This report draws from two interregional workshops on the roles and responsibilities of private sector actors in transitional justice in Africa and Latin America. The workshops were held in April 2021 and June 2022, respectively. Participants represented diverse groups, including academia; grassroots civil society organizations, including women's rights groups and human rights defenders; governmental and regional institutions; transitional justice mechanisms; the media; private law firms; and faith-based organizations in Africa and Latin America. The outcome of the first workshop exchange, which includes specific case studies, recommendations and additional background, is reflected in the first report.¹

The second interregional exchange ("the 2022 workshop") offered a platform for continued exchange on the private sector's involvement in human rights violations during armed conflict and civil unrest, as well as different transitional justice mechanisms in Africa and Latin America. The workshop provided a space to explore the challenges and opportunities of litigation as a strategy for holding private sector actors accountable for human rights violations and related crimes. It further identified and discussed areas for legal innovation, strategic litigation and advocacy; the role of victims and civil society in litigation involving private sector accountability in transitional justice contexts; and appropriate remedies and reparation measures that promote nonrecurrence in the context of litigation. A key outcome from the workshop is hopeful: Despite ongoing impunity for corporations' role in gross human rights violations, strategic litigation has repeatedly helped narrow the impunity gap.

Beyond the interregional exchange, ICSC provided small grants to 10 civil society organizations to implement community projects related to private sector actor accountability in Latin America and Africa, detailed in this report.

The outcomes of all these projects acknowledge the role of corporations in gross human rights violations and the systematic manner in which corporations have not participated in the subsequent accountability mechanisms. Save for South Africa, where research reveals some levels of corporate accountability, there has been no effective corporate accountability implemented in any of the other examined contexts. And still, even in the South African case, which had an out-of-court settlement, there are implications that the question of corporate accountability was not subjected to judicial determination.

To support the partners and participants, project partners also examined private sector accountability in transitional settings through ten case studies, each selected for the information and context it illustrated. The cases covered the litigation in South Africa, Nigeria, South Sudan, Argentina, Guatemala and Colombia. These cases illustrate private sector actors' role in human rights violations, accountability efforts within transitional justice processes and the challenges and opportunities.

By drawing on the information from the case studies, project outcomes and interregional exchanges, this report seeks to advance the discourse on accountability of the private sector for human rights violations in the transitional justice context to narrow the impunity gap. It also shines light on strategies to engage private sector actors in transitional justice processes. Further, it provides information and practical guidance to practitioners, victim and survivor groups, civil society actors and others seeking ways to hold the private sector accountable either through litigation or other forms of transitional justice, as well as meaningful access to remedies.

The following analysis provides a brief overview of recent developments concerning corporate accountability for atrocities at the national, regional and international levels. Following, key issues on corporate accountability for human rights violations are discussed, including the role of private sector actors in committing human rights violations, legal obligations for the private sector actors to respect human rights and state duty to protect people from business-related human rights abuses. The report provides an overview and summary of the community projects focusing on the key outcomes on the role and responsibility of the private sector for human rights abuses. Similarly, the report further analyzes the case studies revealing the roles and responsibility of the private sector in human rights violations. It also explores the potential of strategic litigation as a mechanism toward achieving corporate accountability in transitional justice.

To support practitioners, the report makes five key recommendations. First, the report recommends ways to recalibrate civil society's role in demanding corporate accountability—in particular, strategies for civil society in choosing their advocacy, how they can engage new authorities and how to adopt a victim-centered approach in seeking corporate accountability as well as reparations. It also urges civil society to develop collective victim movement and further calls for coalitions among civil society. Second, the report recommends that it is imperative to include explicit provisions in transitional justice mandates that address the role of the private sector. Third, the report recommends ways institutional innovators at the domestic, regional and international levels can advance corporate accountability. Fourth, it recommends that states engage economic actors in closing the victims' gap. Fifth, the report further suggests ways to incorporate institutional gatekeepers in corporate accountability initiatives and finally how to use national, regional and international criminal prosecution for corporate perpetrators.

The activities undertaken as part of this project that are summarized in this report confirm that existing governance gap with respect to corporate accountability for human rights violations is multifactorial and cannot be underestimated. Those who are working on this have to contend with corporations undermining corporate accountability efforts² and advocate for evolving frameworks to expand the capacity of existing transitional justice approaches regarding corporate accountability.³ In addition, they must assess how the potential role of regional and international structures like the UN human rights architecture, which are not traditionally designed as transitional justice mechanisms, can be accessed to achieve corporate accountability, as well as the push for substantive international norms to regulate corporate accountability.⁴ As these activities have highlighted, those in this field are working to identify effective strategies for tying findings on structural racism and violence to claims for remedies; optimal ways to engage new authorities after power transitions in different country contexts; ways to access regional mechanisms or file claims in foreign courts; and ways to form nongovernmental organization (NGO) coalitions to identify strategies for working with victim communities, developing collective victim movements and identifying resources to support this work. Within this substantial undertaking, this report discusses past litigation, highlights current efforts and makes recommendations for going forward.

RECENT DEVELOPMENTS

The recent past has witnessed numerous initiatives at the regional, national and international levels that seek to resolve some of the challenges of accountability.

International human rights standards dictate that victims of human rights violations be duly accorded the right to an effective remedy.⁵ This right has been interpreted to comprise numerous aspects: the duty to investigate and prosecute,⁶ which accompany the right of victims to participate in criminal proceedings,⁷ sufficient reparation and assistance⁸ or compensation⁹ and guarantee for non-repetition.¹⁰

While international treaty law recognizes the right of victims of human rights violations to an effective remedy against state and nonstate actors, it is silent about the existence of this right against corporations. However, soft law obligations do exist to call upon corporations to remedy their human rights abuses. Yet despite their potential, corporations are not adequately considered for reparations in their broad sense, which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Notably, some cases have witnessed out-of-court settlements as a form of compensation.¹¹

Concerning prosecution at the International Criminal Court (ICC), the Office of the Prosecutor (OTP) attempted to promote corporate accountability by, for example, confirming charges against a business executive in the case of Kenya.¹² The OTP's 2016 *Policy Paper on Case Selection and Prioritisation* also indicates the OTP's intention to give particular consideration to crimes "that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."¹³ Notably, these crimes involve multinational corporations. Victims, human rights lawyers and civil society organizations in Colombia also referred information to the OTP of the ICC, and the Colombian

situation has been under investigation since 2004. Given that the Colombian authorities were not inactive, unwilling or unable to prosecute Rome Statute crimes, the OTP concluded that complementarity was working and therefore there was not a reasonable basis to believe that ICC prosecution of the situation would be admissible. Thus, on October 28, 2021, the ICC OTP closed its preliminary examination into Colombia, choosing not to proceed with an investigation.¹⁴ Civil society has lamented this conclusion, claiming that the Colombian government has not diligently investigated this case and there are no official convictions.¹⁵

While corporate complicity does not feature in the OTP's subsequent interim reports on Colombia, this advocacy has positively influenced government responsiveness to matters related to corporate complicity. One such instance concerns allegations against Chiquita Brands' involvement in crimes against humanity committed by paramilitary groups using funds from Chiquita.¹⁶ In its latest update, the OTP reported on active domestic cases against executives and employees of Chiquita Brands based on information shared by the Colombian government.¹⁷



Family photo. (Activity II: Training workshop for members of civil society on the observation, investigation and reporting of cases of abuse and violation of human rights held in Uvira from 12 to 13/08/2022.)

Regional human rights systems have also advanced the discourse on corporate accountability. In particular, the Inter-American Court of Human Rights issued important decisions on state obligations to investigate corporate-related human rights abuses.¹⁸ In this regard, the Inter-American System has positively affected the interpretation of concepts often used in corporate activities like the concept of due diligence and state obligation to investigate corporate abuses as well as the concept of reparations. The African Commission on Human and Peoples' Rights has also found governments responsible and ordered investigations and prosecutions of those involved.¹⁹ In some cases before the African Court on Human and Peoples' Rights, the court has found governments responsible for corporate human rights violations.²⁰

National mechanisms remain most significant in corporate accountability. Corporate accountability in this sphere can take the dimension of either administrative or civil or criminal cases, both influenced by international law norms. Venues providing a legitimate forum for national prosecution are the host state, where the crimes were committed or the harms where suffered; the home state, where the corporation is legally domiciled; and any other state exercising jurisdiction over the crimes concerned, including universal jurisdiction.²¹ The many ways in which national courts can assume jurisdiction, especially the exercise of extraterritorial jurisdiction, narrow the impunity gap for corporate criminal liability.

Concerning judicial cases involving corporate responsibility in national courts, Argentina and Colombia present the largest numbers of cases under criminal investigations and prosecution. Each of these countries has 19 cases of this kind. As of 2016, the status of these cases in Argentina was that "13 cases were pending, three cases had been dismissed in the first instance and were pending appeal, two cases had produced first instance convictions and were pending appeal, and one case had ended in acquittal."²² The status of the Colombian cases has also been documented as "confirmed convictions in nine cases, one acquittal, and one first instance conviction pending appeal. The remaining eight cases were still open (at investigative stage) as of 2016."²³

In addition to domestic investigations, Colombia created an ad hoc tribunal, the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, or JEP), with possible jurisdiction to investigate the role of the private sector human rights violations for conflict-related crimes, should there be voluntary submission

to the tribunal. The establishment of the JEP and related transitional justice mechanisms was a result of the 2016 peace agreements between the Colombian government and the former Revolutionary Armed Forces of Colombia—People's Army (FARC-EP).²⁴ The JEP originally had jurisdiction over "civilian third parties," which includes businesspeople and companies, but this was subsequently altered by the Colombian Constitutional Court. The court's decision effectively eliminated the JEP's mandatory jurisdiction over economic actors. Currently, the JEP has jurisdiction over only economic actors who voluntarily submit their cases to this transitional tribunal. In 2019, 657 people had voluntarily presented themselves, and in 2020, the JEP decided to prioritize 116 cases involving these third parties, of which 55 involved individual economic actors.²⁵ In August 2022, the JEP opened a case to investigate crimes committed by members of the armed forces, by other state agents or in association with paramilitary groups and third parties, including economic actors.²⁶

In general, for jurisdictions that do not recognize corporate criminal liability, civil remedy might offer victims an alternative avenue. NGOs, victims' groups and human rights lawyers have turned to strategic litigation in third-party countries for corporate accountability for atrocities. Literature on corporate accountability through these mechanisms focuses on civil claims under the US Alien Tort Statute (ATS). However, the Supreme Court cases of *Kiobel* (2013) and *Jesner* (2018) demonstrate the constrained use of the ATS as an accountability mechanism for corporate complicity.

Similar corporate complicity cases involving Colombia, Guatemala and Argentina were filed in the United Kingdom and Canada.²⁷ Notably, however, no case has culminated in a final judgment in favor of victims' right to remedy.²⁸

Despite the limited achievement in extraterritorial civil claims, a study has documented the ripple effect of these cases. It has been found that most companies sued in foreign countries for their role in committing atrocities "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."²⁹

Extraterritorial corporate claims have also led to settlements with victims of their atrocities. Litigation in U.S. courts against Swiss banks for their conduct during the Holocaust, in which the banks paid \$1.25 billion to victims, and the German companies' acknowledgment of their "moral responsibility" to provide funds to victims of their slave-labor practices are cases in point.

PRIVATE SECTOR INVOLVEMENT IN SERIOUS HUMAN RIGHTS VIOLATIONS

Previous research³⁰ in this area notes several contexts within which the private sector has been complicit in past human rights violations: financial incentives provided by governments, owning or controlling resource-rich land, suppressing labor rights and trade unions, government-sponsored land grabs and use of the media as the propaganda arm of government.

The South African Truth and Reconciliation Commission's approach to private sector involvement in gross human rights violations is particularly helpful in delineating the scope. According to the South African truth commission, the private sector participated in atrocities in three categories: the first-order involvement, the second-order involvement and the third-order involvement. First-order involvement comprised businesses directly involved in perpetrating atrocities. These include those involved in developing government policies

during the apartheid regime, which entailed gross human rights violations. It also includes businesses that failed to take action to stop gross human rights violations. The second-order involvement comprised businesses with foreseeability that their product or service would be used for unacceptable purposes. They include businesses that implicitly collaborated with the state by doing business with it or paying taxes and promoting economic growth knowing that their products and services would be used for "morally unacceptable purposes." Finally, third-order involvement refers to businesses that benefited by operating in a racially structured economy.³²

While this categorization was specific to the South African experience, it could easily apply to other contexts. Natural resources are central to most conflicts in Africa and Latin America. Multiple cases in these regions demonstrate how the private sector has supported repressive governments that commit gross human rights violations while gaining an economic benefit from the exploitation of natural resources. In Guatemala, "the government abstained from passing any land reform legislation in exchange for financial contributions that would benefit the dictatorship."³³ In Colombia, economic actors have been associated with either forming or funding irregular armed groups, especially in "regions that offer strategic advantage for the exploitation of certain goods or services."³⁴ Subsequent prosecutions of businesspeople have also revealed the involvement of private sector actors in violent forced displacement of Afro-Colombian communities by illegal armed groups, as well as targeted violence and land dispossessions.³⁵

Corporations' exploitation of natural resources has also been central to the conflicts in Angola, DRC, Liberia, Nigeria and Sierra Leone. In both Liberia and Sierra Leone, this exploitation supplied the respective regimes with funds that fueled the war and facilitated the acquisition of weapons.³⁶

Governments and illegal armed groups have also benefited from multinationals exploiting natural resources in conflict zones. Former United Nations Secretary General Kofi Annan accused multinational corporations of being complicit in human rights violations in the context of armed conflict by buying "diamonds and other minerals" that support rebel groups to buy small arms and prolong conflicts.³⁷ This was the case for Angola, where South African company De Beers bought diamonds from UNITA, which in turn used the revenue to finance the war.³⁸ De Beers also dealt in conflict diamonds from Sierra Leone. In the

DRC, AngloGold Ashanti supported the Nationalist and Integrationist Front, one of the main “political” parties, which perpetrates human rights abuses and terror in the northeast region of the country.³⁹ AngloGold Ashanti is part of the international mining conglomerate Anglo America and offered support in return for gold exploration activities.

Multinationals have also supplied arms to governments to sustain conflicts for lucrative business concessions. For example, Lundin Petroleum, a Swedish company, and Talisman Energy, 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 (now South Sudan).⁴⁰ 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.

Private sector actors have also participated directly in atrocities by supporting repressive governments through suppression of labor rights and trade union association. In Colombia and Guatemala, corporations were accused of engaging paramilitaries and other illegal armed actors to suppress labor rights and intimidate or assassinate union leaders.⁴¹ In Argentina, Colombia and Brazil, several corporations have been allegedly involved in providing financial and material resources to state actors and armed groups to commit human rights violations and related crimes.⁴² In the case of Liberia, security forces associated with mining companies perpetrated gross human rights violations to maintain control over their respective business areas, to maintain control over the local community and their employees.⁴³ The mining companies were also involved in money laundering, terrorism, bribery of public officials, illegal arms trafficking and tax evasion. In South Africa, mining companies such as Gold Fields and Anglo American have been accused of torturing workers, discriminatory labor practices and enslaving Black workers during the apartheid era.⁴⁴ The mining sector has also been accused of influencing and benefiting from cheap labor practices in armed conflict contexts.

The private sector was also involved in financing and providing logistical support to dictatorship regimes. The case studies on Argentina and Brazil demonstrate the role of the private sector in the installment of dictatorship regimes and their subsequent repressive rule in the two countries. In



The participants in the room. (Activity II: Training workshop for members of civil society on the observation, investigation and reporting of cases of abuse and violation of human rights held in Uvira from 12 to 13/08/2022.)

Argentina, corporations financed and supported the repressive government through repression of trade unions and business rivals. For example, economic actors developed lists of unionized workers and union leaders who opposed the regime or the company’s economic interest and turned in these lists to state agents. These union workers would later be subjected to kidnapping, torture, disappearance and killings.⁴⁵ Similarly, the case study on Guatemala portrays the extensive role of corporations in the government’s repressive activities.⁴⁶ In Peru, the factors of inequality and social exclusion have been partially attributed to the role of private sector actors over their influence on government policy.⁴⁷ These two factors played a role in the internal armed conflict and persist today.

In Guatemala, corporate complicity in extrajudicial killings was further manifested through businesses creating and financing firing squads. Businesses also collaborated with the military through the use of forced labor, supporting and facilitating paramilitary acts of enforced disappearance of trade unionists and stripping food and supplies from indigenous workers accused of collaborating with the guerrillas. Private sector actors were also accused of indiscriminate bombardment of rural populations.⁴⁸ Businesses also

supported repressive violence against members of trade unions in the sugar industry and among workers for the Coca-Cola company.⁴⁹

Private sector actors facilitated repressive governments in numerous other ways that furthered the commission of atrocities. In South Africa, banks acted as intermediaries in illicit transactions that sustained the apartheid regime for years. Corporate executives from several banks served on the government-sponsored Defense Advisory Board, a group that supported the development of apartheid policies. Banks, financial institutions and other private actors were also accused of laundering money and facilitating the procurement of weapons despite international embargoes.

Similarly, businesses in Brazil, Argentina and Guatemala were either beneficiaries of the repressive dictatorship or direct perpetrators of atrocities. In Brazil for example, businesses were accused of committing or being involved in crimes such as kidnappings, arbitrary arrests and detentions, murder, torture, disappearances, extrajudicial killings and property theft. Victims included employees, members of the community and political opponents.

LOCAL EXPERIENCES WITH TRANSITIONAL JUSTICE AND PRIVATE SECTOR ACTORS

As part of this project, ICSC provided small grants to civil society organizations to implement community projects related to private sector actor accountability in Latin America and Africa. Each project targeted specific locations and contexts identified by 10 CSOs: The DRC projects focused on the role of mining companies in the province of Lualaba and Uvira; the project in Uganda critiqued the 2019 Transitional Justice Bill and its inadequacy to effectively address corporate accountability; the project in Guinea analyzed violations related to the construction of the Souapiti hydroelectric dam; the Kingdom of Eswatini project examines the exclusion of corporate accountability in Eswatini's transitional justice process; the project in Colombia focused on the effects of agro-industry of the sugar cane on human rights; the project in Guatemala focused on the corporate role in human rights violations for human rights defenders in the region of Maya Chorti; the South African project examined out-of-court settlements by corporations in response to litigations against them for their role in gross human rights violations during apartheid.

The objective of these projects was to establish practical ways of holding private sector actors accountable for atrocities committed in armed-conflict contexts through litigation or forms of transitional justice, as well as to guarantee victims' access to remedies. The project also sought to provide practical ways to navigate the challenges that hinder corporate accountability in different transitional contexts.

The design and implementation of these projects were focused on local community education on available complaint mechanisms for redress for human rights violations by economic actors, civil society capacity building on their role in seeking corporate accountability for human rights violations, and an analysis of local laws and transitional justice frameworks to address corporate complicity in human rights violations.

The outcome of these projects reinforces that corporate entities are often excluded from accountability for atrocities.

While all the projects acknowledge the role of the private sector in gross human rights violations, they also note the systematic manner in which this sector has been excluded from subsequent accountability mechanisms. For example, some of these violations include the role of economic actors in harms related to mining company activities such as floods resulting from acid discharges; cracks in and collapse of houses due to explosives used in mines; chronic pulmonary, respiratory, ophthalmological and dermatological diseases due to harmful remnants such as toxic dust; the gross violations of human rights related to the effects of agro-industry of the sugar cane; and involvement in human rights violations and attacks against human rights defenders in the Maya Chorti region. Despite these harms, corporate impunity is evident in all the projects. Save for the South African project, which reveals some levels of corporate accountability, there has been no effective corporate accountability measures implemented in the other projects.

Corporate impunity is evident in gross human rights violations of mining companies in the province of Lualaba and Uvira in the DRC. Yet, because of lack of information, resources and tools, victims do not resort to formal judicial or nonjudicial complaint mechanisms to obtain substantial reparation for harms suffered. Typically, the government reached agreements with companies exploiting natural resources without involving affected communities. Although the government has full knowledge of these violations, it chooses to support the

companies by violently repressing civil society demonstrations.

A similar scenario is found in Guinea, where there is evidence of displacement of vulnerable communities and other violations related to the construction of the government-commissioned Souapiti hydroelectric dam.

Guatemala's Maya Chorti region has suffered similar violations resulting from the activities of extractive companies. Yet the Guatemalan government has persistently criminalized acts by human rights defenders, leading to arbitrary arrests and detention for condemning abusive corporate conduct. This has negatively affected the struggle and resistance movement among the Maya Chorti communities.

Furthermore, the 2019 Transitional Justice Bill of Uganda and the transitional justice framework of Eswatini do not envisage business-related gross human rights violations.



Crossroads work. (Activity II: Training workshop for members of civil society on the observation, investigation and reporting of cases of abuse and violation of human rights held in Uvira from 12 to 13/08/2022.)

The South African project reveals attempts to pursue judicial decisions against economic actors for their role in gross human rights violations during apartheid that led to out-of-court settlements. These types of settlements are common outcomes of investigations into crimes committed by the private sector in armed-conflict contexts. As part of the 2011 General Motors (GM) case, the company offered compensation in the amount of US\$1.5 million worth of shares in GM to be liquidated and paid to the two claimants in the apartheid case, *Khulumani reparations case* and *Ntsebeza*. In *Nkala & Others v Harmony Gold Mining Company Limited & Others* in 2012, the South Gauteng High Court agreed to the out-of-court settlement of ZAR8.5 billion (US \$5.1 million) to be set aside for the formation of a trust. In a settlement between Brazil and Volkswagen, a German subsidiary of Volkswagen operating in Brazil committed to paying BRL36 million to direct and indirect victims, as well as financial contributions to remedy crimes related to former Volkswagen employees during Brazil's 21-year military dictatorship, which ended in March 1985.

These settlements denied the opportunity to subject corporate accountability to judicial determination.

LEGAL CASE STUDIES

The transitional justice procedures in Latin America and Africa have achieved little in holding the private sector accountable for atrocities as a form of justice.⁵⁰ Some transitional justice mechanisms established special tribunals to hold perpetrators accountable for their crimes, but most of them were silent on the issue of private sector accountability. In fact, accountability through transitional justice mechanisms has very few examples demonstrating an effective route toward private sector accountability. Some symbolic success stories addressing businesses' responsibility for atrocities committed during conflicts occurred outside the scope of transitional justice frameworks. This has been through ordinary judicial processes in the respective country or in foreign jurisdictions, usually where the parent company is located.

Historically, the private sector has exerted its economic power to veto accountability efforts.⁵¹ These “veto players” take different forms. They exist as powerful multinational companies and political and business elites, among others, who use their global economic power to frustrate corporate accountability efforts for human rights abuses.⁵² Thus, the private sector has mainly opposed, failed to advocate for or participate in transitional justice mechanisms. This exclusionary nature of the private sector persists today. It is notable, however, that in some contexts, the issue of corporate accountability was not even discussed or foreseeable in the design of the transitional justice mechanisms. Then, upon implementation of transitional justice processes, this issue was often ignored and the private sector was generally not involved.

Given these complex challenges in seeking corporate accountability, strategic litigation offers a potential opportunity for seeking accountability for human rights abuses committed by the private sector in Latin America and Africa. The hope is this will positively influence and strengthen accountability for private sector violations within transitional justice processes.

Victims, human rights lawyers and civil society organizations have turned to strategic litigation either in host states or in third-party countries or international courts in search of corporate accountability for atrocities. The Marikana massacre and silicosis disease cases in South Africa, the Kilwa massacre in the DRC, the Ken Saro-Wiwa versus Shell case in Nigeria, the Lundin Energy case in South Sudan, the Ingegneros/Techint labor claims of Argentina, the Sepur Zarco gender-based violence case in Guatemala, La Fronterita's alleged crimes against humanity in Argentina, the Córdoba Livestock Fund of Colombia and the Drummond coal case in Colombia embody the complex challenges that characterize corporate accountability initiatives.

A few key themes run through the legal and procedural aspects of these strategic litigation cases. While some of these themes present a window of opportunity to advance corporate accountability for abuse, others hinder the effectiveness of litigation as a mechanism of corporate accountability.

First is the preference of out-of-court settlements in lieu of litigation. The silicosis case and the Saro-Wiwa case offer examples of companies opting for out-of-court settlement. In the Saro-Wiwa case, Shell settled out of court, providing a payment of \$15.5 million in compensation and for the establishment of a trust for the benefit of the Ogoni people.

However, these settlements were based on principles of no fault, whereby none of the parties to the agreement admitted to liability beyond the settlement. Therefore, the courts never got the opportunity to make a decision on whether the respondent companies were actually liable for the damages as claimed. As a result, corporate responsibility for these harms was effectively avoided. In principle, the court missed the opportunity to determine the substantive questions relating to corporate wrongdoing and to assign responsibility for the respective companies. Not only does this undermine corporate accountability efforts, but it also stifles the development of the concept.

Although the court never got to judicially determine the grievances in these

cases, monetary settlements may serve to alleviate economic distress caused but do not amount to acknowledgment or guarantees of non-repetition. Moreover, repeated action and settlements especially in the Saro-Wiwa case increased global awareness around the company's abusive conduct.

Second, civil claims relating to the Marikana cases have been directed mainly at the state, and the company has therefore been able to proceed without legal accountability. Despite the companies directly benefiting from the alleged abuses, the state settles these claims and the companies are not held accountable. Similarly, in the Kilwa massacre case, the call by the African Commission on DRC to initiate investigations and prosecutions against state and Anvil's personnel obscures the possibility of the company being held liable. This scenario can be contrasted with the Lundin Energy case, in which the Swedish public prosecutor for international crimes in 2010 opened an investigation Lundin Energy, a Swedish oil company, for having violated international humanitarian law by materially contributing to war crimes in Sudan. It further issued a notice to Lundin Energy that the Swedish Prosecution Authority would impose a corporate fine at the conclusion of the trial. This is an important step in formally connecting the company to the international crimes committed while operating in Sudan.



The participants in the 3 groups work in crossroads. (Activity II: Training workshop for members of civil society on the observation, investigation and reporting of cases of abuse and violation of human rights held in Uvira from 12 to 13/08/2022.)

Third, and closely related to this point, is the unstructured reparation programs that characterize corporate reparations' programs in some of the case studies. In the Marikana and silicosis cases, the company-driven remedial initiatives allow the narrative for these reparations to be framed as acts of goodwill on the part of the companies. This denies corporate accountability.

Fourth is the challenge posed by the observance of certain legal and procedural doctrines. These can either advance or undermine corporate accountability for abuse. The two-part procedure of the class action mechanism in South Africa slowed down the litigation processes in the silicosis cases. In particular, in *Nkala & Others v Harmony Gold Mining Company Limited & Others* in 2016, the issues before the court were to allow for (1) the institution of the class action and (2) the transmissibility of damages to the defendants of deceased miners. The substantive issues and the pronouncement of liability of the mining companies were therefore not considered by the court, as these issues could be analyzed only in the second phase of the process. Yet the process was interrupted by the out-of-court settlement that was reached shortly after the conclusion of the first phase.

In the case of La Fronterita, the pathway to justice was substantially delayed by "stop-motion" effects. Stop-motion is a series of judicial decisions taken in the investigative phase by first-instance investigative judges and appeal tribunals in Argentina. The stop-motion effect occurred mainly during a political context that disfavored corporate accountability. In December 2020, almost one year after elected President Fernández took power, the court overturned the precedent decisions blocking the path to accountability. Fernández's government reinstated some transitional justice policies discontinued during his predecessor's administration. Also, the human rights secretary created a specialized unit dedicated to fostering corporate accountability in a transitional justice context.

In the Ingegneros/Techint case, the Supreme Court of Argentina overturned a lower court decision against the company. It argued that statutes of limitations hold for labor claims against companies even when they are connected to crimes against humanity.

Fifth is the potential of regional mechanisms in advancing corporate accountability. In the case of the Kilwa massacre, the victims brought complaints to the African Commission on Human and Peoples' Rights in November 2010. In

2016, the commission held that the Congolese government had violated a range of human rights under the African Charter on Human and Peoples' Rights. The commission held the DRC responsible for the massacre and inter alia urged it to pay a sum of \$2.5 million to the eight victims and their families and to prosecute those state and Anvil Mining personnel involved in the human rights violations. The commission also publicly rebuked Anvil Mining for providing logistical support and recommended that the company be prosecuted.

The key lesson from this case is that while positive judicial decisions are a notable achievement, they are not an end in themselves. They require full implementation to achieve transitional justice objectives. In some instances, this may call for lobbying and advocacy through civil society organizations to force states or corporate entities to comply with the decision. Despite the African commission finding the DRC responsible and making the necessary orders concerning reparations and the need to investigate and prosecute the perpetrators in the Kilwa massacre incident, this decision remains unenforced. One of the reasons that underlie this nonenforcement is that decisions by the African Commission are deemed not to be legally binding but merely of a persuasive force. As such, some states may not take them with the seriousness they deserve. However, although the commission is one of the organs that can refer cases to the African Court,⁵³ it has been reluctant to do so. Notably, since the establishment of the African Court, on January 25, 2004, the African Commission has submitted only three cases to the court, which demonstrates the general reluctance of the commission to refer cases to the African Court.⁵⁴

These case studies also demonstrate the disproportionate impact these violations have had on already marginalized groups like women, indigenous, Afro-descendent and *campesino* populations. The Sepur Zarco case involved women who suffered political gender-based violence exercised by Guatemala's authoritarian government in a planned, systematic and continuous manner from 1980 to 1984 within the context of the internal armed conflict. In this case, according to the court, economic motivation was central in committing the gender-based and sexual crimes as a form of torture.

A comparative analysis of these cases further demonstrates a strong relationship between the government and the private sector. In all instances, political elites prioritized economic interests over and above the interests of the local communities, which further exposes the local communities to the repressive actions of the governments in favor of the private sector.

CHALLENGES AND OPPORTUNITIES WITH LITIGATION

While litigation offers an opportunity for holding the private sector accountable for its role in human rights abuses in transitional justice contexts, it is also accompanied by numerous challenges. It is worth noting the numerous recent advances in litigation in this area, with notable and impactful cases; however, the purview of this report is limited.⁵⁵

International Tribunals

To date, there has been no international or ad hoc criminal tribunal that has exerted its jurisdiction over legal persons. Insofar as the corporate accountability before the International Criminal Tribunal of Rwanda and in the Kenyan ICC cases is concerned, the cases involved corporate officials and not corporate entities as such. The African Union Malabo Protocol creates an International Criminal Chamber with jurisdiction over international crimes and transnational crimes and expressly bestows jurisdiction over corporations. However, the protocol is not yet in force.



The participants in the 3 groups work in crossroads. (Activity II: Training workshop for members of civil society on the observation, investigation and reporting of cases of abuse and violation of human rights held in Uvira from 12 to 13/08/2022.)

Regional Human Rights Mechanisms

Though not fashioned out as transitional justice mechanisms, regional mechanisms offer an additional avenue to pursue corporate accountability. In two instances, the African Commission and the African Court on Human and Peoples' Rights have found governments responsible and ordered investigations and prosecutions of those involved.⁵⁶ The Inter-American Court of Human rights has also made great contributions regarding interpretation of concepts often used in corporate activities, like due diligence and state obligation to investigate corporate abuses.⁵⁷

The Inter-American Court of Human Rights has also extensively contributed toward analysis of evidence on corporate abuses and provision of remedy and reparations. In 2012 the court issued a judgment against Guatemala over the 1982 massacre of the 177 inhabitants—including women and children—of the Rio Negro community. Following the reluctance of the Guatemalan government to comply with this decision, the communities involved have resorted to international allies to weigh in. This bore fruits when in 2014 the American government “made compliance with the order to extend reparations to the Chixoy survivors a condition for continuing military aid to Guatemala.” As of December 2017, the Guatemalan authorities had compensated 858 of the 2,274 affected families.⁵⁹

Truth Commissions

Investigation by truth commissions on the role and responsibility of corporations in atrocities is key. As demonstrated in all the case studies, investigation and findings by truth commissions have played a central role in creating either awareness of the role and responsibility of corporate participation in human rights violations or subsequent prosecution initiatives. Yet truth commission recommendations on corporate accountability have not been implemented in all cases.

While studies show that some truth commission staff have the potential to act as veto players and frustrate corporate accountability initiatives, it is imperative for the framework establishing a truth commission to envisage and provide solutions to these acts of sabotage. It is also important that the legal framework expressly bestow mandate over private sector actors. More so, the legal framework should make the participation of the private sector mandatory.

STRUCTURAL BARRIERS TO ACCOUNTABILITY

Case studies and community projects, as well as discussions during the interregional exchange, confirmed the impact of structural barriers to accountability. While some progress has been made, civil society organizations are still seeking support and guidance on how to best push through these barriers and toward accountability.

Political Will

The absence of political will to pursue corporate accountability for atrocities is a common factor in all the case studies. This is mainly informed by the powerful role of the private sector in the economy and the political arena as well as their influence over state policies and functions. Save for Argentina and Colombia, which have subjected corporate officials to prosecution at the national level,⁶⁰ corporate impunity reigns in most countries going through transitional justice processes. In some countries, such as Guatemala, there have been partial accountability measures through the voluntary corporate social responsibility initiatives toward reconstruction of peace, whose efforts were prematurely abandoned.⁶¹ The adoption of an amnesty law depicts the Guatemalan state’s continued rejection of the accountability agenda defined by the peace accords.⁶² Of the 20 cases prosecuted in the post-armed-conflict period relating to the crimes committed during the conflict, there has been no conviction for

economic accomplices to related human rights violations.⁶³ Thus, in Guatemala, despite the role played by corporations in repression, there have been zero accountability measures at the local level. The only case instituted against a corporation was filed in Canada, and it has no relationship to the atrocities committed in the armed conflict. Rather, it concerns evictions.⁶⁴

Lack of political will is also manifested when efforts toward corporate accountability require the intervention of the lawmakers. The Argentine Congress has been accused of inaction concerning the recommendations of a bicameral commission for investigating economic complicity.⁶⁵ More so, while the lower house of Argentine Congress approved a penal code modification in 2017 that would have paved the way for legal (as well as natural) persons to be held criminally liable for offenses including crimes against humanity, the upper house (Senate) rejected this reform.⁶⁶ In Guatemala, the political elites abruptly terminated the mandate of the UN-sponsored anticorruption initiative, the International Commission against Impunity.⁶⁷ Although the mandate of this commission did not extend to international crimes, the commission had been seen as a crucial contributor to strengthening the rule of law, including the capacity to investigate complex crimes, including crimes involving economic actors in the context of conflict.⁶⁸

In Kenya it has been documented that “[m]ajor private sector companies...are either owned by the political class or owe their allegiance to the political class.”⁶⁹ Liberia presents the most interesting scenario, in which “4% of the Liberian population[—]mostly foreign corporations and persons closely allied to the government[—]controlled 60% of the country’s economy.”⁷⁰ Similarly, in South Africa, “it has been estimated that the top 10% of the population, mostly from the white community[,] own 70% of national assets while 60%, largely black community, own 7% of the country’s net wealth.”⁷¹ The same situation is evident in Peru,⁷² Sierra Leone and most other countries in Latin America and Africa, where there have been no initiatives toward corporate accountability despite companies’ role in gross human rights violations.

Of significance to civil societies operating in countries engaged in transitional justice is understanding how they can effectively conduct advocacy and optimize ways of engaging the new authorities after power transitions, hoping to capitalize on a shift in political will.

Amnesty Laws

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

Defense of Legal Doctrines

Defense of existing legal doctrines has been identified as one of the main challenges that undermine corporate accountability for atrocities in national courts. In Argentina, for example, victims’ attempts to use labor tribunals and civil court systems in actions against businesspeople and companies involved in human rights violations were curtailed by what the courts described to be expiry of statutes of limitations.⁷³ Despite a 2015 civil code reform that removed the statute of limitations impediment,⁷⁴ in 2019 the Supreme Court rejected the victims’ petition on the grounds that the statute of limitations applied.⁷⁵

The other problematic legal doctrines have been the defense of the principle of legality and that of “natural judge.” In Colombia, a Constitutional Court decision to limit the competence of the JEP to exercise compulsory third-party jurisdiction has been heavily criticized.⁷⁶ According to the court, giving the JEP jurisdiction over conflict-related crimes committed by civilian third parties and noncombatant state agents, without their prior express authorization, constituted a violation of the right to due process in the sense of the principles of legality and of that of natural judge.⁷⁷ With this decision, the Constitutional

Court almost completely curtailed the JEP's powers to prosecute economic actors, instead creating a system in which prosecutorial responsibilities are shared between the special (transitional justice) jurisdiction and the ordinary justice system.

Legal Mandate

The absence of express mention of economic private sectors in the legal mandates of some transitional justice mechanisms has compromised effective accountability of corporations involved in gross human rights violations. Argentina, Guatemala and Kenya truth commissions experienced this setback. Although the commissioners of the two truth commissions in Argentina and Guatemala incorporated into their work corporate complicity for international crimes, this faced several challenges related to procedure, finance and resources. Furthermore, although the truth "commissions uncovered the truth of corporate complicity, the final reports did not include specific recommendations on how to address this within the framework of other transitional justice accountability policies."⁷⁸

Delay of Judicial Process

In Argentina, ongoing cases concerning corporate accountability reveal unconventional strategies to block accountability processes. While judges may not directly foreclose an investigation, they can manage to freeze it through other means, thereby preventing greater levels of accountability. Thus, delaying the judicial process is an effective strategy to achieve impunity in Argentina.

RECOMMENDATIONS

The Role of Civil Society in Demanding Corporate Accountability in Transitional Societies

Civil society can support private sector accountability in transitional justice mechanisms.

Civil society must be very strategic in how it chooses its advocacy strategies and also how it engages new authorities. This report suggests that civil society should always begin its advocacy for corporate accountability in transitional societies with a power mapping and analysis of all government institutions and, in particular, those that are likely to be involved in the corporate sector accountability programs and victims' reparations, key individuals in these offices, or the decision makers or influencers in these offices. Civil society should thus engage the individuals who support its agenda and allow them to reach out to key government organs and especially the office of the president.

In all these activities, NGOs must adopt a victim-centered approach. Noting the social, political and economic power imbalances between private sector actors and victims of their atrocities,⁷⁹ civil society should first identify any hindrances to a victim's centered approach early enough and devise measures that address victims' needs. Such measures have been identified to include provision of an exclusive platform and direct communication channels within each transitional justice mechanism to provide 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 affected communities; 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; effective consideration of concerns around

the issue of comprehensive representation of victims in transitional justice processes in which the participation of “activists” or NGOs has been prioritized without examining whether there is legitimate victim representation. In these cases, representation at the grassroots level is preferred.

In addition is 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; establishment of partnerships with the public sector that have a legitimate interest in the framework and objectives within a transitional justice mechanism, rather than a strictly corporate social responsibility approach; the inclusion and prioritization of intersectional approaches that promote victims with a range of identities (e.g., gender, race, ethnicity, language, sexuality) participating in the transitional justice process and 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.⁸⁰

Concerning reparation programs, the following promote a victim-centered approach: 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 and a departure from symbolic reparations in which victims are not consulted.

The reparations system should also envisage a complaint mechanism for victims who are aggrieved with the process. This type of mechanism could preferably be nonjudicial to lower the costs and encourage wider participation.

NGOs must ensure they support the development of a collective victim movement. Civil society should be encouraged to establish trusts to facilitate, manage and share funds among victim beneficiaries. The marginalized groups of victims of corporate atrocities must be included. These groups, in Africa and Latin America, include trade union activists; women, children and youth, indigenous, and Afro-descendant communities and *campesinos*; and rural farmers.

Notably, women have been particularly marginalized and have experienced sexual violence, including systematic rapes; sexual slavery; human trafficking; forced pregnancy and abortions; and child, early and forced marriage. 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.

To be most effective in realizing all these objectives, civil society must work in coalitions. NGOs could either develop or tap into preexisting global networks of NGOs and communities to facilitate sharing experiences and identify challenges and strategies on surmounting them. These national and international strategic partnerships can be used to advance accountability efforts, strengthen advocacy campaigns and cultivate innovative legal and nonlegal strategies.

NGOs must also continue to proactively advocate for accountability and participate in political and judicial processes, as well as invite others to do so. Mobilization by civil society, victims and survivors has been an effective tool to push for private sector accountability in transitional settings.

NGOs should 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.

NGOs should also actively participate in consultations on the development of the United Nations Binding Treaty on Transnational Businesses and Human Rights.

Civil society, victims and survivor groups should advocate for the inclusion of the private sector in the reparations and reconciliation framework, taking into account context-specific abuses like structural racism. This may also include traditional mechanisms where they exist.

Explicit Provisions in Transitional Mandates That Address the Role of Private Actors

Transitional justice frameworks should make explicit provisions in transitional mandates that address the role of private actors during conflict and provide measures for the inclusion of private actors in reparation programs.

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.

The Role of Institutional Innovators at the Domestic, Regional and International Levels in Advancing Corporate Accountability

Authors of the book *Transitional Justice and Corporate Accountability From Below: Deploying Archimedes' Lever* advocate for the adoption of the approach they call “corporate accountability from below.” This approach emphasizes the mobilization of local civil societies and local institutional innovators (such as NGO and victim groups, human rights lawyers, prosecutors or judges who use the law to advance accountability processes) as the key drivers of domestic processes toward corporate accountability.⁸¹ In this regard, the authors advocate for the use of domestic accountability mechanisms, both judicial and nonjudicial mechanisms. This may include truth commission, the utilization of the concept of universal jurisdiction, and use of foreign courts.

The role of veto players and corporate capture in preserving corporate impunity is notable. Veto players at both international and national levels play a key role in blocking corporate accountability measures. Notably, veto players exist in myriad forms. They range from powerful multinational companies to political elites, the interplay between political and economic contexts at the domestic level, business elites and so forth. This necessitates mounting sufficient global pressure to suppress their influence on corporate accountability.

Regional human rights systems, International NGOs, UN bodies, foreign legislation, courts and agencies have been identified to be some of the entities to exert international pressure for corporate accountability. This can be achieved through developing standards on business and human rights, advancing cases, pressuring states through visits, and precautionary and provisional measures.

Engaging the Economic Actors in Closing the Victim's Gap

Private sector actors should 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 and not a philanthropic act. In this regard, private sector actors have a responsibility to allow access to archives to support investigations, to 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 and other multinationals should participate in the transitional justice agenda when their subsidiaries have a role in a conflict situation.

Economic actors should also make contributions toward reparations in accordance with transitional justice mechanisms. Memorialization programs and acts of contrition 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.

It should also facilitate or participate in forums in which victims, affected communities and private actors could engage in dialogue to promote or secure reconciliation.

Incorporating Institutional Innovators in Corporate Accountability Initiatives

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 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. Transitional justice mechanisms should establish effective systems to monitor recommendations and relevant outcomes involving the private sector. These mechanisms should also 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. To guarantee a sustainable peace, government officials and state representatives involved in peace negotiations or the development of transitional justice frameworks should ensure the private sector is included in these processes.

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.

Accessing Regional Mechanisms and Using Administrative, Civil Claims or Criminal Prosecutions in National and Foreign Courts to Hold Private Sector Actors Accountable

NGOs and victim groups in transitional contexts should proactively engage national civil and criminal prosecutions of corporate perpetrators.

While conducting investigations and gathering evidence is the key to favorable court decisions, NGOs and victim groups must strategically seek their implementation and enforcement.

Engaging the media and invoking political pressure is necessary for getting cases heard and enforced. Civil society and victims groups must also conduct an analysis of the political context and challenges to the sustainability of a legal case to implement the best strategy. For example, to bring successful claims in foreign courts, victims groups must consider numerous legal and practical hurdles, which include forum non conveniens, rules on jurisdiction, non-justiciability, statutes of limitations, cost implications, and the establishment of a link between the wrong done by the subsidiary company and parent company.⁸²

CONCLUSION

While there is continued involvement of private sector actors in human rights violations, innovations aimed at their accountability keep evolving. However, numerous factors undermine these initiatives. Key among them is the absence of binding treaty norms that regulate accountability for the private sector for their role in atrocities. The existence of soft law obligations, even though not specifically tailored to regulating business and human rights, ameliorate the situation. Further initiatives such as the UN Human Rights Committee's establishment of the Open-Ended Intergovernmental Working Group to develop an international binding treaty are likely to inform the creation of substantive binding norms to regulate business and human rights. Corporations are also bound by the various international human rights treaties as juridical persons inferred within the concept of "legal persons." In line with these legal obligations, private sector actors have the responsibility to prevent atrocities in the first instance—instead of the current cycle of participation, investigation, prosecution and remedy.

Although states have the primary legal duty under international human rights law to protect their citizens from human rights violations, states have done little to achieve corporate accountability for human rights abuse within the context of transitional justice. Private sector actors have consistently vetoed corporate accountability initiatives, and they have not actively engaged in transitional justice processes. A combination of these factors informs the historical exclusion of corporations from accountability for human rights abuses. This lacuna is what has prompted civil society actors to innovatively engage to narrow the impunity gaps for corporations involved in human rights violations.

DEFINED TERMS

ABA ROLI	American Bar Association Rule of Law Initiative
ATS	Alien Tort Statute
AU	African Union
CNV	Comissão Nacional da Verdade
CSR	Corporate Social Responsibility
CSVR	Centre for the Study of Violence and Reconciliation
DPLF	Due Process of Law Foundation
DRC	Democratic Republic of Congo
ESCR	Economic, Social and Cultural Rights
GIJTR	Global Initiative for Justice, Truth and Reconciliation
ICC	International Criminal Court
ICSC	International Coalition of Sites of Conscience
JEP	Special Jurisdiction for Peace (Jurisdicción Especial para la Paz)
NGO	Non-Governmental Organisation
OECD	Organization for Economic Co-operation and Development
OPT	Office of the Prosecutor
TRC	Truth and Reconciliation Commission
UN	United Nations

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20. See the 2001 decision in the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*; the ACHPR held Nigerian government responsible for human rights violations committed by oil companies in the Ogoni land; in the case of *Institute for Human Rights and Development in Africa (IHRDA) and Others v DRC* (Kilwa case), the ACHPR found DRC responsible for the 2004 massacre of over 70 people in Kilwa.
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