



# Peace, everyone's business!

Corporate accountability in transitional  
justice: lessons for Colombia





## **Colophon**

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Together with people in conflict areas and concerned citizens worldwide, PAX works to build just and peaceful societies across the globe. PAX operates independently of political interests and is supported by a wide group of involved citizens, social organisations and churches.

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# PART I:

Conceptual and comparative framework

# 1.

# Introduction

This report focuses on the accountability obligations of private or state-owned national or multinational companies that are alleged to have been involved in, or complicit with, gross human rights violations in the context of armed conflicts or authoritarian regimes.

This is a most relevant topic for Colombia, where on 29 November 2016 Colombia's Congress ratified the long-awaited final peace agreement between the government and the Revolutionary Armed Forces of Colombia (FARC). The central component of this peace agreement is its chapter on victims that envisions the creation of a comprehensive system of transitional justice, a term that has been defined as:

*[...] the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.<sup>1</sup>*

<sup>1</sup> United Nations Approach to Transitional Justice, March 2010, p.2, [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)

An interesting and novel feature of the proposed transitional justice framework in Colombia is the fact that it will not focus solely on combatants in illegal armed groups and state agents, but also on third parties or non-combatants (*terceros civiles or civiles no combatientes*) who participated directly or indirectly in the armed conflict.<sup>2</sup>

The Colombian Peace Agreement, which marks the beginning of the end of an internal armed conflict that lasted for more than five decades, heralds a new, post-agreement era that will hopefully bring the country new opportunities and new modes of coexistence, especially for those who lived in the rural war-stricken areas and suffered most from the devastating effects of the violence. According to estimates, guerrilla groups, state security forces, and paramilitaries together are responsible for killing approximately 220,000 civilians in massacres, selective assassinations, and disappearances, as well as for the forced displacement of more than six million people.<sup>3</sup> It is well documented that, in Colombia, armed actors are not the only ones responsible for these abuses and that unarmed third party actors such as politicians, civil servants, and businessmen in numerous cases and in a variety of ways have also directly and indirectly contributed to gross human rights violations.

A litmus test for the credibility of the Colombian transitional justice process will thus be its ability to deliver truth and justice equitably. For this to happen, all categories of victims will have to be fairly represented and all types of perpetrators (guerrilla, military/paramilitary, and third party) will have to be held to account evenly. Historically, state-sanctioned transitional justice mechanisms have treated business enterprises with clemency. Colombia has a chance to undo this inequitable practice.

<sup>2</sup> *Acuerdo Final (Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace; Colombian government and FARC-EP)*, 12 November 2016, §5.1.2 num. 15, 34, 50(f).

<sup>3</sup> Grupo de Memoria Histórica, *¡Basta Ya! Colombia: Memorias de guerra y dignidad*, Centro Nacional de Memoria Histórica, 2013, segunda edición corregida, <http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-colombia-memorias-de-guerra-y-dignidad-2016.pdf>

## Objectives and content of the report

This report aims to stimulate social and political discussion on the desired role of business enterprises in Colombia's upcoming transitional justice process. Although the details of the transitional justice framework in Colombia are still being debated in Congress, it seems worthwhile to look at recent trends and developments in the field of corporate accountability and transitional justice in other parts of the world and see what lessons can be learned from them. In this exercise, several questions arise, the most pressing one surely being whether these transitional justice processes have been successful in providing effective remedy to the victims of corporate complicity, and, if so, through what mechanisms this was actually achieved. And what measures might be needed to avoid corporate complicity in human rights abuses occurring again in the future? This report also looks into the question of which internal (national) and external (international) factors contributed to, or hindered, the equitable delivery of truth and justice in transitional justice processes.

In addition to this general introductory chapter, the first section of this report includes a contribution resulting from on-going research undertaken by the Latin America Centre of the University of Oxford. That contribution provides an overview of the concept, challenges, and prospects of accountability for corporate complicity and describes a number of innovative, mostly civil society-driven transitional justice processes that attempt to hold companies accountable for past human rights violations. It also includes two cross-national quantitative analyses on the impact of truth commissions and judicial trials around the world in addressing corporate complicity.

The next section of the report, written by PAX with one contribution on Guatemala from the Netherlands-based NGO Impunity Watch, consists of analyses of the ways in which other countries have been dealing with the notion of corporate accountability – the ways that corporations are being held to account for their complicity in gross human rights violations – in seven specific transitional justice processes in Europe, Africa, Asia, and Latin America. These analyses seek to provide insight into how different mechanisms were implemented in practice and into the 'game changers and spoilers' in those processes. The country cases are followed by a third section that focuses on Colombia and includes an assessment by Colombian legal think-tank Dejusticia of the prospects and challenges of corporate accountability within

the Colombian transitional justice process. This examination is based on the Partial Agreement on Victims signed by the negotiating parties on 12 November 2016. It also includes a case study by a doctoral researcher working on the Oxford–Dejusticia team, providing an analysis of one of the very few Colombian examples of judicial and non-judicial actions against corporate actors that resulted in convictions and reparations. In the final considerations, we aim to draw some lessons for Colombia’s own transitional justice process.

## Remedy for victims of corporate complicity: standards and obstacles

As a peace movement, PAX advocates for the realization of the right to remedy and reparation for victims of human rights violations. During its work in conflict areas, PAX has come across various cases of direct links or contributions of businesses to gross and systematic human rights violations, none of which was followed by adequate remedy processes. In 2010, for example, PAX published a report about the role of an international consortium of companies during the oil war in Sudan, and in 2014 it published a report about the alleged involvement of two international coalmining companies in the paramilitary violence in northern Colombia.<sup>4</sup> In both cases, to this day victims have been denied their right to effective remedy.

State-sanctioned transitional justice mechanisms often lack a component of corporate accountability, depriving victims of the right to know the truth and obtain full justice and reparation. This can partly be explained by the fact that the concept of corporate accountability is still in its infancy. The 2011 UN Guiding Principles on Business and Human Rights (UNGPs) clarify that businesses should provide remedy to the victims of human rights abuses if they have caused or contributed to these injustices. However, this instrument is not legally binding and does not provide guidance about the role and responsibilities of businesses in transitional justice processes. Despite these obvious shortcomings, the UNGPs have started to become a universally accepted frame of reference regarding corporate

4 ECOS, *Unpaid Debt: The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan 1997–2003*, June 2010, [http://www.ecosonline.org/reports/2010/UNPAID\\_DEBT\\_fullreportweb.pdf](http://www.ecosonline.org/reports/2010/UNPAID_DEBT_fullreportweb.pdf) PAX, *The Dark Side of Coal: Paramilitary violence in the mining region of Cesar, Colombia*, June 2014, <https://www.paxforpeace.nl/media/files/pax-dark-side-of-coal-final-version-web.pdf>

human rights obligations. These principles, centred on three pillars, reiterate existing obligations embodied by the International Bill of Human Rights<sup>5</sup> and the International Labour Organization's core conventions.<sup>6</sup> The OECD Guidelines for Multinational Enterprises, and the ILO Declaration on Fundamental Principles and Rights at Work were updated in 2011 to incorporate the UNGPs.

Pillar one of the UNGPs deals with the state's duty to protect against human rights abuses by third parties within its territory and/or jurisdiction, including abuses by business enterprises.<sup>7</sup> Pillar two refers to the responsibility of business enterprises to respect human rights. Where business enterprises have caused or contributed to adverse human rights impacts, they should provide for, or cooperate in, their remediation through legitimate processes. Pillar three stresses the right of victims of business-related human rights abuses to effective remedy and defines the need for greater access to effective remedy as a joint responsibility of states and business enterprises.

Remediation of business-related human rights abuses can take place through different kinds of mechanisms. Although the UNGPs do not explicitly deal with transitional justice, they do present a useful classification of remedy mechanisms – along the axes of state-based vs. non-state-based and judicial vs. non-judicial – that can also be applied in transitional justice contexts. Judicial state-based mechanisms cover national criminal and civil courts, labour tribunals, and state-sanctioned transitional justice mechanisms such as hybrid courts or tribunals. Non-judicial state-based mechanisms within the context of transitional justice processes include, for example, truth commissions.

Judicial non-state based mechanisms by necessity seem to be both public and international. Although the UNGPs do not provide examples, the Inter-American Court of Human Rights (IACHR) and the International Criminal Court (ICC) might be included in this category. Non-judicial non-state-based

5 The International Bill of Human Rights consists of the *Universal Declaration of Human Rights* (adopted in 1948), the *International Covenant on Economic, Social and Cultural Rights* (1966), and the *International Covenant on Civil and Political Rights* (1966) and its two Optional Protocols.

6 Amongst others, the C87 *Freedom of Association and Protection of the Right to Organise Convention* (1948), the C98 *Right to Organise and Collective Bargaining Convention* (1949), and the C105 *Abolition of Forced Labour Convention* (1957).

7 This requires states not only to prevent business-related human rights abuses (UNGP 3), but also to take appropriate steps to investigate, punish, and redress such abuses when they have occurred (UNGP 25).

mechanisms include so-called grievance mechanisms established by business enterprises. Such mechanisms function on an operational level and can include risk analysis, impact monitoring, and reporting as part of an overall due diligence strategy of corporations. It remains unclear, however, whether and how such mechanisms should contribute to transitional justice processes.

Despite these recent advances in standard setting for business and human rights, addressing corporate complicity in the context of transitional justice processes is still the exception to the rule. The first reason for this is that, traditionally, transitional justice processes have focused on reparation for acts committed by state and non-state armed actors in countries emerging from armed conflict or authoritarian regimes. The role and responsibilities of unarmed third parties, including business enterprises, have usually been given less priority. This may in part be explained by the fact that these actors play a less visible role than the actual perpetrators of the crimes. As the role of businesses in human rights abuses generally is more indirect, it is often much harder to prove.

Related to this, a second obstacle on the road to corporate accountability is the hesitance of many victims' organizations and civil society groups to research and publish cases of alleged corporate complicity. In civil society circles, fear of liability issues (libel or slander claims), security risks, national political pressure, and a lack of financial resources to fund costly and long-term research and, in some cases, court proceedings are strong deterrents. A recent example of the dangers of internationally denouncing cases of alleged corporate misconduct is the use by corporations of the US 'racketeering' statute (known as RICO) to evade their responsibilities and retaliate against lawyers and civil society organizations that seek remedy for the victims.<sup>8</sup> Another example is the case of indigenous and environmental rights campaigner Berta Cáceres, who on 3 March 2016 was shot dead in front of her house as a consequence of opposing a hydroelectric project in Honduras.<sup>9</sup>

Finally, a third obstacle is the fact that national governments tend to prioritize a future-oriented peace-building process, for which they claim to depend on

8 [http://www.csrwire.com/press\\_releases/39075-U-S-Supreme-Court-Deals-Blow-to-Chevron-on-Ecuador-Pollution-Case-In-Latest-RICO-Decision](http://www.csrwire.com/press_releases/39075-U-S-Supreme-Court-Deals-Blow-to-Chevron-on-Ecuador-Pollution-Case-In-Latest-RICO-Decision); <http://www.law360.com/articles/636779/drummond-hits-attys-with-rico-suit-over-murder-claims>

9 <https://www.theguardian.com/world/2016/mar/03/honduras-berta-caceres-murder-environment-activist-human-rights>

support from the business sector. According to this logic, involving businesses in transitional justice implies the risk of alienating them from post-agreement economic reconstruction efforts. Yet, although it may be crucial to get the business sector on board in terms of their political support,<sup>10</sup> its role as the sponsor of a peace process should not be overestimated.<sup>11</sup> At the same time, this line of reasoning is also likely to be informed by the vested interests of ruling elites. Either way, this political choice is usually made at the expense of the rights of victims of corporate human rights abuses. We, however, believe that the right of victims to truth, remedy, and reparation should easily outweigh the risk of a decrease in the support or contribution of the private sector to peace-building efforts as a result of an equitable and holistic approach to transitional justice.

In the end, the contribution of business enterprises should be not only economic and development-based, but also rights-based. This implies that, in the post-conflict context, businesses should be held to account for past human rights abuses in order to make a positive contribution to peace and democracy.

## **The necessity of corporate accountability in transitional justice processes**

As explained above, obtaining remedy and reparation for victims of corporate human rights violations is fraught with difficulties and obstacles. Even so, we consider it to be a necessary road to follow. Truth, reparation, and accountability are indispensable for the psychological, social, and economic recovery of individuals and communities who suffer the consequences of human rights violations. If effective remedies and just reparations are not provided to victims, the present consequences of past injustices cannot be overcome. Applying different measures of justice to different categories of actors – whether they are guerrillas, public security providers, paramilitaries, or their political or financial supporters – makes no sense.

10 Christoph Zürcher et al., *Costly Democracy: Peacebuilding and democratization after war*, Stanford University Press, 2013.

11 This would depend on the actual role of private business in financing the peace process. In most peace processes, this role is not very important. The international community and the government are usually much bigger players. See: Roland Paris, *At War's End. Building peace after civil conflict*, Cambridge University Press, 2004.



Secondly, on a national level, holding businesses to account for their involvement in past human rights violations arguably is a critical factor in achieving a sustainable peace and/or democratic transition. Companies usually continue their activities in the country after the end of an armed conflict or authoritarian regime, and, without a durable solution to past injustices, the abuses and the issues they raise are likely to continue to resurface and be the source of lingering tensions and renewed violence. Moreover, it is hoped (by the present authors and others) that corporate accountability can contribute to a change in mentality among business managers and in the corporate sector in general, because this ultimately might be the most effective way to prevent future corporate complicity in gross human rights violations (see Payne's contribution to this volume, Chapter 2).

Finally, we are also convinced that, in the process of uncovering the truth surrounding gross human rights violations, all actors implicated should be heard without distinction. Apart from those who carried arms, this should also include the public functionaries, politicians, and business representatives who instigated, organized, and financed the armed actors to commit these abuses. This is also important from the perspective of non-repetition, in the sense that it contributes to preventing a recurrence of corporate violations. Related to this, it has been rightly observed that, if corporations are unable to benefit from transitional justice mechanisms (in terms of 'alternative justice'), there are few incentives for corporations and/or their representatives to take the risk of participating in transitional justice processes.<sup>12</sup>

## Scope of the report

Transitional justice is a fluid term and can be understood in many different ways. This report uses the UN's broad definition provided at the beginning of this chapter. In accordance with this definition, transitional justice generally consists of a combination of 'judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national

<sup>12</sup> Sabine Michalowski, 'Responsabilidad corporativa y justicia transicional', *Anuario de Derechos Humanos*, 11: 173–182, 2015, <http://www.anuariocdh.uchile.cl/index.php/ADH/article/viewFile/37498/39175>

consultations.<sup>13</sup> The advantage of using this inclusive definition is that it does not limit us to only considering state-sanctioned frameworks for transitional justice and allows us to also take into account the victim-driven efforts to find remedy.

This report does not attempt to give a comprehensive overview of all transitional justice processes in which the issue of corporate complicity was addressed, or to give an exhaustive analysis of each case. A University of Oxford preliminary study counted 114 transitional justice processes, of which 16 have pursued judicial or non-judicial mechanisms to deal with the issue of corporate complicity.<sup>14</sup> From these 16, we have chosen some of the most emblematic cases because of their relevance for the Colombian situation.

For the purpose of this report, we have selected the cases of Argentina, Brazil, and Germany because they show recent innovative victim-driven strategies to achieve corporate accountability in and outside official transitional justice processes. On the other hand, cases such as South Africa, Guatemala, Sierra Leone, Timor Leste, and Liberia are interesting because in them corporate complicity was – to varying degrees – explicitly addressed in transitional justice mechanisms. However, for various reasons, these findings were not followed up, and thus have not led to accountability and tangible results for victims.

This does not mean that transitional justice processes in other countries were not at all relevant; in Iraq, for instance, justice and remedy have been pursued mainly through civil court cases in the United States and not through a state-sanctioned transitional justice mechanism. In other countries, such as the recent case of Tunisia, human rights abuses were labelled as economic crimes, making it difficult to distinguish between corporate involvement in abuses on the one hand, and practices of fraud, bribery, and clientelism on the other.

13 United Nations Approach, p.2.

14 Tricia D Olsen, Leigh A Payne, Gabriel Pereira, 'Corporate complicity in Argentina: a preliminary analysis', International Studies Association/FLACSO, July 2014, <http://chrdproject.com/research.html>, p.7.

## Methodology and sources

The sections of this report that were written by PAX are based primarily on in-depth desktop study. The researchers made use of a wide range of secondary sources available on the Internet and in university libraries. Information from these sources has been complemented with information derived from interviews with international experts on corporate accountability, remedy, and reconciliation, the ICC, and transitional justice and truth commissions.

Additionally, Colombian authorities and experts were asked to share their perceptions and ideas about the possible organization and functioning of the Special Jurisdiction for Peace (see the Colombia chapter) announced as part of the transitional justice framework as set out in the Partial Agreement on Victims (Final Peace Agreement). The contents of the other sections represent the research and views of the contributing authors. ♦

## 2.

# Corporate complicity and transitional justice: setting the scene<sup>1</sup>

Leigh Payne, Professor of Sociology and Latin America, University of Oxford, St Antony's College

Corporate complicity in the human rights abuses of dictatorships and in armed conflict is not a new transitional justice phenomenon. Rough justice for such violations was meted out by the Allied Forces at Nuremberg when Bruno Tesch was tried, found guilty, and executed for the sale of the Zyklon B gas used in extermination camps in Nazi Germany. Forty additional businessmen were put on trial in the 'industrialist cases' at Nuremberg for Nazi-era slave labour, theft of Jewish property, and the production and sale of weapons of aggressive war and mass extermination. Many of them were convicted and imprisoned. Thus, just as the notion of transitional justice is said to have begun with the Nuremberg trials, so too could we say that corporate complicity was included in that process from its very origins.

Despite this historical pattern, continuity from Nuremberg has proved spotty, at best. At least there is one significant decision in international criminal courts. The UN International Criminal Tribunal for Rwanda (ICTR) convicted and imprisoned three businessmen for instigating the genocide in the 'media

<sup>1</sup> Adapted from Leigh A Payne, Gabriel Pereira, 'Corporate complicity in international human rights violations', *Annual Review of Law and Social Science*, 12: 63–84, 2016.

case'.<sup>2</sup> Foreign courts under the notion of universal jurisdiction have also held trials for corporate human rights abuses in dictatorships and armed conflicts. Law firms and NGOs have brought these cases in Europe, Canada, Australia, and elsewhere.<sup>3</sup> The highest concentration of foreign court cases involves US civil courts under the Alien Torts Claims Act (ATCA). Although the ATCA cases have received much attention, Michael J. Kelly found that not one of the 60 cases he investigated ended in a legal victory for the plaintiffs.<sup>4</sup> Most scholars and practitioners predict that the 2013 US Supreme Court decision in the *Kiobel* case will produce even fewer successful outcomes.<sup>5</sup> The International Criminal Court (ICC) briefly discussed, but did not include, corporate human rights abuses in its mandate. Regional courts – such as the Inter-American Commission and Court of Human Rights – have also only just begun to consider this area of human rights. The UN's approach to corporate responsibilities for human rights abuses, embodied in the UN Guiding Principles on Business and Human Rights (UNGPs), has focused on soft law and voluntary principles rather than pressure on states to defend victims' rights to truth, justice, and reparations.

Such a picture suggests that transitional justice has all but ignored corporate responsibility for human rights violations in dictatorships and armed conflict. Indeed, it is only recently that corporate complicity is overcoming its role 'at the periphery of transitional justice work.'<sup>6</sup> This chapter considers the dynamic and often overlooked processes underway around the world. In contrast to the emphasis placed on international governmental and non-government organizations in promoting transitional justice aimed at states' human rights

2 Nahimana et al. (*Media case*) (ICTR-99-52). The three defendants in the case were: Jean-Bosco Barayagwiza (Radio Télévision Libre des Mille Collines) sentenced to 32 years' imprisonment, Ferdinand Nahimana (same company) sentenced to 30 years' imprisonment, Hassan Ngeze (*Kangura Magazine*) sentenced to 35 years' imprisonment on 28 November 2007.

3 In the University of Oxford preliminary dataset of judicial actions for corporate complicity, cases have been brought in foreign courts for companies' human rights abuses in Burma (Belgium's *DLH case*), Syria (France, case of French surveillance companies in the Bashar El-Assad government), Democratic Republic of Congo (Canada's *Kilwa case*; Switzerland's *Argor Heraeus SA case*; and Australia's *Anvil Mining case*).

4 Michael J. Kelly, 'Prosecuting corporations for genocide under international law', *Harvard Law Policy Review*, 6: 339–367, 2012.

5 In what has been interpreted as a reversal from past ATCA decisions, the US Supreme Court interpreted the *Kiobel* case as having insufficient connection to the United States and therefore outside US jurisdiction.

6 Dustin N. Sharp (ed.), *Justice and Economic Violence in Transition*, Springer, 2014, p.2.

abuses, this report highlights dynamism ‘from below.’ It highlights innovative processes underway around the world in the search for truth, justice, and reparations for victims of corporate human rights abuses in dictatorships and armed conflict. The aim of this chapter is to consider processes that can overcome the governance gap, or the absence of mechanisms to address victims’ rights to truth, justice, and reparations, by including corporate complicity in transitional justice processes, specifically trials, truth commissions, and reparations.

The chapter begins with the assumption that the truth, justice, and reparations claims of transitional justice are consistent with examining the role of corporations in past human rights abuses. Despite a widespread assumption that transitional justice is aimed only at state actors, the most commonly used definition of transitional justice does not limit it in this way. The International Centre for Transitional Justice uses this definition: ‘Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.’<sup>7</sup> The United Nations identifies transitional justice as ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.’<sup>8</sup> These definitions moreover are reinforced by the practice of transitional justice that has included non-state actors along with state actors in truth commissions and judicial investigations of past human rights abuses of dictatorships and armed conflicts. Thus, although corporate complicity has not yet become an explicit focus of transitional justice, its role in systematic human rights violations by dictatorships and in armed conflict makes it an implicit dimension of transitional justice that has been incorporated into transitional justice practices around the world. The empirical research included in this report reveals that at least half of the world’s truth commissions have included corporate complicity in their investigations and final reports, and that trials are underway in various domestic, international, and foreign courts to examine the role of businesses in past systematic human rights abuses.

7 <https://www.ictj.org/>

8 [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)

Corporate complicity as part of transitional justice mechanisms is not a ‘witch hunt’ aimed at businesses that operated during authoritarian regimes and in civil conflict countries. Rather, it involves an investigation into businesses’ direct or indirect action, assistance, or participation in (aiding and abetting) gross violations of human rights (genocide, torture, crimes against humanity, war crimes) perpetrated by the state or state-like actors (e.g., paramilitary or rebel forces that control territory) during authoritarian or civil conflict situations. The type of corporate act might include direct complicity in criminal violence (e.g., joint criminal enterprise and conspiracy to violence), violations of human rights under labour law (e.g., slave labour), financing repression or war crimes, or illegal enterprises (e.g., knowingly procuring or profiting from violence, such as trading in ‘conflict minerals’).<sup>9</sup> Thus, corporate complicity does not require ideological affinity between companies and abusive regimes or parties, but actual business behaviour. Moreover, such complicity also arises in armed conflicts that occur under democratic governments with rule of law systems, such as the Colombian one.

Social scientists have recognized the business logic behind corporate complicity in dictatorships and armed conflict. Guillermo O’Donnell’s<sup>10</sup> theory of the bureaucratic authoritarian state, for example, viewed businesses as crucial to the particular development strategy that emerged in the 1960s and 70s in Latin American and elsewhere. Businesses allied with authoritarian systems to ensure political stability during a period of labour and student revolts and challenges to the capitalist system and to advance and protect ‘capitalist deepening’ projects. States’ national security regimes repressed wages along with so-called subversive union leaders or workers. In urban areas, businesses’ active collaboration took the form of creating blacklists of workers who faced illegal detention, torture, death, or disappearance. Companies and banks financed the repressive apparatus particularly when those funds

9 Tarek F. Maassarani, ‘Four counts of corporate complicity: alternative forms of accomplice liability under the Alien Tort Claims Act’, *NYU Journal of International Law and Politics*, 38: 39–65, 2005; Inés Tófaló, ‘Overt and hidden accomplices: transnational corporations’ range of complicity in human rights violations’, in: Olivier de Schutter (ed.), *Transnational Corporations and Human Rights*, Hart, 2006, pp. 335–358; Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a fairer and more effective system of domestic law remedies*, UN High Commission for Human Rights, 2014.

10 Guillermo A. O’Donnell, *Modernization and Bureaucratic-Authoritarianism: Studies in South American politics*, Institute of International Studies, University of California, 1973.

were cut off from international lenders because of well-known human rights violations. The Cold War logic prevalent at the time reinforced these policies and extended them into the countryside where the agrarian reform victories that protected peasant, indigenous, and rural workers were violently replaced with private sector land ownership, resulting in large numbers of internally and externally displaced peoples, illegal detention and torture, and massacres of leaders and communities. The Cold War logic and corresponding human rights abuses have persisted in some parts of the world even where democratic systems are in place, such as Colombia.

Corporate complicity in armed conflicts in Africa and Latin America show that economic self-interest is an additional factor explaining abuses along with political and developmentalist convictions. Human rights abuses are closely related to the business alliances with armed actors over 'conflict minerals' – the well-known case of 'blood diamonds' – as well as other forms of trafficking such as in weapons and humans. Businesses' involvement in state, paramilitary, or rebel protection rackets to secure their legal or illegal business operations, or to profit from the sale or trade in the tools of repression or war, has violated human rights of communities, movements, and individuals. The Colombian context provides examples of companies that intentionally and voluntarily financed armed groups and provided intelligence and logistical support to those groups perpetuating the conflict and its human rights violations. Companies and individual business people also profited from gross human rights violations, particularly through forced displacement. Banking operations have also found lucrative financing opportunities in repressive or civil conflict systems. The weak or non-existent rule of law in conflict or authoritarian rule contexts, moreover, means that abusive businesses tend to operate with impunity, lowering the cost of violation in highly lucrative sectors of the economy.

There are, in other words, countless victims of corporate human rights violations. These victims have not yet received redress. Transitional justice has not yet advanced sufficiently to address the rights of victims of corporate abuses: the right to know, the right to justice for gross violations of human rights, and the right to reparations. Transitional justice, moreover, aims not only to address victims' rights and needs, but also to prevent future victimization. The widespread impunity and lack of accountability associated with corporate complicity has undermined the guarantee of non-repetition. Accountability for corporate complicity in authoritarian and civil conflict situations thus constitutes



the ‘missing piece of the puzzle, to pursue the full spectrum of justice for this era’ of authoritarian rule and civil conflict.<sup>11</sup> Transitional justice thus offers a way to overcome what can be viewed as a governance gap in which victims’ rights exist in international human rights law but no international legal institutions exist to allow them to secure those rights.

Transitional justice potentially advances the same moral and practical arguments for corporate violations as for perpetrators of state violations. The moral argument is the duty to victims, to provide them with justice and compensation for the atrocities committed against them. The practical argument is about deterrence and non-repetition: without attaching a tangible cost – such as the credible threat of prosecution – to corporate human rights violations, they are likely to continue in future dictatorships, future armed conflicts, and in stable democracies. Moreover, it is the position of some peace and human rights organizations that, if corporate complicity in human rights violations is not addressed, the prospects for a sustainable peace are greatly diminished (see PAX’s introduction to this report). Just as the ‘age of human rights accountability’ attempted to advance justice for past state human rights violations to diminish them in the future, some form of accountability for corporate human rights abuses rejects any justification for such wrongdoing, relies on accountability as a form of deterrence for a democratic future that respects human rights, and addresses the needs of victims. The call for visibility, accountability, and remedy is a call to build a stable, peaceful, and sustainable democracy.

What blocks this process? Why has transitional justice failed to implement the same sorts of accountability pressures used in relation to perpetrators of state atrocities? The main obstacles are unsettled international law with regard to business and human rights on one hand, and, on the other hand, the power of businesses to block law formation and the implementation of laws and norms that do exist. PAX’s introduction to this report argues that a third obstacle – political choices to let economic arguments prevail over questions of justice – has also limited transitional justice efforts in the area of corporate complicity in many countries. Most scholars, practitioners, and business people agree on the ‘moral

11 Juan Pablo Bohoslavsky, Veerle Opgenhaffen, ‘Past and present of corporate complicity: financing the Argentinean dictatorship’, *Harvard Human Rights Journal*, 23: 157–203, 2010, p.160.

and ethical duties' of businesses regarding human rights.<sup>12</sup> Few doubt that businesses have a 'responsibility to refrain from harming human rights.'<sup>13</sup> A minority of businesses reject this notion of human rights responsibilities, but the vast majority recognize them. Whether from a principled position, a defensive posture, or a new corporate logic that 'human rights are good for business,' most businesses support, at least rhetorically, a human rights framework. In recent years, firm-specific corporate social responsibility initiatives, sectoral or multi-sector codes of conduct, and signing on to the Global Compact reflect a shift in corporate thinking about human rights.

Recognition of business's moral or ethical responsibilities has not translated into agreement on business's legal obligations. Legal scholars debate whether the customary international law used in the Nuremberg industrialist cases constitutes settled law. The application of international human rights law by some courts to corporate complicity cases in the post-Nuremberg era would suggest that businesses face the risk of judicial action if they engage in abuses. Mixed signals, however, may reassure businesses of their capacity to fight such cases and win. For example, the UN's 2011 UNGPs are the most significant international instrument governing business and human rights and rely entirely on soft law and voluntary principles rather than binding and enforceable obligations. When Royal Dutch Petroleum Co., known as Shell, attempted to use the UNGPs to argue that 'companies do not have direct international law human rights obligations,' the UN Special Rapporteur on Business and Human Rights and the author of the UNGPs, Professor John Ruggie, intervened to correct the misinterpretation.<sup>14</sup>

Another legal entanglement is whether businesses, or their employees, can be held accountable. No international forum recognizes the criminal liability of a company entity, but only states' obligations and individuals' liability. Individual, rather than corporate liability may not be a significant barrier to recognizing businesses' obligations. Because the individuals accused were acting not as independent citizens but rather as a result of their position within

<sup>12</sup> Barbara A. Frey, 'The legal and ethical responsibilities of transnational corporations in the protection of international human rights', *Minnesota Journal of Global Trade*, 153: 168–169, 1997.

<sup>13</sup> David J. Karp, *Responsibility for Human Rights: Transnational corporations in imperfect states*, Cambridge University Press, 2014, p.63.

<sup>14</sup> Surya Deva, 'Multinationals, human rights and international law: time to move beyond the state-centric conception', *Global Journal on Human Rights Law*, 23(2): 5–27, 2015, p.7.

the corporation, such criminal cases criminally implicate the corporate entity. Businesses, however, can and have successfully argued that the acts resulted from individual and not corporate behaviour. Where criminal liability occurs in these cases, lower-level and not top company executives tend to be found guilty.

The most serious constraint on international legal pressure, however, is the absence of enforcement mechanisms. Even if international customary law is interpreted to extend to businesses, and states are obligated under such law to hold businesses accountable, international accountability mechanisms do not exist to enforce those obligations. Although the ATCA uses international human rights law to bring corporate complicity cases in US courts, successful outcomes are few and they are likely to dwindle in the post-Kiobel era. As yet, no other foreign courts have filled the widening governance gap. Regional human rights courts lack jurisdiction over corporations. And the UN's human rights-related complaint procedures lack the mandate to monitor the activities of corporations.

The ICC could have offered a solution to this governance gap. Its mandate too is limited in this area of law. The ICC can 'adjudicate corporate involvement in international crimes, when the focus is shifted from the corporation as such to the individuals acting on behalf of a corporation.'<sup>15</sup> Thus, the ICC does not have jurisdiction over legal entities, only individuals. These individuals include those directly responsible as well as others who may be liable, for example by aiding or otherwise assisting the crime. As of today, the ICC has not yet taken up a case of corporate complicity in human rights violations. The Court's behaviour does not mean that the issue of corporate complicity is outside its scope. The ICC's Chief Prosecutor, Mrs. Fatou Bensouda, stated in an interview that 'Those who financed crimes against humanity will also need to be held accountable for it.' She added that: 'In general terms, when crimes against humanity are judged, all the elements must be considered and all the actors involved must be observed: political and military leaders, executioners and also those who financed these crimes. In principle, they are also responsible and must be held accountable for the civilian casualties to which they contributed with their support for systematic plans against the civilian population.'<sup>16</sup>

<sup>15</sup> Wolfgang Kaleck, Miriam Saage-Maaß, 'Corporate accountability for human rights violations amounting to international crimes. The status quo and its challenges', *Journal of International Criminal Justice*, 8(3): 699–724, 2010, p.710.

<sup>16</sup> [http://www.perfil.com/ediciones/2012/7/edicion\\_696/contenidos/noticia\\_0077.html](http://www.perfil.com/ediciones/2012/7/edicion_696/contenidos/noticia_0077.html)

Consistent with that view, in Colombia the ICC mentioned the financing of illegal armed groups in its 2015 Report on Preliminary Examination Activities. The Office of the Prosecutor has identified 'proceedings relating to the promotion and expansion of paramilitary groups' as one of the five areas on which they continue to focus in Colombia.<sup>17</sup>

The ICC thus has the potential to respond to the governance gap in corporate accountability. In addition, the Office of the United Nations High Commissioner for Human Rights initiated in 2014 the elaboration of a legally binding instrument on transnational corporations and other business enterprises to promote the effective implementation of the UNGPs. No blueprint has yet emerged. The Inter-American Commission and Court of Human Rights has also adopted jurisprudence holding any member state internationally responsible for human rights violations carried out by corporations in their respective countries, but such mechanisms have not yet been applied to specific cases. The future looks promising; but the development of international pressure and enforcement mechanisms to date remains highly limited.

The veto power of business cannot entirely explain the governance gap, but it is crucial to understanding the limitations on corporate accountability. The global might of a few companies has been well-documented and suggests that some corporations may not need collective action to leverage veto power over decisions made in international, foreign, or domestic arenas. The kind of cultural capital that business elites enjoy along with judges, prosecutors, and politicians may indicate that an active business lobby may be less significant than shared values in protecting corporate interests. Implicit veto power may also result from dependence on business for global or domestic economic stability and wellbeing that results in an unwillingness to sanction abusive behaviour. Thus, even if international law established explicit human rights obligations on businesses, as some scholars claim that it does, states are unlikely to sanction businesses for abusive behaviour where those companies or sectors are integral to the national economy or national security. The absence of settled law leaves states free to do so without constraint.

<sup>17</sup> The Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities*, 12 November 2015, under 137, p.32.

Direct action by businesses to block accountability is also evident however. The history of the UNGPs reveals powerful pressure from businesses in favour of voluntary mechanisms and against binding obligations. Corporations' economic power allows them to hire high-priced, skilled lawyers to defend them in complicated legal battles – litigation costs that victims can rarely afford. At the very end of long trials, businesses tend to offer financial settlement on condition of no acknowledgment of wrongdoing, thereby avoiding law-making or precedent-setting decisions that might affect subsequent cases. These legal manoeuvres have led scholars to conclude that, in corporate human rights cases, '[c]ourthouse doors are, for both legal and practical reasons, generally closed to victims, particularly those who live in poverty.'<sup>18</sup>

The power used by businesses to intimidate, threaten, bribe, and coerce decisions favourable to them is also documented.<sup>19</sup> To suppress investigations and damaging public exposure, corporations' lawyers are known to threaten, to file libel or slander cases against legal practitioners involved in corporate complicity prosecution cases. Amnesty International and the Inter-American Commission of Human Rights have documented the violence and intimidation faced by indigenous human rights defenders when they bring claims against extractive and other mega-project firms. Some groups have proved unwilling to initiate or continue their claims for justice when faced with business threats. Despite the formidable power of businesses to block accountability for human rights violations, they have not always used it. In the industrialist cases after World War II, several companies acknowledged their complicity in Nazi regime atrocities. In so doing, they recognized the responsibility of companies to abide by international human rights standards. As the examples in the Germany case

18 Robert C. Thompson, A Ramasastry, Mark B. Taylor, 'Translating *Unocal*: the expanding web of liability for business entities implicated in international crimes', *George Washington International Law Review*, 40(4): 841–902, 2009, p.895.

19 One example is the recent murder in Honduras in March 2016 of Berta Cáceres, the leader of the Council of Popular and Indigenous Peoples Organizations of Honduras (COPINH). At least two of the murderers have been linked to the Desarrollos Energéticos SA (DESA) company. Cáceres had challenged the impact of the company's Agua Zarca hydroelectric dam on the indigenous Lenca people. 'Berta Cáceres and human rights defenders in Honduras,' Amnesty International, <http://www.amnesty.ca/our-work/individuals-risk/bertha-caceres-and-human-rights-defenders-honduras>. See also the business pressure in favour of voluntary principles and soft law embodied in the United Nations Guiding Principles and against binding standards of corporate human rights compliance: Giovanni Mantilla, 'Emerging international human rights norms for transnational corporations,' *Global Governance*, 15(2): 279–298, 2009.

in this report show, recognition sometimes occurs without the threat of judicial action.<sup>20</sup> Businesses have also paid into compensation funds particularly for slave labour, seemingly accepting responsibility for Nazi-era atrocities or attempting to avoid judicial action. In the contemporary setting, the Argentine National Stock Exchange hired three academics to investigate and reveal to the public its complicity in the dictatorship.<sup>21</sup> In another Argentine case, the new owners of a firm turned over to the National Prosecutor's office its archive that could reveal the company's complicity with the dictatorship. Although likely intended to protect the current owners from past corporate behaviour, it nonetheless could contribute to establishing a pattern of systematic abuse by businesses.

The weakness of international human rights law in corporate complicity and the power of the business veto have posed obstacles, but have not entirely blocked transitional justice efforts. Both civil society forces and domestic judicial innovations have made advances in terms of including corporate complicity as part of transitional justice. The truth commission reports analysed in this report show that domestic and international human rights organizations have brought attention to the violations carried out by companies during dictatorships and armed conflict. Civil society groups have carried out parallel 'naming and shaming' efforts. In Argentina, the 24 March anniversaries of the coup in recent years have identified the responsibility of firms in the civil-military dictatorship's repression. In South Africa, the Khulumani victims' support group brought a civil suit against companies' human rights violations during the apartheid era. It also used the 2010 World Cup in the country to highlight the role of one of the event's sponsors in the apartheid era: Daimler's Mercedes-Benz iconic hood ornament was identified in posters as the 'star of Apartheid.' In Brazil, students mobilized to petition the removal of a São Paulo street name associated with one of the businessmen connected to the

20 The 1973 trial of Albert Ganzenmüller, secretary of transport and deputy director of the Reichsbahn, for the firm's involvement in the deportations to death camps was closed after he had a heart attack on the first day. Ganzenmüller lived 23 years after the trial ended without threat of further prosecution.

21 A Dandan, H Franzki, 'Entre análisis histórico y responsabilidad jurídica', in: H Verbitsky, JP Bohoslavsky (eds.), *Cuentas Pendientes: Los cómplices económicos de la dictadura*, Siglo Veintiuno, 2013, pp.217–234. See also English version of the book: H Verbitsky, JP Bohoslavsky, *The Economic Accomplices to the Argentine Dictatorship: Outstanding debts*, Cambridge University Press, 2015; MC Perosino, B Nápoli, WA Bosisio, *Economía, Política y Sistema Financiero: La última dictadura cívico-militar en la CNV*, Comisión Nacional de Valores, 2013.

coup and subsequent repression. These civil society initiatives mark a shift away from focusing exclusively on state violations during dictatorships and armed conflict and towards including corporate complicity in those human rights violations. They may apply the kinds of pressures on courts that make it difficult for prosecutors and judges to ignore the moral, ethical, and legal duty to bring justice and remedy to victims.

In recent years, domestic courts have begun adopting innovative measures to overcome the blockages posed by business veto power, unsettled international law, and reliance on voluntary principles. Some of these cases are examined in this report (see Chapters 4 on Argentina and 5 on Brazil). These innovations creatively combine domestic law and international human rights law in ways that might become models for overcoming impunity.

These cases represent an innovation on the ‘bottom-up’ approaches to corporate accountability for human rights violations found in the existing literature that focuses on advanced democracies, particularly the United States, the United Kingdom, Canada, the Netherlands, and Australia. What this report shows is ‘bottom-up’ dynamism occurring in the transitional countries of the global South. Indeed, an argument could be made that these domestic courts are playing a catalyst role in shaping international law, transforming it to enhance the rights of victims of corporate human rights.

When cases of corporate complicity in dictatorships and armed conflicts are being tried, particular sets of challenges emerge. Because of the passage of time since the occurrence of these human rights abuses, statutes of limitations have lapsed for some crimes. In addition, those most responsible for corporate decisions have died, left the company and the country, and in other ways are difficult to track down and prosecute. Similarly, records directly implicating the company or the individual rarely exist, particularly when the firm becomes aware of a pending lawsuit. Finding witnesses long after the incidents also poses difficulties. As we discuss further below, prosecutors and claimants have faced legal (e.g., counter libel or slander suits) and other forms of intimidation (e.g., harassment and threat of violence) that complicate judicial efforts. In many cases, such as Colombia, the lack of witness protection further inhibits claims. These barriers to domestic prosecution have not proved insurmountable, as the cases illustrated in this report show. Legal innovations at the domestic level are emerging. They bypass the constraints

on accountability emanating from the international focus on soft law and voluntary principles. Domestic laws have been applied, often in combination with international human rights law, to reach judgments against corporate acts (see Chapter 11 on Colombia). By developing case law and legal strategies, innovators suggest models that could influence domestic processes elsewhere – perhaps a more appropriate focus than an international one. Efforts to apply unsettled international law regarding corporate obligations or looking to international enforcement of those obligations in the form of soft law and voluntary principles may have a deleterious effect on domestic prosecution.

There are certainly limitations on this model. Most of the successful outcomes of the domestic cases globally involve civil courts; successful criminal actions are much rarer. Yet, in March 2016 a criminal guilty verdict was rendered by an Argentine court against Marcos Levin, owner of the Veloz del Norte. Levin has been sentenced to 12 years in prison for crimes against humanity involving the illegal detention and torture of a company employee, Victor Cobos. As the evidence provided in this report shows, there are a small number of justice victories for victims that demonstrate the possibility of overcoming obstacles.

In sum, transitional justice's reliance on international institutions to promote accountability and the rights of victims may fall short in the area of corporate complicity. Settled law regarding the human rights obligations of businesses and effective enforcement mechanisms to pressure states to advance these cases do not exist. Moreover, businesses have shown their collective, individual, cultural, social, and political power to veto accountability efforts. As civil society pressure increases and domestic courts find ways around the international and business veto blockages, businesses may begin to understand that their resistance may backfire and have significant legal and reputational effects. The changes underway in the global South have begun to play this transformative role to close the governance gap and reinforce the rights of victims of corporate abuse to truth, justice, and remedy. ♦





## Box 1. Truth commissions and corporate complicity<sup>1</sup>

Leigh Payne, Professor of Sociology and Latin America, University of Oxford, St Antony's College

When the Brazilian National Truth Commission (CNV) began in 2012, its decision to investigate not only the crimes of state agents but also corporate complicity in the dictatorship's repressive apparatus seemed like an innovative direction for transitional justice in general and truth commissions in particular. Transitional justice in general and truth commissions in particular had not yet explicitly included recognition of the direct and indirect violations by non-state business actors in dictatorships and armed conflict. However, recent research conducted at the University of Oxford<sup>2</sup> reveals that Brazil's efforts were not as unique as they at first appeared.

The Oxford study has examined where truth commissions have included corporate complicity in human rights violations in their final reports, how they do so, and what they recommend regarding justice and remedy for victims. The research entailed investigating 39 final truth commission reports in 30 countries.<sup>3</sup> See table, this box.

### **Where have truth commissions recognized corporate complicity?**

The Oxford research reveals that over half of the truth gathering bodies that issued final reports recognized business involvement in gross violations of human rights during dictatorships and armed conflicts. The study finds that 22 out of 39 truth commissions (56%) or 19 of the 30 countries (63%) named specific companies, business associations, or individual members of the

<sup>1</sup> Research assistantship is gratefully acknowledged for those engaged in the University of Oxford truth commission and corporate complicity project: Kathryn Babineau, Laura Bernal-Bermúdez, Lina Malagón, and Julia Zulver.

<sup>2</sup> The University of Oxford study is part of the Corporate Accountability and Transitional Justice (CATJ) collaborative project funded by the Open Society Foundation. The project includes partners in Argentina (CELS and ANDHES) and Colombia (Dejusticia). This truth commission study received funding from the British Academy and the University of Oxford Press John Fell Research Fund.

<sup>3</sup> Although some studies mention 50 truth commissions worldwide, not all of these investigative bodies issued final reports available to the public. The Oxford team still hopes to access and analyse reports from truth commissions in Germany, Lebanon/Syria, Lithuania, Nepal, the Philippines, and South Africa (Harms Commission).

business community involved in human rights violations.

Truth gathering mechanisms that include corporate complicity are not evenly distributed around the globe. Most are concentrated in Latin America, with 10 such truth commissions in nine countries. The region is closely followed by Africa with eight truth commissions in eight countries, and Asia with four truth commissions in two countries. Although other world regions – the Middle East and North Africa and Europe – had truth commissions that issued final reports, the Oxford study did not find references in them to business involvement in human rights violations.

### **How do truth commissions address corporate complicity?**

Of those truth commissions that include corporate complicity in gross violations of human rights, all (22 in 19 countries) named specific companies, business associations, or individual members of the business community involved in those abuses. The final reports identified 321 national and multinational economic entities around the world assumed to be complicit in the human rights violations in dictatorships and armed conflict. This number corresponds to an average of 17 companies named per country, but the range is vast with only one company named in three countries and Brazil topping the list with 123 companies named. Reports that name higher than the average number of companies include those on Guatemala (45), Liberia (34), and South Africa (30). The naming of specific companies potentially involved in human rights violations provides initial areas for investigation by judicial bodies for strategic litigation. Indeed, the Oxford study reveals that 22 companies named in 10 truth commission reports have faced subsequent judicial action in domestic and foreign criminal and civil courts. These include companies in Latin America (Argentina – three, Brazil – one, Ecuador – three, Guatemala – three, and Peru – one), Africa (Cote-D'Ivoire – one, Kenya – one, Liberia – five, Nigeria – three, and South Africa – two), and Asia (East Timor – one).

The vast majority of the companies named in truth commissions are identified for their involvement in financing repression and conflict: 154 (48%). Although truth commission reports identified non-specific forms of company participation in violent repression and conflict in 105 (33%) of the cases, they also included specific violations linked to named companies, including kidnapping, arbitrary detention, torture, disappearance, extrajudicial killing or murder, slave labour, and rape. The reports also identified companies that

established on-site detention centres. Companies carried out these violations in collaboration with public (e.g., military or police), private (e.g., death squads and paramilitaries), and firm-sponsored security apparatuses.

The highest proportion of victims of company violations identified in the reports were members of the perceived political opposition (36%), followed closely by unionized and non-unionized urban and rural workers (32%). Local communities, including ethnic groups and indigenous peoples, did not fall far behind (25%).

### **What follow-up actions do truth commissions recommend?**

Although the identification of firms involved in corporate complicity is a significant step in recognizing non-state business actors' responsibility for human rights violations, only a little over half of the truth commission reports (12 of 22) followed up with recommendations regarding remedy for abuses. Of those, seven truth commissions focused on official policies of reparations and restitution, specifically recovery of land, jobs, and other assets, as well as unspecific forms of victim reparation. The South African Truth and Reconciliation Commission called on businesses to voluntarily contribute to a reparation fund, an effort viewed as largely unsuccessful by most accounts. Labour and economic reforms were suggested in some cases as well as the promotion of human rights (Honduras, Paraguay, and Ecuador). Only Brazil explicitly advanced a recommendation for further investigation into companies' violations for possible prosecution. Thus, this study shows that what is unique about Brazil's truth commission is not the investigation into companies' abuses but its recommendation to hold those companies responsible. A civil case is ongoing in Brazil against Volkswagen for its involvement in the on-site detention and abuse of 12 unionized workers. The truth commission reports for Ecuador and Liberia also hinted at further investigations and prosecutions, and, indeed, some of those cases are making their way through the courts.

### **What conclusions can be drawn about truth commissions and corporate complicity?**

These findings from the Oxford team's study of truth commissions and corporate accountability reveal that truth commissions have recognized the role played by corporations in the violence under dictatorships and during armed conflict. Public awareness of these truth commission findings remains quite low however. Even transitional justice specialists lack knowledge of

these truth commission efforts. It may be that the traditional transitional justice focus on violations carried out by state actors obscures awareness of truth commission initiatives regarding non-state actors' responsibility for human rights abuses. Governments dependent on businesses, and the named businesses themselves, would no doubt find truth commission findings inconvenient and harmful, and might therefore attempt to minimize their importance. Whatever the reason, truth commissions' investigations and reporting have generally failed to make visible companies' responsibility for abuses; they have hardly had an impact on public recognition of the phenomenon. Truth commissions, furthermore, have rarely made serious efforts to promote accountability or remedy mechanisms for corporate violations in their recommendations. Such an outcome is consistent with the very slow progress of prosecutions of companies for human rights abuses that have been initiated at domestic, foreign, and international level. Truth commissions' findings suggest a kind of governance gap, in which recognition of human rights violations by businesses exists without corresponding mechanisms to support victims' rights to redress and remedy. ♦

Country	Truth commission name	Year
Argentina	National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP)	1983
Brazil	National Truth Commission (Comissão Nacional da Verdade, CNV)	2012
Chile	National Commission on Truth and Reconciliation (Comisión Nacional de Verdad y Reconciliación, 'Rettig Commission')	1990
Chile	National Commission on Political Imprisonment and Torture (Comisión Nacional Sobre Prisión Política y Tortura, 'Valech Commission')	2003
Cote D'Ivoire	Commission on Dialogue, Truth & Reconciliation (Commission Dialogue, Vérité et Réconciliation)	2011
East Timor	Commission for Reception, Truth, and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, CAVR)	2002
Ecuador	Truth Commission to Impede Impunity (Comisión de la Verdad para Impedir la Impunidad)	2007
Ghana	National Reconciliation Commission	2004

## Table 1. Truth commissions

Transitional justice and corporate complicity: cross-national study

No. firms named	Types of violations	Recommendations
11	General; Kidnapping; Disappearance; Arbitrary detention; Murder; Torture; Detention centres	None
123	General; Kidnapping; Disappearance; Arbitrary detention; Extrajudicial Killing; Murder; Torture; Financing repression; Detention centres; Displacement	Further investigation
14	General; Arbitrary Detention; Torture; Detention centres	None
2	General; Arbitrary detention; Detention centres	None
1	Murder; Environment	None
2	Financing	Reparations
14	General; Disappearance; Murder; Financing; Property displacement; Environment	Human rights promotion
5	General; Arbitrary detention; Murder; Torture	None

Country	Truth commission name	Year
Guatemala	Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer (or Commission for Historical Clarification – Comisión para el Esclarecimiento Histórico)	1997
Haiti	National Truth and Justice Commission (Commission Nationale de Vérité et de Justice)	1995
Honduras	National Commissioner for the Protection of Human Rights (Comisionado Nacional de Protección de los Derechos Humanos, CONADEH)	1993
Kenya	Truth Justice and Reconciliation Commission (TJRC)	2009
Liberia	Truth and Reconciliation Commission (TRC) of Liberia	2006
Nigeria	The Judicial Commission for the Investigation of Human Rights Violations (Oputa Panel)	1999
Paraguay	Truth and Justice Commission (Comisión Verdad y Justicia, CVJ)	2004
Peru	Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación, CVR)	2001



No. firms named	Types of violations	Recommendations
45	General; Kidnapping; Disappearance; Arbitrary detention; Extrajudicial killing; Murder; Torture; Financing repression; Slave labour; Property displacement; Rape; Environment; Detention centres	None
6	General; Disappearance; Financing repression	None
1	Arbitrary detention; Extrajudicial killing;	Media reforms Break up oligopolies
6	General; Property displacement; Landgrabs	Restitution of lands Titling
34	General; Arbitrary detention; Murder; Torture; Financing repression; Slave labour; Property displacement; Child soldiers	Investigation Seize unlawful properties Reparations and restitution
9	General; Arbitrary detention; Extrajudicial killing; Murder; Financing repression; Property displacement; Environment	Reinstatement Environmental protections Contract reform
3	General; Arbitrary detention; Extrajudicial killing; Torture; Property displacement; Detention centres	Human rights promotion Labour reforms
4	General; Kidnapping; Arbitrary detention; Murder	Reparation Restitution

<b>Country</b>	<b>Truth commission name</b>	<b>Year</b>
Sierra Leone	Truth and Reconciliation Commission	2002
South Africa	Commission of Truth and Reconciliation (TRC)	1995
South Korea	The National Committee for Investigation of the Truth about the Jeju April 3rd Event	2000
South Korea	Presidential Commission on Suspicious Deaths	2000
South Korea	Truth and Reconciliation Commission	2005
Zambia	Human Rights Commission of Inquiry (Munyama Human Rights Commission)	1993

No. firms named	Types of violations	Recommendations
7	General; Murder; Financing repression; Slave labour; Rape; Child soldiers	Compensation Regulation
30	General; Extrajudicial killing; Murder; Financing repression; Environment	Voluntary contributions
1	General; Arbitrary detention; Torture; Detention centre	None
1	General	None
1	General; Arbitrary detention; Torture	None
1	General; Environment	None

## Box 2. Trials and corporate complicity<sup>1</sup>

Gabriel Pereira, postdoctoral researcher, Department of Sociology, University of Oxford

Research conducted at the University of Oxford reveals an increase in the use of judicial mechanisms to make businesses accountable for their involvement in human rights violations in transitional justice (TJ) contexts. The use of trials as a TJ mechanism has tended to involve criminal prosecutions, but civil trials have been intensively used to deal with cases of corporate complicity as well.<sup>2</sup> In a preliminary global study of accountability for corporate complicity, a total of 86 trials were found, most of them ongoing. Of these, 46 trials are civil and 40 are criminal. This trend is represented in Table 2.1 & 2.2.

The use of trials for business involvement in human rights violations in TJ is observed in both transnational and domestic litigation.<sup>3</sup> The most common use has been in civil trials against businesses.<sup>4</sup> Of these, a majority of cases (31 of 46 cases), were advanced under the Alien Tort Claims Act (ATCA), a statute that allows foreign citizens to seek justice in US courts for violations committed outside the United States.

1 Part of the evidence presented in this report is taken from Leigh A Payne, Gabriel Pereira, 'Accountability for corporate complicity in human rights violations: Argentina's transitional justice innovation', in: Horacio Verbitsky, Juan Pablo Bohoslavsky (eds.), *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*. Cambridge University Press, 2016, pp.29–46.

2 By 'civil trials' we mean any prosecution in which individuals, groups, companies, and/or the state are held accountable for human rights violations by a civil court. We use the term 'civil' as opposed to both criminal and military courts. Thus, we include in our definition lawsuits in which plaintiffs bring legal complaints seeking remedy for damages through acts committed by individuals, groups, companies, and/or the state. By 'remedy for damages', we mean monetary compensation, reparation, and non-financial remedies.

3 Despite the creation of two UN ad hoc criminal tribunals in Yugoslavia and Rwanda, and the creation of the International Criminal Court with the Rome Statute of 1998, we found only one case of an international criminal trial. As expected, given the nature of the international human rights bodies, this is a criminal trial. See Sophia Kagan, 'The "Media Case" before the Rwanda Tribunal: The Nahimana et al. Appeal Judgment', The Hague Justice Portal, 24 April 2008, [www.haguejusticeportal.net/index.php?id=9166](http://www.haguejusticeportal.net/index.php?id=9166)

4 By 'foreign trials' or 'foreign litigation', we mean judicial process that occurred, or are occurring, in a country different from where the violations of human rights took place.

**Table 2.1. Criminal trials**

Transitional justice and corporate complicity: cross-national study

Region (countries)	Domestic	Foreign	International
Africa (3)		3 (Democratic Republic of Congo) 1 (Liberia)	1 (Rwanda)
Americas (3)	14 (Argentina) 1 (Chile) 18 (Colombia)		
Asia (1)		1 (Myanmar)	
Europe			
MENA (1)		1 (Syria)	
<b>Total (8)</b>	<b>33</b>	<b>6</b>	<b>1</b>

Source: Corporate Human Rights Database (CHRD)<sup>5</sup>

<sup>5</sup> The Corporations and Human Rights Database (CHRD on <http://chrdproject.com>) so far includes only the pilot project focused on Latin America. The unit of analysis is a corporate abuse allegation (CAA). A team of graduate students has coded each CAA documented in the Business and Human Rights Resource Centre (BHRRRC), an archive of allegations of corporations' human rights violations in all countries of the world from 2000 to the present. This archive has been used in scholarly, legal, and policy-oriented projects because of its strength in documenting the alleged abuse and the response. It thus provides a good starting point for tracking changes in violations over time. See <http://business-humanrights.org>

**Table 2.2. Civil trials**

Transitional justice and corporate complicity: cross-national study

Region (countries)	Domestic	Foreign-ATCA	Foreign
Africa (4)		1 (Morocco) 5 (Nigeria) 10 (South Africa)	1 (Democratic Republic of Congo)
Americas (3)	4 (Argentina) 9 (Colombia) 1 (Brazil)	1 (Argentina)	
Asia (3)		1 (Indonesia) 2 (Myanmar) 1 (Papua NG)	
Europe (1)		1 (Croatia)	
MENA (1)		8 (Iraq)	
<b>Total (12)</b>	<b>14</b>	<b>31</b>	<b>1</b>

Source: Corporate Human Rights Database (CHRD)

These cases are mostly concentrated in three countries: South Africa, Nigeria, and Iraq. Eight of the cases are in response to the South Africa apartheid era. For example, in one class action suit, the plaintiffs argued that, in selling cars and computers to the government, these companies aided and abetted violations of international law. The R̄hulumani victims' support group also used US courts and the ATCA to address companies' apartheid-era crimes.

The Ogoni people of Nigeria brought a successful case against Shell Oil for collaborating with the authoritarian regime's military and police in the murder of political activists. Two US-based human rights advocacy groups used the ATCA to bring cases against Shell and other defendants for abuses, including summary execution, crimes against humanity, torture, inhuman treatment, and arbitrary arrest and detention. Despite attempts by Shell to have the cases dismissed, a trial date was set. Right before the trial, the company settled for US\$ 15.5 million in what is recognized 'as a milestone moment in the movement towards corporate accountability and human rights.'<sup>6</sup> The subsequent US Supreme Court decision on *Kiobel v. Royal Dutch Petroleum* has had a negative impact on the use of the ATCA to remedy victims of corporate abuse.<sup>7</sup> Until the *Kiobel* decision, foreigners could sue companies for human rights violations that occurred anywhere in the world. In this decision, the Supreme Court applied the presumption against extraterritoriality to severely limit the territorial reach of the ATCA. This means, as scholars such as Alford<sup>8</sup> claim, that 'the only claims that may go forward under the ATS [ATCA] are those that touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality.'

The eight cases relating to corporate complicity and human rights abuse in Iraq also involve the ATCA. In one case, families of men working for a US oil services company in Iraq claim that the men's passports were confiscated and they were trafficked to work at a US air base and, en route, they were killed. Most of the other cases involve Iraqi plaintiffs seeking justice for torture they endured or remedy for long periods of detention without trial.

6 See Centre for Constitutional Rights, 'Factsheet: The case against Shell', 16 June 2009, <http://ccrjustice.org/learn-more/faqs/factsheet%3A-case-against-shell-0>

7 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) – decided 17 April 2013.

8 Roger Paul Alford, 'The future of human rights litigation after *Kiobel*', *Notre Dame Law Review*, 89(4): 1749–1772, 2014.

Although corporate complicity in South Africa, Nigeria, and Iraq is reliant on the ATCA, three of the four cases relating to the atrocities in the Democratic Republic of Congo (DRC) are taking place not in the US or the DRC, but in Germany, Switzerland, and Canada. Three employees of the Anvil Mining Company were acquitted of complicity in war crimes by a military court in the DRC. In Germany, Olof von Gagern, a senior manager of the Danzer Group, faces prosecution for being complicit in human rights abuses committed by Congolese police and military during an attack on the village of Bongulu in northern DRC in 2011. There is a criminal complaint in Switzerland against Argor-Heraeus SA for benefiting from raw materials extracted through pillage and war crimes during an armed conflict between 2004 and 2005. Finally, a class action suit was brought in a Canadian court against Argor-Heraeus SA for being complicit in human rights abuses, by providing logistical support to the Congolese army who raped, murdered, and brutalized the people of the town of Kijwa in 2004.

Domestic litigation has been also used to address business complicity.<sup>9</sup> Nearly half of the judicial cases that we found were heard in domestic courts. Argentina (18 trials) and Colombia (17 trials) have been the leaders in these cases. In our preliminary investigation into corporate complicity cases around the world, more than three quarters (75 percent) of all criminal cases and more than half of all criminal and civil cases (51 percent) are from these countries.

In sum, this brief overview of where and how TJ was used in cases of corporate accountability suggests that no region is exempt from the efforts. It also shows that innovations in TJ – particularly the use of civil trials – have accompanied the advancement of corporate accountability.

### **Prosecution models**

We are also analysing the different forms in which prosecution is taking place. Our aim is to elaborate prosecution models that can be taken as guidelines for future judicial actions in different context. Such analysis is in a preliminary stage and is initially restricted to Argentina, one of the two leaders in terms of trials for business complicity. We found four models (1) direct complicity in criminal violence, (2) violations of labour law, (3) financing repression, and (4) illegal business.

<sup>9</sup> By 'domestic litigation' or 'domestic trials', we mean judicial processes that took, or are taking, place in the same country where the violation of human rights occurred.



## 1. Direct complicity in criminal violence

A top officer from a local company was convicted for his involvement in human rights violations, and a number of officers from other companies face criminal prosecution for their alleged participation in such violations.<sup>10</sup>

The emblematic case in this category is the Levin case. A federal court in Salta province sentenced former bus company owner Marcos Levin to 12 years in prison in 2016. Levin is the first businessman to be found guilty of human rights violations during the dictatorship in Argentina. He was a former owner of a coach company La Veloz del Norte. The tribunal found evidence that Levin participated in the kidnapping and torture of employee and unionist leader Mr Victor Cobos. Levin provided crucial information that allowed state agents to identify and torture him.

Another important case is the trial of the corporate leaders of the Ledesma sugar mill in 2012 in Jujuy. The company is accused of being complicit in the well-known Noche del Apagón (Night of the Blackout) between 20 and 27 July 1976. An estimated 400 workers, students, and professionals were allegedly kidnapped, tortured, killed, and disappeared during this incident. Four policemen were detained for their involvement in the repression. From Ledesma's top management, Alberto Lemos and Carlos Pedro Blaquier were indicted for the firm's involvement in human rights violations, including providing the trucks used to kidnap workers. In addition, the company is accused of having caused the blackout by cutting off electricity to facilitate the military operation. The company further allowed the armed forces to set up a clandestine detention centre, Esquadron 20, on its grounds. As a result of their involvement in these abuses, the firm's directors are now barred from travelling outside the country during the investigation.<sup>11</sup>

The top managers of two automobile manufacturers – Mercedes-Benz and Ford Motor Company – have also faced investigation for direct human rights violations. The charges against Mercedes-Benz involve the company's creation

<sup>10</sup> In addition to Ledesma, Mercedes-Benz, and Ford Motor Company discussed here, top officers from the following companies are being prosecuted currently for direct involvement in human rights abuses: Techint; Atarsa; Minera Aguilar SA; Loma Negra; La Veloz del Norte; and Acindar. Corporations and Human Rights Database.

<sup>11</sup> See latest developments at <http://tiempo.infonews.com/2012/11/16/argentina-91029-la-justicia-proceso-a-blaquier-por-29-casos-de-secuestro-en-1976.php>

of a blacklist of workers who were subsequently kidnapped. These workers were members of the internal workers' committee. A criminal action was opened in 2002 but there have been no indictments so far.<sup>12</sup> In October 2013, an Appeals Court confirmed the charges against three former Ford Motor Company executives (Pedro Muller, Guillermo Galarraga, and Hector Francisco Jesus Sibilla) for their crimes against humanity of targeting union leaders for kidnapping and torture. They stand accused of, and are under house arrest for, having helped the repressive security apparatus in the illegal kidnapping and torture by providing names, national identification numbers, photographs, and home addresses. The army forces seized two dozen union workers off the Ford factory floor to be tortured and interrogated and sent to military prisons. Bail is set at US\$ 142,000.<sup>13</sup>

## 2. Labour law violations

The creative use of Argentine labour law is a model that could be replicated elsewhere. In these cases, companies have been charged with failing to protect their workers' safety. In February 2012, in the *Ingenieros* case, an Appeals Labour Court dismissed the statute of limitations claims of a legal action brought to the court. Maria Gimena Ingenieros, the daughter of Enrique Roberto Ingenieros, brought the case. She requested financial compensation for her father's disappearance during the civil-military dictatorship. She claimed that Techint SA, owing to its co-authorship of the crime of disappearance on the company's grounds, should pay compensation. The company has denied the claim and further contends that the worker safety law, under which the case was brought, has a two-year statute of limitations that had long ago run out. The Appeals Court rejected that claim, declaring that statutes of limitation do not apply to compensation claims linked to crimes against humanity.<sup>14</sup>

The April 2007 *Siderca* case, brought by Ana María Cebrymsky, the wife of Oscar Orlando Bordisso, heard by the Supreme Court of the Province of Buenos Aires, follows a similar logic. Bordisso disappeared shortly after he

<sup>12</sup> See [www.ambito.com/noticia.asp?id=724383](http://www.ambito.com/noticia.asp?id=724383)

<sup>13</sup> See the latest development at [www.cij.gov.ar/nota-11452-Lesa-humanidad-procesaron-a-ex-directivos-de-la-empresa-Ford.html](http://www.cij.gov.ar/nota-11452-Lesa-humanidad-procesaron-a-ex-directivos-de-la-empresa-Ford.html)

<sup>14</sup> See the latest developments at [www.diariojudicial.com.ar/fuerolaboral/Se-le-vino-la-noche-a-empresas-donde-hubo-desaparecidos-20120215-0002.html](http://www.diariojudicial.com.ar/fuerolaboral/Se-le-vino-la-noche-a-empresas-donde-hubo-desaparecidos-20120215-0002.html)

left work in 1977. In 1995, his wife claimed compensation from his employer – Siderca – under Argentine labour law, specifically that the country’s work safety law obliged the company to protect her husband on entering and exiting the work site. The company rejected the claim and argued against legal action owing to the statute of limitations. The first instance tribunal accepted the claim against the company. On appeal, the company again lost in the Provincial Supreme Court. The Court ordered compensation for Bordisso’s widow.

### 3. Financing repression

Argentina has also investigated cases in which businesses have financially collaborated with the dictatorship’s repressive apparatus in illegal economic activity. In 2009, a group of victims of human rights violations brought the IbañNewez case to a civil court to investigate the complicity of banks in crimes against humanity. The group alleged that the banks financed the de facto regime, facilitating the commission of grave human rights violations against the civil population. In the Ibañez case, the large sums in the loans provided to the regime thus sustained, expanded, and intensified the military and its repressive apparatus.

A similar case was brought to court in 2010. The Garragone case was filed by Martin Garragone, the son of one of Argentina’s disappeared, against Citibank and the Bank of America. Garragone argued that the banks’ loans to the dictatorship were crucial for the latter’s abuses of human rights and demanded the right to truth about the links between the companies and his father’s disappearance. Garragone cited a report prepared by Juan Pablo Bohoslavsky, an Argentine expert on financial complicity at the UN Human Rights Council, demonstrating that the banks were aware that the funds transferred to Argentina would be used to support the illegal and repressive infrastructure. The case is in its early stages; the court still needs to declare that it has jurisdiction to review the case under procedural law.<sup>15</sup>

<sup>15</sup> See the latest developments at <http://tiempo.infonews.com/2013/09/09/argentina-109064-argentina-a-un-paso-de-investigar-a-bancos-por-creditos-a-la-dictadura.php>

#### 4. Illegal business

In an additional creative legal turn, Argentine courts have begun to investigate companies' involvement in illegal business transactions. The *Papel Prensa* case is illustrative. Some observers consider the case to be an example of the Kirchner government's political misuse of transitional justice to punish and weaken the government's current political opponents; others see it as an important case for correcting the wrongs of the previous regime and its corporate allies. After an initial flurry of activity around the case, it died down somewhat until the end of 2012 when files relating to the case were discovered along with other military regime files in an air force headquarters.

The case involves events following the death in 1976 (in a plane crash) of David Graiver, the owner of the *Papel Prensa* newsprint company. Graiver had alleged links to the left-wing urban guerrilla Montonero movement opposed to the dictatorship.<sup>16</sup> After his death, Graiver's wife, Lidia Papaleo, and some months later, his brother, Isidoro Graiver, the heirs to the company, were allegedly threatened and pressured into selling the company to FAPEL (Fábrica Argentina de Papel). FAPEL subsequently sold the company to the three biggest Argentine newspapers loyal to the military regime (*La Nación*, *Clarín*, and *La Razón*), securing their monopoly over news production in the country during the dictatorship. The criminal trial is in its early stages, and the investigation is allegedly frozen.<sup>17</sup>

A second judicial case relates to the commission of human rights violations and money laundering. In the Vildoza case, several military officers and civilians are accused of the illegal procurement of property from detained individuals and the sale of the real estate to private individuals and companies connected to the military. The investigation was initiated by the public prosecutor and private partners and later included the Financial Information Unit (Unidad de Información Financiera), the state agency in charge of investigating money laundering activities. The controversy about the case is whether a money laundering law initiated in 2004 could be applied to a case from the 1970s. This has been resolved by showing that the profit from the sale of the real estate transaction continues to benefit the individuals who initially seized the property.

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<sup>16</sup> The Montoneros urban guerrilla movement was one of the most important clandestine and illegal leftist groups during the 1970s in Argentina.

<sup>17</sup> See the latest developments at [www.telam.com.ar/notas/201401/48677-para-fresneda-la-causa-de-papel-prensa-se-encuentra-cajoneada.html](http://www.telam.com.ar/notas/201401/48677-para-fresneda-la-causa-de-papel-prensa-se-encuentra-cajoneada.html)





# PART II:

Country case studies





## World Map

Country cases included in this volume

Clarification of the world map used: The Gall-Peters projection is a map projection that maps all areas such that they have the correct sizes relative to each other. This projection is not only intended to provide a more precise map, but also point out the traditional Western bias toward the nations of the Global South.

**East Timor** ◆ 

◆ **South Africa**

# 3. Germany

The first significant case of corporate accountability within a transitional justice framework took place in the aftermath of World War II in Germany. At first, it concerned the well-known Nuremberg International Military Tribunal and the Subsequent Nuremberg Trials. Some of these trials involved senior company officials who had been actively helping the German Nazi regime, for crimes such as supplying poisonous gas to concentration camps, forcing people into slave labour in factories, and enrichment of their companies by plundering property in occupied Europe.<sup>1</sup> In the wake of these trials, civil law suits were initiated in Europe and the United States against German companies or their representatives.

<sup>1</sup> International Commission of Jurists, *Corporate Complicity & Legal Accountability, Volume 1 Facing the Facts and Charting a Legal Path*. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 2008.



## Germany

### Fact sheet

World War II, 1939-1945

Nuremberg International Military Tribunal, 1945-1946

Claims Conference, created in 1951

Compensation fund, created in 1998

Some of these civil law suits resulted in reparation mechanisms for former slaves and forced labourers<sup>2</sup> in German companies in the Nazi era. The reparations of the 1950s were meant mainly for Jewish former slave labourers in the concentration camps, and the second wave of reparations after the year 2000 focused on reparations to (mainly non-Jewish) slaves and forced labourers.

## Judicial mechanisms

Immediately after the end of World War II, the ad hoc International Military Tribunal at Nuremberg was established<sup>3</sup> Its main objective was ‘to hold

2 Following the 1926 Slavery Convention, the European Court of Human Rights defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” and following ILO Convention No. 29 defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”, [http://www.echr.coe.int/Documents/Guide\\_Art\\_4\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf)

3 The Nuremberg Tribunal is often viewed as the precursor of the international criminal tribunals established after the end of the Cold War, like the (temporary) International Criminal Tribunal for the former Yugoslavia (ICTY, founded 1993) and International Criminal Tribunal for Rwanda (ICTR, founded 1995), and the permanent International Criminal Court (ICC, founded 2002).

individual high-ranking civilian and military officials accountable for the Nazi regime's systematic human rights crimes.<sup>4</sup> The reason behind the relatively rapid creation of this transitional justice mechanism was the seriousness and magnitude of the Nazi war crimes, in combination with the fact that the Allied Forces had the political power to impose it upon the losing party.

Apart from this core objective, the Nuremberg International Military Tribunal created jurisprudence on the responsibility of entrepreneurs who had provided goods and services to the Nazi state machinery. In its conclusions, the Tribunal stated clearly that: 'Those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. ... [That person] had to have the co-operation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent [...] if they knew what they were doing.'<sup>5</sup> Thus, the Nuremberg prosecutors acknowledged that the owners and directors of large German companies played a key role in supporting and facilitating the Nazi regime and its crimes.<sup>6</sup>

The tribunal had jurisdiction only over natural persons (representatives and owners of companies) and not over corporations. A total of 42 high-ranking representatives of large German companies were tried as part of the three so-called industrial cases of the Subsequent Nuremberg Trials<sup>7</sup> before US Military Tribunals, which took place between 1946 and 1949.<sup>8</sup> These industrial cases consisted of the Flick case (a major conglomerate in the coal and steel industries), the I.G. Farben case (a large conglomerate of chemical

4 Wolfgang Kaleck, Miriam Saage-Maasz, 2010, 'Corporate accountability for human rights violations amounting to international crimes. The status quo and its challenges', *Journal of International Criminal Justice*, 8(3): 699–724, 2010, p.701.

5 The Nuremberg Trial (*United States v. Goering*), 6 F.R.D. 69, 112 (International Military Tribunal at Nuremberg, 1946), as cited in Horacio Verbitsky, Juan Pablo Bohoslavsky, *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, first Spanish edition 2013, English translation 2016, pp.2–3.

6 Wolfgang Kaleck, Miriam Saage-Maasz, 'Corporate accountability', p.701.

7 This is the name commonly used for these trials. Formerly, they were called the Trials of War Criminals before the Nuremberg Military Tribunals, <http://www.phdn.org/archives/www.mazal.org/NMT-HOME.htm>

8 Wolfgang Kaleck, Miriam Saage-Maasz, 'Corporate accountability', p.701.

firms), and the Krupp case (a large steel and arms corporation).<sup>9</sup> Of the total of 42 defendants, 26 men were found guilty of 'enslavement' and imposing slave labour on the civilian populations of German-controlled territories and on concentration camp inmates (regarded as crimes against humanity) and plundering (categorized as war crimes).<sup>10</sup>

A similar conviction took place before a British Military Tribunal in 1946, where, in the so-called Zyklon B case, the businessmen Bruno Tesch and Karl Weinbacher were convicted of 'aiding and abetting murder.'<sup>11</sup> They were the owner and the general manager of a company that supplied concentration camps with Zyklon B, a pesticide used by the Nazis in the gas chambers against millions of people during the Holocaust. They were convicted 'even though they were not physically present at the concentration camps when the gassing occurred.'<sup>12</sup>

Apart from these military tribunals, over the years, civil law suits were taken by victims against German companies that collaborated with the Nazi regime or against the companies' representatives. These law suits took place in both Europe and the United States.<sup>13</sup> A first emblematic case was the lawsuit of Norbert Wollheim, a former Jewish concentration camp inmate, against I.G. Farbenindustrie AG (I.G. Farben). He had been a slave labourer in the I.G. Auschwitz plant, owned by I.G. Farben. This case was won by Wollheim in 1953, and the Regional Court of Frankfurt ordered I.G. Farben to pay him a compensatory sum of 10,000 DM.<sup>14</sup>

9 [https://en.wikipedia.org/wiki/Subsequent\\_Nuremberg\\_trials](https://en.wikipedia.org/wiki/Subsequent_Nuremberg_trials)

10 In the Flick Trial, of the six defendants, one man was found guilty of both enslavement/slave labour and plundering, and one other of enslavement/slave labour only ([https://en.wikipedia.org/wiki/Flick\\_Trial](https://en.wikipedia.org/wiki/Flick_Trial)). In the I.G. Farben Trial, of the 24 defendants, four men were found guilty of enslavement/slave labour in the case of Auschwitz (where I.G. Farben had constructed a plant next to the concentration camp with the clear intent of using inmates as slave workers), eight men were found guilty of plundering, and one man was found guilty of both enslavement/slave labour and plundering ([https://en.wikipedia.org/wiki/I.G.\\_Farben\\_Trial](https://en.wikipedia.org/wiki/I.G._Farben_Trial)). In the Krupp Trial, of the 12 defendants, 11 men were found guilty of enslavement/slave labour, of whom six were also found guilty of plundering, [https://en.wikipedia.org/wiki/Krupp\\_Trial](https://en.wikipedia.org/wiki/Krupp_Trial)

11 Wolfgang Kaleck, Miriam Saage-Maasz, 'Corporate accountability', pp.701–702.

12 Ibid.

13 Ibid.

14 [http://www.wollheim-memorial.de/en/das\\_verfahren\\_wollheim\\_gegen\\_ig\\_farben](http://www.wollheim-memorial.de/en/das_verfahren_wollheim_gegen_ig_farben)

## First reparation mechanism

The appeal in the Wollheim vs. I.G. Farben case gave rise to the first reparation mechanism to address corporate accountability in Germany. Facing a possible verdict of the Higher Regional Court of Frankfurt, the company decided in 1955 to come to an out-of-court settlement. It came to an agreement with the Conference on Jewish Material Claims Against Germany (Claims Conference) regarding the initiation and management of a reparation fund.<sup>15</sup> I.G. Farben provided a sum of 27 million DM for the compensation of Jewish slave and forced labourers of I.G. Auschwitz and 3 million DM for non-Jewish victims.<sup>16</sup>

In order to get 'certainty of the law,' I.G. Farben succeeded in getting the Federal government to create a legal framework, by passing a law called *Aufrufgesetz*. By this law, enacted in 1957, the threat of subsequent lawsuits was eliminated for I.G. Farben. Accordingly, all former forced I.G. Farben labourers were notified that they had to assert their claims by 31 December 1957, or else they would be invalid.<sup>17</sup>

The lawsuit against I.G. Farben 'triggered considerable agitation among the major industrial firms of the Federal Republic of Germany.'<sup>18</sup> Following the example of I.G. Farben, and making use of the same legal framework, several German companies also made agreements with the Claims Conference. In 1959, Krupp agreed with the Claims Conference to provide between 6 and 10 million DM to compensate former Jewish concentration camp prisoners. Each qualified claimant was to receive a sum of 5,000 DM. Because the number of qualified claimants was far greater than originally assumed, the former Jewish forced labourers received no more than 3,000 DM each.<sup>19</sup>

15 Wollheim Memorial, 'Conference on Jewish material claims against Germany', [http://www.wollheim-memorial.de/en/conference\\_on\\_jewish\\_material\\_claims\\_againt\\_germany](http://www.wollheim-memorial.de/en/conference_on_jewish_material_claims_againt_germany). The Claims Conference was founded in 1951 and represented a coalition of several Jewish organizations. They sought compensation agreements and negotiated therefore with the German government and German corporations.

16 [http://www.wollheim-memorial.de/en/vergleichsverhandlungen\\_en](http://www.wollheim-memorial.de/en/vergleichsverhandlungen_en)

17 [http://www.wollheim-memorial.de/en/das\\_verfahren\\_wollheim\\_gegen\\_ig\\_farben](http://www.wollheim-memorial.de/en/das_verfahren_wollheim_gegen_ig_farben) and [http://www.wollheim-memorial.de/en/vergleichsverhandlungen\\_en](http://www.wollheim-memorial.de/en/vergleichsverhandlungen_en)

18 Ibid.

19 [http://www.wollheim-memorial.de/en/entschaedigung\\_durch\\_firmen\\_von\\_den\\_1950er\\_bis\\_in\\_die\\_1990er\\_jahre](http://www.wollheim-memorial.de/en/entschaedigung_durch_firmen_von_den_1950er_bis_in_die_1990er_jahre)

After lawsuits filed by former forced labourers and negotiations by the Claims Conference, compensation was paid also by AEG-Telefunken (agreement in 1960), Siemens (agreement in 1962), Rheinmetall (agreement in 1966), and Daimler-Benz (agreement in 1988).<sup>20</sup> Most of these firms 'that once had employed forced labourers saw themselves as having neither direct guilt nor any legal obligation to pay compensation.' They considered their financial compensation as a voluntary contribution.<sup>21</sup> Like I.G. Farben, the companies were 'insisting in return [for the compensation] that the representatives of the Claims Conference must forego legal measures against them for all time.'<sup>22</sup>

The Wollheim Memorial, an organization that seeks to commemorate the victims of one of Auschwitz' concentration camps and provide information on the reparation process, gives some information on the actual execution of the compensation payments. In the agreement between I.G. Farben and the victims, it had been arranged that the Claims Conference would deal with the processing of the applications for compensation submitted by Jewish survivors of Auschwitz, with the abovementioned fund of 27 million DM. The Claims Conference created an agency specifically for this purpose.<sup>23</sup>

According to the Wollheim Memorial, the Claims Conference's agency accomplished its goals by compensating 5,855 Jewish victims of forced labour in Auschwitz. Thanks to interest earned, a total amount of 27,841,500 DM could be spent, granting each applicant 5,000 DM.<sup>24</sup> In the agreement, it was also specified that I.G. Farben would organize the compensation payments to the non-Jewish forced labourers, with a total fund of 3 million DM. I.G. Farben's implementation process for the non-Jewish labourers was much slower. By spring 1962, it had approved only 404 applications (out of 2,956 received) and had granted a total amount of only 1,410,500 DM.<sup>25</sup> It is unclear how many non-Jewish<sup>26</sup> victims have been compensated by I.G. Farben to date.

<sup>20</sup> Ibid.

<sup>21</sup> Peer Heinelt, 'Financial compensation for Nazi forced laborers', 2010, pp.44–45, [www.wollheim-memorial.de](http://www.wollheim-memorial.de)

<sup>22</sup> Ibid.

<sup>23</sup> This agency was called Compensation-Treuhandgesellschaft.

<sup>24</sup> Wollheim Memorial, 'After the Wollheim Agreement: payments to the survivors', [http://www.wollheim-memorial.de/en/auszahlungen\\_en](http://www.wollheim-memorial.de/en/auszahlungen_en)

<sup>25</sup> Ibid.

<sup>26</sup> This included the group of Jewish victims that had been persecuted by the Nazis as Jews for ethnic reasons but did not self-identify as Jews.

## Subsequent reparations

The second official reparation mechanism was initiated in the late 1990s. It was additional to the first reparation mechanism, which had not (or hardly) included non-Jewish forced labourers deported to Germany from other European countries, such as Poland and Russia. In 1984, the Green Party in the German Federal Parliament proposed the establishment of a national-level compensation fund for Nazi forced labourers, to be financed by German industry. The motion was rejected.<sup>27</sup> In the late 1990s however, the public, political, and legal pressure upon large German corporations and the German government to address corporate accountability for all victims of slave and forced labour started to grow.

In late 1996 and early 1997, a series of class action lawsuits were filed in several US courts against Swiss banks for knowingly retaining and concealing assets of Holocaust victims and for laundering Nazi loot and profits of slave labour. During the lawsuits, official settlement discussions started and an agreement in principle to settle the lawsuits for US\$ 1.25 billion was reached in August 1998, for which a Settlement Fund was created.<sup>28</sup> After this successful legal action, the German companies came under pressure to follow the example of the Swiss banks. Almost immediately following the Swiss Banks Settlement, in August 1998 a class action lawsuit was announced in the US against 16 German companies, including Deutsche Bank and Volkswagen, seeking damages on behalf of tens of thousands of (Jewish and also non-Jewish) wartime slave labourers.<sup>29</sup>

In addition to these legal steps, the issue of German companies' accountability was getting broad media attention in the US. This increased public debate led to opposition from US stockholders against the mergers of Deutsche Bank and Bankers Trust and of Daimler-Benz and Chrysler.<sup>30</sup> According to an

27 Wollheim Memorial, 'Parliamentary efforts to obtain compensation in the 1980s', [http://www.wollheim-memorial.de/en/parlamentarische\\_bemuehungen\\_um\\_entschaedigung\\_in\\_den\\_1980er\\_jahren](http://www.wollheim-memorial.de/en/parlamentarische_bemuehungen_um_entschaedigung_in_den_1980er_jahren)

28 Holocaust Victim Assets Litigation (Swiss Banks). Official website of the Swiss Banks Settlement [www.swissbankclaims.com/overview.aspx](http://www.swissbankclaims.com/overview.aspx)

29 John Schmid, 'Nazi-era slave laborers to sue German companies', *International New York Times*,

28 August 1998, <http://www.nytimes.com/1998/08/28/news/28iht-bonn.t.html>

30 Wollheim Memorial, 'The German economy foundation initiative', [http://www.wollheim-memorial.de/en/die\\_stiftungsinitiative\\_der\\_deutschen\\_wirtschaft\\_1999](http://www.wollheim-memorial.de/en/die_stiftungsinitiative_der_deutschen_wirtschaft_1999)



internal circular of the Federal Ministry of Finance, the German government feared not only the reputational risks and competitive position of the German companies associated with these trials, but also economic sanctions in the form of withdrawals of licences and calls for boycotts.<sup>31</sup> This accumulation of international pressure soon began to bear fruit. In autumn 1998, the German government called upon the US Under-Secretary of State to help facilitate the dialogue between lawyers representing victims, lawyers for German companies, and the German government, with the objective of reaching agreement on compensation.<sup>32</sup>

In February 1999, the first meeting took place between the federal government and representatives of 12 large German firms: Allianz, BASF, Hoechst and Bayer, BMW, DaimlerChrysler, Volkswagen, Deutsche Bank, Dresdner Bank, Degussa, ThyssenKrupp, Hoesch, and Siemens.<sup>33</sup> Following the personal involvement of the President of the United States and Chancellor Schroeder, the parties involved came to an agreement in December 1999. The German government and companies established a special foundation, capitalized with 10 billion DM, to make payments to forced labourers and others who suffered at the hands of German companies during the Nazi era and World War II.<sup>34</sup> In August 2000, the Federal Republic of Germany passed the law on the creation of a foundation – called Remembrance, Responsibility, and Future – to execute the compensation payments. Under the law, the German government and the German companies each provided half of the funds for the foundation.<sup>35</sup>

In return for the establishment of the compensation fund, the German companies and government were seeking a guarantee to ensure that no more complaints against German companies would be accepted by US

31 Circular from the Federal Ministry of Finance to the Finance Offices, 3 February 2000, cited in Ulla Jelpke / Rüdiger Lötzer, 'Geblieden ist der Skandal – ein Gesetz zum Schutz der deutschen Wirtschaft', as cited in Wollheim Memorial, *The Foundation Remembrance, Responsibility, and Future*, [http://www.wollheim-memorial.de/en/die\\_stiftung\\_erinnerung\\_verantwortung\\_und\\_zukunft](http://www.wollheim-memorial.de/en/die_stiftung_erinnerung_verantwortung_und_zukunft)

32 *Statement of Interest of the United States, In Re Austrian and German Bank Holocaust Litigation*, for the United States District Court for the Southern District of New York, p.8, 8 November 2000, [www.state.gov/documents/organization/6542.doc](http://www.state.gov/documents/organization/6542.doc)

33 Wollheim Memorial, 'The German economy foundation initiative'.

34 *Statement of Interest of the United States, In Re Austrian and German Bank Holocaust Litigation*.

35 Patrick Dumbery, *State Succession to International Responsibility*, Martinus Nijhoff Publishers, 2007, pp.388–389.

courts.<sup>36</sup> In a circular from the German Federal Ministry of Finance of 3 February 2000, the payments were therefore described as ‘voluntary payments without any legal obligation [...]’.<sup>37</sup> And, according to the Statement of Interest of the Attorney General of the United States following the agreement on the establishment of the compensation fund, it was agreed that, ‘in exchange [for the compensation payments], the plaintiffs would voluntarily dismiss their lawsuits against German companies [...]’.<sup>38</sup> In that same document, the United States showed its commitment ‘to take certain steps to assist German companies in achieving “legal peace” in the United States for claims arising out of the Nazi era and World War II.’<sup>39</sup>

The German government estimated in 1999 that around 200,000 to 300,000 people would be eligible for compensation, the majority of them living in Eastern Europe.<sup>40</sup> According to the number of beneficiaries of the programme on the Foundation’s website, the reality exceeded these conservative estimates. When the Foundation officially closed its programme in June 2007, payments had been made to 1,665,000 victims and their legal successors. Individual one-time payments of up to 15,000 DM (7,670 Euro) were paid to former forced labourers held prisoner in a concentration camp, a ghetto, or a similar place of detention, and payments up to 5,000 DM (2,560 Euro) for other categories of forced labourers.<sup>41</sup> It is not very clear how many corporations donated to the fund. Some sources state that only 17 companies contributed to the compensation fund, others mention 6,300 corporate donations to the fund.<sup>42</sup> Apparently, leading firms such as Volkswagen, DaimlerChrysler, Deutsche Bank, and Bayer contributed.<sup>43</sup>

36 Wollheim Memorial, ‘The German economy foundation initiative’.

37 Circular from the Federal Ministry of Finance to the Finance Offices, 3 February 2000.

38 Statement of Interest of the United States, In Re Austrian and German Bank Holocaust Litigation, p.6.

39 Statement of Interest of the United States, In Re Austrian and German Bank Holocaust Litigation, p.7.

40 BBC News, ‘German industry unveils Holocaust fund’, 16 February 1999, <http://news.bbc.co.uk/2/hi/business/280475.stm>

41 Payment Programme of the Foundation EVZ [the German acronym for the Remembrance, Responsibility, and Future Foundation], <https://www.bundesarchiv.de/zwangsarbeit/leistungen/direktleistungen/leistungsprogramm/index.html.en>

42 As cited in Leigh A Payne, Gabriel Pereira, ‘Corporate complicity in international human rights violations’, *Annual Review of Law and Social Science*, 12: 63–84, 2016: ‘The American Jewish Committee found 255 corporations that had employed forced labour and only 17 contributed to the compensation fund (Kempster 1999). Another study mentions 6,300 corporate donations to the compensation fund (Helm 2001).’

43 Erik Kirschbaum, ‘Germany ends war chapter with “slave fund” closure’, Reuters, 12 June 2007, <http://business-humanrights.org/en/germany-ends-war-chapter-with-slave-fund-closure>

## Symbolic reparations

Over the last decades, a considerable number of symbolic reparations have taken place in Germany, at both local and national level, effectuated for example by numerous memorials and public events. Open sources mention one specific case of voluntary symbolic reparation by a German company: Deutsche Bahn.<sup>44</sup> The company developed and staged a memorial exhibition called Special Trains to Death. Through this initiative, Deutsche Bahn acknowledged that 'without the [predecessor of the] Reichsbahn the industrial murder of millions of people would not have been possible.'<sup>45</sup> In doing so, they recognized their responsibility to abide by international human rights standards. ♦

44 Leigh A Payne, Gabriel Pereira, 'Corporate complicity'. The recognition in the specific case of Deutsche Bahn occurred without the threat of judicial action.

45 Ibid.

# 4.

# Argentina

On 24 March 1976, President Isabel Perón, the widow of the deceased President Juan Perón, was deposed from power after a military coup headed by the military commander, Jorge Videla. Argentina was subsequently governed by a series of military juntas until 1983. As in the case of Brazil, the military juntas operated in alliance with conservative actors in Argentine society in order to fight communist, leftist, and guerrilla groups and to protect capital investments.<sup>1</sup> According to official sources, the dictatorship committed systematic large-scale practices of kidnapping, detention, torture, killings, and at least 9,000 forced disappearances.<sup>2</sup>

Argentina's corporate sector had been an important ally of the military juntas from the start. Many different kinds of industrial and commercial sectors were involved, ranging from shipyards and steel and car factories to agro-industrial

<sup>1</sup> Leigh A Payne, Gabriel Pereira, 'Corporate complicity in dictatorships', University of Oxford, without date, [https://www.sbs.ox.ac.uk/sites/default/files/Skoll\\_Centre/Docs/essay-payne.pdf](https://www.sbs.ox.ac.uk/sites/default/files/Skoll_Centre/Docs/essay-payne.pdf)

<sup>2</sup> <http://www.usip.org/publications/truth-commission-argentina>



## Argentina

### Fact sheet

Military junta (Jorge Videla), 1976-1983

National Commission on the Disappeared, created in 1983

National Securities Commission, 2012-2013

Truth commission to investigate corporate complicity, created in 2016

companies and banks.<sup>3</sup> The sort of involvement in the repression and the degree of complicity varied. Some corporations participated actively in gross human rights violations (often against their own workers), and others gave financial or logistical support, deployed members of the state security forces, or benefited from illegal transactions with the regime.<sup>4</sup>

Unlike other Latin American countries, Argentina started the truth-finding process right after the democratic transition in 1983. In the course of time, the country became a front-runner regarding the number of transitional justice trials conducted, innovative jurisprudence on the issue, and the tangible results of these processes.<sup>5</sup> Furthermore, it is remarkable that the Argentine transitional

3 Dirección Nacional de Sistema Argentino de Información Jurídica, *Responsabilidad Empresarial y Delitos de Lesa Humanidad. Represión a trabajadores durante el terrorismo del Estado, Tomo II*, (2015), pp.406–408.

4 Leigh A Payne, Gabriel Pereira, 'Accountability for corporate complicity in human rights violations: Argentina's transitional justice innovation?', in: Horacio Verbitsky, Juan Pablo Bohoslavsky (eds.), *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*. Cambridge University Press, 2016, pp.29–46; Dirección Nacional de Sistema Argentino de Información Jurídica, pp.406–408.

5 <http://www.palgraveconnect.com/pc/doifinder/view/10.1057/9781137269393.0010> and <https://www.ictj.org/publication/criminal-prosecutions-human-rights-violations-argentina>; Leigh A Payne, Gabriel Pereira, 'Corporate complicity in dictatorships'.

justice process already included the issue of corporate accountability in an early phase of the process.

## Non-judicial mechanisms

In December 1983, Argentina created the world's first truth commission: The National Commission on the Disappeared (CONADEP). CONADEP's investigation of thousands of forced disappearances between 1976 and 1983 laid the groundwork for the trials of the military juntas that started in 1985.<sup>6</sup> The report included a chapter on trade union activists and mentioned 11 companies by name for their involvement in illegal detentions and forced disappearances during the military regime, among them the shipyards Astarza and Mestrina, the car company Ford, the sugar mill Ledesma, and the steel company Acindar.<sup>7</sup>

Over the years, the work of the first truth commission on the issue of corporate accountability was followed by new initiatives. Under the Kirchner administration in particular, there was a political opening to continue the truth-finding process. This can partly be explained by the fact that the government's political agenda included the limitation of corporate power in Argentine society. In this period, known cases of corporate complicity were further elaborated, new cases were investigated, and new angles and concepts were explored.

An example of such a new initiative is the investigation into the National Securities Commission (CNV) on the impact of the dictatorship on the financial system. The CNV is an official entity – answerable to the Ministry of Economic Affairs – that supervises and controls the market price-formation process and protects investors. The 2013 report reveals how the CNV was used by the Ministry during the dictatorship to gather intelligence and to persecute members of the business sector, and includes a list of businessmen and financiers who were kidnapped and/or dispossessed in the framework of the so-called fight

6 ICTJ Briefing, *Criminal Prosecutions for Human Rights Violations in Argentina*, November 2009, <https://www.ictj.org/sites/default/files/ICTJ-Argentina-Prosecutions-Briefing-2009-English.pdf>

7 Comisión Nacional sobre la Desaparición de Personas (CONADEP), *Nunca Más*, Chapter H: 'Gremialistas', 1984, <http://www.cholonautas.edu.pe/modulo/upload/CONADEP.pdf>

against economic subversion.<sup>8</sup> According to press sources, the CNV filed a written case with the Federal Court and the Public Prosecutor.<sup>9</sup>

Argentina again fulfilled a pioneering role when, in March 2014, the legislature of the province of Rio Negro (Patagonia) approved the establishment of a truth commission to investigate corporate complicity during the Argentine dictatorship.<sup>10</sup> The truth commission was established in 2016 and will focus especially on the banks' support to the military regime.<sup>11</sup>

Another result of the new political dynamic was the publication of the 2015 report by the Argentine Ministry of Justice and Human Rights, which took as its starting point the report of the truth commission and the trials in the judicial process that was started against junta members in 1985. The report identified nearly 900 victims in the 25 companies researched, 354 of whom were forcibly disappeared and 65 of whom were murdered.<sup>12</sup> In terms of the scale of involvement, the report names five companies of which between 70 and 100 workers became victims of the repression: the shipyard Astillero Rio Santiago, the steel companies Dálmine-Siderca and Acindar, the sugar company Ledesma, and car company Fiat.<sup>13</sup> Other international car companies mentioned in the report are Ford and Mercedes-Benz. In more than 50 percent of the cases, there is evidence of military operations on company premises and of the involvement of managers in the detention, kidnapping, and even torture of employees.<sup>14</sup>

8 Comisión Nacional de Valores (Oficina de Coordinación de Políticas de Derechos Humanos, Verdad y Justicia), 'Economía, política y sistema financiero. La última dictadura cívico-militar en la CNV', October 2013, [http://www.cnv.gov.ar/Publicaciones/InformeDDHH/INFORME\\_ECONOMIA\\_POLITICA\\_Y\\_SISTEM\\_FINANCIERO-DDHH.pdf](http://www.cnv.gov.ar/Publicaciones/InformeDDHH/INFORME_ECONOMIA_POLITICA_Y_SISTEM_FINANCIERO-DDHH.pdf)

9 Marcos Leonetti, 'Informe de la CNV sobre el impacto de la dictadura militar en el sistema financiero', *La Economía Online*, 23 April 2013, <http://www.laeconomiaonline.com/2013/04/23/informe-de-la-cnv-sobre-el-impacto-de-la-dictadura-militar-en-el-sistema-financiero/>

10 The Investigative Commission for Memory, the Truth and Justice was approved by law in 2014 and established in 2016. The legislature of the province of Rio Negro, Law N° 4956, [http://unterseccionalroca.org.ar/imagenes/documentos/leg/Ley%204956%20\(comisi%C3%B3n%20de%20memoria\).pdf](http://unterseccionalroca.org.ar/imagenes/documentos/leg/Ley%204956%20(comisi%C3%B3n%20de%20memoria).pdf). <http://www.legism.gov.ar/lrn/?p=18855>;

11 Juan Pablo Bohoslavsky, Jernej Letnar Cernic, *Making Sovereign Financing and Human Rights Work*, Hart, 2014, p.31.

12 Dirección Nacional de Sistema Argentino de Información Jurídica, *Responsabilidad Empresarial*, pp.406-408.

13 Ibid., p.407.

14 Ibid., p.408.

Finally, in November 2015, the Argentine senate approved a draft law to establish a truth commission on economic complicity. The legislative initiative was supported by a group of UN experts, including the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence.<sup>15</sup> This thematic truth commission will have broad powers to collect information and to make recommendations.<sup>16</sup> Its investigations might provide information for possible future trials regarding corporate complicity.

## Judicial mechanisms

The judicial part of the transitional justice process in Argentina has been relatively strong compared to other countries in Latin America and started as early as 1985; and, although the government enacted two amnesty laws in the 1980s<sup>17</sup> to avoid trials against military personnel involved in human rights abuses, the proceedings continued when the amnesty laws and decrees were declared null by the courts in 2001.<sup>18</sup> These legal cases resulted in 506 convictions and 90 acquittals or dismissals in trials up to August 2014 against defendants accused of being a direct or indirect perpetrator of crimes against humanity during the dictatorship.<sup>19</sup> Thus, of any transitional justice process in the world, Argentina has reached the highest number of convictions against human rights violators.<sup>20</sup>

With 18 national and multinational companies under investigation (14 criminal and 4 civil trials), Argentina is also the undisputed world leader for the number of corporate complicity trials being conducted.<sup>21</sup> Remarkably enough, almost

15 Office of the High Commissioner for Human Rights, 'Argentina dictatorship: UN experts back creation of commission on role business people played', 10 November 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16733&LangID=E>

16 Ibid.

17 The first amnesty law was Ley de Punto Final (1986) and the second was the Ley de Obediencia Debida (1987). In 2005, these amnesty laws were struck down by the Argentine Supreme Court.

18 The Supreme Court declared the amnesty laws null in 2005.

19 Horacio Verbitsky et al., *The Economic Accomplices*, p.2. Figures of the Centre for Legal and Social Studies.

20 Leigh A Payne, Gabriel Pereira, 'Corporate complicity in dictatorships'.

21 One other civil trial is taking place under the Alien Tort Claims Act (ATCA). See Chapter 2 of this report, box on judicial cases.



all of the large corporations mentioned in the 2015 report prepared by the Argentine Ministry of Justice and Human Rights face judicial investigation or proceedings today, at varying stages of progress.<sup>22</sup> This tendency can be partly explained by the state support for the issue. Argentina has, for example, set up a special Ministry of Justice unit to examine the complicity of representatives of corporations.<sup>23</sup>

However, the persistent work of civil society has been another crucial factor. The issue gained strength over the years as a result of domestic pressure from civil society organizations.<sup>24</sup> This growing public and political attention manifested itself for example during the 2012 and 2014 marches to commemorate the military coup, during which the names of the companies complicit in the dictatorship's human rights violations were publicly exposed.<sup>25</sup> Given the strength of this movement, it is not surprising that the majority of the corporate accountability trials in Argentina were pursued by victims and their relatives before domestic courts.<sup>26</sup>

The creative interpretation of domestic criminal law within the framework of the transitional justice process in Argentina has had a positive impact on the corporate complicity cases also. The legal reasoning suggests that any regular illegal activity connected to the commission of crimes against humanity is regarded, from a legal point of view, as a crime against humanity. This permits prosecutors to bring cases against non-state actors in which the illegal act itself is not categorized as a crime against humanity.<sup>27</sup> The same spirit of legal innovation is reflected in the use of law in corporate accountability cases in

22 Centro de Estudios Legales y Sociales (CELS), *Business Responsibility in Crimes against Humanity: The repression of workers during state terrorism*, 16 December 2015, <https://www.escri-net.org/node/368351>

23 Ministerio de Justicia, Seguridad y Derechos Humanos, Resolución 3216/2010, 'Créase la Unidad Especial de Investigación de los Delitos de Lesa Humanidad Cometidos con Motivación Económica', <http://www.infoleg.gov.ar/infolegInternet/anexos/175000-179999/175667/norma.htm>.

24 Tricia D Olsen, Leigh A Payne, Gabriel Pereira, 'Corporate complicity in Argentina: a preliminary analysis', International Studies Association/FLACSO, July 2014, <http://chrdproject.com/research.html>, p.26.

25 Leigh A Payne, Gabriel Pereira, 'Corporate complicity in dictatorships'.

26 Tricia D Olsen, Leigh A Payne, Gabriel Pereira, 'Corporate complicity in Argentina', p.26.

27 Ibid.

Argentina. The University of Oxford distinguishes four different categories.<sup>28</sup> The first category relates to the direct involvement of businesses in human rights violations. This concerns, for example, cases in which managers were directly involved in kidnappings, forced disappearances, torture, or killings. The second category blends domestic labour law and international human rights law. Cases in this category are being brought before labour courts, accusing companies of failure to protect their workers.<sup>29</sup> The third category consists of trials against banks that financed the military regime. The legal argumentation suggests that the banks' loans to the dictatorship were crucial for its abuses of human rights, and that the banks were aware that the funds would be used to support the illegal infrastructure used to commit human rights violations. The last category relates to the cases of corporate involvement in illegal business transactions, for example the illegal procurement of property from victims of the repression.<sup>30</sup>

## Reparations

The Argentine state paid reparations to, amongst others, victims of forced disappearance and political imprisonment, funding them by issuing public bonds that resulted from different legislative initiatives.<sup>31</sup> These reparations did not stem directly from the CONADEP truth commission recommendations, although this work might be deemed to have had the 'moral capital' that led to the eventual legal initiatives.<sup>32</sup> No particular institution was in charge of their overarching supervision. As a result of this, different reparation programmes came about.<sup>33</sup>

28 See Chapter 1 of this report.

29 Leigh A Payne, Gabriel Pereira, 'Accountability for corporate complicity'.

30 Ibid.

31 María José Guembe, 'Economic reparations for grave human rights violations, the Argentinean experience', in: Pablo de Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, 2006, pp. 21-54.

32 Ibid., p. 11.

33 Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States. Reparation programmes*, 2008, pp.11–13.

There are only very few examples of reparation or compensation provided by corporations, because most legal cases against corporate actors in Argentina have only recently started and are still pending. However, in some labour law cases, victims have already successfully claimed financial compensation from corporations. In cases of complicity by banks, 'where the strict legal conditions of lender liability for complicity are met, civil lawsuits can be a potential compensatory measure.'<sup>34</sup> ♦

34 Juan Pablo Bohoslavsky, 'Another brick in the Uruguayan transition: Financial complicity', in: Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013, p.205.

# 5. Brazil

The progressive government of President João Goulart (1961–1964) was overthrown in 1964 by some factions of the armed forces, backed up by the United States. During the military dictatorship that followed the coup (1964–1985), systematic and severe human rights violations were committed by state security agents, particularly against trade unionists and political activists.<sup>1</sup> According to the final report of the Brazilian National Truth Commission (NTC) of December 2014, national and foreign companies played an active role in the repressive apparatus of the military regime.<sup>2</sup> The NTC describes an early alliance in the 1960s between conservative forces in Brazilian society consisting of the armed forces, politicians, sectors of the Catholic Church, and the business and industrial sector against the progressive government of President Goulart. Some companies actively supported the armed forces' coup d'état and later on cooperated with and financed the dictatorship's intelligence agencies.<sup>3</sup>

1 <https://www.ictj.org/our-work/regions-and-countries/brazil>

2 Comissão Nacional da Verdade, *Relatório, Volume II*, Texto 8, Civis que colaboraram com a ditadura, under C) O empresariado e a repressão, p.330, [http://www.cnv.gov.br/images/pdf/relatorio/volume\\_2\\_digital.pdf](http://www.cnv.gov.br/images/pdf/relatorio/volume_2_digital.pdf). Oba. In English, see for example Clarissa Neher, Jan D. Walter, 'Brazil's National Truth Commission alleges torture at Volkswagen do Brasil', *Deutsche Welle*, 13 December 2014, <http://www.dw.com/en/brazils-national-truth-commission-alleges-torture-at-volkswagen-do-brasil/a-18126692>

3 Comissão Nacional da Verdade, *Relatório, Volume II*, Texto 8, pp.317–321.



## Brazil

### Fact sheet

Military dictatorship, 1964-1985

Special Commission on Deaths and Disappearances, 1995-2007

Amnesty Commission, created in 2001

National Truth Commission, created in 2011

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The issue of corporate accountability during the Brazilian dictatorship has many similarities with the Argentine case regarding the sort of support given by companies to the military dictatorship, the kind of business sectors involved, and the targeting of representatives of leftist groups and trade unions. The kinds of crime connected to this involvement – murder, torture, and disappearance – also resemble the Argentine case. Contrary to the Argentine case however, the transitional justice process in Brazil hardly addressed the responsibility of companies during the first decades. The process was, and still is, hampered by amnesty laws. Only recently, because of civil society pressure, has the issue of corporate accountability become more prominent in the process.

## Non-judicial mechanisms

Since the end of the dictatorship, some limited truth-seeking and reparation initiatives have taken place. In 1986, for example, the Archdiocese of São Paulo documented the widespread and systematic practice of torture

during the dictatorship in the report: *Brasil: Nunca Mais*.<sup>4</sup> The Archdiocese wrote about the infamous Operation Bandeirantes (OBAN) of São Paulo that functioned semi-officially under the auspices of the military authorities to fight left-wing groups, financed by multinationals such as Ford, General Motors, and bankers. This model of repression was later implemented on a national scale.<sup>5</sup>

A 1995 law established the Special Commission on Deaths and Disappearances, which published its report in 2007 and created a framework for compensating victims. In 2001, an additional commission, the so-called Amnesty Commission, was created and charged with granting reparations to victims who had not yet been compensated. On the basis of additional documentation from these two commissions, financial compensation to over 12,000 victims of abuses had been awarded by mid-2010.<sup>6</sup> The issue of corporate accountability was not included in those initiatives. The public debate on the impacts of the dictatorship and the call for truth finding continued over the years and finally led in 2011 to the setting-up of the National Truth Commission (NTC). The main objectives of this mechanism were to create an authoritative historic account of the human rights abuses committed, to recommend measures to prevent human rights violations, to foster national reconciliation, and to assist the victims.<sup>7</sup>

The political decision-making process that led to the creation of the NTC was a hard-fought struggle that implied far-reaching compromises from the perspective of the victims. As a consequence, the commission's mandate explicitly excluded any jurisdictional or prosecutorial capacity, and the commission had to respect the law that had been created in 1979 to provide amnesty to the security forces.<sup>8</sup> The NTC had to work under difficult

4 <https://www.ictj.org/our-work/regions-and-countries/brazil>

5 Archdiocese of São Paulo (Joan Dassin), *Torture in Brazil: A shocking report on the pervasive use of torture by Brazilian military governments 1964–1979*, University of Texas Press, 1998. The NTC stated in its report that the OBAN were also financed by bankers: Comissão Nacional da Verdade, *Relatório, Volume II, Textos temáticos*, Texto 8, p.330.

6 <https://www.ictj.org/our-work/regions-and-countries/brazil>

7 Pursuant to article 3 of the Law 12.528 of 18 November 2011 relating to the creation of the National Truth Commission, [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/12528.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/12528.htm). See in English the article by Leonard Ghione, 'Addressing past violence: the new Brazilian Truth Commission', *Peace & Conflict Monitor*, 30 March 2012, [http://www.monitor.upeace.org/innerpg.cfm?id\\_article=887](http://www.monitor.upeace.org/innerpg.cfm?id_article=887)

8 Leonard Ghione, 'Addressing past violence'.

circumstances and received little or no support from the Ministry of Defence and the armed forces.<sup>9</sup> Contrary to earlier non-judicial initiatives, the NTC did investigate corporate complicity seriously. Civil society mobilizations seem to have played an important role in this development. In São Paulo, for example, students raised a petition for the removal of a street name that referred to the businessman Boilesen, known to have been a supporter of state repression.<sup>10</sup>

In August 2014, the NTC discovered an important piece of evidence of corporate involvement in the dictatorship, indicating that dozens of companies gave the dictatorship names, home addresses, and other information regarding union activists on their payrolls. This piece of evidence concerned an original typewritten 'blacklist' dating back to the 1980s – with the names and home addresses of some 460 workers from 63 companies in the Greater São Paulo area – that had been put together by the then police intelligence agency, DOPS. During the dictatorship, DOPS detained an undetermined number of people and tortured many of them. Volkswagen had the most employees on the DOPS list, with 73 names. Mercedes-Benz was second with 52, but other foreign car companies such as Ford and Toyota are also mentioned.<sup>11</sup>

In its final report, issued in 2014, the NTC explicitly listed 377 names of suspected perpetrators, allegedly responsible for torture, disappearances, and murders. The report included the names of 78 national and international businesses and entrepreneurs who collaborated with the regime.<sup>12</sup> Included on the list were the Brazilian subsidiaries of several foreign companies such as Johnson & Johnson, the tire manufacturers BF Goodrich, Firestone, Goodyear, and Pirelli, the oil

9 Kai Ambos, Eneas Romero, 'The report of the Brazilian Truth Commission: late truth without justice?' Blog of the *European Journal of International Law* (EJIL), 19 January 2015, p.2, <http://www.ejiltalk.org/12892>

10 Leigh A Payne, Gabriela Pereira, 'Corporate complicity in international human rights violations', *Annual Review of Law and Social Sciences*, 12: 63–84, 2016. For the media initiatives, see for example: <https://www.youtube.com/watch?v=3bNvrCmeyec>, Citizen Boilesen – trailer.

11 Brian Winter, 'The 'Black List'. Documents suggest foreign automakers aided Brazil's dictators', *Reuters Investigates*, 5 August 2014, <http://www.reuters.com/investigates/special-report/brazil-dictatorship-companies/>

12 Comissão Nacional da Verdade, *Relatório, Volume I*, Parte V, Conclusões e Recomendações, pp.959–973, [http://www.cnv.gov.br/images/pdf/relatorio/volume\\_1\\_digital](http://www.cnv.gov.br/images/pdf/relatorio/volume_1_digital). For the recommendations in English, see the Appendix to the blog of the *European Journal of International Law*, recommendation [2], <http://www.ejiltalk.org/12892/>. In Chapter 2 of this report, see the box on truth commissions identified by the University of Oxford.

companies Esso and Texaco, and Volkswagen.<sup>13</sup> The latter, for example, donated 200 vehicles to the regime and let the military make use of the warehouses in its São Paulo factory as a clandestine detention and torture centre. In these buildings, some of the arrested Volkswagen workers were tortured.<sup>14</sup>

In its recommendations, the NTC asked the Brazilian judiciary to establish the legal responsibility — criminal, civil, and administrative — of those involved in serious, systematic human rights abuses and not to apply the 1979 Amnesty Law to them.<sup>15</sup> Whether this will lead to a revocation of the amnesty laws will depend on the stance that the new Supreme Court judges take on this issue and the pressure from Brazilian society.<sup>16</sup> Furthermore, the NTC recommended reparation measures and the creation of ‘an administrative body to [...] continue gathering information and investigating cases, such as [...] the support of businesses.’<sup>17</sup>

## Non-judicial mechanisms at regional level

Although the NTC wrapped up its work and published its final report in 2014, the process of truth finding continued at regional level. A number of state governments have opened their own truth commissions to review crimes, such as the active commission in Brazil’s most industrial region, São Paulo.<sup>18</sup> This truth commission, formally a unit of the Legislative Assembly of São Paulo, called upon six large companies in its district in February 2015 to give testimony about their involvement in the repressive regime: the aircraft

13 Comissão Nacional da Verdade, *Relatório, Volume II, Textos temáticos*, Texto 8, p.321.

14 ‘Volkswagen to pay Brazil dictatorship reparations’, *Buenos Aires Herald*.com, 2 November 2015, <http://www.buenosairesherald.com/article/202181/volkswagen-to-pay-brazil-dictatorship-reparations>

15 Comissão Nacional da Verdade, *Relatório, Volume I, Parte V, Conclusões e Recomendações*, pp.959–973, [http://www.cnv.gov.br/images/pdf/relatorio/volume\\_1\\_digital](http://www.cnv.gov.br/images/pdf/relatorio/volume_1_digital). For the recommendations in English, see the Appendix to the blog of the *European Journal of International Law*, recommendation [2], <http://www.ejiltalk.org/12892/>

16 [http://www.monitor.upeace.org/innerpg.cfm?id\\_article=887](http://www.monitor.upeace.org/innerpg.cfm?id_article=887) and <http://www.ejiltalk.org/12892/>

17 International Centre for Transitional Justice, ‘ICTJ welcomes the historic final report of the Brazilian National Truth Commission’, 10 December 2014, <https://www.ictj.org/news/ictj-welcomes-historic-final-report-brazil%E2%80%99s-national-truth-commission>

18 EFE, ‘Brazil Truth Commission investigates Volkswagen ties with dictatorship’, 28 February 2015, <http://latino.foxnews.com/latino/politics/2015/02/28/brazil-truth-commission-investigates-volkswagen-ties-with-dictatorship/>



manufacturer Embraer,<sup>19</sup> the São Paulo Metro Company, the port operator Codesp, the car manufacturers Volkswagen and Grupo Aliperti, and the public transport vehicle manufacturer Cobrasma SA.<sup>20</sup>

These six companies were not under legal obligation to give testimony.<sup>21</sup> The industrial firms Grupo Aliperti,<sup>22</sup> Cobrasma, and Embraer decided not to collaborate with the commission; the other companies did.<sup>23</sup> Several former Volkswagen workers testified that the company had spied on them, and one former employee stated that he was arrested and tortured by the military in the Volkswagen factory.<sup>24</sup> Volkswagen, however, told the commission that they 'did not collaborate with organizations of repression' and that, furthermore, 'there are no documents or proof of that.'<sup>25</sup> The São Paulo Truth Commission later stated that Volkswagen's testimony regarding its alleged ties with the regime was 'unsatisfactory' and that it would hand over the information to federal prosecutors.<sup>26</sup>

## Judicial mechanisms

Because of the amnesty decreed in 1979, none of the repressors were taken to court by the judicial authorities,<sup>27</sup> but the attention that the NTC gave to the issue of corporate complicity and the public attention raised around the issue did have an effect. Apparently, it motivated ex-employees of Volkswagen to file a civil lawsuit against the company.<sup>28</sup> The accusation in the lawsuit says that 12 former

19 During the dictatorship, Embraer was controlled by the government until its privatization in 1994. *El Economista*, 'Embraer y Volkswagen testificarán ante comisión de la verdad en Brasil', 26 February 2015, <http://eleconomista.com.mx/industria-global/2015/02/26/embraer-volkswagen-testificaran-ante-comision-verdad-brasil>

20 *El Economista*, 26 February 2015; EFE, Brazil Truth Commission investigates Volkswagen.

21 *El Economista*, 26 February 2015.

22 <http://www.reuters.com/article/brazil-dictatorship-companies-idUSL1N0W132020150228>

23 *El Economista*, 26 February 2015.

24 EFE, Brazil Truth Commission investigates Volkswagen.

25 *Ibid.*

26 Brian Winter, 'Brazil probe of dictatorship period not satisfied by Volkswagen testimony', Reuters, 27 February 2015, <http://www.reuters.com/article/brazil-dictatorship-companies-idUSL1N0W132020150228>

27 EFE, Brazil Truth Commission investigates Volkswagen.

28 Leigh A Payne, Gabriela Pereira, 'Corporate complicity,' p.27.

employees were arrested and tortured in the Volkswagen factory. The lawyer of some of the alleged victims added to this in interviews that other Volkswagen workers were laid off and placed on blacklists during the repression.<sup>29</sup>

## Reparations

In response to this civil lawsuit, the director of Volkswagen's Historical Communication Department met with the representatives of the prosecution to discuss the case. In November 2015, Volkswagen stated that it was negotiating a reparation plan with the Brazilian judiciary for its collaboration with the country's military dictatorship (1964–1985). The State of São Paulo publicly mentioned the option of constructing a museum in the city in memory of the victims.<sup>30</sup> ♦

<sup>29</sup> 'Brazil: torture lawsuit against VW', *Deutsche Welle*, 2 November 2015, <http://www.dw.com/en/brazil-torture-lawsuit-against-vw/a-18731165>

<sup>30</sup> 'Cómo fue la relación de Volkswagen con la dictadura de Brasil?', 1 November 2015, <http://www.infobae.com/2015/11/01/1766546-como-fue-la-relacion-volkswagen-la-dictadura-brasil/>





# South Africa

Between 1948 and 1990, apartheid, a system of legally enforced racial segregation, reigned in South Africa.<sup>1</sup> The overall conclusion of the South African Truth and Reconciliation Commission (TRC) was that 'business was central to the economy that sustained the South African state during the apartheid years. Certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies. Other businesses benefited from co-operating with the security structures of the former state. Most businesses benefited from operating in a racially structured context.'<sup>2</sup> The TRC also concluded that 'These forms of collaboration create and promote a context that leads to the systematic execution of gross human rights violations.'<sup>3</sup>

1 United States Institute of Peace, *Truth Commission: South Africa*, <http://www.usip.org/publications/truth-commission-south-africa>

2 TRC Report, Volume 4, Chapter 2, 'Findings arising out of business sector hearings', paragraph 161, p.58, <http://www.justice.gov.za/trc/report/>

3 *Ibid.*, p.23.



## South Africa

### Fact sheet

Apartheid, 1948-1990

South African Truth and Reconciliation Commission, 1995-2003

Business Trust, 1999-2011

President's Fund, created in 2005

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## Non-judicial mechanisms

South Africa's TRC, operational between 1995 and 2003, became in many ways a frame of reference for countries all over the world seeking to come to terms with dark periods in their recent history.<sup>4</sup> The TRC was tasked with 'establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights' and was empowered to grant amnesty from prosecution to persons who made full disclosure of all the relevant facts under certain conditions.<sup>5</sup>

4 In widely televised public meetings, the South African nation broke the silence that had surrounded its 34 years under apartheid. Perpetrators confessed their deeds; victims recounted their stories of abuse. Over seven years, more than 22,000 people testified; more than 6,000 applied for amnesty and more than 1,000 missing people were accounted for. MT Michael, 'Moment of truth. South Africa's Truth and Reconciliation Commission closes its doors', 2 May 2003, <http://www.worldpress.org/africa/1077.cfm>

5 See the Promotion of National Unity and Reconciliation Act 34, (further called the TRC Act) of 1995, section 3(1)(a) and (b), <http://www.justice.gov.za/legislation/acts/1995-034.pdf>. Amnesties were available only to individuals. The TRC awarded amnesty to 1,167 individuals in exchange for full disclosure of their crimes. See Priscilla Hayner, *Unspeakable Truths: Transitional justice and the challenge of truth commissions*, Routledge, 2011.

Its mandate and results have been heavily debated ever since, especially because the Commission focused on truth finding and reconciliation to such an extent that it fell short – according to many observers – on contributing to justice.

The role of corporations under apartheid was the object of a special hearing of the TRC on business and labour. The cooperation of the companies and their representatives with the special hearing was entirely voluntary. This partly explains the limitations of the truth-finding exercise, as the participation of the business sector was low and the contributions generally thin.<sup>6</sup> The special hearing lasted for three days only,<sup>7</sup> and the largest foreign investor sector in South Africa, the multinational oil corporations, did not participate.<sup>8</sup> Representatives of at least 28 companies and financial institutions made submissions to the TRC hearings, including Anglo American (mining), BP and Shell (oil), Armscor (armaments), BMW, Mercedes-Benz, and Toyota (cars).<sup>9</sup>

To capture the different degrees of culpability of corporations, the TRC made a distinction in its conclusions between first-, second-, and third-order involvement of companies in the apartheid regime. First-order involvement related to corporations that had collaborated directly with the apartheid regime, especially with the security establishment.<sup>10</sup> They had, for example, been directly involved with the apartheid regime by the ‘formulation of oppressive policies or practices that resulted in low labour costs.’<sup>11</sup> Several mining corporations had been guilty of the latter. In its report on the hearings with the business sector, the

6 *Traces of truth. Documents relating to the South African Truth and Reconciliation Commission*, University of the Witwatersrand (Johannesburg), [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=5](http://truth.wvl.wits.ac.za/cat_descr.php?cat=5)

7 S Terreblanche, *A History of Inequality in South Africa: 1652–2002*, University of Natal Press and KMM, 2003, p.128.

8 TRC Report, Volume 4, Chapter 2. Findings arising out of business sector hearings, Introduction: ‘Some invitees did not respond to the invitation [of the TRC to give evidence relating to the period 1960 to 1994]. Most notable amongst these were the multinational oil corporations (which were the largest foreign investors in South Africa).’ In the same Volume 4 on p.7 however, the oil company Shell South Africa is included in the list of companies that made submissions to the TRC.

9 The number provided here is based on two sources: submissions made to the Commission and lodged in the Records Management Department at the time of going to press [of the TRC report]. The documentation originates either from unsolicited representations made to the Commission or in response to requests for submissions relating to Commission hearings. TRC Report, Volume 4, Chapter 1, Appendix: Submissions to the Commission, pp.6–8. See also Chapter 2 of this report, box on truth commissions.

10 TRC Report, Volume 4, p.23.

11 *Ibid*, Volume 4, Chapter 2, paragraph 23, p.24.

TRC concluded that ‘businesses that were involved in this way must be held responsible and accountable for the suffering that resulted.’<sup>12</sup>

Second-order involvement had to do with corporations that were implicitly collaborating with the state by doing business with it and paying taxes.<sup>13</sup> They knew that their products or services were used for morally unacceptable purposes. The TRC mentioned specifically the armaments industry.<sup>14</sup> The TRC classified banks in a more indirect way under second-order involvement as well,<sup>15</sup> stating: ‘banks were “knowingly or unknowingly” involved in providing banking services and lending to the apartheid government and its agencies.’<sup>16</sup>

The United Bank of Switzerland (UBS) is named by the TRC as one of the ‘important partners of Pretoria during apartheid [... which] played a central role in marketing South African gold [... and] invested in apartheid-era infrastructure in South Africa and in the homelands.’<sup>17</sup> Another example that emerged from the TRC hearings is that banks provided the police with covert credit cards. The TRC concluded that ‘there was no obvious attempt on the part of the banking industry to investigate or stop the use being made of their facilities in an environment that was rife with gross human rights violations.’<sup>18</sup>

Third-order involvement concerned those corporations that possessed structural advantages because of the concentration of wealth in the hands of the white minority. The white owners of the agriculture industry could be placed in this category, as they benefited from privileged access to land.<sup>19</sup> The TRC mentioned this broad category but excluded it from their considerations regarding responsibility and accountability.<sup>20</sup>

The TRC’s final report named only a few corporations specifically, ‘as it is not

12 Ibid.

13 Ibid., p.23.

14 Ibid., paragraph 26, p.25; paragraph 75, p.36.

15 Ibid., paragraphs 25–36, pp.25–27.

16 Ibid., paragraph 27, p.26.

17 TRC Report, Volume 6, Section 2, Chapter 5, Reparations and the Business Sector, paragraph 14, p.144.

18 Ibid., paragraph 31, p.26; paragraph 28, p.25.

19 Ibid., pp.24–27.

20 Ibid., paragraph 32.

possible to develop case studies on each private corporation.<sup>21</sup> Oxford University registered the names of 32 corporations that were recognized by the TRC. The Swiss banks Credit Suisse and UBS,<sup>22</sup> mining corporation Anglo American,<sup>23</sup> sugar-producing company Tongaat Hulett,<sup>24</sup> industrial and mining group Barlow Rand, and armaments corporation Armscor were explicitly named.<sup>25</sup>

The TRC expressly recognized bases for civil and criminal liability on the part of certain businesses for their actions, including for aiding and abetting the crimes committed by the apartheid regime.<sup>26</sup> As shown in the following however, the TRC did not go beyond this general condemnation.

## Judicial mechanisms

In theory, the TRC's findings could form the partial evidentiary basis of future litigation.<sup>27</sup> However, despite the fact that the TRC subcommittee denied amnesty in numerous cases, in the end this led to very few actual trials.<sup>28</sup> From the available open sources, it appears that the TRC did not explicitly recommend cases of corporate accountability to the South African judiciary. It only mentioned, in more general terms, the possibility of (civil) law suits in order to get reparation for the victims involved. To date however, no corporate accountability cases have been initiated in South Africa.<sup>29</sup>

21 Ibid., paragraph 43, p.141.

22 Ibid., paragraphs 17–28, pp.144, 147.

23 Ibid., paragraphs 43–60, pp.151–155.

24 Ibid., paragraph 51, p.153.

25 Ibid., paragraphs 53, p. 153.

26 Charles P Abrahams, 'Lessons from the South African experience', in: Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013, p.159.

27 Sabine Michalowski, Ruben Carranza, 'Conclusion', in Sabine Michalowski (ed.), *Corporate Accountability*, p.249.

28 <http://www.usip.org/publications/truth-commission-south-africa>. For example, the trial of several high-level members of the former police for the attempted murder of Reverend Frank Chikane in 1989 and the trial of former Minister of Defence Magnus Malan and 19 others. The first ended in a conviction and the latter in acquittal, <https://www.ictj.org/our-work/regions-and-countries/south-africa>

29 Tricia D Olsen, Leigh A Payne, Gabriel Pereira, *Corporate Complicity in Argentina: A preliminary analysis*, University of Denver and University of Oxford, 2014, p.11.



This lack of judicial consequences for corporate actors with first- and second-order involvement can, to a large extent, be explained by the government of South Africa's policy of non-confrontation towards corporations. In 2005, the National Director of Public Prosecutions was granted wide discretion to refrain from prosecution.<sup>30</sup> Two years later, President Mbeki instituted a process to grant special pardons in addition to the amnesties granted by the TRC Amnesty Committee. This initiative was continued by his successors. In the words of the International Centre for Transitional Justice, the government 'has done virtually everything possible to extend amnesty and pardon, and nothing to pursue prosecutions.'<sup>31</sup>

Victims' frustration with corporate impunity and the lack of corporate reparations led to litigation under the US Alien Tort Claims Act (ATCA).<sup>32</sup> The University of Oxford has identified ten cases under the ATCA (see Chapter 2). In 2002, for example, victims filed a civil complaint in the United States against 23 multinational corporations for aiding, or participating in, the violations of international law by the apartheid regime.<sup>33</sup> They concerned the key industries of oil, armaments, banking, transportation, technology, and mining.<sup>34</sup> These lawsuits ended after more than 10 years either in a settlement or in a dismissal in favour of the corporations, mostly due to a change in ATCA jurisprudence

30 <http://www.usip.org/publications/truth-commission-south-africa>

31 The website of the International Centre for Transitional Justice (ICTJ) states: 'Most efforts to respond to victims' rights and pursue individual criminal responsibility for crimes committed during apartheid failed: a) The TRC law authorized a controversial offer of "amnesty for truth" to perpetrators of human rights abuses who were willing to confess b) Former President Thabo Mbeki's presidential pardons process – publicly described as a means for resolving "the unfinished business of the TRC" – conducted secret proceedings which excluded victim representation c) Amendments to the National Prosecuting Authority's Prosecution Policy provided for a "back-door amnesty" that effectively granted impunity for apartheid-era perpetrators who had not applied for the TRC's amnesty', <https://www.ictj.org/our-work/regions-and-countries/south-africa>

32 Under the ATCA, foreign nationals can bring civil claims arising from 'violation[s] of the law of nations or a treaty of the United States', Tara L van Ho, 'Transnational civil and criminal litigation', in: Sabine Michalowski (ed.), *Corporate Accountability*, pp.57–58.

33 The lawsuits were filed by the Khulumani Support Group, together with 93 of its members. Charles P Abrahams, 'Lessons from the South African experience', pp.161–162.

34 *Ibid.*, p. 164. 'The corporations named in the lawsuits included oil companies such as BP Plc and Exxon Mobil Corp, banks such as Citigroup, Deutsche Bank AG and UBS AG, as well as other multinationals like IBM, General Motors Corp and Ford Motor Co', <http://www.khulumani.net/active-citizens/item/230-us-top-court-lets-apartheid-claims-proceed.html>

in 2013.<sup>35</sup> Furthermore, in 2003, a lawsuit was filed in the US against Anglo American and its diamond subsidiary De Beers.<sup>36</sup> The case was dismissed in 2004 by the New York Court.<sup>37</sup>

These attempts by victims to find justice and reparations via judicial means were opposed by the South African government. They were regarded as an attempt to undermine the governmental policy on reparations.<sup>38</sup> On 15 April 2003, President Mbeki publicly criticized the lawsuits that had been filed against multinational corporations based in the US.<sup>39</sup>

## Reparation

In terms of remedy and reparation, the TRC spoke in general ethical wordings about the 'moral obligation to assist in the reconstruction and development of post-apartheid South Africa through active reparative measures.' The argumentation of the TRC was that 'business benefited substantially during the apartheid era either through commission or omission.'<sup>40</sup> The Commission also stated that 'business [...] needs to commit itself to a [...] focused programme of reparation.'<sup>41</sup> However, besides this more general recommendation, the TRC did not propose a 'mandatory contribution by businesses who had participated in the apartheid era to provide remedy for victims.'<sup>42</sup>

35 Business & Human Rights Resource Centre, Apartheid reparations lawsuits (re So. Africa), <http://business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa> 'ATS [ATCA] claims face several hurdles, starting with a ten-year statute of limitations, and, in the light of the Supreme Court decision in Kiobel, the question of what provides a sufficient connection to the US to withstand the presumption against extraterritoriality.' The ATCA does not apply to violations that occurred outside the US. Tara L van Ho, 'Transnational civil and criminal litigation', p.60. Litigation under the ATCA is expensive and time-consuming. Charles P Abrahams, 'Lessons from the South African experience', p.173.

36 'Diamond industry hit by £3bn suit', *The Scotsman*, 5 April 2003, <http://www.scotsman.com/news/world/diamond-industry-hit-by-163-3bn-suit-1-602418#ixzz40H0OPNJH>

37 'Court throws out apartheid cases', BBC, 29 November 2004, <http://news.bbc.co.uk/2/hi/business/4053493.stm>

38 Charles P Abrahams, 'Lessons from the South African experience', p.168.

39 MT Michael, 'Moment of truth'.

40 TRC Report, Volume 6, Section 2, Chapter 5, paragraph 14, pp.143–144.

41 Ibid.

42 Tricia D Olsen, Leigh A Payne, Gabriel Pereira, *Corporate Complicity in Argentina*, p.16.

In some cases, the TRC went one step further than just stating businesses' moral obligations to make reparations. It stated that several Swiss banks, one of them being the predecessor of the UBS bank, 'played an instrumental role in prolonging apartheid [... and] were accomplices to a criminal government that consistently violated international law.'<sup>43</sup> The Commission pointed to the legal grounds for instituting a claim for reparation<sup>44</sup> against these companies,<sup>45</sup> as well as against South African mining firms, such as Anglo American.<sup>46</sup>

The TRC in its recommendations suggested several possible forms of reparation but did not specify how corporations should be selected for the reparations. It only recommended that 'those who benefited from apartheid policies' should contribute.<sup>47</sup> The suggestions for possible forms of reparation included: a wealth tax on businesses operating in South Africa; a one-off levy on corporate and private income; a one-off donation of 1 percent of market capitalization by companies listed on the Johannesburg Stock Exchange; a retrospective surcharge on corporate profits backdated to an agreed time; responsibility for the payment of the previous government's debt; and some more.<sup>48</sup> On 15 April 2003, President Mbeki publicly rejected the TRC's calls for a corporate tax, a move that earned praise from the financial press.<sup>49</sup>

Rather than imposing a tax on businesses, President Mbeki called for voluntarily contributions by corporations to a Business Trust to assist the

43 Charles P Abrahams, 'Lessons from the South African experience', p.159.

44 TRC Report, Volume 6, Section 2, Chapter 5, paragraphs 23–24, p.146. The grounds on which the TRC made a case for reparations against Swiss banks: these banks 'benefited over several decades from the exploitation of black mine-workers' in the South African gold mines; ignored calls for sanctions against the apartheid regime; 'continued to enrich themselves through the gold trade and lending... [and] played an instrumental role in prolonging apartheid from the time of the debt crisis in 1985 onwards' by supplying the government with the necessary financial means to contribute to its continued existence.

45 TRC Report, Volume 6, Section 2, Chapter 5, paragraphs 17–18, p.144. Paragraph 18 states: 'After the Sharpeville massacre in 1960, the chairman of the largest Swiss bank, UBS, was asked: "Is apartheid necessary or desirable?" His response was: "Not really necessary, but definitely desirable".'

46 'Diamond industry hit by £3bn suit'.

47 TRC Report, Volume 6, Section 2, Chapter 5, paragraph 14, p.308.

48 TRC Report, Volume 5, paragraph 39, pp.318–319.

49 MT Michael, 'Moment of truth'.

country's development.<sup>50</sup> This Business Trust received about US\$ 143,734,000 in financial contributions from 140 companies.<sup>51</sup> The financial donations were not used as a form of individual compensation to victims of the businesses, but rather for collective general projects in, for example, the tourist and educational sectors.<sup>52</sup> After the Business Trust had run from 1999 to 2011, victims stated that 'none of the funding [...] has yet benefited the most seriously harmed communities [...]'.<sup>53</sup>

The TRC Act of 1995 foresaw the establishment of a governmental fund for the reparation of victims of apartheid.<sup>54</sup> This so-called President's Fund was set up in 2005 and accumulated approximately US\$ 112.5 million.<sup>55</sup> The main contributors were the National Treasury and the Swiss Government.<sup>56</sup> Smaller individual donations were received as well, but it remains unclear whether this included contributions from corporations.<sup>57</sup> The Department of Justice was made responsible for the implementation of this fund, and it granted 16,000 victims who appeared before the TRC or were named in the TRC report a one-off payment in 2003. The collective reparation to the 128 communities mentioned in the TRC report was not accomplished for many years. When the

50 P de Vox, 'Khulumani welcomes call for a wealth tax', Constitutionally speaking (Blog), 16 August 2011, <http://constitutionallyspeaking.co.za/khulumani-welcomes-call-for-a-wealth-tax/>

51 The Business Trust received R 1.2 billion (about US\$ 143,734,000) of financial contributions from 140 companies. 'This amount of money has been considered to be insufficient for providing redress to the victims.' P de Vox, 'Khulumani welcomes call for a wealth tax'.

52 'These financial contributions should not be understood as a form of compensation, given that they were not a response to the individual harm suffered by victims and were not used to redress victims. [...] Approximately 60 percent of this money has been used for tourism and education and has had various beneficiaries, including some who could claim to have been acknowledged as victims by the South African TRC.' See further Clara Sandoval, Gill Surfleet, 'Corporations and redress in transitional justice processes', in: Sabine Michalowski (ed.), *Corporate Accountability*, pp.101–102.

53 P de Vox, 'Khulumani welcomes call for a wealth tax', <http://www.khulumani.net/khulumani/about-us.html>

54 The Promotion of National Unity and Reconciliation Act 34, section 4(f)(i) and 42.

55 *Daily Maverick*, 'The President's Fund: Where is the money for Apartheid victims actually going?', <http://www.dailymaverick.co.za/article/2014-10-14-the-presidents-fund-where-is-the-money-for-apartheid-victims-actually-going/#.VvQUzvnhCig>.

Accumulated amount of the President's Fund in South African currency: R 1.19 billion.

56 Mail & Guardian, 'Victims groups mad over reparation', <http://mg.co.za/article/2011-05-20-victims-groups-mad-over-reparations/>. The National Treasury donated R 800 million and the Swiss Government R 200 million.

57 Ibid.

Department finally presented a plan in 2014, it was heavily criticized by victims' organizations. The general complaint is that it covers only 18 communities and does not necessarily benefit traumatized victims. The reparation plan focuses on infrastructure projects.<sup>58</sup> ♦

<sup>58</sup> *Daily Maverick*, 'The President's Fund'.



# Guatemala

Impunity Watch

The coup that took place in Guatemala in 1954 came partly as a result of pressure from a business enterprise, the United Fruit Company (UFCO), which feared the advance of agrarian reform.<sup>1</sup> From that time on, governments alternated with military dictatorships until the signing of the peace accords between the government and the guerrillas in 1996. Military repression peaked between 1978 and 1986, when forced disappearances and extrajudicial executions reached a massive scale and genocide was committed against the Mayan people.<sup>2</sup>

The involvement of a considerable number of businessmen and companies in the repression of trade union activists and peasant leaders is extensively documented in the final report of the truth commission,<sup>3</sup> established in

1 See Piero Gleijeses. *Shattered hope. The Guatemala revolution and the United States (1944–1954)*, Princeton University Press, 1991.

2 Comisión de Esclarecimiento Histórico (Commission for Historical Clarification), *Memoria del Silencio*, Chapter IV, Conclusion p.105ff. These facts were also duly documented through on-site visits carried out by the Commission and five country reports by the Inter-American Court of Human Rights from 1981 to 1996.

3 For example: CEH, *Memoria del Silencio*, example case 109, Forced disappearance of members of the Pantaleón Sugar Mill Trade Union, p.316. Another example: CEH, *Memoria del Silencio*, example case no. 13, Persecution and separation of the Bautista Escobar family, torture of minors and pregnant women, rape of minors, and forced disappearances, Volume VI p.297ff. This illustrates how the sugar mills of Santa Lucía Cotzumalguapa persecuted this family for participating in trade union activity.



## Guatemala

### Fact sheet

Internal armed conflict, 1960-1996

Commission for Historical Clarification, 1993-1999

Inter-Diocesan Project for the Recovery of

Historical Memory, report presented in 1998

National Reparations Programme, created in 2002

1996. Other entrepreneurs created death squads that murdered a large number of lawyers, political activists, trade unionists, labour activists, and environmentalists.<sup>4</sup> Businessmen, while occupying important ministerial positions,<sup>5</sup> also voluntarily contributed US\$ 60 million to military campaigns that ended in genocide.<sup>6</sup> Other members of the business sector provided their aircraft and private pilots for military operations to transport cargo and for machine-gunning and bombing civilians.<sup>7</sup>

4 For example: The *Ejército Secreto Anticomunista* (Secret Anti-Communist Army) and the *Mano Blanca* (White Hand) and others. CEH, *Memoria del Silencio*, example case 28, Execution of Mario López Larrave, p.105ff. Environmentalists were often opposed to mining projects and industrial activities causing pollution, such as EXMIBAL, the project to extract nickel at Lake Izabal. CEH, *Memoria del Silencio*, example case 100, Execution of Adolfo Mijangos López, Vol. VI p.99 ff.

5 The businessmen were organized within the CACIF (*Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras*). In this way, the President of the Chamber of Commerce was Minister for Economic Affairs, and another 14 businessmen held ministerial or executive posts.

6 This support took place during the scorched earth policy carried out between 1982 and 1986. Plaza Pública, 'Los militares y la élite, la alianza que ganó la guerra', <https://www.plazapublica.com.gt/content/los-militares-y-la-elite-la-alianza-que-gano-la-guerra>. The US\$ 60 million was equivalent to 70 percent of military spending.

7 <https://www.plazapublica.com.gt/content/los-militares-y-la-elite-la-alianza-que-gano-la-guerra>

The Guatemalan transitional justice system included both judicial and non-judicial mechanisms. However, to date, these mechanisms have not resulted in significant tangible results for the victims of corporate complicity. No corporate executive or business representative has been tried in the Guatemalan justice system, nor has any company been called to face allegations of civil liability.

## Non-judicial mechanisms

The 1996 peace accords included the establishment of the Commission for Historical Clarification (CEH: Comisión de Esclarecimiento Histórico) to determine responsibility for gross human rights violations and serious violations of international humanitarian law committed against the Guatemalan population. It was determined that the final report would not have legal effect and it would not personally name those responsible for the serious violations of human rights, but only indicate institutional (state) responsibility. This report was published in 1999, with the UN functioning as moderator throughout the process.

The Guatemalan Catholic Church, concerned by the CEH's weak mandate, proceeded to set up its own truth commission through the Inter-Diocesan Project for the Recovery of Historical Memory (REMHI).<sup>8</sup> In this project, the various dioceses of Guatemala helped with massive collections of information about the atrocities committed in the country. Its report, published in 1998, paved the way for the later publishing of the CEH report.

The CEH report and the REHMI report explicitly detailed the mass genocide against the Mayan people,<sup>9</sup> forced disappearances of political opponents,<sup>10</sup> and the forced displacement of many indigenous communities.<sup>11</sup> On the subject of corporate responsibility/complicity, the CEH documented various cases of repression of members of trade union organizations, including cases of unions in the sugar industry and at Coca Cola. Likewise, it documented the forced

<sup>8</sup> *Recuperación de la Memoria Histórica Interdiocesana*.

<sup>9</sup> CEH, *Memoria del Silencio* (English version), Conclusions 122.

<sup>10</sup> CEH, *Memoria del Silencio* (English version), Conclusions 89.

<sup>11</sup> CEH, *Memoria del Silencio* (English version), Conclusions 65.



disappearance of over 6,000 people, many of them with links to trade unions or peasant organizations, in many cases carried out by paramilitary or irregular forces also supported by businessmen.<sup>12</sup> The Oxford study in Chapter 2 of this report registered 45 companies in the CEH report. However the CEH, like the REHMI, did not reach any specific conclusions about corporate complicity, and it did not explicitly say that companies had an obligation to provide compensation.

## Judicial mechanisms

After the peace agreement was signed, various cases of gross human rights violations were brought to court. Before 2008 however, very few of them made progress as the transitional justice trials were paralysed due to dilatory defence motions.<sup>13</sup> As the cases stalled, a number of civil society organizations took cases to the Inter-American Court of Human Rights in 2009 (IACHR). In some of these cases, companies were mentioned as having been involved with the gross human rights violations committed.

Some of the IACHR judgements condemned the state, as in the cases of the Plan de Sánchez and Río Negro massacres.<sup>14</sup> In this last case, it was found that the massacre of the Mayan Achí people was basically carried out because they refused to leave the lands where the Chixoy hydroelectric dam was to be built.<sup>15</sup> This project was financed by the Inter-American Development Bank (IDB), the International Bank of Reconstruction and Development (IBRD), and the World Bank. The construction of the hydroelectric facility was managed by a consulting firm called LAMI, made up of several companies: Lahmeyer from

<sup>12</sup> CEH, *Memoria del Silencio*, example case 67, The Coca Cola trade union, p.111ff.

<sup>13</sup> See Constitutional Court Judgement in the case of Dos Erres on the application of the National Reconciliation Law. Impunity Watch, *Reconociendo el Pasado. Desafíos para combatir la impunidad en Guatemala*, 2008, p.25.

<sup>14</sup> See Inter-American Court of Human Rights, *Plan de Sánchez v. Guatemala*, Judgement 29 April 2004; Inter-American Court of Human Rights, *Río Negro Massacres v. Guatemala*, Judgement 4 September 2012.

<sup>15</sup> Inter-American Court of Human Rights, 'The construction plan for the Chixoy Hydroelectric facility involved flooding more than 50 kilometres along the river and some tributaries, which would affect about 3,445 people in the communities settled along its banks.' The authorities planned to settle the inhabitants of Río Negro in Pacux, an arid area, and in houses that broke with their traditional way of life. The peasants were massacred because they resisted leaving their lands. Case of the *Río Negro Massacres v. Guatemala*, Judgement 4 September 2012. (Preliminary objection, merits, reparations and costs).

Germany, Motor Columbus from Switzerland, and International Engineering Co. from the United States.<sup>16</sup>

The cases brought before the IACHR led to several significant judgements ordering the Guatemalan state not to apply any law of amnesty or other obstacle to criminal prosecution that might stop the investigation and punishment of those responsible for serious human rights violations.<sup>17</sup> As a result, from 2009 onwards, criminal cases were resumed for serious violations committed during the armed conflict by soldiers and paramilitaries. Some of these trials have ended in guilty verdicts, including the case for genocide against the Mayan Ixil people, in which the ex-dictator Efraín Ríos Montt was sentenced in 2013 to 80 years in prison.<sup>18</sup> However, this verdict was subsequently overturned by the Constitutional Court under pressure from the CACIF business chamber, an institution known to be the most powerful association in the country and strongly opposed to the application of justice for the abuses carried out during the war.<sup>19</sup> Apparently, the CACIF used its veto power because of concerns that the progress of cases in the justice system could also lead to cases against companies or their executives, even though this verdict does not include any reference to corporate responsibility.

The responsibility of businessmen and their role in the repression has not yet been effectively addressed or even publicly discussed in Guatemala. Although the CEH extensively documented cases of repression in which company representatives participated, these cases still have not been brought to trial, either individually or collectively. The only legal action brought so far against a foreign company involved in human rights abuses in Guatemala was initiated in Canada in response to the violent land evictions of Q'eqchí communities in El Estor,

16 <https://www.theguardian.com/global-development/poverty-matters/2012/dec/10/guatemala-chixoy-dam-development-terror>

17 The main IACHR judgements on Guatemala are: Maritza Urrutia, Judgement of 27 November 2003; Forced disappearance of María Tiu Tojín, Judgement of 26 November 2008; Massacre of Las Dos Erres, Judgement of 24 November 2009; Chitay et al. v. Guatemala, Judgement of 25 May 2010; García et al., Judgement of 29 September 2012; Forced disappearance of Marco Antonio Molina Theissen, Judgement of 4 May 2014.

18 Other important cases include the judgement of El Jute, in which a military commander from the Zacapa base was sentenced for the forced disappearance of seven people, and the case of Dos Erres, in which there was a guilty verdict for military officers in a Kaibil patrol that massacred 260 people in a community in Petén.

19 <http://www.bbc.com/news/world-latin-america-22605022>

Izabal, in 2009, more than a decade after the signing of the peace accords.<sup>20</sup> (The incidents referred to in this case have no relation to the armed conflict.)

## Reparations

The CEH recommended that the Guatemalan state should create a national reparations programme to benefit the victims and their relatives, to compensate them individually and collectively for the damages caused by the human rights abuses committed in the context of the conflict, and to promote other measures for psychosocial rehabilitation and reparation.<sup>21</sup> At the time, the CEH only said that such a programme should be financed by 'putting into effect the universally progressive tax reform established by the peace accords. To achieve this, a redistribution of social spending and a decrease in military spending would be appropriate. These measures should constitute the principal source of financing.'<sup>22</sup> At no point is reference made to reparation contributions from businessmen or companies.

The National Reparations Programme (PNR: Programa Nacional de Resarcimiento) was finally created in 2002. This programme includes mechanisms for individual and collective compensation to the benefit of direct victims of serious violations of human rights and humanitarian law. The programme, which in practice is chronically underfunded, does not contemplate the involvement of companies, which, consequently, have not been asked to provide financial support for reparation initiatives.<sup>23</sup> ♦

20 Hudbay Minerals, the company that later took over the EXMIBAL mine project, is currently facing an indictment in Canada for the murder of the Mayan leader Adolfo Ich in 2009 and actions against other members of the community that oppose the functioning of the mine, including rape of Q'eqchi' women in El Estor. Laura Lynch, 'Guatemalan peasants sue Canadian mining company Hudbay', *The World* (Public Radio International), 30 November 2012.

21 CEH, *Memoria del Silencio*, Recommendations (English version), Reparatory measures, No.9.

22 CEH, *Memoria del Silencio*, Recommendations (English version), Reparatory measures, No.19.

23 The lack of funds for the PNR has been a repeated concern that has made it impossible to compensate all the victims. Over recent years, the PNR has been seriously called into question because of the limited number of people who have benefited, the low budget levels approved by the government to finance it, and the paralysis of the programme since 2012, when the government of General Otto Pérez Molina came to power. See Impunity Watch, *Luchamos con Dignidad. Participación de las víctimas en la justicia transicional en Guatemala*, 2015.



# 8. East Timor

On 28 November 1975, the Revolutionary Front for an Independent East Timor unilaterally declared its independence from Portugal. In fear of having a communist regime in its area of influence, Indonesia decided to invade East Timor in December 1975. This invasion, supported by the United States, was followed by Indonesian military occupation and a civil war that lasted for more than two decades and led to at least 100,000 conflict-related fatalities.<sup>1</sup> Corporate accountability in this conflict was twofold. The Indonesian invasion and occupation were dependent on foreign military equipment; and Indonesian and foreign companies profited from war and benefited from the occupation.<sup>2</sup>

**The occupation came to an end after an independence referendum and a UN intervention in 1999, followed by the establishment of a UN transitional**

1 Human Rights Data Analysis Group (HRDAG), *The Profile of Human Rights Violations in Timor-Leste, 1974–1999*. A report by the Benetech Human Rights Data Analysis Group to the Commission on Reception, Truth and Reconciliation of Timor-Leste (9 February 2006), <https://hrdag.org/content/timorleste/Benetech-Report-to-CAVR.pdf>

2 John G Taylor, *East Timor: The price of freedom*, Zed Books, 1999; *Chega! Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, 2006, part 11: 'Recommendations', point 12.10 on how to finance the reparations programme, <http://www.etan.org/news/2006/cavr.htm>



## East Timor

### Fact sheet

Civil war, 1975-1999

Commission on Reception, Truth, and

Reconciliation, 2001-2005

Commission of Truth and Friendship, 2005-2008

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administration. East Timor became an independent state in May 2002.<sup>3</sup> The subsequent transitional justice process, carried out under the auspices of the UN, included both judicial and non-judicial mechanisms. The UN installed, for example, the Special Panels for Serious Crimes – mixed courts for judging serious crimes committed during the last year of the Indonesian occupation (1999).

## Non-judicial mechanisms

In the category of non-judicial mechanisms, two truth commissions were established: in 2002 under the UN, the Commission on Reception, Truth, and Reconciliation (CAVR), and, in 2005, the joint truth commission of Indonesia and Timor-Leste, the Commission of Truth and Friendship (CTF).

The bilateral CTF had a limited mandate that did not include corporate accountability and that specified that the commission would not lead to prosecution and would emphasize institutional responsibility. Because of this,

<sup>3</sup> International Centre for Transitional Justice, 'Background: justice denied', <https://www.ictj.org/our-work/regions-and-countries/timor-leste>

the CTF did not recommend referrals for prosecution of alleged perpetrators.<sup>4</sup> The CTF had also been given the authority to recommend amnesties, and for this reason the UN declined to cooperate with this commission.<sup>5</sup>

The CAVR, operational from 2002 to 2005, could recommend prosecutions, where appropriate, to the Office of the General Prosecutor. It had not been given the authority to recommend amnesties.<sup>6</sup> In the clarification of its mandate, the CAVR explicitly mentioned corporations as one of the parties often involved in massive violations and thus an important subject of their inquiries or investigations.<sup>7</sup>

The CAVR did not mention any specific names of businesses in its recommendations; only the general terms 'businesses' and 'business corporations who supported the illegal occupation of Timor-Leste and thus indirectly allowed violations to take place' were used. These businesses were further specified as 'Indonesian business companies, including state owned enterprises, and other international and multinational corporations and businesses who profited from war and benefited from the occupation [...] and business corporations who benefited from the sale of weapons to Indonesia.'<sup>8</sup>

The body of the text of the CAVR report includes only slightly more information. Two Indonesian business companies and entrepreneurs associated with the military regime are specifically named. The companies mentioned are the coffee company SAPT and the parent company Bata Indra

4 As laid down in the CTF mandate under: 'c. Based on the spirit of a forward looking and reconciliatory approach, the CTF process will not lead to prosecution and will emphasize institutional responsibility', *Per Memoriam Ad Spem. Final Report of the Commission of Truth and Friendship (CTF) Indonesia – Timor-Leste*, Denpasar, 31 March 2008, pp.13–14 and 295.

5 The UN declined to cooperate with the CTF as the CTF's openness to amnesty conflicted with UN policy. Budi Hernawan, Pat Walsh, *Inconvenient Truths. The fate of the Chega! and Per Memoriam Ad Spem reports on Timor-Leste*, Asian Justice and Rights, August 2015, p.21, <http://asia-ajar.org/2015/09/inconvenient-truth-the-fate-of-the-chega-and-per-memoriam-ad-spem-reports-on-timor-leste/>

6 *Chega!*. Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), 2006, <http://www.etan.org/news/2006/cavr.htm>

7 *Ibid.*, part 2: The Mandate of the Commission, point 8: '[...] Often the context of massive violations, which is the object of a commission's inquiries or investigations, involves not only state actors, such as military and police officers and government officials, but also members of opposition groups, political parties, militias, corporations and other individuals [...].'

8 *Ibid.*, part 11: Recommendations, point 12.10 on how to finance the reparations programme.

Group that holds five subsidiaries active in the coffee, sandalwood, marble mining, and construction sectors.<sup>9</sup> The text of the report makes no mention of international and multinational corporations,<sup>10</sup> despite the fact that military equipment had reportedly been supplied by foreign companies from a range of different countries, especially the US.<sup>11</sup>

As a follow-up institution for the CAVR, the national Parliament was given the primary responsibility to oversee and monitor the implementation of the recommendations.<sup>12</sup> These were endorsed by the Parliament in 2009,<sup>13</sup> but that same Parliament has blocked their implementation to date. This lack of political will is probably explained by the unequal power relations between the emerging nation of East Timor and its powerful neighbour Indonesia, which would be affected by the implementation of the recommendations.<sup>14</sup> An NGO report on the impact of the CAVR reports in Indonesia states that there is a continuing denial by the Indonesian state of the question of historical justice that 'blocks the implementation of recommendations made by both reports on behalf of victims.'<sup>15</sup>

Amongst the indictments that the truth commission submitted for trial to the Special Panels for Serious Crimes, there were no representatives of businesses, but only military, police, administrators, and militia members.<sup>16</sup>

9 Especially in *Chega!* Chapter 7.9: 'Economic and social rights', <http://www.cavr-timorleste.org/>, pp.11, 13, 16.

10 *Ibid.*, part 2: 'The mandate of the commission, points 28–39: The use of specific names in the report.

11 More concrete information about the sale of military equipment to Indonesia that was used against the East Timorese is provided by John G Taylor, *East Timor*. Taylor stated that the Indonesian invasion and occupation was dependent on foreign military equipment. He specifically named the American Rockwell International Corporation, which provided military aircraft 'with the aid of an official US government foreign military sales credit.' According to Taylor, during the initial invasion by Indonesia, approximately 90 percent of the military equipment was reportedly supplied by US companies, but, during the course of the occupation, equipment came from the United States, Australia, the United Kingdom, France, West Germany, Malaysia, the Netherlands, Taiwan, South Korea, and other countries (pp.84, 134, 175).

12 *Ibid.*, part 11: Recommendations, point 13.

13 <https://www.ictj.org/our-work/regions-and-countries/timor-leste>

14 S H Rimmer, *Gender and Transitional Justice: The women of East Timor*, Routledge, 2010, pp.115, 119.

15 Budi Hernawan, Pat Walsh, *Inconvenient Truths*, p.1.

16 *Chega!* part 12, Annex 12.3 'Indictment summaries', <http://www.cavr-timorleste.org/>. See also: [http://www.ibanet.org/Committees/WCC\\_EastTimor.aspx](http://www.ibanet.org/Committees/WCC_EastTimor.aspx); <http://wscs.berkeley.edu/east-timor/east-timor-2/>

## Judicial mechanisms

As part of the transitional justice process, various judicial mechanisms were established under the auspices of consecutive UN Missions on East Timor, more or less simultaneously with the CAVR. The so-called Serious Crimes Process consisted of three judicial mechanisms, including the Special Panels for Serious Crimes.<sup>17</sup> The outcome of this process was disappointing for many Timorese. Only a small number of serious crimes have been prosecuted, and these relate only to offences from 1999 onwards, committed by East Timorese who stayed in, or returned to, Timor-Leste after the vote for independence.<sup>18</sup> This means that the vast majority of serious crimes have gone unpunished.

Although recommended by UN-initiated inquiries, no international tribunal has been established.<sup>19</sup> From the public sources available, it appears that the issue of corporate accountability has not been addressed by these mechanisms.

## Reparations

The recommendations of the CAVR report made a direct link between the human rights obligations of corporations, the violations they aided and abetted, and their obligation to provide reparations. The report stated: 'Member states of the international community, and business corporations who supported the illegal occupation of Timor-Leste and thus indirectly allowed violations to take

<sup>17</sup> The Serious Crimes Unit (SCU), Special Panels for Serious Crimes (SPSC), and Serious Crimes Investigation Team (SCIT) were all hybrid (also called internationalized or mixed) judicial mechanisms, which are half national, half international by nature, <http://www.internationalcrimesdatabase.org/Courts/Hybrid>. Thus, they can all be categorized as somewhere between a non-state-based and a state-based judicial mechanism.

<sup>18</sup> Pat Walsh, *Submission No 60 to Inquiry into Australia's Relationship with Timor-Leste* to the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade, 4 April 2013, [http://www.aphref.aph.gov.au-house-committee-jfad-timor\\_lete\\_2013-subs-sub%20060.pdf](http://www.aphref.aph.gov.au-house-committee-jfad-timor_lete_2013-subs-sub%20060.pdf). The non-prosecution of pre-1999 crimes is particularly painful for many Timorese, as is the fact that so many indictees are living freely. Timor-Leste President José Ramos-Horta and Prime Minister Xanana Gusmão have made liberal use of clemencies and have reduced sentences. *Irinnews*, 'Timor-Leste: Occupation-era crimes forgiven, not forgotten', 31 August 2011, <http://www.irinnews.org/report/93619/timor-lete-occupation-era-crimes-forgiven-not-forgotten>

<sup>19</sup> *Ibid.*, pp.4–5.



place, are obliged to provide reparations to victims.<sup>20</sup> The CAVR supported this statement with the argument that it emanated from 'the principle of international responsibility recognized in the international customary law of torts.'<sup>21</sup>

Furthermore, the CAVR recommended in general terms that corporations should contribute to a domestic reparation programme.<sup>22</sup> This recommendation has not been implemented to date. Two draft laws on compensation to victims have been awaiting enactment by Parliament since 2009. They appear to have been delayed indefinitely.<sup>23</sup> ♦

20 *Chega!* part 11: 'Recommendations', under 12.10 Financing.

21 *Ibid.*

22 This reparation programme was to be funded by, among others, Indonesian business corporations, including state-owned enterprises and other international and multinational corporations and businesses that profited from war and benefited from the occupation, and that profited from selling weapons to Indonesia. *Chega!* part 11: 'Recommendations', point 12.10.

23 International Centre for Transitional Justice, 'Timor-Leste. Parliament denies victims justice again', 17 February 2011, <https://www.ictj.org/news/timor-leste-parliament-denies-victims-justice-again>. In October 2012, Timor-Leste's Judicial System Monitoring Programme (JSMP) asked MPs again to hasten the process of debating and subsequent approval of the Victim Compensation Law and the Public Remembrance Institute, <http://www.easttimorlawandjusticebulletin.com/2012/10/victims-compensation-law-1975-1999-must.html>



# Sierra Leone

From 1991 to 2002, a civil war raged in Sierra Leone. The Revolutionary United Front (RUF), a rebel force aided by President Charles Taylor of the neighbouring country Liberia, fought against the government of Sierra Leone and its allies. Both sides used extreme violence and committed large-scale human rights violations. In July 1999, the government and the RUF rebel group signed the Lomé Peace Agreement. However, hostilities briefly re-erupted in 2000, and peace was only finally and formally declared in January 2002.

The Lomé Agreement included the decision to establish a truth commission and a reparation fund for victims. At the same time, the Lomé Agreement gave an unconditional blanket amnesty to all parties, a decision that came under intense criticism.<sup>1</sup> However, in 2000, the government of Sierra Leone had already requested the United Nations to provide for a Special Court for Sierra Leone to address serious crimes against civilians and UN peacekeepers. Negotiations between the United Nations and the Government of Sierra Leone resulted in the world's first hybrid (mixed) international criminal tribunal.

<sup>1</sup> International Centre for Transitional Justice [ICTJ], *Sierra Leone. Background*, <https://www.ictj.org/our-work/regions-and-countries/sierra-leone>



## Sierra Leone

### Fact sheet

Civil war, 1991-2002

Truth and Reconciliation Commission, created in 2002

Special Court for Sierra Leone, created in 2002

Victims' Trust Fund, created in 2009

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So, in the years following the final peace agreement in 2002, three mechanisms were established for Sierra Leone: the Truth and Reconciliation Commission (TRC), the Special Court for Sierra Leone (SCSL), and the Victims' Trust Fund.<sup>2</sup> The internationally supported Court and the nationally initiated Truth Commission appeared to be unable to harmonize their objectives.<sup>3</sup> In 2012, the Special Court for Sierra Leone sentenced the ex-president of Liberia, Charles Taylor, to 50 years in jail for war crimes.

Some of the amnesty provisions reached at Lomé were repealed by the SCSL, based on the provisions in the Statute of this Tribunal stating that amnesty should not bar prosecution with respect to crimes against humanity, violations of article 3 common to the Geneva Conventions and of the Additional Protocol II, and other

<sup>2</sup> Mohamed Gibril Sesay, Mohamed Suma, *Transitional Justice and DDR: The case of Sierra Leone*, International Centre for Transitional Justice, June 2009, p.4, <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf>

<sup>3</sup> According to the remarks in the TRC report, there had been operational difficulties which 'arose out of their different approaches to addressing impunity [...]', Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume II, under the chapter 'The TRC and the Special Court for Sierra Leone', paragraph 71, p.18, <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf>

serious violations of international humanitarian law.<sup>4</sup> Thus, the decision to establish the Special Court represented 'an important shift in policy, from a complete pardon and amnesty to limited prosecutions.'<sup>5</sup> The TRC welcomed the decision and stated that 'the international community has signalled to combatants in future wars that peace agreements containing amnesty clauses ought not to be trusted.'<sup>6</sup>

## Non-judicial mechanisms

The Sierra Leone TRC was operational in the period 2002 to 2004. The Commission had a broad mandate that included accountability for corporate complicity in human rights violations.<sup>7</sup> The mandate stated: 'perpetrators may be both natural persons and corporate bodies, such as transnational companies or corporations.'<sup>8</sup> It is unusual that it is not only representatives of companies as natural persons that are held accountable, but also corporations, being legal entities.<sup>9</sup>

The TRC found in its conclusions that 'successive political elites plundered the nation's assets, including its mineral riches' and that this political elite in Sierra Leone included, among others, the business elite.<sup>10</sup> Oxford University registered

4 Statute of the Special Court for Sierra Leone, art. 10 with art.2–4, <http://www.rscsl.org/Documents/scsl-statute.pdf>

5 Marieke Wierda, Priscilla Hayner, Paul van Zyl, *Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*, International Centre for Transitional Justice, 24 June 2002, note 24, p.9, <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Court-TRC-2002-English.pdf>

6 Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume II, under the chapter 'The TRC and the Special Court for Sierra Leone', paragraph 6, p.18, <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf>

7 The Truth and Reconciliation Commission Act 2000, Part III – Functions of Commission, under 6. (1) stated that the object of the Commission was 'to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent repetition', <http://www.sierra-leone.org/Laws/2000-4.pdf>

8 Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume I, paragraph 45, p.35, <http://www.sierra-leone.org/TRCDocuments.html>

9 In contrast, the International Criminal Court does not have jurisdiction over legal entities, only over individuals.

10 Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume II, paragraph 18, p.27, <http://www.sierra-leone.org/TRCDocuments.html>

the names of seven corporations that were recognized by the TRC. The TRC report hardly provided any specific information on companies' alleged conflict-related violations. Neither did the report mention whether these companies had participated or not in the TRC hearings, or whether they had made submissions to the TRC.

One of the few exceptions in the report to the general lack of specific information on the role of companies in the conflict is the case of the intertwined private security firms Executive Outcomes, Sandline International, and the mining company Diamond Works/Branch Energy.<sup>11</sup> During the conflict, the companies Branch Energy, Diamond Works, and Executive Outcomes became important players in the diamond industry in Sierra Leone.<sup>12</sup> The TRC explained this development stating that, in return for repelling the rebel group RUF from the diamond-mining areas in Kono District, Branch Energy was granted mining concessions.

Despite these indications, no form of accountability has taken place to date. Instead, the TRC's recommendations regarding businesses were forward looking. The TRC called upon the business sector to 'develop its own Code of Corporate Governance' and to 'assist in the reduction of crime and corruption by sharing information with each other and law enforcement agencies.'<sup>13</sup>

## Judicial mechanisms

The SCSL was set up in 2002 following a request to the United Nations by the Government of Sierra Leone. It was the world's first hybrid tribunal, a criminal court that is in nature half national, half international.<sup>14</sup>

11 Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume III B, 'External actors and their impact on the conflict', paragraph 91, p.5. Branch Energy is a subsidiary of the mining company Diamond Works, registered in Canada.

12 Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume III B, paragraphs 93–96, p.26.

13 Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume II, under the chapter 'Fighting Corruption', three paragraphs (297–299) discuss 'Business', p.165.

14 Hybrid, internationalized, or mixed criminal tribunals are those tribunals that are half national, half international in nature. This can be discerned from 1) the way they were established (e.g., agreement between the host state and the UN), 2) their subject matter jurisdiction (both international crimes and national crimes), and 3) their staff (both local judges/prosecutors and international staff), <http://www.internationalcrimesdatabase.org/Courts/Hybrid>

The SCSL was 'mandated to try those "bearing the greatest responsibility" for crimes committed in Sierra Leone after 30 November 1996.'<sup>15</sup>

The SCSL focused on prosecuting local warlords, but not the multinational companies implicated in widespread abuses. Although the SCSL tried former Liberian president, Charles Taylor, for his cross-border responsibility in Sierra Leone, the Court failed to address the complex structures of political and economic support by multinational corporations, like for example Firestone.<sup>16</sup>

## Reparations

Sierra Leone established various instruments to finance and implement reparations for war victims, but the public documentation of this process is not very transparent. What can be deduced from the scarce and confusing information is that the constrained funding depended heavily on international donors, like UN organizations, and that the scale of the reparations was quite limited.

The governmental National Commission for Social Action (NaCSA) was designated to implement the post-war rehabilitation. The TRC recommended the NaCSA as the implementing body for the reparations programme and entrusted it as well with governing the Special Fund for War Victims.<sup>17</sup> According to an evaluation by the TRC, this fund 'could not attract any significant amount' of funding.<sup>18</sup> With UN resources, the NaCSA registered 21,000 beneficiaries and provided them with micro-credit.<sup>19</sup>

<sup>15</sup> Special Court for Sierra Leone and the Residual Special Court for Sierra Leone, website under: 'The Special Court for Sierra Leone. Its history and jurisprudence', <http://www.rscsl.org/RSCSL-Mandate.html>

<sup>16</sup> Vasuki Nesiiah/Impunity Watch, *Transitional Justice: Scoping study for the expert meeting 'Making Transitional Justice Work'* of Impunity Watch, the Dutch Ministry of Foreign Affairs, International Development Law Organization (IDLO), The Hague, The Netherlands, 25–27 November 2015.

<sup>17</sup> Sierra Leone Truth and Reconciliation Commission, *Final Report*, 2004, Volume II, 'Recommendations', paragraph 211ff (specifically paragraphs 211 and 220), pp.266–270, <http://www.sierra-leone.org/TRCDocuments.html>

<sup>18</sup> Sierra Leone Truth and Reconciliation Commission, 'Background to the recommendations matrix', <http://www.sierraleonecsc.org/index.php/background-to-the-recommendations-matrix>

<sup>19</sup> Ibid.

The TRC recommended that part of the funding for the reparation programme should come from 'revenues from the exploitation of mineral resources.'<sup>20</sup> This intent was hampered by a lack of political will. The abovementioned evaluation concluded that 'the government has not adopted any mechanism to utilize a percentage of mining revenue for the programme as recommended by [the] TRC.'<sup>21</sup> ♦

20 Sierra Leone Truth and Reconciliation Commission, *Final Report*, Volume II, 'Recommendations', paragraph 227, p.269.

21 Sierra Leone Truth and Reconciliation Commission, 'Background to the recommendations matrix'.

# 10. Liberia

During the period 1989–2003, civil wars raged in the West African country of Liberia between rebel warlords of different ethnic descent, who fought for domination of the diamond mines and other natural resources. The warring parties were backed by several foreign powers, amongst others Sierra Leone. Liberia was marked by massive human rights violations, and more than 200,000 persons died as a result of the armed conflict. The most infamous rebel group, the National Patriotic Front of Liberia (NPFL), was led by Charles Taylor. He was elected president in 1997 and resigned in 2003 as a result of growing international pressure.

Private companies were active in the country before and during the civil conflict, especially in the extraction of natural resources. After the conflict, they were accused of having played a 'crucial role' in the armed conflict.<sup>1</sup> Corporations provided financial and military support to successive governments, including the Taylor regime, in exchange for illegal economic benefits, and engaged in looting, forced displacement of civilians, and arms smuggling.<sup>2</sup>

<sup>1</sup> *Republic of Liberia Truth and Reconciliation Commission, Volume 3, Appendices. Title III: 'Economic crimes and the conflict, exploitation and abuse', 2009, p.1.*

<sup>2</sup> *Ibid.*; also *Republic of Liberia Truth and Reconciliation Commission, Volume 2, Consolidated final report, 2009, pp.289–296.*





## Liberia

### Fact sheet

Civil war, 1989-2003

Truth and Reconciliation Commission, 2005-2009

Supreme Court of the Netherlands

(trial of Guus Kouwenhoven), 2005-2017

The end results of the transitional justice process in Liberia were disappointing. The Liberian state failed to convict Charles Taylor, and instead he was charged by the Special Court for Sierra Leone for 'bearing the greatest responsibility' for war crimes, crimes against humanity, and serious violation of international humanitarian law in Sierra Leone.<sup>3</sup> In 2012, he was found guilty by the Special Court for aiding and abetting war crimes in Sierra Leone and sentenced to 50 years in prison.

## Non-judicial mechanisms

After 2003, a transitional justice process was initiated by the Liberian state. The Truth and Reconciliation Commission (TRC), enacted in 2005 by the Liberian Parliament, was operational between 2006 and 2009. Its mandate included the issue of corporate complicity, described as 'economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts.'<sup>4</sup> The TRC was advised by an International Technical Advisory

3 Tomas Jaye, 'Transitional justice and DDR: The case of Liberia', International Centre for Transitional Justice, June 2009, p.9.

<https://www.ictj.org/sites/default/files/ICTJ-DDR-Liberia-CaseStudy-2009-English.pdf>

4 TRC Act, article IV, section 4 (a), p.4, [www.refworld.org/docid/473c6b3d2.html](http://www.refworld.org/docid/473c6b3d2.html)

Committee (ITAC) of three persons, all 'individuals of international distinction and repute.' Two experts were nominated by the Economic Community of West African States (ECOWAS) and one by the United Nations High Commissioner for Human Rights.<sup>5</sup>

The TRC had the authority to recommend investigations and prosecutions<sup>6</sup> and perceived this authority as binding. It stated: 'The TRC determines that the TRC Act provides that all TRC recommendations are authoritative, binding and have the weight of law serving as quasi-judicial directives that must be implemented by the Government of Liberia and the National Legislature.'<sup>7</sup> This was initially criticized by human rights NGOs as being contrary to the independence of the judicial process.<sup>8</sup> However, this debate later became irrelevant as in the end their recommendations were overruled by political factions.

The TRC had the authority to recommend persons for amnesty if they had fully disclosed their wrongs and expressed remorse, as long as these wrongs did not involve violations of international humanitarian law and crimes against

5 TRC Act, article V, section 10, pp.6–7, [www.refworld.org/docid/473c6b3d2.html](http://www.refworld.org/docid/473c6b3d2.html). The Committee members were entitled to full rights and privileges as commissioners, except that they were not allowed to vote during TRC meetings.

6 TRC Act, article IV, section 4 (a), p.4, and article VII, section 26 (j), p.10, [www.refworld.org/docid/473c6b3d2.html](http://www.refworld.org/docid/473c6b3d2.html). Article VII, section 26 (j): 'The TRC shall enjoy and exercise such functions and powers as are relevant for the realization of its mandates. Its functions and powers shall include, but not be limited to: [...]

(j) Making recommendations to the Head of State with regard to:

- i. Reparations and rehabilitation of victims and perpetrators in need of specialized psychosocial and other rehabilitative services;
- ii. Legal, institutional and other reforms;
- iii. The need for continuing investigations and inquiries into particular matters, at the discretion of the TRC; and
- iv. The need to hold prosecutions in particular cases as the TRC deems appropriate...

7 The TRC was mindful that it did not have 'penal jurisdiction to make any determinations or judgments on the criminal responsibility [...], but rather jurisdiction and competence to make binding determinations and levy public sanctions on any person [...], corporate body or other entity, responsible for committing EDC [Egregious Domestic Crimes], GHRV [Gross Human Rights Violations] and IHL [International Humanitarian Law] violations.' See *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, 11.1 'General determinations', p.332.

8 'Any judicial process must be independent and, as such, devoid of influence from any external actors. Accordingly, the TRC's recommendations to prosecute, or not, particular individuals should not be binding on any criminal investigations and prosecutions for serious past crimes', Human Rights Watch, *Justice for Liberia*, under III. 'TRC recommendations regarding selection of persons to be prosecuted', 10 December 2009, [www.hrw.org/news/2009/12/10/justice-liberia](http://www.hrw.org/news/2009/12/10/justice-liberia)

humanity.<sup>9</sup> There is no information available from open sources on whether any companies or their representatives have applied for, or have been recommended for, amnesty.<sup>10</sup>

In its final report of June 2009, the TRC labelled the crimes and involvement of companies in the armed conflict as 'economic crimes.' Within this category however, the TRC included not only crimes such as fraud and embezzlement, but also conflict-related crimes and serious human rights violations by companies, such as looting, illegal arms dealing, sexual slavery, human trafficking, and child labour.<sup>11</sup> It stated clearly that 'economic actors and economic activities played a crucial role in contributing to, and benefiting from, armed conflict in Liberia. [...] Private companies benefited from dealings with corrupt public officials to obtain lucrative natural resource concessions and exclusive licenses and [...] formed corporate entities with perpetrators of grave human rights violations.'<sup>12</sup> According to Oxford University, the TRC named 35 companies for their corporate complicity.

The rubber company Firestone became one of the most emblematic cases in the TRC report. The TRC stated in its Catalogue of Selected Human Rights Violations 1979–2003: '1991: Accord between Charles Taylor and Firestone. The management at Firestone had an arrangement with factional leadership during the war to organize protection and export of their product.

9 TRC Act, article VII, section 26 (g):

'(g) Recommending amnesty under terms and conditions established by the TRC upon application of individual persons making full disclosures of their wrongs and thereby expressing remorse for their acts and/or omissions, whether as an accomplice or a perpetrator, provided that amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards...' p.9.

10 There is only some public information on amnesty requests made by members of the warring factions. An example that created much controversy was the TRC's recommendation for amnesty for former warlord General Butt Naked (Joshua Milton Blahyi), who claimed before the TRC to have taken 20,000 lives. Proscovia Svård, *Liberia's Truth and Reconciliation Commission: The importance of documentation in postwar education and reconciliation*, Social Science Research Council, 29 April 2013, <http://forums.ssrc.org/kujenga-amani/2013/04/29/liberias-truth-and-reconciliation-commission-the-importance-of-documentation-in-postwar-education-and-reconciliation/#.VrCkkNAjMto>

11 See the TRC's *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, 'Definition of economic crimes', pp.286–287.

12 Republic of Liberia Truth and Reconciliation Commission, Volume 3, p.1.

Firestone paid the rebel group NPFL US\$ 2 million annually for protection.<sup>13</sup> The Firestone officials chose not to give statements to the TRC.<sup>14</sup> After investigations, the TRC accused Firestone of providing financial support and equipment to Charles Taylor's rebel government during the civil war.

Of the 45 cases recommended for prosecution for alleged economic crimes, 26 names appear to belong to (representatives of) corporations.<sup>15</sup> Firestone was one of these cases. Further investigation to uncover additional evidence of alleged economic crimes was recommended for 54 other individuals and corporate entities.<sup>16</sup> The companies concerned were active in the timber, mining (diamond), and rubber sectors, as well as in petroleum, banking, and telecommunications.<sup>17</sup>

On the one hand, the TRC made strong recommendations, addressing the issue of accountability for corporate complicity in human rights violations, but, on the other hand, it gave an escape route to the companies it recommended for prosecution. It offered them the opportunity to confess their crimes and restore the stolen goods.<sup>18</sup> By doing so, the companies would 'benefit from mitigation of liability and sanctions, legal, judicial or otherwise.'<sup>19</sup> The TRC reasoned that this would be an alternative to lengthy and expensive prosecution proceedings. The scarce information from open sources suggests that none of the concerned companies opted for this alternative mechanism.<sup>20</sup>

13 *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, p.226.

14 T Christian Miller, Jonathan Jones, *Firestone and the Warlord. The untold story of Firestone, Charles Taylor and the tragedy of Liberia*, Frontline Publication, 'Editors' note', [www.propublica.org/article/firestone-and-the-warlord-editors-note](http://www.propublica.org/article/firestone-and-the-warlord-editors-note)

15 The other 19 names belong to state institutions or rebel groups. *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, pp.370–372.

16 *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, pp.374–375. Firestone is still active in Liberia, see SOMO, 'Liberia back in business? Conflict and human rights issues in a post conflict environment', Centre for Research on Multinational Corporations (SOMO), July 2015, p.3, [www.somo.nl/publications-en/Publication\\_4212](http://www.somo.nl/publications-en/Publication_4212)

17 *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, pp.289–296 and 374–375.

18 'In lieu of prosecution all perpetrators of economic crimes may apply to the Independent National Human Rights Commission to make restitution of [...] gains from [...] economic crimes [...] to the Government and People of Liberia', *ibid.*, p.370.

19 *ibid.*, p.370.

20 'Although the TRC did hold a public hearing regarding the role of economic crimes in the conflict, neither asset recovery nor judicial accountability was ever achieved', Mark Kersten, 'Legacies of injustice in Liberia: transitional justice and economic crimes', *Justice in Conflict*, 16 February 2012, <http://justiceinconflict.org/2012/02/16/legacies-of-injustice-in-liberia-transitional-justice-and-economic-crimes/>

Only a week after the release of the TRC's report however, its recommendations were effectively blocked by former warlords who were active in post-conflict politics in Liberia.<sup>21</sup> This political elite dismissed the TRC report, accusing the TRC of trying to overthrow the government.<sup>22</sup> The Independent National Commission on Human Rights (INCHR), which was assigned by the TRC Act to monitor and implement the TRC recommendations, also fell prey to the pressures of former members of illegal armed groups in parliament. In February 2010, Liberia's Senate rejected the six individuals nominated by the president to serve as INCHR commissioners.<sup>23</sup>

To date, the TRC recommendations have not been acted upon, and nobody has ever been punished in Liberia for their responsibility in the armed conflict.<sup>24</sup> The INCHR only implemented the less polemic recommendations, and none of the recommendations regarding economic crimes.<sup>25</sup> An expert stated: 'Hence, for as long as Liberia's postwar political elites are composed primarily of former perpetrators, as emphasized by the recent elections in Liberia, implementation of the TRC recommendations is unlikely.'<sup>26</sup>

21 Paul James-Allen, Aaron Weah, Lizzie Goodfriend, *Liberia, Beyond the Truth and Reconciliation Commission: Transitional justice options in Liberia*, International Centre for Transitional Justice, May 2010, p.12, [www.ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf](http://www.ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf)

22 Aaron Weah, 'Hopes and uncertainties: Liberia's journey to end impunity', *The International Journal of Transitional Justice*, 28 June 2012, pp.5–6, <http://ijtj.oxfordjournals.org/content/6/2/331>

23 'ICTJ [International Centre for Transitional Justice] understands that some of those senators who were on the list voted against the nominees in an effort to avoid any work on the TRC's recommendations. There was also a problem of absenteeism in the senate, thus preventing it establishing a necessary quorum. Failure to accept the nominees means a continued delay in the constitution of this important body', Paul James-Allen, Aaron Weah, Lizzie Goodfriend, *Liberia, Beyond the Truth and Reconciliation Commission*, p.12 note 45.

24 Aaron Weah, 'Hopes and uncertainties', p.1.

25 The report of the Office of the High Commissioner for Human Rights of 4 May 2015 mentioned the following activities of the INCHR, which are not related to economic crimes: 'Liberia's Independent National Commission on Human Rights, established in 2010, has trained a number of human rights monitors, and has begun implementing the Palava Hut program, a critical initiative of the Reconciliation Roadmap', [www.ohchr.org/EN/HRBodies/UPPR/Pages/Highlights4May2015pm.aspx](http://www.ohchr.org/EN/HRBodies/UPPR/Pages/Highlights4May2015pm.aspx)

26 Aaron Weah, 'Hopes and uncertainties', p.1.

## Judicial mechanisms

The fact that the Liberian Senate did not accept the conclusions of the TRC proved to be a death blow for the transitional justice process in Liberia. The TRC recommendation to establish an Extraordinary Criminal Court for Liberia to try all persons recommended by the TRC for the commission of gross human rights violations, for example, was never implemented.<sup>27</sup> And although the judiciary, being theoretically independent of the legislature and executive, could have decided to investigate the companies and individuals that were recommended for prosecution by the TRC, to date this has not happened.

The high-profile case of Guus Kouwenhoven of the Oriental Trading Company and Royal Timber Corporation,<sup>28</sup> a Dutch individual who was recommended for prosecution by the TRC,<sup>29</sup> was pursued elsewhere. Kouwenhoven was arrested in his country of origin, the Netherlands, in 2005 and tried there on charges of involvement in war crimes during the civil war in Liberia and illegal arms deals with the Charles Taylor regime between 2000 and 2003.<sup>30</sup> A 2008 ruling by the Court of Appeal cleared the businessman of the charges, but this ruling was overturned in 2010 by the Supreme Court of the Netherlands. On 21 April 2017, the Court of Appeal convicted Kouwenhoven to 19 years of imprisonment for, *inter alia*, complicity in war crimes committed in Liberia.<sup>31</sup>

27 'The TRC hereby recommends the establishment of an "Extraordinary Criminal Court for Liberia" to try all persons recommended by the TRC for the commission of gross human rights violations including violations of international humanitarian law, international human rights law, war crimes and economic crimes including but not limited to, killing, gang rape, multiple rape, forced recruitment, sexual slavery, forced labor, exposure to deprivation, missing, etc.', *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, paragraph 12.1. 'Accountability: Extraordinary Criminal Court for Liberia', p.349.

28 The UN Panel of Experts on Sierra Leone Diamonds and Arms had stated in 2000 that Kouwenhoven was 'a member of President Taylor's inner circle' and was 'responsible for the logistical aspects of many of the arms deals', *Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000)*, paragraph 19, in relation to Sierra Leone, UN Doc. S/2000/1195, 20 December 2000, paragraph 215.

29 Kouwenhoven is mentioned as No. 8 on the list of individuals responsible for committing economic crimes in the *Republic of Liberia Truth and Reconciliation Commission, Volume 2*, p.371.

30 *Prosecutor v. Kouwenhoven*, Netherlands, LJN: AY5160, Rechtbank's-Gravenhage, 09/750001-05, 28 July 2006.

31 <https://www.theguardian.com/law/2017/apr/22/dutch-arms-trafficker-to-liberia-guus-kouwenhoven-given-war-crimes-conviction>

## Reparations

The TRC recommended the creation of a Reparations Trust Fund (RTF) that could obtain funding by: '(1) recovering tax arrears from timber, mining, petroleum and telecommunications companies that evaded tax liability under the Taylor regime; (2) obtaining funds from economic criminals that are sentenced by Liberian courts to pay restitution or other fees; and (3) utilizing criminal and civil confiscation schemes in foreign jurisdictions to repatriate Liberian assets.' The TRC recommended the government to 'aggressively' seek restitution from corporations. It noted that those convicted under Liberian criminal law could be fined double their illicit gains.<sup>32</sup>

However, because of the blocking of the TRC recommendations, the RTF was never installed, and the recommendations on reparations to victims have not been implemented to date. ♦

<sup>32</sup> Republic of Liberia Truth and Reconciliation Commission, Volume 3, pp.43–44.





# PART III:

The case of Colombia

# 11.

# Corporate accountability in transitional justice in Colombia<sup>1</sup>

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<sup>1</sup>This research was possible thanks to support from Open Society Foundations (OSF) as part of the project Corporate Responsibility for Human Rights Violations during past Dictatorships and Armed Conflicts: Promoting Strategic Litigation and Truth Commissions.

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On 15 December 2015 in Havana, Cuba, the Colombian government and the Fuerzas Armadas Revolucionarias de Colombia (FARC: Revolutionary Armed Forces of Colombia) agreed to create a complex model of transitional justice, the Sistema Integral de Verdad, Justicia, Reparación y No Repetición (Comprehensive System of Truth, Justice, Reparation, and Non-Repetition), to attribute responsibility for the domestic armed conflict and, above all, to guarantee that the rights of victims would be respected.<sup>4</sup> This system will create a Comisión de Esclarecimiento de la Verdad (TC: Truth Commission) and a transitional jurisdiction known as the Jurisdicción Especial para la Paz (SJP: Special Jurisdiction for Peace), among other measures. The parties to the negotiations acknowledged that, to be comprehensive, the system should identify and hold to account not just the demobilized combatants, as direct participants in the conflict, but also those who participated indirectly, particularly those who collaborated with and financed armed organizations.<sup>5</sup>

A week later, on 23 December 2015, the President of Colombia, Juan Manuel Santos, explained that the comprehensive system would include all collaborators and financiers who had engaged in 'decisive or habitual' participation in the commission of crimes falling under the competence of the SJP.<sup>6</sup> He said: '[T]hose who supported illegal armed groups consciously and voluntarily, and played a decisive role, may be subject to the Special Jurisdiction for Peace and, if found guilty, they will be liable to sanctions reflecting the severity of the crimes involved and the extent to which their participation played

4 This system comes under Point 5 of the Final Agreement (FA) signed by the Colombian government and the FARC guerrilla organization on 24 November 2016, on which this article focuses. See: Mesa de Conversaciones, 'Acuerdo sobre las víctimas del conflicto: Sistema Integral de Verdad, Justicia, Reparación y No Repetición, incluyendo la Jurisdicción Especial para la Paz y Compromiso sobre Derechos Humanos' – Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 24 November 2016, available at: <https://www.mesadeconversaciones.com.co/sites/default/files/24-1480106030.11-1480106030.2016nuevoacuerdoofinal-1480106030.pdf>

5 Point 5.1 of the FA recognizes that '[t]he definitive end of hostilities offers the conditions for the victims to express themselves without fear and receive the recognition they deserve; an opportunity for everyone who is responsible for violations of human rights or infractions of IHL to recognize this appropriately; and therefore an opportunity to apply measures to guarantee truth, justice, reparation, and non-repetition more effectively,' p.127.

6 The term 'decisive or habitual' was changed in Point 32 of the Final Agreement of 24 November 2016 to 'active or decisive', pp.148–149; this issue is addressed in more detail below.

a decisive role.<sup>7</sup> This means that civilian third parties, particularly members of the country's economic and political sectors, may have to clarify how they collaborated and under what circumstances, and admit their responsibility for the commission of such crimes before the SJP as part of transitional justice.

This was a very important step in the Colombian peace talks process. Investigating corporate accomplices<sup>8</sup> implies acknowledging that the domestic conflict in the country was more than just an armed confrontation between insurgent groups and state forces over more than 60 years. The conflict has involved different sectors of society and economic powers that, to a lesser or greater degree, have not only benefited from, but also contributed to, serious human rights violations and the phenomenon of land concentration.<sup>9</sup>

In Colombia, there is ample evidence of the role played by corporate actors in events in the domestic armed conflict. Firstly, there is evidence of the confluence of economic interests (commercial operations, production, or distribution) and the presence of armed groups in different areas of the country. Studies on the political economy of the Colombian armed conflict show that regions of strategic value for business operations are generally the most strongly contested by armed groups, so they are propitious settings for collaboration between economic powers and armed groups.<sup>10</sup> Secondly, there is evidence of alliances between

7 Presidency of Colombia, Declaración del Presidente Juan Manuel Santos sobre las bases de justicia para civiles, 23 December 2015, available at: <http://es.presidencia.gov.co/noticia/Declaracion-del-Presidente-Juan-Manuel-Santos-sobre-las-bases-de-justicia-para-civiles>

8 In this text, the term 'corporate complicity' is used in the sense found in the academic literature on corporate actors financing or supporting armed groups that commit severe violations of human rights. Corporate complicity means support for armed groups that goes beyond what is generally accepted as normal business practice. It means that legitimate business transactions have been transformed into reprehensible acts of complicity. See: Sabine Michalowski, 'Doing business with a bad actor: how to draw the line between legitimate commercial activities and those that trigger corporate complicity liability', *Texas International Law Journal*, 50(3): 403–464, 2015.

9 This step is all the more relevant bearing in mind that one of the red lines for businessmen at the start of the current peace negotiations was that no mention should be made of the private sector's complicity in human rights violations. See: Angelika Rettberg, 'Peace is better business, and business is better peace: examining the role of the private sector in Colombian peace processes from the 1980s until today', in: *Companies in Conflict Situations: Building a research network on business, conflicts and human rights*, ICIP Research 01, Institut Català Internacional per la Pau, 2013, 179–196, available at: [http://icip.gencat.cat/web/.content/continguts/publicacions/arxiu\\_icip\\_research/web\\_-\\_icip\\_research\\_num\\_01.pdf](http://icip.gencat.cat/web/.content/continguts/publicacions/arxiu_icip_research/web_-_icip_research_num_01.pdf).

10 For example, see: Astrid Martínez (ed.), *Economía, Crimen y Conflicto*, Universidad Nacional de Colombia, 2001; Mauricio Rubio, *Economía y Violencia*, Universidad del Rosario, 2002.

economic powers, local elites, and armed groups to promote their economic and political interests through the co-optation of local institutions in the regions and at national level.<sup>11</sup> For example, in Urabá and on the Caribbean coast, in northern Colombia, these alliances involved collusion with, and support for, serious violations of human rights: principally forced displacement and land grabbing. Likewise, some judicial verdicts have held corporate actors responsible, and, when right-wing paramilitary groups were taken to court, evidence emerged of unholy alliances with groups operating on the fringes of the law.<sup>12</sup>

On 26 September 2016, the parties reached agreement on the points established in the peace talks agenda, and, as negotiated between the parties, the SJP's competence over corporate third parties was endorsed. Nonetheless, implementation of the peace agreement was contingent on popular approval by plebiscite. In the referendum on 2 October 2016, the majority of Colombians voted against it. This meant that the agreement had to be renegotiated and certain points had to be changed. Some changes were introduced regarding the responsibility of civilian third parties. For example, the SJP now has competence not just for cases of collaboration with paramilitaries but also for cases of collaboration with any actor in the conflict, and relevant actors have the option of appearing voluntarily before this jurisdiction.<sup>13</sup> Changes were also introduced regarding the standard for participation: the SJP will be involved in cases where 'active or decisive' participation has been confirmed.<sup>14</sup> This definitive version of the Final Agreement (FA) signed on 24 November 2016 is the key text referred to throughout this chapter. At the time of publication of this chapter, the Colombian Congress has approved the amendment to the constitution through the act that will bring the

11 For example, see: Luis Jorge Garay et al., *La Captura y Reconfiguración Cooptada del Estado en Colombia*, Grupo Método, Transparencia por Colombia, Fundación Avina, 2008, available at: [http://www.oas.org/juridico/spanish/mesicic3\\_col\\_sc\\_anexo8.pdf](http://www.oas.org/juridico/spanish/mesicic3_col_sc_anexo8.pdf); Claudia López (ed.), *Y Refundaron la Patria...* Random House Mondadori, 2010; Mauricio Romero Vidal, *La Economía de los Paramilitares: Redes de corrupción, negocio y política*, Debate, 2011.

12 In their contribution to this report, Leigh Payne and Gabriel Pereira identified at least 18 examples of criminal proceedings against corporate actors in Colombia. For more information about the trials of paramilitaries see Chapter 2, Box 2b.

13 This possibility, expressed in FA p. 159, is explained in more detail below.

14 The concept of 'active or decisive' participation is analysed in more depth below.

comprehensive system into being.<sup>15</sup>

## History of bringing corporate complicity cases to court

Cases of corporate complicity in the Colombian armed conflict have been brought to court with mixed results. There has been a relatively high level of success in some landmark cases in the ordinary justice system, such as the case against oil palm businessmen in northern Colombia, known as the Urapalma SA case (see the box in this chapter), and the case against livestock farmers in the Fondo Ganadero de Córdoba (Córdoba Livestock Fund) on the Caribbean coast.

Demand for justice has also been increasing in other jurisdictions, such as the proceedings under the Alien Tort Claims Act in the United States to make claims on the basis of civil responsibility for illegal cooperation by Colombian companies with paramilitary groups. The best known case is that against Chiquita Brands Inc. in the Federal Court of New Jersey and more recently in Florida.<sup>16</sup>

Nevertheless, not enough cases have been tried in the Colombian justice system to reflect the extent of corporate complicity with actors in the armed conflict. As the conflict occurred across virtually the entire country for more than half a century, the level of cooperation between corporate actors and armed groups must be incalculably high. The scale of the phenomenon can be seen clearly in the transition following the demobilization of the right-wing paramilitary groups in the Autodefensas Unidas de Colombia (AUC: United Self-Defence Forces of Colombia) in 2005, covered by the Justice and Peace

<sup>15</sup> For more information on the legislative procedure for this constitutional amendment we recommend the monitoring carried out by Congreso Visible. See: <http://congresovisible.org/proyectos-de-ley/ppor-medio-del-cual-se-crea-un-titulo-de-disposiciones-transitorias-de-la-constitucion-aplicables-a-los-agentes-del-estado-para-la-terminacion-del-conflicto-armado-y-la-construccion-de-una-paz-estable-y-duradera-y-se-dictan-otras-disposiciones-jurisdiccion-especial-para-la-paz-jep/8760/>

<sup>16</sup> Business & Human Rights Resource Centre, profile of lawsuits against Chiquita for activities in Colombia, available at: <http://business-humanrights.org/es/perfil-de-las-demandas-judiciales-contrachiquita-por-actividades-en-colombia-0>; Sabine Michalowski, 'Doing business', p.425; Verdadabierta.com, 'Chiquita Brands podrá ser juzgada en los Estados Unidos', 5 December 2016, available at: <http://www.verdadabierta.com/otros-negocios-criminales/6493-chiquita-brands-podra-ser-juzgada-en-estados-unidos>

Law (Law 975 of 2005).<sup>17</sup> Paramilitaries confessed during what are known as *versiones libres* (spontaneous declaration hearings), and they appeared before the Salas de Justicia y Paz (Chambers of Justice and Peace). Prosecutors and magistrates then requested the ordinary justice system to carry out criminal investigations (requests known as *compulsas de copias*: investigation orders). A total of 15,291 civilians were to be investigated – the vast majority of them belonging to corporations or smaller businesses.<sup>18</sup>

When such requests have involved the investigation of corporate actors, in most cases procedures have not been started to actually bring them to court for contributing to crimes committed by armed groups. This is largely because the Justice and Peace Law only included a model for bringing ex-combatants to court and omitted civilian third parties who collaborated with armed actors. Therefore, transitional criminal proceedings against top paramilitary leaders over the last 10 years have had no way to include people who collaborated with, and financed, these groups.<sup>19</sup> The design of the Justice and Peace proceedings did not take into account the socio-economic complexities involved in paramilitary violence, and there was no comprehensive approach to prosecuting those responsible.

Because of the number of requests for investigation and the decision of the Mesa de Conversaciones to include these actors in the transitional justice framework, the Fiscalía General de la Nación (Attorney General's Office) created a group specializing in the investigation of corporate complicity in actions related to the conflict. This group has started working to produce an

17 Various judgements by the Salas de Justicia y Paz (Chambers of Justice and Peace) have revealed that businessmen participated in serious violations of human rights and the financing of paramilitary groups. These include: Tribunal Superior de Medellín, Sala de Justicia y Paz, Postulados Jorge Eliecer Barranco y otros, 23 April 2015, Rad: M.P. 110016000253200682689, M.P. Rubén Darío Pinilla Cogollo; Tribunal Superior de Medellín, Sala de Justicia y Paz, Postulado Jesús Ignacio Roldán Pérez, 9 December 2014, Rad: 110016000253200682611, M.P. Rubén Darío Pinilla Cogollo; Tribunal Superior de Bogotá, Sala de Justicia y Paz, Postulados Edwar Cobos Téllez y otro, 29 June 2010, Rad: 110016000253200680077, M.P. Uldi Teresa Jiménez López; Tribunal Superior de Bogotá, Sala de Justicia y Paz, Postulados Salvatore Mancuso y otros, 31 October 2014, Rad: 11001600253200680008, M.P. Alexandra Valencia Molina.

18 Fiscalía General de la Nación, Estadísticas de la Dirección de Fiscalía Nacional Especializada de Justicia Transicional, March 2015, available at: <http://www.fiscalia.gov.co/jyp/wp-content/uploads/2015/09/estadisticas-DFNEJT.pdf>

19 For an overview of the Peace and Justice process see: Verdadabierta.com, 'Especial: ¿Qué nos dejan 10 años de Justicia y Paz?', 27 September 2015, available at: <http://www.verdadabierta.com/justicia-y-paz/10-anos-de-justicia-y-paz/6003-10-justicia-paz>

inventory of cases that the transitional justice system may pursue.<sup>20</sup> How much progress is made in holding corporate actors accountable over coming years, both in the transitional justice system and the ordinary justice system, will largely depend on the work carried out by this group.

## Corporate complicity under the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition

The shortcomings in the Peace and Justice experience and the empirical evidence provided by various studies highlight the need to establish an effective system of accountability for corporate complicity. This need is even greater if we take into account the fact that many of those who financed activities are still economically powerful in the areas that suffered most from the violence.<sup>21</sup>

## Corporate accomplices' participation in the Truth Commission

The TC will provide the truth element of the comprehensive system agreed in Havana. This extrajudicial<sup>22</sup> mechanism has three objectives.<sup>23</sup> The first objective is to help clarify what occurred during the armed conflict. The second is to promote and support voluntary acknowledgement of individual and collective responsibilities by everyone who participated directly or indirectly in the conflict.

20 The working group on *Compulsas de Copias e Investigaciones de postulados excluidos* (Investigation orders and investigations of persons whose claims to benefit from the law have been excluded) started work at the end of 2015 by order of the Attorney General. See: Resolution 3139 of 2015 by the Attorney General and Resolution 0429 of 2015 by the Director of Transitional Justice Management.

21 For example, see: Comisión Intereclesial de Justicia y Paz (Inter-Church Commission for Justice and Peace), 'Paramilitaries announce territorial control and make the threat "We are going to recover the jailed bosses land"', 20 January 2016, available at: <http://justiciaypazcolombia.com/Paramilitaries-announce-territorial-control-and-make-the-threat-We-are-going-to-9363>

22 The FA sees it as an extrajudicial mechanism for several reasons: its activities are not judicial, they do not imply criminal charges against the people who appear, information received or produced cannot be transferred to the judicial authorities nor will it have any evidential value.

23 Mesa de Conversaciones, Acuerdo Final para la Terminación del Conflicto.



The third is to promote co-existence in the region, where the victims will be honoured by collective and individual acknowledgement of responsibility, with the aim of consolidating respect and public confidence.

The TC's mandate is to be extensive<sup>24</sup>: broadly speaking, to clarify patterns of violence and practices constituting serious violations of human rights. In the context of assuming responsibility, the TC is intended to be an appropriate platform for the FARC, the state, and any other national or international organizations, including companies, to acknowledge their collective responsibility in the commission of serious human rights violations. Although there is still no clarity on how it will work or the people it will include, the TC will have a mandate to report its findings within three years.

When clarifying the relationship between economic powers and armed groups in the TC, the FA views corporate actors in two ways. On the one hand, it views them as participants in human rights violations committed during the conflict, and, on the other, as a group that suffered from actions related to the conflict. This breaks with the common dichotomy in studies of corporate complicity in armed conflict: the assumption that all businessmen in conflict areas collaborated with, or facilitated, the armed groups, or otherwise that all businessmen were victims of these groups. To this end, the FA commits the Colombian government to promoting the participation of third parties in the TC, 'in order that they contribute to clarification and acknowledgement of responsibility, as part of the necessary guarantees of non-repetition.'<sup>25</sup>

As participants in the violence, local, national, and international corporate actors could assist the TC effectively in at least six ways, by: firstly, helping to clarify the violent actions carried out in the regions of the country; secondly, acknowledging their collective responsibility for their participation in the conflict (as a company, an economic sector, a group of companies, professional association, and so forth); thirdly, clarifying the historical context, the origins and causes of the conflict in which they were sponsors or their rights were violated; fourthly, identifying the factors and conditions that facilitated or contributed to the continuation of the conflict, particularly economic conditions such as voluntary financing of armed groups; fifthly, explaining the different forms of illegal cooperation with

<sup>24</sup> Ibid., p.134.

<sup>25</sup> Ibid., p.138.

paramilitaries or other armed groups; sixthly, clarifying the phenomenon of land grabbing in which the main beneficiaries were corporate actors, as shown in various legal cases.<sup>26</sup>

The parties to the negotiations have acknowledged that the armed conflict had a different impact depending on whether the victims were businessmen, agriculturalists, or livestock farmers.<sup>27</sup> In this area, the TC will not concentrate on clarifying the phenomenon of complicity. On the contrary, having acknowledged that some businessmen were victims, the TC has to clarify the way in which people were victimized, including merchants, cattle farmers, agriculturalists, and businessmen from small and large companies. In other words, it will be necessary to acknowledge that there were patterns of violence that had a disproportionate impact on some businessmen in the form of crimes such as extortion and kidnapping for ransom.

It is vital that the characteristics of this mechanism are appropriately designed, so that the TC can actually achieve its aims. The Colombian experience must avoid a repeat of what happened in South Africa, for example. Businessmen had no concrete incentives to participate in the Truth Commission there, and only did so on a voluntary basis. This meant that they contributed less to efforts to clarify the truth. In this sense, various aspects of TC design that have played a key role in the functioning of truth commissions in other countries have still not been clarified for the TC in Colombia. One question that needs to be addressed is whether the TC can suggest a plan for corporate actors to make reparations to victims of the conflict, and if the recommendations will be binding for them or not.

## Corporate complicity under the Special Jurisdiction for Peace

The SJP represents the justice component of the comprehensive system. It consists of chambers and a tribunal, with different divisions to carry out proceedings depending on the extent to which the implicated person is

<sup>26</sup> For example, see: César Molinares, 'La primera derrota de Argos en los Montes de María', *El Espectador*, 7 April 2016, available at: <http://www.elespectador.com/noticias/judicial/primer-derrota-de-argos-los-montes-de-maria-articulo-625874>

<sup>27</sup> Mesa de Conversaciones, Acuerdo Final para la Terminación del Conflicto.

legally determined to have collaborated in the commission of crimes under its jurisdiction. The actions covered will include serious violations of human rights and infractions against international humanitarian law, including crimes against humanity, war crimes, and genocide.<sup>28</sup>

The SJP will carry out special proceedings to determine the criminal responsibility of perpetrators of, and participants in, these acts, including not just ex-combatants and state agents involved in the conflict, but also corporate actors that may have participated in these acts. In this respect, the FA considers that corporate actors may be subject to this jurisdiction if at least two conditions are established: i) the party perpetrated or participated in one of the actions under its competence; and ii) the party's participation was active or decisive.<sup>29</sup> Therefore the SJP's competence to issue verdicts on financing and collaboration 'with paramilitary groups or any other actor in the conflict' is fundamental.<sup>30</sup>

The proceedings undertaken by the SJP to attribute responsibility to corporate actors and establish sanctions will take two distinct forms, depending on whether or not the corporate actor admits to having participated in an action under the SJP's jurisdiction. In both cases, it is anticipated that state bodies will

28 The FA states that it refers to 'any infraction of international humanitarian law committed systematically or as part of a plan or policy.' Other crimes are also considered, such as hostage-taking or other serious deprivation of liberty, torture, extrajudicial killings, forced disappearance, rape and other forms of sexual violence, child abduction, forced displacement, and recruitment of minors as per the Rome Statute of the International Criminal Court, Point 40, p.151.

29 Ibid., Point 32, p.148.

30 The version signed on 24 November 2016 introduced the idea that the SJP's competence included collaboration 'with any actor in the conflict,' whereas the previous version included only 'paramilitary groups.' This was an important element of negotiations for the new agreement, as one of the key complaints of those campaigning for a 'No' vote in the plebiscite was that no mention was made of the 'other actors in the conflict.' There are vital nuances that must be taken into account when one is studying how cases involving financing of armed groups are brought to court. There are differences between financing paramilitary groups and guerrilla groups. The aims of paramilitaries are not placed in the category of political crimes, such as rebellion, so financing them is part of an agreement to commit crimes. Financing guerrilla groups, however, might be considered to be linked to the political crime of rebellion, provided it is proven that this financing did not have a decisive influence on the commission of serious human rights violations. Therefore, measures such as amnesties or pardons would only be applicable in the second scenario. The FA introduced a requirement for decisions about whether crimes related to illicit crops are connected to political crime: 'account will be taken of criteria shown in Colombian internal jurisprudence, applying the principle of favourability,' p.150; and 'the Chamber of Amnesty and Pardon will determine whether there is a connection with political crime on a case-by-case basis,' p.151.

supply any documentation they have<sup>31</sup> regarding actions that represent serious human rights violations to an SJP chamber (the Sala de Reconocimiento de Verdad y Responsabilidad y de Determinación de los Hechos y Conductas: Chamber of Acknowledgement of Truth and Responsibility and the Identification of Acts and Conduct). This will determine the range of cases that should be brought to the attention of the SJP and act as a first filter. For cases involving corporate complicity, this chamber reserves the option of notifying corporate actors once they have been identified and, if they do not appear, demanding that they do so. Corporate actors will appear here, as a way to access the SJP, to make a declaration regarding their participation in actions related to the conflict, thus guaranteeing that their case has legal certainty.<sup>32</sup> Once identified, corporate actors can accept or reject their responsibility.

If they do accept responsibility, there will be swift proceedings with more lenient sanctions, in the course of which the Chamber of Acknowledgement will send the case<sup>33</sup> to the Tribunal for Peace to be studied by a section specializing in cases where the charges have been accepted. A legal check will be carried out there on the judgement of the Chamber of Acknowledgement, rulings will be issued, and the sanctions specified in the FA will be imposed. For those who have collaborated with the Comprehensive System in the areas of truth, justice, and reparation, and admitted their actions, an effective restriction of freedom of five to eight years will be imposed, with a restorative focus.<sup>34</sup>

If the corporate actors do not acknowledge their complicity, a trial will be held before the Tribunal for Peace to establish their responsibility for the crimes. The case is handed to a prosecution body, similar to a public prosecutor, called

31 These include judgements by jurisdictional bodies, reports from state bodies such as the Attorney General's Office and reports from civil society organizations. This explains the importance of the group created by the public prosecutor to deal with requests to investigate civilian third parties involved in the conflict.

32 The joint draft covers what should be done during the first year of functioning of the Chamber of Acknowledgement.

33 The case is transferred provided that the Chamber of Acknowledgement includes it in its resolution of conclusions – the document it issues determining allocation to the different chambers of the SJP – on the basis of personnel and resources available and its policies for case prioritization and selection. If a case involving a corporate actor is not included in the resolution of conclusions, it will be analysed to determine its legal status by a chamber of the SJP (Chamber for the Definition of Legal Situations).

34 Mesa de Conversaciones, Acuerdo Final para la Terminación del Conflicto.

the Unidad de Investigación y Acusación (Investigation and Accusation Unit). This body will stipulate whether a formal case is presented to the court of first instance. If the case proceeds, the Unit will press charges and initiate adversarial proceedings, in which, if found guilty, the corporate actors will lose the benefits of the alternative sentence that they would have received if they had accepted their responsibility, and a prison sentence of up to 20 years will be imposed.<sup>35</sup> The court will also have an Appeals Section where these cases can be appealed.

Likewise, the FA includes a form of voluntary appearance before the SJP: this jurisdiction will also define the legal situation of third parties that appear voluntarily within three years of its initiation, 'and who have been charged with, or found guilty of, crimes that are within the SJP's competence, providing their participation in the most serious and egregious crimes was not decisive.'<sup>36</sup>

## **Business complicity under the constitutional amendment that creates the comprehensive system**

As highlighted in the introduction, at the time of publishing, Congress had passed the constitutional amendment creating the comprehensive system. Provisional Article 16 retains what was agreed in the FA regarding competence over third parties, voluntary appearance, and the standard for participation in the commission of serious human rights violations during the conflict. However, the text contains ambiguities that raise concerns in some sectors of civil society, as discussed in the following paragraphs.

In our opinion, the framework of rules established in Provisional Article 16 preserves the general line of the FA for at least three reasons, but we wish also to express some caveats. Firstly, the SJP retains competence over

<sup>35</sup> Ibid., p.175.

<sup>36</sup> Ibid., p.159; this stipulation responds to the proposal of supporters of the 'No' campaign, who called for clarification of the SJP's competence in relation to members of the FARC, private individuals, and agents of the state. See: 'Esto propuso el No y así quedó en el Acuerdo', Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 29 November 2016, p.8, available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/2016-11-29-Ajustes-Acuerdo-FINAL.pdf>

## Provisional Article 16. Competence over third parties

"Persons who, without forming part of armed groups or organizations, may have contributed directly or indirectly to the commission of crimes within the framework of the conflict, may invoke the SJP and receive special treatment determined by the rules, *provided that they meet the established conditions for contribution to truth, reparation, and non-repetition.*

The above is without prejudice to the competences of the Chamber of Acknowledgement of Truth and Responsibility and the Review Section of the Tribunal for Peace regarding appearance of those third parties that may have engaged in active or decisive participation in the commission of the following crimes: genocide, crimes against humanity, serious war crimes (i.e. any infraction against International Humanitarian Law committed systematically), hostage-taking or other serious deprivation of liberty, torture, extrajudicial killings, forced disappearance, rape and other forms of sexual violence, child abduction, forced displacement, and recruitment of minors, all as per the Rome Statute of the International Criminal Court. Decisive participation is understood for these purposes to be action that is effective and decisive in the carrying out of the crimes listed.

In the exercise of these competences, the Chamber and Section mentioned may not base their request and ruling exclusively on reports received by the SJP, but rather they must corroborate them through other means of proof."

(italics ours)

actions committed by corporate third parties as part of the armed conflict, regardless of whether or not they appear voluntarily before the jurisdiction and in a way that takes precedence over ordinary jurisdiction.<sup>37</sup> On this point it is worth noting that the legislature included a definition of decisive participation that had not been considered in the text of the FA, considering it to be action that was 'effective and decisive in the carrying out of the crimes listed.' Although upon initial inspection we did not find it to constitute a clear limitation to the standard for incriminating corporate third parties, in our view it is a cause for concern that this definition could come to be interpreted in a restrictive manner, going against the FA philosophy. We would therefore like to draw attention to this point, so that more information may be added to the definition in future laws, making this section of the constitutional amendment more specific. This change should be made without prejudice to the scope established in the FA regarding cases brought by the SJP for these third parties' collaboration with, and financing of, paramilitary groups and other armed groups in the armed conflict.

Secondly, we find that the amendment includes the pertinent information regarding the voluntary appearance of third parties before the SJP. This rule establishes a system in which third parties that have not been called to appear may appear voluntarily before the SJP, resolve their legal situation, and obtain the legal benefits offered by the system, provided when they fulfil the conditions for contribution to truth, justice, and comprehensive reparation. This point offers a clear incentive, as it tells corporate third parties that, if they do not use the opportunity, they may run two risks: either i) the SJP may call them to appear because of their active or decisive participation, or ii) they may face criminal prosecution in the ordinary courts and they may be subjected to more severe penalties. Once more, the risk here is that the ordinary jurisdiction will not act on these cases and in practice the incentive will disappear. For this reason, it is important that civil society organizations monitor the process involving corporate third parties.

Finally, the amendment requires that other means of proof must be provided to

37 In our opinion, Provisional Article 16 provides a good catalogue of crimes within the competence of the SJP, as contained in number 40 of Point 5 of the FA. Although number 63 of Point 5 of the FA, referring to the SJP's competence over third parties, refers to number 40, it is right for Article 16 of the law to make this catalogue of crimes explicit. Number 63 establishes that: 'Regarding those persons who engaged in active or decisive participation in the commission of the crimes within the competence of this jurisdiction, *in accordance with what is established in number 40*, unless they have previously been condemned by justice for the same conduct'. (italics ours)

corroborate the information about corporate actors contained in submissions to the SJP by state institutions, human rights organizations, or victims' organizations. This requirement does not block prosecution for corporate complicity consequent to decisive or active participation in crimes. In our opinion, this requirement establishes that the information contained in submissions to the SJP must be corroborated, but it does not reject this content out of hand. This corroboration is one of the investigative tasks required to reliably prove criminal responsibility; this applies even more strongly if the third party does not accept responsibility and there are adversarial proceedings to be won. Nonetheless, the main risk at the moment is that this corroboration might not be developed in legislation because of new obstacles, which might make it rigid to the point of being almost impossible. Therefore, the statutory laws passed by Congress to govern this point, as well as the decisions of the Constitutional Court in relation to these laws and the SJP in its jurisdictional exercise, should provide sufficient tools (i.e. in this context also 'teeth') to avoid corroboration being an impediment to the exercise of competence over corporate third parties.

Nonetheless, the idea of creating a comprehensive system with mechanisms for seeking and clarifying the truth and judging responsibility for atrocities carried out during the conflict gives cause for hope. On the one hand, it will provide opportunities for victims to see the truth about how the phenomenon of corporate complicity with armed groups came about, what motivated it, who caused the violations, and who became rich by exploiting commodities in conflict zones,<sup>38</sup> particularly through alliances with right-wing paramilitary groups. On the other hand, it will establish the responsibility of corporate actors, so that they can be prosecuted in a way that so far has not been seen in Colombia, guaranteeing lower levels of impunity in these cases.<sup>39</sup> It must be stressed that the projected mechanisms and measures in the comprehensive system as planned will be interconnected, so that corporate actors' contribution to it cannot be reduced. Their contribution must be comprehensive: they must make a contribution to

38 Emily Harwell, Philippe LeBillon, 'Natural connections: linking transitional justice and development through a focus on natural resources', in: Pablo De Greiff, Roger Duthie (eds), *Transitional Justice and Development: Making connections*, International Centre for Transitional Justice, 2009, 282–330, pp. 299–305, available at: [https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new\\_publication\\_3/%7B1ED88247-585F-DE11-BD80-001CC477EC70%7D.pdf](https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/%7B1ED88247-585F-DE11-BD80-001CC477EC70%7D.pdf)

39 For an analysis of access to justice in cases against companies in Colombia see: Miguel La Rota, Carolina Bernal, *Acceso a la Justicia: Casos de abusos de derechos humanos por parte de empresas – Colombia*, International Commission of Jurists, 2010.



truth by participating in the TC, to justice in the SJP, and to reparation by taking appropriate action within state programmes to remedy the damage caused to their victims. In our opinion, if the risks mentioned are taken seriously, the text approved in the constitutional amendment will be consistent with what has been agreed (i.e. the FA) and will strengthen the system's comprehensiveness.

## **Tensions, incentives, and challenges for accountability of corporate accomplices under the Comprehensive System of Truth, Justice, Reparation, and Non-Repitition**

As already stated, the Colombian state is aware of the alleged participation of more than 15 thousand civilian third parties in actions related to the conflict. Many of these third parties belong to the country's business sector. Their inclusion within the Integral System of Truth, Justice, Reparation, and Non-Repitition is not gratuitous and follows the principle of the integrality of the system. The Peace and Justice proceedings demonstrate the importance of involving both direct and indirect participants in transitional justice mechanisms.

In our view, despite the uncertainties that still surround them, the TC and the SJP could open a window of opportunity for the state to respond appropriately to the question of accountability for corporate complicity with armed groups. For this reason, it is important not just to know the content agreed in Havana and the constitutional amendment that creates the comprehensive system, as described in the previous section. It is also important to highlight the latent tensions that remain in a transitional justice process that will attempt to maintain a holistic approach<sup>40</sup> and in which businessmen are expected to play a significant role in strategies to build peace in the country.<sup>41</sup>

40 The holistic approach to transitional justice considers that the mechanisms and processes initiated during the period after an armed conflict or an authoritarian regime should be integrated. This should be done in such a way that the work of each of the mechanisms tends to satisfy the victims' rights to truth, justice, and comprehensive reparation, recognizing its limitations but understanding that it can be more effective in this task as a system of mechanisms and measures than if each mechanism is considered in isolation. For more information on the holistic approach to transitional justice, see: [http://www.dejusticia.org/files/r2\\_actividades\\_recursos/fi\\_name\\_recurso.363.pdf](http://www.dejusticia.org/files/r2_actividades_recursos/fi_name_recurso.363.pdf)

41 See: Magdalena Correa, 'Justicia transicional en Colombia: balance y... desafíos constitucionales', in: Carlos Bernal, Gerardo Barbosa, Andrés Ciro (eds), *Justicia Transicional: El caso de Colombia*, Universidad Externado de Colombia y Ejército Nacional, 2016, pp.135–145.

As we have highlighted, there could be tension between promoting an accountability agenda within the transitional justice mechanisms and progress with a reconciliation policy agenda and post-conflict peace initiatives. Experience shows that the private sector's participation during the period after demobilization is key,<sup>42</sup> bearing in mind that their capital and skill can generate virtuous circles to build peace in zones affected by violence.<sup>43</sup> However, their actions in these areas can have the opposite effect, helping to maintain a state of affairs that perpetuates conflict if they are not consciously involved in peace and reconciliation initiatives. Persisting conflict can be triggered by various factors, for example by the initiation of accountability mechanisms that the business sector considers to be disproportionate, partisan, or even illegitimate. This might generate obstacles not just to the transitional justice process, but also to peace-building projects in Colombia, such as the inclusion of ex-combatants and armed conflict victims in the workforce.

Moreover, experience has shown that accountability for business complicity in severe human rights violations depends largely on whether the authorities in question have the political will to face objections from the business sector. In several countries, businessmen's political and economic power has provided them with an effective veto, which they have used to influence or block the progress of the transnational justice process on the issue. As in Argentina and Brazil, the victims and Colombian civil society could play an important role in putting the issue of business complicity on the political agenda.

There is a second latent tension, relating to the content of the legal standard for active or decisive participation for attributing responsibility to businessmen in the framework of transitional justice. In this case, there is tension between those

42 See: United Nations Development Programme [UNDP], Post-Conflict Economic Recovery: Enabling local ingenuity, Crisis Prevention and Recovery Report 2008, United Nations Development Programme, 2008, available at: <http://www.undp.org/content/dam/undp/library/crisis%20prevention/undp-cpr-post-conflict-economic-recovery-enable-local-ingenuity-report-2008.pdf>, Angelika Rettberg, The Private Sector, Peacebuilding, and Economic Recovery: A challenge for the UNPBA, The Future of the Peacebuilding Architecture Project, Norwegian Institute of International Affairs – Centre for International Policy Studies, University of Ottawa, 2010, available at: <http://dspace.africaportal.org/jspui/bitstream/123456789/27738/1/The%20Private%20Sector,%20Peacebuilding,%20and%20Economic%20Recovery.pdf>.

43 Elizabeth Reyes (ed.), ¿Cómo Construir Paz Desde el Sector Empresarial en Colombia?, Fundación Ideas para la Paz, 2014, p.23, available at: <http://cdn.ideaspaz.org/media/website/document/5331f14d6c26d.pdf>

who consider that the standard should be low and that any contribution to armed groups should be considered to be decisive, and those who believe that there must be overwhelming evidence of the causal link between the corporate actor's collaboration and the action of the armed group, and that this collaboration must have been decisive in making the group act.

This was one of the most controversial points from the moment the decision to create the SJP was announced in a joint statement by the government and the FARC on 23 September 2015<sup>44</sup> – so much so that, a few days later, the Consejo Gremial Nacional (National Business Council), which represents Colombian businessmen, expressed its concerns about the possibility of judging 'indirect responsibilities' in transnational justice, as this would pave the way for a 'witch hunt.' In response, on 23 December 2015, once the text of the joint draft<sup>45</sup> was known, the President of Colombia said that misinformation had led people to misunderstand how the SJP would investigate civilians. He was therefore obliged to define in detail the SJP's competence regarding civilian third parties:

*[...] civilians who were obliged to participate in the conflict or did so under threat have absolutely nothing to fear. Those who supported illegal armed groups consciously and voluntarily, and played a decisive role, may be subject to the Special Jurisdiction for Peace, and, if found guilty, they will be liable to sanctions in accordance with the severity of the crimes and depending on how decisive a role their participation played.<sup>46</sup>*

Moreover, since the constitutional amendment was passed, sections of civil society have been concerned that the text of Provisional Article 16 goes against what was established in the FA. For example, initial public reactions criticized the Article for 'excluding financiers from the SJP, and letting off all

44 Mesa de Conversaciones, 'Comunicado Conjunto #60 sobre el acuerdo de creación de una jurisdicción especial para la paz', 23 September 2015, available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/documentos-y-comunicados-conjuntos/Documents/comunicado-conjunto-60-23-septiembre-2015.pdf>

45 See: Mesa de Conversaciones, Acuerdo sobre las Víctimas del Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', including the joint draft of the Special Jurisdiction for Peace and Commitment to Human Rights, 15 December 2015, available at: <https://www.mesadeconversaciones.com.co/sites/default/files/borrador-conjunto-acuerdo-sobre-las-victimas-del-conflicto-1450190262.pdf>

46 Presidency of Colombia, Declaración del Presidente Juan Manuel Santos sobre las bases de justicia para civiles.

the third parties who financed criminal groups.<sup>47</sup> Hence, the debate on the SJP's competence regarding third parties continues to this day. As mentioned in the previous section, Provisional Article 16 of the constitutional amendment included a definition of decisive participation that was not considered in the FA. Hence, our concern is that the interpretation of this definition may be understood in a restricted way in the sense that it excessively limits the SJP's competence vis-à-vis corporate actors. To us it is clear that, in accordance with the constitutional amendment and the philosophy of the SJP as a jurisdiction to bring closure to the conflict, both the Constitutional Court and the Congress in the statutory laws that regulate this amendment must make an interpretation that meets the international standards of the fight against impunity and the FA's aims. On this point, international experience can be of great help in assessing whether 'decisive participation,' as conceived by the amendment, is in line with typologies of business complicity developed in doctrine and jurisprudence elsewhere.<sup>48</sup>

Finally, there is a further tension, related to the previous two, between corporate actors' interest in participating in the transnational justice mechanisms and their interest in profit and corporate goodwill. The main incentive for corporate actors to enter the comprehensive system is that the proceedings can provide legal certainty in exchange for their help in fulfilling the victims' rights to truth, justice, and reparation. It would mean that ordinary criminal proceedings would not be opened against them in the future. At the same time, concerns about the impact that this participation could have on their businesses could prove a strong deterrent. Therefore, corporate accountability must be balanced so that the costs of not participating are higher than the impact on their reputation.

47 See: Ariel Ávila, 'La impunidad que lograron Uribe y Vargas Lleras en la justicia transicional colombiana', 20 March 2017, El País, available at: [http://internacional.elpais.com/internacional/2017/03/21/colombia/1490056201\\_292126.html](http://internacional.elpais.com/internacional/2017/03/21/colombia/1490056201_292126.html)

48 See: International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Media Case)*, 3 December 2003; International Commission of Jurists, Volume 2 Criminal Law and International Crimes, Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, 2008; Doug Cassel, 'Corporate aiding and abetting of human rights violations: confusion in the courts', *Northwestern Journal of International Human Rights*, 6(2): 304–326, 2008; Sabine Michalowski, 'No complicity liability for funding gross human rights violations?', *Berkeley Journal of International Law*, 3(2): 451–524, 2012; Tara L Van Ho, 'Transnational civil and criminal litigation, in: Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013, pp.57–58.

The incentives offered by the comprehensive system agreed in the FA are still not that palpable for the possible 'beneficiary.' In Colombia, many of the merchants and businessmen that financed, and collaborated with, armed groups are individuals who are not included in any corporate structure and have informal commercial relations, mostly in rural areas. In this context, it is unclear how they can be persuaded that this is an appropriate model for assuming their responsibilities. Apart from legal certainty regarding the case in question, no further incentives are offered; this perception is strengthened by the Attorney General's low level of prosecution of cases of past corporate complicity. This does not give cause for hope that their cases will be tried in the future if they do not participate in the comprehensive system. Therefore, it is important to think about how better to involve the large proportion of businessmen that participated in the armed conflict. A particular point to highlight is that accountability for past actions adds to the tools provided by negotiating parties in Havana for building a stable and lasting peace. This would even be worthwhile in the context of business compliance and due diligence, where contributions to the system are considered to show the corporate actor's contribution and commitment to transitional justice.<sup>49</sup>

We believe that the TC and the SJP still face challenges in relation to their functioning. On the one hand, there are doubts about how to maintain the schedule for prosecuting corporate agents within a transitional justice system that focuses primarily on guerrilla groups, state agents, and politicians.<sup>50</sup> There should be greater public awareness of the importance of revealing corporate complicity in order to achieve a comprehensive transition.

On the other hand, the simultaneous work of the TC and the SJP will be complex. In this area, there should be good protocols for the methods of functioning, so that there is no function overlap and the process is not too

49 For example, see: Genevieve Paul, Judith Schönsteiner, 'Transitional justice and the UN guiding principles on business and human rights', in Sabine Michalowski (ed.), *Corporate Accountability*, pp.85–91. For more on the measures that the state could implement to promote corporate due diligence for compliance with human rights standards, see: Olivier De Schutter et al., *Human Rights Due Diligence: The role of states*, International Corporate Accountability Roundtable – European Coalition for Corporate Justice-Canadian Network on Corporate Accountability, 2012, available at: [https://issuu.com/\\_icar\\_/docs/human\\_rights\\_due\\_diligence\\_\\_the\\_role\\_of\\_states](https://issuu.com/_icar_/docs/human_rights_due_diligence__the_role_of_states)

50 Nelson Camilo Sánchez, 'Argentina and Colombia go after economic actors in contexts of violence', 4 January 2016, available at: <https://dejusticiablog.com/2016/01/04/argentina-and-colombia-go-after-economic-actors-in-contexts-of-violence/>

onerous for the participants in the mechanisms, in order that the rights of the victims can be fulfilled as far as possible. However, we should also take into account how crucial it is that corporate actors participate extensively and effectively in both instances. ♦

### Box 3. Urapalma case

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This short case study provides a summary of the judicial and non-judicial actions against the oil palm company, Urapalma SA, for its complicity in human rights violations. This case is an emblematic example of the positive effect of the activation of transnational activism networks by victims when they encounter the so-called governance gap; in other words, when they experience that 'all official judicial and non-judicial channels for victims to obtain justice and remedy are blocked.'<sup>1</sup> These channels include the transitional justice framework of the Justice and Peace Law, designed to try former paramilitaries of the United Self-Defence Forces of Colombia (Autodefensas Unidas de Colombia: AUC) and to contribute to truth finding. The victims of Urapalma SA's complicity bypassed the state and searched for international allies (e.g. the black caucus in the USA, the Inter-American System of Human Rights) to bring pressure on their own state.

In the midst of a 50-year internal armed conflict in the Pacific region of Colombia, Afro-Colombian communities, paramilitaries, and corporations controlled by local and transnational economic and political elites have coexisted and disputed control over land. In October 2014, a lower court in Medellín convicted over 20 businessmen from nine different domestic oil palm companies for associating with the AUC to forcibly displace the members of the Afro-Colombian communities of Curvaradó and Jiguamiandó in the Department of Chocó. The court ordered reparation for members of the communities and the restitution of communal lands.<sup>2</sup>

The struggle started for these communities in 1997 when the Colombian army and the Autodefensas Unidas de Córdoba y Urabá (ACCU) (a paramilitary group) joined forces to expel the leftist FARC guerrilla group from the area,

<sup>1</sup> Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, 1998.

<sup>2</sup> Juzgado Quinto Penal del Circuito Especializado de Medellín. Sentencia Rad. No. 201101799 de 30 de octubre de 2014.

resulting in the forced displacement of 3,500 peasants.<sup>3</sup> Seeing a business opportunity in cheap access to land and the perfect meteorological conditions for oil palm plantations, a group of businessmen contacted the paramilitaries with a business proposal. The paramilitaries would guarantee access to land and, using the businessmen's know-how, they would start a joint venture. In 2000, several oil palm companies, including Urapalma SA, started acquiring these lands, owning half by 2005.<sup>4</sup>

The Colombian Institute for Rural Development (Instituto Colombiano de Desarrollo Rural: INCODER) reported that palm oil was harvested from a total of 17,000 hectares, of which almost 10,000 belonged to the Consejo Comunitario de Curvaradó (i.e. 28 percent of their collective lands) and the remaining 7,000 belonged to the Consejo Comunitario de Jiguamiandó (i.e. 15 percent of their collective lands).<sup>5</sup> According to what was discovered in the course of the trial, the company, with the support of the AUC paramilitary groups, started using threats and legal strategies to obtain legal titles to the lands, paying derisory prices per hectare. Because these lands had been declared collective lands in 2000 and were protected against individuals being able to sell them, the company hired lawyers to come up with other legal mechanisms to obtain the titles.

The success of the economic project depended on the collaboration and participation of several other entities and institutions, all of which were used to legitimize the project (i.e. give it an appearance of legality). The company used associations of Afro-Colombian farmers (mainly FUNPAZCOR) to guarantee having the human capital (i.e. local small-scale farmers) to

3 Gustavo Gallón, "Operación Génesis' al desnudo," *El Espectador*, January 9, 2014, <http://www.elespectador.com/opinion/operacion- genesis-al-desnudo-columna-467580>; Operation Génesis was coordinated by the 17th Brigade of the National Army between 24 and 28 February 1997, in the Cacarcía river basin, in the department of Chocó. In the nearby Curvaradó and Jiguamiandó river basins, Operation Septiembre-Negro was undertaken by the same military forces in September 1996. See: Comisión Intereclesial de Justicia y Paz, Banacol: a company implicated in paramilitarism and land grabbing in Curvaradó and Jiguamiandó <http://www.oidhaco.org/uploaded/content/article/2133713038.pdf>, p.5.

4 Defensoría del Pueblo, 'Resolución Defensorial No. 39 – Violación de Los Derechos Humanos Por Siembra de Palma Africana En Territorios Colectivos de Jiguamiandó Y Curvaradó – Chocó,' Bogotá: Defensoría del Pueblo, 2005, [www.defensoria.gov.co/attachment/194/defensorial39.pdf](http://www.defensoria.gov.co/attachment/194/defensorial39.pdf)

5 Juzgado Quinto Penal del Circuito Especializado de Medellín. Sentencia Rad., p.165.



constitute associations that would apply for funding from the Banco Agrario (Agrarian Bank) and Finagro (a financial institution attached to the Ministry of Agriculture).<sup>6</sup> This meant that the project was partly funded by state institutions. Furthermore, to show how the company had state support at national and local level, it organized an inaugural event where it planted the first oil palm and invited the Minister of Agriculture, the Governor of Chocó, and the Major of the Carmen del Darien municipality. In photographs presented by one of the defendants in the criminal trial, it is possible to verify their attendance at the event. Finally, they sought, but failed to obtain, funding and support from the US Agency for International Development<sup>7</sup> and The Federación Nacional de Cultivadores de Palma de Aceite – Fedepalma (National Federation of Oil Palm Growers).<sup>8</sup>

### **Judicial actions**

Supported by local and international NGOs, these communities began a legal process to seek the restitution of their lands.<sup>9</sup> Their search for justice was extensive in both space and time. Over a decade, the communities reached out to domestic courts in the constitutional and criminal jurisdictions, as well as regional courts of human rights. They secured several decisions declaring the companies accountable for the forced displacement of these communities, for having benefited from the violent actions of the paramilitaries to access land, and for having acted later as an obstacle to the communities' return.

The communities decided to return to their lands, despite not having protection from the state. They started to organize again around the Consejos Comunitarios (Community Councils) and to cut oil palms as a form of protest. Represented by the NGO Comisión Intereclesial de Justicia y Paz (CÍJP), they first sought a field verification visit by the Inter-American Commission of Human Rights (IACmHR).<sup>10</sup> The Commission visited the area to verify the

6 Ibid., p.48.

7 Teo Ballve, 'El Lado Oscuro Del Plan Colombia,' Verdadabierta.com, 17 November 2009, <http://www.verdadabierta.com/negocios-ilegales/captura-de-rentas-publicas/1969-el-lado-oscuro-del-plan-colombia>

8 Ruben Dario Lizarralde, Interview, Bogotá, 2015.

9 Colombialand.org, Justicia Evasiva La Lucha Por La Tierra Y La Vida En Curvaradó Y Jiguamiandó, 2013, [http://colombialand.org/wp-content/uploads/2013/06/Justicia\\_Evasiva.pdf](http://colombialand.org/wp-content/uploads/2013/06/Justicia_Evasiva.pdf)

10 Manuel Garzón, Interview, Bogotá, 2015; Danilo Rueda, Interview, Bogotá, 2015.

violations committed against the communities by all actors, and in 2002 issued precautionary measures ordering the state to establish security measures to guarantee the life and physical integrity of these communities.<sup>11</sup> The case was then moved to the Inter-American Court of Human Rights (IACtHR), which in 2003 issued provisional measures requiring the state to: (i) investigate the abuses against the communities, (ii) guarantee the restitution of lands, and (iii) guarantee the legal recognition of the concept of humanitarian refugee zones<sup>12</sup> where these communities had been gathering in their struggle to return to their lands. The communities had asked all armed parties of the conflict to respect them and refrain from entering these areas.<sup>13</sup>

In 2005, the CIJP filed a criminal complaint against several executives of the oil palm companies that were occupying the lands. By that time, the CIJP had collected enough evidence through testimonies, but also from third party reports by state entities and regional bodies, to strengthen their position in the trial. They secured decisions not only from two organizations at the international/regional level (the IACmHR and the IACtHR), but also from internal state entities including a resolution from the Human Rights Ombudsman's Office in 2005 (Resolution No. 39), which required the companies to stop their operations and the Ministry of Justice to guarantee the restitution of the lands to the communities.<sup>14</sup> A report by INCODER also recognized the relationship between paramilitary groups, forced displacement, and oil palm companies. The Contraloría General de la Nación (Office of the Comptroller General of the Republic) and the Procuraduría General de la Nación (Office of the Inspector General of Colombia) also issued decisions regarding the use of public funds to finance companies that were occupying lands that belonged to Afro-Colombian communities. Finally, there was a decision from the Tribunal Contencioso Administrativo (Contentious Administrative Court) of Chocó<sup>15</sup> and another from the Constitutional Court in

11 <http://www.cidh.org/medidas/2002.eng.htm>.

12 This concerns the concept of Zona Humanitaria de Refugio as developed by the Colombian NGO Comisión Intereclesial de Justicia y Paz and the communities.

13 Contagio Radio Hablemos Alguieto, 'Condenados Empresarios Palmeros de Curvaradó Por Paramilitarismo,' Bogotá, 2015.

14 Defensoría del Pueblo, 'Resolución Defensorial No. 39.'

15 Tribunal Contencioso Administrativo del Chocó, 'Sentencia No. 0073 de 5 de Octubre de 2009, Expediente No. 2009-0030,' Quibdó, 2009, [http://www.setianworks.net/indepazHome/attachments/370\\_SENTENCIA\\_CURVARAD%C3%93.pdf](http://www.setianworks.net/indepazHome/attachments/370_SENTENCIA_CURVARAD%C3%93.pdf)

favour of the communities, ordering the companies to stop operations and the state to guarantee the restitution of communities' lands.<sup>16</sup>

In 2007, the Attorney-General's Office (National Prosecutor) started hearing testimonies from the defendants, and, in April 2011, he closed the preliminary investigation and filed charges to start the trial stage.<sup>17</sup> The trial started on 23 July 2012 involving several former executives of the company (and of the other companies and not-for-profit organizations). On 30 October 2014, the Juzgado Quinto Penal del Circuito Especializado de Medellín handed down a guilty verdict for all but two of the defendants.<sup>18</sup> They were found guilty of having ties with the paramilitary forces (*concierto para delinquir*) and of forced displacement. The latter included their activities to prevent the communities from returning.

However, this was not the first ruling in the case of Urapalma SA. In 2013, a former company worker, Carlos Daniel Merlano, had accepted a plea bargain and got a pre-agreed sentence. Mr Merlano would later appeal the decision, saying that he wished to retract his confession.<sup>19</sup> He was the lawyer who structured the legal strategy used by Urapalma SA to acquire the lands. The Prosecutor is investigating two other businessmen.

One point to highlight regarding the criminal trial is the strategy used by most of the defence lawyers during the trial: they argued that the CÍJP and the communities had connections with the FARC, and that the humanitarian refugee zones were in fact a tactic to facilitate the guerrillas return to the area. They also contended that companies were good faith occupants who had actually altruistic interests to incentivize the development of communities

16 Contagio Radio Hablemos Alguito, 'Condenados Empresarios'; Corte Constitucional, 'Sentencia T-025-04,' Bogotá: Magistrado Ponente Manuel José Cepeda Espinosa, 2004, <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>; Corte Constitucional, 'Auto 005 de 26 de Enero de 2009,' Bogotá: Magistrado Ponente Manuel José Cepeda Espinosa, 2009, <http://www.corteconstitucional.gov.co/relatoria/autos/2009/a005-09.htm>; Corte Constitucional, 'Auto No. 384 de 18 de Mayo de 2010,' Bogotá: Magistrado Ponente Luis Ernesto Vargas Silva, 2010, <http://www.corteconstitucional.gov.co/relatoria/autos/2010/a384-10.htm>

17 Contagio Radio Hablemos Alguito, 'Condenados Empresarios.'

18 Ibid.; Juzgado Quinto Penal del Circuito Especializado de Medellín. Sentencia Rad.

19 Corte Suprema de Justicia Sala de Casación Penal, 'Casación Rad. 41952, Auto de 20 de Noviembre de 2013,' Bogotá: Magistrado Ponente Luis Guillermo Salazar Otero, 2013, <http://vlex.com/vid/-480375590>

that had been forgotten by the state (i.e. they were acting in the communities' best interests).<sup>20</sup>

Finally, there is the issue of who are the defendants in the trial. This is an interesting question to explore, because it provides a rough sketch of the way the company was structured to ensure that those with economic control and power did not appear as directly involved in committing the abuses. Both the lawyer involved for the CijP and the lawyer for one of the defendants (Mr Javier Daza Pretelt) agree that the economic elites behind the company are not amongst those convicted.<sup>21</sup> Instead, some of the defendants claim to be mere employees, including one who claimed to be a company driver and that the managers of the company took advantage of his ignorance of the law to name him as legal representative of one of the associations without him understanding the implications.<sup>22</sup>

The Court decided to sentence more than a dozen businessmen, four of them former employees of Urapalma SA (Mario León Villa Pacheco, Javier José Daza Pretelt, Raía Patricia Sánchez Mejía, and Hernán Ínigo de Jesús Gómez Hernández) to 10 years in prison and a fine of 2,650 minimum wages at the time of the ruling (i.e. £430,000). Regarding remedy for victims, the Court ordered the defendants to pay compensation of approximately 20 million pesos (i.e. around £5,300) to each victim of forced displacement and ordered several state entities to guarantee and monitor the process of restitution of lands to the communities of Curvaradó and Jiguamiandó.<sup>23</sup> Although this reparation goes a long way symbolically towards recognizing the harm caused to the victims, it is as yet uncertain whether the victims have received, or will receive, the compensation in full.

The CijP sees this case as a partial success story; partial, because, as the interviewees Manuel Garzón and Danilo Rueda argue, not all those with real

20 Contagio Radio Hablemos Alguieto, 'Condenados Empresarios'; Juzgado Adjunto al Juzgado Quinto Penal del Circuito Especializado de Medellín, 'Proceso Rdo. 2012-2015, Sentencia Del 30 de Julio de 2013' (Medellín, 2013), <http://justiciaypazcolombia.com/Sentencia-Empresarios-Palmeros-por>

21 Diego Corredor, Interview, Bogotá, 2015; Garzón, Interview; Rueda, Interview.

22 Juzgado Quinto Penal del Circuito Especializado de Medellín, 'Sentencia Condenatoria,' p.103.

23 Ibid., pp.349–356.

economic and political power have been convicted.<sup>24</sup> However, they do find that the ruling has significant value in terms of truth, reconstruction of the historical memory of the armed conflict, and facilitation of the reconstruction of these communities.<sup>25</sup> In this sense, it would be an interesting case to bring to the truth commission that will be established as part of the recent transitional justice process, in order to expose the economic structure of the conflict and the participation of the economic elite in the atrocities.

The ruling expands the scope of the crime of forced displacement. It now includes not only all actions directed at forcing communities out of their lands (which are usually attributed to armed actors), but also all actions directed at preventing the return of communities and all actions that benefit from victims' condition as internally displaced persons (IDPs) (which is where corporations come in). This approach allows the Court to convict former company employees for the crime of forced displacement.

The ruling is also valuable because of its contribution to historical memory and because it is one additional element that communities can use to continue to pursue the restitution of their lands. At the time of writing, the state has not been able to secure the communities' return to their lands, mainly because it has been unable to dismantle the economic projects of the illegal occupants.<sup>26</sup> ♦

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24 Garzón, Interview; Rueda, Interview.

25 Contagio Radio Hablemos Alguito, 'Condenados Empresarios'; Garzón, Interview.

26 Colombialand.org, Justicia Evasiva.

# 12. Conclusions

The involvement or indirect participation of businesses in gross human rights abuses perpetrated by the state or state-like actors in the context of armed conflicts and dictatorships is a well-known phenomenon. This does not mean that it has become a self-evident issue to hold companies accountable for corporate human rights abuses. On the contrary, the arduous endeavours of victims to obtain truth, justice and reparations for corporate injustices suffered have often proven to be an uphill battle. In transitional justice processes, corporate accountability has often been treated as a secondary or ancillary element at best. Nonetheless, especially in Latin America, the notion has been gaining ground over the last decades, with Argentina, and to a lesser degree, Brazil setting the example.

It is in this context that Colombia is next to face the challenges of corporate accountability. It is remarkable that the Colombian peace agreement endorsed the competence of the Special Jurisdiction for Peace (SJP) over corporate complicity cases, even though it only applies to certain crimes and cases of 'active or decisive' participation. There is little doubt that the issue will encounter as many obstacles as it did in other parts in the world, but it is

crucial that Colombia takes up the challenge. First of all because the truth, reparation and accountability to which victims of gross human rights violations are entitled, comes at the responsibility of all actors involved in these abuses, also when these include corporate third parties. Moreover, a durable solution to past injustices can be considered a precondition for achieving a sustainable peace, because corporate injustices that remain unsolved are likely to resurface and become the source of lingering tensions and renewed violence. In the long run, accountability for corporate complicity can be considered an important guarantee of non-repetition, as it allow companies to truly fulfil their human rights responsibilities and become drivers for peace instead of conflict.

## The Colombian opportunity

If one thing can be learned from cases of corporate involvement in human rights abuses around the world it is that they seldom quietly disappear over the years. Organized victims usually continue to seek for ways to achieve justice and reparation, even though it often takes decades before their persistence bears fruit. This is not only strenuous and burdensome for the victims but can also cause long-term reputational damage and legal insecurity for the companies involved.

In this respect the transitional justice process in Colombia provides a significant way-out for companies burdened by accusations of having participated in actions related to the conflict. Under the SJP they basically have two options. Either they deny responsibility for the crimes and leave it up to the Investigation and Accusation Unit to decide whether there is sufficient basis for presenting a formal case to the Tribunal for Peace. Or they admit responsibility and voluntarily submit their case to the Chamber of Acknowledgement, while at the same time showing their good will by engaging with organized victims in a genuine dialogue on meaningful collective reparations that seek to provide remedy for the groups and communities that have suffered the consequences of their actions. It is in this sense that the SJP can be understood as – in the words of President Santos – ‘a great opportunity [...] so that any businessman who is involved in any case can turn to it and cleanse its name.’<sup>1</sup>

<sup>1</sup> <http://www.eltiempo.com/politica/proceso-de-paz/presidente-santos-habla-con-empresarios-de-la-justicia-transicional-37871>

## The governance gap

The lack of corporate accountability in general can be explained by what has been called a 'governance gap': although the rights of victims of corporate complicity are laid down in international human rights law, no effective laws and enforcement mechanisms exist that allow them to secure those rights. In part, this is due to the fact that recognition of companies' ethical responsibilities has not been translated into legal obligations. Recently adopted standards such as the UNGPs fail to regulate international business because of their reliance on soft law and voluntary approaches. Even if international law placed human rights obligations on corporations, those obligations would not be enforceable due to the absence of relevant international mechanisms. Currently, no international court or tribunal recognizes the criminal liability of company entities, as they have jurisdiction only over natural persons (individual employees).

## The political will to address corporate accountability

Although some transitional justice processes have explicitly recognized corporate complicity, in few cases this recognition was followed up with concrete measures to hold companies accountable for human rights abuses. The most common spoilers of corporate accountability are the lack of political will by governments, the veto power of businesses and the difficulties to substantiate evidence in legal proceedings. Businesses tend to use all their political and economic leverage to prevent states from including or following up on cases of corporate complicity. In turn, many governments have a policy of non-confrontation towards the business sector during transitional phases because of its the potential role in post-conflict economic reconstruction efforts. South Africa provides a disappointing example however. As an outcome of the transitional phase a Business Trust was set up, yet in the end very few victims' communities appear to have benefitted from this business support.

With respect to corporate accountability, the peace agreement in Colombia raised high hopes. It opens up the possibility hold unarmed third party actors, including businessmen, accountable for their role in the conflict. However,



bringing their veto power into play, the Colombian business sector was soon to express its concern that the prosecution of companies in the proposed SJP might lead to a 'witch hunt', in which company executives will be prosecuted for financing armed groups while in fact having been victims of kidnapping and extortion. This concern seems exaggerated, since the text of the agreement clearly states that the SJP will focus only on the most serious corporate crimes and because important legal checks have been built into the system. Nevertheless, representatives of the business sector have since joined forces with political actors to lobby for eliminating or weakening the corporate accountability component of the transitional justice framework. Not without success: during the congressional debate about the law on the creation of the SJP in March 2017, Congress made significant adjustments to the sections dealing with third party responsibility.

## Drivers of corporate accountability

A crucial element for the advancement of private sector accountability is the determination and commitment of domestic judicial and governmental institutions. In Argentina, for example, the support of the Kirchner administration provided the necessary political opening to create new institutions, investigate new angles and re-activate frozen processes. Also in Colombia, the room for corporate accountability will depend, to an important degree, on the extent to which future administrations will prioritize a victim-centred approach to transitional justice.

Commitment from the Colombian state to accountability efforts should focus on increasing access to archives, as well as financial and political support for improving the investigative capacity of judicial and non-judicial institutions. In Brazil, persistent inquiries by the truth commission only recently resulted in the discovery of important evidence compromising dozens of companies and leading to criminal investigations. It is important that the transitional justice process in Colombia can count on sufficient human and financial resources, especially in corporate complicity cases (not in the least in view of the significant imbalance in litigation capacity between companies and victims). As of yet, international donors are reluctant to contribute to these processes and prefer to focus on less politically sensitive issues.

In other countries, groups of victims that eventually achieved to overcome the economic and political influence of business opted for combining legal strategies with direct-action organising, both within and outside transitional justice mechanisms. In Argentina, for example, innovative judicial steps followed after mass mobilisation and public pressure. The German case is also a striking example of this. Class action lawsuits initiated by former concentration camp inmates in the late 1990s inmates, followed by large-scale political and economic pressure at international level, at long last resulted in the establishment of a compensation fund for both Jewish and non-Jewish victims of slave and forced labour.

The driving force of civil society should not be underestimated. In Argentina and Brazil on-going public pressure was brought into play through protest mobilizations, civic actions, political initiatives and advocacy to keep the issue on the political agenda. In the U.S., victims and activist shareholders successfully opposed American companies from merging with German companies involved in corporate complicity cases. In Colombia the public debate on the issue of corporate accountability is yet to start in earnest. Until now, efforts of civil society organizations in addressing corporate accountability in the context of transitional justice are still incipient, but their involvement with the issue is slowly growing. On a local level, victims of corporate complicity are increasingly organizing themselves, which might result in a unified national agenda in the future.

## Truth Commissions

The experiences with truth commissions around the world, provides important lessons for Colombia. First of all, it is important that the yet-to-be-established truth commission includes the issue corporate complicity in her mandate. This cannot be taken for granted. A preliminary study of University of Oxford shows that approximately half of the truth commissions under study (22 out of 39) mentioned corporate involvement in abuses in their final reports. This ranged from the exact naming of companies to only general information. Secondly, it appears that the quantity and quality of the testimonies was adversely affected by the often-voluntary nature of commissions. Furthermore, the Liberia truth commission opted to categorize corporate complicity cases as 'economic crimes', along with fraud and embezzlement. In terms of justice and reparation, it is questionable whether the use of such broad labelling is effective as it puts cases of bribery and cases of corporate complicity in the same category.

Only seven truth commissions followed up with concrete recommendations regarding remedy for abuses. But concrete recommendations are no guarantee for tangible results. In Sierra Leone, the recommendation had a forward looking approach and focused only on the establishment of a voluntary code of conduct. And in South Africa and East Timor, recommendations were subsequently blocked in national parliament. Again, the relative successes can be found in Latin-America. The Brazilian truth commission issued a recommendation for further investigation into cases of corporate complicity, and in Argentina, the first truth commission's recommendations have formed the 'moral capital' for judicial innovations many years later. They also paved the way for the later creation of a thematic truth commission. For Colombia, it is recommended that the to-be-established truth commission clearly defines its mandate in terms of the legal status of its future recommendations. Moreover, clarity is needed regarding the coordination between the truth commission and the SJP, and the implications this will have for corporate complicity cases.

## Judicial mechanisms

According to the aforementioned study of University of Oxford, in transitional justice contexts the use of judicial mechanisms to make businesses accountable for their involvement in human rights violations is on the rise. The researchers found a total of 86 trials, most of them on-going, of which 46 are civil and 40 are criminal trials. Slightly more than half of these cases were heard in domestic courts, Argentina being the country with the highest number. The other cases were filed in foreign and international courts. The victims often take this decision when their cases in transitional justice processes and domestic judicial systems are stalled. In Guatemala, for example, civil society organizations brought various cases in which corporate actors were mentioned to the Inter-American Court of Human Rights. From 2009 onwards, this led to new lawsuits and judgments against the Guatemalan state, although the business sector has successfully managed to avoid that these statements also could have implications for companies or their executives.

Most foreign corporate liability cases are taking place in the US where these are advanced under the Alien Tort Claims Act (ATCA). However, the 2013 US Supreme Court decision on *Kiobel v. Royal Dutch Petroleum* has had a negative impact on the use of the ATCA to remedy victims of corporate human rights abuses.

Victims of corporate complicity that bring cases before a domestic or foreign court are generally facing long-drawn-out trials and appeals. Corporations' economic power allows them to hire high-priced, skilled lawyers to defend them in complicated legal battles – litigation costs that victims can rarely afford. Where criminal liability is alleged, the corporate legal defence strategy usually is to argue that the violations resulted from individual and not corporate behaviour. Civil cases also hardly ever result in a verdict against the companies. Leaving aside procedural hurdles that stand in the way of cases going forward, corporations usually prefer to offer financial settlement on condition of no acknowledgment of wrongdoing, thereby avoiding law-making or precedent-setting decisions.

Colombia's future Tribunal for Peace, as a transitional judicial mechanism, is special in the sense that it concerns a fully domestic court established in the framework of the SJP. Many of the details of its mandate are still to be defined. Until the constitutionality test regarding the law that regulates the SJP, it remains unclear under which exact conditions the Tribunal for Peace can assume jurisdiction over corporate complicity cases. Whatever the outcome, the political will of the government to support the investigations by the tribunal and to guarantee the protection of judges, witnesses and prosecutors will be crucial. For the sake of truth and justice, it is also necessary that the SJP in corporate complicity cases can dispose of the testimonies of all actors that include knowledge about practices of voluntary financing or collaboration with armed groups. This would also include testimonies from former paramilitary leaders that were previously excluded from the Justice and Peace proceedings. ♦







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