

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

The cases of Colombia, Guatemala,
and Argentina



GIJTR

Global Initiative for Justice
Truth & Reconciliation



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



International Coalition of
SITES of CONSCIENCE

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

Cover photo caption: Protesters gather outside Congress in Guatemala City, Nov. 21, 2020. Hundreds protested in various parts of the country against Guatemalan President Alejandro Giammattei and members of Congress for the approval of the 2021 budget that reduced funds for education, health and the fight for human rights. Photo: Moises Castillo / AP Images.

ABOUT THIS REPORT

Roles and Responsibilities of the Private Sector in Transitional Justice Processes in Latin America: The cases of Colombia, Guatemala, and Argentina provides an overview of corporate complicity in the perpetration of grave human rights violations during some of the most notable periods of repression and conflict in those countries, and considers how the issue of private sector involvement has been addressed by both official and unofficial transitional justice mechanisms. This report presents lessons learned for the ongoing efforts to promote accountability, and considers the obstacles that remain.

Until fairly recently the transitional justice and corporate accountability movements have operated as largely separate fields, although practitioners and academics have made important progress in linking the two. The business and human rights framework established by the UN Guiding Principles on Human Rights provides a helpful starting point for considering the human rights responsibilities of private actors, as well as the state's duty to protect against human rights abuses committed by non-state actors and to provide remedy. In most countries in Latin America that have undergone some type of transitional justice process, private sector accountability has been limited. However, this report considers several noteworthy efforts in Latin America to hold private sector actors accountable in transitional justice contexts. The report concludes with recommendations for further research, for governments

and official transitional justice mechanisms, for victims and civil society, and for the private sector.

This report was prepared in the context of a project carried out in the first half of 2021 by GIJTR partners the Due Process of Law Foundation (DPLF), the International Coalition of Sites of Conscience (ICSC) and the American Bar Association Rule of Law Initiative (ABA ROLI). The findings herein were presented at a virtual workshop, *The Roles and Responsibilities of Private Sector Actors in Transitional Justice in Africa and Latin America: An Interregional Exchange*, convened in April 2021 by Consortium partners and Tatiana Devia from the Corporate Accountability Lab. The discussions were framed by the regional research on private sector actors and transitional justice processes in Africa and Latin America, as well as dedicated case studies and presentations with examples from Argentina, Brazil, Guatemala, Kenya, Liberia, Peru, Sierra Leone and South Africa. A dynamic group of approximately 70 participants representing academia, grassroots civil society organizations, intergovernmental and interregional organizations, national ministries, truth commissions, human rights commissions, memorialization initiatives, the media, private law firms, faith-based organizations, women's rights groups, and human rights defenders joined the exchange across the two continents, the United States and the United Kingdom.

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Mothers of the Plaza de Mayo march for the return of their children who were disappeared during the dictatorship in Argentina. Photo: Eduardo DiBaia / AP Images

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

In countries around the world, there is an increasing call for justice, truth, and reconciliation to confront legacies of gross human rights violations that cast a shadow on transitions from repressive regimes to participatory and democratic forms of governance.

To meet this need, the International Coalition of Sites of Conscience (ICSC or the Coalition) launched the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in August 2014. GIJTR seeks to address new challenges in countries in



Indigenous women take part in a “March for Dignity” to protest corruption and the government in Guatemala City. Photo: Moises Castillo / AP Images

conflict or transition that are struggling with legacies of or ongoing gross human rights abuses. The Coalition leads the GIJTR, which includes eight other organizational partners: American Bar Association Rule of Law Initiative (ABA ROLI), United States; Asia Justice and Rights (AJAR), Indonesia; Centre for the Study of Violence and Reconciliation (CSV), South Africa; Documentation Center of Cambodia (DC-Cam), Cambodia; Due Process of Law Foundation (DPLF), United States; Fundación de Antropología Forense de Guatemala (FAFG), Guatemala; Humanitarian Law Center (HLC), Serbia; and Public International Law & Policy Group (PILPG), United States. In addition to leveraging the expertise of GIJTR members, the Coalition taps into the knowledge and longstanding community connections of its 300-plus members in 65 countries to strengthen and broaden the GIJTR’s work.

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

- Truth telling, reconciliation, memorialization and other forms of historical memory;
- Documenting human rights abuses for transitional justice purposes;
- Forensic analysis and other efforts related to missing and disappeared persons;
- Victims' advocacy such as improving access to justice, psychosocial support and trauma mitigation activities;
- Providing technical assistance to and building the capacity of civil society activists and organizations to promote and engage in transitional justice processes;
- Reparative justice initiatives; and
- Ensuring gender justice in all these processes.

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



Bogotá, octubre 5 de 2016.

*Dirección de Patrimonio Cultural
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A soldier in Bogota, Colombia stands guard next to a poster that calls for an end to the conflict.
Photo: Fernando Vergara / AP Images

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1. INTRODUCTION

During the second half of the 20th century, various Latin American societies underwent periods of widespread brutal repression, and/or internal armed conflict. These experiences often left a legacy of massive human rights violations, and significant weakening of democratic institutions. Over subsequent decades, pro-democracy and pro-human rights advocates have sought to rebuild political systems and institutions in the affected countries, as well as to address the legacies of victimization and respond to the needs of victims. Their efforts have encompassed truth, memory and reparations processes ranging from Argentina’s pioneering “Nunca Más” truth commission report, to the prosecution of Peru’s former autocrat Alberto Fujimori; and the more recent establishment, in Colombia, of the sophisticated transitional justice court system known as the “Special Jurisdiction for Peace” (Jurisdicción Especial para la Paz).

Efforts to confront the region’s past political violence are still ongoing, as authoritarianism and repression have proven to be powerful, long-lasting, and dangerous. Victims have often spent years seeking truth and justice, and

many of them are still waiting. The process of piecing together the truth about repressive and violent systems is still incomplete, and each day brings with it the possibility of new revelations.

One of the main revelations of these ongoing processes of justice and factfinding to date has been to demonstrate that widespread repression was planned and carried out with the consent or complicity of a whole range of social actors. The command structures of repressive forces included lines of communication with powerful actors who endorsed repression, whether out of ideological affinity, or political or economic self-interest. Latin America's transitional justice mechanisms have time and again turned up evidence of the relationship between economic elites, repression, and conflict.

This study has two main aims. One is to investigate the role that corporate complicity played in the perpetration of grave human rights violations in Latin America, with particular emphasis on the experiences of Argentina, Colombia, and Guatemala. The second is to show how this relationship has been described and addressed by Latin America's transitional justice mechanisms. We already know, from official sources and existing scholarship, that corporate complicity was common and widespread. This study accordingly aims to draw together some lessons learned, in order to assist victims, survivors, civil society organizations and policymakers in their efforts to hold accountable economic actors that were involved in gross human rights abuses.

Since this study particularly focuses on the relationship between the private sector and transitional justice, setting out how each of these will be defined and understood is useful for defining the scope and terms of the discussion and conclusions.

The relationship between economic actors and human rights violations is usually addressed by what is today referred to as the business and human rights movement. 'Business and human rights' is the term adopted by the relevant UN Guiding Principles.¹ The Guiding Principles state that the standards they set out apply to "all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure". The text of the Principles does not, however, define what is meant by a 'business enterprise', an omission which may lead us to question whether the term is to

¹ United Nations Guiding Principles on Business and Human Rights (UNGPR), UN Doc. A/HRC/17/31 (2011).



Argentina defense reforms protest. Photo: Natacha Pisarenko / AP Images

be understood as referring solely to the responsibility of an economic entity qua legal person, or whether it also covers the actions of individuals linked to a specific legal person or legal entity, or even individuals who undertake economic activities without creating a specific legal entity to administer their business.²

Furthermore, “private sector” is one umbrella term used to refer generically to activities carried out for economic purposes (i.e., in pursuit of economic benefit), by a broad range of types of actors. The ‘private sector’ is usually understood as referring to that sector of a national economy that is not under the direct control of the state. However, the hard and fast distinction between ‘private’ and ‘state’ that this entails, risks leaving out state-owned enterprises. This is particularly unwise, given that we know that state enterprises have played an important role in many Latin American countries, and so should be taken into account.

This report accordingly uses the term ‘private sector’ broadly, and will also use the terms ‘private sector’ or ‘economic actor’ interchangeably, following common practice in the academic literature³ that has adopted the term ‘corporate responsibility’.⁴ This heuristic approach is particularly useful for present purposes

- 2 It is worth noting that the second draft of the UN Draft Treaty on business and human rights does define the terms “business activities” and “business relationship”. The former is defined as meaning “any for-profit economic or other activity undertaken by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures, undertaken by a natural or legal person. This will include activities undertaken by electronic means.” The second is limited, for the purposes of the draft, to “any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means.” Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf
- 3 Payne, L. & G. Pereira. (2016). Corporate complicity in international human rights violations, *Annual Review of Law and Social Science*, 12 pp. 63–84; Sánchez León, N.C. & Payne, L. & Pereira, G. & Bernal-Bermúdez, L. & Marín López, D. & Barboza López, M. (2018). *Cuentas Claras: El papel de la Comisión de la Verdad en la Develación de la Responsabilidad de las Empresas en el Conflicto Colombiano*; Bogotá: De Justicia; Sabine Michalowski, S. et al. (2018.) Entre coacción y colaboración: verdad judicial, actores económicos y conflicto armado en Colombia. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia.; Payne, L., Pereira, G., & Bernal-Bermúdez, L. (2020). *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes’ Lever*. Cambridge: Cambridge University Press; Pietropaoli, I. (2020). *Business, Human Rights and Transitional Justice*. Abingdon: Routledge.
- 4 Sánchez et. al. define “corporate complicity” as “the assistance or participation of economic actors in gross human rights violations (including genocide, torture, crimes against humanity and war crimes) committed by the State or State-like agents (e.g., paramilitary or rebel forces with control over territory) during situations of authoritarianism or civil conflict. Types of corporate sector actions may include

because, as we will see later, it allows us to capture the hybrid nature of economic actors' participation in violence and repression. Various mechanisms used for justice and factfinding have traced involvement of economic actors both in a formal capacity, as companies and corporations, and in less formal arrangements. While this involvement sometimes came about under the auspices of a particular legal entity, in other cases, relationships of a more individual nature nonetheless had associations with certain economic elites, production sectors, or business and professional associations. Factfinding and justice mechanisms have also sometimes laid responsibility variously at the door of national, or transnational, economic actors. Representatives of national and regional economic elites frequently accumulated and deployed both economic and political power to gain entry to structures of power. Understanding the fluid nature of the relationships involved is essential, not only for identifying different types of economic actor involvement, but also in order to appreciate how the very existence of these different categories is deployed to deflect demands for accountability.

We should also be clear that the private sector, business sector, or economic sector is both complex and diverse: the fact that some of its members are reported as having taken part in particular episodes, cases, or strategies does not mean to say that all companies did the same. Each of the countries analyzed here has an internally heterogeneous private sector. Similarly, mention in this report of allegations that certain individuals, companies, or associations played a part in human rights violations does not necessarily suggest that the only role played by businesses was that of perpetrator: many businesspeople in each of the three countries in this study were themselves victims of violence, and should be acknowledged as such.

It is also a fact that the focus of this particular study is limited to corporate complicity in human rights violations taking place during a specific period of time, and to the truth and justice mechanisms that were implemented in each of our three country cases to attempt to deal with the aftermath of the violence. It was particularly important to delimit a certain time period for our analysis, given that the relationship between economic activities and human rights violations continues to give cause for concern in Latin America today. The

direct responsibility for criminal violence (e.g., conspiracy to commit criminal conspiracy or conspiracy to commit violence); human rights violations under labor law (e.g., slave labor); financing of war crimes; or illegal enterprises (knowingly benefiting from violence, such as blood diamonds). Accountability does not require ideological affinity between companies and their state or parastatal partners." Sánchez et al. (2018). *Cuentas Claras...* op. cit. p. 23, following Payne & Pereira (2016), *Corporate Complicity...* op. cit.

levels of increasing monopoly control, and concentration of wealth, that some companies have achieved; the overexploitation of natural resources, and the opening of Latin American economies to global markets via the active pursuit of foreign investment, make this relationship one of the most pressing issues for human rights, and for the region's democracies. This study however focuses exclusively on corporate complicity in crimes of mass repression and internal armed conflict. Accordingly, it covers the most recent Argentine civil-military dictatorship (1976-1983), and the internal armed conflicts that took place, or are taking place, in Guatemala (1960-1996) and Colombia (1966-2021).

Our main interest is in efforts to provide a response to the victimization that took place during the named periods. This means the report will home in most closely on the particular public policies, regulatory frameworks, and unofficial efforts that most closely match that description. The report will use the term 'transitional justice' for all of these efforts, even though some of the mechanisms involved may not have been officially considered transitional justice measures.⁵ The states studied here have also adopted a series of recent relevant measures beyond and outside of the transitional justice framework, mostly as part of efforts to implement the UN Guiding Principles on Business and Human Rights. This report will consider these policies insofar as they are related to some aspect of the post-authoritarian or post-conflict agenda: such as, for example, the dimension of the latter that calls for guarantees of non-repetition.⁶ However, this study is not intended as an analysis of the national Business and Human Rights action plans of the countries studied.

The remainder of this report is divided into four parts. The first provides an analytical summary of what is currently known regarding patterns of participation in violence and repression by economic actors. The second describes how official and unofficial mechanisms created in these three Latin American countries have attempted to uncover this participation, in the decades following democratic transition or the signing of peace accords. The third part considers remaining obstacles to achieving truth, justice and reparations for victims, and the prospects for strengthening efforts to this end. Finally, the report closes with a series of conclusions that attempt to signal avenues for making progress in associated agendas for research and practice.

5 The whole concept of transitional justice is the object of ongoing debate among academics and practitioners alike. Some civil society organizations and victims prefer to refer to efforts along these lines as "truth, memory and reparations policies", while others use terms such as "dealing with the past".

6 UNGP, Art. 25 Commentary, op. cit.

2. THE PRIVATE SECTOR, STATE REPRESSION AND ARMED CONFLICT IN ARGENTINA, COLOMBIA, AND GUATEMALA

This section of the report aims to draw together information currently in the public domain regarding the involvement of corporate actors in periods of repression and conflict in Argentina, Guatemala, and Colombia. The chapter takes a particularly close look at the motives for, and dynamics surrounding, this involvement, and sketches a portrait of the supposed ‘enemy’ or enemies against whom the violence that economic actors promoted or supported was directed. The chapter also analyzes the factors that favored the original involvement, bolstered subsequent impunity, and/or continue to impede it.



A police officer for the Prosecutor General's office in Tumaco, Colombia, a city long victimized by paramilitary groups and the FARC. Photo: William Fernando Martinez / AP Images

2.1 ARGENTINA

Over the course of the 20th century, Argentina experienced a series of coups d'état that displaced democratically elected governments, installing a succession of military governments that restricted the rights of the population. The most recent de facto government, the self-styled Process of National Reorganization, 'Proceso de Reorganización Nacional', held power between March 1976 and December 1983. It imposed a system of planned State terror, carried out by the Armed Forces and security services.⁷ The dictatorship operated in part under a cloak of legality, provided by exceptional legislative decrees that gave the junta absolute power over the constitution. Meanwhile, many of its repressive activities were carried out in secret, drawing on a series of "clandestine rules for organization and action, i.e., a parallel, and secret, set of norms" approved by the military high command.⁸

The regime carved up the entire country into military zones and areas, in which the Army had primary responsibility for military operations. Official and unofficial investigation of the repression has found overwhelming evidence that the Armed Forces were the prime movers in the planning and implementation of a systematic plan of extermination, whose main forms of repression included kidnapping, the holding of prisoners in secret detention centers, torture, enforced disappearance, baby-snatching, and murder. Civil society human rights organizations have estimated that some 30,000 people were victims of state terrorism over the course of the period.⁹ In 1984, the National Commission on the Disappearance of Persons (Argentina's Truth Commission, known as CONADEP after its Spanish acronym) documented and confirmed 8,960 individual cases of enforced disappearances during the dictatorship, plus a further 600 or so kidnappings that took place in the period immediately preceding it (1974-1976).¹⁰

7 See Barbuto, V. (2010). Argentina. In: DPLF, *Las Víctimas y la Justicia Transicional: ¿Están cumpliendo los Estados Latinoamericanos con los Estándares Internacionales?* Washington DC: DPLF. pp. 35-62. <http://www.dplf.org/sites/default/files/1285258696.pdf> Barbuto writes: "After overthrowing María Estela Martínez de Perón, the Armed Forces formed a military *junta*, made up of a representative from each branch of the Armed Forces (the Navy, Army, and Air Force). The Junta, which had power to appoint the country's president, suspended the Constitution, dissolved Congress and in favor of a 'Legislative Advisory Commission', and replaced senior judges or made them swear allegiance to new institutional decrees." Id., p.36, author's translation.

8 Id.

9 Id.

10 CONADEP. (1984). *Nunca Más. Informe de la Comisión Nacional sobre la Desaparición Forzada de Personas*. Buenos Aires: EUDEBA.

With the return of democracy, in 1983, Argentina implemented a series of mechanisms to deal with the legacy of dictatorship-era violence. These included, as we have seen, the National Commission on the Disappearance of Persons, CONADEP. Several sources nonetheless suggest that links between the Armed Forces' operations and other actors were not fully investigated in the early years of justice and memory activity. Increasing academic and societal attention has however been paid to this issue since the year 2000. According to Verbitsky and Bohoslavsky (2016), the very term 'military dictatorship' has increasingly fallen into disuse, in favor of alternatives such as 'civil-military dictatorship'.¹¹ These are considered to more accurately reflect the truth about the coalition of interest groups that took part in repression, including civilian, economic and ecclesiastical actors alongside the military.

Recent efforts in the field of historical memory have sought to problematize an established narrative that depicted state repression as the creation of a limited number of high-level and mid-ranking Armed Forces officers. Newer studies have pointed out the existence of a complex economic web, whereby "the government obtained economic support (and political support connected with the economy) precisely from those who benefited both from economic advantages provided by the dictatorial state (subsidies, tax exemptions, elimination – even physical – of business competitors, corrupt business deals, privatizations, etc.) and from the market conditions created by the repression of certain sectors of society".¹²

This web of relationships found its expression in a wide range of forms of criminality and violence: the creation of criminal gangs to kidnap businesspeople and confiscate their property; elimination of union leaders to crush the unions and control the labor market, the implementation of socially exclusionary policies, etc. The businesses that were involved in these practices were drawn from various sectors of the economy.¹³

11 Verbitsky, H. & Bohoslavsky, J.P. (eds.) (2016). *The Economic Accomplices to the Argentine Dictatorship: Outstanding Debts*. Cambridge: Cambridge University Press.

12 Verbitsky & Bohoslavsky (eds.) (2016). *The Economic Accomplices...* op. cit. p. 7.

13 Examples can be seen in a comprehensive report on corporate responsibility for crimes against humanity produced jointly in 2015 by the Argentine Ministry of Justice and Human Rights, the academic center Flacso-Argentina, and the human rights NGO the Center for Legal and Social Studies, CELS. The report addresses cases connected to: "three steel factories, three automobile factories, four textile factories (one of them specializing in synthetic fibers, and therefore also linked to petrochemical activity), three sugar mills, a mining company, two ceramics companies, three companies involved in shipbuilding, a meat packing plant, a cement factory, a printer and two food industry companies", plus one company from the transport sector. In Ministerio de Justicia y Derechos Humanos, FLACSO

Repression of the trade union movement is one underlying pattern that has been revealed by subsequent scholarship and the unions' own research. It has been further highlighted in cases litigated in both national and international courts. The pattern of violence directed against the labor sector had at least three elements. First, the regime's rapid transformation of methods of production and the country's economic model led to the impoverishment of workers. Simultaneously, the state altered the regulatory framework that had previously protected workers' rights and union rights. The third element was the unleashing of physical violence against workers, with the full support of employers and, often, at the victims' own place of work. Companies actively collaborated by, for example, drawing up lists of unionized workers and union leaders, who subsequently fell victim to kidnapping, illegal detention, torture, disappearance, and killing. Some firms even allowed detention centers to be set up on company premises.

The twin examples of car assembly companies and sugar refineries can be used to illustrate the patterns of complicity between some businesses and dictatorial repression. Criminal case number 2,855, known as the 'Ford Case', was a domestic criminal investigation into events surrounding the participation of board members of the Ford Motor Company of Argentina, in crimes against 24 workers.¹⁴ The investigation revealed, first, that company cars had been used to detain workers. Second, multiple testimonies claimed that the company had asked the military to kidnap the workers, and had provided the authorities with their names, photos, and other identifying information. It has also been established, in other cases, that military barracks were set up on factory premises later used to detain and torture workers (as reported by Basualdo, Ojea and Varsky).¹⁵

Our second example is a criminal case involving the Ledesma sugar refinery, located in the Argentine province of Jujuy. This time, the judicial authorities' investigation linked two refinery executives to two grave crimes. The first was

Argentina, & CELS. (2015). 'Responsabilidad empresarial en delitos de lesa humanidad: Represión a trabajadores durante el terrorismo de Estado' Tomo 1. Buenos Aires: Ministerio de Justicia, FLACSO, CELS, p. 12.

14 The case was officially entitled "Pedro Muller and others: illegal deprivation of liberty" (*Muller Pedro y otros s/privación ilegal de la libertad*). The defendants were the company's president, and its managers of manufacturing, labor relations, plant safety, and security.

15 Basualdo, V. & Ojea Quintana, T & Varsky, C. (2016). The Cases of Ford and Mercedes Benz. In Verbitsky & Bohoslavsky (eds.). *The Economic Accomplices...* op. cit., pp. 159-173.

the kidnapping of four workers, all members of the refinery union (the Sindicato de Obreros y Empleados del Azúcar del Ingenio Ledesma). The second was the detention and subsequent disappearance of at least 26 people, from three neighborhoods in the environs of the refinery, amidst widespread power outages.¹⁶ The sequence of events in the later arrests was similar to that of the first four: targeting unionized workers (including, in the second case, leaders of the union itself, and of a health unit affiliated to it), and using company trucks to carry out the detentions.¹⁷

Unofficial truth-telling efforts have also demonstrated how certain companies used the repressive apparatus to undermine business rivals.¹⁸ For example, an investigation commissioned by Argentina's National Securities Commission (CNV) found that some businessmen had denounced their competitors as 'subversives', following which, those who had been denounced were detained, tortured and forcibly disappeared. Their companies or shares later ended up being sold on to those competitors who had denounced them.¹⁹ One case that has become emblematic of this practice involves the newsprint company 'Papel Prensa', whose owner died in a mysterious plane crash. His wife reported having then been kidnapped and threatened by agents of military repression. She was forced her to sell the business to press outlets favorable to the regime, giving them a monopoly over the printed media.²⁰

Researchers and investigators have also taken an interest in the issue of the involvement of private capital in financing the regime, leading to various domestic and international lawsuits.²¹ In 2009, survivors of repression sued a group of international private financial institutions alleging that these banks had knowingly supported the criminal apparatus of an authoritarian state that

16 Dandan, A. & Franzki, H. (2016). Between Historical Analysis and Legal Responsibility: The Ledesma Case. In Verbitsky & Bohoslavsky (eds.) *The Economic Accomplishes...* op. cit., pp. 186-200.

17 Similar features are presented by the 'La Fronterita' case from the province of Tucumán. See Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit., p. 213.

18 Delgado, F. (2016). Organized Pillaging. In Verbitsky & Bohoslavsky (eds.) *The Economic Accomplishes...* op. cit., pp. 269-276.

19 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit., p. 156.

20 Gualde, A. (2016). The Papel Prensa Case: Notes for a Study. In Verbitsky & Bohoslavsky (eds.) *The Economic Accomplishes...* op. cit., pp. 292-304.

21 Bohoslavsky, J.P. (2016). Complicity of the Lenders. In Verbitsky & Bohoslavsky (eds.) *The Economic Accomplishes...* op. cit. pp. 105-118.

kidnapped and forcibly disappeared their parents.²² This line of inquiry, which has now spread to other countries in Latin America's Southern Cone, is similar to that pursued by activists and investigators in South Africa, determined to address the responsibility of banks who financed the apartheid regime.²³

A number of economic groups, and trade and professional associations, have also been denounced by victims and social researchers for their links with, and support of, the repressive apparatus. In the words of Verbitsky and Bohoslavsky, in addition to their other contributions to the regime, "economic think tanks and employers' unions attempted a technical, political and institutional defense of that economic-criminal machinery, whose social, economic, legal and political repercussions are still palpable today".²⁴ Amongst these trade associations features a group known as the 'chambers of agricultural owners' (cámaras patronales agropecuarias). Recent research has highlighted how political support lent to the regime by the leaders of these chambers was rewarded by the concession of direct economic benefits to this sector by the dictatorship.²⁵ The role played during this period by the National Securities Commission has also been highlighted: contributing to a policy of persecution, extortion, kidnapping, torture and disappearance of businesspeople, in order to dismantle their companies and benefit certain economic groups.²⁶ Victims and investigators have also asked questions about the role played by certain media conglomerates, a role described by Loreti as tantamount to "editorial complicity of the media with the regime".²⁷ These investigations have sought to demonstrate how deference to, and defense of, the dictatorship was rewarded with direct economic benefits.

22 Verbitsky, H. (2009, March 16) "Los prestamistas de la muerte" *Página 12*. <https://www.pagina12.com.ar/diario/elpais/1-121607-2009-03-16.html>.

23 Bohoslavsky, J.P. (2021). Banking Southern Cone Dictatorships. In Basualdo, V & Berghoff, H & Bucheli, M. (eds.) *Big Business and Dictatorships in Latin America*. Palgrave, pp. 185-214.

24 Verbitsky & Bohoslavsky (eds.) *The Economic Accomplices...* op. cit. p.8.

25 See Rapoport, M. & Zaiat, A. (2016). The Complicity of Agricultural Business Chambers. In Verbitsky & Bohoslavsky (eds.) *The Economic Accomplices...* op. cit. pp. 253-266.

26 See Dandan, A. (2016). The National Securities Commission and the Assault on "Economic Subversion. In Verbitsky & Bohoslavsky (eds.) *The Economic Accomplices...* op. cit. p. 277-291.

27 See Loreti, D. (2016). The Media: Unified Discourse and Business Deals under Cover of State Terrorism. In Verbitsky & Bohoslavsky (eds.) *The Economic Accomplices...* op. cit. pp. 307-322. See also Iturralde, M. (2014). Prensa y Dictadura en Argentina: El Diario Clarín ante las violaciones a los derechos humanos durante la última dictadura militar (1975-1983). *Projeto História*, São Paulo, no. 50 (August) pp. 289-303.

2.2 GUATEMALA

The internal armed conflict in Guatemala, which lasted from 1960-1996, has been catalogued as one of the longest and bloodiest in Latin America. The conflict began in 1960 with the insurrection of a group of soldiers who opposed the policies of the government of the day. Over the course of the subsequent decade, several guerrilla groups emerged, which were quickly contained by the Guatemalan armed forces. Later, new guerrilla groups began to operate, in regions mostly inhabited by indigenous communities. These groups included the 'Revolutionary Organization of the People in Arms' (Organización Revolucionaria del Pueblo en Armas, ORPA), and the Guerrilla Army of the Poor (Ejército Guerrillero de los Pobres, EGP). State security forces responded by launching a harsh campaign of persecution, forced disappearance, and assassinations, targeting political leaders, trade unionists, academics, students and community leaders in the capital and in the west of the country.

The most intense period of the internal armed conflict took place between 1982 and 1983, during the dictatorship of General Efraín Ríos Montt. During this time, the Army destroyed entire communities and ruthlessly massacred children, women, the elderly, and unarmed men. Soldiers tortured men, raped women, disappeared and executed community leaders, and burned villagers' homes and crops.²⁸ As a result, an estimated 1.5 million people were internally displaced and more than 150,000 Guatemalans fled to Mexico, where some 45,000 were granted refugee status by the UNHCR.²⁹

The report of Guatemala's official truth commission, the Commission for Historical Clarification (CEH), estimated that more than 200,000 people were subjected to extrajudicial execution or enforced disappearance.³⁰ The CEH also reported that 93% of these crimes could be attributed to the Armed Forces and to state-linked paramilitary Civil Self-Defense Patrols. The indigenous population was targeted because the authorities considered that indigenous communities

28 Martínez, D. & Gómez, L. (2019). Report: A Promise to be Fulfilled: Reparations for Victims of the Armed Conflict in Guatemala. Queens' University, Belfast: Project Reparations, Responsibility & Victimhood in Transitional Societies.

29 Brett, R. & Malagón, L. (2020). Report: *Realising victims' rights to reparation, truth and justice in Guatemala in the midst of a zero-sum game*. Queens' University, Belfast: Project Reparations, Responsibility & Victimhood in Transitional Societies.

30 CEH (Comisión para el Esclarecimiento Histórico). (1999). *Guatemala: Memoria del silencio*. Guatemala: CEH. An official summary, in English, of the report's conclusions and recommendations is available at http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf

in the northwest of the country were collaborating with the guerrillas.³¹ According to the CEH Report, the Guatemalan state committed acts of genocide against the indigenous population as part of its counterinsurgency strategy.³²

Research by the Human Rights Office of the Catholic Church Archdiocese of Guatemala resulted in a major, nonstate, truth commission-style report. The Report of the Interdiocesan Project for the Recovery of Historical Memory, known as 'REMHI' after its Spanish acronym, asserted that the involvement of Guatemalan economic elites in the armed conflict and violence can be traced from the beginning of the conflict.³³ According to REMHI, over the course of the 1970s, Guatemala's industrial sector became "increasingly intolerant" of the labor movement.³⁴ The same period also saw economic transformations and conflict dynamics that led to "large-scale agricultural entrepreneurs, or army officers turned entrepreneurs, [to begin] to seize communal lands".³⁵ The process was deepened by the actions of "numerous small- and medium-scale entrepreneurs [who] followed closely on their heels (especially ladinos from the east or from middle-class urban enclaves around the country), attempting to take possession of lands that had suddenly become valuable".³⁶

The connections between economic elites and military power became more evident during the period of Ríos Montt's de facto rule. Through contacts with the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations ('CACIF', after its Spanish acronym), the regime obtained political support that led to a third of Ríos Montt's cabinet being made up of businessmen (the Minister of Economy came from the Chamber of Commerce, the Minister of Agriculture had previously represented the Chamber of Agriculture, and the Minister of Health came from the country's medical association).³⁷ A similarly

31 According to the CEH report the Army forced men from the communities to form Civil Self-Defense Patrols, and designated 'military commissioners' who were to monitor and control their own neighbors.

32 CEH, *Guatemala: Memoria del Silencio*. op cit.

33 For an abridged version of REMHI in English, see REMHI. (1999). *Guatemala: Never Again!* Maryknoll, NY: Orbis Books. For the full REMHI report in Spanish, see REMHI (Proyecto Interdiocesano de Recuperación de la Memoria Histórica). (1998). *Guatemala: Nunca más*. 4 vols. Guatemala: Oficina de Derechos Humanos del Arzobispado. Vols. 1 and 2 are available at: <http://www.derechoshumanos.net/lesahumanidad/informes/guatemala/informeREMHI-Tomo1.htm>

34 Id. Chapter 12. p. 207.

35 Id.

36 Id.

37 Rodríguez Pellecer, M. (2013). "Los militares y la élite: la alianza que ganó la guerra". PlazaPublica.com https://www.plazapublica.com.gt/sites/default/files/la_elite_y_los_militares_0.pdf.

significant number of businessmen were part of the Council of State, the body created by the dictatorship to replace the elected legislature (National Assembly).³⁸ Guatemalan researchers have also denounced the 1982 creation of a pact between the regime and a group of big businessmen, whereby the government committed itself to abstaining from agrarian reform or nationalization of banks, in return for the businessmen agreeing to pay their taxes, reverse capital flight, and pay a “specific financial levy for the eradication of subversion”.³⁹

The direct and indirect involvement of business sectors in serious human rights violations has been documented in various reports. Since Guatemala’s internal armed conflict was predominantly fought out in its rural areas, many cases are related to agricultural and mining interests whose activities directly affect peasant and indigenous communities, including by producing environmental degradation. One form of business sector involvement was the creating and financing of death squads.⁴⁰ In addition, as for Argentina, reports exist of corporate complicity in acts of kidnapping, torture, murder and enforced disappearance, including the setting up of clandestine detention centers on the premises of private companies.⁴¹

Guatemala is also one of the countries where the use of forced labor has been identified as part of corporate complicity. The REMHI report exemplifies this pattern by citing the case of at least two women forced against their will to work on the Finca La Perla estate. The report also details the deployment of sexual violence against peasant and indigenous women by members of the armed forces, in complicity with economic actors. The report cites a case of collusion between the military and the owner of the Finca San Francisco. The farm’s indigenous workers, accused of collaborating with the guerrillas, were first stripped of their food and supplies. The women were then sexually assaulted and burned alive, while male workers were killed and their children, dragged

38 “The Council of State was a corporatist entity that advised and legitimized the government in its decisions.” Rodríguez Pellecer (2013), *op cit.* Author’s translation.

39 Rodríguez Pellecer, *op cit.* (citing Valdéz, F. and Palencia, M. (1998) *Los Dominios del Poder: La encrucijada tributaria*. FLACSO Guatemala.). Author’s translation.

40 As shown by Payne, Pereira and Bernal-Bermúdez, the CEH report documents cases such as a 1976 murder conviction in which the convicted man confessed to having been part of a death squad financed by businessman Elías Zimeri Nassar, and the case of landowner Carlos Thompson, accused of creating a death squad in La Palma (Río Hondo, Zacapa). Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* *op. cit.*, p.181.

41 *Id.*

from a nearby church where they had taken refuge, were beaten against wooden posts. After the soldiers had feasted on the stolen food, the village was burned to the ground. The report suggests that over 350 people may have been killed.⁴²

Another form of corporate complicity is connected to the military tactic of indiscriminate bombardment of rural populations. According to reconstructions by journalist Martín Rodríguez Pellecer, one group of businessmen took active part in military bombing campaigns by lending or even piloting their private planes. This private sector alliance with the military would have made a key contribution to the war strategy, taking place as it did at a time when the regime's air strike capability was severely reduced, due inter alia to a US government embargo preventing the Armed Forces from acquiring aircraft and spare parts.⁴³

2.3 COLOMBIA

Colombia's internal armed conflict stands out from other periods of violence experienced in the region, due to its long duration. Although the exact origins of the conflict are a matter of some dispute, most of the specialist literature dates the origins of Colombia's ongoing violence to the mid-1960s, with the emergence of insurrectionist peasant movements.⁴⁴ These movements, organized around grievances proceeding from political exclusion and lack of access to land, were entirely indigenous and rural in nature. The response of state authorities and affected regional elites was similarly concentrated in the countryside. The army and police, who constituted the principal declared targets of the incipient guerrilla movements, spearheaded the state's response. Regional economic and political elites meanwhile organized self-defense militias to fight the guerrillas. The conflict escalated over time, thanks in part to an influx of large sums of money from both legal and illegal economic activity (the latter

42 REMHI (1999) op. cit., chapter 5.

43 Rodríguez Pellecer cites claims made in a book by Gustavo López Díaz, to the effect that these civilian pilots came to participate in "dangerous aerial reconnaissance missions, and some missions to bomb and attack enemy positions. In view of Air Force hardware shortages, the Air Reserve planes were adapted to allow them to drop improvised bombs, made from obsolete German anti-tank mines from the Second World War, to which a time detonation mechanism was added". Rodríguez Pellecer (2013). *Los militares...* op. cit., (citing López Díaz, G. (2008). *Guatemala en Llamas, una visión político-militar del conflicto*. Ciudad de Guatemala: Editorial Oscar de León López Díaz). Author's translation.

44 Centro Nacional de Memoria Histórica (CNMH). (2013). *Basta Ya: Colombia Memorias de Guerra y Dignidad*. Bogotá: CNMH. Available at: <http://www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/descargas.html>.

including drug trafficking). The early 'self-defense' militias mutated into full-blown paramilitary organizations, and both these and their guerrilla counterparts grew in size and sophistication.⁴⁵ The Colombian state, for its part, invested heavily in a securitized response, expanding and enhancing its military capability in response to the security threats associated with the conflict.

The internal armed conflict hit the civilian population particularly hard, with peasant, indigenous, and Afro-Colombian communities especially likely to be in the firing line. Official data suggests that over 9,100,000 people, or 18.8% of the entire national population, are currently considered to be victims of violence associated with the internal armed conflict.⁴⁶ The same official record further identifies enforced displacement as the most frequent violation, with 8,100,000 registered victims.⁴⁷ Violation of the right to life has also, of course, featured heavily, with at least one million people recognized as victims of conflict-related homicide, and over 130,000 more, considered to be direct or indirect victims of enforced or involuntary disappearance.⁴⁸ The conflict has also left nearly 40,000 victims of kidnapping, and at least 10,000 survivors of torture, in its wake.⁴⁹

Laura Bernal-Bermúdez has observed that Colombia presents characteristics that are common in countries where human rights violations have been promoted by economic actors: the existence of internal armed conflict, high levels of corruption, and a marked weakness of public institutions.⁵⁰ A host of other official and academic sources support her assertion.

Academic scholarship, and research by civil society organizations, have extensively documented the involvement of regional economic elites with irregular armed groups, ranging from forming such groups to providing

45 While several guerrilla groups have taken part in the conflict over the decades, today only one (the National Liberation Army – commonly known as the 'ELN' after its Spanish acronym -) remains active. In 2016, the single largest, and then most powerful, guerrilla group (the Revolutionary Armed Forces of Colombia, 'FARC-EP') surrendered their weapons and entered a demobilization process, after signing a historic peace agreement with the national government.

46 National Government of Colombia, Consolidated Victim Register (Registro Único de Víctimas). Retrieved March 8, 2021. <https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394>.

47 Id.

48 Id.

49 Id.

50 Bernal-Bermúdez, L. (2017). *The Power of Business and the Power of People: Understanding Remedy and Business Accountability for Human Rights Violations – Colombia 1970-2014*. PhD Thesis, University of Oxford. p. 102.

them with funding and other forms of support. Academic scholarship has demonstrated an association between a confluence of economic interests (whether in the extractive sector, in production, or in distribution), and the presence of armed actors in different parts of the country. Studies focused on the political economy of the armed conflict suggest that “regions that offer strategic advantages for the exploitation of certain goods or services tend to be the most contested by armed groups, which produces a scenario favorable to collaboration between economic power and armed actors”.⁵¹ Investigative journalism and academic research have each traced links between paramilitary armed groups and economic elites, back to the very moment of inception of the paramilitary movement.⁵² Another group of studies has shown how the expansion of the paramilitary phenomenon was driven in part by a demand for private security services, emanating, inter alia,, from cattle ranchers and agricultural interests in various areas of the country.⁵³

A host of information and claims exist as to the motives that drive the involvement of economic actors in the dynamics of the armed conflict, and the forms that this involvement takes. One cluster of studies has identified cases where a clear potential economic benefit can be seen. Many of these cases present the relationship as one in which business interests external to armed organizations provide finance, or other material support, in return for physical security or competitive advantage (e.g., guaranteed monopoly control of a particular market or area of operation).⁵⁴ Other studies however show that political and ideological affinities can also exist alongside economic ones. Here, for example, a desire to contain possible outbreaks of social protest is translated into violence directed specifically against targets such as social leaders, trade unionists, activists, community leaders, human rights defenders, and students.⁵⁵ Drilling deeper into certain relationships between armed and economic actors

51 Bernal-Bermúdez, L. & Marín, D. (2018) Los empresarios en la guerra: Elementos de la verdad judicial sobre la complicidad empresarial en Colombia. In Sánchez León et. al., *Cuentas Claras...* op. cit. p. 33, author’s translation.

52 Ronderos, M. T. (2014). *Guerras recicladas: una historia periodística del paramilitarismo en Colombia*. Bogotá: Penguin Random House.

53 Franco, V. L. & Restrepo, J. D. (2011). Empresarios palmeros, poderes de facto y despojo de tierras en el Bajo Atrato. In Ávila Martínez, A. F. & Romero Vidal, M. (eds.). *La economía de los paramilitares: redes, corrupción, negocios y política*. Bogotá: Debate.

54 Bernal-Bermúdez & Marín (2018). *Los empresarios...* op. cit p. 43.

55 Id.

can also suggest that even more complex forms of interaction are in play. In their work on enforced displacement and land dispossession, for example, Gutiérrez Sanín and Vargas Reina point out that one sector of a rural economic elite was articulated “organically to [a] paramilitary unit – through direct participation of [business association] personnel and/or explicit pacts between the armed group and the leaders of associations of producers”.⁵⁶

Other studies, carried out by social organizations and human rights groups, offer both emblematic case analysis⁵⁷ and broader-reaching investigations; allowing us to detect various patterns of human rights violations promoted by economic actors. These include a report presented by the ‘José Alvear Restrepo Lawyers Collective’ (CAJAR, after its Spanish acronym) which identifies the following nine patterns:⁵⁸ 1) the complicity of private security companies with human rights violations against social leaders or communities; 2) the “privatization of public security functions” by private mining and energy projects, and the impact of this on human rights; 3) relationships between public security forces and economic actors that made human rights violations possible; 4) corporate complicity with paramilitary groups; 5) anti-union practices to benefit the interests of economic actors; 6) territorial damage and environmental depredation through the action or omission of economic actors; 7) corporate dispossession practices; 8) criminalization of social protest, community leadership, and social organizations that question business practices, and 9) mechanisms of corporate impunity through “Corporate Social Responsibility, ‘brandwashing’, and the United Nations Voluntary Principles”.⁵⁹

Judicial system activity is another potential source of information on the nexus between economics and the conflict. Much of this information takes the form of voluntary confessions: testimony given by former members of armed groups

56 Gutiérrez Sanín, F. and Vargas Reina, J. (eds.). (2016). *Paramilitary dispossession and its variation: who, how and why*. Bogotá: Editorial Universidad del Rosario. p. 5.

57 PAX (2014). Report: *The Dark Side of Coal: Paramilitary Violence in the Mining Region of Cesar, Colombia*. Utrecht, NL: PAX.

58 Colectivo de Abogados José Alvear Restrepo (CAJAR) (2020). *El rol de las empresas en el conflicto armado y la violencia sociopolítica*. (Report presented to the Colombian Truth Commission). <https://www.colectivodeabogados.org/el-rol-de-las-empresas-en-el-conflicto-armado-y-la-violencia-sociopolitica/>

59 According to the CAJAR report, this pattern occurs because “[c]ompanies have focused their CSR on ethical or collective responsibilities and on individual or discretionary responsibilities, omitting their legal responsibilities in the area of human rights”. CAJAR (2020). “*El rol*”... op. cit., p. 27, author’s translation.

before special transitional tribunals.⁶⁰ Although this kind of information is necessarily fragmentary, it has allowed for some of the patterns surrounding economic actor involvement in the conflict to emerge.⁶¹ Amongst the first of these was the revelation that economic actors got involved in the conflict on both an individual and a collective (corporate) basis, something which is in keeping with the informality that is prevalent in the operating practices of business engaged in agricultural production in rural Colombia. It also suggests a concern on the part of certain actors to avoid having their actions leave a trail that could generate liability of the companies they represented. In fact, in a large proportion of the cases analyzed, economic actors seem to have acted “predominantly as a power network, facilitating armed action by paramilitaries and benefitting from it”.⁶²

A second finding that can be made from judicially-produced information is that both national and transnational companies have had links to paramilitary violence, although the structure of special transitional tribunals creates stronger incentives for former paramilitaries to reveal their alliances with small-scale ranchers and farmers, rather than deals they may have struck with transnational companies. Third, judicially-sourced information suggests that alliances between paramilitaries and economic interests were stable and sustained over time. Analyzing the sentences issued to date by special courts, academic researchers found that in 22% of the cases where complicity was present, the relationship between economic actors and paramilitary groups lasted more than a year.⁶³ Fourth, in terms of spatial distribution, business complicity tracks the pattern of territorial intensity of the internal armed conflict.

Fifth, confessions by demobilized paramilitary combatants show that various sectors of the economy sponsored or benefited from armed conflict-related violence. Testimonies make mention of businesses involved in agriculture (including livestock); mining and extraction of natural resources (including emeralds, gold, and oil); trade in consumer products (soft drinks, processed food, etc.); land transportation (passengers and cargo); gambling and betting,

60 Which usually have the power to concede alternative sanctions (reduced sentences, and/or community service) in return for free and full confessions. (Editor’s note).

61 Michalowski et. al. (2018). *Entre coacción y colaboración...* op. cit.

62 Bernal-Bermúdez & Marín (2018). *Los empresarios...* op. cit., p. 58, author’s translation.

63 Bernal-Bermúdez & Marín (2018). *Los empresarios...* op. cit., p. 52.

and private security.⁶⁴ Finally, these accounts allow connections to be drawn between corporate complicity and certain particularly grave categories of human rights violations, including forced displacement, dispossession of land and property, homicide, enforced disappearance, and threats to social leaders.⁶⁵

64 Michalowski et. al. (2018). *Entre coacción y colaboración...* op. cit., p. 43.

65 Sánchez León (et al.) (2018). *Cuentas Claras...* op. cit., p.60.

3. TRANSITIONAL JUSTICE AND CORPORATE RESPONSIBILITY EFFORTS

The objective of this section is to make a comparative assessment of the formal and informal mechanisms that have been developed in the three countries to promote private sector accountability. Rather than attempting an exhaustive inventory of cases that have been documented or prosecuted in each place, the section instead presents a selection of emblematic or innovative experiences. These have been chosen because they allow us to see how and where existing efforts have been directed, and how and when victims' demands have or have not been met. The section is divided into four parts. The first addresses efforts in factfinding, truth, and memory; the second part, trials; and the third, reparations. The fourth and final section gives an account of initiatives that have been promoted by business associations and companies to support the peace process, democratization, and fulfilment of victims' rights.



Remembrance of victims of a massacre in Guatemala. Photo: Luis Soto / AP Images

3.1 FACTFINDING, TRUTH, AND MEMORY

3.1.1 Truth Commissions

Latin American societies are internationally renowned for their efforts to recover truth and memory about atrocities committed during periods of repression and conflict, especially in relation to corporate complicity. According to a comparative evaluation carried out by Payne, Pereira and Bernal-Bermúdez, 59% of the 39 truth commissions that have published final reports, have addressed the issue of corporate responsibility by mentioning the names of economic actors allegedly involved in abuses.⁶⁶ The reports of these 23 commissions have named some 329 companies. Breaking their data down by region of the world, Payne, Pereira and Bernal-Bermúdez find that most of the commissions [that name economic actors allegedly complicit in human rights violations] are concentrated in Latin America: “ten countries (50 percent) and eleven truth commissions (48 percent).”⁶⁷ In addition, the research found that “most of the companies named in truth commission reports are also found in Latin America (232, or 71 percent [of all companies named]).”⁶⁸

Argentina and Guatemala are two very important cases in this regional trend (see also sections 2.1 and 2.2, above). Argentina’s truth commission, CONADEP, set up in December 1983, is usually considered to be the world’s first truth commission. It was also a pioneer in addressing corporate complicity at a very early stage of a country’s transitional justice process. CONADEP’s final report, published in 1984 under the title “Nunca Más” (‘Never Again’) included a chapter dedicated to union activists, and mentioned by name 11 companies involved in illegal detentions and enforced disappearances during the dictatorship.⁶⁹ Nunca Más also highlighted the working-class identity of many of the victims, and placed emphasis on the fact that mass kidnappings and detentions had often happened at victims’ places of work. The report also presented testimonies from survivors reporting that many companies had provided repressive security forces with lists, photographs, and other personal information about political activists and union leaders. Cases that receive a direct mention in the report

66 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit., p. 167.

67 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit., p. 168.

68 Id.

69 Payne, L. (2017). Corporate Complicity and Transitional Justice: Setting the Scene. In PAX. *Peace, Everyone’s Business! Corporate Accountability in Transitional Justice: Lessons for Colombia*, pp. 20-54.

include shipyards located the northern zone of the first industrial cordon of the capital, Buenos Aires; the Acindar steel company, the Ford automobile assembly plant, and sugar refineries belonging to Ledesma and Fronterita firms (located, respectively, in the provinces of Jujuy and Tucumán).

For Guatemala, truth-telling efforts carried out immediately after the 1996 peace accords consistently show that a considerable number of businesspeople and companies were involved in repression against union activists and indigenous and peasant leaders. It is useful here to remind ourselves that for Guatemala, we can draw on two major truth reports (see also section 2.2, above). One of these, entitled “Guatemala: Memoria del Silencio” (Guatemala: Memory of Silence), was the result of the work of the official (state) truth commission, the Commission for Historical Clarification (Comisión de Esclarecimiento Histórico, CEH), set up in July 1997 under the terms foreseen in the 1996 peace accords. The 1996 agreement had established that the CEH’s final report was not to be treated as having legally binding effect; and would not name individuals deemed responsible for serious human rights violations, instead indicating only institutional responsibilities. The other report, “Guatemala: Nunca Más” (Guatemala: Never Again) was published in April 1998, ten months before the CEH report. It was the outcome of the REMHI historical memory project initiated by the Guatemalan Catholic Church in response to the perceived weakness of the mandate given to what would later become the official CEH. REMHI’s sources included information and testimony gathered from Church diocesan areas around Guatemala.⁷⁰

Both reports detail attempted mass genocide against Mayan peoples, enforced disappearance of political opponents, and the forced displacement of many indigenous communities. In reference to corporate responsibility, the CEH concluded that in addition to state agents, “private citizens also committed acts of violence in defense of their own interests, instigating these actions or participating in them”.⁷¹ Its final report also concluded that “the perpetrators were usually individuals with economic power at the national or local level”.⁷² The report documented several cases of repressive violence against members of trade unions, including cases of unions in the sugar industry and among workers for the Coca-Cola company.⁷³

⁷⁰ See CEH (1999) *Guatemala...* op. cit., and REMHI (1998, 1999) op. cit.

⁷¹ CEH (1999) *Guatemala* op. cit., p. 55, author’s translation.

⁷² CEH (1999) *Guatemala* op. cit.

⁷³ Id.

The report also documented the enforced disappearance of people linked to trade unions or peasant organizations, carried out, in several cases, by paramilitary or irregular forces that enjoyed support from the business sector. A study conducted by Payne and Pereira in 2016 notes that the CEH report names 45 companies,⁷⁴ making it the truth commission report with the second highest number of mentions of company names, worldwide (only Brazil's truth commission, which names 123 companies, mentions more).⁷⁵

Finally, mention should also be made of the work of Colombia's official truth commission, the Commission for the Clarification of Truth, Coexistence and Non-Repetition, (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, usually referred to in Spanish by the abbreviated acronym CEV), even though its final report has not been published at time of writing. The CEV's mandate sets it the task of producing a complex account of the causes of over six decades of armed conflict in Colombia, the harms and victimization it has produced, and responsibilities for these. The detailed norms that regulate the implementation of the mandate nonetheless set down that the CEV is to concentrate on clarifying collective responsibilities.

The CEV has been rigorous from the outset in establishing the exact parameters of its constitutional and legal mandate, as regards the extent and scope of accountability which is to be demanded of economic actors. At the same time, it has created spaces for economic actors to participate in its activities, whether as victims, as individuals named as having responsibility, or in their capacity as an identifiable sector of society.⁷⁶ Non-governmental organizations and academic sources have submitted a series of reports to the CEV that discuss how its mandate can best be deployed to include the issue,⁷⁷ and to present

74 Payne, L. (2017). *Corporate Complicity*... op. cit., p. 35. This publication acknowledges its debt to previous work published as Payne, L. & G. Pereira. (2016). Corporate complicity in international human rights violations. *Annual Review of Law and Social Science*, 12, pp. 63–84.

75 According to the Corporate Accountability and Transitional Justice Database created by researchers from Oxford University, only four truth commissions worldwide have included a significant number of names of economic actors: Brazil's Comissão Nacional da Verdade (123 names); Guatemala's Comisión de Esclarecimiento Histórico (45 names); Liberia's Truth and Reconciliation Commission (34 names), and South Africa's Commission of Truth and Reconciliation (30 names). See Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice*... op. cit., p. 169.

76 Bermúdez, A. (2020, July) "La Comisión de la Verdad y los empresarios aún no logran vencer la desconfianza". *LaSillaVacía*, Available at: <https://lasillavacia.com/comision-verdad-y-los-empresarios-aun-no-logran-vencer-desconfianza-77762>

77 Sánchez et. al. (2018). *Cuentas Claras*... op. cit.

information about the possible complicity of economic actors in the Colombian conflict.⁷⁸

3.1.2 Other mechanisms

Several complementary truth and memory initiatives have been launched in the region in recent years, with Argentina often in the forefront of innovation. In one example, Argentina's National Securities Commission (Comisión Nacional de Valores, CNV) launched an investigation into the impact of the dictatorship on the financial system. The CNV is a body established by the country's Ministry of the Economy. Its job is to supervise and control the formation of market prices, and to protect investors. In 2013, the CNV commissioned a report on its own historic role during the dictatorship. The findings revealed how the CNV was used to gather intelligence, and to persecute certain members of the business sector. The report includes a list of people from the business and financial sectors who were kidnapped, and subsequently stripped of their companies, on the pretext of 'combating economic subversion'.⁷⁹

In response to the CNV report, the Argentine Central Bank created a Human Rights Unit. Among the tasks of the Unit, created in 2014, is to create a compilation of all Bank documentation produced and preserved during the dictatorship. This task includes analysis of minutes of board meetings, documents, internal newsletters, and annual reports. These sources are then triangulated against external sources of information, in an effort to understand what degree of responsibility the bank or its executives may hold for crimes against humanity committed during the dictatorship.

Another notable example comes from a publication referred to in section one, above, produced in 2015 at the behest of Argentina's Ministry of Justice and Human Rights. The report, focused on cases involving corporate responsibility, identified close to 900 victims associated with the 25 companies that were investigated. The report names five companies in which between 70 and 100 workers were subjected to repressive violence: the Río Santiago shipyard company, the steel companies Dálmine-Siderca and Acindar; the Ledesma

78 A report published by the Fundación Ideas para la Paz (FIP) analyzes 56 reports from national and international NGOs from the last decade available to the CEV. According to the FIP, "at least 81 companies, especially in the agribusiness and extractive sectors, have been identified in relation to violations of human, labor and environmental rights in the context of the conflict". Fundación Ideas para la Paz (FIP) *Los Empresarios y la Verdad*. <http://www.ideaspaz.org/especiales/empresas-paz/>

79 Verbitsky & Bohoslavsky (eds.) (2016). *The Economic Accomplishes...* op. cit. pp. 13.

sugar company, and the Fiat automobile firm. Other international automobile companies mentioned in the report are Ford and Mercedes-Benz.⁸⁰

These measures have been complemented by regional-level efforts. For example, also in 2014, the state legislature of the Argentine province of Rio Negro (Patagonia) approved the establishment of a ‘memory, truth and justice’ commission to investigate corporate complicity during the dictatorship. This commission was established in 2016, with a mandate to focus on support extended by banks to the dictatorial regime.⁸¹

This idea of establishing complementary, theme-specific commissions was later taken up at national level. Thus, in December 2015, the federal Senate approved a draft legislative bill to establish a congressional commission to investigate economic complicity with the dictatorship.⁸² The proposal had garnered support from a group of UN experts, including the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Repetition.⁸³ The text of the law gives the green light for a bicameral legislative commission with powers to gather information, make recommendations, and denounce any suspected criminality before the relevant authorities.⁸⁴ Unfortunately, however, the initiative subsequently stalled – see section 4.1. below.

For Colombia, one experience that stands out combines advances produced by an official, judicial, transitional justice mechanism with work done by NGOs and academic research institutions. The work took as its basis investigations carried out by the judicial branch under the auspices of Colombia’s ‘Justice and Peace Law’, *Ley de Justicia y Paz*. This law created a special jurisdiction for the criminal investigation and/or prosecution of former combatants who underwent voluntary demobilization. A substantial number of leaders of armed

80 Ministerio de Justicia, FLACSO, & CELS. (2015). *Corporate responsibility...* op. cit.

81 Infoparlamentaria. “Se constituyó la Comisión Investigadora por la Memoria, la Verdad y la Justicia” (March 30, 2016) <https://web.legisrn.gov.ar/comunicacion/se-constituyo-la-comision-investigadora-por-la-memoria-la-verdad-y-la-justicia>

82 Law 27217 (Dec. 2015) Available at <http://servicios.infoleg.gov.ar/infolegInternet/anexos/255000-259999/256130/norma.htm>

83 UN Office of the High Commissioner on Human Rights, OHCHR, “Expertos de la ONU apoyan la creación de una Comisión de la Verdad sobre las Complicidades Económicas en Argentina” Available at <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=16733&LangID=S>.

84 Payne, L. (2017). Corporate Complicity and Transitional Justice: Setting the Scene. In PAX. *Peace, Everyone’s Business! Corporate Accountability in Transitional Justice: Lessons for Colombia 2017*, pp. 20-54.

groups confessed their crimes before special Justice and Peace tribunals. Some of their testimonies include more, or less, detailed accounts that make reference to economic actors as co-participants in, or accomplices of, acts of violence, especially those committed by paramilitary groups. However, since the Justice and Peace tribunals only had jurisdiction over ex-combatants, information concerning third parties often simply fell by the wayside. Even when such information was referred on for further investigation by the competent authorities, little subsequent judicial progress has been made. Academic and civil society researchers however took it upon themselves to work through this wealth of raw data, using the mentions made in testimony in order to better understand corporate complicity with Colombian paramilitarism.⁸⁵

Although the information provided is incomplete and in need of corroboration, it has proved key to shedding light on the importance of understanding violence beyond the solely military sphere. The exercise has also demonstrated the need for transitional justice mechanisms to have the capacity and jurisdiction to investigate and prosecute different kinds of responsibility for serious human rights violations. Finally, the collation and analysis of information that has been carried out to date shows that complicity was an extensive phenomenon, sustained over time; suggesting that existing mechanisms for justice and truth-telling have not fully discharged their duties, at least as far as the victims of these violations are concerned.⁸⁶

3.2 CRIMINAL LIABILITY

3.2.1 Domestic prosecutions

When designing their 2016 database on corporate responsibility, Payne, Pereira, and Bernal-Bermúdez (2020) conducted a search for judicial cases involving corporate responsibility, in national courts around the world. They found that the largest single numbers of cases were being investigated in Argentina and Colombia (19 cases each). According to the database, as of 2016, the status of the 19 court actions identified for Argentina was as follows: 13 cases were pending, three cases had been dismissed in the first instance and were pending

85 See Bernal-Bermúdez & Marín (2018). Los empresarios... op. cit.; or Michalowski et al. (2018). *Entre coacción y colaboración...* op. cit.

86 Id.

appeal, two cases had produced first instance convictions and were pending appeal, and one case had ended in acquittal.⁸⁷

Several of these cases have been emblematic in the struggle against impunity in Argentina and beyond. One of them, known as the ‘Ford case’ (see above, section 2.1) has been described by official sources as “the first ever conviction in Argentina of senior officials of a multinational company, over corporate participation in crimes against humanity”.⁸⁸ The matter before the court was the potential criminal liability of two men who had been senior managers at Ford Motor Argentina during the dictatorship: Héctor Sibilla, then-Head of Security, and Pedro Müller, then manager with responsibility for manufacturing. The initial investigation also gathered evidence as to the possible involvement of Nicolás Enrique Courard (company president), and Guillermo Galarraga (its labor relations manager), but both died before or during the course of the trial. In December 2018, the court sentenced Pedro Müller and Hector Sibilla to 10 and 12 years imprisonment, respectively, as ‘necessary participants’ in criminal acts.⁸⁹ Both defendants appealed, with their appeal still pending as of March 2021.

Another case that has received substantial public attention involves ‘La Veloz del Norte’, a well-known passenger transportation company operating out of Argentina’s Salta and Tucumán provinces. The case investigated the kidnapping and torture of 17 company workers during the dictatorship. In March 2016, a federal court sentenced the firm’s owner, Marcos Jacobo Levín, to 12 years imprisonment for the kidnapping and torture of one of the workers. The conviction went to appeal and was overturned by the Criminal Cassation Chamber in 2017, on the grounds that the statute of limitations had expired. The case then went to review by the Supreme Court, which in 2018 ordered the original court, Federal Court No. 1, to re-open the file in order to address the crimes committed against the other 16 victims. In July 2020, Argentina’s state Secretariat of Human Rights (Secretaría de Derechos Humanos de la Nación) filed as a plaintiff in the case, requesting the indictment of Levín and another

87 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit. The cases involved the following companies and individuals: Acindar (2 cases), Adolfo Navajas Artaza, Editorial Atlántida, Ford, Fronterita, Héctor María Torres Queirel, La Nueva Provincia, La Veloz del Norte (2 cases), Ledesma (3 cases), Loma Negra, Mercedes Benz, Minera Aguilar S.A., Molinos Raíz de la Plata S.A., Papel Prensa S.A., and ‘Unknown’ (a money laundering/property theft case).

88 Ministry of Justice and Human Rights, “A dos años del veredicto en la Causa “Ford””, author’s translation. Available at: <https://www.argentina.gob.ar/noticias/dos-anos-del-veredicto-en-la-causa-ford>

89 Id.

suspect, senior employee José Antonio Grueso, as “primary participants” in the events under investigation, “in the context of investigation into corporate responsibility.”⁹⁰

As previously noted, (section 2.3, above), ample information exists about involvement of economic actors over various decades of the conflict in Colombia. According to data published in 2019 by the country’s Attorney General’s Office, information provided by former combatants during Justice and Peace proceedings about or involving civilian accomplices gave rise to at least 16,772 ‘mentions’ (known in Colombia as ‘compulsas de copias’), a process whereby a judge or other official sends notification to the proper authorities, of issues that may merit investigation or sanction but fall outside of his or her direct jurisdiction. The compulsas make reference to civilian third parties, state agents, and members of certain illegal organizations.⁹¹ After cross-checking, the Attorney General’s Office identified at least 311 separate civilian third parties, who might therefore be liable for criminal prosecution.⁹² The vast majority of any associated investigations or cases are, however, at a preliminary stage in which publicly accessible information is very scarce.

As for cases that are at a more advanced stage of investigation, the 19 Colombia cases identified by Payne, Pereira, and Bernal-Bermúdez in 2016 had produced, at that time: confirmed convictions in nine cases; one acquittal, and one first-instance conviction pending appeal. The remaining eight cases were still open (at investigative stage) as of 2016.⁹³

Three emblematic cases in which convictions have been reported involve the US mining company Drummond Ltd., the livestock firm Fondo Ganadero de Córdoba, and the palm oil company Urapalma. In the case of Drummond

90 Ministry of Justice and Human Rights. (2020, December 17). “La Veloz del Norte: procesaron por segunda vez a Levín, a su ex jefe de seguridad y a dos ex policías”. Available at <https://www.argentina.gob.ar/noticias/la-veloz-del-norte-procesaron-por-segunda-vez-levin-su-ex-jefe-de-seguridad-y-dos-ex>

91 Attorney General’s Office (Fiscalía General de la Nación) (2019, May 23). “Fiscalía concluye estudio sobre terceros civiles vinculados al conflicto armado”. Available at: <https://www.fiscalia.gov.co/colombia/noticias/fiscalia-concluye-estudio-sobre-terceros-civiles-vinculados-al-conflicto-armado/>

92 The Attorney General’s Office breaks down the category ‘civilian third parties’ into “businesspeople, commercial traders, members of the professions and companies involved in a range of economic sectors, predominantly livestock, agriculture and hydrocarbons”. Author’s translation. <https://www.fiscalia.gov.co/colombia/noticias/fiscalia-concluye-estudio-sobre-terceros-civiles-vinculados-al-conflicto-armado/>

93 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit.

Ltd., company executives and personnel are accused of providing financial and logistical support to paramilitary groups, and of paying for trade unionists at the mine to be harassed and assassinated. In 2013, the courts convicted Jaime Blanco Amaya, a businessman and Drummond subcontractor who had confessed to his part in the structure of violence.⁹⁴ In December 2020, the Attorney General's Office brought formal charges against Drummond's current and former company presidents for Colombia (respectively, José Miguel Linares and Augusto Jiménez). The indictment makes reference to 3,382 victims of crimes such as murder, forced disappearance and kidnapping, allegedly committed by paramilitaries with the complicity of company executives.⁹⁵

The case involving Fondo Ganadero de Córdoba concerns violence and land dispossession suffered by inhabitants of the Urabá region of northwestern Colombia. Based on an alliance forged between businesspeople and a paramilitary group, the paramilitaries initially threatened and displaced some 130 families. The company then bought their land from them, for negligible sums. The confession in court of Benito Osorio, a former manager at the firm, led to other executives, including major shareholders and executive directors, coming under investigation. Various custodial sentences handed down in the case include a 16-year sentence, imposed on Benito Molina Laverde in September 2015, and confirmed by the Colombian Supreme Court in August 2018.⁹⁶

In the Urapalma case, the Colombian courts sentenced 15 businesspeople, in 2014, for their part in the violent forced displacement of Afro-Colombian communities by paramilitaries. Several executives and former employees of the palm oil firm were convicted, with sentences of up to ten years in prison handed down. The court also imposed fines and ordered the businesspeople to pay reparations to the victims.⁹⁷

94 *Verdad Abierta*, (2012, April 20) "Blanco Maya confiesa que fue el puente entre Drummond y 'paras'" ("Blanco Maya confesses that he was the bridge between Drummond and the 'paras'"). Available at: <https://verdadabierta.com/contratista-de-la-drummond-acusa-a-la-empresa-minera-de-financiar-a-los-paramilitares/>

95 *El Tiempo* (2020, December 17). "Acusan a presidente de Drummond Colombia por supuesto nexo con paras" Available at: <https://www.eltiempo.com/justicia/delitos/acusan-a-presidente-de-drummond-en-colombia-por-supuesto-nexo-con-paras-555228>

96 Bonilla Mora, A. (2018, August 2). "Nueva condena a exintegrante del Fondo Ganadero de Córdoba por despojo paramilitar," *El Espectador*. <https://www.elespectador.com/colombia-20/paz-y-memoria/nueva-condena-a-exintegrante-del-fondo-ganadero-de-cordoba-por-despojo-paramilitar-article/>

97 Bernal-Bermúdez (2017). *The Power of Business...* op. cit. pp.214-267.

All of the cases discussed above were prosecuted in ordinary domestic courts in Argentina and Colombia. In Colombia, the 2016 peace agreement between the Colombian government and the former FARC-EP has given rise to an additional domestic alternative. Colombia has created the first transitional tribunal whose jurisdiction includes the possible prosecution economic actors with responsibility for conflict-related crimes. Known as the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, or 'JEP'), the special system can exercise jurisdiction not only over state and nonstate combatants, but also over "civilian third parties". This covers non-combatants such as businesspeople, landowners, cattle ranchers, etc. Although the JEP's jurisdiction was originally broadly drawn, interpreted as allowing it to initiate proceedings against any of these individuals, a later decision of the Colombian Constitutional Court limited its jurisdiction to those third party actors who voluntarily present themselves before the court.⁹⁸ To access the legal benefits granted by the tribunal – which include the possibility of reduced tariff and/or non-custodial sentences – third parties must demonstrate a 'substantial commitment' to truth-telling, and to providing reparation for victims.

Colombian law established a series of deadlines by which third parties who wanted their case seen by the JEP had to voluntarily present themselves. According to the JEP's own statistics, as of 2019, 657 people had voluntarily presented themselves. 117 of these were state agents not classed as members of the public security services. The remaining 540 were civilians not linked to the state (i.e., 'civilian third parties').⁹⁹ In 2020, the JEP decided to prioritize 116 cases involving these third parties, at least 55 of which involve individuals' economic activities.¹⁰⁰

Of the three countries discussed in this study, Guatemala stands out as the one that has made the least progress in terms of judicial accountability. Brett and Malagón (2020) document the Guatemalan state's continual rejection of the accountability agenda spelt out in the peace accords.¹⁰¹ This attitude was

98 Michalowski, S. & Cruz Rodríguez, M. & Orjuela Ruíz, A. & Gomez Betancur, L., (2020). *Terceros Civiles ante la Jurisdicción Especial Para la Paz (JEP): Guía de Orientación Jurídica*. Bogotá: Dejusticia

99 JEP. Comunicado 127: 657 terceros civiles han solicitado su sometimiento a la JEP ("657 civilians have asked to appear before the JEP" (September 9, 2019). Available at: <https://www.jep.gov.co/Sala-de-Prensa/Paginas/657-terceros-civiles-han-solicitado-su-sometimiento-a-la-JEP.aspx>

100 The complete list of prioritized individuals appears in: JEP. Chamber for the Definition of Legal Situations. Resolution No. 008017 of December 24, 2019. Annex 1.

101 Brett & Malagón (2020) *Realising victims' rights ...* op. cit.

demonstrated early on, with the promulgation of an amnesty law that impeded many efforts to pursue accountability. Many similarly pro-impunity actions have followed, including official 2019 attempts to further expand the scope of legal amnesty. Consequently, such progress as there has been in this area has been thanks to victim-led initiatives. Martínez and Gómez (2019) reported that as of 2019, Guatemalan ordinary courts had tried more than 20 cases of serious human rights violations committed in the context of the armed conflict. Twenty of these had led to the conviction of former regular military personnel, members of civilian self-defense patrols, and ‘military commissioners’ (a form of locally-recruited non-professional soldier). One case on record involved the conviction of a former member of the guerrilla. No case had at that time produced a conviction for economic accomplices to the violations at issue.¹⁰²

3.2.2 International venues

Victims, human rights lawyers, and civil society organizations have been very active and innovative in their quest for justice. Each of the three countries analyzed offers examples of victims turning to third country and international courts to seek accountability for economic actors.

Examples invoking criminal law include the Mercedes Benz Argentina case, brought before German courts,¹⁰³ and the Nestlé Colombia case, brought before the Swiss courts.¹⁰⁴ These cases represent efforts by organizations to

102 Martínez & Gomez (2019). *A Promise...* op. cit.

103 The facts in the Mercedes Benz case follow the general pattern already discussed for case Ford Argentina, a case with which it shares various similarities. In 1999, prompted by reports from investigative journalism, a prosecutor in the German city of Nuremberg opened an investigation of Mercedes executive Juan Tasselkraut. Although the investigation was later shelved, the case – the first of its kind in the world – had repercussions that included advances in local campaigning in Argentina. See: Kaleck, W. (2013) *International Criminal Law and Transnational Businesses. Cases from Argentina and Colombia*. In Michalowski, S. (ed) *Corporate Accountability in the Context of Transitional Justice* Routledge. pp 180-184.

104 The Nestlé case concerns the 2005 paramilitary murder of a unionized worker at Cicolac, a subsidiary of Nestlé. The ensuing domestic case in Colombia produced convictions against the paramilitaries involved. In March 2012, the nonprofit European Center for Constitutional and Human Rights and Colombian trade union Sinaltrainal filed a complaint with the public prosecutor’s office in Zug, Switzerland against Nestlé and its board members. The Swiss public prosecutor’s office however dismissed the case, in May 2013, on the grounds that the statute of limitations had expired. The decision was upheld on appeal in July 2014. That same year, the petitioners appealed to the European Court of Human Rights, which dismissed the case in May 2015. That same month, the petitioners submitted information on the case to the International Criminal Court, ICC, as part of the ICC’s ongoing preliminary examination of the situation of Colombia. See: Kaleck, Wolfgang. *International Criminal Law and Transnational Businesses...* Op cit. See also: Business & Human Rights Resource Centre, Nestlé lawsuit (re Colombia), <https://www.business-humanrights.org/en/latest-news/nestlé-lawsuit-re-colombia/>.

close the accountability gaps left by at least two aspects of prevailing local laws. First, national legal systems often lack the tools necessary to stretch criminal proceedings to cover foreign nationals affiliated – usually at managerial or executive level – with relevant companies. Second, Latin American legal tradition and culture rarely encompasses criminal accountability of corporate entities (i.e., legal, as distinct from natural, persons). It is worth noting, however, that in the examples mentioned, the cases were eventually dismissed in home and third country venues alike.

Another interesting route that Colombian organizations and their international allies have explored is the referral of information about corporate involvement to the Office of the Prosecutor (OTP) of the International Criminal Court, ICC, where the situation of Colombia has been under preliminary examination since June 2004. In November 2012, the Office of the Prosecutor published an Interim Report on Colombia, summarizing its concerns and setting out a series of issues of particular interest that it proposed to follow up. While impunity for paramilitary acts featured as one of the named issues, the report did not expressly address corporate complicity.

This situation has changed thanks to NGO insistence. One of the cases that has stimulated most interest from the OTP of the ICC is the case involving the ‘Chiquita Brands’ multinational. A consortium of NGOs asked the OTP to look into allegations that crimes against humanity were committed by Colombian paramilitary groups using money provided by the Chiquita banana company. They requested that the OTP review the actions of company directors who had authorized these payments; and that it closely follow a case then going through the Colombian courts. The NGOs pointed out that no Chiquita executive had yet been successfully tried in either Colombia or the United States, even though the company acknowledged before the US justice system as far back as 2007 that it had channeled 1.7 million US dollars to the major paramilitary association known as the ‘United Self-Defense Forces of Colombia’. Those resources would have funded the perpetration of massacres, targeted killings, enforced disappearance, rapes, and forcible displacement of communities.¹⁰⁵

This advocacy has resulted in regular requests, since at least 2018, from the ICC OTP to the Colombian authorities, requiring specific and detailed reporting on this matter. The requests have in turn prompted the state to become more concerned

105 Restrepo, J.D. (2017) “Llevar caso de Chiquita Brands a la Corte Penal Internacional” *Verdad Abierta* <https://verdadabierta.com/especiales-v/2017/chiquita/chiquita-corte-penal.html>

about providing information on an issue that had been before the national Attorney General's Office for years, without visible signs of progress. The latest official report by the ICC OTP stated that the Colombian Attorney General's Office now has at least 703 active cases on file, related to crimes allegedly committed by civilian financiers and supporters of paramilitarism.¹⁰⁶ The OTP also reported on specific information that the Colombian authorities had provided regarding the domestic case against former executives and employees of Chiquita Brands.¹⁰⁷

3.3 REPARATIONS

3.3.1 Reparations via Domestic Judicial Routes

Guaranteeing victims comprehensive reparations for harm caused by serious human rights violations that occurred with the complicity of economic actors is still unfinished business for Latin American states. Although Herculean efforts by victims have led to delivery of some reparations, the gulf between cases reported and reparations received is still very wide.

One factor behind the failure of the region's judicial systems to ensure delivery of timely, effective reparations for victims is the fact that normative frameworks continue to favor determination of responsibility according to classic civil law models. These models are designed for operation in peacetime and under democracy. They tend to impose a high evidentiary threshold, limited time parameters for the initiation of civil action, and the following of legal formalities that require specialist advice. Victims and human rights organizations have exposed these limitations, pressing for more accountability-friendly frameworks to be designed.

For an example, we might turn to Argentina and consider the fate of litigation around labor law and civil law in cases of crimes against humanity. As criminal

¹⁰⁶ International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities 2020, Available at: <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-col-spa.pdf>.

¹⁰⁷ Notably, the Colombian Attorney General's Office indicted 13 individuals, in August 2018, for aggravated conspiracy to commit a crime. In September 2019, the Office however withdrew the indictment, furthermore placing a permanent stay on any further proceedings against three of the 13 individuals (the general secretary of domestic banana firm C.I. Banacol, and two employees of a second domestic banana trading firm, C.I. Banadex: its director of Labor Relations, and its administrative manager, the latter a US citizen). <https://www.fiscalia.gov.co/colombia/noticias/actualizacion-boletin-no-24007-caso-chiquita-brands/>

prosecutions began to move ahead, once the amnesty-like provisions of the Full Stop Law and Due Obedience Law were removed, victims of dictatorship-era abuses began to resort to labor tribunals and the civil court system, to take actions against the businesspeople and companies who had contributed to human rights violations. Under the terms of the laws then in force, however, the courts rejected these claims on the grounds that the respective statutes of limitations had expired.¹⁰⁸ Various Argentine jurists constructed legal arguments demonstrating why the principle of prescription should be interpreted differently in matters related to crimes against humanity,¹⁰⁹ which helped leverage Civil Code reform in 2015.¹¹⁰ The controversy nonetheless continues, given a 2019 Supreme Court ruling in the case of *Ingenieros v. Techint*, in which the Court persisted in rejecting the victims' petition, on the grounds that the statute of limitations applied.¹¹¹

A second example has to do with the restitution of land seized during the Colombian internal armed conflict. To address this issue, the Colombian state created a unique mechanism, via Law 1448, of 2011, known as the Victims and Land Restitution Law (*Ley de Víctimas y Restitución de Tierras*). The law created a mixed (administrative and judicial) reparations process, accessed via a specially created judicial procedure called an "action for land restitution" (*acción de restitución de tierras*). The underlying normative framework is structured according to human rights principles and aims to facilitate restitution, and therefore differs from classic civil and civil procedural law.¹¹² This mechanism has allowed victims of land dispossession to recover their land, in cases where companies derived some benefit, for example by purchasing the seized land at below-market prices. The law does not require victims to prove that the economic actors instigated or directly participated in the violence.¹¹³

108 For example, see the *Larrabeiti Yáñez* case, analyzed in Hitters, J.P. (2019, August 21) *¿Prescribe la reparación civil en los delitos de lesa humanidad?* *La Ley* No. 155, pp.1-5. Available at: <https://www.corteidh.or.cr/tablas/r39117.pdf>

109 See Sommer, C. (2018). *La imprescriptibilidad de la acción reparatoria por crímenes de lesa humanidad y la responsabilidad del Estado*. *Comentarios sobre la jurisprudencia y la legislación argentinas*, *Revista Derecho del Estado* (41), pp. 285-315. Available at <https://www.redalyc.org/jatsRepo/3376/337657562011/html/index.html>

110 The reform removed the statute of limitations impediment: Article 2561, paragraph 3 of the Civil Code now stipulates that "civil actions derived from crimes against humanity are imprescriptible."

111 Hitters (2019) *¿Prescribe la reparación civil?....* op. cit.

112 See Sánchez León, N. C. (2017). *Tierra en transición: justicia transicional, restitución de tierras y política agraria en Colombia*. *Primera edición*. Bogotá: Dejusticia.

113 For examples of 70 firms ordered to return seized land under the terms of Law 1448, see <https://www.bluradio.com/judicial/mas-de-70-empresas-condenadas-a-restituir-tierras-a-campesinos-en-el-pais>

The Chixoy case, in Guatemala, provides a third example of victims' struggle to obtain reparations through domestic courts. Martínez and Gómez (2019) describe Chixoy as "an atypical example of reparations"¹¹⁴ involving claims made by several communities in the Alta Verapaz and Baja Verapaz region. The communities suffered massacres, and were forced to abandon their lands, at the hands of the Army and state-linked 'civil defense patrols' between 1975 and 1983. The land was earmarked for the construction of the Chixoy Hydroelectric Plant, a state infrastructure project overseen by Guatemala's Instituto Nacional de Electrificación (INDE) and financed by the World Bank and the Inter-American Development Bank (IDB).

The communities affected by the construction of a dam as part of the hydroelectric project have been seeking restitution ever since, via direct lobbying as well as domestic and international legal action. As a result, the Inter-American Court of Human Rights, IACtHR, issued a 2012 judgment against the Guatemalan state over the 1982 massacre of 177 inhabitants – including women and children – of the Rio Negro community, located on the banks of the Chixoy River; and for another series of violations of survivors' rights.¹¹⁵ Following the IACtHR ruling, the communities have tried to have international allies bring pressure to bear on their government, on their behalf, to encourage implementation of the decision. In 2014, the US government made compliance with the order to extend reparations to the Chixoy survivors a condition for continuing military aid to Guatemala, under the terms of a Consolidated Appropriations Act passed by the US Congress. According to Martínez and Gómez, as of December 2017, the Guatemalan authorities had compensated 858 of the 2,274 affected families affected.¹¹⁶

3.3.2 Reparation via Overseas Judicial Routes

Latin American victims and activists have been extremely active in their quest to secure adequate reparations for the harms caused by human rights violations. The lack of adequate responses in home countries have led many to attempt a range of legal actions in other-country jurisdictions. One route attempted has been the search for civil remedy before US courts. The Alien Tort Statute (ATS), an 18th century statute that provides for civil liability for tort violations of international law ('law of nations'), or of US treaties, has been used to sue,

114 Martínez & Gómez (2019). *A Promise...* op. cit.

115 Inter-American Court of Human Rights (IACtHR), *Río Negro Massacre v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs. Judgment of September 4, 2012.

116 Martínez & Gómez (2019). *A Promise...* op. cit.

primarily, corporations and multinationals. Victims have also brought cases under other federal statutes (such as the Torture Victim Protection Act and the Trafficking Victims Protection Act), and some state statutes.

Each of the three countries in this study has given rise to examples of this type of US-venue litigation. Although no case has to date culminated in a final judgment ordering the requested reparations, they demonstrate how victims have engaged in legal mobilization. Numerous cases involving Colombia can be found in the Lawsuits Database and/or Corporate Legal Accountability online resource hub, hosted on the website of UK-based nonprofit the Business and Human Rights Resource Centre.¹¹⁷ Examples include Chiquita Brands,¹¹⁸ DynCorp,¹¹⁹ The Coca-Cola Company,¹²⁰ Drummond, and Occidental Petroleum ('Oxy').¹²¹ For Guatemala, a case that has similarities to the Coca-Cola case mentioned above, was filed in 2010 before the New York Supreme Court in New York. 'Palacios v. The Coca-Cola Co., Inc.' was brought by the family members of a union leader murdered in Guatemala.¹²² Although the facts at issue took place after the end of Guatemala's

117 See <https://www.business-humanrights.org/en/>.

118 Several lawsuits have been filed against Chiquita, under different civil laws. A series of accumulated cases under the ATS were denied, on appeal, between 2014 and 2015. Another lawsuit was subsequently filed, before a federal court, under the Torture Victim Protection Act. In 2018, Chiquita negotiated an amicable settlement with a number of families of US citizens killed in Colombia by armed groups paid by the company. It has not done the same for affected Colombian families. In March 2020, a group numbering over 200 people filed a new lawsuit in federal court in New Jersey. See <https://earthrights.org/media/over-200-colombian-plaintiffs-file-claims-for-torture-and-killings-against-chiquita/>

119 Case relates to a company contracted under a (US-funded) Plan Colombia program to carry out aerial spraying of glyphosate for coca leaf eradication. Related lawsuits were filed by victims in Colombia and Ecuador, inhabitants of border towns affected. Business & Human Rights Resource Centre, DynCorp lawsuit (re Colombia & Ecuador), <https://www.business-humanrights.org/en/latest-news/dyncorp-lawsuit-re-colombia-ecuador-2/>

120 A case was brought by a group of plaintiffs, including the Colombian food workers' union Sinaltrainal, against the US-based Coca Cola company and two of its bottlers in Colombia, alleging that the companies had hired or incited paramilitaries to kill unionized workers. Business & Human Rights Resource Centre, Coca-Cola lawsuit (re Colombia) <https://www.business-humanrights.org/en/latest-news/coca-cola-lawsuit-re-colombia/>

121 In 2003, a group of residents of Santo Domingo, Colombia, filed a lawsuit in federal court in California, against Occidental Petroleum (Oxy) and its security contractor, Airscan, Inc., both US firms. The plaintiffs claim that the companies had collaborated with a bombing raid carried out by the Colombian Air Force over Santo Domingo on December 13, 1998, purportedly to protect Oxy's Caño Limón pipeline. Business & Human Rights Resource Centre, Profile of lawsuit against Occidental for activities in Colombia, <https://www.business-humanrights.org/es/últimas-noticias/perfil-de-demanda-judicial-contra-occidental-por-actividades-en-colombia/>.

122 Johnson, E. (2011, May) "Coca-Cola Co. Denies Involvement in Murder and Rape, Blames "U.S. Judicial System"" *The HuffPost*. https://www.huffpost.com/entry/coca-cola-co-denies-invol_b_494476

internal armed conflict, anti-union practices against Coca-Cola's employees in Guatemala were documented in the truth commission report, which referred to "selective repression" against the Coca-Cola workers' union, which it called "one of the protagonists of the union movement in Guatemala between 1970 and 1980".¹²³ For an example of third-country civil litigation involving Argentina, we can consider the Mercedes Benz case, an example which also demonstrates how victims have at times been active in multiple jurisdictions seeking accountability for a corporation involved in repression (in this case, civil cases in Argentina and the United States, and criminal proceedings in Germany).¹²⁴

Victims and activists have also litigated or attempted domestic cases in other third-country jurisdictions, notably Canada and the United Kingdom.¹²⁵ One extremely interesting case currently going through the Canadian courts involves nickel mining in El Estor, Izabal, Guatemala. Although the acts of violence at issue took place after the end of the internal armed conflict, connections can be traced to conflict-era patterns of violence and exploitation. Guatemala's official truth commission report documented violence suffered by indigenous communities in the region in the 1970s, with the complicity of landowners and EXMIBAL, a nickel mining company.¹²⁶ EXMIBAL later withdrew from the country

123 CEH (1999) *Guatemala...* op. cit., Anexo Casos Ilustrativos, p. 118, Author's translation. https://www.plazapublica.com.gt/sites/default/files/tomo_6_y_7_anexo_i_casos_ilustrativos_1.pdf.

124 In 2004, 23 Argentine citizens filed suit against DaimlerChrysler AG, in US federal court in California, under the Alien Tort Statute and the Torture Victim Protection Act. The plaintiffs alleged that Mercedes Benz Argentina, a Daimler subsidiary, had collaborated with Argentine security forces to kidnap, detain, torture and murder the plaintiffs or their family members during the dictatorship. In 2013, the US Supreme Court ruled that Daimler did not have sufficient ties to the State of California for its court to hear the case. Business & Human Rights Resource Centre, Profile of lawsuit against Daimler for activities in Argentina, <https://www.business-humanrights.org/en/latest-news/daimler-lawsuit-re-argentina/#c86296>

125 Examples include two claims filed against petroleum company BP in the United Kingdom. One concerned the kidnapping of Gilberto Torres, a union leader and oil worker in Casanare, Colombia. <https://www.business-humanrights.org/en/latest-news/bp-lawsuits-re-casanare-colombia/>. The other, 'Flores v BP Exploration Company Ltd.', was brought by a group of peasant farmers claiming that the construction of an oil pipeline had caused severe environmental damage to their land. Business & Human Rights Resource Centre, BP lawsuit (re Colombia), <https://www.business-humanrights.org/en/latest-news/bp-lawsuit-re-colombia/>

126 In its account of Illustrative Case 1149, the truth commission report states that in 1978, landowners opened fire from EXMIBAL cars against the community, wounding José Che Pop and Miguel Sub. According to the account of Illustrative Case 9401, in the same year, four people were executed in the village of Santa María, in the district of Alta Verapaz, by military commissioners and employees of the company. Illustrative case 1145 recounts how Pablo Bac Caal, a catechist, cooperative member, and member of the Guatemalan Labor Party, was extrajudicially executed in 1981 by Judicial Police agents traveling in EXMIBAL vehicles. See Níquel: Minería, Militares y Muerte en Guatemala. Available at <https://cmiguate.org/niquel-mineria-militares-y-muerte-en-guatemala/>

(in the 1980s), due to the falling global price of nickel. Two decades later, in 2003, the Guatemalan state reactivated the mining concessions, reassigning them to CGN, a subsidiary of the Canadian company Hudbay Minerals. They subsequently came into the possession of Sky Resources.¹²⁷ The new mine operation led to the reactivation of patterns of violence similar to those experienced during the conflict, including killings, forced displacement of indigenous communities, and acts of sexual violence. Victims have filed three cases that are currently being litigated before the Canadian courts.¹²⁸

3.3.3 Administrative Reparations

The three countries in this study have designed and implemented a range of administrative programs of victim reparations. Once again, Argentina has been a pioneer. From the mid-1980s, onwards, Congress passed a series of laws creating administrative reparations program for various categories of affected persons, amongst them, victims of repression targeted at the trade union movement.¹²⁹ In Guatemala, a National Reparations Program, the Programa Nacional de Resarcimiento, was created in 2003, by government order, to “offer individual and collective reparations to civilian victims of human rights violations and crimes against humanity committed during the internal armed conflict”.¹³⁰ Its initial 10-year term was renewed in 2013 for another decade.¹³¹ Similarly, in Colombia, the Victims and Land Restitution Law of 2011 (discussed above) created an ambitious administrative program of reparations for victims of the conflict.¹³²

Many things could be and have been said about these programs. For present purposes, one of the main aspects to note is that these are basically state-centric programs, drawing on public resources. This sets them apart from experiences

127 Id.

128 The cases are: Angelica Choc v. HudBay Mineral Inc., concerning the murder of Adolfo Ich; German Chub Choc v. HudBay Minerals Inc., concerning injuries suffered by the victim when shot with firearms by members of the mine’s security team; Margarita Caal v. HudBay Minerals Inc., concerning the rape of eleven women from Lote Ocho. For an account in English, see <http://www.chocversushudbay.com>

129 Guembe, M. J. (2006). Economic Reparations for Grave Human Rights Violations. The Argentinean Experience. In De Greiff, Pablo, *The Handbook of Reparations*. Oxford: Oxford University Press.

130 Acuerdo Gubernativo 258-2003, Art. 1, author’s translation.

131 Martínez & Gómez (2019). *A Promise...* op. cit., p. 18

132 Sánchez León, NC. and Sandoval-Villalba, C. (2020). Go Big or Go Home? Lessons Learned from the Colombian Victims’ Reparation System. In Ferstman, C. and Goetz, M. *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*. Second Revised Edition. Leiden: Koninklijke Brill, pp. 547- 570.

in which private companies have created reparations funds for distribution among victims and survivors (e.g., the fund created in Germany with money from companies formerly allied with Nazism). The sole exception is perhaps Colombia's victim reparations fund, which draws on public funds, but also on the proceeds of liquidation of assets turned over by, or seized from, perpetrators. The fund also accepts voluntary private contributions (such as donations from companies).

3.4 ACTIONS INITIATED BY, OR WITH THE VOLUNTARY PARTICIPATION OF, ECONOMIC ACTORS

Economic elites and political power have been closely connected since time immemorial. Latin America is no exception, and the relationship between economic and political power has long been decisive in for political decision-making.¹³³ It should come as no surprise, then, that corporations and individuals affiliated with economic elites have been key players during periods of repression and conflict, and also in processes of transition.¹³⁴ The presence, opinion and intervention of economic actors has been a constant feature in conversations about transition, and around the table whenever peace is being negotiated. This is so even where similar consideration was not extended to victims.

Angelika Rettberg has spent decades studying decades the behavior of private actors in transition processes in the region, showing that their participation has been determinant, for good and for ill, in peace negotiations in countries including El Salvador, Guatemala and Colombia.¹³⁵ According to Rettberg (2016), from the standpoint of corporate logic there are three types of reason why private actors get involved in these processes: need, conviction, and avarice ('Need-Creed-Greed').¹³⁶ Those whose involvement is driven by need are seeking to reduce or overcome the obstacles that repression or conflict poses to their business activities. This creates a self-interested motive for them to support peace or political transition. The second reason, 'creed', tends to

133 Basualdo & Berghoff & Bucheli (eds). (2021) *Big Business ...* op. cit.

134 On the case of Guatemala, Professor Rettberg notes "In fact, CACIF contributed to induce the military to accept the democratic transition, starting with the reestablishment of constitutional order and the return to civilian government in 1982". Rettberg, A. (2007). The Private Sector and Peace in El Salvador, Guatemala, and Colombia *Journal of Latin American Studies* 39 (3), p. 476.

135 Id.

136 Rettberg, A. (2016). Need, Creed, and Greed: Understanding How and Why Business Leaders Focus on Issues of Peace. *Business Horizons* 59 (5), pp. 481-492.

apply to progressive private actors who act motivated by a belief in the social and economic advantages of democratization and peace. This type of actor, according to Rettberg, is the one that has tended to spearhead processes carried out under the banner of corporate social responsibility. The third and final incentive – ‘greed’ – focuses on the possibility that transition might bring new business opportunities, ripe for economic exploitation (often referred to as the ‘economic dividends’ of peace).¹³⁷

This schema, which frames contribution to the transition as essentially a matter of volition, has been predominant in calls for private actors to take part in transition processes. Their involvement has been portrayed as a vital contribution to the strengthening of social relations (via economic contributions, knowledge transfer, job creation, etc.) rather than as a legal or political obligation proceeding from the part they played in past regime violence.¹³⁸

The voluntaristic framing has led in recent years to a growing number of initiatives, usually branded as pro-peace or pro-reconciliation, in which economic actors take part or even take the lead.¹³⁹ For Colombia, the most recent transition process included in this study, Miklian and Rettberg (2019) have identified four types of strategy in which economic actors have been involved. The first, referred to as “operational strategies”, see firms expanding their operations into sectors that have been highly affected by violence, and therefore often have weaknesses in infrastructure and economic opportunities.¹⁴⁰ A second, philanthropic strategy might, for example, support the demobilization

137 Id.

138 Mariño-Arévalo, A. & Valencia-Toro, M. (2015). Participación de la gran empresa en la política pública de atención a las víctimas del conflicto armado en Colombia. *Cuadernos de Administración* Vol. 28, no.50, Jan./June. http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0120-35922015000100008

139 Although such initiatives are not entirely new, this increase is associated with, on the one hand, a greater desire on the part of economic actors to establish their credentials as responsible businesses with active corporate responsibility agendas, and, on the other, a desire on the part of states to promote action within the terms of their National Action Plans on Business and Human Rights.

140 The authors highlight the examples of national companies, such as Alquería, and multinationals Telefónica and CEMEX, becoming involved with what are known as ‘ZOMACs’ or Zones Most Affected by Armed Conflict. Miklian, J. & Rettberg, A. (2019). From War-Torn to Peace-torn? Mapping business strategies in transition from conflict to peace in Colombia. In Miklian, J. & Alluri, R. & Katsos, J. (eds.) *Business, Peacebuilding and Sustainable Development*. Abingdon: Routledge, pp. 110–128.

of armed groups, and promote local reconciliation efforts.¹⁴¹ A third strategy pursued by private actors has been to gain or protect access to important political decisionmakers by financing electoral or media campaigns, or hiring lobbyists. The fourth strategy, public relations, has resulted in projects such as “Empresas por la Paz” (‘Businesses for Peace’) and “Soy Capaz”.¹⁴²

Although such initiatives are not necessarily underpinned by a human rights and victims’ rights framework, some of them have coordinated with policy frameworks for victims’ services.¹⁴³ This articulation has allowed companies to become involved in logistical support and/or co-financing, mainly in regard to memory and collective reparation measures.¹⁴⁴

Colombia’s truth commission (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, or ‘CEV’) constitutes another arena for victims’ rights claims with which economic actors have become involved. Various professional and trade associations have sought active involvement, contributing reports and taking part in Commission discussions and hearings, often with the aim of providing the CEV with information as to how such associations or their members were victimized by the armed conflict.¹⁴⁵ For example, local business association ‘Pro-Antioquia’, assisted by Colombia’s EAFIT University, began, when peace negotiations started, a series of dialogues for businesspeople on transitional justice themes. The aim was to encourage

141 A prime example of a product of this type of thinking is a 2019 report produced by Colombia’s National Businessperson’s Association (Asociación Nacional de Empresarios de Colombia), whose title translates as ‘Inclusion of Victims and Demobilized Persons: A Competitive Advantage for Colombian Companies’ (“La Inclusión de Víctimas y Desmovilizados: Una ventaja competitiva para las empresas de Colombia”). See <http://www.andi.com.co/Uploads/Paper%20Victimas%20y%20Desmovilizados%20Lectura.pdf>

142 Discussed in Miklian & Rettberg (2019). From War-Torn to Peace-Torn... op cit. p. 119. Elsewhere, Rettberg (2019) gives an account of over 650 companies that are supporting demobilization and economic reintegration efforts led by the Colombian government: Rettberg, A. (2019). *The Colombian Private Sector in Colombia’s Transition to Peace, in Civil Action and the Dynamics of Violence*. Oxford: Oxford University Press. p. 258.

143 Article 33 of Law 1448, on victims’ services and reparation in Colombia, seeks to promote a framework for the involvement of “civil society and private enterprise” in the implementation of public policy for victims.

144 One example is Fundación Semana’s involvement with the community of El Salado, Colombia. <http://www.ideaspaz.org/tools/download/47209>

145 Bermúdez, A. (2020) *La Comisión...* op. cit.

business actors to contribute their own narrative to the process.¹⁴⁶ In an effort to welcome participation from these sectors, the truth commission published a guide on its mandate and functions, specially aimed at business actors.¹⁴⁷

146 The promoters of the initiative were of the view that “a strong narrative from the business sector was absolutely essential, to give an account of the victimization that the sector suffered during the conflict, but also to highlight the thousands of examples of responsible business development that serve as a basis on which Colombia can hope to build peace.” Gallego, L. et al. (2014), *Los Retos de los empresarios en la construcción de paz*. Universidad EAFIT Cuadernos de Trabajo en Gobierno y Ciencias Políticas, no 6, September. Available at: https://repository.eafit.edu.co/bitstream/handle/10784/9658/cuadernos_trabajo_eafit_6.pdf?sequence=1

147 Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición, 28 *Claves de la Comisión de la Verdad para Actores Empresariales*. Bogotá: CEV. Available at: https://comisiondelaverdad.co/images/zoo/publicaciones/archivos/28_claves_azul_SENCILLAweb.pdf

4. LESSONS, CHALLENGES AND REGIONAL PERSPECTIVES

The main objective of this section is to give an account of the opportunities and obstacles encountered by victims and other organizations attempting to promote accountability. The section also evaluates the participation of victims and civil society organizations in transitional justice mechanisms. It closes with a discussion of lessons learned from the strategies that were developed to respond to challenges to accountability.

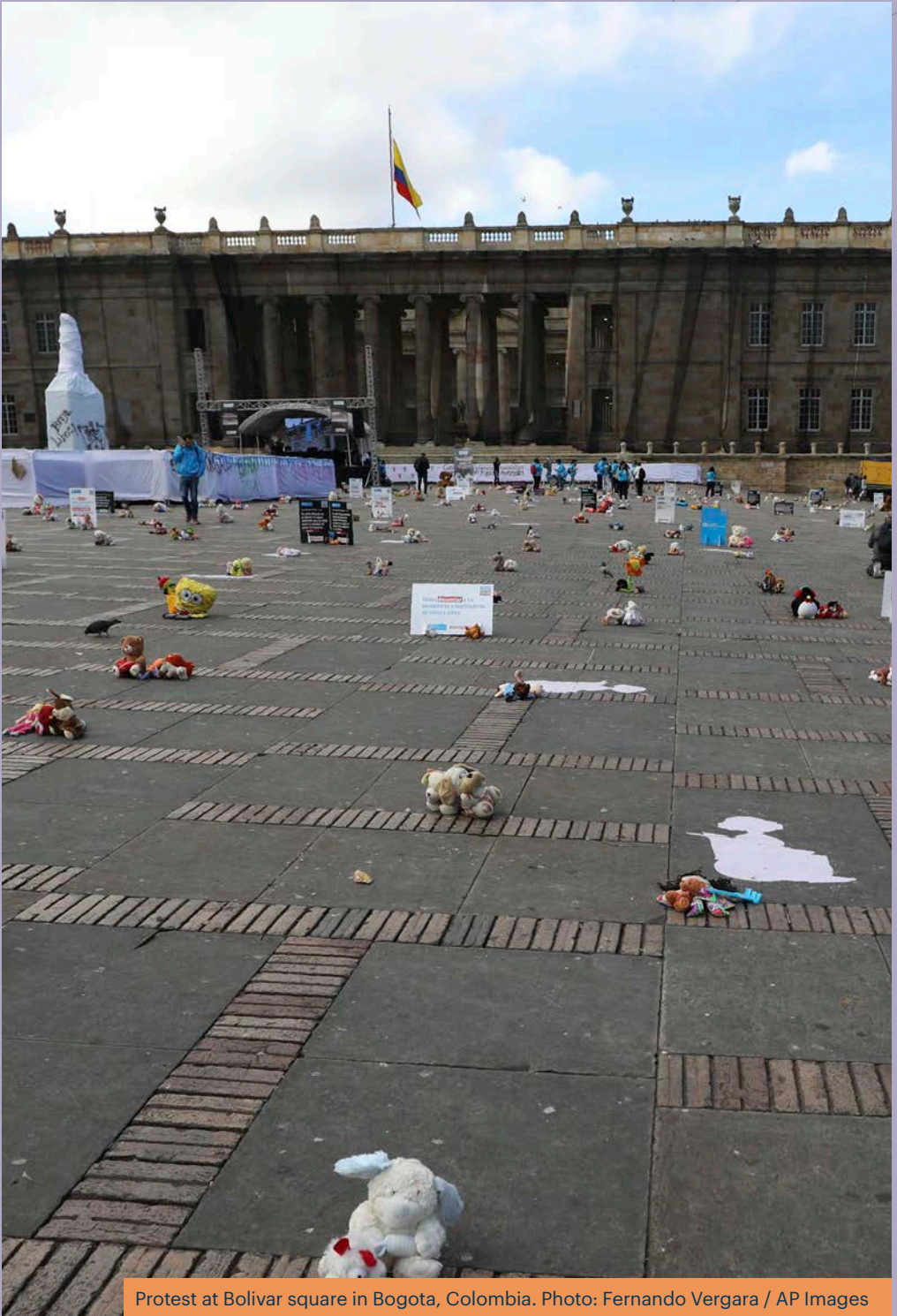
4.1 OBSTACLES TO ACCOUNTABILITY

The main obstacle to advances in accountability processes in transition contexts is what Payne, Pereira and Bernal-Bermúdez (2020, p. 113) call the “corporate veto”¹⁴⁸, i.e., the power that some actors possess, to prevent changes to the status quo. They also note that “an extensive [academic] literature on the power of businesspeople to influence political outcomes would suggest that this veto power is, in general, effective.”¹⁴⁹ The operation of veto power can be clearly seen both in the immediate transitional period, and for as long as victims and their organizations continue to challenge barriers to accountability.

Our three country cases reveal, first of all, that different economic elites have played a significant role in efforts to foster impunity or, at least, to limit the

148 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit. p. 113.

149 Id. p. 32.



Protest at Bolivar square in Bogota, Colombia. Photo: Fernando Vergara / AP Images

ability of transition processes to create robust accountability mechanisms.¹⁵⁰ Each case provides striking examples of this pattern. As Rettberg puts it, “in many ways, Guatemala’s tepid record in implementing peace accords can be attributed to the ... ambiguous involvement of its private sector in peace negotiations”.¹⁵¹ In fact, the author argues, there is evidence that one important business sector “consistently obstructed implementation (of the [peace] accord) by resisting key reforms, such as tax increase that would help raise domestic funding to meet peace commitments”.¹⁵² Through these actions, this economic elite contributed to the “instability that has marked peace consolidation in the country”.¹⁵³ This same obstruction allowed impunity-promoting measures such as the country’s amnesty law to be implemented, contrary to the terms of the peace agreement. Meanwhile, parts of the peace agenda that were essential for victim reparations – such as those regarding land policy – were left unimplemented.

In a somewhat similar vein, the pioneering advances made in Argentina’s truth commission report gave way to a period of limbo after President Carlos Menem (1989-1999) oversaw the introduction of amnesty laws and decreed presidential pardons for convicted perpetrators.¹⁵⁴ This setback also truncated the early efforts of victims and trade union organizations to seek accountability for crimes committed by companies and businesspeople. The business sector was without a doubt a prime behind-the-scenes beneficiary of the Menem-era measures.

One sector of the Colombian business community has also been a staunch opponent of Colombia’s negotiated transitional measures. Agricultural and livestock associations have been particularly vociferous in opposing reforms to the sector, as well as measures such as land restitution and reparations

150 It is worth bearing in mind Rettberg’s point about the need to distinguish between different sectors and their capacity and interest in these veto processes. As the author states, “The larger a company or group of companies, the stronger its economic veto power and the greater its access to politics. Conversely, the smaller a firm is, the more it is dependent on strength in numbers and vulnerable to collective action dilemmas.” Rettberg (2019) *The Colombian Private Sector*... op. cit. p. 260.

151 Rettberg, A. (2007). *The Private Sector*... op. cit., p. 474.

152 Id.

153 Id.

154 Basualdo, V. (2017). Corporate responsibility in the repression of workers during state terrorism: recent advances on the Argentine dictatorship (1976-1983) in a regional and international framework. Universidad Nacional de Misiones, *Revista de investigaciones en ciencias sociales* 5 (9), July-December. (Full text exists in Spanish only).

for victims.¹⁵⁵ The agricultural sector led opposition to the peace agreement signed between the Colombian government and the then-guerrilla group the Revolutionary Armed Forces of Colombia, FARC-EP, in 2016. A significant business lobby provided political, logistical, and financial support to the anti-agreement side that won a national referendum, held in October 2016, to approve or reject the text as initially signed.¹⁵⁶

There is evidence that business actors have tried to exert influence in order to prevent specific accountability processes from moving forward. One example is documented by Martín Rodríguez Pellecer, in his news report on the attitude of an influential sector of Guatemalan business interests toward the 2013 criminal prosecution of former dictator Efraín Ríos Montt and co-defendant Mauricio Rodríguez Sánchez.¹⁵⁷ The report claims that when the initial sentence was handed down in 2013, a group of representatives of Guatemalan businesspeople decided to lobby the Constitutional Court to reverse the verdict. Their reasoning was that “if Ríos Montt was convicted, the investigations would follow the chain of command and might prosecute [members of the] 1982 and 1983 Council of State, which included six big businessmen”.¹⁵⁸

A similar example of pressure being brought to bear, this time in Argentina, is reported in the recent book by Payne, Pereira and Bernal-Bermúdez (2020). Commenting on action taken by the in-house legal representatives of the Ledesma sugar refinery against a congresswoman, the authors claim that many sources in Argentina familiar with the justice scenario surrounding crimes against humanity “interpreted the charge as an act of intimidation against an elected legislator”.¹⁵⁹

A more surreptitious form of pressure, effective and very difficult to document, is the exercise of private influence over government agents or agencies in charge

155 See, for example, a call published on the webpage of the national cattle ranchers’ association, Federación Colombiana de Ganadero, Fedegan, urging members to ‘unite to oppose face the Land Restitution Law’ (“Ganaderos deben unirse para enfrentar Ley de restitución de tierras”): <https://www.fedegan.org.co/noticias/ganaderos-deben-unirse-para-enfrentar-ley-de-restitucion-de-tierras>

156 Rettberg (2019) *The Colombian Private Sector...* op. cit., p. 256. According to *Semana* magazine, the companies that made economic contributions to the No campaign included large financial and insurance companies, such as Banco Davivienda and Seguros Bolívar. “Aquí el listado de donantes a campaña del No... y no está Ardila Lülle” (*Semana*, October 6, 2016) <https://www.semana.com/pais/articulo/empresario-que-aportaron-a-la-campana-del-no-en-el-plebiscito/234634/>

157 Rodríguez Pellecer (2013) *Los militares...* op. cit., author’s translation.

158 Id.

159 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit. p. 113.

of implementing transitional justice processes. One such case is documented by researcher Philipp Wesche in his work on land restitution in Colombia.¹⁶⁰ Wesche cites the example of an account given by an official of the government agency in charge of restitution processes. The official recounted how representatives of the company Cementos Argos, which had acquired a series of lands subsequently denounced as the proceeds of land seizure, arranged a meeting with the President of Colombia (at that time, Juan Manuel Santos, 2010-2018). According to the version obtained by Wesche, after that meeting the President personally contacted the agency's legal director, asking him to review the cases "carefully".¹⁶¹ For Colombia these kinds of machinations take place in the context of an environment that is already hostile and dangerous for those seeking land restitution, whereby claimants and leaders have been subjected to threats and even assassination.¹⁶²

Pro-accountability efforts by victims and other organizations have found that traditional political forces often present an additional obstacle, not least because these forces often command a majority of votes in the legislature, whether in their own right, or in coalition. Two episodes from the Argentine Congress offer possible examples. The first is a case of congressional inaction: Pereira (2020) reports that the bicameral commission for investigating economic complicity whose genesis is described above (section 3.1.2) was never implemented.¹⁶³ This inaction has stymied a potentially world-leading innovation. The second example, also outlined by Pereira, is the missed opportunity represented by Penal Code reform carried out in 2017. The lower house of the Argentine Congress approved a modification that would have paved the way for legal (as well as natural) persons to be held criminally liable for offences including crimes against humanity. The upper house (Senate) however refused to ratify this aspect of the reform.¹⁶⁴

160 <https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1773441>

161 Wesche, Philipp, (2021) Business actors and land restitution in the Colombian transition from armed conflict, *The International Journal of Human Rights*. 25(2) p. 310.

162 Id.

163 Pereira, G. (2020, November 4) Vaivenes en la responsabilidad legal de actores económicos por crímenes de lesa humanidad en Argentina. *Agenda Estado de Derecho*. Available at: <https://agendaestadodederecho.com/crimenes-de-lesa-humanidad-en-argentina>

164 Id.

In Guatemala, political elites have made ever more overt attempts to derail advances in accountability for internal armed conflict-related crimes. One such attempt resulted in the September 2019 termination of the mandate of major UN-sponsored anti-corruption initiative the International Commission against Impunity (Comisión Internacional contra la Impunidad en Guatemala, CICIG). Although cases related to the internal armed conflict were not directly part of CICIG's remit, the commission had been seen as a crucial contribution to strengthening the rule of law – and with it, the capacity to investigate complex crimes – in Guatemala.¹⁶⁵ Therefore, in addition to the practical effect of the truncation of this specialized technical support for the prosecution of complex cases, the abrupt termination of CICIG had a negative symbolic impact on the victims of violence and corruption, and their expectations of justice. The negative effects were compounded by subsequent attempts in Congress to shore up legal impediments to investigation of conflict-era crimes by introducing a new, expanded, amnesty law.¹⁶⁶

Another source of difficulty has been the insistence of high-level judicial sources in each country on defending legal doctrines that have presented real barriers to justice. The Argentine Supreme Court has, for example, refused to allow corporate responsibility claims in civil courts and labor tribunals for crimes against humanity, adducing the argument that any claims arising have already been satisfied by Argentina's administrative reparations policy.¹⁶⁷ Another Supreme Court legal doctrine that has attracted criticism from national experts holds that actions attempting to establish liability for dictatorship-era harms are prescribed (time-barred) due to the expiry of the relevant statute of limitations. Majority opinion on the Court has held, for example, that “the non-applicability of statutes of limitations [to crimes against humanity] set forth in Article 2561 (...) of the Civil and Commercial Code is not applicable” since this provision

165 International Crisis Group, *Curtain Falls on Guatemala's International Commission against Impunity* (September 2019). <https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/curtain-falls-guatemalas-international-commission-against-impunity>

166 Burt, Jo-Marie and Paulo Estrada, *In Defiance of Court Rulings, Guatemalan Congressional Leaders Push Amnesty Bill* (International Justice Monitor, 2019) Available at: <https://www.ijmonitor.org/2019/09/in-defiance-of-court-rulings-guatemalan-congressional-leaders-push-amnesty-bill/>

167 As Pereira argues, this doctrine does not take on board “a fundamental argument regarding access to justice in cases where private persons are accused. The actions undertaken in civil or labor cases represent not only claims for reparation, but also [activation of] the only judicial avenue the Argentine legal system provides by which the legal liability of legal persons for crimes [against humanity] could be established” Pereira (2020) Vaivenes... op. cit., author's translation.

was introduced into the civil code via reform.¹⁶⁸ This interpretation invokes the principle that the change should not be applied to statutes of limitation that were running and/or had expired at the time the change took effect.¹⁶⁹

In Colombia, meanwhile, jurists and other experts have strongly criticized a Constitutional Court decision to limit the competence of the Special Jurisdiction for Peace (JEP) to exercise compulsory third party jurisdiction.¹⁷⁰ According to the Court, giving the JEP jurisdiction over conflict-related crimes committed by civilian third parties and non-combatant state agents, without their prior express authorization, constituted a violation of the right to due process in two senses (the principles of legality, and of the ‘natural judge’).¹⁷¹ With this decision, the Constitutional Court almost completely curtailed the JEP’s powers to prosecute economic actors, instead creating a system in which prosecutorial responsibilities are shared between the special (transitional justice) jurisdiction and the ordinary justice system. Such dissipation of responsibilities has shown itself to be an inefficient institutional design, which tends to foment impunity.¹⁷²

Finally, although victims have been very active in international litigation, it should be noted that civil actions in foreign jurisdictions have not been an effective avenue for achieving accountability and access to reparations. In fact, observations made by Michalowski and Carranza (2013) fit perfectly with the track record of civil liability cases brought by victims from our three featured countries.¹⁷³ According to these authors, civil litigation in non-domestic venues presents only very limited possibilities for achieving transitional justice objectives, owing to two factors. First, civil liability is determined on the basis of principles that were not designed to address either problems of large-scale

168 Concurring opinion of Judge Rosenkrantz in the case of *Ingenieros v Techint*, cited in Centro de Información Judicial (2019, May 9) “Las acciones laborales por daños derivados de delitos de lesa humanidad son prescriptibles”. <https://www.cij.gov.ar/nota-34417-Las-acciones-laborales-por-da-os-derivados-de-delitos-de-lesa-humanidad-son-prescriptibles.html>

169 Centro de Información Judicial (2019) *Las acciones laborales...* op. cit.

170 Michalowski et. al. (2018) *Entre coacción y colaboración ...* op cit., and Michalowski, S. & Jiménez Ospina, A. & Martínez Carrillo, H. & Marín López, D. (2019). *Los terceros complejos: la competencia limitada de la Jurisdicción Especial para la Paz*. Bogotá: Dejusticia.

171 Constitutional Court of Colombia, Judgment C-674 of 2017.

172 Michalowski, S. & Cardona Chaves, J.P. (2015). Responsabilidad corporativa y justicia transicional *Universidad de Chile, Anuario de Derechos Humanos* 11, pp. 173-82.

173 Michalowski, S. & Carranza, R. (2013). Conclusions. In Michalowski, S. (ed.) *Corporate Accountability in the Context of Transitional Justice*. Abingdon: Routledge.

violence or atrocity crimes, or the limitations of transitional contexts. Second, these principles are applied by judges who have no knowledge of the context in which the violations occurred. These two factors have resulted in the majority of cases in this category, being dismissed by the courts. In addition, courts in countries whose laws allowing such actions to be brought have begun in recent years to significantly narrow their scope in ways unfavorable to victims. We see this, for example, in US Supreme Court jurisprudence regarding Alien Tort Statute-based actions – where the *Jessner* case virtually eliminated the ATS as a viable option for the type of cases discussed in this report¹⁷⁴ – or in Spain, where limits have been imposed on litigation based on universal jurisdiction.

4.2 LESSONS FROM THE EXPERIENCES STUDIED

4.2.1 Lessons For Truth-telling and Memory

The experiences of the three countries studied here show that truth recovery and memory are long and complex processes. Although truth commissions in Argentina and Guatemala made remarkable progress at very early stages of transition, the prevailing narratives about responsibilities for repression and conflict were dominant enough to keep questions about participation and responsibility of private actors off the public agenda. Nonetheless, the legacy of these commissions should not be downplayed. Each was pioneering in its day, and the information they gathered has been key for subsequent truth and justice processes.

The experience of these two commissions also leaves a legacy for other settings. Payne and Pereira (2018) have formulated a series of recommendations for the design of new truth commissions, such as the one currently ongoing in Colombia.¹⁷⁵ A first finding, based on study of these early commissions, is that none mentioned economic or private actors in their mandates. In the absence of such a specific mandate, which could have favored adoption of this line of inquiry as a cross-cutting axis to the work of the commissions, what happened

174 Howe, A. (2018, April 4) “Court bars lawsuits against foreign corporations under Alien Tort Statute”. SCOTUSblog. <https://www.scotusblog.com/2018/04/opinion-analysis-court-bars-lawsuits-against-foreign-corporations-under-alien-tort-statute/>

175 Payne, L. & Pereira, G. (2018). “Análisis comparado de la complicidad económica y la justicia transicional: Aportes para el diseño y funcionamiento de la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición”. In Sánchez et al. (2018) *Cuentas Claras...* op. cit., pp. 25-38.

instead, in cases including Guatemala and Argentina, was that commission staff became “institutional innovators”.¹⁷⁶ By incorporating into their work an issue not explicitly contained in the official terms of reference of their respective commissions, they “respond[ed] positively to the testimonies and claims of victims and relatives.”¹⁷⁷

The fact that this variable was not expressly contained in the mandates of the commissions nonetheless negatively affected their ability to address it. Commissions either had to improvise in order to factor the issue logistically and institutionally into their plans of work, or, more problematically, found they had not budgeted or recruited adequately for the particular type of investigation that was needed.¹⁷⁸ The absence of an explicit concrete mandate has also prevented commissions from adding discussions about what working definition(s) of economic complicity to adopt and pursue, to their agenda of methodological deliberations.

Another important lesson can be drawn from reflection on the extent to which truth commission reports should contribute to objectives that go beyond the reconstruction of the truth. One of the areas where these commissions can pave the way for complementary transitional policies is in the formulation of recommendations. However, the Latin American cases studied show that although the institutional innovators within commissions uncovered truth about corporate complicity, the final reports did not include specific recommendations on how to address this within the framework of other transitional accountability policies.

In addition, since the political and financial power of economic accomplices can be weighty enough to overshadow the truth-telling work of truth commissions, it is essential to incorporate specific strategies that ensure public visibility for the commission’s work and its final report. A truth commission report should be understood as the starting point for a social dialogue that should be nurtured and kept alive over an extended time period.

176 Id., p.34, author’s translation.

177 Id.

178 Id.

4.2.2 Lessons For Judicial Accountability

Latin American countries have been signaled as leaders of a global movement to prevent impunity for serious crimes committed by repressive governments and in contexts of armed conflict.¹⁷⁹ There is also now evidence that Latin America could aspire to equal prominence regarding efforts to prosecute private actors who have co-sponsored, participated in, or sponsored serious crimes in transitional contexts. The database of court cases developed by Payne, Pereira and Bernal-Bermúdez suggests, indeed, that Colombia and Argentina are two of the contemporary leaders in this sort of litigation.¹⁸⁰

However, as we saw above (section 3), this protagonism is explained more by the tenacity and creativity of victims and their legal representatives than by the existence of accessible, rights-protective judicial and political systems. One of the lessons from the cases reviewed in this report is that processes to date have been lengthy; and have only begun, or have only made progress, in response to pressure from victims. Therefore, as argued by Gastón Chillier of Argentina's Center for Legal and Social Studies, organizations and victims should set broad objectives for what they expect from these processes, reaching beyond solely achieving a judicial decision to convict.¹⁸¹

Among the most successful processes are those that have managed to have repercussions for broader legal reform and new regulatory frameworks. Organizations and victims in Colombia and Argentina have been very successful in coordinating their litigation strategies with legal debates leading toward concrete legal reform. The debate over the imprescriptibility of civil claims and labor law actions is a notable example in which the arguments used before the courts became novel legal doctrines that leveraged processes of reform. Something similar can be observed in the case of Colombia, regarding the procedural and

179 Sikkink, K. (2011) *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. New York: W.W. Norton & Co.

180 Payne, Pereira & Bernal-Bermúdez (2020) *Transitional Justice...* op. cit.

181 Discussing Argentina, Chillier states: "Prosecuting the leaders of still-powerful corporations is not the same as trying retired military officials, who are largely seen as the dictatorship's "bad guys." Nonetheless, the importance of these trials goes beyond determining the guilt or innocence of individuals. The hope is that they will contribute to a broad societal debate about the role that corporations and civilians played during the dictatorship. In that sense, they represent just one more essential step forward in the process of memory, truth and justice." Chillier, G (2014, December) "Prosecuting corporate complicity in Argentina's dictatorship". *Open Democracy*. Available at: <https://www.opendemocracy.net/en/openglobalrights-openpage-blog/prosecuting-corporate-complicity-in-argentinas-dictatorship/>

evidentiary rules surrounding dispossession. Victims' organizations were able to document the legal barriers they faced in ordinary litigation, producing alternative legal doctrines. These were later introduced as legislative modifications contributing to the transitional framework for victims of the conflict.

In terms of criminal prosecution, the cases studied highlight the importance of investigations and prosecutions taking full advantage of holistic analysis of the range of responsibilities for each act of violence. Closer fit between enquiries into the responsibilities of armed and state actors, and of the economic powers that may be involved, increases the chances that investigations will produce more comprehensive revelations about participation and responsibilities. Examples can be seen in Argentina, in regard to cases that were reopened after the amnesty laws were annulled or overturned.

Colombia likewise demonstrates the importance of unifying processes to avoid fomenting impunity. Here, the transitional Justice and Peace tribunal was given limited competence, restricted to acting against one type of perpetrator of violence (members of irregular armed groups). This created a large field of impunity: even when investigators, prosecutors and judges found strong evidence of the involvement of private actors in crimes and violations, they had no jurisdiction to proceed. The prevailing law only permitted them to forward the information to other authorities. This created major distortions in investigative logic, reducing the visibility of this aspect of the overall violence and distorting perceptions as to its actual prevalence. While public opinion came to know a great deal about the conflict, and drew links to the responsibility of paramilitary groups, their economic allies were allowed to escape scrutiny.

Thus, an additional lesson relates to the need to create specialized investigative capacity in both ordinary and transitional justice systems, if the relationships between violence and economic power are to be uncovered. Domestic ordinary and hybrid courts have achieved a remarkable degree of specialization in the investigation and prosecution of cases of mass violence. This development is central to the adequate investigation of legacies of repression and conflict, which present very different challenges from those posed by ordinary criminality. Many of these advances however relate to areas such as understanding how orders are issued, transmitted, and implemented in regular and irregular armed forces. These insights are not necessarily applicable to the actions of private entities. Here, expanding specialist capabilities becomes

essential. So too does the adaptation of legal standards so that they become adequate to the task of addressing this type of participation in crimes.

4.2.3 Lessons For Victim Reparations

The three countries analyzed have each adopted distinctive approaches to the provision of reparations to victims, with differing scope and varied results.¹⁸² At the same time, all three have implemented state-provided administrative reparations. While these programs have generally sought to cover broad categories of victims, including some who suffered violations produced through corporate complicity, these programs do not make direct connections aimed at holding the actor who caused the harm accountable.

Depending on how they are structured, reparations funds basically use public funds to pay economic compensation. Although other sources – private actors, international donations, etc. – also contribute make up these funds, their relative participation is extremely small. Thus, if economic actors are to become a source of funds to be earmarked for reparations, it is likely that these funds would have to come from court-mandated asset seizure, or from voluntary contributions. The experience of Colombia however suggests that even these two types of sources pale into insignificance when compared to the financial burden that falls on public budgets. The link between administrative reparations and the attribution of responsibility is moreover minimal, with funds obtained from voluntary contributions often treated as philanthropic donations that do not signal either an admission of responsibility or a desire to make amends. Something similar has happened with private initiatives to contribute to other components of reparations, such as symbolic and collective reparations efforts.

Accordingly, seeking reparations through the courts has sometimes been seen as a more direct way to promote accountability and obtain redress for victims. It has not, however, been an easy route. Substantive and procedural barriers have been common in both domestic and international venues.¹⁸³ Despite these restrictions, which have resulted in the majority of cases brought before overseas venues being dismissed, legal activism by victims has provided important lessons.

182 See Sánchez & Sandoval (2020) *Go Big...* op. cit., for Colombia; Martínez & Gómez (2019) *A Promise...* op. cit., for Guatemala; and Guembe (2006) *Economic Reparations...* op. cit., for Argentina.

183 See, for example, Domingo, M. (et. al). (2014) *Business and human rights violations in Guatemala: a challenge for justice*. International Commission of Jurists.

As noted above, the setting of broad objectives, that go beyond the desire to achieve a favorable verdict in each particular case, are vital if litigation is to become, or is to feed into, a campaign for the enforceability of rights both inside and outside the courtroom. Transnational alliances appear to be necessary in order to navigate different jurisdictions, swap success stories, and possibly re-litigate unsatisfactory (or even satisfactory) outcomes in other jurisdictions. One example is the incorporation of evidence obtained in one jurisdiction, to proceedings initiated in other countries on the same or related facts.¹⁸⁴ Organizations and victims have also made interesting strategic use of jurisdictions that allow exploration of different types of liability (corporate, individual, and state), treating these as stepping stones to open up opportunities for future litigation. The use of the Inter-American human rights system to further explore these avenues, as evidenced in the cases of Colombia and Guatemala, has promise. This is especially true in the current era, in which the Inter-American system has shown more interest than previously in the corporate connection regarding human rights violations.¹⁸⁵

184 A very interesting tool in this regard is the EarthRights International & Corporate Accountability Lab guide (2020) *Using U.S. Courts to Obtain Information for Foreign Legal Cases. Foreign legal assistance actions under 28 U.S.C. § 1782*.

185 As evidenced by the production of a recent report, by the Inter-American Commission's Special Rapporteur on Economic, Social, Cultural and Environmental Rights, that dedicates a chapter to this theme. Inter-American Commission on Human Rights, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights, *Informe sobre Empresas y Derechos Humanos: Estándares Interamericanos*. Approved by the Inter-American Commission on Human Rights on November 1, 2019. OAS Document OEA/Ser.L/V/II CIDH/REDESCA/INF1/19. Available at: <https://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>

5. RECOMMENDATIONS FOR FURTHER RESEARCH AND ACTION

Based on the challenges faced in the three societies considered here, and taking into account the lessons learned from existing accountability processes in the region, the following recommendations can be made:

5.1 RECOMMENDATIONS FOR THE RESEARCH AGENDA

The topic of corporate responsibility during repression, conflict and transition is a fertile field for academic study. The many issues arising from the present cases that are of possible scholarly interest include:

- Formulating a deeper understanding of the specific types of relationships between perpetrators of violence, and underlying economic or corporate interests. Issues that might particularly benefit from further academic study include the identification of patterns; and analysis of how structures of incentives emerge that give rise to these relationships, the channels through which they develop, and what considerations these actors take into account when approaching transition processes.
- The private sector is not homogeneous. Scholarship that portrays these sectors, their interests, and their international alliances in transitional settings as accurately as possible is therefore essential for refining institutional responses, and fine-tuning mechanisms that might help prevent crimes being committed by corporations and individuals affiliated with them.

Analysis of this sort should also provide insights into the different roles that economic actors play in processes of violence and repression, including, potentially, as victims.

- Some existing transitional justice mechanisms would benefit from review, as the thinking and practice behind them has tended to date to focus on the responsibility of direct perpetrators of violence and repression, rather than considering accomplices or co-perpetrators. Examples worth mentioning here are the establishment of alternative sanctions for economic actors; the identification of those most responsible, and the development of reparations criteria and policies that directly involve the private sector.
- The efforts of victims, and organizations allied to them, to promote accountability and confront impunity would also merit further exploration. While groundbreaking works such as those of Michalowski, Payne, Bernal-Bermúdez, Pereira, and Pietropaoli are noteworthy, they remain pioneering and somewhat isolated in debates in the transitional justice field.
- Enquiring into the relationship between economic actors and transition processes is a strategic entry point for research agendas that seek to understand socioeconomic aspects of transitions, and the role that these play in justice. Issues such as the impact of violence on economic, social and cultural rights; the relationship between corruption and violence, and structural aspects of social and economic inequality are all worthy of further scholarly attention. This thematic area also lends itself to study of the impact of conflict on the environment; the role of economic actors in environmental degradation, and how transitional justice mechanisms could contribute to the prevention and reversal of this kind of harm.
- The phenomenon of co-optation of the State, or of public institutions, by certain corporate sectors is another possible avenue for research.

5.2 RECOMMENDATIONS FOR GOVERNMENTS AND OFFICIAL TRANSITIONAL JUSTICE MECHANISMS

- State representatives or members of political elites who participate in peace negotiations, or in authoritarian-to-democratic transitions, should make every effort to secure the involvement of private actors. At a minimum, negotiators should be aware of the international framework that establishes state and individual obligations for human rights violations committed during conflict; and should refrain from promoting or accepting agreements that prevent the responsibilities of economic actors from being discussed within transition processes, or that limit the competence of the transitional justice mechanisms that are created as a result of these processes.
- Transitional justice mechanisms designed to respond to the needs of the victims of violence must be committed to the comprehensive revelation of both the facts about, and responsibilities of, all actors who participated in the violence. They should not focus solely on direct participation by members of regular armed forces and security services, and/or of irregular armed groups.
- All transitional justice mechanisms – especially those related to the satisfaction of victims’ rights to truth, justice, reparations, and measures of non-repetition – must be designed in ways that allow them to address the legacies of corporate responsibility in the violation of victims’ rights. This entails institutional designs geared toward generating a broad and inclusive narrative of responsibilities; institutions equipped with the tools they need to meet demands for justice and truth-telling (particularly regarding the legacy of corporate responsibilities), and personnel who have sufficient specialist training to enable them to investigate such matters.
- Societies undertaking transitional processes must take into account the fact that the impunity gap is especially evident in relation to accountability for corporate responsibilities. The accumulated experience of countries such as Argentina, Colombia and Guatemala can serve as a salutary reminder of the challenges that surround these processes, as well as of the potential benefits for democratization and justice that can accrue if transitional processes consciously seek to investigate and address the legacies of corporate responsibilities.

- In order to strengthen transition, states should promote measures aimed at rebuilding the social fabric and promoting coexistence, reconciliation, economic growth, and productive development. These measures need the involvement of economic sectors and their representatives. However, participation in these actions should be a separate matter from the question of addressing the outstanding accountability agenda that might arise from the participation of some individuals, companies, or business associations in past violence. Voluntarism and corporate social responsibility frameworks cannot be substituted for the meeting of the legal obligations of individuals and states, which include responding to victims' need for justice.
- States should implement measures and policies that ensure effective inter-institutional cooperation and sharing of information – including information about economic actors – between transitional justice entities. In transitional justice contexts, states are tasked with implementing ambitious frameworks whose goals include to secure and end to conflict, transform societies, hold perpetrators accountable, and guarantee victims' rights. The various mechanisms and entities created and used therefore form a diverse and complex matrix, connecting state and civil society actors at national and local levels. To ensure a smoother and more effective implementation of these mechanisms and processes, states must clearly delimit and define the different roles to be played by each actor in policy implementation. States should also provide clear channels for communication and information exchange between the entities and actors involved, to ensure efficient and effective implementation.

5.3 STRATEGIC RECOMMENDATIONS FOR VICTIMS AND CIVIL SOCIETY ORGANIZATIONS

The experiences of Argentina, Colombia and Guatemala demonstrate that the limited, but significant, advances that the region has seen to date in the area of corporate responsibility in transitional justice have been achieved thanks to the tenacity, creativity, and strategic vision displayed by victims' movements and allied organizations. Some lessons that can serve for reflecting on how to give continuity to these efforts, and inspire others, include:

- Document cases and situations, and do not forego the construction of broad narratives of violence and repression. Even in periods where it appears

unlikely that corporate accountability can be made to feature in efforts at justice, victims should document and protect as much information as possible. The case studies presented here show that this has been vital for allowing the subject of economic actor accountability to be broached as subsequent transformations alter the opportunity structure.

- Act strategically across a range of political and legal processes. The most successful processes in the case studies are those where victims and civil society actors have deployed a range of initiatives engaging with domestic and international litigation, legal and policy reform, and public campaigns. Planning such broad frameworks for action also requires careful thinking about overall objectives, reaching beyond the likelihood of potentially favorable or unfavorable decisions in a particular court of law.
- Build international alliances. Particularly given that many economic actors have strong international ties, justice campaigns and initiatives that reach beyond the borders of the transitional country setting have been important. Campaigns of this sort are however long and complex, requiring considerable investment of effort and resources. The most successful experiences have been based on coalitions between movements and organizations, providing mutual support and drawing on the specific expertise of each member to advances on both domestic and international fronts.
- Create links with academia. Independent and university-affiliated research centers have been vital for developing research into particular situations, as well as conceptual approaches to addressing accountability gaps surrounding economic actors in the three countries investigated. Especially in Argentina and Colombia, alliances between victims' organizations and research centers have produced information, and theoretical and legal arguments, that have had a positive impact on the pro-accountability efforts of victims and their organizations.
- Share experiences. There is still a pervasive belief, even among experts, that very few positive experiences of corporate accountability in transitional justice processes exist. In reality, important efforts by victims, organizations, and existing transitional justice deserve to be better known and studied. Raising awareness of these initiatives is vital for continuing the present upward trajectory towards holding accountable all actors who share responsibility for repression and conflict.

5.4 RECOMMENDATIONS FOR THE PRIVATE SECTOR

As stated in the report of the UN Working Group on Business and Human Rights, the UN Guiding Principles “provide clarity on what is expected of business and States in conflict-affected areas. What is needed now is more decisive action to integrate business and human rights into peace and security frameworks.”¹⁸⁶ In this regard, the Working Group’s report is fundamental for guiding the actions of corporate entities and businesses, and its recommendations must be implemented. In particular, given the prevailing, rather chaotic, situation described in this report, the following actions emerge as requiring prioritization:

- Where possible, members of the private sector should participate actively and in good faith in transitional justice mechanisms. Since economic actors may be considered responsible for human rights violations in transitional justice contexts, they sometimes refuse to participate in such processes, even if they have not committed crimes. Businesses should recognize the importance of contributing to transitional justice mechanisms such as truth commissions and post-authoritarian and post-conflict tribunals, as this kind of participation furthers respect for victims’ human rights. Companies should also be aware of the individual and organizational benefits that participation can bring.
- In order to respect human rights and meet the highest standards of corporate responsibility, economic actors must understand the local context in which they plan to conduct business, before they invest in and pursue a particular project. This is a particularly key and sensitive matter in contexts where repression or conflict are ongoing or have recently concluded. Companies must make a firm commitment not to fuel existing patterns and structures of violence and inequality, and to refrain from creating new forms of violence and injustice. As the above-mentioned UN Working Group report points out, situations of armed conflict create a heightened obligation for state action, and a higher standard of due diligence for companies.¹⁸⁷
- The cases of Guatemala and Colombia show that in order to respect human rights and meet the highest standards of corporate responsibility, economic

¹⁸⁶ Report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, “Business, human rights and conflict-affected regions: towards heightened action” UN Document A/75/212, July 21, 2020. Paragraph 100.

¹⁸⁷ Id., Paragraph 13.

actors must conduct a meticulous study of property ownership and other land rights before investing in a project. All companies should conduct enhanced due diligence on chain-of-title records and other publicly available information regarding a particular piece of land. This due diligence should be conducted even more rigorously in post-conflict societies, taking into account the complex dynamics of forced displacement, land dispossession and forced abandonment that may have occurred. At the same time, poor public record systems, informal titling and fraudulent transactions can add to the complexity of such due diligence. Nonetheless, this meticulous care is necessary in order to respect the human rights of the true owners, occupiers, possessors, and tenants of land.

- Similarly, companies should not invest in or initiate any development project until the state has consulted with any indigenous or otherwise specially protected communities who may be affected, in order to seek free, prior, informed consent. Economic actors should refrain from intervening in such consultation processes, or engaging in any way with the possibly affected communities prior to such consultation.



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