Can a Treaty on Business and Human Rights help Achieve Transitional Justice Goals?

Pode um Tratado em Empresas e Direitos Humanos ajudar a Atingir Objetivos de Justiça de Transição?

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ABSTRACT

Although the definition and purpose of transitional justice (TJ) does not preclude the inclusion of non-state business actors' involvement in past authoritarian state or armed conflict violence, these types human rights violations (HRVs) are not included in formal TJ mandates. Nonetheless, in practice, TJ processes have included ad hoc measures to hold economic actors responsible for those violations. This article seeks to participate in the ongoing discussions and design of a UN-initiated proposal for a treaty on business and human rights by adding the TJ dimension. It draws on the Corporate Accountability and Transitional Justice (CATJ) data base to show that TJ initiatives have already incorporated economic actors in the investigations of past human rights abuses and how they have done so. It further explores what is missing from these processes and how

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a treaty on business and human rights could help fill those voids and advance victims' rights to truth, justice, and reparations.

KEYWORDS: Business. Human rights. Transitional Justice. Treaty.

RESUMO

Embora a definição e o propósito da justiça de transição (JT) não impeçam a inclusão do envolvimento dos atores comerciais não-estatais no estado autoritário ou violência de conflitos armados passados, esses tipos de violações de direitos humanos (VDH) não estão incluídos nos mandatos formais de JT. No entanto, na prática, os processos de JT incluíram medidas ad hoc para responsabilizar os atores econômicos por essas violações. Este artigo procura participar das discussões em andamento e do projeto de uma proposta de um tratado sobre empresas e direitos humanos, iniciada pela ONU, adicionando a dimensão da JT. A partir da base de dados de Responsabilidade Corporativa e Justiça Transitória (CATJ) busca-se mostrar que as iniciativas de JT já incorporaram atores econômicos em investigações passadas de abusos de direitos humanos e como eles o fizeram. Além disso, explora-se o que falta nesses processos e como um tratado sobre direitos humanos e empresas poderia ajudar a preencher essas lacunas e promover os direitos das vítimas à verdade, à justiça e às reparações.

PALAVRAS-CHAVE: Empresas. Direitos humanos. Justiça de transição. Tratado.

INTRODUCTION

In the aftermath of the resolution of the United Nations Human Rights Council establishing a Working Group on Business and Human Rights (WG) to draft a treaty on the topic, practitioners and academics have engaged in a lively debate over the usefulness, content, scope, and elements of such an instrument[5]. This article attempts to advance that discussion by exploring elements of the treaty that could achieve *transitional justice* (TJ) goals regarding economic actors' complicity with systematic or widespread HRVs.

Transitional justice (TJ), as defined by the United Nations, is the "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation" (Secretary General 2004:8). TJ mechanisms have been implemented in societies aimed at addressing massive HRVs both in cases of peace processes seeking to end internal armed conflicts and in cases of new governments replacing repressive regimes. Its main goals are the recognition of the dignity of individuals; the redress and acknowledgment of violations; and the aim to prevent them from happening again. Rooted in accountability and redress for victims of past human rights abuses, the mechanisms most commonly associated with TJ are criminal prosecutions, non-judicial "truth-seeking" processes to expose HRVs, and reparations to victims of HRVs.

One particular form of past abuse has not formally received attention in TJ mandates: that carried out by non-state business actors during periods of state repression and armed conflict. This is not because of a lack of information; the operation of companies in countries with armed conflict or authoritarian regime is well-known. It is also not explained by the definition and purpose of TJ; neither the wording nor the goals of TJ preclude the inclusion of businesses in accountability efforts. Moreover, TJ processes have included what has been

[5] The process aimed to elaborate a business and human rights treaty was established by the United Nations Human Rights Council Resolution 26/9 of June 2014. The resolution established an open-ended Intergovernmental Working Group with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (United Nations Human Rights Council, Resolution 26/9, 25 June 2014, A/HRC/26/L.22/Rev.1)

termed “corporate complicity” in the human rights violations of repressive states and in armed conflict. Indeed, the very origin of TJ in the post-Holocaust Nuremberg Trials included recognition of the role businesses had played in HRVs, leading to the “industrialist trials” carried out by Allied Forces. Nonetheless, scholars and practitioners have failed to recognize the efforts to include past involvement of economic actors in human rights violations as an integral part of TJ (Payne and Pereira 2015).

The lack of visibility of the TJ projects may result from the fragmented nature of the study of business and human rights. Over the past several years, two sets of scholarship have emerged and evolved separately (Payne and Pereira 2016). One – business and human rights -- looks at contemporary issues; the other – transitional justice -- examines accountability for past perpetrators of state violence without considering businesses’ role in those HRVs. Scholars and practitioners working in these two areas have not traditionally engaged in dialogue and, as a result, have failed to establish the substantive links between these sets of problems. As a result, these literatures fail to recognize enduring patterns: the thread that links past and current abuses by businesses; the role that business has played in financing, sustaining, and collaborating in state violations and armed conflict over time; and the impunity that has protected businesses from accountability for HRVs.

The literature on business and human rights in the current global context aims to investigate the patterns of current abuses or how to prevent them. Also, it looks at which sectors of industry, countries, or regions are most likely to perpetrate these violations; and what corporate, state or global policies or practices are most likely to prevent or reduce them. These studies are mainly focused on current dynamics of corporate wrongdoings but do not look at the origins and patterns of corporate violence during non-democratic times. Meanwhile, the transitional justice literature that has sprung up to deal with accountability for past human rights abuses in dictatorships and armed conflict has focused almost exclusively on violence carried out by state forces and their paramilitary allies or rebel groups. Accountability for corporate complicity in authoritarian and civil conflict situations has been referred to as the “missing piece of the puzzle, to pursue the full spectrum of justice and remedy for authoritarian and civil conflict periods.” (Bohoslavsky and Opgenhaffen

2010:160). The lack of scholarly dialogue is replicated among human rights and transitional justice practitioners. In the deliberations over the content, scope, nature and form of a future international instrument of international human rights law regulating the activities of transnational corporations and other business enterprises (TNCs and OE),[6] scant attention has been paid to past patterns of corporate complicity in gross violations of human rights during dictatorships and armed conflict.

Attempts to bridge the gap between transitional justice studies and business and human rights are fairly recent, and they have focused particularly on ways to include corporate complicity in transitional justice contexts. Although TJ practitioners and academics have mainly focused on state actors and their associates (such as paramilitaries) or rebel forces, an emergent wave of studies has targeted business complicity. As we discuss in several sections of this paper, our research has revealed efforts by human rights practitioners to implement groundbreaking strategies to advance accountability mechanisms for business human rights violations in all regions of the world. In addition, scholars such as Carranza (Carranza 2008), Gray (Gray 2007) Michalowski (Michalowski 2013), Verbitsky and Bohovslasky (Verbitsky and Bohoslavsky 2013, 2015), and Payne and Pereira (Payne and Pereira 2015, 2016, 2018) have begun documenting accountability efforts for business human rights complicity in academic publications. This paper attempts to further connect the heretofore disparate business and human rights and transitional justice fields through the exploration of an international binding instrument.

It does so by introducing the Corporate Accountability and Transitional Justice (CATJ) database[7] (Part II). The article is grounded in empirical evidence

[6] Business complicity in TJ received some attention only in the second session of the WG in October 2016. Alfred de Zayas, UN Independent Expert on the Promotion of a Democratic and Equitable International Order, addressed the need of the new treaty to regulate business behavior in the context of conflict and authoritarian regimes. See also contributions by ANDHES, CELS and Dejusticia to the discussion: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/WrittenContributions.aspx>; <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVI/CentrodeEstudios_Legales_y_Sociales.pdf>; <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/PanelIV.aspx>.

[7] The CATJ database includes cases where businesses have been named in non-judicial and judicial transitional justice mechanisms (truth commissions, justice and peace process in Colombia and judicial actions) as being complicit with abuses committed in the course of an armed conflict or an authoritarian regime.

derived from this database that reveal certain aspects of corporate complicity with HRVs in the context of authoritarian regimes and civil conflicts[8]. The data collected by both practitioners and academics in the CATJ suggests that business complicity has been a key component of the violence used during authoritarian regimes and civil conflicts.

The findings from the database suggest that current developments in corporate complicity in TJ contexts can inform the discussion on the scope and content of the international binding instrument. In section III of the article we look at the main principles of transitional justice to achieve its goals. We focus on states' obligations arising from their duty to protect against, respect, and remedy the HRVs by state and non-state business entities. Our proposals are elaborated in the form of general elements rather than specific provisions to be included in the treaty[9]. Specifically, we promote: judicial accountability and access to justice; non – judicial forms of accountability; inclusion of domestic companies along with TNCs; collective reparations; extraterritorial accountability; and the establishment of a monitoring and supervisory body.

1. Corporate Accountability and Transitional Justice: The database

The Corporate Accountability and Transitional Justice database is the result of a joint project between academics and practitioners[10]. The University of

[8] Most of the evidence presented in this document are preliminary results of three *action research* projects implemented by the University of Oxford with the human rights organizations Andhes, Cels and Dejusticia. This paper builds on Andhes's written submission to WG's second session, mentioned in footnote 6.

[9] Our focus on state obligations regarding business accountability in transitional justice does not mean that we propose that the treaty should exclusively regulate state obligations in contexts of gross human rights violations. We are aware that there is an intense debate as to whether a binding instrument should establish obligations only for States or duties that would be directly incumbent on companies themselves (ICJ 2016: 7). Similarly, there is an important debate on the type of rights the global treaty should cover. Particular, some actors such as Ruggie (Ruggie 2013)) proposes that it should address only gross human rights violations. We do not address these debates here as they are beyond the scope of this piece. However, we should clarify that we do not necessarily agree with these restrictive views.

[10] The authors acknowledge the funders of the Project for their invaluable support: Open Society Foundation and the ESRC Knowledge Exchange Impact Acceleration Account. In addition, a number of individuals provided assistance in finding and coding cases for the CATJ. This list includes: Andhes Research Assistant Cynthia Cisneros; Oxford University researchers Kathryn Babineau and Julia Zulver; University of Minnesota Mondale School of Law students Mary Beale and Ami Hutchinson; and Dejusticia researcher Lina Arroyave, and Dejusticia interns: Paula Szy,

Oxford, the University of Minnesota, ANDHES and CELS in Argentina and Dejusticia in Colombia have collaborated to identify and code cases of corporate complicity in HRVs during dictatorships and armed conflicts throughout the world. The project aims to track judicial and non-judicial responses to corporate complicity, and includes the so-called "industrialist" and slave labor cases in Nazi Germany up to the current conflict in Colombia. In addition to mapping where accountability has occurred, the project further considers the type of accountability, and the outcome of those accountability processes for victims. In addition to generating statistical analysis to consider when, where, why, and how accountability for past corporate abuses is possible, the project aims to identify a set of models that could be adapted to gaining victims of such abuses remedy in other contexts.

The database has four subsets of data: (i) a global dataset that includes all judicial actions cases involving corporate complicity in HRVs in past authoritarian regimes and armed conflicts; (ii) a global dataset of final truth commission reports that include reference to corporate complicity in past human rights violations; (iii) a country dataset for Argentina that includes Allegations of business complicity found on judicial actions against state actors in four provinces of Argentina; and (iv) a country dataset for Colombia, including allegations of business complicity derived from paramilitary leaders' testimony in the *Justicia y Paz* prosecutorial process.[11]

The CATJ includes a total of 874 observations of companies identified for their involvement in HRVs in 37 countries that transitioned from authoritarian rule or armed conflict between 1945 and 2017. Certain countries, owing to the particular mechanisms used, register a high concentration of observations: Colombia (460), Brazil (123), Guatemala (47), Liberia (37), South Africa (36), and Chile (23). Three types of TJ mechanisms were coded: (i) truth commissions (335 cases); (ii) judicial actions (112 cases); and (iii) the *justicia y paz* process in Colombia (460 cases).

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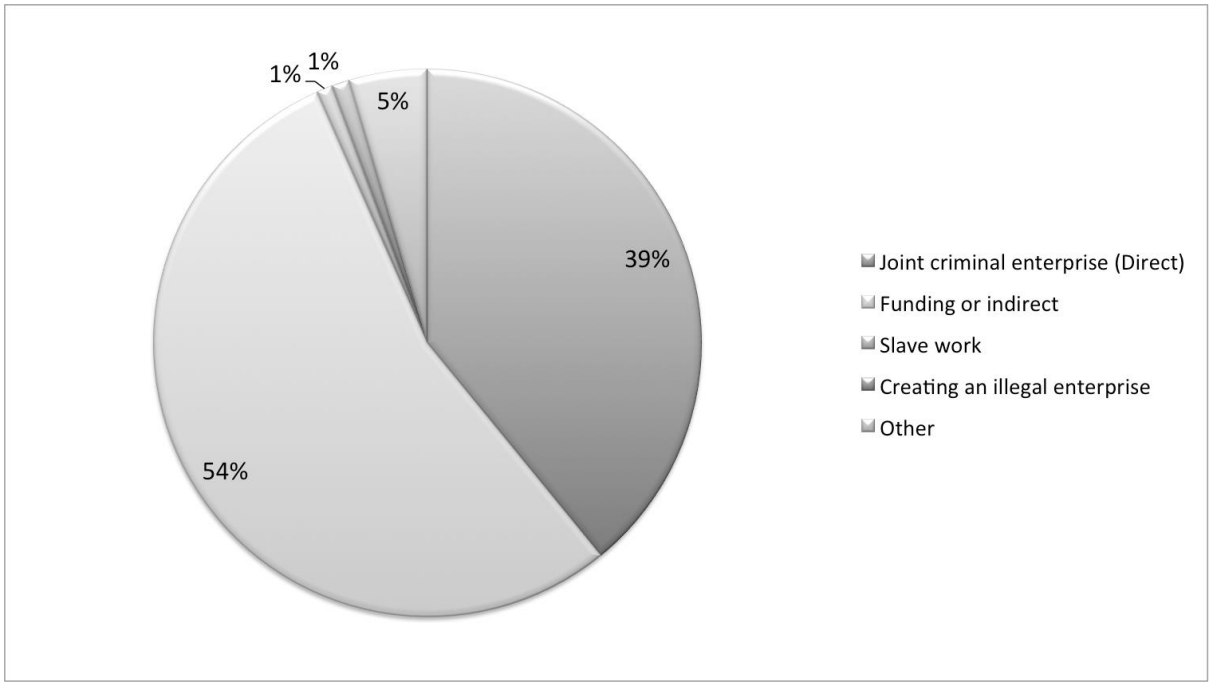
[11] The research team is in the process of including a fifth subset of cases: a multi-country dataset of judicial actions involving corporate complicity in Holocaust HRVs. Although the cases have been coded, the team is in the process of cleaning and analyzing the data and thus did not include the results in this article.

The CATJ limits the definition of complicity to the four types emerging from existing case law (Maassarani 2005):

- Joint criminal enterprise (Direct company involvement in the abuse), e.g. use of violence by security personnel inside the company's factories; forced displacement
- Slave work and other labor-related HRVs
- Funding or indirectly participating in the abuses (with knowledge of results) e.g. Bruno Tesch and Zyklon B in Nuremberg; Swiss Banks in South Africa during Apartheid
- Creating an illegal enterprise, e.g. "blood diamonds" in Sierra Leone

The CATJ reveals business participation in all four types of complicity, with more than half (54%) of the recorded cases identified as indirect involvement in the violations, and 39% as a joint criminal enterprise (direct involvement) between business and state actors (or paramilitary forces).

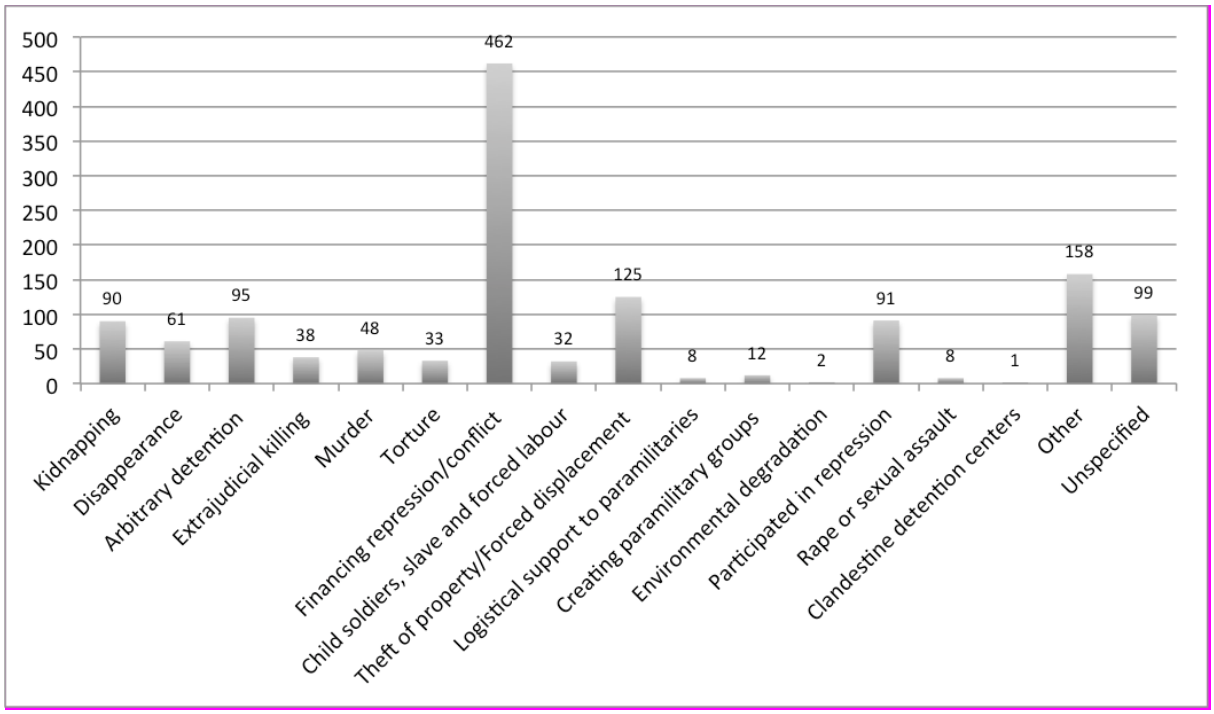
Graph 2. Type of complicity



Source: Corporate Accountability and Transitional Justice database, 2017

Although a high proportion of cases involve gross HRVs (mainly physical integrity rights, or crimes against humanity), the database also reveals environmental degradation as part of the atrocities suffered by people in the course of a conflict or authoritarian regime. This dimension of atrocities affects the social, economic and cultural rights of peoples. Further exploration will be required in the future to consider the implications of business behavior in the fulfillment of these human rights. The distribution of violations is summarized in Graph 2 below.

Graph 2. Distribution of cases of corporate complicity by type of abuse



Source: Corporate Accountability and Transitional Justice Database, 2017.

In its initial phases, the CATJ has focused in-depth on cases of corporate complicity in Colombia and Argentina[12]. In Colombia, business complicity has occurred in the midst of the internal armed conflict and has involved abuses committed by two parties in the conflict: the official armed forces (e.g. Occidental Petroleum and the Santo Domingo massacre[13]) and paramilitary groups (e.g.

[12] Argentina and Colombia are the two countries in the database with the highest number of judicial actions against businesses (18 and 26 respectively).
[13] See <http://www.eltiempo.com/archivo/documento/MAM-997669>.

Chiquita Brands and Dole)[14]. The *Justicia y Paz* rulings showed a particular concentration of cases in the northern part of the country (the Departments of Chocó, Antioquia, Córdoba, Norte de Santander and Cesar), and in one particular sector of the economy (cattle ranchers), allegedly involved in 25% of the cases. A total of 439 businesses were mentioned by paramilitaries as being allegedly involved in forced displacement, homicide, the creation and provision of logistic assistance to paramilitary groups. Surprisingly, from the 186 cases with prosecutorial activity, 31 judicial actions concentrate in Colombia. However, these actions have rarely resulted in convictions and accountability.

In Argentina, business complicity in HRVs occurred during the last dictatorship (1976-1983) as documented from the very beginning of the democratic transition by the CONADEP (National Commission on the Disappearance of Persons) in its *Nunca Mas* report. The report identified eleven companies involved in killing, kidnapping, disappearance, arbitrary detention, and torture. Moreover, research conducted by academics and practitioners suggests that the CONADEP underrepresented the level of corporate complicity, by identifying at least 47 companies that appear to have been involved in gross violations of human rights during that period[15]. A report generated by the National Ministry of Justice, the human rights organization CELS, and FLACSO University, claims that killing, torture, and disappearance of workers was a systematic practice in which businesses and the state were engaged during the dictatorship[16]. Despite this knowledge, the memory, truth and justice process in

[14] The links between businesses and the left wing FARC guerrilla group are still to be determined as part of the TJ mechanisms that are under design in Congress during the writing of this article.
[15] The report "Responsabilidad Empresarial en Delitos de Lesa Humanidad: Represión a Trabajadores Durante el Terrorismo de Estado" conducted by the National Ministry of Justice, the Center for Legal Studies and FLACSO, accounts for business complicity of 22 companies. In the meantime, our own database contains business complicity allegations of 29 companies which are included in the paper "*Un modelo de investigación para avanzar en la rendición de cuentas por complicidad corporativa en violaciones de derechos humanos en regímenes autoritarios. Estudio de caso sobre Argentina"* (ANDHES, Oxford, CELS). Four companies are duplicated in both studies (Ledesma, Minera Aguilar, Ingenio Fronterita e Ingenio Concepción).
[16] Ministerio de Justicia y Derechos Humanos de la Nación (MJDDHH), Centro de Estudios Legales y Sociales (Cels) y Facultad Latinoamericana de Ciencias Sociales (Flacso - Argentina). *Responsabilidad empresarial en delitos de lesa humanidad. Represión a trabajadores durante el terrorismo de Estado.* Tomo I y II. Ed Ministerio de Justicia y Derechos Humanos de la Nación. Noviembre 2015.

the country has mainly focused on the prosecution of state and not non-state economic actors.

The CATJ reveals the particular forms that corporate complicity took form in particular regions of Argentina. The *CELS Report* shows important national patterns of business complicity. For example, it reveals that companies involved in HRVs operated in a wide range of sectors of the economy. Also, it reveals corporate violence occurred in both rural and urban areas. Meanwhile, our in-depth research on the Northwestern region suggests business complicity was mainly concentrated on both a reduced number of industries and in rural areas. For example, in Tucumán, 14 of the 22 companies in the database are sugar mills. In Jujuy, three of four companies identified as complicit in HRVs are from the sugar production sector. In these provinces, violence targeted workers in rural areas in which large extensions of land and the small villages on it were fully controlled by the dictatorship's repressive apparatus.

This overview of the CATJ provides the background to the empirical study. In the next section of the paper, we examine particular elements of a binding treaty that could advance the TJ efforts already underway in piecemeal fashion. Underlying our analysis is the argument that a binding agreement would force businesses to recognize their obligations under international human rights law. It would further engage TJ practitioners and scholars in the systematic investigation and documentation of abuses in which businesses engaged during periods of weak rule of law (authoritarian regimes and armed conflict). A binding treaty would thereby advance efforts at accountability to promote non-recurrence of violence and to address the rights of victims to truth, justice, and reparations. We incorporate findings from the CATJ below in making these arguments.

2. Elements for a binding treaty

In this section, we discuss a series of elements that the binding instrument should incorporate to achieve accountability for business complicity in TJ contexts. The elements presented in this work aim to reaffirm the general duty of the state to respect human rights. In particular, they refer to the State's obligation to investigate and prosecute alleged perpetrators of massive HRVs and to punish those found guilty; to the right to know the truth about past abuses and the fate

of disappeared persons; and, the right to reparations for victims of systematic HRVs.

This general duty means that states should take all necessary and adequate measures to ensure accountability for business complicity with massive. We are not using here the term *complicity* in a strictly legal sense, which refers, in general terms, to the position of the criminal accomplice. We use the term *complicity* in a broader sense to refer to the different ways in which companies and/or their top officials are implicated, directly or indirectly, in the perpetration of massive HRVs[17]. That approach has been used in previous developments of business and human rights regulations. The UNGPs, and earlier initiatives such as the UN Global Compact[18], recognize that it is not enough for businesses to avoid causing adverse human rights impacts, but they also need to avoid contributing to HRVs (UN Global Compact 2000; United Nations 2011). According to Principle 2 of the UN Global Compact "[c]omplicity basically means being implicated in a human rights abuse that another company, government, individual, group, etc is causing."

We contend that without binding instruments, and the reliance instead on soft-law or voluntary principles, states have failed to address systematic patterns of abuses by business. A treaty would recognize the duty of states to address the rights of victims of atrocity – whether carried out by non-state business or state actors – to truth, justice, reparation, and guarantees of non-recurrence. The key elements to be emphasized in a binding agreement that emerge from our empirical study that advance TJ goals include: examined in this article are: 1) judicial accountability and access to justice; (2) non-judicial forms of accountability; (3) non-discrimination in terms of company ownership; (4) collective reparations; (5) extra-territorial enforcement duty; and (6) monitoring. These six elements also link the two existing approaches to corporate complicity in human rights violations in TJ and non-TJ contexts.

[17] For a discussion on the advantages of using the term in a non-legal sense, see for example ICJ 2008 Vol 1: 3 <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>.

[18] "The Global Compact (GC) is a voluntary initiative [launched in 2000] intended primarily for corporations to pledge commitment to human/labour rights and environmentalism (and anti-corruption after 2004)" (Lim and Tsutsui 2012). It is part of the global effort to affect corporate behaviour.

2.1 Judicial Accountability and Access to Justice

According to International Human Rights law, any victim of human rights violations has the right to an effective remedy, to know the truth and obtain fair compensation. The fulfillment of this right depends, in general terms, on the existence of a legal framework establishing legal accountability of human rights perpetrators and the availability and effectiveness of legal remedies to provide redress to victims of HRVs and their relatives.

In the TJ field, trials for serious violations of human rights have been a fundamental tool in the reconstruction of democracy after authoritarian rule and armed conflict. Particularly, the investigation and prosecution of HRVs arise from international legal obligations that can be traced back to the Nuremberg trials (Anon n.d.; Bernaz 2017; Teitel 2003). However, judicial corporate accountability has been marginal in TJ contexts.

The evidence included in our database of judicial actions against both companies and individuals acting on behalf of companies suggests a low level of both judicial activity and judicial accountability. Of the 874 cases recorded in the CATJ, we found prosecutorial activity in only 136 cases (13%). Only 23% (37) had significant accountability results in terms of convictions of either companies or individuals working for a company. Settlements, arguably another form of accountability, have occurred in 17% (27) of the cases. Although there are only 4% (7) of cases with acquittals, the lack of business accountability is observed in the small number of cases mentioned above in which any prosecutorial activity occurred, as well as the outcomes of those that were taken to court: 28% (48) of judicial actions were dismissed, and in 21% (35) of the cases a final decision is still pending.

Notably, scarce judicial investigations against companies and individuals working for companies exist in contexts of intense judicial activity against state and paramilitary actors. For example, in Chile as of December 1, 2015, there are 1,373 state officers on trial, indicted and convicted. In sharp contrast, only one Chilean businessman has faced conviction despite 16 companies listed in the two truth commission processes as being involved in violations. Similarly, Argentina, another judicial accountability country leader, only 19 judicial actions have been

put forward and only two companies and one top officer of another company have been convicted for their involvement in atrocities[19].

This lack of legal accountability also occurs in countries where prosecutorial activity has provided evidence suggesting the involvement of companies in massive violations of human rights.

This context of impunity for the corporations is compounded by shortcomings of the legal systems of several states (Oxford Pro Bono Público 2008). As the International Commission of Jurists (International Commission of Jurists 2015:19) argues in relation to corporate accountability, many states do not establish provisions in their legal frameworks establishing legal liability of legal persons and clear provisions of liability for top company officers, including main shareholders, CEOs, managers of companies and other executives like chiefs of security.

Regarding criminal responsibility of companies, in most countries, this does not exist and where it does it only covers a heterogeneous set of serious human rights abuses and not others (International Commission of Jurists 2015:20). Also, the rules or hurdles set in jurisprudence to attribute criminal responsibility to a corporation differ across jurisdictions (International Commission of Jurists 2015:20). Although criminal responsibility of individuals such as company CEOs and top officers fall within the scope of criminal law, how to legally attribute criminal responsibility to those individuals on account of corporate crimes remains unclear and subject to insufficient state practice (International Commission of Jurists 2015:20). TJ contexts pose further challenges to criminal responsibility of both corporations and company officers. The connection of the individual crimes with a broader and systematic situation of HRVs has to be demonstrated. Such factual linkages should be elaborated under a legally sound doctrine of criminal responsibility.

[19] Research conducted by academics and practitioners suggests that at least 47 companies might have been involved in gross violations of human rights. The report “Responsabilidad Empresarial en Delitos de Lesa Humanidad: Represión a Trabajadores Durante el Terrorismo de Estado" conducted by the National Ministry of Justice, the Center for Legal Studies and FLACSO, accounts for business complicity of 22 companies. In the meantime, our own database contains business complicity allegations of 29 companies which are included in the paper “*Un modelo de investigación para avanzar en la rendición de cuentas por complicidad corporativa en violaciones de derechos humanos en regímenes autoritarios. Estudio de caso sobre Argentina”* (ANDHES, Oxford, CELS). Four companies are duplicated in both studies (Ledesma, Minera Aguilar, Ingenio Fronterita e Ingenio Concepción).

Another feature that a legal accountability framework should incorporate is civil liability of companies for their involvement in human rights violations in TJ contexts. Although laws providing for civil remedies are common to most legal systems in the world, some substantive, procedural and practical obstacles often undermine the potential of civil remedies as an effective accountability mechanism (International Commission of Jurists 2015:22). As discussed above, some civil actions have attempted to make businesses accountable, but their overall outcome is not positive. That outcome is in part due to the inadequacy of private law regimes to address HRVs but also due to the imbalance of rights and privileges granted to corporations, particularly TNCs, and the relatively weak regime of private law to be used in holding them accountable, as the ICJ has pointed out.

There is one particular aspect of private law that represents an obstacle for accountability in TJ contexts. Usually, civil legal remedies are subject to statutes of limitations, which in practice operate as temporal barriers to access to justice. Both the nature of systematic HRVs and the complexity to investigate them call for the removal of such a barrier. The inapplicability of statutes of limitations in international law has been established by some instruments and human rights bodies such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Traditionally, this mandate has been incorporated into domestic criminal legal systems but not private law systems. One of the few states that has incorporated this international prescription to its private law regime is Argentina. In 2015 a new civil code came into force and established, among other substantial modifications, that any civil actions connected to crimes against humanity against natural and legal persons are not subject to the statute of limitations.

The prohibition of the statute of limitations should also be expanded to other public law regimes. As discussed by the ICJ (International Commission of Jurists 2015) specific laws on consumer protection, environmental harm and labor relations also generally establish grounds of legal liability for corporations, which may also be used to pursue business accountability. In fact, labor laws have been used as an accountability mechanism in Argentina in TJ contexts (Payne and Pereira 2016). In February 2012 in the “Ingegnieros” case, an

Appeals Labor Court dismissed the statute of limitations claims of a legal action brought to the court. Maria Gimena Ingegnieros, the daughter of Enrique Roberto Ingegnieros, brought the case. She requested financial compensation for her father's disappearance during the civil-military dictatorship. She claimed that Techint SA should pay compensation given its role as co-author of the crime of disappearance on the company's grounds. The company has denied the claim and further contends that the worker safety law, under which the case was brought, has a two-year statute of limitations that had long ago run out. The Appeals Court rejected that claim, declaring that statutes of limitation do not apply to compensation claims linked to crimes against humanity.[20] The April 2007 SIDERCA case, brought by Ana María Cebrymsky, the wife of Oscar Orlando Bordisso, heard by the Supreme Court of the Province of Buenos Aires follows a similar logic. Bordisso disappeared shortly after he left work in 1977. In 1995, his wife claimed compensation from his employer – SIDERCA – under Argentine labor law, arguing specifically that the country's work safety law obliged the company to protect her husband from entering and exiting the work site. The company rejected the claim and argued for the dismissal of the legal action due to the statute of limitations. The first instance tribunal accepted the claim against the company. On appeal, the company lost again in the Provincial Supreme Court. The Court ordered compensation for Bordisso's widow.

It should be noted that the implementation of effective legal remedies does not depend only on adequate legal accountability frameworks in TJ contexts. According to academic studies and human rights organizations reports, structural conditions also facilitate impunity regarding business involvement in human rights violations (Payne and Pereira 2016). In many countries, corporate elites are part of the ruling and judicial elite structure, recreating a context of impunity (Payne and Pereira 2018). Also, the economic sustainability and development of some states depend on corporate actors linked to massive human rights violations (Abrahams 2013). Corporations use their economic power to influence directly or indirectly the justice system to secure impunity (Paul and Schönsteiner 2013:85; Sánchez 2013:115). Businesses, particularly TNCs or large domestic firms, have

[20] See latest developments here <http://www.diariojudicial.com.ar/fuerolaboral/Se-le-vino-la-noche-a-empresas-donde-hubo-desaparecidos-20120215-0002.html>.

resources to hire expensive law firms and legal teams that can draw out cases and engage in jurisdictional forum shopping and other lengthy judicial processes; these resources are usually unavailable to the victims of abuse or their legal representatives. Finally, some TNCs and OE have used illegal means to ensure impunity by intimidating, threatening or paying victims and their families and bribing members of the judiciary (Payne and Pereira 2016).

The binding instrument should incorporate the obligation of states to create an effective legal framework of business accountability in TJ contexts. The framework should incorporate the obligation of States to establish criminal liability of both natural and legal persons, as well as clear standards to attribute such criminal responsibility to both types of persons. Also, the state should be mandated to adapt their private law regimes to serve as a useful mechanism for accountability. Particularly, states should remove statues of limitations of both civil and criminal actions connected to crimes against humanity. Finally, state obligations should include the establishment of any positive measure to remove structural barriers to access to justice and remedies that victims and their relatives might face.

2.2 Non – judicial accountability

Citizens in societies affected by massive and systematic HRVs have the right to know what happened to victims during violent times. Although it has not been an object of a specific international convention, it is included in a wide range of international and regional human rights instruments, and it has been developed by monitoring bodies of some human rights treaties (Paterson 2016). The right to truth has an individual and a collective dimension. It entitles both victims and their relatives to know the facts and circumstances of the specific crimes that affected them and society in general to know the truth about violence and HRVs [21]. Although it has not been the object of a specific international convention, this right is considered either derived from other well-established rights in international

[21] The Inter-American Commission on Human Rights defines this as “a collective right that ensures society’s access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted.”() Cited in Engstrom 2016: 11.

human rights law, such as the right to a remedy; or, to be an autonomous right, independent of or in addition to these other rights. Nevertheless, the core elements of the right are well accepted.

Truth Commissions (TCs) are one of the most frequently non-judicial tools used to address the right to know about massive human rights violations. TCs are generally aimed to clarify and officially acknowledge the truth about massive HRVs (Hayner 2001). In that regard, they seek to determine "*the facts, root causes, and societal consequences of past human rights violations"* (The International Center for Transitional Justice n.d.). Their finding and recommendations might be used for criminal justice, reparations, and institutional reform processes to redress past abuses and prevent new ones from occurring.

It is generally argued that TCs have not addressed the involvement of corporate actors in human rights violations. However, in our research, we reviewed all of the available final reports produced by truth commissions around the world and found that just over half of them (56%; or 22 out of 39 final reports) identify the role of economic actors in human rights violations. The distribution of these mechanisms is not uniform across the world. There is a high concentration in Latin America with 12 TCs in 10 countries.

The evidence collected in our research suggests three crucial barriers to the implementation of strong TCs that can account for business complicity. First, no national truth commission has included the role of business in human rights violations of former authoritarian regimes or armed conflict as part of the official mandate. When truth commissions have investigated corporate complicity, this has occurred in a more ad hoc manner. A treaty would no doubt encourage future truth commissions to include human rights violations by business as a significant area for addressing the rights of victims to truth, justice, and remedy.

Although truth commissions have not included corporate complicity in their formal mandates, over half (56%) have not only carried out investigations but have also named names of companies and economic actors involved in violations. The CATJ contains a list of 321 names of companies named in the final truth commission reports of 19 countries around the world. By identifying by name those economic actors engaged in human rights violations, truth commissions have held them at least symbolically responsible for their role (in order of frequency) in financing repression, arbitrary detention, kidnapping,

torture, extrajudicial killing, forced disappearance, and other international human rights violations. A treaty would codify into law the practice of holding economic actors responsible for gross violations of human rights. The truth commission investigations would initiate a process that courts would be expected to pursue according to the binding agreement.

As it is, the CATJ shows that truth commissions have not tended to include judicial investigations as a follow-up to their findings on corporate complicity. This is, thus, the third block. Only 12 truth commission reports in 30 countries (or 40%) establish specific recommendations regarding corporate complicity. All of them address in vague language the need for businesses to comply with human rights standards. Two (East Timor and South Africa) call on economic actors to make voluntary payments to a reparations program. Only two others (Brazil and Liberia) mention investigation to determine judicial action against businesses. In the absence of binding agreements in international law regarding business and human rights, truth commissions thus experience some constraint in terms of recommending costly action that might curb businesses from engaging in future violations or fulfill victims' rights to truth, justice, and remedy. A binding instrument would likely increase truth commissions' investigations into corporate complicity in past HRVs and to include in their final recommendations further judicial investigations.

The most recent truth commission – the 2012 National Truth Commission in Brazil – suggests that increased global attention to business HRVs may prompt movement in the direction of holding businesses accountable. The initiative came not from the National Commission itself, however, but the Sao Paulo Commission. The Sao Paulo Commission included corporate complicity in its original mandate and then actively pressured for its investigation to be included in the final national report. The Sao Paulo Commission identified nearly all of the 123 economic actors named in the final national report. That commission, in turn, identified over one-third of the full list of economic actors named in all truth commissions. The National Truth Commission in Brazil, moreover, included in its recommendations the judicial investigations into cases of corporate complicity. One set of investigations – of the Volkswagen subsidiary in Sao Paulo, is underway due to pressure and information from victims who had testified in the Sao Paulo Truth Commission. The success in the Brazil case has depended on

local level organization and mobilization of workers in Sao Paulo. The same sort of civil society initiative has overcome obstacles -- the absence of a mandate, lack of clear international law to apply, and specific recommendations to hold economic actors accountable under that law – that we have seen block other truth commission initiatives.

Our findings suggest the need to establish specific state obligations to implement effective mechanisms to account for the participation of TNCs and OE in massive human rights violations in order to guarantee the right to truth of the victims and society in general. Half of the countries that implemented TCs in transitional contexts have ignored this issue. Furthermore, most TCs do not establish specific mandates to account for the involvement of corporate actors in massive human rights violations. Also, not all TCs that provided names of TNCs and OE syndicated as perpetrators of human rights violations. Finally, the evidence suggests that it is necessary to establish guidelines to determine the types of recommendations that TCs should include to ensure the right to truth, access to justice and reparation for victims and their families of massive violations of HR.

2.3 Treaty scope: Transnational and national companies' regulation

One of the main discussions about the treaty refers to the kind of business enterprises it should regulate. The controversy revolves around whether the term 'other companies' refers exclusively to companies whose activities are transnational (TNCs) or if it includes local companies regulated by national law[22]. This question, called *the depth question* (Deva 2017) was triggered by a 'footnote' in the resolution of the Human Rights Council establishing the WG which states that *other business enterprises* denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.

[22] For a discussion on the implications of this discussion see <http://www.icj.org/wp-content/uploads/2015/07/Global-Report-ScopeBusinessTreaty-2015.pdf>.

Much of the literature on the topic of corporations and human rights focuses on the concept of the ‘transnational corporation.' This is explained by the concern in the UN during the 1980s with foreign corporations operating in the developing world (Clapham 2006:199). The ‘transnationality’ of corporations has led to the possibility of companies having their headquarters in one country, being incorporated in a second country, operating in a third and fourth country, with workers from a fifth country and shareholders from a sixth state (Clapham 2006:200). This management arrangement increases the difficulty of regulating their operations, which is why the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (United Nations Sub- Commission on the Promotion and Protection of Human Rights 2003) and the Guiding Principles on Business and Human Rights (United Nations 2011) focus on creating a framework that is particularly concerned with transnational, as oppose to national, companies (Ruggie 2013).

However, despite the fact that corporate abuses by TNCs are more broadly publicized and targeted by civil society organizations, this does not mean that national companies are not involved in human rights abuses. They have, however, been largely overlooked by the media and civil society because of their low visibility at a global level. This provides a perfect scenario for domestic companies to commit abuses without monitoring beyond the state where they are incorporated. It further fails to recognize the universal right of victims for protection against human rights abuses, regardless of the national origin of the violator.

The current trend seems to move towards the adoption of instruments where all companies, not only TNCs, must be included. As an example, the OECD Guidelines for Multinational Enterprises (1976) and the Tripartite declaration of principles concerning multinational enterprises and social policy (1977) included only TNCs, but the review of both instruments in the year 2000 extended its scope to other companies. More importantly, the two standard setting initiatives at the UN level preceding the current treaty process have moved in this direction (International Commission of Jurists 2015). The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights defined “other business enterprises” as “any business entity, regardless of the international or domestic nature of its activities,

including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity." (United Nations Sub- Commission on the Promotion and Protection of Human Rights 2003:20). Similarly, the UN Guiding Principles on Business and Human Rights, established in its general principle that the principles "apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure." (United Nations 2011)[23]

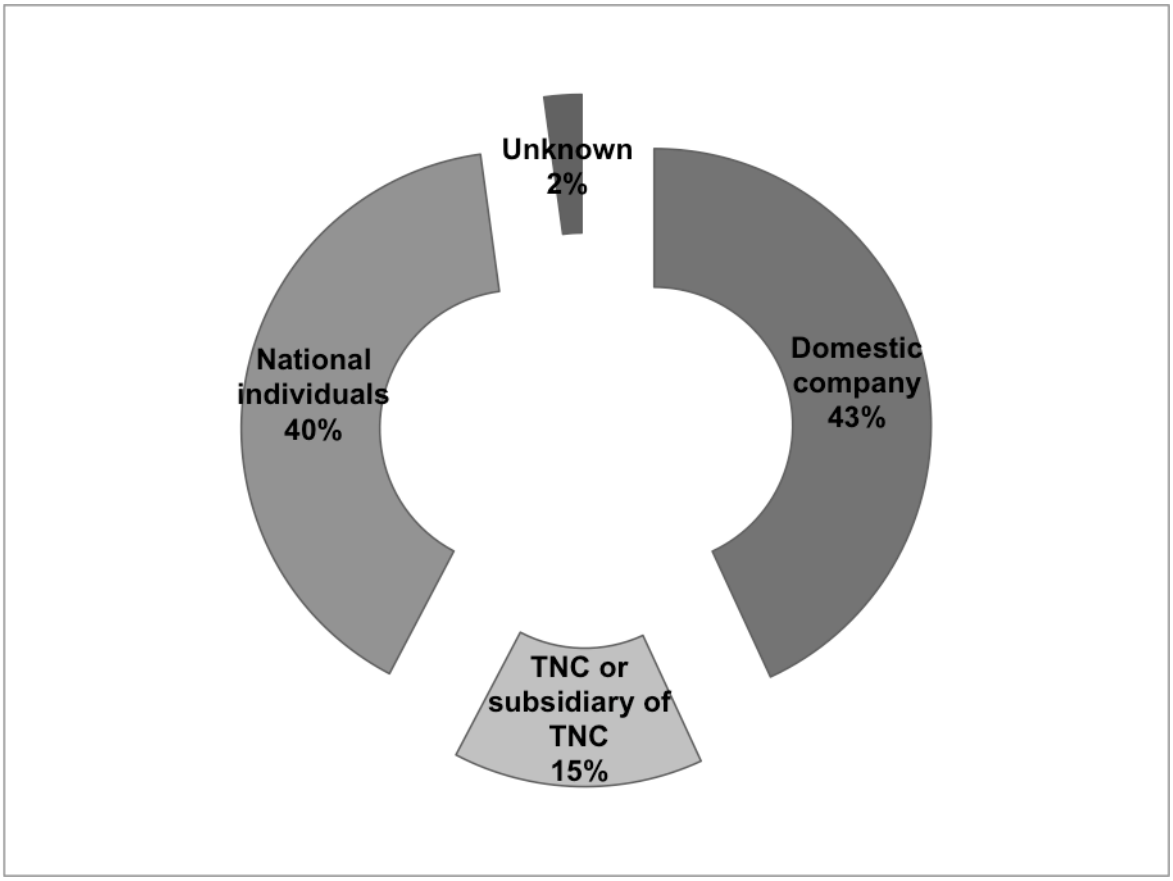
The CATJ data further reinforce the notion of the international regulation of TNCs[24] as well as national firms. National corporations have been the protagonist of HRVS in TJ contexts. As Graph 3 below shows a higher concentration of domestic firms (43% or 375 companies) than transnational enterprises (15% or 127), from diverse sectors of the economy,[25] have been implicated in HRVs in judicial and non-judicial transitional justice mechanisms.

Graph 3. Nationality of firms

[23] Report elaborated by the Special Representative of the Secretary General on Business and Human Rights (which worked between 2005 and 2011) and endorsed by the UN Human Rights Council in 2011.

[24] They are, after all, some of the most powerful forces in the world economy; and they present a challenge in terms of jurisdiction and regulation that they abide by.

[25] The other 42% of cases involve domestic individuals (40%) and unknown nationality of the business (2%). The sectors of the economy more represented in the sample are: Agriculture (31% (271)), natural resources (14% (120)), Consumer products/retail (10% (85)), Finance (6% (53)).



This data suggests that the regulatory efforts need to be encompassing and not only focus on the role and operation of TNCs. It is also important to note the arbitrary distinction at times of ownership. Some companies in Colombia, for example, were domestic at the beginning of the conflict but by the end of the conflict had become Colombian-headquartered TNCs.[26]

Also, in the case of Argentina, our preliminary findings suggest that corporate engagement in serious HRVs has not been limited to the actions of TNCs. Indeed, we observe a high participation of domestic enterprises in the commission of these crimes. In Argentina, there is information linking at least 40 firms, with serious HRVs in the period 1975-1983. In the province of Tucuman, for example, 12 of the 16 companies implicated in HRVs are linked to the sugar industry, the main local economic activity. During this period, according to allegations found in judicial files, various national companies gave over their facilities for military operations and the establishment of Clandestine Centres of

[26] Comments made by Mónica Cortes Yepes of the UNDP at the Universidad del Rosario conference on “Pasos hacia el posconflicto: un análisis desde miradas comparadas,” Bogotá, Colombia, 17 November 2016.

Illegal Detentions and Tortures (CCDs). As an example, some testimonies mention the case of *La Fronterita* sugar mill. In the first case, at least twenty-nine (29) victims were illegally detained and/or tortured in the company's facilities between January 1975 and May 1976. In the second case, at least thirty-one (31) people were victims of illegal deprivation of liberty and/or torture in company grounds between February 1975 and July 1976 and at least five (5) of them are missing. In both cases, the crimes were committed in the context of a constitutional government.[27]

Similarly, in Colombia, from the 28% of cases where companies were involved, only 3% of the cases reported by the Justicia y Paz rulings involved TNCs. The other 25% were domestic companies working in the agriculture and retail sectors of the economy. For example, there is the case of several companies working in the Urabá region of Colombia (northern part of the country) that worked hand in hand with the paramilitary forces to displace Afro-Colombian communities from their collective ancestral lands in order to build large oil palm plantations. Forced displacement was used not only as a war strategy but also as a business strategy. The economic project started in 1999 and by 2005 the companies owned half of the lands (Defensoría del Pueblo 2005; Juzgado Quinto Penal del Circuito Especializado de Medellin 2014).

The evidence suggests that national companies might have been involved in systematic HRVs during both authoritarian governments and conflicts. The provisions of the new binding instruments should be applied to such national companies if it intends to promote accountability and close the impunity gap that benefited those companies. As the ICJ (International Commission of Jurists 2015) sustains, that coverage is the most consistent with the approach followed

[27] El 5/2/1975 el gobierno constitucional de María Estela Martinez de Perón, dio inicio a través del Decreto Nº262/75 al llamado "Operativo Independencia" el cual consistió en la primera intervención masiva de las fuerzas armadas y de seguridad en un plan sistemático de exterminio de opositores políticos mediante la utilización del aparato estatal y de control social a través del terror, llevada adelante con la aquiescencia del gobierno civil en la provincia de Tucumán desde febrero de 1975. Si bien la intervención se produjo durante un gobierno democrático, marcó el compás del creciente proceso de autonomización de las fuerzas armadas respecto de los poderes constitucionales, constituyéndose en el acto preparatorio central del golpe de estado del 24 de marzo de 1976 (REJ Causa: "Operativo Independencia" Expte. Nº 1.015/04 y sus causas conexas y acumuladas jurídicamente) los delitos de lesa humanidad cometidos durante este período están siendo juzgando actualmente en juicio oral y público ante el tribunal oral federal en lo criminal de la provincia de Tucumán.

to date by the United Nations and also with the original aims of ensuring legally binding human rights duties for business enterprises.

2.4 Collective reparations

States have an obligation under international law to provide reparations to victims of massive HRVs (Roht-Arriaza and Orlovsky 2011; van Zyl 2011)[28]. Demands for reparations are prevalent in post-conflict negotiations and, thus, become a crucial TJ mechanism (Roht-Arriaza and Orlovsky 2011).

Reparations in TJ contexts attempt to restore victims to the positions they would have been in had the HRVs not occurred (Roht-Arriaza 2004; Roht-Arriza and Orlovsky 2009). Material reparations include restitutions of: material goods such as land, jobs, pensions restitutions; health rehabilitation, such as medical, psychiatric, and occupational therapy; and monetary compensations such as lump-sums, package of services for victims and relatives, and pensions. Moral reparations include a wide range of initiatives such as official acknowledgment and apologies; disclosure of the circumstances in which HRVs took place and the names of perpetrators; the emplacement of memorials, among others.

Reparations can be established through either judicial procedures or reparation policies. Court-ordered reparations generally entail individualized considerations of damages to each claimant based on the idea of putting the individual back in the position he/she would have been in the absence of the human right violation. Meanwhile, reparation policies to operate either by providing a uniform sum to all victims or through a schedule of amounts for different violations and do not attempt to define or repair the full amount of the losses (Roht-Arriaza and Orlovsky 2011).

Both reparations ordered by courts and reparations policies can be individual or collective. Individual reparations serve as recognition of specific harm to an individual. Meanwhile, collective reparations respond, among others, to collective harms and harms to social cohesion, to re-establish social solidarity,

[28] The victim's legal right to reparation is articulated in the basic human rights instruments, specialized conventions, nonbinding instruments, the Rome Statute of the International Criminal Court (ICC) and in the UN's 2005 Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Roht-Arriaza 2004; Roht-Arriaza & Katharine Orlovsky 2011)

and to maximize the effectiveness of existing resources. The collective aspect of reparations can arise from the fact that they are distributed in a non-individualized way, they include public goods tied to specific communities, or they aim to repair the harm suffered by a particular group (Roht-Arriaza and Orlovsky 2011).

A treaty contributing to business accountability in TJ contexts should incorporate state obligations to guarantee reparations to victims. We would like to focus on one particular aspect of such obligation: the establishment of collective reparations. There is a pattern of business complicity with HRVs in violent times, which reveals that business violence is usually directed against specific groups. The sphere of influence of business operations makes groups like workers, local communities and human rights and community leaders more likely to be targeted in times of repression or conflict. These groups pose a threat to the operation of companies by e.g. asking for increased labor guarantees, opposing the operation of the company in communal lands, or opposing the company's operations because of the negative environmental impact. Some of these groups have even managed to put company operations in stand still. Moreover, repressive regimes and paramilitary forces target them for their perceived left-wing political orientation. In this way, business and state interests to silence these groups collide. For example, in Colombia[29] and Argentina we see a pattern in businesses providing lists of union leaders to paramilitary forces and to state forces. These leaders would later on be kidnapped, disappeared, tortured and killed. And these violent actions would serve to purposes: to eliminate perceived left wing opposition to current power structures, and to eliminate obstacles to smooth operation of businesses. We also see as noted above, that corporate complicity can be concentrated in particular geographic zones and sectors (such as the sugar industry in the north of Argentina or the palm oil industry in Colombia). In Argentina, for example, we found that criminal prosecutions provide valuable evidence of potential business complicity. In our study of 14 rulings and one request of prosecution in the Northwestern region of

[29] One of the emblematic cases in Colombia of collusion of paramilitary and business interests to silence union workers (who were identified by paramilitary forces as members or supporters of left wing guerrilla groups) is the case of Sindicato Nacional de Trabajadores de la Industria de Alimentos - SINALTRAINAL, the union workers of the food industry. There was an ATS lawsuit in the US against Coca-Cola for the role of its bottling companies in Colombia in anti-union violence against SINALTRAINAL workers. The lawsuit was dismissed in 2009. See: <https://business-humanrights.org/en/coca-cola-lawsuit-re-colombia>.

Argentina in which only states officers were prosecuted, we found evidence suggesting that at least 30 companies might have been involved in crimes against humanity. We found that such involvement might account for HRVs against more than 400 individuals[30]. Notwithstanding this evidence, no judicial actions were initiated against companies in these provinces. Only one criminal prosecution was launched against two businessmen in the province of Jujuy.

Similarly, in Colombia, our research on Justicia y Paz processes suggest that paramilitaries confessed to over 400 cases of corporate complicity, but very few cases reach the courts and those that do very seldom reach a favorable outcome for the victims. Only in less than a third of the cases (31%) mentioned by the paramilitaries, there was an explicit order from the court to the prosecutors to start an official investigation. Moreover, from those cases, only in 6% of the cases, a trial was started. However, the few cases that have reached a trial, combined with the recent institutional interest in prosecutions, are important precedents for future litigation. There is, for example, the Chiquita Brands case under the U.S. Alien Torts Statute[31], and some domestic cases like the oil palm companies in the Pacific region of the country, where businessmen were convicted in 2014 for their involvement in forced displacement (the ruling was confirmed in the appeal in 2016).

Because of the losses not only to the direct and individual victims and their families, but to whole communities, collective reparations could provide a response that gets to the developmental set backs of these types of violations.

Unions have been particularly targeted in contexts of massive HRVs. Returning to the case of the northern province of Tucuman in Argentina, unionized workers in the sugar industry became the paradigmatic victims of massive HRVs.[32]. We found that the number of victims of serious human rights violations with business involvement currently amounts to three hundred and fifteen (315) between 1974 and 1977. Around 55% of these cases were workers of the companies. From the total number of victims, around 70% had some kind of union activity. At least 60 of those victims were actively engaged in defense of

[30] Prior to our research, only 42 victims were connected to business complicity involving one company.
[31] See <https://business-humanrights.org/en/chiquita-lawsuits-re-colombia>.
[32] We found that 14 of the 22 companies in the database are sugar mills.

labor rights, while in only seven (7) cases the victims were involved in other kinds of organizations or political parties. As other research suggest, the military government aimed to weaken the active Sugar Industry Workers Union of Tucumán (FOTIA) given their strong organization and resistance to sugar mill companies' internal policies as well as government policies[33].

Meanwhile, In Colombia, some of the most emblematic cases of business complicity with paramilitary groups involve the torture, killing, and disappearance of unionized workers (e.g. Chiquita Brands, Drummond[34], Coca-Cola). By financing the paramilitaries, businesses had access to a "*protection scheme*" that included repression of all social protest coming from union members, activists, community leaders, human rights defenders, or any other individual who was labeled as '*guerrillero*.' The Grupo de Memoria Histórica (GMH) (Group of Historical Memory) was able to document the selective murders of 685 union members. However, the number of unionized workers killed in the course of the conflict is debated. While the GMH records only 658 deaths, the Escuela Nacional Sindical (ENS) and the UNDP recorded approximately 2,800 deaths from 1984 to 2011 (Centro Nacional de Memoria Histórica 2013:46). The ESN has a database of violence against union members that is not open to the public, which is why there is a lot that we do not know about business complicity in violence against union members. Particularly regarding small and medium sized domestic companies and state-owned companies. However, in interviews with the leaders of the ESN, we were told that entire unions were annihilated in the course of the armed conflict.

The new treaty should establish the obligation of state to implement an adequate framework of national remedies for victims of human rights abuse perpetrated directly or indirectly by business enterprises. That framework should establish reparations trough both courts-based mechanisms and policy schemes. Given the particularities of business involvement in massive violations of human rights, such framework should incorporate collective remedies in the sense that

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[33] Nassif, Silvia. Declaración como testigo experto ante el Tribunal Oral en lo Criminal Federal de la Provincia de Tucumán, 22 de junio de 2016. Tesis: "Las luchas obraras tucumanas durante la autodenominada "Revolución Argentina" en el período 1966-1973" (ofrecida como prueba documental por la fiscalía).

[34] See PAX, El Lado Oscuro del Carbón, <http://www.cronicon.net/paginas/Documentos/El%20Lado%20oscuro%20del%20carbon.pdf>.

group such as union should be entitled to claim reparations either in courts or trough more general policies.

2.5 Extraterritorial responsibility

In contexts of TJ, one of the ways to achieve justice and reparations for gross violations of human rights was through judicial processes taking place in countries that had not carried out such violations. This kind of judicial process, usually based on universal principles of justice, has the immediate effect of bringing justice to particular victims and, in turn, contribute to the longer term generation of international pressure. Along with other variables, international pressure and international political opportunities provide the conditions to achieve justice for massive HRVs. In that sense, judicial processes occurring in countries other than those that committed human rights abuses are crucial for TJ, though not very often used. There have been several prosecutions of former Nazis carried out by domestic courts under universal jurisdiction in countries like France (the Klaus Barbie case tried by the Cour de Cassation Française), Israel (the Eichmann trial in Jerusalem), Belgium, and Canada. More recent developments include the appeal to universal jurisdiction by UK and Spanish judges (particularly Baltazar Garzón) in order to prosecute crimes against humanity committed by former officials of the Chilean and Argentinean military regimes.

Regarding the liability of TNCs and OE in contexts of transition, we observe that this pathway has been explored as a way of bringing justice and reparation to the victims. Of the 136 judicial processes identified in the CATJ, 44 occurred or are underway in states other than where the HRVs were committed (Payne and Pereira 2016). These trials are not explicitly based on universal jurisdiction principles but rather on more traditional principles of jurisdiction that appeal to the nationality of the defendant. They show, however, that victims and human rights advocates are using foreign litigation strategies to hold businesses accountable, similar to the processes by which these actors attempted to establish the accountability of state agents. Claimants have looked to the courts of the countries where TNCs are registered (home states) or where they have substantial economic operations to achieve justice for abuses in host countries.

These processes face the obstacles mentioned above. Also, in some countries, the extraterritorial obligations of companies have been limited by court rulings, such as US Supreme Court decision in the Kiobel case that has appeared to affect the use of the Alien Torts Statute in the United States. As a result this type of litigation yields few substantive results regarding accountability and reparation. We found only one convictions and 10 out of court settlements in our database.

These processes also pose two problems for victims: (i) they only apply to corporations (i.e. juridical persons) and (ii) they must involve TNCs domiciled in a country where the rule of law is, arguably, stronger than the host country (where the company or its subsidiaries operate). This does not correspond to the empirical evidence that we have collected where 43% of cases collected in the CATJ involve domestic companies or where individuals and not corporations are involved (such as the 60% of cases in Colombia). The existing efforts to ensure extraterritorial jurisdiction based on the nationality of the TNC (e.g. ATS and recent legislation in France), needs to be expanded to include explicit support for the use of universal jurisdiction principle.

The treaty would further the purposes of TJ by ordering states to issue regulation that facilitates legal proceedings in foreign countries and extraterritorial responsibility for TNCs. Such a system should include the obligation of the states to ensure that TNCs based in their territory refrain from violating human rights in other countries, as well as implement effective measures of access to justice in its territory for victims of violations of human rights committed by these TNCs in the territory of other states. It would also encourage states to explicitly allow for universal jurisdiction in cases of grave violations to human rights by businesses.

2.6 Monitoring and supervisory body

Existing global and regional human rights instruments provide for the creation of monitoring and supervisory mechanisms to support states to implement human rights obligations. Such mechanisms play a crucial role to advance accountability as they might require states to report periodically on their progress to implement their obligations, and hear individual petitions against both states and individuals.

In TJ contexts, these mechanisms have not only brought accountability at the international level but also contributed to building the appropriate circumstances for domestic accountability. Four factors have been used in a multidimensional approach to explain the capacity to overcome impunity in TJ: international pressure, civil society mobilization, judicial leadership, and weak veto players (Lessa, Payne, and Pereira 2015). While each factor plays a key functional role in overcoming impunity, no single factor is sufficient to bring about pathways to accountability (Lessa et al. 2015). In that regard, international pressure on states to comply with human rights obligations in TJ context has proved instrumental in domestically holding perpetrators of human rights violations accountable in the aftermath of dictatorships and armed conflict even where amnesty laws protected them. Traditionally, international pressure is exerted through the enforcement of clear state obligations by international bodies. According to this approach, international pressure that empowers local actors promotes new legal standards and sets specific obligations on states to end patterns of impunity for gross violations of human rights. Therefore, the effective use of domestic judicial and non-judicial TJ mechanism requires the existence of international bodies able to exert international pressure on states.

In Colombia, the presence of global actors as part of the efforts to seek prosecution and remedy in cases of corporate complicity was determinant for successful outcomes. In the CATJ-Colombia dataset, these actors are present in 48 per cent of cases with prosecution, and in 75 per cent of cases with remedy outcomes, and global actors were present in all cases where remedy was possible. Also, predicted probabilities tables show the salient role of global actors and the pressures that they exert on the state to increase the probabilities of prosecution of corporations (Bernal Bermúdez n.d.)

Although some TJ mechanisms have addressed corporate complicity in different countries, very little has been achieved in terms of accountability, as the evidence in CATJ databze suggests. As Payne and Pereira (Payne and Pereira 2016) discuss, the absence of international pressures and the strength of veto players might account for such a record. In the CATJ-Colombia dataset, in only 4% of the cases did global actors like INGOs, intergovernmental organisations or other state agents, have an active role in supporting the claimants' pursuit of truth

and justice (Bernal Bermúdez n.d.). The current soft law nature of business and human rights international law has proven not to be enough to promote domestic business accountability. Similarly, international criminal law bodies have marginally addressed criminal business complicity of either companies or individuals[35].

The elaboration of the binding instrument is an opportunity to create a global monitoring and supervisory body able to exert international pressure to promote domestic business accountability. It is crucial to decide whether such an international body would have jurisdiction over states, companies, or both. Also, discussions need to take place on whether such a body will have powers only to monitor states, hear individual cases, mediate conflicts between parties, or a combination of all these alternatives. Although the discussion about all these issues go beyond the scope of this work, we bring the attention to the need of creating a monitoring body to promote accountability at the international level but also, and more importantly, at the domestic level.

CONCLUSION

In the current context of TJ, a victims gap and accountability gap exists regarding the involvement of economic actors in the human rights violations of authoritarian regimes and armed conflicts. This is a gap that has been recognized in the business and human rights studies. Although victims face human rights violations perpetrated by businesses or businesses in collaboration with states or armed non-state actors, the absence of a clear and binding human rights instrument for redress of these crimes has led to a lack of redress. That failure to address the international rights of victims to truth, justice, and reparations for gross violations of human rights is inconsistent with the goals of TJ and the goals of universal international human rights instruments.

[35] The Rome Statute of the International Criminal Court (ICC) and the Statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have provisions that unequivocally declare that these tribunals have jurisdiction only over natural persons. Where these courts have heard corporate complicity cases, individual employees and not the companies have faced accountability. This is the case for ICTR's media case (Ferdinand Nahimana and Jean Bosco Barayagwiza of Radio T´ el´evision Libre des Mille Collines; Hassan Ngeze of the Kangura newsletter), the Mugonero incident trial (Elizaphan and G´erard Ntakirutimana), and the Gisovu Tea Factory trial (Alfred Musema).

The CATJ reveals important initiatives that some advocates of victims' rights in some countries have been able to implement to fill these gaps. They have done so against all odds. They have overcome the very strong business veto over these judgements. They have also used innovative ways of blending international human rights principles found in domestic law. However, the extent to which other advocates in courts in other countries might use these precedents and interpret international and domestic law in such a way to overcome the business veto and fill the victims' and accountability gap remains unclear.

A binding agreement would advance these efforts by providing the international instrument and pressure to enforce it. The binding agreement would not only hold businesses accountable for contemporary human rights violations, it could get at the root causes of impunity that has perpetuated corporate complicity in authoritarian and conflict situations. The binding agreement thus advances the possibility of fulfilling TJ goals and filling gaps in addressing victims' rights to truth, justice, and reparations.

This paper has used empirical findings from the CATJ to show the role a treaty on business and human rights could play in these TJ goals that also promote the rights of victims in non-TJ environments. It thus merges the two – business and human rights and TJ literatures – in searching for solutions to the victims and accountability gap that exists where economic actors have been involved in the perpetration of human rights violations. We have proposed six elements crucial to that process. First, judicial accountability and access to justice fills victims' rights to justice. Second, non-judicial forms of accountability address victims' right to truth. Third, by including all -- domestic and transnational – economic actors, victims' universal rights are satisfied. Fourth, collective reparations guarantee that not only individuals but targeted groups and communities have access to redress. Fifth, by recognizing the responsibility of courts in every country to uphold universal rights of victims of human rights violations, a binding agreement would close jurisdictional loopholes used by companies to escape accountability. Sixth, by monitoring the outcomes of these efforts, the international community demonstrates the seriousness of closing the victims' and accountability gap and sends a clear message to businesses of their responsibility to respect human rights wherever they operate.

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