Introduction

Transitional Justice and Corporate Accountability

Bruno Tesch was tried, found guilty, and executed for his company’s production and sale of the Zyklon B gas used in Nazi Germany’s extermination camps. Tesch was not alone. More than 300 economic actors faced trial for crimes against humanity during the Holocaust. This book examines those cases and hundreds of other subsequent accountability efforts in trials and truth commissions around the world. These are examples of the uses of transitional justice for corporate complicity in gross violations of human rights during armed conflict and authoritarian rule. Until this study, such uses have been largely invisible.

Accountability for corporate complicity has been referred to as the “missing piece of the [transitional justice] puzzle, to pursue the full spectrum of justice and remedy for authoritarian and civil conflict periods.” Corporate accountability also addresses a “victims’ gap,” a situation in which victims of corporate abuses have rights to truth, justice, reparations, and guarantees of non-recurrence under international human rights law, but they lack the effective mechanisms to fulfill those rights.²

This book aims to find the corporate accountability piece of the puzzle to begin to narrow the victims’ gap. It probes what these accountability efforts are, who they include, why, when, and where they take place, and how they unfold. It also explores obstacles that have blocked accountability efforts at the international and domestic level, in particular the absence of clear and binding international human rights instruments and economic actors’ veto power.

**WHAT IS CORPORATE ACCOUNTABILITY AND TRANSITIONAL JUSTICE**

The trials for crimes against humanity after the Holocaust are considered to be the origin of transitional justice, defined as “the processes designed to address past human rights violations following periods of political turmoil, state repression, or armed conflict.” The International Military Tribunal at Nuremberg prosecuted and imprisoned those responsible for the Holocaust atrocities, including economic actors. The modern architecture of international human rights law emerged from those trials, aimed at punishing and preventing genocide and crimes against humanity, including torture, disappearance, and killing. The response to the Holocaust led to what the United Nations (UN) asserts as states’ obligations in transitional justice contexts embodied in a wide range of international human rights instruments today. UN instruments and Accountability,” *Journal of Human Rights* 14, no. 2 (2015): 237–59; Nadia Bernaz, *Business and Human Rights History, Law and Policy – Bridging the Accountability Gap* (New York: Routledge, 2017).


enshrine rights and duties to justice,\textsuperscript{6} truth,\textsuperscript{7} reparations,\textsuperscript{8} and guarantees of nonrecurrence of violations (prevention).\textsuperscript{9}

While the Holocaust trials played a formative and foundational role with regard to state perpetrators’ atrocities, the same cannot be said for economic actors’ complicity in those violations. The trials for the atrocities committed by Tesch and other economic actors have not had much of a legacy in contemporary transitional justice approaches.

We define corporate complicity as economic actors’ assistance or participation in gross violations of human rights perpetrated by the state or state-like actors during authoritarian or civil conflict situations. Unpacking that definition, corporate complicity refers to economic actors’ aiding and abetting the crimes against humanity carried out by state actors, paramilitaries, and rebel forces that control territory. Complicit economic actors may include state-owned, private, or mixed enterprises involved in authoritarian regime or civil conflict violence. Although conducting business with repressive authoritarian regimes or warring armies, and making profits from that business, might be considered immoral or unethical, our definition focuses instead on economic actors’ direct or indirect participation in gross violations of human rights.

Among those gross violations of human rights are genocide, torture, kidnapping and forced disappearance, illegal detention, sexual assault, slave labor, and other crimes against humanity. A criticism of transitional justice is that it limits its approach to physical integrity abuses and sidesteps serious violations of economic, social, and cultural rights.\textsuperscript{10} While we agree on the importance


\textsuperscript{7} Ibid.


of those rights, we focus in this book on crimes against humanity that are unequivocally part of transitional justice processes. Our decision is not intended to support the claims that transitional justice should only address physical integrity rights, but rather to examine to what degree it has addressed the physical integrity violations that are clearly within its remit when they are carried out by economic actors.

Our definition includes four criteria for determining economic actors’ complicity in those physical integrity rights. Businesses may be engaged in direct complicity in criminal violence (e.g., joint criminal enterprise and conspiracy to violence). Violence may involve specific gross human rights violations with regard to labor (e.g., slave or forced labor). Financing repression, crimes against humanity, or war crimes are forms of indirect complicity in violence (e.g., bank loans to sanctioned regimes, or odious debt). Finally, corporate complicity results from enterprises or individuals engaged in illegal activity that knowingly procure or profit from, and thereby perpetuate, violence (e.g., trading in “conflict minerals”). When corporations engage in one or more of these four types of activities, they can be said to have committed gross violations of human rights and thereby may face accountability for complicity in past state violence. These four areas fall within transitional justice’s remit.

We employ the shorthand “corporate complicity” and “corporate accountability,” but we do not limit our study to corporations. Instead, we cast the broadest conceptual framework of “corporate” to include the array of economic actors engaged in gross violations of human rights during authoritarian or conflict situations. By “corporate,” we mean the corporate structure of business as well as the definition of the term as “of, relating to, or formed into a unified body of individuals.” Our use of corporate thus includes firms, but also individual economic actors who are part of a business enterprise or community. We include, for example, landholders who are not in a corporation but are part of a rural business sector. We also include business

associations, or a unified group of individual economic actors and corporations in a single entity. Economic actors in our study include private, state-owned, or mixed enterprises. They comprise individuals who own or work for companies and other enterprises (such as a bank, farm, insurance company, or real estate concern) and commit violations as part of their role in the economic enterprise. We emphasize the economic activity of the individual or firm or association that links to the violent action. When economic actors participate directly or indirectly in the human rights violations carried out in armed conflicts or by authoritarian regimes, their actions constitute corporate complicity in those violations for which victims demand accountability. The use of the term “complicity,” means that individual economic actors are not acting on their own. Instead, they form part of the violent structure in which human rights violations occur in authoritarian regimes and armed conflicts. They are directly or indirectly involved in the violations, not as individual citizens, but as economic actors.

We conceptualize corporate complicity in broad terms intentionally. Our operating assumption, shared by many, is that few transitional justice processes have included economic actors. To track accountability efforts, we therefore undertook the fullest possible range of economic actors who have faced transitional justice accountability mechanisms for gross violations of human rights. Our findings show who has been held accountable for what types of activities, where, when, and how.

Similarly, we adopt a broad accountability framework to include the full range of efforts. We do so to avoid seeing accountability only as guilty verdicts in criminal trials. Following Felstiner et al.,12 we consider the act of claiming by victims and their advocates as an effort to hold actors responsible, a kind of public truth-telling effort that attaches a cost – even if only reputational – to certain acts. Transitional justice includes institutional and informal truth-gathering processes among its mechanisms; we show that corporate accountability for past human rights violations is a hidden aspect of these processes. Guilty verdicts tend to be seen as the maximal form of accountability, yet transitional justice scholars have noted the impact of earlier, pre-judgment, efforts at judicial accountability as well as other forms of restorative

and reparative justice.\textsuperscript{13} Consistent with other approaches to accountability, our study looks not only at outcomes or verdicts, but includes the full range of judicial actions as accountability efforts, from the formal initiation of legal processes to final judgments. This approach allows us to track the full extent to which transitional justice processes are being used to hold economic actors accountable for past human rights violations.

The specific set of accountability mechanisms is derived from transitional justice processes: domestic, foreign, and international human rights trials and truth commissions following periods of armed conflict or authoritarian rule. By domestic trials, we mean judicial actions investigated and/or decided by courts located in the same country in which the human rights violations took place. Foreign trials are the judicial actions investigated and/or decided by courts located in a country other than the one in which the human rights violations occurred. International trials are those judicial actions pursued in tribunals created by international organizations or alliances. The truth commission definition we use in this study is “a newly established, temporary body officially sanctioned by the state or an international governmental organization to investigate past human rights abuses.”\textsuperscript{14} We tracked these accountability efforts by constructing an original Corporate Accountability and Transitional Justice (CATJ) database.\textsuperscript{15} Unlike other transitional justice databases, the CATJ is segmented into four discrete data sets of mechanisms.

The first set involves the “historical” data of trials for World War II human rights atrocities committed by economic actors in Nazi Germany and in Japan. When we first began researching the topic of corporate accountability at the Nuremberg and Tokyo Trials and their aftermath, we expected to find an existing and thorough study of all of the cases. Much to our surprise, it appears that no legal scholar or practitioner has systematically analyzed the full set of Nazi business trials or the economic actors held accountable in the Tokyo Trials. Some studies focus on specific companies, such as IG Farben or Krupp AG,\textsuperscript{16} or specific courts, such as the Holocaust restitution and slave

\textsuperscript{14} Olsen et al., Transitional Justice in Balance: Comparing Processes, Weighing Efficacy, 34
\textsuperscript{15} http://ahra.web.ox.ac.uk/.
labor cases in the United States. Most studies mention only in passing the members of the business community charged or sentenced as part of the larger efforts at accountability for the mass atrocity. To fill that void, we collected all accessible data on all of the trials of Nazi businesses (and Japanese companies) and their outcomes. We are certain that more could be done to systematically analyze these cases of corporate complicity in the Holocaust (and in Japan). We looked for corporate accountability for the Holocaust and Japanese violations not only at the international tribunals, but also in foreign criminal and civil courts, and domestic civil and criminal courts. The data were gathered using online web searches as well as secondary research in academic publications. Our data set includes 349 economic actors in thirty-five judicial actions for their complicity in Nazi human rights atrocities and thirteen economic actors in ten judicial actions for Japanese abuses. From the Nazi cases, 43 percent (15) of the judicial actions ended with at least one conviction or adverse judgment, 37 percent (13) in settlements, 9 percent (3) in dismissals, and only 3 percent (1) ended in acquittal for all charges of individuals. For the remaining three cases we do not have information about outcomes. Of the ten Japanese cases (involving 13 economic actors), six ended in dismissals, one ended in a conviction that was later reversed by the Japanese Supreme Court, two ended in out-of-court settlements, and for one we were unable to determine the outcome.

The second set of accountability mechanisms data is official truth commissions. We established this data set by reading, searching, and coding every final truth commission report available. We looked for any mention of economic actors connected to physical integrity human rights violations carried out by authoritarian regimes or in armed conflicts. We tracked accountability for corporate complicity in twenty-three truth commissions in twenty countries around the world – half of the thirty-nine truth commissions with accessible final reports. These reports identified 329 economic actors by name for alleged abuses committed in armed conflict or authoritarian rule.

The third data set includes judicial accountability for corporate complicity in the violations occurring during the repressive regimes and armed conflicts of the 1960s to the present. We coded any judicial action that was initiated: a judicial investigation, a preliminary hearing, dismissal, settlement, a trial, an appeal, and final verdicts and sentencing. Using the Business and Human Rights Resource Centre (BHRRC) online archive, we first identified the economic actors mentioned for complicity in human rights violations in

armed conflict and authoritarian rule around the world. We faced great difficulty finding information on these judicial actions, and others not included in the BHRRC archive. No single source compiled the information needed for our analysis. Thus, our team of researchers searched for judicial action data from a variety of national and international human rights organizations’ press releases and reports, reports from different government and UN bodies, scholarly articles and books, and articles from digital news agencies and newspapers. In some cases, we had access to judicial archives. As a whole, we found 145 economic actors involved in 104 actions in 18 countries around the world. Among the trials for violations that occurred in other countries, we found only one international criminal, thirteen foreign criminal, and thirty-seven foreign civil cases. At the domestic level, forty-two criminal and eight civil trials appear in the database.\(^8\) Of these 104 actions, only 17 have terminated in final convictions or adverse judgments, and 10 settled out of court. Although some were dismissed (28) and some resulted in acquittals (5), others are awaiting appeal (7), still others were withdrawn by the plaintiffs (2) or had an undetermined outcome (1). The majority are pending investigation and final judgment (36).\(^9\)

The fourth data set involves a unique process in Colombia. The highest number of CAIJ economic actors – 439 – appears in the Justice and Peace judicial actions. The 2005 Justice and Peace Law (Law 975) enabled members of the paramilitary group, United Self Defense Forces to demobilize and receive a reduced sentence (five to eight years) in exchange for legal testimony (versión libre) accounting for their acts and monetary compensation and restitution to their victims. About 36,000 members of the paramilitary forces demobilized; ten years later 195 have received judicial sentences.\(^10\) We read the thirty-five rulings issued by the Justice and Peace tribunals from 2011 to 2015.\(^11\) These included a section on the context in which the paramilitary unit under investigation

\(^8\) We could not find the type of claim in two domestic cases.

\(^9\) Two judicial actions ended with more than one outcome. The first one is the case brought in US Courts against 52 companies, where 51 were acquitted and one reached a settlement. The second one is a case in Chile where one of the defendants was convicted, and the second was acquitted of all charges. We therefore have 104 judicial actions with 106 outcomes. Leigh A. Payne and Gabriel Pereira, “Accountability for Corporate Complicity in Human Rights Violations: Argentina’s Transitional Justice Innovation,” in *Outstanding Debts to Settle: The Economic Accomplices of the Dictatorship in Argentina*, ed. Horacio Verbitsky and Juan Pablo Bohoslavsky (Cambridge: Cambridge University Press, 2015).

\(^10\) Contraloría General de la República, “Análisis sobre los resultados y costos de la Ley de Justicia y Paz” (Bogotá, 2017).

\(^11\) This work was done in collaboration with Dejusticia, as a result of the “Advancing Corporate Accountability for Human Rights Violations during Past Dictatorships and Armed Conflicts in Latin America” project, funded by Open Society Foundation – Human Rights Initiative.
operated, including claims they made regarding ties to politicians and economic actors. From that source, we coded information related to corporate involvement in paramilitaries’ human rights abuses. Although these Justice and Peace proceedings are judicial actions, they are not judicial actions aimed at economic actors. Nonetheless, through these legal documents, companies named by paramilitaries have faced a form of judicial accountability. Moreover, Justice and Peace prosecutors have begun to investigate the alleged criminal activities of those economic actors as a result of paramilitary testimony. Any follow up trial of companies or business people initiated from the Justice and Peace process are included in the judicial action data set.

These four types of accountability mechanisms illustrate that transitional justice has included, and is including, corporate complicity in past human rights abuses. How to interpret this level of corporate accountability depends on perspective. Compared to an assumed level of complicity by economic actors in past human rights violations, the total number of judicial actions initiated, and the small number of outcomes, impunity seems to be a better description than accountability. We do not dispute that impunity prevails for corporate complicity in past human rights violations. Indeed, our findings show that despite significant efforts, corporate accountability faces formidable barriers. On the other hand, these data refute the notion that transitional justice has utterly failed to address corporate complicity in past violence.

In sum, what we examine is the phenomenon of corporate accountability and transitional justice from the Holocaust to the present. Despite increasing interest in business and human rights, this is the first systematic and global collection of data on the topic. It begins to track and analyze accountability efforts for economic actors engaged in indisputable physical integrity violations during authoritarian and conflict situations.

**WHY HOLD ECONOMIC ACTORS ACCOUNTABLE**

One reason why transitional justice should address corporate complicity in human rights violations during authoritarian regimes and armed conflict is the nature of past abuses. The CATJ database shows that businesses have been accused of widespread and systematic abuses over time and throughout the world. The alleged involvement of economic actors in human rights violations during armed conflict and authoritarian rule has not been peripheral, but rather is at the very core of, the logic behind, the violence. This was the argument made at Nuremberg in including businesses among those held to account for past atrocity.

It is also part of the argument about the rise of repressive bureaucratic authoritarian states of Latin America in the 1970s and 1980s, an approach...
subsequently applied to other world regions. Guillermo O’Donnell emphasized the alliance among the military, technocrats, and business that produced those violent regimes. During the Cold War, and at a key developmental phase in the most economically advanced countries of the Global South, businesses and technocrats perceived authoritarian systems as the best way to advance and protect “capitalist deepening” projects. Successive coups, and the national security regimes they implanted, aimed at stemming the tide of Communism and strengthening capitalism through wage repression and violence against those labeled “subversives.” Businesses actively collaborated with those authoritarian regimes by creating blacklist of workers and union leaders who subsequently faced kidnapping, illegal detention, torture, disappearance, and death, sometimes in companies’ on-site detention centers. Not all members of the business community supported the coups and the regimes. Some opposed them. Others withdrew their initial support owing to state abuses, regimes’ economic mismanagement, and the countries’ loss of prestige in international spheres that had a negative impact on business. Still others were themselves the victims of state violence. Nonetheless, business support provided an important degree of legitimacy, funding, and collaboration that sustained these regimes and their violence.

Economic actors are also key to the root causes of violence in armed conflicts in Africa and Latin America. The human rights abuses related to business partnerships with armed actors over “conflict minerals” (e.g., blood diamonds) and illegal trade (e.g., arms and drugs) are well documented.

