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Commentary:

**On Developing Purposeful Involvement of Business in Reparation
Programming within Transitional Justice Settings**

**Prepared for the United Nations Special Rapporteur on the promotion of
truth, justice, reparation and guarantees of non-recurrence's
Call for submissions for upcoming report: Roles and responsibilities of non-
state actors in transitional justice processes**

by

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Introduction

Transitional justice mechanisms—including trials, truth commissions, amnesties, reparations, and lustration—are meant to redress severe and widespread abuses that occurred during periods of violent conflict such as wars, government repression and other situations leading to massive human rights violations. Yet, those who commit human rights abuses are not only state actors; private enterprise has also played a role in exacerbating or perpetrating human rights abuses for their own economic gain. Other businesses may not be criminally culpable but nevertheless were passive beneficiaries or bystanders in these contexts.¹

However, when this violence ends, economic actors are often overlooked during transitional justice processes, especially as part of reparation administrative plans implemented by governments seeking to assure recovery and lasting peace. Yet, these same governments often proactively engage the business sector to support economic development, but do not push them to do so in a way that would reduce the possibility of future violence. This oversight amounts to a missed opportunity to better engage businesses in development efforts that contribute to reparation programming and restorative justice, and thus, lasting peace.

In this commentary, the authors propose an approach to closing this gap in practice to better incentivize companies to contribute more holistically to reparation programs that form part of a transitional justice process, while also supporting the integration of the United Nations Guiding Principles on Business and Human Rights (UNGPs) into these conflict recovery efforts. This approach would also help integrate the principles into transitional justice settings to encourage states and businesses to do what they can to avoid abuse, but when it does occur, cooperate in assuring the provision of a remedy.² Reparation programs include a wide range of measures, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³

Our commentary is drawn from existing literature and the collective empirical research conducted by the authors. Starting in 2016, the Center for International Law and Policy (CILP), directed by Professor Laplante, began to develop its Transition Justice and Business and Human Rights database to explore various themes related to this topic. Beginning in 2012, Professor Olsen began collecting data for the Global Corporations and Human Rights Database (CHRD), which includes allegations of corporate human rights abuses and related remedy efforts for wrongdoing that occurred between 2006-2018. CILP data has revealed that while some transitional justice experiences have included some focus on businesses, such an approach remains rare, thus leaving us with still scant practice to draw lessons and recommend best practices. Even so, the CHRD underscores that non-judicial remedy efforts are more common than many might assume and, perhaps, could pave the way for business engagement in reparations efforts, generally.⁴ The

¹ Lisa J. Laplante, *What's Business Got to do With It? The Role of the Private Sector in Transitional Justice and Peacebuilding*, 2021. (draft manuscript on file with author).

² UNGPs, Principle 11 and 22.

³ “Principle IX, UN Basic Principles and Guidelines 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,” adopted by UN General Assembly Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006.

⁴ Tricia D. Olsen, *Varieties of Remedy: How Contestation Shapes Governance for Corporate Human Rights Abuse in Latin America*. Cambridge University Press, forthcoming.

CHRD also uncovers the role states play in human rights abuses in the corporate context. The authors draw from the existing data to provide input to the Special Rapporteur's inquiry into the roles and responsibilities of non-state actors (armed groups and other NSAs) in transitional justice processes. In particular, we explore how the involvement of businesses in these contexts can be understood, the limits to that understanding, and suggestions on how it may be appropriate to consider a business's involvement in development, peacebuilding or corporate social responsibility initiatives as a part of reparations.

We first provide an understanding of the ways that truth commissions, thus far, have addressed the role of businesses. We find that truth commissions can set the tone for the rest of the transitional justice process, especially since the recommendations that flow from these investigations often justify the implementation of reparations programs. We argue that the initial framing of a truth commission mandate on *whether and how* to engage non-state actors directly influences the amount and type of attention given to the business sector in the transitional justice experience. While our commentary focuses on truth commissions and reparations, we would also like to note that truth commissions, when used alone, have not been found to improve broad measures of democratic strength nor respect for civil and political rights.⁵ Even so, more recent research illustrates that truth commissions are associated with greater democratic behaviors; they bolster citizen participation in elections and civil society mobilization.⁶ We suggest that truth commission engagement with corporate actors may complement other transitional justice efforts and catalyze both restorative and reparative engagement with private actors that are both backward and forward looking.

Truth Commissions, Reparations and the Business Focus

Typically, transitional justice includes administrative reparation programs as a possible mechanism to redress human rights abuses that took place during non-democratic regimes.⁷ The Transitional Justice Research Collaborative includes approximately 45 reparations programs across 31 countries.⁸ Reparation programs may include a wide range of measures that include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁹ At times, reparations for state-sponsored abuse are linked with truth commissions that issue

⁵ Olsen, Tricia, Leigh Payne, and Andrew Reiter. *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. USIP Press, 2010.

⁶ Dancy, Geoff, and Oskar Timo Thoms. "Do Truth Commissions Really Improve Democracy?." *Comparative Political Studies* (2021): 00104140211024305.

⁷ Some judicial processes like Germany civil suits or ATS stand apart from transitional justice processes as dependent on individual plaintiffs to pursue claims. It may be even more rare that criminal trials will offer significant reparations. See for discussion, Michalowski, Sabine, ed. *Corporate Accountability in the Context of Transitional Justice*. Routledge, 2014.

⁸ "Transitional Justice Research Collaborative." October 17, 2021, <https://transitionaljusticedata.com/>

⁹ "Principle IX, UN Basic Principles and Guidelines 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," adopted by UN General Assembly Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006.

recommendations which a government then takes steps to implement. There are also examples of countries that first implemented a reparations program before a truth commission.¹⁰

Even so, it is rare to find that businesses are explicitly contemplated in such administrative reparation programs. We argue that the historic lack focus on the businesses sector in truth commission investigations can help to explain, in part, why this omission in reparation programs persists. Indeed, research conducted by CILP focused on countries included in the United Institute of Peace database¹¹ and found that only 8 of 29 countries created commissions that identified specific businesses or particular private sectors of industry within their mandates and incorporated this theme in an integral manner during their investigations.¹² Additionally, while it is not uncommon for truth commissions to include explicit reference to “non-state actors” in setting the terms of their investigations, they tend to focus on militia groups and not businesses.¹³ Moreover, even if truth commission reports do make mention of business actors and some companies, they rarely offer a dedicated and systematic review of how private enterprise, generally, contributed to past conflict.¹⁴

Only a handful of countries examined the role of businesses in past episodes of violent conflicts which led to only minimal inclusion of the private sector in reparations or other post-conflict measures to assure lasting peace. To help address this trend, we suggest that more guidance be offered by the Special Rapporteur on how truth commissions could be designed to include a focus on the business sector. Doing so will help lay the foundation as to how truth commissions might include business in later reparation programming. We argue that without this framing it is less likely that businesses can be naturally folded into reparation programming. We offer the following examples to show how such framing has occurred in the past. We then provide recommendations on a more proactive and effective approach to framing that would also help to identify peacebuilding initiatives that support both development and reparative projects involving businesses as stakeholders.

¹⁰ Colombia led its transitional justice process with reparations establishing the Unit for Comprehensive Attention and Reparation of Victims (Unidad para la Atención y Reparación Integral a las Víctimas) established in Colombia to implement comprehensive reparations measures ordered through its Law 1448 of 2011: compensation, rehabilitation, restitution, satisfaction, and guarantees of non-repetition.

¹¹ The United States Institute of Peace database is located at: <http://www.usip.org/library/truth.html>.

¹² These countries are Mauritius, Kenya, Liberia, Timor-Leste, Sierra Leone, El Salvador, Uruguay, Rwanda and South Africa.

¹³ For example, Chile, Democratic Republic of Congo, Guatemala, Peru and Solomon Islands named non-state actors were militia or guerrilla groups opposing the government.

¹⁴ Payne, Pereira and Bernal-Bermúdez (2020) provide a comprehensive account of how transitional justice mechanisms, including truth commissions, refer to economic actors. However, their account reveals that few truth commissions take a dedicated focus to the business sector in their investigations. Payne, Leigh A., Gabriel Pereira, and Laura Bernal-Bermúdez. *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes' Lever*. Cambridge University Press, 2020.

1. *A focus that seeks to identify the culpability of businesses in contributing to human rights violations and seeks direct business contributions to reparations.*

Truth commissions that directly engage with the business sector to identify their role in the past atrocities have a better bases for integrating businesses into their final recommendations which typically include a plan for reparations. For example, South Africa's Truth and Reconciliation Commission was one of the first Commissions of its kind to include corporations in its public hearings that asked "whether business had been involved in the violation of human rights, how business related to the State and whether or not business benefited from apartheid."¹⁵¹⁶ In organizing such hearings, the TRC accepted submissions from trade unions, political parties, businesses, business organizations, and individuals.¹⁷ One conclusion of the hearings was that "as part of a system of racial-capitalism...apartheid was beneficial for (white) business because it was an integral part of a system premised on the exploitation of black workers and the destruction of black entrepreneurial activity."¹⁸ While many business representatives tried to represent themselves as not culpable, it was nevertheless argued that "[h]istorically privileged business as a whole must...[should] accept a degree of co-responsibility for its role in sustaining the apartheid system of discrimination and oppression over many years."¹⁹

Ultimately the TRC concluded that (all) businesses were "guilty of acts of omission in that they failed to adhere or live up to the ethics of their profession and to accepted codes of conduct,"²⁰ and that "[b]usiness was central to the economy that sustained the South African state during the apartheid years."²¹ This observation points to the fact that there is a wide range of business involvement in conflict settings and not all of it rises to the level of criminal accountability. Recognizing the multiplicity and complexity of business involvement, the TRC contemplated a broader vision of involving businesses in its recovery plan. Specifically, in its recommendations, the TRC proposed a wealth tax, a one-time tax on corporate income, and a flat percentage donation from the leading companies in South Africa's stock exchange with the idea that businesses could make voluntary contributions to reparations although such an ambition never came to fruition.²²

Similarly, in East Timor (Timor L'este), the Commission for Reception, Truth, and Reconciliation discussed how exploitation and competition for natural resources by private business entities intensified that country's conflict, which was primarily about independence.²³

¹⁵ Julian Simcock. "Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission" (2011) 41. *Stanford Journal of International Law* 1: 239.

¹⁶ Truth and Reconciliation Commission of South Africa, "Report, Volume four, Chapter 2," para. 2, p. 18, <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>.

¹⁷ Ibid.

¹⁸ Ibid., para. 6, 19.

¹⁹ Ibid., para.16, 22.

²⁰ Ibid., para. 74, 211.

²¹ Ibid., para. 156, 252.

²² Simcock, 250 -251, 253. Nattrass, Nicoli. "The Truth and Reconciliation Commission on business and apartheid: a critical evaluation." *African Affairs* 98, no. 392 (1999): 373-391.

²³ Chega! "The CAVR Report." Chapter 7, section1, para 6, October 18, 2021, <https://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf>

The Truth Commission called for reparations to be paid by those businesses that profited from the conflict.²⁴ Yet, these recommendations have yet to be established in East Timor.²⁵

Both experiences point to the challenge that even if businesses are included in official calls for reparations, there are difficulties in enforcing such recommendations. Victims may still be left with the option of pursuing private claims, although such an individualized avenue of remedy presents many challenges and rarely results in comprehensive reparations for all victims as do administrative plans. Here, the South African TRC also acknowledged that victims may instead resort to other mechanisms such as judicial claims to seek redress from business involvement in human rights violations during apartheid, and indeed the “Apartheid Litigation” used the Alien Tort Statute in the United States Federal court.²⁶ Notably, given recent Supreme Court rulings limiting the reach of the ATS to corporations, this avenue would prove less fruitful.²⁷

Thus, while we recognize the important role judicial accountability may play in seeking reparations in transitional justice, we also recognize the practical limitations of holding all businesses to account, given not only limited time and resources but also the limitations of legal doctrines that often reach only the worst offenders, as recognized in the commentary of Principle 27 of the UNGPs:

Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach to all claimants. Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding mandates of non-judicial mechanisms and/or by adding new mechanisms.

Similarly, we highlight that a more holistic approach facilitates engagement with a wider range of businesses in non-judicial reparation programming, especially that which also overlaps with development efforts. This approach recognizes a wider range of business actors that may not necessarily be subject to judicial accountability, but nevertheless were involved in past conflicts in a range of ways and thus should be involved in its recovery to help countries transition to the lasting peace.²⁸

2. *A focus that recognizes the role of the businesses sector in exacerbating a conflict and suggests other sector reforms or future investigations but falls short of calling for reparations.*

Some truth commissions that included recognition of the role of business in a country’s past conflict, fell short of recommending they contribute to reparations. For example, in Sierra Leone, the Truth

²⁴ Ibid, Chapter 11, section 12.10.

²⁵ Evans, Christine, and E. Christine Evans. *The right to reparation in international law for victims of armed conflict*. No. 91. Cambridge University Press, 2012, p. 200.

²⁶ Julian Simcock. "Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commissioner." *Stan. J. Int'l L.* 47 (2011): 239.

²⁷ Hathaway, Oona A., Chris Ewell, and Ellen Nohle. "Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment." *Cornell Law Review* 107 (2022).

²⁸ In her manuscript, author Laplante provides a taxonomy of business involvement and the range of initiatives that could correspond with such involvement, see Laplante, *supra*. 1.

and Reconciliation Commission concluded that the country's rich diamond deposits were a source of corruption, inequality and violence; and that extensive foreign investment influenced the conflict and drew multiple non-state actors into the conflict that ultimately ravaged Sierra Leone.²⁹ But rather than asking businesses to contribute to reparations, the Commission instead called upon the business sector to develop its own Code of Corporate Governance in order to build a culture of ethical business conduct.³⁰ While these actions would certainly contribute to the reparative aim of non-repetition, they fall short of contributing to other types of restorative (backward looking) reparations that include both pecuniary and non-pecuniary reparations.

In El Salvador, even though the commission's mandate mainly focused on the responsibilities of the State and paramilitary groups, it acknowledged that these groups likely received private financing from business to support their actions. The report noted its concern that "[b]ecause of the clandestine nature of their operation, it is not easy to establish all the links existing between private businessmen and the death squads. However, that the possibility that businessmen or members of moneyed families might feel the need and might be able to act with impunity in financing murderous paramilitary groups, as they did in the past, poses a threat to the future of Salvadorian society."³¹ The El Salvador truth commission's final recommendation include a recommendation that the Public Defender Office and the Ministry of Justice and Human Rights implement codes of human rights for transnational corporations and other business enterprises that work with affected communities.³² Again such a focus goes towards supporting forward-looking business reform, but not backward-looking repair.

The Kenya Truth, Justice and Reconciliation Commission mandated the investigation of economic crimes such as grand corruption and irregular acquisition of land.³³ However, after submission to President Uhuru Kenyatta on May 21, 2013, there were many challenges to its publication including court injunctions.³⁴ The commission did not sufficiently develop an "operative institutional framework to execute" a reparations program.³⁵

Rwanda's truth commission focused on the role of the media in encouraging the targeted racism that contributed to the genocide in 1994 that formed the focus of its investigations. The Commission's recommendations included a proposal for legislation that would punish all forms of discrimination, including those taken by business actors.³⁶ The commission found that many

²⁹ Witness to Truth - Volume Three B, Chapter 1: Mineral Resources, their Use and their Impact on the Conflict and the Country, p. 36.

³⁰ Witness to Truth - Volume Two, Chapter 3: Recommendations, p. 64.

³¹ From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador, 129.

³² Final Report of the Ecuadorian Truth Commission, para. 5, 94.

³³ "Truth Commission: Kenya," United States Institute of Peace, July 1, 2009.

<http://www.usip.org/publications/truth-commission-kenya>

³⁴ Christopher Gitari Ndungú, "Kenya TJRC Final Report deserves serious analysis and action," International Center for Transitional Justice, May 19, 2014. <https://www.ictj.org/news/ictj-kenya-tjrc-final-report-deserves-serious-analysis-and-action>.

³⁵ Christopher Gitari Ndungú, "Lessons to Be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission," International Center for Transitional Justice, May 2014, <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf>

³⁶ Ibid.

people employed in both the public and private sector were fired after being detained but without trial or conviction.³⁷ The commission did not make recommendations regarding businesses or corporate complicity, although trials for some of these sectors did take place separately through the International Criminal Tribunal for Rwanda (ICTR).³⁸ The ICTR issued a conviction in its “Media Case” for the roles played by three prominent members of the media in “sowing the seeds of hatred” eventually leading to the genocide.³⁹

These examples demonstrate that while the truth commissions offered some focus on business, they missed the opportunity to recommend their involvement in reparations.

3. *A focus on the socio-economic conditions that contributed to causing the country’s conflict, but only as historical background and context and not as rights violations.*

Some truth commissions discuss the business sector when presenting the context and historical background of their country’s conflict but do not necessarily take the additional step of attributing any responsibility to these actors that could form a basis for including them in any future reparation program.

For example, the Mauritius Truth and Justice Commission recognized the role of companies in the country’s history of slavery and labor abuses.⁴⁰ Significantly, the unique mandate of the Commission—examining socio-economic class abuses over more than 370 years (1638-to the time of the commissions work)—tended to focus more on the historical role of industry as opposed to the responsibilities of the modern business community.⁴¹ The commission recommended a “special class of trainers in small business enterprises” be appointed to support the emerging social class of small business entrepreneurs.⁴² Thus similar to the examples above, the recommendations fall far short of addressing the deeper socio-economic conditions that contributed to the violence.

The Guatemala Commission for Historical Clarification (CEH) concluded that the State served to protect the economic interests of the privileged minority.⁴³ The commission was created to “clarify human rights violations related to the thirty-six-year internal conflict” from 1960 to 1996.⁴⁴ The commission found that businesses contributed to acts of violence committed by private individuals. Specifically, “in urban areas, diverse human rights violations were committed

³⁷ Rwanda Truth Commission Report, March 1993, p. 48. <https://truthcommissions.humanities.mcmaster.ca/wp-content/uploads/2019/07/Rwanda-1993.pdf>

³⁸ PROSECUTOR V. NAHIMANA, BARAYAGWIZA, & NGEZE. Case No. ICTR 99-52-T. Judgment and Sentence. At . International Criminal Tribunal for Rwanda, December 3, 2003.

³⁹ Kagan, Sophia, “The ‘Media case’ before the Rwanda Tribunal: The Nahimana, et al. Appeal Judgement” April 24, 2008 <http://www.haguejusticeportal.net/index.php?id=9166>

⁴⁰ “Truth Commission: Mauritius,” United States Institute of Peace, February 9, 2012 <http://www.usip.org/publications/truth-commission-mauritius>

⁴¹ Ibid.

⁴² “Report of the Truth and Justice Commission,” p. 413, 2011 https://www.usip.org/sites/default/files/ROL/TJC_Vol1.pdf

⁴³ “Guatemala Memory of Silence,” p. 17, 1999 [Guatemala-Report-of-the-Commission-for-Historical-Clarification.pdf \(mcmaster.ca\)](https://www.usip.org/sites/default/files/Guatemala-Report-of-the-Commission-for-Historical-Clarification.pdf).

⁴⁴ “Truth Commission: Guatemala,” United States Institute of Peace, February 1, 1997. <https://www.usip.org/publications/1997/02/truth-commission-guatemala>

against trade union members and labour advisors.” The commission concluded these acts were directly perpetrated by State actors based on “close co-operation between powerful businesspeople and security forces” to protect business interests.⁴⁵ Yet, its recommendations do not include a focus on the business sector in terms of reforming the socio-economic conditions that contributed to the violence.⁴⁶

One challenge for truth commissions is that their traditional approach, as reflected by their mandates, is to investigate only civil and political rights violations, thus omit economic, social and cultural rights violations. Commentators in transitional justice have challenged this narrow framing as contributing to the exclusion of not only economic actors but also opportunities to focus on economic development as a means of securing lasting peace.⁴⁷ Choosing the latter framing would provide one means of justifying the inclusion of businesses as general contributors to an economic system into their reparation scheme. In essence, the reparation program could be designed not to just address the general harms of economic and social inequality that may not have direct causation by any one company, but instead recognize the role all companies play in sustaining a more just and equitable economic system. In this setting, collective reparations may address these underlying economic disparities while also contributing to development.

Notably, even without this suggested framing, some governments already try to justify economic development as a form of reparation. However, without the linkage to the truth commission revelation of a rights violation, recipients of these development-like projects reject this framing as a separate obligation (the right to development).⁴⁸ Thus without reparations that account for, if not acknowledge, the violation of economic and social rights, governments should be cautious of suggesting development work is part of reparations.

At the same time, our research reveals that even if businesses are reluctant to engage in reparations programming, they are more inclined to be engaged in development projects. In part, we argue there is less stigma as forward-looking development does not involve the same disincentive of attributing criminal guilt or wrongdoing that often disincentivizes business involvement. When collective reparations are framed more broadly to address also economic and social rights violations, it might reduce the fear that contributing to reparations would be some type of admission of responsibility that may be associated with criminal wrongdoing and possible legal liability. At the same time, we argue that re-framing the contributions of business could allow for development projects to bring in an aspect of restorative and reparative justice.

With these projects, the reparations may not address the type of individualized harm more closely associated with criminal wrongdoing, but rather would address the underlying economic and

⁴⁵ “Guatemala Memory of Silence,” p. 44, 1999 [Guatemala-Report-of-the-Commission-for-Historical-Clarification.pdf \(mcmaster.ca\)](#).

⁴⁶ Ibid.

⁴⁷Zinaida Miller, *Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice*, International Journal of Transitional Justice, V. 2(3), p 266 (2008); Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, International Journal of Transitional Justice, V. 2(3), p 331 (2008).

⁴⁸Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations and the Right to Development*, Yale Human Rights & Development Law Journal, V. 10, p. 141 (2007)

social system that gave rise to economic and social rights violations. Moreover, they could be framed as contributing towards the principle of Satisfaction and Guarantees of Non-Repetition, a recognized form of reparation, to help bridge the gap between TJ reparations and peacebuilding development.⁴⁹

Reframing Business and Development

Truth commissions may offer an opportunity to shape businesses' prospects to contribute to lasting peace in two ways: First, as noted above, truth commissions might have an opportunity to investigate or bring to light the ways in which businesses supported the non-democratic regime generally as beneficiaries to an economic system, even if not always directly causing abuses. Second, commissions could also play an important role in shaping the conversation about the role of business in the post-transition period to encourage their involvement in reparation programming as well as peacebuilding development projects aimed at assuring non-repetition of rights violations, which is a recognized form of reparations.

Note that while we are exploring a more positive perspective on the role business might play in promoting peace, numerous scholars have documented their serious concerns about business capacity to effectively improve outcomes for the poor through economic development efforts,⁵⁰ to responsibly steward natural resources,⁵¹ and to include women and marginalized groups in those efforts.⁵² Even so, we offer a few ideas as to how truth commissions and reconciliation efforts might engage business actors in discussions of non-repetition and thus, facilitate a greater focus on creating a more just and equitable approach to development with improved prospects for lasting peace.

1. A focus on the economic cost of conflict to draw businesses in as promoters of peace and non-repetition.

A truth commission may be well positioned to make a solid case for business involvement in post-conflict recovery projects that provide forward looking collective reparations projects. Businesses, on average, seek to reduce risk and operate in a context of stability yet do not often envision the role they might play in exacerbating conflict or encouraging stability. Yet, conflict can be very costly for businesses due to unmanaged or unmitigated risk, which can lead to fatalities, destruction of assets, and even project abandonment. In South Africa, Lonmin PLC saw its share price plummet by nearly one-third after the South African Police Service opened fire on a crowd of striking mineworkers, killing 34 people and leaving many others severely injured.⁵³ Truth commissions could, for example, underscore the conditions that led to violence and democratic erosion and encourage corporate actors

⁴⁹ UN Basic Principles on Reparations:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

⁵⁰ Mansuri, Ghazala, and Vijayendra Rao. "Community-based and-driven development: A critical review." *The World Bank Research Observer* 19, no. 1 (2004): 1-39.

⁵¹ Cheng, Christine, and Dominik Zaum. "Corruption and the role of natural resources in post-conflict transitions." In *Governance, natural resources, and post-conflict peacebuilding*, pp. 461-480. Routledge, 2016.

⁵² Agarwal, Bina. "Participatory exclusions, community forestry, and gender: An analysis for South Asia and a conceptual framework." *World development* 29, no. 10 (2001): 1623-1648.

⁵³ Ganson, Brian, and Achim Wennmann. *Business and conflict in fragile states: The case for pragmatic solutions*. Routledge, 2018, p. 22; *The Guardian*, May 19, 2015, "Marikana massacre: the untold story of the strike leader who died for workers' rights"

to, instead, engaging in economic activity that contributes to, rather than exacerbates, the prospects for peace. Such involvement would then help to set up the recommendations issued by truth commissions to set the government on a clearer path towards including businesses in the reparative work.

Some may point to an inherent tension in including business in truth telling or reconciliation mechanisms in the post-transition phase. On one hand, countries seek to consolidate their relatively new democratic institutions and as such, newly elected leaders rely heavily on economic development which depends on businesses' participation. Indeed, the correlation between democratic endurance and economic development is robust.⁵⁴ Alternatively, some might argue that seeking justice for businesses' role in direct or indirect past human rights abuses could upset the prospects for economic growth that are needed to secure a successful transition. Countries that do so, the logic goes, may be perceived as less "business friendly."

Yet, this is a false dichotomy. Newly democratized economies that are looking to secure increased economic activity and development can move beyond the classic neoliberal notion of economic growth. The post-transition economy could emphasize business leaders' increased engagement in efforts to support local peace and development.⁵⁵

During the peace processes between Northern Ireland and Ireland, for example, business leaders took an active role in supporting non-violent pathway toward peace. In 1994, companies in the Northern Ireland Confederation of British Industry (CBI) produced a "landmark publication" that became known as the "peace dividend paper" in which they spelled out the economic importance of peace in Northern Ireland.⁵⁶ The paper argued that, without peace, companies would have to increase security costs, face decreased foreign investment and tourism, and deal with labor shortages as good talent would leave the region. Business engagement in this issue shaped the framing of the peace process and even led to the leader of Sinn Fein, Gerry Adams, referring to the "economic peace dividend in terms of jobs and investment, impacts on the day-to-day lives of citizens."⁵⁷ The CBI grew into the Group of Seven, which organized a meeting with all nine political parties in October of 1996 in an effort to employ a "strategy of political cooperation and impartiality".⁵⁸ In short, business leaders began to appreciate and articulate the value of peace and, in doing so, sought to shape the prospects

⁵⁴ Cheibub, Jose Antonio, Adam Przeworski, Fernando Papaterra Limongi Neto, and Michael M. Alvarez. "What makes democracies endure?." *Journal of democracy* 7, no. 1 (1996): 39-55; Przeworski, Adam, and Fernando Limongi. "Modernization: Theories and facts." *World politics* 49, no. 2 (1997): 155-183.

⁵⁵ Miklian, Jason. "The role of business in sustainable development and peacebuilding: Observing interaction effects." *Business and Politics* 21, no. 4 (2019): 569-601; Blowfield, Michael, and Catherine S. Dolan. "Business as a development agent: Evidence of possibility and improbability." *Third World Quarterly* 35, no. 1 (2014): 22-42; Kindornay, Shannon, and Fraser Reilly-King. "Promotion and partnership: Bilateral donor approaches to the private sector." *Canadian Journal of Development Studies/Revue canadienne d'études du développement* 34, no. 4 (2013): 533-552.

⁵⁶ International Alert. 2006. Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector, p. 438. Accessed at: https://www.international-alert.org/sites/default/files/publications/23_section_2_Northern_Ireland.pdf

⁵⁷ Id. p. 439

⁵⁸ Id. p. 440

for non-recurrence. This is an example of how businesses might engage in the UN's Basic Principles and Guidelines on the Right to a Remedy and Reparation describe as reparation of non-repetition.⁵⁹

2. *A focus on economic activity to build a more justice and equitable future, thereby reducing the possibility of recurrence.*

Business interventions in peacebuilding can have a positive effect, through efforts that might seek to improve the lives of vulnerable populations in conflict-affected regions.⁶⁰ or by utilizing different organizational forms to address both social and economic goals.⁶¹ In *The Business of Peace* (2000) Jane Nelson argued that with only a fraction of the world's GNP related to military expenditures, the vast majority of business thrives on peace and stability.⁶²

Business leaders can help bolster peace by addressing the drivers of conflict through community development, economic engagement, and reconciliation-based peacebuilding efforts.⁶³ This is the logic, for example, of two recent efforts in Colombia that were part of the 2016 Peace Agreement. One government program focuses on attracting private investment and job creation (ZOMAC, Zones Most Affected by the Armed Conflict) while another supports a more participative development strategy with greater community engagement (PDET, Development Programs with a Territorial Focus). However, the literature is mixed as to which approach is more likely to lead to less violence and more inclusive economies. Considering that the participation of victims in the design and implementation of projects constitutes a form of reparations itself, it is important to recommend the full and effective involvement to assure the full reparatory effect of these projects.⁶⁴

Investors are also a key leverage point to improve corporate conduct. Recent changes in companies' environmental, social, and governance (ESG) performance are driven, in large part, by large institutional investors interest in improved performance. In 2018, Larry Fink the CEO of Blackrock, which today manages more than \$9 trillion in assets, surprised everyone by telling clients that "[t]o prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."⁶⁵ Recent research

⁵⁹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation; <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

⁶⁰ Miklian, Jason, and Juan Pablo Medina Bickel. "Theorizing business and local peacebuilding through the "Footprints of Peace" coffee project in rural Colombia." *Business & Society* 59, no. 4 (2020): 676-715.

⁶¹ Kolk, Ans, and Francois Lenfant. "Hybrid business models for peace and reconciliation." *Business Horizons* 59, no. 5 (2016): 503-524.

⁶² Nelson, Jane. "The Business of Peace: The private sector as a partner in conflict prevention and resolution." London: Prince of Wales Business Leaders Forum, 2000.

⁶³ Ballentine, Karen, and Virginia Haufler. *Enabling economies of peace: Public policy for conflict-sensitive business*. United Nations Compact Office, 2005; Miklian, Jason. "The Dark Side of New Business: How international economic development in Myanmar helped accelerate one of the most vicious ethnic cleansing campaigns of the past 50 years." *Harvard International Review* 38, no. 4 (2017): 19-22; Smoller, Bruce R., Andreas Wenger, and Daniel Möckli. *Conflict prevention: The untapped potential of the business sector*. Lynne Rienner Publishers, 2003.

⁶⁴ Lisa J. Laplante, Negotiating Reparation Rights: The Participatory and Symbolic Quotients, *Buffalo Human Rights Law Review*, V. 19, p. 217 (2012); Lisa J. Laplante, Ana María Reyes and Carolina Silva Portero, On Measuring Reparative Processes (2021) (manuscript on file with author).

⁶⁵ Fink, Larry, "Letter to CEOs" 2018. <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

suggests the trend spreads beyond Mr. Fink. One study found that the value of gold in the ground represents only 22 percent of the market valuation of a gold company. Rather than valuing the actual commodity, the authors estimate that investors calculate approximately 45-65 percent of the company's share value on their socio-political support for or opposition to the company's mines.⁶⁶

Beyond private investors, international financial institutions and agreements would be well-placed to incentivize companies to engage with communities in a way that would address the systemic issues that could avoid recurrence. The World Bank, the International Finance Corporation, and numerous bilateral trade agreements (BITs) seek to foster development in post-conflict or post-transition settings. These loans and/or trade agreements could serve as a strong signal, if not a direct incentive mechanism, to encourage firms to engage in economic development that would build a more just and equitable future.

3. *Recognizing the role the state plays in exacerbating human rights abuses in the corporate context, post-transition.*

Alternatively, business engagement—without greater attention to the systemic or root causes of a conflict—can also have a negative effect on peace.⁶⁷ Those truth commissions, as noted above, that do not assess the underlying causes of conflict are unlikely to address how business might mitigate them and, we would add, how segments of the state apparatus undermine respect for basic human rights, even in the post-transition era.

Business-centered peace projects can have the unintended consequence of bolstering cycles of violence, when their operations produce violence or reinforce existing power structures. For example, joint ventures between the government and companies to increase development in Myanmar, a conflict-ridden country, led to ethnic cleansing to secure access to natural resources located on specific community's lands.⁶⁸

The CHRDR illustrates that states were directly or indirectly involved in economic complicity in 35 percent of the claims—well over one-third of the cases of corporate human rights abuse indicated substantial involvement by state actors to either carry out the abuse or facilitate it.⁶⁹ That is, the state committed the abuse in 238 of 1,264 claims (18.83 percent) and assisted in the abuse in 205 of 1,264 claims (16.22 percent). State involvement occurs across the sample, but to varying degrees. Direct state economic complicity occurs in 39 percent of the cases in Argentina, 33 percent in Panama and 31 percent in Bolivia. In Panama, for example, workers were violently repressed by police during a peaceful protest that they staged in early July 2010; police killed two banana workers and injured hundreds of others. More than 100 protesters were detained by Panamanian authorities.⁷⁰ Police

⁶⁶ Henisz, Witold J., Sinziana Dorobantu, and Lite J. Nartey. "Spinning gold: The financial returns to stakeholder engagement." *Strategic Management Journal* 35, no. 12 (2014): 1727-1748.

⁶⁷ Miklian, Jason. "The role of business in sustainable development and peacebuilding: Observing interaction effects." *Business and Politics* 21, no. 4 (2019): 569-601.

⁶⁸ Ibid.

⁶⁹ Olsen, Tricia D. and Laura Bernal-Bermúdez, "Do the Watchmen Need Watching? Yes. Explaining Economic Complicity and State Participation in Corporate Human Rights Abuses" (draft manuscript on file with author).

⁷⁰ Olsen, Tricia D. "Corporations and Human Rights Database, 2006-2014" UniqueID 101BOC0004. www.bhrlab.com

acting on behalf of corporate interests—whether by default or by design—contributes to continued human rights abuses in the corporate context.

Indirect state economic complicity occurs in 37 percent of the cases in Brazil, 30 percent in Haiti, and 21 percent in Honduras. This might include those instances in which states act on behalf of company interest and, in doing so, violates the rights of others. In Brazil, for example, Concremat Engenharia e Tecnologia S.A. was collaborating on the environmental impact study to assess the viability of two of the hydroelectric power stations planned for the Tapajós river. The study was conducted, however, without prior consultations with indigenous peoples, which is required by law. Indigenous peoples have strongly demanded a consultation, and even held three employees hostage. This prompted the state to agree to hold a consultation. The government however did not hold up its end of the deal, sending the company, again, to work on the project with military escorts to protect them. Locals are now intimidated by the police force and have not taken any more action.⁷¹ When states do not comply with binding legislation and, instead, seek to protect corporate activity, it complicates the prospects for corporate engagement for a more peaceful future.

Conclusion

Taking in mind the experiences shared, a truth commission that does include a more purposeful focus on business as well as the violation of economic, social and cultural rights through the economic system they contribute to through their operations, would have ample experience to draw upon on making recommendations for business involvement in achieving the goals of non-repetition. Were truth commissions able to assess the underlying contributors to conflict—and the role of private enterprise therein—they might facilitate a more in-depth look at business actors' role in either providing reparations or engaging in more restorative practices that seek to break the cycles of violence.

⁷¹ Olsen, Tricia D. "Corporations and Human Rights Database, 2006-2014" UniqueID 608CNT0013. www.bhrlab.com