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The emerging corporate turn in transitional justice

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Published in:
Cooperation and Conflict

DOI:
[10.1177/00108367231161264](https://doi.org/10.1177/00108367231161264)

Publication date:
2023

Document Version
Peer reviewed version

Citation for published version (APA):
Jakobsen, L. J. (2023). The emerging corporate turn in transitional justice. *Cooperation and Conflict*, 58(4), 561-571. <https://doi.org/10.1177/00108367231161264>

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The emerging corporate turn in transitional justice

Reviewed works

- Payne, Leigh A., Laura Bernal-Bermúdez, and Gabriel Pereira (eds.). 2022. *Economic Actors and the Limits of Transitional Justice: Truth and Justice for Business Complicity in Human Rights Violations*. British Academy Scholarship.
- Kyriakakis, Joanna. 2021. *Corporations, Accountability and International Criminal Law: Industry and Atrocity*. Cheltenham, UK: Edward Elgar Publishing.
- Payne, Leigh A., Gabriel Pereira, and Laura Bernal-Bermúdez. 2020. *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes’ Lever*. 1st ed. Cambridge University Press.
- Pietropaoli, Irene. 2020. *Business, Human Rights and Transitional Justice*. Abingdon, Oxon ; New York: Routledge/Taylor & Francis Group.

Introduction

Historically, the complicity of economic or corporate actors has seldomly been taken into account in the design of truth commissions or tribunals for transition that deal with mass crimes committed during armed conflicts. On the other hand, it has long been acknowledged that war economies and economic non-state actors have been involved directly or indirectly in war crimes (Duffield, 1999; Kurtenbach and Rettberg, 2019; Le Billon, 2001). 439 economic actors are, as an example, allegedly complicit with paramilitary violence and killings during Colombia’s six-decades long violent conflict (Bernal-Bermúdez and Sánchez in Payne et al., 2022: 98). Nonetheless, and despite significant efforts to hold economic actors¹ legally liable, scholars argue that ‘corporate accountability faces formidable barriers’ (Payne et al., 2020: 9) and is one of the ‘missing puzzle pieces in transitional justice’ (Payne et al., 2020: 11). The four books reviewed in this essay all identify this historical accountability gap. This has also earlier been argued by a range of other scholars (Aparac, 2021; Grosescu, 2019; Kaleck and Saage-Mass, 2010; Kamminga and Zia-Zarif, 2000; Michalowski et al., 2019; Miller, 2008; Roht-Arriaza, 2015). Hence, that is not what makes the four books novel nor reason to review them in this way. Instead, it is the fact that all four books highlight the possible ways that corporate accountability in fact is, and has been, a possibility within the broad frameworks of transitional justice (TJ) and business and human rights, despite the immediate lack of one systematic appropriate mechanism. Furthermore, these books eminently represent, in a constructive manner, the notable increase in attention the topic of corporate accountability attracts from various fields. As recently stated in an editorial in *International Journal of Transitional Justice* (van der Merwe and Lykes, 2022), the absence of

¹ Economic actors are generally those who, without being a direct part of any of the sides in a confrontation such as a violent conflict in a country, have (allegedly) contributed to crimes committed in the context of the armed conflict.

corporate accountability in transitional justice has become almost a commonplace notion, but solutions to overcoming this gap have been slow to emerge. Exploring the multiple ways that ‘innovative mechanisms’ (Pietropaoli, 2020) and ‘creative uses’ of TJ (Payne et al., 2020) *have* sought to address corporate complicity in violent conflicts and attempt to provide redress for victims, the books represent an emerging corporate turn in TJ. The books share a genuine interest in drawing on the lessons from the past and contemporary cases, in order to look for pathways forward to substantially hold corporate actors accountable for their complicity in crimes against humanity and gross violations of human rights. This essay will review the four books not only to give leverage to their individual and important contributions to the field, but also to show how they together form a broader tendency in the scholarly field of TJ. I share the observation by van der Merwe and Lykes (2022) that corporate accountability for complicity in past and ongoing gross violations of human rights and economic crimes is ‘a rapidly growing area of interest in the transitional justice field’ (p.1). This emerging corporate turn within academia might bear the potential to have genuine spillover to practice and as such represent pathways for breaking with corporate impunity.

Kyriakakis (2021) is oriented towards the field of international criminal law, whereas the remaining works explicitly direct their attention to the field of transitional justice and draw on broader transdisciplinary lenses. This difference is also reflected in the titles of their books and their analyses of challenges with and implications of corporate accountability. Entitled ‘Corporations, Accountability and International Criminal Law’ Kyriakakis’ book addresses issues related to TJ in a rather legalist way (her chapters are divided into the industrialist cases in Nuremberg, the ICC, The Hague, ad hoc courts and TJ beyond the criminal trial). The 5th chapter links international law directly with transitional justice in looking ‘beyond the criminal trial’. Pietropaoli’s (2020) book ‘Business, Human rights and Transitional Justice’ is organized around the different levels of judicial processes, the international, regional and domestic (chapters 2,3 and 4). The 5th chapter is designated to truth-seeking initiatives that mention economic actors which is followed by a chapter on administrative reparation programs (land restitution). Despite the different framings, Kyriakakis and Pietropaoli present overlapping content. Payne et al.’s book from 2020 is different as it is built up around an argument about corporate accountability from below and has a more socio-political take on the barriers for corporate accountability than the beforementioned books. The most recent book (from 2022) is an edited volume by Payne et al., with 15 additional contributors, making it more empirical and case-based. Its first part addresses the historical roots of corporate accountability, based on empirical chapters on Latin America and South Africa. The second part directs attention to ongoing efforts for corporate accountability, and includes examples from Chile, Honduras and the Philippines. The eminent conclusion by Rodrigo Uprimny discusses the current situation of transitional justice and prospects for how it can incorporate better mechanisms to hold economic actors accountable in the future.

All books recognize the existence of two bodies of literature that address accountability for corporate abuse. The first, and most burgeoning field is business and human rights. As Payne et al. (2022) make clear, this body of literature mostly deal with contemporary business involvement in human rights abuses and has a lesser judicial orientation than the other. Transitional justice on the other hand is slowly beginning to address issues related to corporate accountability. Seldomly, both Pietropaoli (2020: viii), Payne et al. (2020: 17), state, these two bodies of literature have been linked, which make these authors claim originality in their work exactly because their work combines these areas for the first time.

In the light of this potential ‘new era’ (van der Merwe and Lykes, 2022) of TJ, it is interesting how the books explain the lack of corporate accountability historically. Given the multiple calls for accountability throughout the years, how have corporations managed to escape the last wave of TJ with its central focus on socio-economic justice (Lemay-Hébert and Freedman, 2022; Nolan, 2013; Sharp, 2013)? Do they see TJ, which has increasingly become a standardized set of mechanisms (Gissel, 2022), as a pathway for corporate accountability or does it require new tools, renewal and/or expansion? Before we return to these questions, first a brief presentation of the books’ analysis of previous and emblematic cases of TJ, in which economic actors have been included.

Corporate accountability in a historical perspective

While there has not been any formal pre-established entity that can exercise jurisdiction over legal entities² such as corporations, the reviewed books recognize that several cases from the World War II cases to today show evidence that it has been possible to address corporate war crimes and the like in courts – as well as beyond courts. According to Pietropaoli (2020, 19), the debate over the responsibility of corporations under international criminal law has its roots in the Nuremberg trials conducted after World War II. The Nuremberg trials addressed the complicity of corporations such as IG Farben and Krupp AG in the so-called ‘industrialist cases’. Although it only prosecuted individuals, it recognized that legal entities could engage in criminal conduct (Pietropaoli, 2020: 28). Kyriakakis offers the most detailed presentation of the different industrialist cases at Nuremberg, and comments that the interpretation of the trials’ legacy in relation to whether the jurisprudence supports or rejects corporate obligations under international law is contested (chapter 2). This disagreement is also reflected in the other two anthologies: While Pietropaoli presents the Nuremberg industrialist cases as key to the further development of corporate liability in international law, Payne et al. (2020, 3) argue that the business trials at Nuremberg have not ‘had much of a legacy’ in the development of TJ. Based on their CATJ database, which function as the empirical basis of their book, they argue that, at international level (international courts and foreign courts, including Alien Tort Statutes),

² Legal entities refer to legal personality as different from that of natural persons. In law terms, a corporation can be a legal person, while a human being is a natural person. As an example, provided by Pietropaoli (2020, 23), the Nuremberg trial ‘did not have jurisdiction over legal persons, [so] it could not render a verdict against *Farben* as a legal entity’.

corporate accountability has occurred only in rare and isolated moments (chapter 2). Instead, as mentioned, the focus throughout their books from 2020 and 2022 is on the possibilities of ‘corporate accountability from below’ and the importance of domestic processes in the Global South, which also contemplates their most important contribution to the field of TJ.

Corporate accountability does not only find expression in criminal justice. TJ’s other important element, truth commissions, is also dealt with in all books. These are official bodies, usually established by legislation and often conferred with a wide range of legal powers such as the ability to ‘subpoena, search and seize’ (Pietropaoli, 2020: 143). As both Pietropaoli (chapter five), Kyriakakis (2021: 186–207) and Payne et al. (2020, chapter 4) highlight, corporations are on several occasions included in truth telling. Out of the 39 accessible truth commission reports that Payne et al. (2020, 7) could find, 23 of them addressed corporate complicity of abuses committed in armed conflict or authoritarian rule. 329 economic actors were identified in these reports. As Pietropaoli (2020, 143) explains, the legal consequences of being identified and mentioned with name in a truth commission report vary over context but is nonetheless an important aspect of TJ’s multiple layers of accountability. Payne et al. (2020: 166) claim that few knew about the abundant mentioning of economic actors in truth reports, and that their work is ‘exposing’ what was before ‘hidden’. Kyriakakis (2021: 181) refers to Payne et al.’s database but interprets it with lesser enthusiasm. Corporate accountability, as presented in the publications, mostly relates to the first two pillars of the TJ standard (Gissel, 2022): justice (trials) and truth telling. Beyond that, Pietropaoli explores administrative reparations programs (third pillar) in her 6th chapter and institutional reform in chapter 7 (fourth pillar). Besides this, these latter elements are hardly explored in the reviewed works. In continuation hereof, the reviewed works do also not address the potentials, or implications of, what could be called the corporate turn’s second leg: the growing ‘business for peace’ agenda (Melin, 2021; Rettberg et al., 2019; Schouten and Miklian, 2020), in which companies are sponsoring peace initiatives and furthering public discourses on business’ role in building peace.

From the reviewed works, the strongest contribution in terms of looking forwards come from Payne et al. (2020, 2022). Exactly because corporations traditionally have powers that are way stronger than civil society actors pushing for corporate accountability, these authors use the analogy of Archimedes Lever to argue their case on ‘corporate accountability from below’. With the right tool, the analogy goes, even weak actors can ‘move the earth’ (Payne et al., 2020: 272). The right tool for Payne and colleagues is institutional innovations of the Global South, which they contend are achieving far higher levels of accountability than international courts or foreign courts of the Global North or any top-down TJ process. Payne et al.’s (2020) model for ‘corporate accountability from below’ builds on innovative and creative combinations of ordinary domestic law (e.g. labor law), international law and international human rights norms. This, they argue, have

led to cases of corporate liability through civil courts. This ‘creative’ combination as *the tool* to achieve corporate accountability is parallel to what Pietropaoli (2020: 66) calls ‘a dynamic development of law’ when different branches of national law are adapted to international criminal law norms in holding companies accountable for violations of human rights. This indicates that a genuine corporate turn in TJ will be an innovation of TJ from below, steered by the Global South, and not from western institutional levels.

Barriers for corporate accountability

But, how come it has been so difficult to design strategies of peacebuilding and justice aimed to address private sector involvement in past atrocities and acts of violence? To answer this, the books offer different aspects and accounts. Kyriakakis (2021) largely remains within the legalist sphere and explores in detail the multiple legal obstacles and complexities relating to liability under international law. One important element that explains the limited accountability for economic actors is the immediate lack of one appropriate legal mechanism that has that ability and mandate to prosecute corporations. Kyriakakis (2021) and Pietropaoli (2020) discuss the implications of the exclusion of ‘legal persons’ (here called entities) in the jurisdiction of the Rome statute of the International Criminal Court (ICC) when it was negotiated in 1998. If the proposal from France was accepted back then, that would most likely have kickstarted the corporate turn more than 20 years earlier. But it was rejected, and jurisdiction is maintained to include only natural persons. A shared observation in all four books is that business and human rights frameworks operate through principles of soft law and voluntary commitment, which have generally been insufficient to substantially bring human rights improvements and corporate accountability. This, combined with the unsettled nature of international law regarding corporate liability, has historically made it difficult to develop international pressure in favor of accountability for corporate abuses. The other books recognize this legal-technical challenge but focus on other more socio-economic and historical explanations. A further prominent explanation is summarized in what is referred to as ‘the corporate veto’ (Payne et al., 2020: 113). That indicates the companies’ abilities, through the ample resources that are often at their disposal, to ‘veto’ accountability efforts and protect themselves from prosecution. Corporations are often deeply entangled into political elite networks of governments and businesses that build on colonial legacies, modernist ideologies, and, in some cases, the use of violence in the shadows to quell opposition (Brock and Dunlap, 2018; Jakobsen, 2020, 2021). Payne et al. (2020: 124–130) frame this as veto power through political linkages. As all four books mention (Pietropaoli being most explicit) conflicts over land and natural resources as one of the main driving causes of conflict. The mining and extractive sector is consequently also the one that dominates literature on corporate accountability in particular when related to the business and human rights domain (Pietropaoli, 2020). As Bernal-Bermúdez and Camilo Sánchez show in their chapter in Payne, Bernal-Bermúdez, and Pereira 2022, in Colombia especially cattle ranchers, banana growers and increasingly also the extractive business sector are deeply entangled into national politics and the elite. These sectors, consequently, managed to circumvent

the proposal from 2016 to include third party actors as subjects of jurisdiction under the Special Jurisdiction for Peace (JEP). At the same time, and despite of this, Colombia represents signs of the emerging corporate turn in practice.

Signs of the emerging corporate turn *in contemporary practice*

Colombia is indeed an emblematic case on the challenges but also the possibilities for corporate accountability. Currently, according to Payne et al. (2020), Colombia has the highest number of economic actors in their database. This is explored in more detail in the contribution by Laura Bernal-Bermúdez and Nelson Camilo Sánchez (chapter 5) in Payne et al. (2022). Colombia's current TJ process is often praised for being innovative and comprehensive, while still following the standardized TJ model (Jakobsen forthcoming, n.d.). As such, Colombia stands out as a current TJ laboratory in which there is an impetus for seeing more corporations being held accountable in judicial processes in the JEP. A recent example reflecting the corporate turn in practice on an international level, is the US charge of the French company Lafarge for supporting terror groups in Syria, to which they pled guilty in October 2022.

All four books share the aim to show how, despite the gap, there are in fact examples of both previous and contemporary cases of corporate accountability. The pressure might not be emerging as a 'cascade' (Sikkink, 2011), as it has been for accountability in transitional justice more generally. This route seems to be more complex and messier, at least. The pressure comes mainly from civil society actors (Payne et al., 2020, 2022). International and national civil society organizations of different sizes and leverage advocate in distinct forms for corporate accountability measures. Among these actors are human rights collectives and NGOs in Latin America, who often engage in collaborations with academia.

One important formalized avenue for the corporate turn to have practical implications is the ongoing efforts of the Working Group on Business and Human Rights, established on a mandate from the UN Human Rights Council³, to draft a treaty on the topic. This working group has facilitated the exploration of how regulation of transnational companies through international human rights law can also assist in addressing TJ goals regarding economic actors' complicity with systematic or widespread human rights violations. However, while it is still too early to conclude whether we will see the corporate turn have real effects in practice, TJ scholarship is surely turning towards the corporation.

Prospects for the corporate turn in TJ

TJ as a field of practice and scholarship has developed and gone through several phases (Teitel, 2000) or generations (Sharp, 2013). In this development, TJ has also had different, and sometimes overlapping

³ The mandate is to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of business enterprises (United Nations Human Rights Council, Resolution 26/9, 25 June 2014, A/HRC/26/L.22/Rev.1)

‘turns’: a ‘technocratic turn’ (Macdonald, 2019), a ‘local turn’ (Kochanski, 2018), a ‘transformative turn’ (McAuliffe, 2017), and an emerging ‘socio-economic’ turn’ (Lemay-Hébert and Freedman, 2022). TJ’s emerging ‘corporate turn’ comes as a (belated) continuation of this latter turn, linked to TJ’s ‘fourth generation’, which includes an increased focus on economic violence and economic justice, areas which have been pushed to the margins in traditional approaches to TJ (Sharp, 2013). While this last development addresses broader issues of retributive justice, the emerging corporate turn indicates the increasing centrality of economic actors such as corporations into the sphere of TJ as bearing a responsibility for past violence as well as future justice. This is in line with Payne et al. (2020: 3), as they state how corporate accountability in their presentation focuses on crimes that already fall under the scope of TJ, namely crimes against humanity and gross violations of human rights (and not socio-economic rights violations). The new element (accountability of economic actors) bears the potential to break with the strong state-centered focus of TJ, also mentioned by all four reviewed books.

A question remains about whether the emerging corporate turn has the potential to innovate TJ in such a way that it will lead to more justice in the future. Will the corporate turn be able to ‘shake’ the increasingly standardized toolkit approach, that arguably have assisted in producing this blind spot in TJ in the first place?

The concept ‘standardized TJ’ indicates that increasingly, the scope of TJ procedures has been constrained on states and state-like actors, as well as the victims of crimes into a paradigmatic ‘one-size-fits-all’ logic (Sharp, 2015: 152). This movement has gone hand in hand with the increasing normalization and mainstreaming of TJ as a field of practice (Arthur, 2009; Atteberry, 2019; Gissel, 2017, 2022), as it has expanded over time and space (Hansen, 2014; Macdonald, 2019). As Gissel (2022) argues, the standardization of TJ is puzzling because it consolidates practices that have so far not demonstrated a genuine beneficial effect on transitional societies. Not only are actors involved in crimes against humanity or other serious violations of human rights insufficiently held accountable, in many cases, victims do not experience to have been sufficiently remedied. This ‘victim’s gap’ is also mentioned by Payne et al. (2020).

While confirming the lack of corporate accountability historically, Pietropaoli (2020: i) claims that ‘innovative transitional justice mechanisms have [...] now started to address corporate accountability for human rights abuses and crimes under international law and have attempted to provide redress for victims’. Other scholars argue that TJ ‘is well positioned to advance the development of legal mechanisms for corporate accountability [...] into its fundamental framework’ (Atteberry, 2019: 357). While Kyriakakis (2021: 4) admits that ‘the field can seem categorically ill-suited to the task given criminal law’s emphasis upon human agency and international law’s state-centeredness’ she concludes that yes ‘industry does and

ought to fall within the purview of international criminal law, in terms of both individual and corporate responsibility’.

Conclusion: An emerging turn in TJ?

Despite of their relative optimism, however, none of the books claim that the accountability gap is closed. Rather they all declare that there is a need to strengthen the mechanisms that allow for corporate accountability – or develop new ones, as Kyriakakis (2021) mentions in her concluding chapter and Uprimmy similarly concludes in his conclusion of the edited volume by Payne et al. (2022). Following in this same line, the argument of the emerging corporate turn in TJ builds on a two-fold observation: firstly, the observation that the increasing attention and pressure by scholars, civil society and some international organizations to integrating corporate actors into TJ designs and systems, is now so significant, that TJ implementers will hardly be able to continue overlooking it. Secondly, as the books elegantly show, there *are* mechanisms available to hold economic actors accountable, and cases show that it *has* been done. Thus, my argument is that with the unfolding of the corporate turn, holding economic actors accountable for past abuse might develop from its current ad hoc and exceptional fashion in the periphery of the TJ standard into a more systematized and ‘normalized’ practice. It should be acknowledged that it will not be a straight-forward process as corporate power continues to be strong and it requires a great deal of strength from multiple actors, also beyond the civil society.

The question of corporate accountability will increasingly appear in relation to TJ work in the (near) future. The four books reviewed not only represent the increased interest in corporate accountability. When seen together, they are also furthering the corporate turn agenda. As Atteberry (Atteberry, 2019: 357) proclaims, the accountability movement, led by the Global South, pushing for mechanisms to hold corporations accountable is ‘gathering momentum’. Dustin Sharp claimed already in 2013 that there was an ‘increasing momentum to interrogate the peripheries of the field’ as he saw a ‘confidence to call into question some of its own blind spots and biases’ (Sharp, 2013: 157). I see corporate complicity as representing such blind spot, which I believe is a product of two parallel processes: Firstly, the historical entanglements of networks of power and colonial legacies that have protected economic actors such as large landowners and enterprises. Secondly, and combined with the first, TJs increased standardization. In fact I suggest that the increasing standardization has consolidated a blind spot that was already identified in 2000 (Kamminga and Zia-Zarifi, 2000) and again in 2010 (Kaleck and Saage-Mass, 2010).

The emerging turn in TJ scholarship is a much-welcomed development in the field. Its potential beneficial effect is that it will lead new pathways for accountability in practice. As Payne et al. (2020) claim, achieving corporate accountability bears the potential to ‘locate root causes of violence and the economic and political

power structures underlying armed conflicts’. Despite the emerging corporate turn, however, corporate accountability still rests on the edges or outside of standard TJ. Kyriakakis (2021: 219) identifies two possible pathways forward. The first is to better utilize the mechanisms already at hand. The second is to develop new tools to pursue business cases. But, as Van der Merwe and Lykes (2022: 4) claim, ‘we are yet to see a theory of transitional justice that outlines an alternative framing of transition that speaks to these economic drivers, underlying systems of marginalization and exclusion and forms of conflict’. To build such theory and make it applicable in practice is the next big task for TJ scholars.

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