

Corporate Reparations in Transitional Justice Contexts: A Restorative Justice Approach The Case of Colombia's Conditionality Regime

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CORPORATE ACCOUNTABILITY, REMEDY, AND REPARATION IN TRANSITIONAL JUSTICE CONTEXTS

Experts from the Global South in conversation with
Anita Ramasastry, member of the UN Working Group
on Business and Human Rights

28 October 2021, 5 - 6.30 pm CEST
Zoom online event

Panel:

Prof. Laura Bernal, Pontificia Universidad Javeriana, Colombia

Dr. Marco Velásquez, CREER, Colombia

Daniel Marín-López, Faculty of Law,
Universidad de los Andes, Colombia

Dr Hugo van der Merwe, CSV, South
Africa

Prof. Anita Ramasastry, UN Working
Group on Business and Human Rights,
USA

Registration:
bit.ly/2XshIE3



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Jurisdicción Especial para la Paz 
@JEP_Colombia

#Atención: La JEP concede libertad condicionada a Jaime Blanco Maya, excontratista de la Drummond.  Blanco Maya actuó como intermediador en el financiamiento de las AUC y está condenado en la justicia ordinaria por el asesinato de 2 miembros de Sintramineroenergética 

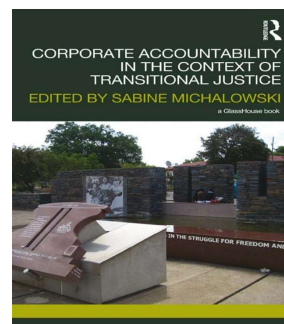
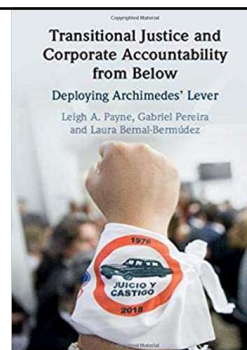
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Corporate Accountability in TJ Settings

- An elusive quest
- Increased attention
 - By scholars: judicial & non-judicial mechanisms
 - Burgeoning innovation at Global South institutions
- Focus on corporate actors' reparations



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Corporate Reparations through TJ mechanisms

Where corporate reparations are awarded...

- Overemphasis on material reparations
 - Financial compensation is the most common form
 - Restitution
 - Symbolic forms of repair remain neglected / overlooked
- Risk of commodification of reparations
- Victims as recipients
 - Passive role in the design of reparations
- Victim's needs unaddressed / ignored

How can TJ settings provide corporate accountability that delivers reparations that are more victim centric?

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Restorative Justice

is an approach to justice in which “parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future” (Marshall, 1999, p. 5)

- Born in the field of criminal justice (Christie 1977, Zehr 1990)
- A reaction against retributive approaches to justice
- Process controlled by judges & lawyers vs process owned by victims, wrongdoers, community
- Rebuild social relationships
- Also discussed in TJ literature (e.g.: REF)

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A framework for corporate reparations in TJ settings

Substantiveness

- Adequate recognition of harm done
- Repentant & apologetic reparation
- Customization to victims' needs / context
- Material & symbolic reparations

Participation

- Share stories, ask questions
- Source of information on victims' needs

Inclusion

- Reparations to restore people & relationships
- Beyond victim & offender
- Inclusion of other key Stakeholders

Transformation

- From powerlessness to empowerment
- Offender to make amends + non-recurrence
- Community through reintegration

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A trade-off between RJ and TJ

Two opposing forces shaping reparations

- TJ stresses a procedural and systematic approach to reparations
 - Maximize number of victims covered
 - Avoid impunity
 - Adjudicative
 - No space for participation
- RJ emphasizes a targeted and customized approach to them
 - Customized and open-ended
 - Participation centric

The CR represents the configuration through which Colombia's TJ project responded to the trade-off

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JEP & The Conditionality Regime

- First specialized court in the world to address economic actors for their role during conflict
- Orders reparations based on roles and responsibilities during the conflict
- Third parties: business actors (individuals)
- Benefits: avoid prison and access softer sentences.
- Condition: formulate a concrete, programed, and clear compromise to restore victims (Restorative Plan)

Embraces the paradigm of restorative justice.

- Non-retribution
- Reincorporation of offenders & victims
- Satisfaction rights of victims

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Discussion: a RJ approach to corporate reparations in TJ settings

Substantiveness

- Welcomes different types of reparations
- Safe space for symbolic reparations

But...

- Restorative plan drafted by offender
- Material reparations are rare

Participation

- Active participation offender & victim in reparations definition

But...

- Judge's last word.
- Victims' feedback. No veto power

Inclusiveness

- Offender & victim

But...

- Voluntary joining JEP's CR
- Corporations excluded
- Many victims remain excluded & no access to reparations

Transformation

- Limited transformational power
- Reparation centered on the specific harm
- Root causes that led to the violence not addressed.

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In a nutshell

- Corporate accountability debate with focus corporate reparations
- Corporate reparations in core TJ mechanisms
- Guiding framework based on restorative justice
- Discuss its implementation and a trade off associated to
- Colombia's Special Jurisdiction for Peace TJ mechanism, Conditionality Regime

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Thank you!



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Back up

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Swiss Network for International Studies



- Corporate reparations in TJ projects
- 2 years project
- Multidisciplinary, 7 people, 3 continents
- Colombia, South Africa, Germany
- Advance scholarship & foster discussion



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Scholarly output

“Corporate Archives as an instrument of TJ Reparation”

- Can corporate archives act as a source of corporate reparation?
- German context post WWII
- Submitted to the IABS conference 2021

“Unresolved Linkages between Transitional Justice and Corporate Accountability: the temporal dimension”

- TJ a reform process may last for decades & corporate impunity to prevail
- Unaddressed issues re-emerge.
- South Africa’s TJ and the mining sector

“Victims Perspectives on Corporate Symbolic Reparations: South Africa’s Marikana Mine”

- What role for symbolic reparations by corporate actors?
- Marikana mine, South Africa
- Field research starts March 2021

“Corporate Reparations in Transitional Justice Contexts: A Restorative Justice Approach. The case of Colombia’s Conditionality Regime”

- Goal: Journal of Business Ethics
- Planned submission: Fall 2021

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Transitional Justice Settings: mechanisms and institutions through which societies attempt to “come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”
(United Nations, 2004a, p. para. 8)



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Business actors and the conflict in Colombia

Some statistics:

- Six decades of internal conflict
- 8-9 million victims
- 218,094 deaths
- 27,023 kidnappings
- 5,7 Million forced displacement

Source: Centro Nacional del Memoria Histórica

Role of business actors

- **Victims:**
 - Object of extortion & kidnapping,
 - Terrorist attacks & sabotage
 - Threat or violence against contractors and employees, etc.
- **Complicit**
 - Financing armed groups.
 - Pointing targets against union members
 - Benefitted from massive forced displacement

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Colombia's Special Jurisdiction for Peace (II)

Business Actors

- Where considered relevant to the conflict
- Individual actors – not corporate entities
- Not a trial, but a process under judicial supervision
- Voluntary appearance
- Benefits: avoid prison and access softer sentences.
- Conditional regime: formulate a *concrete, programed, and clear compromise* to restore victims (Restorative Plan)

Restorative Plan features:

- Business actor to prepare & present a restorative plan
- Specify time, means, and place
- Measures can be material and symbolic
- Presented to victims
- Victims can suggest amendments, formulate suggestions, reject the plan.
- The judge acts as a final instance of legitimation of the agreement

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Discussion: Two trade-offs identified - TJ & RJ

Broad and extensive vs narrow and intensive

- TJ to avoid impunity
- E.G., macrocriminality: broad categories
- Broad scope implies losing reparative capacity
- RJ pushes for "one on one" (Personalism)
- Difficult to match corporate wrong with specific victims: diffused reparations.

Procedural and systematic vs targeted and customized

- A RJ process that is customized to the particularities of each case vs. Judicial approach with systematized processes, predefined steps (prevent impunity, offer judicial security)
- TJ flexibility & large-scale vs "one on one on one" approach of RJ
- Symbolic reparations: "apologies can be routinized", but they are still apologies (and reparations)!
- E.G, restorative plan could allow for customization

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Restorative Justice is not a panacea

“The rhetoric of restorative justice was used as a basis for reintegrating business into post-apartheid South Africa, whilst denying the need for [corporate] reparations”

Koska 2016: 41

- Clear warning on the limitations and potential “manipulation”
- TJ vulnerable to powerful & political players (Lekha Sriram, 2007)
- TJ politically weak & under-resourced (OHCHR 2006)