

## FINAL SCIENTIFIC REPORT

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### INITIAL PROBLEM STATEMENT, LITERATURE, HYPOTHESIS AND METHODS

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In the project “Corporate symbolic reparations in transitional justice contexts: Case studies from Colombia, Germany, and South Africa” we set out to identify and elaborate the role corporations can and do play in processes of transitional justice. In contexts of conflict or authoritarian regimes, a wide range of actors commit or support acts of violence. These can include corporations who command, directly engage in, entice and support, or benefit from violence. We started from the view that whilst corporations are increasingly important as participants in and supporters of transitional justice, their role in these processes remains under-researched. Neither transitional justice nor business ethics and management literatures provide satisfactory answers to the questions of why, when, and how both corporations and victims may decide to engage in transitional justice processes or what impact this may have. Using symbolic reparations (SR) as our specific entry point, this project set out to explore those questions in Germany, South Africa and Colombia.

In practice, corporations are playing an increasingly important role in TJ settings (e.g. as participants, supporters, sponsors)<sup>1</sup> and TJ mechanisms have been given expanded mandates in recent years to address corporate responsibility.<sup>2</sup> Though TJ scholarship has sought to reflect on the relevance of this new player, the field has not fully theorised the multiplicity of roles that corporations can play in post-conflict contexts. In fact, the discussion on corporate reparation processes has been limited to discussions of material reparations.<sup>3</sup> Despite the importance and potential contributions corporate SR can make to transitional societies, there is hardly any literature and evidence exploring the link between TJ and corporate accountability,<sup>4</sup> much less concerning corporate SR initiatives. This silence is also reflected in recent key international TJ policy documents such as the European Union Policy Framework on Support to Transitional Justice and the African Transitional Justice Policy. This research project aimed to address precisely this gap.

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<sup>1</sup> Sandoval, C., Filipini, L., & Vidal, R. (2014). Linking Transitional Justice and Corporate Accountability. In S. Michalowski (Ed.), *Corporate Accountability in the Context of Transitional Justice*. New York, NY: Taylor & Francis. P. 63

<sup>2</sup> Only 8 out of 29 countries that embarked on TJ journeys have included any emphasis on businesses in any dimension of their TJ initiatives. CREER. (2017). *Construcción colectiva de verdad y reconciliación: contribuciones y desafíos de la participación del sector privado en el proceso de justicia transicional en Colombia*. Bogotá D.C.: Centro Regional de Empresas y Emprendimientos Responsables (CREER).

<sup>3</sup> For an exception see Sandoval, C., & Surfleet, G. (2014). Corporations and Redress in Transitional Justice Processes. In S. Michalowski (Ed.), *Corporate Accountability in the Context of Transitional Justice*. New York, NY: Taylor & Francis. P. 108-112

<sup>4</sup> For an interesting exception see: Michalowski, S. (Ed.) (2013) *Corporate Accountability in the Context of Transitional Justice*. Abingdon, NY: Routledge.

We set out to answer the questions of 1) How do corporations in TJ contexts engage in the provision of symbolic reparations, and 2) how do victims and communities engage with corporations in the provision of symbolic reparations? We developed five hypotheses:

H1: Corporates favor SR processes that draw a clear line between a past where abuses happened and the present where such corporate abuses are unlikely to happen.

H2: A corporation's willingness to engage in SR is greater if it faces legal action to account for its role in HR abuses as part of the TJ process.

H3: Where victim communities have the power to determine corporate access to key resources, the corporation will be more likely to adopt SR.

H4: Where corporations opt to engage in SR acknowledging victims' suffering only at the hands of others, one should observe a higher degree of satisfaction than not providing any SR at all. Thus, engagement in SR without acknowledgement of the corporation's own responsibility has a negative impact on victims' perception of the reconciliatory effort.

H5: Victims are expected to show a degree of satisfaction where corporations are able to embed SR into their reparatory efforts.

We anticipated a multiple case study approach of two cases each in the case study countries (Germany, South Africa, Colombia) which were selected due to their significance in defining and shaping the theory and practice of TJ globally and regionally. Given that corporate engagement with SR is a relatively new phenomenon, we chose to focus on countries where well-established, state-led TJ provided a conducive context for corporates to play an active role in SR. Data was to be collected through a literature review, a mapping of corporate engagement in symbolic reparations, document analysis of public documents, communication, interviews, archival work, and media reporting. The adaptation of the research plan is discussed in the internal report.

## RESULTS AND ANALYSIS

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Here we will discuss the results of each case study before discussing the overall project results.

### Colombia

The Colombian case focused on an analysis of the Conditionality Regime under Colombia's Special Jurisdiction for Peace (JEP) which is an integral part of its Integral System of Truth, Justice, Reparation, and non-Repetition. This case has generated insights primarily with regard to (1) the state obligation to provide reparation within the fields of international law and human rights law, and victims' right to reparation within the field of transitional justice; (2) conceptual elements around restorative justice from the perspective of both ethics and transitional justice; (3) instruments facilitating access to remedy by victims of human rights violations within the context of entrepreneurial activity in general and under the umbrella of Colombia's JEP.

The Colombian case has shown that the prevailing conceptualization of corporate reparations exclusively in material terms leads to conceiving of victims as mere passive recipients in corporate reparation processes. Such an approach neglects the agency of victims and their needs, and thus hinders the process of restoring relationships between corporate actors, victims, and communities. To counterbalance such downsides, we introduce a framework of four principles based on the restorative justice literature to guide corporate reparations in TJ settings. The framework makes evident that to deliver corporate reparations along with the parameters of restorative justice, TJ accountability mechanisms have to actively manage a

trade-off related to their scope, and their degree of systematization. The resulting paper develops a matrix to evaluate whether a particular reparations mechanism meets the criteria of a restorative justice approach that can be applied in other contexts. The matrix covers the elements of substantiveness, participation, inclusion, and transformation.

### South Africa:

Transitional justice processes have increasingly engaged with issues of corporate accountability, but these measures remain ad hoc, partial, and without enforcement or follow through. Much of the initiative for corporate reparations remains with the companies concerned, with courts playing a limited role, and other TJ measures such as truth commissions being largely absent. Increased human rights guarantees in national, regional, and international systems have strengthened the ability of victims and civil society to pursue corporate accountability, including the provision of symbolic and other forms of reparations.

Corporate actors sometimes engage intensively in symbolic reparations initiatives in response to cases where they have been implicated in past human rights violations. They engage with such processes both as complementary to a legal compensation process or as an alternate avenue of compensation. Where companies reach out of court settlements for civil claims lodged against them, they tend to engage in symbolic gestures in order to frame the narrative of the past and to present the settlement as an act of good will. In the absence of judicial pressure, corporate actors sometimes engage very intensively in symbolic reparations measures in order to address the harm to their reputation and improve relations with key stakeholders.

The South African case study focused on the case of Marikana, which has to be read against the backdrop of the unresolved legacy of apartheid-era corporate abuses. Although the South African Truth and Reconciliation Commission raised these concerns and made recommendations, these were never followed through. Addressing more recent corporate abuse is compounded by mining companies' previous complicity in apartheid legislation, paying exploitative wages and subjecting miners and mining communities to unsafe and undignified living and working conditions.

The South African case shows that in cases such as Marikana corporate symbolic reparations were developed through consultation with relatives of those who died in the conflict. These consultations have however been framed as acts of charity, rather than an acknowledgement of wrongdoing and recognition of the rights of victims. They have also been framed through a narrative of the conflict and a vision of the future that supports the perspective of the company. Victims' perceptions of these reparative initiatives are very mixed. While acknowledging their material value in addressing their desperate circumstances, they are seen as insufficient for compensating for the harm suffered, unresponsive to their particular circumstances and dismissive of their stories, understanding and experience of the events. The company's engagement with and reparations for victims is also very selective and ignores key victim groups. Company reparative initiatives are not in line with international human rights norms in a number of key respects.

### Germany

Rather than focusing on one or two individual companies, the German case study focused on business archives as cases of corporate engagement with the past. Based on interviews with corporate historians and archivists, as well as archival experts, the German case shows the multitude of contributions corporate archives as sites and actors of dealing with the past can

make. The research has shown that corporate archives contribute considerably to the acknowledgement of facts as they are often not only a key resource for historians, historical commissions or commissions of inquiry, but by making traces of the past continuously available they also maintain the possibility of fact-finding well beyond any transitional justice mechanism’s duration. Through their activities around exhibitions, commemorations, and memorials, archives and archivists also help preserve memory. Some archives additionally engage in educational work with a focus on prevention, or what is referred to as non-recurrence in transitional justice. The work of corporate archives, at least in cases where they engage pro-actively with their past, thus pursues the goals of providing access to information, helping in the verification of facts and the disclosure of the truth, contributing to prevention and non-recurrence, fostering the recognition of rights, and acknowledging both victims’ experiences and the responsibility of perpetrators.

As this case study considered not only *what* archives do, but also *how* they do it, additional insights can be gained. Looking at the collection, description, access policies and practices of corporate archives and the use of such archives, positive examples of collaboration with victims and survivors emerge. However, it is here where we find great potential for further engagement. The current processes are driven and owned by the companies, which means they retain ultimate control over (the extend of) their engagement, the narratives that emerge, and the reparative actions implemented. A more dialogic and dynamic approach to reparations and a focus on victim participation are important steps towards more meaningful engagement and deepening the reparative potential of corporate archives’ dealing with the past engagement.

The work on the German corporate archives in relation to reparations has fostered reflections on the link between archives and reparations in transitional justice contexts more generally. Going beyond the current literature’s focus on archival documentation as evidence in reparation claims, a more nuanced and complex understanding of this relationship is called for. This suggests that archives are used *for* reparation processes, that archival restitution can itself be seen as a form of reparation, that we need to engage with the archives *of* reparations, and, most importantly, that we should reflect on archival practices *as* reparative actions. The latter in particular, builds on emerging debates in the archival scholarship but promises to hold important insights for *how* we conduct documentation and archiving in relation to transitional justice.

### Overall results

Keeping in mind the hypotheses laid out above and the results of the individual case studies, a few overall findings can be summarized. Some of these are laid out in more detail in the Working Paper.

- Victims’ satisfaction is dependent not only on material reparations but also on symbolic reparations aspects. This has been evident in both the South African and the German cases.
- Corporate engagement with the past is driven by external or internal pressures, for example demands for justice by former victims and their relatives, or more general calls for engagement by consumers, unions, workers, journalists or the public. The threat of lawsuits seems particularly important as a motivator.
- Corporate engagement with the past can be a long, tedious process that takes multiple iterations before constructive engagement with victims emerges. Many companies undergo different forms and stages of engagement, reaching from denial and objection

through passive acceptance of their past, to more transparent engagement. Apologies and acknowledgement of a company's responsibility are not always part of this process.

- As we discuss in the working paper, in order to understand the complexity, evolution, development and underlying motives of corporate engagement with the past, at least four dimensions of this engagement need to be considered: 1) the role the company played during the conflict or human rights violations, 2) the degree to which and how it acknowledges and frames that role, 3) the reparative actions the company engages in, and 4) whether and how a corporation initiates transitional justice processes in a more comprehensive and pro-active manner (beyond individual activities).

What emerges from this project overall is that there is a diverse range of transitional justice activities and goals that corporations engage in. The motivations for doing so and the particular catalysts at play vary considerably from case to case. Notably, these engagements go well beyond the judicial and truth-seeking mechanisms that the transitional justice literature has focused on thus far. Our analysis has engaged with examples of companies not only partaking in and contributing to transitional justice mechanisms and processes initiated by others (the government, civil society, etc.) but also those where companies themselves initiate and set up transitional justice mechanisms. This opens up the possibility of conceptualizing corporations as transitional justice actors, and perhaps even agents. Whilst we start exploring this idea in the Working Paper, it warrants further reflection and analysis.

#### CONCLUSION AND OUTLOOK FOR FURTHER EXPLORATION

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In conclusion we would like to highlight the considerable importance of corporate contributions to adequately deal with past atrocities and human rights violations. There is immense unused potential in this regard, but also considerable pitfalls and risks, e.g., that engagement ends up being detached from and little cognizant of the needs of victims, their relatives and communities. The results of this project encourage us to think beyond companies' legal responsibility and their importance in truth seeking. We need to also consider the symbolic and material reparations, the contributions to non-recurrence and the educational work that companies can and, at times, do engage in, but which could be considerably expanded and improved in terms of how they work with victims and survivors.

This project has also produced a set of academic questions that warrant further analysis:

- Is restorative justice a reliable and adequate paradigm to be applied as a standard for corporate reparations processes?
- What strategies can be used by governments and civil society to pressure or encourage corporations to engage in transitional justice in meaningful ways? Are different strategies required and more suitable for transnational and domestic companies?
- How does the motivation of a company's engagement in transitional justice influence how victims perceive this engagement? In other words, does it matter to victims why a company 'does transitional justice'?
- How does the temporal dimension impact corporate reparations in a transitional justice setting?
  - o Do reparations connected to "recent" corporate abuses change in nature and scope versus those corporate abuses perpetrated in a more distant past?
  - o How does the speed (fast vs slow) in responding to allegations of abuse influence how victims perceive corporate reparations?
- What factors are key to deliver gender sensitive corporate reparations, both in their material and symbolic dimensions?

Methodologically, this project points to the importance of conducting further empirical research on corporate transitional justice engagement. Moving away from the normative orientation that has driven much transitional justice research has allowed us to see not only the breadth of corporate transitional justice initiatives that have been implemented in Germany, Colombia, and South Africa, but they have also rendered the lack of depth in some of these mechanisms visible. For example, it is true that corporate archives contribute to truth-seeking, acknowledgement of victims and the responsibility of perpetrators, and prevention. However, the empirics also show that these activities would have to engage much more comprehensively with victims to be truly reparative.

Furthermore, our study points to the importance of comparative qualitative research in order to identify the factors that drive variations in engagement not only between individual companies but also across different contexts and jurisdictions. If we want to encourage more and deeper corporate transitional justice engagement we need to understand what shapes that engagement: the types of crimes the company was involved in or the level of involvement, whether it is a small, medium, or large enterprise, whether it acts domestically or internationally, what pressure groups are most effective in what context, and a plethora of other possible factors.