

JOINT SUBMISSION IN RESPONSE TO THE CALL FOR
INPUT ON BUSINESS, HUMAN RIGHTS AND
TRANSITIONAL JUSTICE

BY

UN WORKING GROUP ON BUSINESS AND HUMAN
RIGHTS

Dr. Hugo van der Merwe.
Center for the Study of Violence and
Reconciliation (CSVr)
South Africa
hvdmerwe@csvr.org.za



Dr. Jordi Vives Gabriel.
Institute for Business Ethics,
University of St Gallen,
Switzerland
jordi.vives@unisg.ch



Dr. Marco Velásquez,
Centro Regional de Empresas y Emprendimientos
Responsables (CREER),
Colombia
m.velasquez@ihrb.org



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1. The Relationship between Reparations, Development, and Peacebuilding

The Marikana Massacre in which 34 miners were shot dead occurred in 2012. The underlying causes of the conflict (the poor living conditions, low salaries and migrant labor process) were issues that had not been addressed by the political transition of 1994. The heavy handed police response to the protest also reflected the lack of transformation of policing culture since the end of Apartheid. The transition to political democracy in 1994 had limited immediate impact on transforming business-labor relations on the mines, and the unresolved legacy of systemic apartheid inequality meant that the workplace remained a conflict context.

In response to the events of 2012, Sibanye-Stillwater, the company that now owns the Marikana mine initiated various programmes of restoration and direct support the widows of those killed (e.g. housing and jobs for the widows, and education for children of those killed) as well as symbolic measures (such commemoration events and a memorial wall). It also initiated an ambitious development programme and supports the development of a memorial on the site of the massacre.¹ While acknowledged the direct support to families as a substantial contribution to their livelihoods, the relationship between the company and the victims remains one that is reflective of a highly unequal power balance. The benefits derived by victims is never framed in terms of their rights to compensation, their engagement in memorial activities remain highly scripted in events designed and convened by the company², and the narrative of the massacre is one that frames it as a tragedy which does not allocate responsibility, or link it to the legacy of unresolved legacy of apartheid. This business-led process of development and repair holds great potential for direct benefits to individuals and development processes for a community more broadly. But it also seeks to introduce a hegemonic framing of the narrative and discourse that positions the mine owner as the altruistic benefactor of the community.

These initiatives are thus framed in direct contrast to the way symbolic reparations have been defined as “the shared framework of interpretations through which the material conditions of human existence are rendered intelligible and given meaning”.³ They typically share a “truth telling” component aiming at establishing certainty around key facts about past events.⁴ Symbolic repair efforts “derive their potential from the fact that they are carriers of meaning”⁵ and their capacity to shape narratives. In the aftermath of a transgression, they can help ritualize and work towards closure, and provide individuals, groups, and societies with a marking point for moving onto a new phase.⁶

Business involvement in development and peacebuilding cannot be viewed simply as a neutral or objective engagement to address a particular need or set of rights. While

¹ Sibanye-Stillwater (2020) Marikana Renewal Fact Sheet 2020, Accessed on 18 October 2021 at: [file:///C:/Users/CSVRLAP9/OneDrive%20-%20CSVRLAP9/Downloads/SSW-FS20-marikana-renewal%20\(3\).pdf](file:///C:/Users/CSVRLAP9/OneDrive%20-%20CSVRLAP9/Downloads/SSW-FS20-marikana-renewal%20(3).pdf)

² See for example stories of the victims shared by Sibanye-Stillwater at <https://www.sibanyestillwater.com/features/marikana-commemoration/> (accessed 18 October 2021)

³ Greeley, R. A., Orwicz, M. R., Falconi, J. L., Reyes, A. M., Rosenberg, F. J., & Laplante, L. J. (2020). Repairing Symbolic Reparations: Assessing the Effectiveness of Memorialization in the Inter-American System of Human Rights. *International Journal of Transitional Justice*, 14(1), 165-192. doi: 10.1093/ijtj/ijaa002

⁴ Radzik, L., & Murphy, C. (2019). Reconciliation. *The Stanford Encyclopedia of Philosophy*. Fall 2019; Walker, M. U. (2010). Truth Telling as Reparations. *Metaphilosophy*, 41(4), 525-545.

⁵ United Nations. (2008). *Rule of Law Tools for Post-conflict States: Reparation Programmes* (Vol. HR/PUB/08/1). New York and Geneva: Office of the United Nations High Commissioner for Human Rights.

⁶ Hamber B. & Wilson, R.A. (2002) Symbolic closure through memory, reparation and revenge in post-conflict societies, *Journal of Human Rights*, 1(1) 35-53.

containing important positive elements that should be encouraged, it comes with a very clear agenda for framing relationships with other actors, shaping a narrative of past events and introducing a discourse that frames debates about responsibility. These are all integrally linked to reparative processes. Giving corporate actors undue power in framing these initiatives can directly undermine key components of symbolic reparations. Only when ownership (and control of resources allocated to these initiatives) is placed outside the control of the business actors (e.g. through the establishment of an independent fully funded trust), where such programmes are controlled by victim or jointly controlled by relevant stakeholders, can such processes hold the potential to realize their reparative potential.

2. Incentivizing Business Participation

Colombia's Special Jurisdiction for Peace (JEP acronym in Spanish), and its Conditionality Regime (CR) in particular, are a relevant and current case from which to draw insights on the matter of incentivizing corporate actors to participate in TJ mechanisms. It also serves to illustrate the typical resistance dynamics that corporate accountability and remedy mechanisms face in TJ contexts. Despite its limitations, we think it is a step in the right direction, and thus worth the attention of the UN Working Group.

The JEP is one of the institutions emerging from the "Integral System of Truth, Justice, Reparation, and non-Repetition" set up by the 2016 Peace Accords between the FARC-EP guerrilla and Colombia's Government. Its function is to investigate, conduct trials, and impose sanctions on those responsible for the crimes committed during the conflict⁷. It is the first specialized court in the world that might address economic actors for their role during conflict, and it represents a paradigmatic example of institutional innovation taking place in the Global South⁸. The primary focus of the Tribunal is the prosecution of the direct actors of the conflict – i.e. the members of both the FARC-EP and the armed forces⁹. Yet it was also envisaged that, given their decisive contribution to the commission of crimes, third parties – i.e. individuals who belonged to neither of the armed groups, such as business people – should have the opportunity to appear *voluntarily* before the tribunal, in order to contribute to the satisfaction of the victims' rights¹⁰.

The JEP offers third parties the opportunity to join the CR. The CR incentivizes the voluntary appearance of business actors and other third parties by granting them a more favorable treatment and softer sentences than they would receive before a criminal judge within the ordinary justice system. To enjoy such alternative beneficial treatment though, they must provide effective contributions to the satisfaction of the rights of the victims to truth, reparation, and non-repetition¹¹. Third parties are required to devise and hand in a restorative plan – i.e. *a concrete, programed, and clear compromise* detailing how they plan to effectively contribute to the satisfaction of the victims' rights. To date, more than 750 third party individuals, among them many business people, have requested to join the JEP's CR¹².

As it is defined, and with some reservations, the CR incentivizes and facilitates the provision of diverse forms of repair, including symbolic reparations, and allows victims to actively

⁷ Acuerdo Final, Punto 5 – Víctimas.

⁸ Payne, L. A., Pereira, G., & Bernal-Bermúdez, L. (2020). *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes' Lever*: Cambridge University Press

⁹ See Law 1957/19, art. 63.

¹⁰ See Sabine Michalowski et al, *Guía de orientación jurídica. Terceros civiles ante la JEP*. Bogotá: Dejusticia (2019), 6-7.

¹¹ See Law 1957/19, art. 20; Colombian Constitutional Court, Decisions C-674/2017 and C-080/2018.

¹² JEP. (2020). JEP en Cifras: Jurisdicción Especial para la Paz.

participate in the definition of their restoration plans. The CR, though, is still in its infancy, and the JEP has yet to issue enough rulings for researchers to assess the typology and effectiveness of the repair plans resulting from the CR.

Arguably, the JEP relies on a system of negative incentives to attract business actors to join its CR – i.e. the threat that if they do not join the CR they will face more severe consequences in the ordinary justice system. Yet, from a corporate accountability perspective, such a system is weak. First, because corporate actors are invited to join voluntarily, and the JEP has no mechanism to force them do so other than the threat from potential more severe sentences from ordinary justice. Second, legal entities (e.g. corporations) are excluded from the CR, which only applies to private individuals. Thus only business owners, managers or contractors can join. Finally, the CR is contingent on the existence of a solid and effective ordinary system of justice capable of investigating allegations of corporate wrongs during the conflict. Yet, very often, states engaging in a transitional justice process are characterized by weak legal institutions with limited resources. As a result, many business actors engage into a calculated risk exercise of balance the cost and benefits of joining the CR, against the chances of being prosecuted by Colombia's ordinary justice system, which may be remote.

Strikingly, if corporate actors do not join the CR, this has direct consequences for victims in terms of access to repair. Victims can only be recognized as such, and hence access reparations, if the corresponding business actor has previously and voluntarily opted to participate in the CR. In turn, the CR cannot do anything for those victims where the third party (e.g. a manager, owner or business contractor) decides not to join the JEP, let alone provide or order reparations to victims from wrongs attributed to business actors. Victims would thus be dependent on the ordinary justice system (with its inevitable delays and uncertainties) if corporate actors opted out of the CR.

Despite all its reservations and limitations, the CR should be assessed as part of the slow but steady positive evolution of corporate accountability in TJ contexts. TJ mechanisms are typically the result of complex political negotiations among parties attempting to put an end to a conflict. As a result, outcomes from such negotiations may allow certain actors to avoid accountability and thus avoid responsibility for reparations. JEP's CR is not an exception in this regard. As such, the UN Working Group would do good to emphasize the need for more coercive incentives for business actors of all kinds to join TJ mechanisms.

3. Understanding Business's Independent Responsibility

We seek to speak specifically to the following questions raised in the request for inputs:

- (c) should affected rights-holders be able to pursue businesses for civil claims outside of state-based communal reparations programmes, and
- (d) what are the impacts of the answers to these questions on state efforts to address the root or underlying causes of the conflict?

In order to address this question, it is important to appreciate the vast impact that business involvement can have on human rights abuses when operating in the shadow of repressive rule, both in terms of the scope of harm caused, but also in terms of the invisibility of these harms. In the South African case, legal accountability for business human rights abuses during apartheid occurred separately from the formal TRC process and in a much delayed manner. While it is regrettable that such a settlement took 25 years to reach settlement for some of these cases, the total settlement amount and the number of beneficiaries –

particularly in comparison to the government's reparations fund is notable. While a more integrated transitional justice process that served to expose business involvement in human rights abuses and supported a speedy resolution of reparations for such abuses would have been ideal, the serious danger of limiting rights to reparations through integrating them into one time-bound intervention needs to be noted.

Viewed together, the reparations from the state and the business sector provides a much clearer picture of the systemic causes of the conflict during apartheid South Africa, particularly highlighting the way that violent repression, denial of political rights and subjecting workers to inhumane working environments are intricately interlinked. This would suggest that the complementary roles of state reparations programmes and civil court processes should be encouraged.

Examining the contrasting approaches to reparations and the contrasting outcomes of the two processes is however very instructive. The South African Truth and Reconciliation Commission provided detailed recommendations for reparations for victims of gross human rights violations, which resulted in substantial payments to 18 000 victims in the following years (totaling in excess of \$30 000 000). These payments were however only made to a narrowly defined set of victims and only in relation to acts perpetrated with a political motive. The amount allocated to individual financial reparations also only amounted to 25% of that recommended by the TRC. Furthermore, victims who were unable to make a statement during the brief operation of the TRC were excluded from qualifying from any payments.

The narrow definition of political conflict and what qualifies as victimization (murder, torture, severe ill treatment¹³) means that most of the victims of apartheid policies were excluded. Forced displacement, a migrant labor system and inhumane and unhealthy work conditions, and other apartheid legislation and policies were responsible for the deaths of hundreds of thousands of workers. The fact that these actions were pursued for business interests rather than a political objective placed them outside the TRC's ambit. The nature of most of the abuses, although resulting in many deaths, were also not within the TRC's definition of "gross human rights violations." Although there have been many calls for truth commissions and other TJ processes to broaden the scope of abuses they cover¹⁴, in practice, they remain generally quite narrowly targeted in terms of time frame or types of victimization they cover, their reparations recommendations are rarely fully implemented,¹⁵ and they can exclude victims based on arbitrary administrative grounds. It would thus be unadvisable to limit victims' access to reparations through other avenues.

While the TRC did call attention to the need for greater accountability for business's role in apartheid policies and abuses,¹⁶ it did not have the resources to conduct sufficient investigations to identify victims, assess damages and allocate responsibility. Such assessments and claims for damages took much longer to pursue and were only made

¹³ South African Parliament (1995) National Unity and Reconciliation Act, Act 34 of 1995.

<https://www.justice.gov.za/legislation/acts/1995-034.pdf> defines: gross violation of human rights to mean "the violation of human rights through- (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)".

¹⁴ Zinaida Miller, Z. (2008) Effects of Invisibility: In Search of the 'Economic' in Transitional Justice, *International Journal of Transitional Justice*, 2(3), 266–291.

¹⁵ Moffett, L. (2019). In the Aftermath of Truth: Implementing Truth Commissions' Recommendations on Reparations - Following Through for Victims. In Jeremy Sarkin (ed.) *The Global Legacy of Truth Commissions*, Intersentia.

¹⁶ TRC (1998) Truth and Reconciliation Commission Final Report, Volume 4, Chapter 2

feasible through legal reforms (such as the provision for class action lawsuits). Most significant of these is the Silicosis settlement between various mining companies and workers that was finally settled in 2019. This settlement involving six mining companies and tens of thousands of former employees amounts to over \$300 000 000.¹⁷ The exposure to an unhealthy work environment had directly led to the premature deaths of tens of thousands of workers.¹⁸ These working conditions were made possible by the apartheid labor and citizenship laws, which had facilitated the recruitment of migrant laborers from rural areas, limited their rights in the workplace, and enabled their forced return to their rural homes upon falling ill.

5. Broader Reflections on Lessons Learned

The fact that the transitional justice process in South Africa is still ongoing and unresolved 27 years after the 1994 transition to democracy raises critical concerns about how transitional justice is conceptualized and how remedies are devised. Transition to democracy has not resolved some of the fundamental sources of conflict in the business sector, and the conditions of inequality in wealth and power have continued to fuel new conflict and human rights abuses. The Marikana Massacre of 2012 (the worst mass shooting by police in South Africa since 1960) in which 34 miners were killed was a direct consequence of systemic problems in the corporate sector that had not been addressed by the political transition. Key problems identified¹⁹ were the very direct role of the mining company officials in shaping police responses, the appalling living conditions of the mine workers, and the volatility in the bargaining relations between workers and managers. This expectation that the conditions that cause conflict in the business sector will be resolved through a political transition is often misplaced.

The invisibility of the abuses committed by business actors (particularly in relation to health and mining) can make it very difficult to address these through more immediate and short term interventions such as truth commissions or state reparations programmes. Where the effect on communities and workers' health is not immediate, it may take many years before the full extent of the impact is known. It also may take years for a legal system to reform to the extent that it can effectively tackle class action claims and complex responsibilities involving local and international corporate actors. While civil claims may seem unfeasible in the immediate aftermath of transition, it would be unreasonable to discount this prospect in favor of a neat short term solution that has limited benefits for victims.

¹⁷ Tehillah N. (2019) Court approves historic R5bn settlement in silicosis saga Accreditation, News24, 26 July 2019.

<https://www.news24.com/fin24/companies/mining/breaking-court-approves-historic-r5bn-settlement-in-silicosis-saga-20190726>

¹⁸ Roberts, Jaine (2009) *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Work Act in the Eastern Cape*, South Africa, Health Systems Trust, Durban.

¹⁹ Farlam I.G. (2015) Marikana Commission of Inquiry: Report on the Matters of Public, National and International Concern arising out of the Tragic Incidents at the Lonmin Mine in Marikana, 31 March 2015.

<https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf>

About us

We are an interdisciplinary group of scholars researching corporate reparations and accountability in TJ contexts such as Colombia, South Africa, and Germany. Most of the insights shared in this contribution to the call for inputs from UN Working Group on Business and Human Rights are part of our ongoing scholarly efforts that we expect to publish in the near future. The research is made possible through the generous support of the Swiss Network for International Studies (SNIS).

For further enquiries about the content of this document or our research please contact us:

- Dr. Ulrike Lühe. Swisspeace, Switzerland: ulrike.Luehe@swisspeace.ch
- Dr. Hugo van der Merwe. Center for the Study of Violence and Reconciliation (CSVR), South Africa: hvdmerwe@csvr.org.za
- Dr. Marco Velásquez, Centro Regional de Empresas y Emprendimientos Responsables (CREER), Colombia: m.velasquez@ihrb.org
- Dr. Jordi Vives Gabriel. Institute for Business Ethics, University of St Gallen, Switzerland: jordi.vives@unisg.ch
- Prof. Florian Wettstein. Institute for Business Ethics, University of St Gallen, Switzerland: florian.wettstein@unisg.ch