

DEVELOPMENTS IN THE FIELD

Access to Remedy and the Construction of Collective Memory: New Perspectives in the Realm of the Colombian Transitional Justice Project[†]

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‘If we are not able to rescue the past and tell what is happening to us, this unprocessed past will continue to define our present and our future’

Doris Salcedo¹

I. Outline

This article intends to explore how the production of collective memory within transitional justice processes could be considered as a feasible avenue to advance the instrumentalization of the Access to Remedy Pillar of the United Nations Guiding Principles on Business and Human Rights (UNGPs). This account considers that collective memory is a fundamental component of transitional justice as the attainment of both victims reparation and national reconciliation require the emergence of a shared historical narrative that fixes an explanation as to the implications of violence on the trajectory of the affected society. Hence the current Colombian transitional justice project, and particularly certain social dialogue activities conducted by its Truth Commission (hereafter the Commission), are presented as an embryonic and non-exhaustive case study that serves as the starting point of further research on the matter.²

[†] This article is one of the principal results of the research project “Challenges around the interaction between foreign investment and human rights in Colombia”, conducted under the auspices of Pontificia Universidad Javeriana (Bogota, Colombia).

¹ *Revista Arcadia*, Doris Salcedo gana el Nomura, el mayor premio en efectivo en artes visuales contemporáneas (30 January 2019) <https://www.revistaarcadia.com/arte/articulo/doris-salcedo-gana-el-nomura-art-award/78803/> (accessed 30 August 2020).

² We intend to locate this incipient line of work, which seeks to explore innovative means to facilitate corporate accountability through the production of collective memory, within the scholarly intersection between Business and Human Rights and Transitional Justice. In this regard, see Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (New York: Routledge, 2013); Leigh Payne, Gabriel Pereira and Laura Bernal-Bermúdez,

II. Collective Memory Production and Corporate Actors in the Context of the Colombian Transitional Justice Project

Colombia is a country that has been affected by a 60-year internal armed conflict that is rooted in structural causes. Its impact on the population – particularly the most vulnerable, located in the rural areas – has jeopardized the very achievement of its national project. Importantly, the generalized violence associated with the conflict touched all sectors of society, including the business sector. On the one hand, corporate actors were objects of serious affectations as a consequence of the display of actions such as kidnappings, extortions and atrocities.³ On the other hand, it has been established that certain business actors had some degree of complicity in the commission of human rights violations and associated international crimes.⁴

In 2011, the government decided to shift the orientation towards finding a lasting solution to the conflict. Therefore, it adopted a victims-oriented Transitional Justice Project (TJP) that includes a regulatory regime to address the victims' rights to justice, truth and reparation. The first related normative step was commonly known as the 'Victims Law', which defined the ideological contours of the state response to transition and set up the massive administrative reparation and land restitution processes that have been functioning since then.⁵ In parallel, a peace process with FARC, the oldest and most powerful guerrilla group in the country, was initiated.⁶

As a peace settlement was reached 2016, the Final Agreement provided for the creation of a holistic-oriented institutional structure: the *Sistema Integral de Verdad, Justicia, Reparación y No Repetición*⁷ (hereafter the System). Its establishment aims to bring about effective responses to the universe of human rights violations that occurred within the realm of the conflict while it directly addresses the rights of the victims. The System is composed of a set of institutions that, while having particular mandates related to each transitional justice component (justice, truth and reparation), is expected to perform as a joint machinery that provides comprehensive responses and contributes to the ultimate aim of national reconciliation. First, the Victims Unit⁸ is in charge of providing administrative integral-oriented reparation to individual and collective victims. Second, the Land Restitution Unit aims at promoting the restoration of conflict-based looted lands to

Transitional Justice and Corporate Accountability from Below: Deploying Archimedes' Lever (Cambridge: Cambridge University Press, 2020); Irene Pietropaoli, *Business, Human Rights and Transitional Justice* (New York: Routledge, 2020).

³ María José Viana, *El empresariado cómo víctima del conflicto armado* (Bogotá: Instituto de Ciencia Política Hernán Echavarría Olózaga y Editorial La República, 2019), <https://www.icpcolombia.org/dev/wp-content/uploads/2019/09/LIBRO-Paper-las-empresas-en-el-Posacuerdo-final.pdf> (accessed 27 August 2020); Ximena González, 'Los empresarios deben ser reconocidos como víctimas del conflicto armado en Colombia', *Asuntos Legales* (11 September 2019), <https://www.asuntoslegales.com.co/actualidad/los-empresarios-deben-ser-reconocidos-como-victimas-del-conflicto-armado-en-colombia-2906818> (accessed 27 August 2020).

⁴ Dejusticia, *Cuentas Claras. El papel de la Comisión de la Verdad en la develación de responsabilidad de la responsabilidad de empresas en el conflicto armado colombiano* (Bogotá: Dejusticia, 2018) <https://www.dejusticia.org/wp-content/uploads/2018/02/Cuentas-claras.pdf> (accessed 27 August 2020); Dejusticia, *Entre coacción y colaboración: Verdad judicial, actores económicos y conflicto armado en Colombia* (Bogotá: Dejusticia, 2018), <https://www.dejusticia.org/wp-content/uploads/2018/08/Entre-coaccion-y-colaboraci%C3%B3n-PDF-para-WEB-agosto-16.pdf> (accessed 27 August 2020).

⁵ See *Ley 1448 de 2011* (Colombia).

⁶ For a comprehensive account of the evolution of transitional justice in Colombia, see Marco Alberto Velásquez-Ruiz, 'The emergence and consolidation of transitional justice within the realm of Colombian peacebuilding', in Fabio Díaz Pabón (ed.), *Truth, Justice and Reconciliation in Colombia Transitioning from Violence* (New York: Routledge, 2018) 50–65.

⁷ Integral System for Justice, Truth, Reparation and Non Recurrence.

⁸ See: www.unidadvictimas.gov.co (accessed 27 August 2020).

dispossessed persons and ethnic groups. Third, the Special Jurisdiction for Peace (JEP⁹) performs as a peace tribunal that investigates trials and imposes restorative-oriented sanctions on those responsible for the crimes committed on the occasion of the conflict.¹⁰ Fourth, the Search Unit for Missing Persons¹¹ fulfils a humanitarian objective of determining the whereabouts of persons disappeared during the conflict¹². Finally, the Truth Commission¹³ is an extrajudicial mechanism in charge of clarifying both the causes and drivers of the conflict and conducting social dialogue to advance national reconciliation. Provided the holistic scope of the System, these institutions have the elements to provide coordinated responses to the expectations of the victims as to the content and scope of their transitional rights.

Following the path taken by prior transitional justice scenarios,¹⁴ the Commission was set up as an institution in charge of the production of truth, which is considered a public good that must be appropriated by the Colombian population in order to reconstitute its social ties.¹⁵ Correspondingly, the Commission displays territorial-oriented actions to propitiate recognition by the armed actors, dignify the victims, incentivize co-existence among all members of society, and contribute to ensuring the non-repetition of violence dynamics.¹⁶ These are labelled as *social dialogue activities* (SDAs), and seek to facilitate the establishment of a narrative devoted to surpassing the normalization of armed violence, the justification of the conflict means, and the generalized indifference of the population about violence.¹⁷

Interestingly, the work of the Commission, and particularly some of the SDAs, have included the direct participation of corporate actors. For instance, in September 2018 the Commission co-organized the commemoration of a series of massacres committed by paramilitary groups, that took place between 1998 and 2000 in the country's Northeast coal zone (Cesar Department, Becerril Municipality).¹⁸ Such a memorial included as sponsors as well as active participants, of representatives of Prodeco, a mining company that operates the mines in which some of the victims of the above-mentioned killings used to be employed.¹⁹ In a public account of the ceremony, the company stated that it could be a

⁹ See: www.jep.gov.co (accessed 27 August 2020).

¹⁰ See *Ley 1957/2019* (Colombia).

¹¹ See: www.ubpdbusquedadesaparecidos.co (accessed 27 August 2020).

¹² See *Ley 589/2017* (Colombia).

¹³ See: www.comisiondelaverdad.co (accessed 27 August 2020).

¹⁴ Gerardo Alberto Arce, 'Armed Forces, Truth Commission and Transitional Justice in Peru' (2010) 13 *Sur-International Journal on Human Rights* 27–50; Max Du Plessis and Jolyon Ford, 'Transitional Justice: A Future Truth Commission for Zimbabwe' (2009) 58 *International and Comparative Law Quarterly* 73–118; Emmanuel Guematcha, 'Genocide Against Indigenous Peoples: The Experiences of the Truth Commissions of Canada and Guatemala' (2019) 10 *International Indigenous Policy Journal* 1–23; Valeria Vázquez, 'Crafting the Lawful Truth: Chile's 1990 Truth Commission, International Human Rights and the Museum of Memory' (2019) 7 *London Review of International Law* 253–280.

¹⁵ USAID, 'Truth, Coexistence, and Nonrecurrence Comision Performance Evaluation' (2021), https://pdf.usaid.gov/pdf_docs/PA00XM1T.pdf

¹⁶ Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera 2016 (Colombia), punto 5.1.1.

¹⁷ Comisión Para El Esclarecimiento De La Verdad, La Convivencia Y La No Repetición, 'Estrategia de Diálogo Social' (February 2020), 3.

¹⁸ PAX Colombia, 'Conmemorar a las víctimas por la Verdad, la Justicia, la Reparación y la No repetición' (28 September 2018), <https://paxencolombia.org/conmemorar-a-las-victimas-por-la-verdad-la-justicia-la-reparacion-y-la-no-repeticion/> (accessed 27 August 2020).

¹⁹ PAX Colombia, 'Prodeco asiste a histórica conmemoración en homenaje a víctimas del carbón ensangrentado' (2 October 2017), <https://paxencolombia.org/prodeco-asiste-a-historica-conmemoracion-en-homenaje-a-victimas-del-carbon-ensangrentado/> (accessed 27 August 2020).

key participant in the zone in order to facilitate a clear and constructive dialogue between the actors, so as to consolidate territorial peace.²⁰ Father Francisco de Roux, President of the Commission, chaired the session and linked it to the Commission's truth-seeking task.²¹ On the other hand, the SDA *Diálogo para la No Repetición* (Non-Repetition Dialogue) that took place in Arauca in September 2019, involved the participation of representatives of Colombia's biggest public company, Ecopetrol.²²

The latter examples illustrate specific situations in which corporate actors have joined the current Colombian transitional justice project (TJP) to support the work of the Commission, whose mandate gravitates around the satisfaction of the victims' right to truth. In these situations, SDAs focused on creating conditions to advance the transformation of certain social relations affected by the country's armed conflict. The corporate actors involved did not accept any type of responsibility before either judicial or extrajudicial institutions. However, their active participation in the Commission's SDAs enabled the initiation of a process for the construction and reconstruction of the past lived by particular communities – the inhabitants of both Becerril and Arauca municipalities, victims of massive and systematic human rights violations – in order to guarantee their cohesion and preserve their identity²³ vis-à-vis the severe affectation of fundamental social structures and dynamics. Following French sociologist Maurice Halbwachs, this process can be characterised as building *collective memory*.²⁴

Collective memory is a fundamental component of transitional justice, as the attainment of national reconciliation requires the emergence of a shared historical narrative that fixes an explanation as to the implications of violence on the trajectory of the affected society.²⁵ In this regard, collective memory exercises such as the ones carried out by the Commission's SDAs allow armed conflict victims to face society, to share their history, and to progress collectively in overcoming trauma.²⁶ Hence, it is considered that their effective achievement is an avenue not only to produce a public good (truth), but to significantly provide symbolic reparation to both individual victims and Colombian society. The latter may include official apologies, the change of names of public spaces, the establishment of days of commemoration, the creation

²⁰ PAX Colombia, 'Estados Unidos reafirma su apuesta por la reconciliación y sueña con encontrar la verdad' (5 October 2018). <https://paxcolombia.org/estados-unidos-reafirma-su-apuesta-por-la-reconciliacion-y-suenan-con-encontrar-la-verdad/> (accessed 30 August 2020).

²¹ PRODECO, 'Grupo Prodeco accompanied the Estados Unidos community in a ceremony honoring its victims' (1 October 2018) <http://www.grupoprodeco.com.co/en/media/corporate-news/grupo-prodeco-accompanied-estados-unidos-community-ceremony-honoring-its-victims/> (accessed 27 August 2020).

²² Comisión Para El Esclarecimiento De La Verdad, La Convivencia Y La No Repetición, 'Segundo Dialogo para la No Repetición' (12 September 2019), <https://comisiondelaverdad.co/actualidad/noticias/segundo-dialogo-para-la-no-repeticion-laverdadesconloslideres> (accessed 30 August 2020).

²³ SH Corchete, 'Mediated Collective Memory and the Political Process Towards Democracy in Spain', in E Bell and A Gray (eds), *Televising History* (London: Palgrave Macmillan, 2010) 122–136.

²⁴ Maurice Halbwachs, *On Collective Memory* (Chicago and London: University of Chicago Press, 1992); Nicolas Russel, 'Collective Memory Before and After Halbwachs' (2006) 79 *The French Review* 792–804; Moshe Hirsch, 'Collective Memory and International Law', in *Invitation to the Sociology of International Law* (Oxford: Oxford Scholarship Online, 2015); Moshe Hirsch, 'The Role of International Tribunals in the Development of Historical Narratives' (2018) 20 *Journal of History of International Law* 391–428; Camilo Tamayo Gómez, 'Victims' Collective Memory and Transitional Justice in Post-Conflict Colombia: The Case of the March of Light' (2019) *Memory Studies*, doi: 10.1177/1750698019882055.

²⁵ James V Wertsch, 'The Narrative Organization of Collective Memory' (2008) 36 *Ethos* 120–135; Moshe Hirsch, 'Uses of History and Collective Memories by International Courts and Tribunals', *Max Planck Encyclopedia of International Procedural Law* (2018), <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3277.013.3277/law-mpei-pro-e3277> (accessed 30 August 2020).

²⁶ In this regard, see for example the work of Vera Vital-Brasil, 'An Ethical and Aesthetic Challenge: Symbolic Reparation and the Construction of Memory' (2008) 27 *Torture* 70–83.

of museums and parks dedicated to the memory of victims, or rehabilitation measures such as restoring the good name of victims, falling in the category of satisfaction.²⁷

In addition, collective memory-building could impact on other transitional justice components. First, collective memory actions facilitated by the state may be considered part of the integral reparation that is provided by the Victims Unit under its administrative procedures, especially under its collective scheme.²⁸ Second, information produced by these processes might orient the humanitarian work of the Search Unit. Third, within the realm of the JEP the outcomes of memorial exercises could reveal the structures, complicity and omissions that allowed the commission of illegal conduct so the investigation, trial and sanction of those responsible for gross human rights violations and other grave crimes within the realm of the conflict may be facilitated.²⁹

III. Access to Remedy Within the Framework of the UNGPs

The illustration of the Colombian TJP poses the question whether the social dialogue activities conducted by the Truth Commission could be considered as a feasible avenue to advance the instrumentalization of the Access to Remedy (Pillar III), constitutive of the UNGPs. The possible reparatory outcomes of the SDAs, the production of collective memory for the transformation of social relationships that were shaped by the country's armed conflict seem to fit within both the nature and the extent of the measures associated with this pillar.

Access to remedy by the victims of human rights violations that occurred within the context of business activity is one of the core contents included within the UNGPs. After almost ten years of progressive implementation, the pillars have been demonstrated to be a feasible mechanism to both prevent corporate-related human rights harm and transform the conduct of entrepreneurial actors in such regard. Professor John Ruggie, the author of the UNGPs, has maintained that as part of their duty to protect under international human rights law, States are required to take steps to investigate, punish and redress corporate related abuse of the rights of individuals within their territory and/or jurisdiction – in short, to provide access to remedy.³⁰

In this regard, the UNGPs have developed a basic set of orientations for States to take appropriate steps to ensure, through judicial, administrative, legislative, or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.³¹ These include State-based judicial mechanisms, State-based non-judicial grievance mechanisms, and non-State-based grievance mechanisms. Without these processes, both the State duty to *protect* and the corporate responsibility to *respect* could be rendered weak or even meaningless.³² Likewise, the United Nations Working Group on the Issue of Human Rights and Transnational Corporations, in unpacking the concept of access to effective remedies under the Principles, stated that remedial mechanisms should be responsive to the diverse experiences and expectations of

²⁷ United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States Reparations Programmes', HR/PUB/08/1 (2008), 22, <https://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf> (accessed 31 August 2020).

²⁸ See *Ley 1448 de 2011* (Colombia).

²⁹ International Center for Transitional Justice – CTJ, 'Does Collective Remembrance of a Troubled Past Impede Reconciliation?', <https://www.ictj.org/debate/article/memory-essential-illuminate-and-transform> (accessed 30 August 2020).

³⁰ John Ruggie, *Just Business. Multinational Corporations and Human Rights* (New York: Norton & Company, 2013), 104.

³¹ United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (21 March 2011), 27.

³² Ruggie, note 30.

rights-holders, so they should be able to claim what may be termed a ‘bouquet of remedies’ without fear of victimization.³³

With respect to the cases under study, it is considered that as the involvement of corporate actors in the memorial activities conducted by the Commission is verified, such a mechanism could eventually fit within the features of State-based grievance mechanisms, as defined within the UNGPs. In this regard, the SDAs conducted in Cesar and Arauca Departments could be characterized as extrajudicial measures that facilitate the provision of symbolic reparation to victims by means of the production of collective memory. Moreover, the SDAs also entailed psycho-social rehabilitation actions on behalf of certain – direct or indirect – victims and guarantees of non-repetition by means of the dialogue established in the territory. These measures fit within the remedy examples provided within the UNGPs.³⁴

The Access to Remedy Pillar of the UNGPs has been the object of scrutiny, due to its voluntary formulation and apparent inability to respond effectively to the particular reparatory expectations of the victims of human rights abuses. In this regard, certain human rights organizations have formulated critiques on the Principles’ failure to ensure the right to an effective remedy and the need for states’ measures to prevent abuses committed by their companies overseas.³⁵ For instance, Amnesty International criticized the UNGP’s failure to adequately address key corporate accountability, under the explicit recognition of the right to a judicial remedy as a human right.³⁶

As mentioned, the Commission’s SDAs have not included the direct recognition of responsibility by business actors, or the offering of concrete explanations to the victims, but the supporting of collective memory-building actions. Yet, through these activities such private actors tried to respond to conflict-related situations occurring within their direct sphere of influence, which directly affected communities linked to their economic activity due to factors such as their geographical proximity, possible labour relation, and quotidian social interaction. Thus, the fact that business actors provided financial and logistic support to the SDAs organized by the Truth Commission must be considered a crucial component for the effective occurrence of such reparatory-oriented activities. On the other hand, the effective participation of the business actors in the memorials can be regarded as a particular display of deference to the transitional justice initiative and a phenomenon with great symbolic relevance in the realm of the victims’ right to reparation. From the point of view of the state, it is relevant how, as to this collective memory-building initiative, the Colombian state has aimed to promote the public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.³⁷

Having these considerations in mind, it becomes salient that the Colombian Truth Commission’s SDAs were designed – and have been conducted – to respond to the expectations of the victims of the armed conflict from the standpoint of their right to truth. Moreover, as these activities have provided particular accounts of the context and extent in which the corresponding human rights violations took place – collective memory – they have also produced symbolic content that contributes to the satisfaction of the victims’ right to

³³ United Nations, ‘Human Rights and Transnational Corporations and Other Business Enterprises. Note by the Secretary General’, A/72/162 (18 July 2017).

³⁴ UNGPs, note 31.

³⁵ Robert Blitt, ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance’ (2012) 48 *Texas International Law Journal* 53.

³⁶ Amnesty International, ‘Public Statement, United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses’ (14 June 2011), <https://www.amnesty.org/download/Documents/32000/ior400092011en.pdf> (accessed 27 August 2020).

³⁷ UNGPs, note 31, 28.

reparation. Hence, the eventual involvement of corporate actors in these reparatory-oriented activities suggests that transitional justice could be a feasible avenue to advance the instrumentalization of the UNGPs, and particularly the access to remedy pillar this is so because the commemorated facts are representative for the companies' sphere of influence, and since such engagement was conducted in a way that entailed clear reparatory effects.

The introduction of the precedent case studies does not intend to suggest that the Colombian transitional justice project should be considered as a privileged matrix to advance corporate accountability. Nor does it suggest that the corresponding SDAs conducted by the country's Truth Commission are completely successful instances through which corporate actors may effectively commit to provide remedy to the victims. In turn, the aim is to introduce a line of academic work that requires further development. On the one hand, scholarship is needed to help understand and conceptualize the plausible role of collective memory in the provision of remedy to victims of corporate violations within the framework of the UNGPs. On the other hand, business and human rights would also benefit from research into defining the particular contributions that social dialogue could make to scholarly debates around integral reparation in transitional justice scenarios.

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