

## Impact case study (REF3)

<b>Institution: University of Essex</b>		
<b>Unit of Assessment: 18 – Law</b>		
<b>Title of case study:</b> Enhancing third party actor accountability and victim participation in Colombia's peace and transitional justice process		
<b>Period when the underpinning research was undertaken:</b> 09/2010 to 12/2020		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Sabine Michalowski Clara Sandoval	Professor, Co-director ETJN Professor, Co-director ETJN	Since 01/2000 Since 09/2003
<b>Period when the claimed impact occurred:</b> February 2015 to December 2020		
<b>Is this case study continued from a case study submitted in 2014?</b> N		
<b>1. Summary of the impact</b>		
<p>Our research significantly shaped the Colombian peace and transitional justice (TJ) process, both with regard to the inclusion of third party actors, i.e. those who played a role in the conflict without belonging to the state military or armed groups, and to victim participation. On third party actors, we (a) provided analysis which resulted in changes to the jurisprudence of the Colombian Special Jurisdiction for Peace (SJP) on the inclusion of third party actors in the TJ process; (b) strengthened the work of the influential Colombian civil society organisation (CSO) Dejusticia and (c) shaped the UN Working Group on Business and Human Rights' report on human rights and transnational corporations and other business enterprises.</p> <p>We substantially influenced the drafting process of the SJP's Operational Protocol on Victim Participation by providing recommendations (which were adopted) on how to define the scope and reach of victim participation and the measures needed to enable victim participation during COVID-19, particularly during hearings.</p>		
<b>2. Underpinning research</b>		
<p>Since 2009, the Essex Transitional Justice Network (ETJN), under the leadership of Michalowski and Sandoval, has established itself as an international research hub that produces innovative TJ research to maximise accountability and the satisfaction of victims' rights in the aftermath of mass atrocities.</p> <p><b>1. Accountability of third party actors</b></p> <p>In 2010, the ETJN led on a ground-breaking international research project [G4] that explored ways to combat impunity of economic actors, such as businesses' CEOs or directors, for their role in gross human rights violations in times of conflict or repression. The resulting edited collection [R1] was the first to promote the then novel idea that economic actors should be held accountable through TJ processes.</p> <p>Building on this work, the ETJN and Dejusticia, an internationally renowned Colombian CSO, co-authored a book [R2] aiming to improve economic actor accountability in the current Colombian peace and TJ process. It showed how the Colombian Justice and Peace process, a TJ process that started in 2005 and only had jurisdiction over demobilised members of armed groups, but not over third party actors who collaborated with them, resulted in widespread impunity of the latter. The book explained that the impunity gap was caused by the fragmentation of the process, as the TJ tribunals that discovered extensive information about the role of third-party actors did not have jurisdiction to act on it. Instead, they had to refer the cases to the ordinary criminal courts which encountered significant difficulties to prosecute them, because ordinary criminal law is underdeveloped regarding the complicity of these actors and the burden of proof is stricter.</p> <p>To avoid perpetuating this impunity gap in the current TJ process, based on the Peace Agreement</p>		

between the Colombian Government and the FARC guerrilla group, the book, a subsequent policy paper specifically written for the SJP [R3] and two amicus briefs filed in leading court cases [R4] argued that the SJP's jurisdiction over third party actors needed to be interpreted broadly to maximise their accountability. These publications established that: a) the Peace Agreement is not a legally binding source for determining the jurisdiction of the SJP, and its provisions cannot be used to restrict the SJP's jurisdiction over third party actors; b) the only element that determines the competence of the SJP over third party actors is that of their direct or indirect contribution to conflict related crimes, whereas the seriousness of their participation in these crimes is irrelevant for determining jurisdiction; c) the jurisdiction of the SJP is not excluded where a third party actor's participation in conflict related crimes was motivated by the purpose to gain personal or financial benefits [R2, R3]; and d) the SJP needs to differentiate between economic actors already under investigation or who have been convicted in the ordinary criminal courts and those who are not under any criminal investigation, lowering the entry conditions for the latter to incentivise their adherence to its jurisdiction [R3].

Applying research findings from the Colombian experience to the wider question of how to achieve economic actor accountability in TJ contexts, [R5] argues, inter alia, that TJ tribunals should be given jurisdiction over economic actors; that businesses that acted lawfully but benefited from conflict-related crimes should be strongly encouraged to engage with truth and reparation mechanisms and that one form of guarantees of non-recurrence would be for States to introduce corporate criminal liability.

## 2. Victim participation

The ETJN has conducted significant research on the right to reparation for victims of international crimes, including how to operationalize it in TJ processes [R6-R8]. It has maintained that victims have a human right to participate in justice and reparation proceedings and to be consulted about them. Research carried out under [G3] has demonstrated the importance of such participation, in particular in relation to judicial hearings and their significance for the effective implementation of reparation measures [R6]. The findings of our fieldwork also allowed us to consider ways to foster victim participation in TJ mechanisms [R7, R8], including for victims in a situation of vulnerability, such as victims of sexual violence [R7] through confidentiality and camouflage measures. The research also considered the implications of Covid-19 for victims' participation in Colombia before the SJP, particularly when carrying out judicial hearings. To foster their participation before the SJP during the pandemic, we recommended 'compensatory measures', such as providing additional time for filing arguments or views with the SJP.

Under [G1], the ETJN coined the concept of "integral participation," linking it to the Inter-American Court of Human Rights' concept of 'integral reparation' (reparación integral). We put forward the view that meaningful participation goes beyond effectiveness, an existing standard in international law that is not in itself sufficient for victims. [R8] adds to this that participation should also be accessible; based on adequate and timely information, must be gender and culturally sensitive and grounded in dialogical processes. Victims also need two enabling measures: access to adequate legal representation and psycho-social support.

## 3. References to the research [can be supplied by the HEI on request]

R1 Michalowski, S. (ed.), *Corporate Accountability in the Context of Transitional Justice* Routledge (2013), Michalowski, S., and Carranza, R. 'Conclusion', pp.396-409, <https://doi.org/10.4324/9780203338094>

R2 S. Michalowski et al, [Entre Coacción y colaboración – Verdad judicial, actores económicos y conflicto armado en Colombia](https://www.dejusticia.org/en/publication/entre-coaccion-y-colaboracion-verdad-judicial-actores-economicos-y-conflicto-armado-en-colombia/) Dejusticia, Bogotá (2018), ISBN: 9789585441453 <https://www.dejusticia.org/en/publication/entre-coaccion-y-colaboracion-verdad-judicial-actores-economicos-y-conflicto-armado-en-colombia/>

R3 S. Michalowski et al, [Los terceros complejos: la competencia limitada de la Jurisdicción Especial para la Paz](https://www.dejusticia.org/publication/los-terceros-complejos-la-competencia-limitada-de-la-jep/), Dejusticia, Bogotá (2019). ISBN: 9789585597228 <https://www.dejusticia.org/publication/los-terceros-complejos-la-competencia-limitada-de-la-jep/>

R4 Compilation of amicus briefs before the SJP including Char Navas resolution number 00084 (2018), on the questions raised in the Order APTP-SA ECN 002 (2018) and Official Letter TPSA 270-2020 (2020) (available from HEI on request).

R5 Essex Transitional Justice Network, [Submission to the UN Working Group on Business and](#)

[Human Rights in response to the consultation on business in conflict and post-cpr4/; Conflict contexts](#), (June 2020) (available from HEI on request).

**R6** Sandoval, C., Leach, P., and Murray, R., "Monitoring, Cajoling and Promoting Dialogue – What Role for Supranational Human Rights Bodies in the Implementation of Individual Decisions?" *Journal of Human Rights Practice* (2020), 12 (1), 71-100 <https://doi.org/10.1093/jhuman/huaa009>

**R7** Gilmore, S., Guillerot, J., and Sandoval, C. *Beyond Silence and Stigma: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programmes*, Reparations, Responsibility and Victimhood in Transitional Societies, 2020. [https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/03/report/beyond-silence-and-stigma-crafting-a-gender-sensitive-approach-for-victims-of-sexual-violence-in-domestic-reparation-programmes/QUB-SGBV\\_Report\\_English\\_Web.pdf](https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/03/report/beyond-silence-and-stigma-crafting-a-gender-sensitive-approach-for-victims-of-sexual-violence-in-domestic-reparation-programmes/QUB-SGBV_Report_English_Web.pdf)

**R8** Sandoval, C., Cruz, M. and Ruiz Segovia, C., "Victims' Participation in Times of Covid-19 in Transitional Justice Accountability Mechanisms: What is Needed for Virtual Hearings to Fulfil this Right? The case of Colombia and the Special Jurisdiction for Peace", In Ferstman, C. and Fagan, A. *Covid-19, Law and Human Rights: Essex Dialogues*. University of Essex. 73- 81. ISBN 978-1-5272-6632-2 (available from HEI on request).

#### Grants:

**G1** PI Michalowski, Co-Is Sandoval, Micus (Bonavero Institute Oxford), Davila (Dejusticia), Legitimacy, accountability, victims' participation and reparation in transitional justice settings - lessons from and for Colombia, AHRC GCRF urgency grant, 02/2020 to 01/2021, £149,985.

**G2** PI Dr. Moffett (Queen's Univ. Belfast), Co-Is Sandoval (Essex), McEvoy and Luther (Queen's Univ. Belfast), Reparations, Responsibility and Victimhood in Transitional Societies, AHRC, 10/2017 to 09/2020, £655,198 (£66,361 to Essex).

**G3** PI Murray (Univ of Bristol), Co-Is Sandoval (Essex), Leach and Donald (Middlesex Univ), Viljoen (Pretoria Univ), Implementation and compliance with international human rights law: An exploration of the interplay between the international, regional and national levels, ESRC, 09/2015 to 02/2019 £1,339,799; (£287,921 to Essex).

**G4** PI Michalowski, Co-I Filippini (University of Palermo, Buenos Aires), Linking transitional justice and corporate complicity, BA UK-Latin America Link Programme, 09/2010 to 04/2011, £19,966.

## 4. Details of the impact

### 1. Accountability of third party actors

The ETJN research on third party actors has benefited (1) Dejusticia, (2) the SJP, and (3) the UN Working Group on Business and Human Rights.

#### 1.1. Shaping Dejusticia's work on third party actors

Our research has significantly informed the work of the influential Colombian CSO Dejusticia which, in collaboration with the ETJN, has been positioning itself as a crucial player in the debate on how to integrate third party actors in the Colombian TJ process. Sustained academic guidance from the ETJN has shaped Dejusticia's approach to this issue. It resulted in a joint ETJN/Dejusticia research and impact agenda to maximize the accountability of economic actors. The effectiveness of our collaboration is evidenced by joint academic publications **[R2]**, policy papers **[R3]**, externally funded projects **[G1]** and amicus briefs to the SJP **[R4]**. According to the co-ordinator of the TJ area of Dejusticia, the amicus briefs "had ... impacts in the decisions itself" as well as creating "interest of the Jurisdiction in the research." **[S1]**. He emphasised that: "Professors Michalowski and Sandoval have contributed enormously to our capacity to work effectively on this issue. ... Their skillset has allowed us to achieve three objectives: conduct innovative research, use that research to inform our legal and institutional analysis, and finally, carry out an effective dialogue with policy makers and other concerned political and institutional agents. This collaboration has enabled Dejusticia to develop its work and reputation in this area" **[S1]**.

#### 1.2. Influencing the decisions of the SJP on third party actors

Our research has led the SJP to adopt an inclusive approach to exercising its jurisdiction over third party actors.

##### **Decision of the Appeals Chamber of the SJP in Char Navas**

In April 2018, a Chamber of the SJP issued the first decision on its jurisdiction over third party

actors, interpreting the applicable legal framework to restrict considerably the SJP's jurisdiction to adjudicate the conduct of third-party actors. In response, the ETJN and Dejusticia jointly filed the only civil society amicus curiae brief before the Appeals Chamber of the SJP [R4], drawing heavily on [R2]. Despite highlighting that the two institutions did not have formal standing to file an amicus brief, the Appeals Chamber "*consider[ed] it pertinent to allude to their intervention, given its usefulness and the academic prestige of both institutions*" [S2, para.3.3.2, fn.64]. It then summarised [S2 para.3.3.2] and adopted some of its key arguments in its judgment. Consistent with our submission, the Appeals Chamber held that the first instance chamber had excluded third party actors from the SJP based on a mistaken interpretation of the relevant statutory provisions [S2, paras 13.3-13.4, 13.8-13.10]. As we had argued, the correct approach was to recognise that third party actors could adhere to the SJP, whether or not their role in conflict-related crimes was primarily driven by economic motivations [S2, paras 13.3, 13.7, 13.10, 13.12, 13.14, 13.22] or reached the highest level of responsibility for the commission of the crimes [S2, paras 12.3, 12.5-12.6].

The change in the SJP's approach facilitated by our amicus brief has informed subsequent cases. Had the first instance decision not been overturned, this would have seriously undermined the Colombian TJ process that was designed to fight impunity of, and provide comprehensive closure for, all actors of the conflict, as many third party actors participated in conflict related crimes for their economic benefit [R2]. As a result, these actors can and are seeking access to the SJP (over 500 so far) to make use of its benefits in exchange for providing victims and society with truth and reparations.

#### ***Interpretative Decision No.1 of the Appeals Chamber (SENIT 1)***

In December 2018, the Appeals Chamber of the SJP specifically invited the ETJN as one of two international university research hubs, to provide observations prior to issuing an interpretative decision. The decision [S3] followed the ETJN's joint intervention with Dejusticia [R4] regarding an important issue left open in the decision in Char Navas: how much detail on their contributions to truth and reparation third party actors need to provide in their plan that needs to accompany an application for access to the SJP. The Appeals Chamber adopted our arguments [based on R2 & R3] that a) this plan must not create a disincentive for adhering to the SJP [S3, paras 147, 205, 206, 209]; b) a distinction needs to be made according to the procedural situation of the third party actor in the ordinary jurisdiction when determining what contributions to the transitional justice process can be required of him/her, with third party actors without proceedings in the ordinary jurisdiction only having to contribute truth but not having to assume criminal responsibility or contribute to reparation [S3, paras 147, 227-230, 292]; and c) those without any proceedings can have access without any prerequisites where this is necessary to incentivise their adherence [S3, para 293]. In providing maximum incentives to third party actors to adhere to the SJP, this differentiated approach ultimately enhances the rights of victims.

### **1.3. International impact**

The ETJN's research on economic actors in the Colombian TJ process has significantly influenced the approach of the UN Working Group on Business and Human Rights (UNWG) on economic actor responsibilities in conflict, post conflict and transitional justice settings. Based on Michalowski's internationally renowned research on linking business and human rights with TJ [R1-R3], she was invited by the UNWG to make a submission to inform their report to the UN General Assembly. Six of the 15 paragraphs of the report dealing with TJ almost verbatim adopt the ETJN submission that draws heavily on [R1], [R2] and [R3] [S4]. A member of the UNWG, confirmed that: "*In our report, we adopted most of the points made in her [Professor Michalowski's] submission to our consultation*" [S5]. They highlighted, in particular, the adoption of our arguments that (a) all pillars of TJ represent a form of remediation and should be recognized as an inherent part of the remedy pillar of the UN Guiding Principles, and become a guidepost for how States design transitional justice processes that account for the role of business (para.85); (b) TJ tribunals should be given jurisdiction over all actors of a conflict, including economic actors (paras.88-89); (c) where economic actors incur criminal liability, their obligation to provide remedies goes beyond symbolic reparation (para.89); (d) symbolic reparations need to be designed from a victim perspective (para.89); (e) businesses that benefited from conflict should be strongly encouraged to engage with truth and reparation mechanisms (para.90); (f) States should consider introducing corporate criminal liability as a guarantee of non-recurrence (para.91) [S4].

According to the UNWG member, who is a law professor, “*Professor Michalowski’s research carried out as part of the ETJN at the University of Essex, significantly shaped the UN Working Group’s report on transitional justice and business and human rights, which is expected to influence future UN approaches as well as state and business practice on this matter.*” [S5].

## 2. Victim participation

The ETJN’s research on victim participation has significantly shaped the work of the SJP through close collaboration with its Commission on Victims’ Participation during the drafting process of its Operative Protocol on Victim Participation to be used by all staff at the SJP, by victims and relevant stakeholders. Upon the Commission’s request [S6], the ETJN drafted two of the chapters of the Protocol: (1) General principles on Victims’ Participation and (2) Guidelines on Holistic Participation of Victims in the written and oral proceedings before the SJP. They further advised the SJP on challenges and limitations of the use of digital technologies in times of COVID-19, which also influenced the drafting of annex 1 to the Manual on guidelines for victims’ participation through such technologies [S6].

Following our research [R6-R8] and the draft chapters we presented to the SJP, the Protocol included our concept of integral rather than just effective participation [S7, p.27] and followed our suggestions on how to design it [S7, p. 122, 264]. Our recommendations for compensatory measures [R8], such as additional opportunities to present pleadings in writing during Covid-19 restrictions, were also incorporated [S7, p. 323, 324, 344].

As stated by Justice Roberto Vidal, Chair of the Commission on Victims’ Participation, “*Professor Sandoval’s influence at the SJP has materialised in [these] two key chapters of the Manual*” [S6]. Furthermore, the Manual, launched by the SJP in November 2020, expressly indicates that the Commission on Victims’ Participation at the SJP “*thanks [...] national and international experts that contributed to the richness of this document, and especially to the Essex Transitional Justice Network...*” [S7, p.16].

Sandoval’s influence on the drafting of the Protocol was recognised publicly by the National Attorney’s Office, represented by the Special Attorney for the Special Jurisdiction for Peace, who at a high level panel organised in June 2020, referring to Sandoval, stated that: “*You are really an expert on victims’ participation and reparation in contexts of transitional justice, and I am an eye witness of the way you have accompanied the SJP with very important recommendations on victims participation*” [S8, minute 39:13 onwards].

## 5. Sources to corroborate the impact

**S1** Letter from Co-ordinator of the Transitional Justice area at Dejusticia, 29<sup>th</sup> January 2021.

**S2** Decision of the Appeals Section of the Special Jurisdiction for Peace in Char (TRIBUNAL PARA LA PAZ, SECCIÓN DE APELACIÓN, *En el asunto de David Char Navas* Auto TP-SA 19 de 2018, 21 August 2018) with table contrasting the decision and our amicus brief.

**S3** Interpretative decision of the Appeals Section of the Special Jurisdiction for Peace (TP-SA-SENIT 1 de 2019 *Sobre beneficios provisionales, régimen de condicionalidad y participación de víctimas*, 3 April 2019, with table contrasting the decision and our amicus brief.

**S4** UNWG, Report to the GA, Business, human rights and conflict-affected regions: towards heightened action, [A75/212 of 21 July 2020](#).

**S5** Letter from Member of the UNWG on Business and Human Rights, 13 January 2021.

**S6** Letter from Magistrate of the Tribunal for Peace at the Special Jurisdiction for Peace, 27 August 2020.

**S7** [Operative Protocol for Victims Participation before the Special Jurisdiction for Peace](#), (SJP, 2020) (Manual para la Participación de las Víctimas ante la jurisdicción Especial para la Paz), <https://www.jep.gov.co/Infografas/participacion/manualparticipacion.pdf>

**S8** Webinar: [Lucha contra la impunidad y participación de las víctimas en contextos de transición](#), organised by the Attorney General’s Office in Colombia, El Espectador 2020, DAAD and Capaz, 30 June 2020. <https://www.youtube.com/watch?v=wA62-ia3znY>.