



Submission to the UN Working Group on Business and Human Rights in response to the consultation on business in conflict and post-conflict contexts

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In general terms, both from an international human rights law and a transitional justice perspective, it is crucial that the report to the UN does not solely approach the issues from a business and human rights logic, informed by and applying the language of the UNGPs. This would be problematic because the consultation was necessary precisely because the UNGPs need input from other perspectives in order to consider the particular problems that arise in conflict, post-conflict and transitional justice settings. More importantly, given the non-binding nature of the UNGPs, as far as the business sector is concerned, this would invite a focus on responsibilities where in fact legal violations often will have taken place that create legal obligations towards victims.

Our work in Colombia³ has shown several issues that could be important for recommendations in this area. The involvement of business in complicated conflict scenarios is complex and can range from business and individual economic actors being willing perpetrators of conflict related crimes and human rights violations; acting under coercion; benefiting from the conflict without incurring legal responsibility; being victims of conflict related crimes or a mix of these different forms of involvement. Recommendations on business in conflict, post-conflict and transitional justice situations therefore need to distinguish clearly these different types of involvement.

This is important because where, as will often be the case, the involvement of businesses in conflict amounts to criminal behaviour, the state has an obligation to investigate, prosecute and punish the most egregious forms of these violations and even where the violations do not reach that level, the criminal nature of the wrongs to the victims mean that reparation is not a voluntary act but rather a legal obligation. This needs to find its way into how to think about the state obligation to protect and the remedy pillar of the GPs.

On the respect side, this could be captured by the responsibility to avoid complicity in human rights violations, but the content of this responsibility would need to be spelled out in detail. It is obvious that businesses violate the responsibility to respect if they actively and willingly participate in human rights violations that amount to international crimes through co-designing

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³ Michalowski *et al.* (2018). Entre coacción y colaboración. Verdad judicial, actores económicos y conflicto armado en Colombia. Dejusticia: Bogotá, D.C. Available at <<https://www.dejusticia.org/wp-content/uploads/2018/08/Entre-coaccion-y-colaboración-PDF-para-WEB-agosto-16.pdf>>; Michalowski *et al.* (2019). Los terceros complejos: la competencia limitada de la Jurisdicción Especial para la Paz. Dejusticia: Bogotá, D.C. Available at <<https://www.dejusticia.org/wp-content/uploads/2019/05/Los-terceros-complejos-JEP.pdf>>; Michalowski *et al.* (2020). Guía de orientación jurídica. Terceros civiles ante la Jurisdicción Especial para la Paz. Dejusticia: Bogotá, D.C. Available at <<https://www.dejusticia.org/wp-content/uploads/2020/03/TercerosJEP-Web-Mar9.pdf>>.

the criminal policies and activities, voluntarily financing armed groups that carry them out or instigating certain crimes, such as extrajudicial killings of trade unionists or other social leaders. However, complicity can take many forms which could be elaborated further to make clear the boundaries between lawful and unlawful business practices during armed conflict.

This is particularly complex in the context of financing. In the Colombian example, unlike in countries such as Argentina, financing relates less to banks and more to businesses or individual economic actors financing the armed groups and/or the crimes they commit. It needs to be made clear that short of coercion, in many cases this amounts to criminal complicity and therefore entails legal obligations that go beyond the merely voluntary. Also, it needs to be made clear that duress or coercion is a rather limited legal defence or excuse, in that it entails a notion of lack of alternatives and also proportionality. As the industrialist cases in Nuremberg already highlighted, a threat to economic interests does not justify complicity in international crimes.

With regard to businesses that move into conflict ridden areas, it will be particularly difficult to justify any complicity with the parties of the conflict and due diligence responsibilities need to include an assessment of whether in that particular zone and at that particular time, business operations can be carried out without a high risk of becoming complicit in conflict related human rights violations.

What all of this shows that in many contexts, parts of the business sector do not stand outside of conflicts, but are rather an integral part of it.

Moving to the topic of transitional justice, the question linked to TJ assumes that business can play a role in transitional justice and that the GPs can have implications in TJ settings. From a TJ perspective, additional questions arise. For example,

- What are state obligations in TJ settings and how do they apply to businesses?
- How can TJ mechanisms such as truth commissions, criminal trials, reparations and guarantees of non-recurrence address the role of business actors?
- How to address the tensions between achieving business accountability for their role in a conflict and their role as investors and promoters of post-conflict reconstruction?
- How can TJ inform the GPs?

For the reasons highlighted on the previous page, with regard to the role businesses can play in TJ, a clear distinction needs to be made between different economic actors based on the type of their involvement. Where they were part of the conflict and committed conflict related human rights violations, the state has an obligation to investigate their role and to hold them to account. From a TJ perspective, this can be done through a combination of various mechanisms based on the four pillars of transitional justice, truth, justice, reparation and guarantees of non-recurrence. One way of achieving this is shown by the Colombian experience. Accepting that some economic actors committed conflict related crimes, they were initially included in the mandatory jurisdiction of the Special Jurisdiction for Peace. Those with the highest responsibility were given access to lenient sanctions, those with lower levels of responsibility could apply for a waiver of prosecution. In all cases, the benefits of the SJP depended on contributions to truth, reparation and guarantees of non-recurrence.

Including economic actors into the TJ process alongside the other actors of the conflict, in the Colombian context the state military and the FARC, might be a good way to reflect that economic actors who committed conflict related crimes were also actors of the conflict and should be treated similarly to the combatants. However, the Colombian example also highlights some problems that can arise when including such a powerful actor in a process focused on

criminal responsibility. The SJP's mandatory jurisdiction over these actors was declared to be unconstitutional by the Colombian Constitutional Court (Decision C-674 of 2017). This was based on the idea that the SJP was a jurisdiction agreed to and designed for the combatants, but that other actors, including economic actors, need to adhere to its jurisdiction voluntarily and otherwise stay under the jurisdiction of the ordinary criminal courts. This shows a mistaken view that economic actors were not really part of the conflict and has created enormous problems, as there are very few incentives for these actors to engage with SJP out of their own volition. To avoid this problem and the fragmentation of achieving legal accountability for conflict related crimes, an important recommendation to states could be that where specific transitional justice tribunals are being created, they should be given jurisdiction over all actors of the conflict.

Moving to the remedy pillar, another recommendation would be that it is the responsibility of businesses to remedy their past behaviour by engaging with a TJ process and assuming their criminal responsibility as well as contributing to truth, reparation and guarantees of non-recurrence would be important. This could be a way to conceptualise synergies between the business and human rights and the TJ frameworks, ie that the 4 pillars of TJ are integrated in the remedies pillar of the GPs.

Staying with the remedy side, where businesses incurred criminal liability, the obligation to provide remedies goes well beyond symbolic reparations, and rather includes all forms of reparation, in particular restitution (eg in the context of land displacement) and compensation. To the extent that symbolic reparations are provided, it needs to be clear that they do not replace other forms of reparation and that they need to be constructed from the perspective of the victims, not determined by the businesses.

With regard to what role businesses can play in TJ contexts, even those that did not incur legal responsibility but, for example, benefited from the conflict, should be very strongly encouraged to engage with the truth component of the TJ process and provide full truth and assume their role in the conflict, even if they acted within the realm of the lawful. This is also important for corporations that might have actively and willingly contributed to serious human rights violations, but are not criminally liable simply because criminal corporate responsibility does not exist in many countries. In such cases, they should also be encouraged to contribute reparation, for example where their acts harmed particular communities. Engaging with a truth commission can also contribute to guarantees of non-recurrence, as recognition of past wrongdoing is necessary to avoid it in the future, and to construct this narrative is one of the tasks of truth commissions. One form of guarantees of non-recurrence would be to recommend to states to introduce corporate criminal responsibility, given that often the interests behind the human rights violations are those of the corporate entity, not of individuals who are the only ones who can currently be held to account in most cases.

Where remedies, but also simply business involvement in post-conflict reconstruction, takes the form of development measures, it is crucial that there be consultation with the relevant communities where these measures are taking place, to provide development based on their needs and avoid revictimization.

Lastly, it is crucial to be aware that TJ processes are highly contextual and the recommendations therefore should include that there cannot be one single set of 'best practices' for business in all conflict/post-conflict and TJ settings and that the business and human rights responses to these scenarios need to be flexible enough to be context sensitive. Moreover, some contexts, as it is the case in Colombia, might experience political violence after peace agreements have been reached and TJ mechanisms started to operate. Transitions are difficult processes in which peaceful regions/areas can coexist with places where the conflict reignites.

In these contexts, businesses should support TJ mechanisms as well as be extremely careful not to get involved in persistent forms of violence.