

Corporate Accountability for Abuses of Economic, Social & Cultural Rights in Conflict and Transition

February 2020

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List of Acronyms

ACC	Arbitration and Conciliation Committee
ATJF	African Union Transitional Justice Framework
ACHPR	African Commission on Human and Peoples' Rights
AfrCHPR	African Charter on Human and Peoples' Rights
CAVR	Timor-Leste Commission for Reception, Truth and Reconciliation
CRC	Committee on the Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
CEDAW	Committee on the Elimination of Discrimination against Women
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CPA	Child Protection Agencies
CPR	Civil and Political Rights
CRPD	Convention on the Rights of Persons with Disabilities
CNV	Brazilian National Truth Commission
CSR	Corporate Social Responsibility
ESCR	Economic, Social and Cultural Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
CRC	Convention on the Rights of the Child
CEDAW	Convention the Elimination of Discrimination against Women
ICCPR	International Covenant on Civil and Political Rights
CERD	Convention on the Elimination of All Forms of Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTJ	The International Centre for Transitional Justice
ICC	International Criminal Court
ICJ	International Commission of Jurists
LRA	Lords Resistance Army
NHRI	National Human Rights Institution
OHCHR	United Nations Office of the High Commissioner for Human Rights
OP-ICESCR	Optional Protocol to the Covenant on Economic, Social and Cultural Rights
OP1-CRC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
SEZ	Special Economic Zones
TJDP	Transitional Justice Database Project

TRC	Truth and Reconciliation Commission
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNTAET	United Nations Transitional Administration in East Timor

Overview and Summary

Businesses frequently operate in areas or regions in which armed conflict, internal disturbances or upheaval, severe authoritarianism, or other crises are either continuing or have recently ceased. Some of these “conflicts [are] not [exclusively] civil wars, conventional or unconventional [but rather stem from] the abusive exercise of a tremendously asymmetric State power”.¹

At times businesses are involved, either directly or in complicity with State agents, armed groups or other actors, in human rights violations or abuses, which occur during or after such conflicts or authoritarian settings. In the wake of such turmoil, when societies make attempts to come to terms with a legacy of gross human rights violations and abuses, the principles and practice of transitional justice offer a variety of processes, measures and mechanisms to assist States in ensuring the establishment or restoration of a stable order grounded in the rule of law, protection of human rights and the fair administration of justice.

The aims of transitional justice include truth, justice, reparation and guarantees of non-recurrence. The fulfilment of these objects requires, among other things: achieving accountability and justice; establishing the truth about injustices perpetuated during conflicts; providing for reparations and institutional reform; moving towards constitutional democratic reforms; and ensuring reconciliation and securing peace.

Despite the involvement of non-State actors in human rights abuses, traditionally, transitional justice mechanisms have tended to focus exclusively on the conduct of States, leaving corporate abuses outside the scope of transitional justice measures. Increasingly, however, the role of businesses in causing, facilitating, exacerbating or indirectly and directly supporting the misconduct of State and armed non-State actors during conflicts is rightly coming under closer scrutiny. Some governments have therefore taken transitional justice measures aimed at holding businesses accountable for their roles in human rights abuses in transitional settings. This approach has, for example, been adopted to varying degrees in countries spanning Latin America, Africa and Asia. As this Guide shows, however, it is of significant concern that transitional justice measures aimed at corporate accountability have often occurred in piecemeal fashion and with little grounding in international human rights law and standards relating to transitional justice or business and human rights.

¹ Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *Report to the Human Rights Council*, UN Doc. A/HRC/36/50, 21 August 2017, para 37, available at <https://undocs.org/A/HRC/36/50>.

Furthermore, transitional justice approaches have often focused primarily on international human rights law violations pertaining to civil and political rights to the neglect of measures and mechanisms for accountability for economic, social and cultural rights (ESCR) violations or abuses. This despite the ample evidence that conflict, repressive rule and transition results in wide scale violations of ESCR. These violations of ESCR leave large swathes of society living in poverty and have a particularly devastating effect on marginalized or disadvantaged groups such as women, children, indigenous persons, and persons with disabilities, among others.

The objective of this guide is to assist stakeholders – state legislators, policy makers, administrators, lawyers, judges, and human rights defenders – in transitional environments. It seeks to assist them in their efforts to ensure that all measures and mechanisms aimed at addressing human rights and the administration of justice are grounded in the applicable international human rights law and standards. Given the Guide’s significant focus on State’s *obligations* relating to business activities *and* businesses’ human rights *responsibilities*, both State actors and non-State actors (including businesses) should benefit considerably from this guide.

In short, this guide provides guidance on international human rights law standards applicable when determining the corporate accountability of business enterprises for the abuses of ESCR in a transitional context. It provides guidance to a wide range of stakeholders on how to ensure that transitional mechanisms and measures comply with international standards relating to business accountability for human rights abuses. To do so, it summarizes and draws together three overlapping fields of international law and standards: 1) Transitional Justice Principles; 2) ESCR Standards; and; 3) Business and Human Rights Principles.

The guide begins by introducing central concepts on transitional justice in Chapter 1. Chapter 1 summarizes applicable international law and standards with a primary focus on guidance provided in the United Nations Guidance Note on transitional justice. This section is best read with the ICJ’s Practitioners Guide on *The Right to a Remedy and Reparation for Gross Human Rights Violations*.²

Simply put, transitional justice encompasses mechanisms and measures that States can and should use to ensure protection and promotion of human rights when emerging from repressive rule or conflict. There are various components of transitional justice and States may choose to employ all or just some transitional justice mechanisms and measures in their transitional processes. Much will, in reality, depend on the specific social, economic and

² ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations – A Practitioners’ Guide*, Revised Edition, October 2018, available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

political context. However, irrespective of context, *international law and standards must be fully observed in the transitional justice settings whatever mechanisms are chosen*. This means that such mechanisms must encompass and consider all rights and sources of all human rights violations and abuses, including State actors and non-State actors such as armed groups and businesses.

Chapter 2 summarizes the range of ESCR standards in international human rights law with a primary focus on the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the general comments of the Committee on Economic, Social and Cultural Rights (CESCR). This chapter is best read with the ICJ's Practitioners Guide on *Adjudicating Economic, Social and Cultural Rights at National Level*.³

Given continued and widespread poverty, inequality and underdevelopment in many regions in the world in which business enterprises continue to operate, positive and negative impacts of business operations on economic, social and cultural rights is critical to their overall realization. States' obligation to, "by all appropriate means", ensure that ESCR are respected, protected, promoted and fulfilled is therefore equally applicable in the context of transitional justice mechanisms and measures implemented in the aftermath of situations of conflict.

Chapter 3 provides a summary of the applicability of international human rights law standards to businesses with a particular emphasis on the United Nations Guiding Principles on Business and Human Rights (UNGP). Since the international standards relating to accountability of business enterprises for international human rights violations are constantly and quickly developing, this part of the guide should also be considered in the context of continuing contemporary development in this regard. Nevertheless, the UNGPs have led to an increased rate of normative development internationally and regionally (including perhaps most notably in Africa and Europe) regarding corporate responsibilities and State obligations for business impacts on human rights. Such development has consistently included focus on the need for awareness of heightened risks in situations of conflict, ultimately resulting in a higher standard of scrutiny for both State and non-State actors.

Chapter 4 draws together the standards on ESCR and business and human rights in greater depth. The focal point of the chapter is CESCR's General Comment 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities. It also analyzes some of the CESCR Committee's general comments on specific ESCR; the CESCR Committee's statements; the CESCR Committee's concluding observations to State parties; and the CESCR Committee's communications decisions. The

³ ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level – A Practitioners Guide*, 2014, available at <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf>.

chapter concludes that a clear set of standards on international human rights law now exists that is indispensable in ensuring the effectiveness of transitional justice measures and mechanisms in securing accountability of State and non-State actors for abuses of economic, social and cultural rights perpetrated during situations of conflict. These standards create real opportunities to ensure that future transitional justice mechanisms and measures are more capable than their predecessors in contributing to: sustainable development; the establishment of the rule and protection of human rights; and the securing of peace in transitioning societies. Without effective corporate accountability for ESCR violations, such efforts will always be incomplete and such opportunities may be missed

Using a range of case studies of transitional mechanisms from across the world, Chapter 5 illustrates the ways in which Transitional Justice mechanisms have (or have not) considered violations of ESCR and business abuses of ESCR. The case studies span a wide range of geographic and political contexts including: Argentina; Colombia; East-Timor; Mauritius; Liberia; South Africa and Tunisia. The chapter provides some guidance to stakeholders on how to determine, design and implement transitional justice laws, policies and practices which are consistent with international human rights law and standards, including those related to ESCR and business and human rights. The illustrative examples used focus on truth commissions and judicial mechanisms, but are useful in determining approaches in relation to the full range of available transitional justice measures and mechanisms. An analysis of these case studies allows transitional justice stakeholders to gauge evolving best practices that are consistent with international human rights law.

The particular vulnerability of children to human rights violations and abuses perpetrated by State and non-State actors warrants particular consideration. In Chapter 6, a summary of the Committee on the Rights of Child's General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's rights is provided. General Comment 16, which includes specification of State obligations under the Convention on the Rights of the Child as they relate to business and human rights, also provides for refined interpretation of these standards in the context of conflict, emergency and transitional justice. The chapter uses a variety of case studies from across the world (including Argentina, South Africa, Sierra Leone and Uganda) to highlight the application of children's rights principles in the transitional context. Chapter 6 is best read with the *Practical Guide for Non-Governmental Organizations on how to use the United Nations Committee on the Rights of the Child's General Comment No. 16*⁴ and the *Practical Guide for States on how to implement the United Nations Committee on the Rights of the Child's General Comment no. 16*, co-authored by the ICJ and

⁴ ICJ & Child Rights International Network, *State Obligations regarding the Impact of the Business Sector on Children's Rights – A Practical Guide for Non-Governmental Organisations on how to use the United Nations Committee on the Rights of the Child's General Comment n° 16*, December 2015, available at <https://www.icj.org/wp-content/uploads/2016/04/Universal-Guide-UN-Committee-on-Rights-of-the-Child-Publications-Reports-2016-ENG.pdf>.

UNICEF.⁵ The chapter concludes that while transitional justice mechanisms and measures have a crucial role to play in the protection of children's rights they cannot be the beginning and the end of "rebuilding of a child's world". They can only do so if they involve the fullest participation of children as is possible in compliance with the requirements of international human rights law.

From the outset, several notes of caution are necessary about what this guide does *not* cover.

First, this guide does not cover the standards of international humanitarian law applicable during and after armed conflict.

Second, the guide does not provide any detailed analysis of the role of international criminal law, including international criminal tribunals such as the International Criminal Court in ensuring accountability. Other crucial fields of international law, which are vital to securing protection of human rights, such as international refugee law, are also beyond the ambit of this guide.

Finally, while using specific examples of standards applicable to persons in situations of vulnerability and marginalization such as women and children, this guide omits analysis of existing standards applicable to the protection of other groups in similar positions such as, for example, migrants and persons with disabilities during and after conflicts.⁶

⁵ ICJ & UNICEF, *Obligations and Actions on Children's Rights and Business, A practical guide for States on how to implement the United Nations Committee on the Rights of the Child's General Comment no. 16*, 2015, available at <https://www.icj.org/wp-content/uploads/2015/09/Report-UNICEFChildrenBusiness-2015-ENG.pdf>.

⁶ The UN Convention on the Rights of Persons With Disabilities is clear on the fact that, in situations of conflict and emergency, persons with disabilities require particular attention. See, for example, Article 11 that provides that "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters". The United Nations Security Council is currently discussing the significant impact of conflict on persons with disabilities. See for example: <http://www.internationaldisabilityalliance.org/arria-idpd2018>.

Chapter 1: Transitional Justice

Creating a framework that can be used to assist in (re)establishing the rule of law, access to justice, and the protection of human rights in the aftermath of conflict or crisis is an urgent and challenging task. This is especially so because such contexts are commonly marred by broken institutions, depleted resources, diminished security and distressed and divided populations.⁷ Moreover, as conflicts are complex and context sensitive, sustainable solutions must be tailored to each country with specific social, cultural, economic and political concerns in mind, driven by these distressed and divided societies. Therefore, it should be borne in mind from the outset that although navigating the terrain of transitional justice involves the application of international law and standards, there is also a need to ensure that all transitional justice measures and mechanisms are designed to suit the particular country taking into account its specific history and context.

Although the ICJ considers that “transitional justice” properly conceived is about “justice in transition”; the essential quality and nature of justice, and the laws, standards and institutions that undergird it are universal and not subject to compromise because a State or society is going through momentous change. The ICJ therefore takes as a starting point the position that any approach to transitional justice cannot compromise fundamental human rights and rule of law principles. As reaffirmed by the ICJ’s Geneva Declaration on Upholding the Rule of law and the Role of Judges and Lawyers in Times of Crisis⁸ and Tunis Declaration on Reinforcing the Rule of Law and Human Rights,⁹ these principles include: legality and legal certainty;¹⁰ democracy and political pluralism;¹¹ the separation of powers;¹² the independence and accountability of judges and lawyers;¹³ the right to a fair trial by a competent, independent, and impartial tribunal;¹⁴ *habeas corpus*;¹⁵ accountability of the

⁷ United Nations Secretary-General, *Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice*, 10 March 2010, p. 3.

⁸ ICJ, *Legal Commentary to the ICJ Geneva Declaration Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, 2011, pp. xv-xx, available at <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>.

⁹ ICJ, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019, available at <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>.

¹⁰ *Tunis Declaration, op. cit.*, Principle 9.h.

¹¹ *Tunis Declaration, op. cit.*, Principles 9.b, 9.c and 9.d.

¹² *Geneva Declaration, op. cit.*, in particular Principles 2 and 3; *Tunis Declaration, op. cit.*, Principle 9.a.

¹³ *Geneva Declaration, op. cit.*, in particular Principles 1, 2, 7 and 8; *Tunis Declaration, op. cit.*, Principle 9.e.

¹⁴ *Tunis Declaration, op. cit.*, Principle 9.f.

¹⁵ *Geneva Declaration, op. cit.*, Principle 9.

military to civilian authorities;¹⁶ the need to ensure accountability and avoid impunity;¹⁷ and the right to an effective remedy and reparation.¹⁸

With this important context in mind, this chapter provides a summary of applicable international law and standards (and best practices) applicable to transitional justice. It discusses what transitional justice is as well as its components and principles. It focuses on the guidance given by United Nations offices and institutions, including the 2004 report of the UN Secretary-General to the United Nations Security Council,¹⁹ the Guidance Note of the Secretary-General on the United Nations Approach to transitional Justice²⁰ and the various reports and studies of the UN Special Rapporteurs on the Promotion of Truth, Justice, Reparation and Guarantee of Non-Recurrence.²¹

Since the establishment of the mandate by the Human Rights Council, Special Rapporteurs Pablo de Greiff and Fabian Salvioli have identified some of the most crucial aspects for the implementation of transitional justice. In that regard, the fight against impunity and the re-establishment of civic trust have been defined as integral components and current priorities of such processes. As highlighted by the Special Rapporteur:

“[o]ne of the problems that most affects victims of repression and/or conflict and that usually produces re-victimization is the impunity of those who have perpetrated or masterminded massive or systematic violations of human rights or international humanitarian law. Justice systems are often weak or non-operational in the aftermath of mass violations, which obstructs any chance of accountability or the realization of the right to justice for past abuses. (...) Impunity also arises from the failure of States to provide victims with effective remedies and reparation, to ensure the right to know the truth about violations endured, and to adopt measures to prevent the recurrence of violations”.²²

In that context, participation of the victims and of civil society, in particular women, minorities and victims’ organizations, must be central to transitional justice processes. The

¹⁶ *Geneva Declaration, op. cit.*, Principle 3; *Tunis Declaration, op. cit.*, Principle 9.g.

¹⁷ *Tunis Declaration, op. cit.*, Principle 9.m.

¹⁸ *Tunis Declaration, op. cit.*, Principle 9.n.

¹⁹ United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General to the Security Council*, UN Doc. S/2004/616, 23 August 2004, available at <https://www.un.org/ruleoflaw/files/2004%20report.pdf>.

²⁰ *Guidance Note of the Secretary-General, op. cit.*

²¹ All the Reports of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantee of Non-Recurrence to the Human Rights Council and the General Assembly, from 2012 to this day, are available at <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/AnnualReports.aspx>.

²² Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Report to the Human Rights Council*, UN Doc. A/HRC/39/53, 25 July 2018, paras. 31 and 32, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/233/85/PDF/G1823385.pdf?OpenElement>.

recognition of the victims by this process will in turn contribute to the re-establishment of trust within societies.²³

Secondly, African and South and Central American regional frameworks are presented as examples of regional approaches to such international standards. In addition, the Committee on the Elimination of Discrimination Against Women's General Comment 30 provides examples in respect of gender and conflict. This approach exemplifies the need to consider the impact of transitional justice standards and norms in a manner that protects and acknowledges the specific needs of persons from disadvantaged and marginalized groups.

The chapter lastly includes a brief introduction of the other concepts that are going to be discussed in later chapters of the guide such as ESCR (Chapter 2) and business and human rights (Chapter 3) and indicates how they overlap directly with the transitional justice discourse.

What is Transitional Justice and Why is it Important?

At the most basic level, in the context of legal standards and norms, transitional justice has been described as:

"a field of international law which is concerned with the question how to confront a situation of past large-scale human rights violations and humanitarian abuses in a period of transition to peace and democracy".²⁴

The International Center for Transitional Justice has widened the concept and defined transitional justice, expressing it in the following terms:

"Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. [It] is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades".²⁵

However, it should be acknowledged that transitional justice is not a legal term, but rather a conceptual framework which is flexible and evolving:

"Definitions of transitional justice vary and have evolved and broadened over time, yet the field can be broadly conceived of as a set of moral, legal, and political dilemmas involving how best to respond to mass atrocities and other forms of profound injustice in the wake of periods of conflict and repression".²⁶

²³ *Ibid.*, paras. 33, 34 and 35.

²⁴ Anja Seibert-Fohr, "Transitional Justice in Post-Conflict Situations", in *Max Planck Encyclopaedia of Public International Law*, Rüdiger Wolfrum, Oxford, 2012, para 1.

²⁵ International Center for Transitional Justice, *What is Transitional Justice?*, p. 1, available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.

²⁶ Dustin N. Sharp, *Rethinking Transitional Justice for the Twenty-First Century, Beyond the End of History*, Cambridge University Press, 2018, p. 1.

Nevertheless, the working definition of transitional justice from which this guide will depart is the definition provided by the United Nations in its Guidance Note on Transitional Justice. It describes transitional justice as follows:

“The term “transitional justice” covers a wide range of activities, including criminal trials at domestic and international courts for past abuses, commissions of inquiry, vetting and institutional reform processes, amnesty (conditional or blanket).”²⁷

Though the concept and practice of transitional justice has a much longer history, the term “Transitional Justice” began to be prominently used in the early 1990s.²⁸ The term embodies a modern rule of law, democracy and human rights focused approach to political transitions which have been dominant in the international human rights environment since the end of the Cold War.

In this “modern” conception, the term transitional justice refers to a “wide range” of both legal and non-legal avenues (including transitional justice measures and transitional justice mechanisms) that a society undertakes after repression and conflict to deal with human rights abuses that happened in the past. The strong focus on the *past* is matched by a concern with the *present* and the *future*. As George Orwell famously noted in his novel 1984, in the political realm, the past, present and future coalesce: “he who controls the past, controls the future; and he who controls the present, controls the past”.²⁹

Often, transitional justice mechanisms and measures are employed in the aftermath of periods marked by widespread and human rights violations and abuses. The primary political and social objective of transitional justice, then, is often to design and implement measures and mechanisms to end conflict and prevent impunity for human rights violations, while simultaneously moving towards (re)establishing the rule of law, constitutional democracy and societal reconciliation.³⁰ One of the big challenges for governments and civil society organizations face with working towards transitional justice is therefore balancing the often competing demands for justice and aims of transitional justice.

Though transitional justice practices include various historic practices dating back thousands of years, the Nuremberg Trials after World War II are often seen as the beginning of the

²⁷ Chandra Lekha Sriram, “Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?”, in *Justice and Economic Violence in Transition*, Dustin N. Sharp, Springer, 2014, p. 28.

²⁸ Dustin N. Sharp, “Introduction: Addressing Economic Violence in Times of Transition”, in *Justice and Economic Violence in Transition*, *op. cit.*, pp. 5-6. See also, Dustin N. Sharp, “Economic Violence in the Practice of African Truth Commissions and Beyond”, *Justice and Economic Violence in Transition*, *op. cit.*, p. 82, indicating that “many of the mechanisms associated with transitional justice have origins and parallels going back centuries if not millennia”.

²⁹ George Orwell, *1984*, Secker and Warburg, 1949, Part I, Chapter 3.

³⁰ *Guidance Note of the Secretary-General*, *op. cit.*, p. 3.

application of the “modern” conception of transitional justice detailed in this guide.³¹ Transitional justice has been crucially important in the recent years in the wake of the numerous conflicts occurring since the start of the twenty-first century.

In general, despite the context-sensitivity of conflicts themselves and notions of what transitional justice is, it is very important to note that guidance may be gained from the experience of transition in other countries. As international standards are continuously developed to reflect growing experiences around the world such standards provide an indispensable departure point in all contexts. The UN Secretary General, for example, has indicated that all transitional justice mechanisms must be “based” on international human rights law and standards, which:

“bring a legitimacy that cannot be said to attach to exported national models which, all too often, reflect more the individual interests or experience of donors and assistance providers than they do the best interests or legal development needs of host countries”.³²

This is expressed directly in UN Guiding Principles on Transitional Justice, which require “compliance with international norms and standards when designing and implementing transitional justice processes and mechanisms”.³³

Transitional Justice may involve laws, procedures, administrative actions and procedures, and other measures (“transitional justice measures”) and may be implemented through various mechanisms (“transitional justice mechanisms”). Some States have chosen to employ a range of mechanisms simultaneously, while others have concentrated on just a few targeted measures and mechanisms or even just one single response.³⁴ The various components of modern transitional justice system are discussed below and include:³⁵

1. Prosecutions and other Accountability Measures;
2. Institutional and Legal Reform;
3. Truth Seeking;
4. Reparations; and
5. National Consultation and Participation.

The different components of transitional justice may serve different purposes but should ultimately be understood and considered as working together to achieve the main aims of

³¹ Sharp, *Rethinking Transitional Justice*, *op. cit.*, p. 2.

³² 2004 Report of the Secretary-General, *op. cit.*, paras. 9 and 10.

³³ Guidance Note of the Secretary-General, *op. cit.*, p. 2, section A.1.

³⁴ ICTJ, *What is Transitional Justice?*, <https://www.ictj.org/about/transitional-justice> (accessed 6 November 2019).

³⁵ 2004 Report of the Secretary-General, *op. cit.*, para. 8; Guidance Note of the Secretary-General, *op. cit.*, pp. 7-10.

transitional justice, which are to bring societies to terms with human rights violations and abuses that have occurred during the time of conflict and to assist its society to move forward and secure peace and democracy and the protection of all human rights for all people.

United Nations Guidance on Transitional Justice

In a 2004 report of the UN Secretary General to the United Nations Security Council, transitional justice is defined as:

“the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.³⁶

This definition of transitional justice is “widely cited”³⁷ and finds its basis in human rights law, international humanitarian law, international criminal law and international refugee law.³⁸

Transitional Justice related rights in international human rights law

There are four specific obligations that States have to meet in order to take effective action to combat impunity and which frame the transitional justice discourse, namely:

1. **The obligation of accountability:** the State obligation to investigate and prosecute, in fair trials, alleged perpetrators of violations of human rights and serious violations of international humanitarian law, often referred to as the *right to justice*;³⁹
2. **The obligation to ensure and pursue truth:** the right to know the truth about past abuses and the fate of disappeared persons, often referred to as *the right to truth*;⁴⁰

³⁶ 2004 Report of the Secretary-General, *op. cit.*, para. 8; Guidance Note of the Secretary-General, *op. cit.*

³⁷ Sharp, *Rethinking Transitional Justice*, *op. cit.*, p. 1.

³⁸ Guidance Note of the Secretary-General, *op. cit.*, p. 3.

³⁹ UN Principles on Impunity, Principles 1 and 19. See also, ICCPR, Article 2; CAT, Articles 4, 5, 7 and 12; ICPED, Articles 3, 6, 7 and 11; ICJ, *International Law and the Fight Against Impunity – A Practitioners Guide*, 2015, pp. 133-268, available at <https://www.icj.org/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf>.

⁴⁰ Human Rights Council, *Resolution 9/11*, UN Doc. A/HRC/RES/9/11, 18 September 2008; Human Rights Council, *Resolution 12/12*, UN Doc. A/HRC/RES/12/12, 12 October 2009; Human Rights Council, *Resolution 21/7*, 10 October 2012. See also, ICCPR, Article 2; ICPED, Article 24; United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (UN Principles on Remedy and Reparation), Principles 11.c, 21.b, 22.b, 22.c, 22.d, 22.h and 24; UN Principles on Impunity, Principles 2 to 5.

3. **The to provide an effective remedy and reparations:** the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law, often referred to as the *right to reparations*;⁴¹ and
4. **The obligation to prevent repetition of violations:** the State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future, often referred to as *the duty of prevention*.⁴²

Components of Transitional Justice under UN guidance

The box below summarizes and provides illustrative examples of the components of transitional justice as provided by the UN Guidance Note on Transitional Justice. While warning that “pre-packaged solutions are ill advised”⁴³ and that local factors may determine the exact combination of measures and mechanisms, UN’s Guiding Principles on Transitional Justice are clear that “whatever combination is chosen must be in conformity with international legal standards and obligations”.⁴⁴ This non-exhaustive list of components must be understood and interpreted through the lens of the rights to justice, truth and reparations and States’ duty to prevent violations of human rights as detailed directly above.

Components of Transitional Justice under UN guidance

1. Prosecution

Prosecution initiatives are used to ensure that those who commit human rights violations are held criminally accountable and, where appropriate, convicted of such offences. In short, to ensure that perpetrators are brought to justice in accordance with the domestic and international human rights law. Prosecution is not simply policy strategy. It is an international legal obligation. It is important that any such prosecutions are conducted in accordance with international standards of a fair trial. The responsibility of prosecutions primarily rests on States and “in relation to the alleged crimes committed in the context of the conflict or repressive rule, transitional justice programmes will seek to reinforce or develop national investigative and prosecutorial capacities, an independent and effective judiciary, adequate legal defense, witness and victims protection and support, and humane correctional facilities”.⁴⁵ However, at times States may not have the capacity or be willing to prosecute, in such instances international and hybrid criminal tribunals may exercise concurrent jurisdiction.

In this context, subject to certain conditions, amnesties or other similar measures may be appropriate to promote peace and reconciliation. However, under international standards amnesties must never be granted to perpetrators of *gross* human rights violations and crimes

⁴¹ See e.g., UN Principles on Remedy and Reparation, Principles 3.a and 23; UDHR, Article 8; ICCPR, Article 2; ICERD, Article 6; CAT, Article 6; ICPED, Article 24; CRC, Article 39. See also, General Assembly, *Resolution 60/147*, UN Doc. A/RES/60/147, 21 March 2006.

⁴² See e.g., UN Principles on Impunity, Principle 35; ICCPR, Article 2; CAT, Article 2; ICPED, Article 23. See also, *LaGrand Case (Germany v. United States of America)*, Judgment of 27 June 2001, International Court of Justice, Reports 2001, p. 466.

⁴³ *2004 Report of the Secretary-General*, *op. cit.*, para. 16.

⁴⁴ *Guidance Note of the Secretary-General*, *op. cit.*, p. 2.

⁴⁵ *Guidance Note of the Secretary-General*, *op. cit.*, p. 7.

under international law, such as genocide, war crimes, crimes against humanity, torture or enforced disappearances.⁴⁶

In this regard, Principle 24 of the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* provides that:

"Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

- (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction – whether international, internationalized or national – outside the State in question; and
- (b) Amnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation, to which principles 31 through 34 refer, and shall not prejudice the right to know."

In turn, Principle 19 reads as follows:

"States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."

Therefore, in cases of gross violations of human rights and crimes under international law, amnesties cannot be used as an alternative to criminal liability and can only be considered in the aftermath of an appropriate criminal conviction.

2. Truth Seeking

The *right to the truth* has emerged under international law and standards as the right of the victim and his or her family to know the whole truth concerning the gross human rights violations committed, the specific circumstances and the identity of those responsible and of the perpetrators, as well as their motives.⁴⁷

Principle 2 of the UN Principles on Impunity enshrines the inalienable right to truth and states that "[e]very person has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations".

Additionally, Principle 22(b) of the UN Principles on the Right to Remedy and Reparation affirms that victims' satisfaction shall include "[v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations". Principle 24 adds that "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations".

⁴⁶ See e.g., *Guidance Note of the Secretary-General, op. cit.*, p. 4; Secretary-General, *Report on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, para. 22; ICJ, *International Law and the Fight Against Impunity, op. cit.*, p. 269.

⁴⁷ ICJ, *International Law and the Fight Against Impunity, op. cit.*, p. 228.

Truth seeking can assist countries in a post conflict or transitional time to investigate and discover whether human rights abuses occurred during a time of conflict or repressive rule. Establishing the truth about human rights violations can be very important to transitional justice processes, particularly because conflicts sometimes produce environments of fear and secrecy making it difficult for ordinary means of accessing information (including media and government sources) become unreliable and restricted.

Truth seeking can be achieved using truth commissions, fact-finding missions and commissions or enquiry. These bodies are usually distinct from courts (non-judicial) though they may be allocated with some judicial-like (quasi-judicial) powers and processes to ensure that they are equipped to uncover the truth.⁴⁸ Truth Commissions have quickly become one of the most common modern transitional justice mechanism, although it is imperative that such commissions conform to international standards and do not themselves become vehicles of impunity. In particular, truth commissions must be established through procedures that ensure their independence, impartiality and competence;⁴⁹ the modalities of their establishment should be based upon broad public consultations and include the views of victims and survivors;⁵⁰ the commission's scope must be clearly defined and be consistent with the principle that it is not intended to act as a substitute for civil, administrative or criminal courts.⁵¹

To this day, there have been more than 40 such truth commissions spanning much of the world. Broadly, the "remarkable similarity" between these commissions from all over the world allows for a loose definition of such mechanism as a mechanism which:⁵²

- "(1) focuses on the past, rather than ongoing events;
- (2) investigates a pattern of events that took place over a period of time;
- (3) engages directly and broadly with the affected population, gathering information on their experiences;
- (4) is a temporary body, with the aim of concluding with a final report;
- (5) is officially authorized or empowered by the State under review."

Although there may be competing and different claims relating to the truth in transitional societies, part of the purpose of truth commissions is often hearing, reconciling and accommodating these differences, and making recommendations for how retribution (e.g. through prosecution and lustration) and reconciliation (e.g. through amnesty and reparation) should be balanced. Truth Commissions may or may not have the power to make binding recommendations depending on their particular mandates.

3. Ensuring the right to an effective remedy and reparation

Under international law, the normative basis for the right to a remedy and reparation is well established, as attested by numerous international human rights treaties and other instruments and jurisprudence.⁵³ While interpretation and terminology differ from system to system, it is possible to identify a coherent set of principles on the right to a remedy and reparation.

⁴⁸ See UN Principles on Impunity, Definition D, p. 6; *Guidance Note of the Secretary-General, op. cit.*, p. 8.

⁴⁹ UN Principles on Impunity, Principle 7.

⁵⁰ *Ibid.*, Principle 6.

⁵¹ *Ibid.*, Principle 8.

⁵² Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, New York, 2011, pp. xi-xii, 30-31.

⁵³ ICJ, *The Right to a Remedy and Reparation, op. cit.*, p. 15; UDHR, Article 8; ICCPR, Article 2; CERD, Article 6; CAT, Article 14; CRC, Article 39; ICPED, article 24. In addition, both international humanitarian law and international criminal law are relevant in this context, including, in particular: the Hague Convention respecting the Laws and Customs of War on Land, Article 3; the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, Article 91; and the Rome Statute of the International Criminal Court, Articles 68 and 75.

International law recognizes not only direct victims of human rights violations, but also indirect victims, when they suffer physical, mental or economic harm as a result of the violation. For instance relatives and other persons close to the victim, may suffer harm as a result of violations that are not targeted at them but nevertheless affect them.⁵⁴

Reparations refer to any type of material or symbolic compensation, as a form of redress, given to victims who have suffered human rights violations. The UN General Assembly has reaffirmed the right of victims to reparations in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Redress may take a variety of forms, including:

- **Restitution:** e.g. restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- **Compensation:** e.g. financial or "in kind" compensation.
- **Rehabilitation:** e.g. medical and psychological care as well as legal and social services.
- **Satisfaction:** e.g. official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; and commemorations and tributes to the victims.
- **Guarantees of non-repetition:** e.g. ensuring effective civilian control of military and security forces; ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary.⁵⁵

Providing reparation to victims of human rights violations in the aftermath of conflicts is primarily the responsibility of the State. Other forms of redress with reparative purposes may also be made privately between individuals for wrongs perpetrated. Business enterprises who have contributed to human rights violations are also subject to making reparations. International support from States and international organizations can enable States to provide reparations in order to assist transition and address harms suffered by victims of a conflict.

4. Institutional reform, prevention and guarantees of non-repetition

Institutional reform in the context of transitional justice is the process of transforming State institutions that previously perpetuated conflict and repressive rule into those that foster peace, respect of the rule of law and fulfil their international human rights obligations. One of the ways of doing this is to remove all those who were part of the government at the time of repressive rule or conflict and to extensively vet new members of the public service and state security apparatus.⁵⁶ This process is often referred to as "lustration".⁵⁷

Institutional reforms may involve constitutional and electoral reform. They may also include reforms to policing and justice or reform of state provision of services such as education, housing, health and welfare policy.

Guarantees of non-repetition may take diverse forms and there is a considerable body of jurisprudence which indicates the different measures that can be taken by States in order to ensure that similar violations to those found will not occur in the future, including the duty to

⁵⁴ ICJ, *The Right to a Remedy and Reparation*, *op. cit.*, p. 51.

⁵⁵ *Guidance Note of the Secretary-General*, *op. cit.*, p. 9.

⁵⁶ *Guidance Note of the Secretary-General*, *op. cit.*, p. 9.

⁵⁷ Cynthia M. Home, "International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context", in *Law & Social Inquiry*, Vol. 34, No. 3 (Summer, 2009), pp. 713-744. In this context, "lustration" refers to the purging or replacement of government officials who held positions in regimes from which a society attempting to transition, making use of transitional justice mechanisms and measures. Lustration itself is therefore often part of a possible package transitional justice measures undertaken by countries in transition.

adopt legislative measures to prevent further violations.⁵⁸ The UN Principles on Remedy and Reparation indicate that these measures encompass, among others: ensuring civilian control over military and security forces; strengthening the independence of the judiciary; protection of legal, medical, media and related personnel and human rights defenders; and human rights training.⁵⁹

5. National Consultation and Participation

Consultations are an important part of fostering the human rights-based approach to transitional justice. Public participation, including victims' participation, allows individuals and communities affected by the conflict or repressive rule to have their voices heard and to enable State legislators and administrators, policy makers and national human rights institutions to craft solutions in line with their concerns and interests. Public participation also allows for those involved in the process to validate and "take ownership" or, in some instances, to reject the process, which may contribute to the success or failure of transitional programmes. Consultations can occur at various levels: "national consultations can shape the design of an overarching transitional justice strategy" and consultations may also occur "within the context of a specific mechanism, such as during the planning stages of a truth commission or reparations programme".⁶⁰

All consultations should prioritize ensuring participation of persons from disadvantaged or marginalized groups who may otherwise struggle to ensure their voices are heard. Guidance related to ensuring women and girl's participation compliant with international human rights standards is provided below in this chapter, while guidance with regard to children's participation is provided in Chapter 6.

Finally, evidence also suggests, as has been acknowledged by a report of the United Nations Commission on Human Rights, that failure to strengthen and protect human rights after conflicts ultimately "lessens the ability or willingness of victims and witnesses to participate in the formal processes of post-conflict justice" including transitional justice mechanisms.⁶¹

UN Guiding Principles on Transitional Justice

In addition to outlining the components of transitional justice the UN Guidance provides ten clear guiding principles for all transitional justice processes. Compliance with these guiding principles assists in ensuring that transitional justice mechanisms and measures are consistent with international norms and standards. The ten guiding principles, which are expanded on and detailed in the UN's Guidance Note on Transitional Justice, are quoted in the box on page 23.

⁵⁸ ICJ, *The Right to a Remedy and Reparation*, *op. cit.*, p. 140.

⁵⁹ UN Principles on Remedy and Reparation, Principle 23.

⁶⁰ *Guidance Note of the Secretary-General*, *op. cit.*, p. 9.

⁶¹ Christine Chinkin, *The Protection of Economic, Social and Cultural Rights Post Conflict*, 2008 available at https://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf. See also, Evelyne Schmid, "Socio-Economic and Cultural Rights and Wrongs after Armed Conflicts: Using the State Reporting Procedure before the UN CESCR More Effectively", in *Netherlands Quarterly of Human Rights*, Vol. 31(3), 2013, pp. 242-3.

The Ten Guiding Principles of Transitional Justice by the United Nations⁶²

1. **Comply with International Law:** Support and actively encourage compliance with international norms and standards when designing and implementing transitional justice processes and mechanisms.
2. **Consider Political Context:** Take account of the political context when designing and implementing transitional justice processes and mechanisms.
3. **Strengthen Domestic Capacity:** Base assistance for transitional justice on the unique country context and strengthen national capacity to carry out community-wide transitional justice processes.
4. **Adopt Gender-Sensitive Approach:** Strive to ensure women's rights through transitional justice processes and mechanisms.
5. **Adopt Child-Sensitive Approach:** Support a child-sensitive approach to transitional justice processes and mechanisms.
6. **Create Victim-Centred Mechanisms:** Ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms.
7. **Promote Rule of Law:** Coordinate transitional justice programmes with the broader rule of law initiatives.
8. **Utilize Multiple Mechanisms:** Encourage a comprehensive approach integrating an appropriate combination of transitional justice processes and mechanisms.
9. **Address Root Causes:** Strive to ensure that transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights.
10. **Co-ordinate and Collaborate Widely:** Engage in effective coordination and partnerships with the widest range of possible domestic, regional and international partners.

These international principles are supplemented and contextually specified by regional norm development in relation to transitional justice principles.

Two Regional Approaches to Transitional Justice

1. The African Transitional Justice Framework

Since 2011, the African Union has held various consultations on the role of the African Union in transitional justice in Africa, resulting in the African Transitional Justice Framework (ATJF).⁶³ From an early stage in the AU's consultations, it was agreed that transitional justice should include ESCR violations, as well as ESCR related issues more generally including "targeted underdevelopment, economic crimes, corruption and land grabbing"⁶⁴ and that the

⁶² *Guidance Note of the Secretary-General, op. cit.*, p. 2.

⁶³ African Union, *African Union Transitional Justice Framework (ATJF)*, available at <https://www.legal-tools.org/doc/bcdc97/pdf/>.

⁶⁴ There is, of course, some significant overlap between ESCR violations and, as examples, the effects of economic crimes and underdevelopment.

scope of accountability should include “third party states, transnational corporations and non-state actors”.⁶⁵

The ATJF seeks to “prioritize the use of specialized African agencies and regional bodies, as well as African technical expertise”⁶⁶ in the design and implementation of transitional justice mechanisms; it locates itself within “multiple obligations under international law” relating to human rights, peace and justice.⁶⁷ While the use of regional mechanisms and resources is certainly important, the ATJF should be seen as being complementary to, rather than taking priority over, UN and universal mechanisms and cooperation, in line with the principles agreed by all States at the last World Conference on Human Rights.⁶⁸ Indeed, the ATJF itself accepts the broad definition of transitional justice by the UN, which “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with the legacy of large-scale past abuses”.⁶⁹

The ATJF usefully clarifies that “accountability for serious violations of international humanitarian or human rights law is not a matter of choice or policy but is an obligation under domestic and international law” which includes investigation and prosecution of serious crimes as well as “a broad process that addresses the political, legal and moral responsibility of individuals and institutions for past violations of human rights and dignity”.⁷⁰

Overall, the ATJF seeks to supplement and clarify existing transitional justice principles in the African regional context. Importantly for the context of this guide, the ATJF places emphasis on the idea that transitional justice principles necessarily include “the effective realization of socio-economic rights” and “the right to development”.⁷¹ Crucially, regarding all human rights, African transitional justice also requires “effective consultation and participation and informed consent” with all affected groups.⁷² Furthermore, the ATJF is clear on the fact that the scope of transitional justice includes consideration of abuses of human rights committed by non-State actors.⁷³ Though corporations and other business enterprises are not explicitly mentioned in the ATJF, they clearly fall within the non-State actors to which the ATJF applies throughout.

Overall, the broadened scope of transitional justice in terms of the ATJF has the consequence of reinforcing and contextualizing universal transitional justice law and standards.

The ATJF also includes a discrete subsection providing guidance on the expansion of transitional justice mechanisms to include ESCR violations. Noting that “ESC rights have been neglected”, the ATJF acknowledges “violations of ESC rights have a devastating effect on communities, often extending over several generations”. These violations of ESCR, the ATJF indicates, are both “at the heart of many armed conflicts” and themselves “exacerbated in situations of armed conflict”.⁷⁴

As a consequence of this departure point the ATJF acknowledges that transitional justice principles have application to both 1) historical events resulting in the violation of ESCR and 2) contemporary violations of ESCR because “historical events continue to prohibit the enjoyment of the economic, social and cultural rights of individuals and peoples”.⁷⁵ With

⁶⁵ The Centre for the Study of Violence and Reconciliation, *Enhancing the Role of the African Union in Transitional Justice in Africa*, p. 3, available at <http://www.peaceau.org/uploads/enhancing-the-role-of-the-au-in-transitional-justice-final-july-2013.pdf>.

⁶⁶ ATJF, C.1.1, p. 8.

⁶⁷ *Ibid.*, E.1, pp. 12-13.

⁶⁸ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Para. 37.

⁶⁹ ATJF, E.1, pp. 12-13.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, C.1.1, p. 8.

⁷² *Ibid.*, C.2.1, p. 8.

⁷³ *Ibid.*, E 1.1, p. 12.

⁷⁴ *Ibid.*, F.17, pp. 32-33.

⁷⁵ *Ibid.*, F.17, pp. 32-33.

regard to historical events, the ATJF notes generally that “serious violations” of ESCR have “remained unpunished” and without “reparation”. Examples of historical events leading to ESCR violations given by the ATJF include “slavery, colonization, apartheid and the looting of the developing world’s cultural heritage”⁷⁶.

The expanded lens used by the African Union also has an impact on its approach to contemporary violations of ESCR. As examples, the ATJF specifically acknowledges that “debt [and] structural adjustment programmes” and “fraudulent activities of transnational corporations” lead to contemporary violations of ESCR. The ATJF pays special attention to forms of economic violence such as “corruption”, “misappropriation of public funds”, “financial speculation” and “tax and customs evasions” as direct causes of ESCR violations relevant to transitional justice processes.⁷⁷

Moreover, though the ATJF takes the UN Principle on Remedy and Reparations as its starting point,⁷⁸ it urges the African Union to “encourage states to design reparations programmes, which would address the structural nature of ESC violations” and include non-State actors within reparations programmes.⁷⁹

Finally, the African Union in 2019 published the *African Union Transitional Justice Policy*. The Policy places “socio-economic transformation” and “socio-economic development” directly within its definition of transitional justice,⁸⁰ explaining that: “Along with the reparative measures, forward-looking redistributive measures that address underlying socio-economic marginalization and exclusion and contribute to preventing relapse to violence should be adopted”⁸¹. It thereafter suggests a range of redistributive measures relating to property, land reform, affirmative action measures to support marginalized groups and provisional of employment and educational opportunities to youth.⁸²

Governments within the African Union, business, and civil society actors and other stakeholders operating within the African Union should therefore supplement their understanding of international standards on transitional justice with the ATJF’s broadened approach. This will be particularly useful where, as is frequently the case, transitional justice mechanisms should consider ESCR violations both by State and non-State actors.

2. The Inter-American Human Rights System

The Inter-American Human Rights System (IAHRS) has developed and expansive and progressive standards and jurisprudence regarding accountability, remedies and reparation, due process, transitional justice processes have been implemented unevenly throughout Latin and Central America.⁸³

The entire system revolves around various fundamental objectives in the IAHRS approach: protecting the individuals through guarantees of truth, justice and reparations; promoting awareness of the human rights situation by providing credible, reliable information on the overall human rights strategy in terms of general patterns of behavior, their rationale and their motives; creating space for democratic dialogue between civil society and governments;

⁷⁶ *Ibid.*, F.17.1, p. 32.

⁷⁷ *Ibid.*, F.17.2, p. 33.

⁷⁸ *Ibid.*, F.8, pp. 23-24.

⁷⁹ *Ibid.*, F.17.2, p. 33.

⁸⁰ African Union, *Transitional Justice Policy*, February 2019, para. 19, available at https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf.

⁸¹ *Ibid.*, para. 68.

⁸² *Ibid.*, paras. 69 and 70.

⁸³ Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, Washington, July 2007, p. 1, available at <http://www.dplf.org/sites/default/files/11904038281.pdf>.

legitimizing victims and human rights defenders; and building a culture of human rights within domestic courts, legislatures, governments and society at large.

As regards transitional justice, the IAHRS functions in complementarity with domestic legal systems: it ensures, through monitoring, that States are giving effect to their international obligations and that truth, justice and reparations are effectively provided. This allows for a dialogue among relevant stakeholders occurring in various forms and degrees.

The Inter-American Courts of Human Rights ("the Court") has long played a significant role in addressing impunity for gross violations of human rights, which it defines as the systematic failure to investigate, prosecute, arrest, adjudicate, and convict those who are responsible for violations of rights protected by the American Convention.⁸⁴ Its judgments have articulated "a wide-ranging right of access to justice for victims and families and, in practical effect if not in formal doctrine, for societies as well"⁸⁵ and often require States to adopt legislative, judicial and administrative measures to publicize past violations and prevent their repetition. For instance, in the landmark case of *Velásquez Rodríguez*, the Court drew out State duties to investigate, prosecute and punish gross violations of human rights.⁸⁶ In other judgments, it also prohibited the use by States of "self-amnesties", statutes of limitations, absolute bars on double jeopardy and any other measures that may protect perpetrators.⁸⁷ However, the Court has not developed a specific jurisprudence on transitional justice, this is probably due to the fact that its judgments must guide all States confronted to human rights violations, not only those undergoing transitions.⁸⁸

Prior to the Court's interventions, the Inter-American Commission on Human Rights too had a major impact in pioneering jurisprudence on States' duties, the rights to justice and truth, and the unacceptability of amnesties for serious violations.⁸⁹ Particularly during military dictatorships, it consistently condemned human rights violations and took strong position against amnesty decrees and impunity regulations.⁹⁰

Both organs therefore carry important legal and moral authority and have gained a reputation for thorough analysis and fair procedures. In parallel, truth commissions have carried out important work in the search for truth in specific domestic contexts including in countries such as Argentina, Chile and Peru. Some domestic courts and legislative bodies have also contributed to this mission by generalizing "the right to truth" in their daily practice and establishing reparations schemes of an administrative nature.⁹¹

Transitional Justice, situations of vulnerability and marginalization

The UN Guidelines on Transitional Justice and International Standards recognize that contextually appropriate transitional justice mechanisms and measures must take into account the needs of people and groups who are disadvantaged, marginalized or in situations

⁸⁴ *Almonacid Arellano et al. v. Chile*, Inter-American Court of Human Rights, Judgment of 26 September 2006, Series C, No. 154, para. 111.

⁸⁵ Due Process of Law Foundation, *Victims Unsilenced*, op. cit., p. 151.

⁸⁶ *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C, No. 4.

⁸⁷ *Barrios Altos v. Peru*, Inter-American Court of Human Rights, Judgment of 14 March 2001, Series C, No. 75, para. 43; *Almonacid Arellano et al. v. Chile*, IACtHR, op. cit., para. 121.

⁸⁸ Due Process of Law Foundation, *Victims Unsilenced*, op. cit., p. 162.

⁸⁹ See for example, IACHR, *Annual Report 1985–86*, Chapter V, for Guidelines on the Responsibilities of Democratic Governments to Investigate and Remedy Human Rights Violations under Prior Regimes. Also see *Garay Hermosilla et al. v. Chile*, Report 36/96, Case 10.843, and *Irma Reyes et al. v. Chile*, Report 34/96, Cases 11.228 et al., both in IACHR's *Annual Report 1996*, Chapter III.

⁹⁰ Due Process of Law Foundation, *Victims Unsilenced*, op. cit., p. 192.

⁹¹ *Ibid.*, pp. 193, 195.

of vulnerability such as minorities, women, and children among others.⁹² Therefore, while a “child-centred approach” and the need to “strive to ensure women’s rights” are listed amongst the 10 guiding principles, the need to consider marginalized and disadvantaged groups extends far beyond this. Other affected groups may include the elderly, persons with disabilities, migrants and refugees, LGBTI individuals, rural persons, indigenous persons, and others, depending on the particular circumstances.

In ensuring non-discriminatory transitional justice mechanisms and measures consistent with international human rights law, governments and civil society organizations are therefore encouraged to identify these groups at an early stage, when such mechanisms and measures are being designed and planned.

Chapter 6 deals in depth with some of the peculiar vulnerabilities concerning children during and after conflict. The box below highlights some of the ways in which the situation of women must be considered in transitional justice processes. It is based on the guidance given by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in its General Recommendation 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations.⁹³

CEDAW Committee General Recommendation 30: Women and Conflict

The CEDAW Committee’s General Recommendation advises States on how to ensure the fulfillment of their obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) before, during and after conflicts. It also gives States guidance on “acts of private individuals or entities that impair the rights enshrined in the Convention”.⁹⁴ The CEDAW recognizes the variety of ways in which diverse groups of women are involved in conflicts: as combatants; as human rights defenders; as part of organized civil society; as members of resistance movements; as part of peace building processes; and as victims and bystanders.⁹⁵

The CEDAW Committee emphasizes that States’ duty to protect rights enshrined in the CEDAW requires them to “regulate non-State actors” including businesses. States are required in this regard to exercise “due diligence to prevent, investigate, punish and ensure redress for the acts of private individuals or entities”.⁹⁶ To ensure adherence to this duty to protect, the CEDAW Committee recommends that States:

1. **Ensure Redress:** Ensure redress for acts of “private individuals or entities” that impair the enjoyment of rights under the CEDAW. This includes establishing accountability mechanisms;
2. **Reject Rollback:** Reject rollbacks in women’s rights that are aimed at appeasing any non-State actors;

⁹² *Guidance Note of the Secretary-General, op. cit.*, p. 5.

⁹³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 1 November 2013.

⁹⁴ CEDAW Committee, *General Recommendation 30, op. cit.*, para. 3.

⁹⁵ *Ibid.*, para. 6.

⁹⁶ *Ibid.*, para. 15.

3. **Prevent Abuses:** Engage non-State actors to prevent human rights violations of women including in particular “all forms of gender-based violence”;
4. **Assist Corporations:** Assist corporations in assessing and addressing heightened risks to women’s rights;
5. **Use Gender-sensitive Practices:** Such practices include use of female officers in investigation of rights violations and abuses of women and should persist during and after conflicts.

The CEDAW Committee directly “urges non-State actors” to “respect women’s rights in post-conflict situations” and “commit themselves to abiding by codes of conduct on human rights and the prohibition of all forms of gender-based violence”.⁹⁷

The CEDAW Committee’s focus on gender-based violence during and after conflicts is as a result of its acknowledgment of evidence of gender-based and sexual violence against women and girls being used as “a tactic of war to humiliate, dominate, instill fear in” communities and societies. Evidence suggests that such targeted violence may continue or even “escalate in the post-conflict setting”.⁹⁸ The CEDAW Committee makes detailed recommendations regarding measures States are required to take to combat gender-based and sexual violence during and after conflicts.⁹⁹

Such violence also has an effect on a range of women’s rights, including the right to health. More generally the Committee notes that women and girls “bear[] the brunt of the socioeconomic dimensions” of conflicts.¹⁰⁰ The Committee’s recommendations relating to ESCR in post-conflict situations therefore include recommendations on women’s rights to education, work, health (including sexual and reproductive health) and an adequate standard of living more generally.¹⁰¹

The CEDAW Committee’s message with regard to the ambit of transitional justice mechanisms is clear:

“Transitional justice mechanisms have not succeeded in fully addressing the gendered impact of conflict and in taking into account the interdependence and interrelatedness of all human rights violations that occur during conflict. For most women, post-conflict justice priorities should not be limited to ending violations of civil and political rights, but should include violations of all rights, including economic, social and cultural rights”.¹⁰²

States are advised to take advantage of the “unique opportunity” during transitions “to lay the ground towards the achievement of substantive gender equality” including during constitutional drafting and electoral, legal and social reform.¹⁰³ This necessitates women’s participation in all transitional justice processes.

CEDAW General Recommendation 30: Women and Transitional Justice

Consistent with the UN Guiding Principles on Transitional Justice, the CEDAW Committee acknowledges that a combination of transitional justice mechanisms may be selected by States in particular contexts. It recommends a “comprehensive approach” including “both judicial and non-judicial mechanisms” which are all “gender sensitive and promote women’s

⁹⁷ *Ibid.*, para. 18.

⁹⁸ *Ibid.*, para. 36.

⁹⁹ *Ibid.*, para. 38(a)-(h).

¹⁰⁰ *Ibid.*, para. 48.

¹⁰¹ *Ibid.*, para. 52(a)-(e).

¹⁰² *Ibid.*, para. 76.

¹⁰³ *Ibid.*, para. 77.

rights”¹⁰⁴. It sets further recommendations to states in this regard including:¹⁰⁵

1. **Gender-sensitive mandates:** all mechanisms must ensure women’s access to justice and should be mandated to “address all gender based violations” and recommendations regarding gender-based violations complied with.
2. **Gender-sensitive procedures:** gender-sensitive procedures to “avoid revictimization and stigmatization” should be put in place. Such procedures include, but are not limited to: establishing special protection units and gender desks at police stations; confidential and sensitive investigation procedures; and giving equal weight to the testimony of women and girls in all investigations and trials.
3. **Informal justice mechanisms:** State authorities should engage with any informal justice mechanisms and “encourage appropriate reforms” to them if this is necessary to ensure their consistency with “human rights and gender equality standards” including the prohibition on discrimination against women.
4. **No blanket amnesties:** blanket amnesties for human rights violations against women and girls, especially relating to sexual violence against women and girls, should be rejected. To prevent impunity, violations of women’s rights must be “properly investigated, prosecuted and punished by bringing the perpetrators to justice”.
5. **Non-discrimination during reforms:** all forms of discrimination against women should be prohibited during reforms emanating from transitional justice mechanisms. Such reforms should include “specific measures aimed at protecting women against any act of discrimination”.
6. **Women’s participation throughout:** women should participate in the “design, operation and monitoring” of all transitional justice mechanisms “at all levels” including with regard to reparations programmes. Women’s experiences, needs and priorities and “all violations suffered” must be addressed by such mechanisms.
7. **Confidentiality and anonymity:** special procedures which “facilitate and encourage women’s full collaboration and involvement” while ensuring identity protection should be adopted in all transitional justice mechanisms. This includes, but is not limited to, statement taking by women professionals.
8. **Effective and timely remedies:** effective and timely remedies for violations of women’s rights should be provided in all mechanisms so that “adequate and comprehensive reparations” addressing “all gender-based violations” are incorporated. Gender-based violations include: sexual and reproductive rights violations, domestic and sexual enslavement, forced marriage and forced displacement, sexual violence and violations of ESCR.
9. **Enhancing women’s access to justice:** provision of legal aid and the establishment of specialized courts such as domestic violence courts and family courts should occur to improve access to justice for women. Mobile courts should also be provided to increase access to justice for women in remote areas.

Whatever transitional justice measures and mechanisms that are adopted in a particular country or context, ensuring women’s “meaningful and effective participation” in such processes is critical to ensuring that states comply with their CEDAW obligations and that such measures do not result in re-traumatization of women and girls.¹⁰⁶ Women’s participation should, in this regard, be considered as “a priority at the official cessation of hostilities”.¹⁰⁷

¹⁰⁴ *Ibid.*, para. 81(a).

¹⁰⁵ *Ibid.*, para. 81(b)-(l). For the purposes of brevity, CEDAW Committee’s recommendations have been paraphrased and fused together in the following list.

¹⁰⁶ *Ibid.*, para. 42.

¹⁰⁷ *Ibid.*, para. 44.

The CEDAW Committee makes detailed recommendations in this regard to both State and non-State actors. It is critical that governments and civil society organizations consider the CEDAW Committee's recommendations from the outset in determining their approaches when engaging in the design and implementation of transitional justice mechanisms.¹⁰⁸

Finally, during the drafting of this guide the United Nations Working Group on Business and Human Rights published *Gender Dimensions of the Guiding Principles on Business and Human Rights*.¹⁰⁹ This report includes additional "gender guidance" on all the UNGPs including those pertaining to conflict and may be useful in assessing how to ensure to protection of women and girl's in situations of conflict and transitional justice settings.¹¹⁰

Transitional Justice and Corporate Complicity

Most transitional justice mechanisms and measures have focused on States and armed groups and have omitted the important role of businesses. Despite the lack of clarity about the nature of the human rights duties and responsibilities of businesses under international human rights law, as far back as 1940's, post-world war II transitional justice measures illustrated a clear appreciation that businesses played a major role in atrocity crimes. Individual businesspersons could and should be held therefore accountable for their role in the sanctioning, and at times committing, crimes under international law. Indeed, senior company officials were convicted for active complicity in the crimes of the Nazi-led Germany. These business leaders, often working through their companies: supplied poisonous gas to concentration camps knowing it would be used to exterminate human beings; actively sought slave labour to work in their factories; acquiesced or helped in the deportation, murder and ill-treatment of slave workers; donated money to support the criminal S.S., and enriched their companies by plundering property in occupied Europe.¹¹¹ The post-World War II criminal tribunals, therefore, in addition to being an unprecedented attempt at attaining transitional justice, also contain early precedent for acknowledging that corporate perpetrated abuses should result in accountability within transitional justice processes.¹¹²

¹⁰⁸ *Ibid.*, paras. 46-47.

¹⁰⁹ United Nations Working Group on Business and Human Rights (2019) "United Nations Working Group on Business and Human Rights" available at <https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/gender-dimensions-guiding-principles-on-business-n-human-rights.html>.

¹¹⁰ *Ibid*, see pp 15-16, 53, 62.

¹¹¹ See e.g., the *Zyklon B Case, Trial of Bruno Tesch et al.*, March 1946, available at http://www.worldcourts.com/imt/eng/decisions/1946.03.08_United_Kingdom_v_Tesch.pdf; and, *The United States of America v. Carl Krauch, et al.*, also known as the Farben Case, available at http://www.worldcourts.com/imt/eng/decisions/1948.07.30_United_States_v_Krauch.pdf.

¹¹² Leigh A. Payne & Gabriel Pereira, "Corporate complicity in international human rights violations", in *Annual Review of Law and Social Science*, Vol. 12, October 2016, paras. 63-84.

Nonetheless, this jurisprudence predated the emergence of contemporary human rights law, which has been slow to bring businesses within its ambit. The application of transitional justice accountability principles to businesses has more recently been bolstered by the development of general principles relating to business and human rights area of international human rights law. Chapter 3 of this guide treats this area in greater depth; Chapter 4 applies such principles to ESCR; and Chapter 5 applies them directly to transitional justice contexts.

Transitional Justice and Economic, Social and Cultural Rights

Contemporary international human rights law is moving towards the eradication of the distinction between civil and political rights and economic, social and cultural rights. The distinction is a historical one, not one that is militated by any inherent divergence in the nature of these rights. As the Officer of the High Commissioner for Human Rights has explained: "In the past, there has been a tendency to speak of economic, social and cultural rights as if they were fundamentally different from civil and political rights. However, this categorization is artificial and even self-defeating [...] when closely scrutinized, categories of rights such as 'civil and political rights' or 'economic, social and cultural rights' make little sense. For this reason, it is increasingly common to refer to civil, cultural, economic, political and social rights".¹¹³

Nonetheless, the historic disparate treatment between the two sets of rights, is evidenced in the transitional justice context. Since the very beginning of their articulation and application, transitional justice mechanisms have concerned themselves predominantly with violations and abuses of civil political rights, to the exclusion of ESCR. While part of the explanation for this neglect is the overall deficiency in attention accorded to ESCR, an additional factor is that crimes under international law largely, though not entirely, concern the violations CPR. Crimes under international law, some of which have been addressed by international criminal law mechanisms such as the ICC and ad hoc tribunals, generally cover war crimes (serious violations of international humanitarian law), crimes against humanity and genocide, slavery, torture, enforced disappearance, and extra-judicial, summary or arbitrary executions which, for the most part, tend to be characterised as violations of CPR. Despite this the concept of "gross human rights violations" is not necessarily confined only to CPR.

This approach has begun to change with the ever-increasing acceptance of ESCR as fully justiciable and interdependent with CPR. The acknowledgment of the centrality of ESCR to transitional justice is also embraced by the UN Guiding Principles on Transitional Justice,

¹¹³ See OHCHR, *Fact Sheet Number 33: Frequently asked Questions on Economic, Social and Cultural Rights*, December 2008, available at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

which require all transitional justice measures and mechanisms to “take account of the root causes of conflict or repressive rule, and address[] the related violations of *all* rights” and “international legal standards and obligations”¹¹⁴. The Guiding Principles further clarify that this includes “violations of all rights, including civil, political, economic, social and cultural rights”.¹¹⁵

The consensus of all States is that “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.¹¹⁶ This well-established international human rights principle has been reflected in UN actors’ emphasis on the equal importance of economic, social, cultural, civil and political rights in processes of transitional justice.¹¹⁷

This guide will, however, in particular, place emphasis on gross human rights violations and abuses of so-called economic, social and cultural rights. This is because, in reality, many truth commissions adopted “narrow” mandates and “thin conceptions of justice”, largely excluding efforts to ensure justice for violation of ESCR or concomitant reparations for harms and losses of access to ESCR resulting from such violations.¹¹⁸ Ultimately, therefore:

“in many contexts, “transitional justice” came to stand for a sort of “atrocities justice,” where accountability was often seen as synonymous with individual criminal accountability for extreme acts of physical violence, and where broader questions of structural, economic, and quotidian violence and justice were either invisible or treated as mere context”.¹¹⁹

¹¹⁴ *Guidance Note of the Secretary-General, op. cit.*, pp. 2-3.

¹¹⁵ *Ibid.* See also page 10 of the same document, which suggests further strengthening of transitional justice measures and mechanisms:

“1. Adopt an approach to transitional justice that strives to take account of the root causes of conflict or repressive rule, and address the related violations of all rights, including economic, social, and cultural rights in a comprehensive and integrated manner:

- Mandating truth commissions, where appropriate, to examine violations of economic, social, and cultural rights and make recommendations on how best to redress these abuses;
- Investigating and prosecuting crimes under national or international law where the conduct involves violations of economic, social and cultural rights as well as civil and political rights;
- Redressing violations of victims’ rights in the areas of health, housing, education, an economic viability through reparations measures, and ensuring that redress for both women and men’s rights violations is taken into account in the design of such programmes;
- Guaranteeing victims non-discriminatory access to government services;
- Adopting, revising, and strengthening key legislation to ensure national recognition and protection for economic, social, and cultural rights and non-discrimination;
- Enshrining protections for economic, social, and cultural rights, as well as nondiscrimination clauses, in peace agreements and constitutions”.

¹¹⁶ Vienna Declaration and Programme of Action, para. 5.

¹¹⁷ See for example, OHCHR, *Protection of economic, social and cultural rights in conflict*, 2015, available at <https://www.ohchr.org/Documents/Issues/ESCR/E-2015-59.pdf>; and, OHCHR, *Early warning and economic, social and cultural rights*, 2016, available at https://www.ohchr.org/Documents/Issues/ESCR/EarlyWarning_ESCR_2016_en.pdf. See also, ICCPR, CRC or CRPD.

¹¹⁸ Sharp, *Rethinking Transitional Justice, op. cit.*, pp. 3-4, where Chile, Argentina, Uruguay and South Africa are used as prime examples of such thin conceptions of justice.

¹¹⁹ *Ibid.*, p. 4.

The result has been that “economic violence and economic justice have sat at the periphery of transitional justice work”.¹²⁰ Therefore, as former United Nations High Commissioner for Human Rights, Louise Arbour has concluded:

“transitional justice must have the ambition to assist the transformation of oppressed societies ... it must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that predated the conflict and caused or contributed to it”.¹²¹

In addition to recognizing that ESCR violations are root causes of conflict, Louise Arbour also observes that “actions and omissions by States and non-State actors during conflict can also amount to violations of economic, social and cultural rights, and often have a particular impact on the most vulnerable”.¹²²

Finally, it should be noted that “economic violence” might be caused by violations of ESCR or by “economic crimes”.¹²³ As the ATJF acknowledges clearly, if transitional justice mechanisms are to attain justice that is meaningful for societies around the world, they must have to focus on both violations of ESCR *per se* and “economic crimes” which ultimately have a deleterious impact on any States ability to ensure the realization of ESCR. The OHCHR has acknowledged this in a publication on transitional justice and ESCR, noting:

“States may be unable to comply with their international obligations if economic crimes and corruption affect the availability of State resources. Furthermore, State agents may be involved in economic crimes or turn a blind eye. Such behaviour could engage the international responsibility of the State if, as a result of such conduct, the State fails to comply with its human rights obligations. *Therefore, while truth*

¹²⁰ *Ibid.*, p. 22.

¹²¹ Louise Arbour, “Economic and social justice for societies in transition”, in *International Journal of Law and Politics*, Vol. 40, No. 1, Fall 2007. See also, UN High Commissioner for Human Rights, *Analytical study on human rights and transitional justice*, UN Doc. A/HRC/12/18, 6 August 2009, paras. 3 and 59–65, available at <https://undocs.org/A/HRC/12/18>; and, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 2004 ICJ 136, para. 106. On the approach of the CESCR to ESCR obligations during armed conflicts, see Evelyne Schmid, “Socio-Economic and Cultural Rights and Wrongs after Armed Conflicts: Using the State Reporting Procedure before the UN CESCR More Effectively”, in *Netherlands Quarterly of Human Rights*, Vol. 31(3), 2013, pp. 241–271. See lastly, Vienna Declaration and Programme of Action, para. 5; *Guidance Note of the Secretary-General*, *op. cit.*, p. 4; Chandra Lekha Sriram, *Liberal Peacebuilding and Transitional Justice*, *op. cit.*, p. 34; and, OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*, UN Doc. HR/PUB/13/5, 2014, p. 1, available at <https://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>.

¹²² Vienna Declaration and Programme of Action, para. 5; *Guidance Note of the Secretary-General*, *op. cit.*, p. 4; Chandra Lekha Sriram, *Liberal Peacebuilding and Transitional Justice*, *op. cit.*, p. 34; and, OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*, *op. cit.*, p. 1.

¹²³ See for example, Truth and Reconciliation Commission of Liberia, *Final Report, Vol. II: Consolidated Final Report*, Section 9.9.1, for a definition of “economic crime” as: “Any prohibited activity aimed at generating economic gain by a State or non-State actor whose economic activities fuelled the conflict, or contributed to gross human rights and/or humanitarian law violations, or who benefited economically from the conflict; or any activity of a public or private person aimed at generating illicit profit by engaging in conduct such as tax evasion, money laundering, looting, human trafficking and child labour”. See also, OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*, *op. cit.*, p. 22, in which the OHCHR recommends that Truth Commissions investigate *both* economic crimes *and* ESCR alongside each other.

*commissions could also consider economic crimes, this should occur alongside the examination of violations of economic, social and cultural rights”.*¹²⁴

Conclusion

In short, transitional justice encompasses mechanisms and measures that States can use when emerging from repressive rule or conflict. There are various components of transitional justice and States may choose to employ all or just some transitional justice mechanisms and measures in their transitional processes. Much will, in reality, depend on the specific social, economic and political context. However, irrespective of context, international law and standards must be taken fully into account in the transitional justice settings whatever mechanisms are chosen. This means that such mechanisms *must encompass all rights and sources of all human rights violations and abuses*, including state actors and non-state actors such as armed groups and businesses.

¹²⁴ OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*, op. cit., p. 22 (emphasis added).

Chapter 2: Economic, Social and Cultural Rights

This guide departs from the well-evidenced assumption that ESCR are now acknowledged as fully-fledged, justiciable rights, giving rise to binding obligations under international human rights law. It also acknowledges the ever-increasing trend of the recognition of overwhelmingly similar notions of ESCR in domestic jurisdictions throughout the world.

Chapters 4 and 5 of this guide expands in some detail on ESCR as they apply specifically to business activities and in transitional settings. This chapter seeks to briefly outline the general content and context of ESCR. Since the treatment is a summary only, this chapter is best read with ICJ's practitioners guide *Adjudicating Economic, Social and Cultural Rights at National Level* which provides a detailed analysis of ESCR as understood in international human rights law and applied in specific domestic contexts.¹²⁵

What are Economic Social and Cultural Rights?

ESCR are commonly distinguished from civil and political rights in international human rights law as a result of the historically motivated division of such rights into two different treaties: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. As is now well accepted, the rigid conceptual distinction between these categories of rights is inconsistent with the notion of rights as "indivisible".¹²⁶ Indeed the Universal Declaration of Human Rights included both sets of rights, as do various regional human rights treaties and domestic constitutions.

Nevertheless, ESCR, as they have developed in terms of ICESCR, commonly refer to a collection of rights including: the right to work and rights at work;¹²⁷ the right to social security;¹²⁸ family rights;¹²⁹ the right to an adequate standard of living (including water, sanitation, housing, food and clothing);¹³⁰ the right to health (physical, mental and

¹²⁵ ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level*, *op. cit.*

¹²⁶ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford, 2008, p. 2, who describes ESCR as the "Cinderella of the international human rights law corpus".

¹²⁷ ICESCR, Articles 6-8.

¹²⁸ ICESCR, Article 9.

¹²⁹ ICESCR, Article 10.

¹³⁰ ICESCR, Article 11.

environmental);¹³¹ the right to education (primary, secondary and tertiary);¹³² and certain cultural rights (relating to cultural life, scientific progress, literary and artistic production).¹³³

These rights, established in the ICESCR, are detailed further in a wide range of international treaties including, as examples, the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). These latter treaties contain both ESCR and CPR. Broadly, though nuancing the content of ESCR, these instruments do not replace ICESCR's approach to ESCR or CESCR's authoritative interpretation of their content and States' corresponding duties to realise and enforce ESCR.

What is the content of individual ESCR?

The individual content of ESCR is detailed in CESCR's jurisprudence, which include:

- General Comments and ad hoc statements issued by the Committee;
- Concluding Observations to state parties reports; and
- Individual Communications Decisions pursuant to the Optional Protocol to ICESCR.

Many of CESCR's General Comments divide the content of specific ESCR into the components of: Availability; Quality; Adequacy; Accessibility; Acceptability; Adaptability and Affordability. Although the components vary and overlap depending on the particular right, these conceptual categories employed by CESCR are suggestive of the firm and detailed approach it has adopted with regard to the clear substantive content of ESCR.

What is clear is that ESCR rights, so conceived, are not mere policy goals, guidelines or aspirations but reflect clearly set out rights which place a comprehensive set of legal obligations on States.

What are States' obligations with regard to ESCR?

The general duty provided by ICESCR for States with regard to ESCR is to "take steps" within "the maximum of its available resources" in order to achieve "progressively the full

¹³¹ ICESCR, Article 12.

¹³² ICESCR, Article 13-14.

¹³³ ICESCR, Articles 15. Cultural rights are generally not the focus of the guide, which places emphasis on economic and social rights.

realization” of ESCR “by all appropriate means”¹³⁴ and to do so “without discrimination of any kind”.¹³⁵

The CESCR Committee describes the duty to progressively realize ESCR as the “primary” obligation of States under the ICESCR. CESCR has also clarified that ICESCR contains certain “immediate obligations”. These “immediate obligations” which require immediate state compliance include obligations to:

1. “Take steps” towards the realization of ESCR;
2. Abstain from taking “retrogressive steps” which decrease existing access to ESCR;
3. “Prevent discrimination” in the enjoyment ESCR; and
4. Ensure compliance with “minimum core obligations” relating to specific ESCR.

These immediate obligations are given further content by CESCR in its jurisprudence, including most clearly in its general comments on particular ESCR.

What kind of “means” and “steps” are States required to take?

As with other international human rights, States are required to take action to ensure the realization of ESCR and prevent their violation. States are required to take a full range of measures including legislative, judicial, executive, administrative, financial, educational, social and other measures.¹³⁶

These duties of States in terms of ESCR are divided by CESCR into at least four duties:

1. The duty *respect* ESCR;
2. The duty to *protect* ESCR;
3. The duty to *fulfil* ESCR; and
4. The duty to *promote* ESCR.

Given the importance of understanding the conceptual distinctions between these four duties to the principles of business and human rights, of which the duty to protect in particular is a central pillar, each duty is now briefly outlined. Readers considering the question of accountability of business for abuses of ESCR in line with Chapter 3 to 6 of this guide are advised to understand all State obligations in terms of these four duties.

¹³⁴ ICESCR, Article 2(1).

¹³⁵ ICESCR, Article 2(2).

¹³⁶ ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level*, *op. cit.*, pp. 37-38.

1. Duty to Respect ESCR

When discharging its functions and exercising public power, the duty to respect requires the State to “refrain from itself interfering with the existing enjoyment of a right by rights-holders”.¹³⁷ Such interference can be “direct” or indirect”.¹³⁸ In *SERAC*, for example, the African Commission articulated the duty to respect the right to housing as requiring States to:

“abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs”.¹³⁹

Although often cast as a “negative obligation” (in contrast with obligations to fulfil and protect), the duty to respect will often require States to take positive measures to prevent interference with ESCR. This may include, for example: the establishment of appropriate institutions to ensure the respect of ESCR; the provision for an effective system of administration of justice to conduct proper investigations relating to the violation of ESCR; and the provision for remedy and reparation to any violation by State agents of ESCR.¹⁴⁰

In its guidelines on the implementation of ESCR, the African Commission clarifies that the duty to respect includes an obligation “to take positive measures to ensure that all branches of government (legislative, executive and judicial) at all levels (national, regional and local), as well as all organs of State, do not violate economic, social and cultural rights”.¹⁴¹

The *obligation* to respect ESCR should not be confused, in the context of business and human rights, with businesses’ *responsibility* to respect ESCR. Though the similar phrasing may suggest an equivalence of concepts and standards, as will be discussed below, at the international level under the United Nations Guiding Principles on Business and Human Rights (UNGPs), businesses’ *responsibility* to respect appears, in distinction to the State *obligation* to respect, not to be legal standard. The distinction between a State *obligation* and a business *responsibility* is discussed in more detail in Chapter 3.

¹³⁷ ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level*, *op. cit.*, p. 57.

¹³⁸ ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, January 2013, paras. 20 and 21, available at https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

¹³⁹ *SERAC and CESR v. Nigeria*, African Commission on Human and Peoples’ Rights, Communication No. 155/96, 13-27 October 2001, paras. 61 and 62.

¹⁴⁰ *Ibid.*, paras. 5-6.

¹⁴¹ *Ibid.*

2. Duty to Protect ESCR

States' general duty to protect under international human rights law, including ESCR, "requires States Parties to take measures that prevent third parties from interfering with the enjoyment of the right to work".¹⁴² The obligation requires States to prevent such third parties from "nullifying or impairing the enjoyment of economic, social and cultural rights".¹⁴³

This obligation to protect applies generally to any interference by any "third party". Though this includes businesses it is not limited to them. In Africa, for example, the African Commission's guidelines indicate more directly such third parties may include a wide range of "non-State actors" such as "multi-national corporations, local companies, private persons, and armed groups".¹⁴⁴ In Europe, the Committee of Ministers to member States on Human Rights and Business expands upon the content of the obligation to protect, also acknowledging that the category of third parties covered by the obligation is broader than businesses.¹⁴⁵

As the ICJ has observed, although the obligation is generally applicable it "may involve a heightened measure when there is a power imbalance between an individual and a third party, such as in respect of large business enterprises".¹⁴⁶ This is consistent with UNGP that require States to protect against violations of ESCR resulting from businesses "within their territory and/or jurisdiction by third parties" and indicate States must take "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication".¹⁴⁷

The responsibility of States is engaged "for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors".¹⁴⁸ States must therefore take "positive measures" including "regulating and monitoring the commercial and other activities of non-State actors that affect people's

¹⁴² See for example, CESCR, *General Comment No. 18, The Right to Work*, UN Doc. E/C.12/GC/18, 6 February 2006, available at <https://www.refworld.org/docid/4415453b4.html>.

¹⁴³ *Maastricht Principles*, *op. cit.*, Principle 13.

¹⁴⁴ African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, November 2019, para. 7, available at <https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC%20E.pdf?sequence=1&isAllowed=y>.

¹⁴⁵ Committee of Ministers, *Recommendation to Member States on Human Rights and Business*, Recommendation CM/Rec(2016)3, 2 March 2016, Articles 13 to 15, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4.

¹⁴⁶ ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level*, *op. cit.*, p. 59.

¹⁴⁷ UN Working Group on Business & Human Rights, *UN Guiding Principles on Business and Human Rights*, Principle 1.

¹⁴⁸ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 1997, para. 18, available at http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html.

access to and equal enjoyment” of ESCR.¹⁴⁹ The duty to protect ESCR therefore includes an “obligation to regulate” non-state actors where States “are in a position to regulate” such non-state actors to ensure they “do not nullify or impair the enjoyment of economic, social and cultural rights”.¹⁵⁰

Such “regulation” may include, as examples:¹⁵¹

- Adopting legislation, policies and programmes relating to ESCR;
- Protecting against “threats” to ESCR emanating from private sector activity;
- Controlling and regulating products and services relating to ESCR;
- Ensuring compliance with certain standards for professionals providing services impacting on ESCR;
- Preventing harmful practices limiting access to ESCR; and
- Ensuring that activities of third parties do not limit access to information relating to ESCR.

3. Duty to Fulfil ESCR

According to CESCR, “the obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide”.¹⁵² As a prerequisite to taking action to fulfil ESCR states are required to proactively “identify problematic situations” and assess the need to “provide relief” in the absence of which individuals will not enjoy access to ESCR.¹⁵³

The duty to fulfil, at the most basic level, “generally involves establishment by a State of institutional machinery essential for the realization of rights”.¹⁵⁴ The establishment of such institutional machinery is one aspect of the duty fulfil (facilitate). The CESCR has expanded on the duty to facilitate in indicating various times that it requires “positive measures”, as examples, to:

- “Enable and assist individuals to enjoy the right to work and to implement technical and vocational education plans to facilitate access to employment”;¹⁵⁵
- “Assist individuals and communities to enjoy the right to social security”;¹⁵⁶
- “Enable and assist individuals and communities to enjoy the right to health”;¹⁵⁷ and
- “Strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security”.¹⁵⁸

¹⁴⁹ *Maastricht Principles, op. cit.*, paras. 7 and 24.

¹⁵⁰ *Ibid.*, para. 24.

¹⁵¹ CESCR, *General Comment No. 14, The right to the highest attainable standard of health (Art. 12)*, UN Doc. E/C.12/2000/4, 11 August 2000, para. 35.

¹⁵² CESCR, *General Comment No. 19, The right to social security*, UN Doc. E/C.12/GC/19, 4 February 2008, para. 47.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ CESCR, *General Comment No. 18, op. cit.*, para. 27.

¹⁵⁶ CESCR, *General Comment No. 19, op. cit.*, para. 48.

¹⁵⁷ CESCR, *General Comment No. 14, op. cit.*, para. 37.

¹⁵⁸ CESCR, *General Comment No. 12, The right to adequate food*, UN Doc. E/C.12/1999/5, 12 May 1999, para. 15.

The duty fulfil (provide) ESCR is placed on States directly “when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal” or with the mere assistance by the State in facilitating such access.¹⁵⁹ On the same basis, this duty “applies for persons who are victims of natural or other disasters” including victims of conflicts.¹⁶⁰

In its General Comments, CESCR provides a range of other right-specific content to the duty to fulfil. Violations of the duty common to the full range of ESC rights may include:¹⁶¹

- Failure to meet substantive standards regarding the quality of services for the provision of an ESCR;
- Failure to meet procedural standards for planning, implementing or monitoring services for the provision of an ESCR;
- Failure to allocate sufficient resources for the provision of an ESCR;
- Failure to implement statutory obligations for the provision of an ESCR; and
- Failure to provide services to eligible individuals for the provision of an ESCR.

4. Duty to Promote ESCR

The duty to fulfil (promote) is sometimes regarded as a separate self-standing duty by CESCR and is therefore dealt with here separately.¹⁶²

The duty to promote requires States to “adopt measures to enhance people’s awareness of their rights, and to provide accessible information relating to the programmes and institutions adopted to realise them”¹⁶³ and “promote the values and objectives of economic, social and cultural rights in administrative and judicial decision-making” which could include “training of the judiciary and administrative officials should expressly include economic, social and cultural rights”.¹⁶⁴

Further, under its articulation of State duties to protect human rights, the UNGP recognizes that States should provide “effective guidance to business enterprises on how to respect human rights throughout their operations” and “relevant information, training and support” to “departments, agencies and other State-based institutions that shape business practices” in order to ensure the protection of human rights.¹⁶⁵ In the context of ESCR, this understanding is consistent with the duty to promote as articulated by CESCR.

¹⁵⁹ CESCR, *General Comment No. 18*, *op. cit.*, para. 26; CESCR, *General Comment No. 14*, *op. cit.*, para. 37; CESCR, *General Comment No. 12*, *op. cit.*, para. 15.

¹⁶⁰ CESCR, *General Comment No. 12*, *op. cit.*, para 15; CESCR, *General Comment No. 19*, *op. cit.*, para. 50; ACHPR, *Principles and Guidelines on the Implementation of ESCR*, *op. cit.*, para. 11.

¹⁶¹ ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level*, *op. cit.*, p. 62.

¹⁶² CESCR, *General Comment No. 14*, *op. cit.*, para. 33 and footnote 23; CESCR, *General Comment No. 15*, *The right to water*, UN Doc. E/C.12/2002/11, 20 January 2003, para. 25; CESCR, *General Comment No. 19*, *op. cit.*, para. 49.

¹⁶³ ACHPR, *Principles and Guidelines on the Implementation of ESCR*, *op. cit.*, para. 8.

¹⁶⁴ *Ibid.*, para. 9.

¹⁶⁵ *Ibid.*, Principles 3(c), 8.

The Right to Effective Remedies for the violation of ESCR

The right to an effective remedy and reparation is a core tenet of international human rights law, protected under all major human rights treaties and customary international law.¹⁶⁶ A full treatment of this right is available in the ICJ's Practitioners Guide on *The Right to a Remedy and Reparation for Gross Human Rights Violations*.¹⁶⁷ Remedies around ESCR are detailed in the ICJ's Practitioner's Guide on *Adjudicating Economic, Social and Cultural Rights at National Level*.¹⁶⁸ In this regard, the right to a remedy applies fully and equally to violations of ESCR, including in the context of business and human rights transitional justice principles detailed in this guide.¹⁶⁹

ESCR and business and human rights

Both international treaties and international jurisprudence have affirmed the States' duty to protect ESCR by taking regulatory and other measures to prevent ESCR violations by businesses. Recently, in order to supplement these scattered principles relating to business and human rights, the CESCR has adopted a General Comment 24 on ESCR and business and human rights.¹⁷⁰ In addition, the Committee on the Rights of the Child (CRC Committee) has adopted a General Comment relating to business and human rights in the context of children's rights including ESCR. CESCR's General Comment and CESCR's other jurisprudence relevant to business human rights is detailed in full below in chapter 4. The CRC Committee's General Comment is detailed in full below in chapter 6.

¹⁶⁶ See Article 2(3) of the *International Covenant on Civil and Political Rights*; Article 13 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; Article 6 of the *Convention on the Elimination of All Forms of Racial Discrimination*; Articles 12, 17(2)(f) and 20 of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 6(2) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*; Article 6(2) of the *Universal Declaration of Human Rights*; Articles 9 and 13 of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principles 4 and 16 of the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions*; Principles 4-7 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Article 27 of the *Vienna Declaration and Programme of Action*; Articles 13, 160-162 and 165 of the *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*; Article 9 of the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*; the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*; Article 13 of the *European Convention on Human Rights*; Article 47 of the *Charter of Fundamental Rights of the European Union*; Articles 7(1)(a) and 25 of the *American Convention on Human Rights*; Article XVIII of the *American Declaration of the Rights and Duties of Man*; Article III(1) of the *Inter-American Convention on Forced Disappearance of Persons*; Article 8(1) of the *Inter-American Convention to Prevent and Punish Torture*; Article 7(a) of the *African Charter of Human and Peoples' Rights*; Article 9 of the *Arab Charter on Human Rights*.

¹⁶⁷ ICJ, *The Right to a Remedy and Reparation*, *op. cit.*

¹⁶⁸ ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level*, *op. cit.*, pp. 214-223.

¹⁶⁹ See also, ICJ, *The Right to a Remedy and Reparation*, *op. cit.*

¹⁷⁰ CESCR, *General Comment No. 24, on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Doc. E/C.12/GC/24, 10 August 2017.

ESCR and Transitional Justice

States have an obligation “by all appropriate means” to realize ESCR. This necessarily includes redress for violations of ESCR emanating from conflicts and reaching into transitional justice mechanisms. Such appropriate means should be capable of “effectively address[ing] the individual and structural nature of the harm” to ESCR.¹⁷¹

Civil society organizations, governments and business entities are advised to draw upon, wherever possible, the guidance provided by CESCR in its jurisprudence in relation to transitional justice. Governments are encouraged not to delay reporting to CESCR because of conflict or transitional justice processes. Reports submitted by States and civil society to CESCR should be timely and include sufficient information on the substance of transitional justice processes (and the progress with regard to the implementation of recommendations and rulings related to such processes) to allow CESCR to provide invaluable input and advise relating to the ESCR norms in transitional justice settings.

¹⁷¹ CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2 July 2009, para. 40.

Chapter 3: Corporate Accountability for Human Rights Violations: Business and Human Rights

Transnational corporations and other business enterprises can and do commit human rights abuses, sometimes on a widespread or systematic basis. However, owing to their legal status, economic power, and paucity of international law and standards in this regard, it has typically been difficult for victims of such abuses to hold many businesses accountable. This has especially been the case with regard to large domestic and multinational business enterprises. As the ICJ has previously underscored: “[i]nstances of abuse or negative impact on the enjoyment of human rights have been compounded by the growing pace in economic globalization and increased facilities for businesses to move and operate across frontiers”.¹⁷²

Business and Human Rights in Historical Context:

Business involvement in what are now accepted as human rights violations, including crimes under international law, is longstanding. Early business enterprises such as the British East India Company and the Dutch East India Company were direct perpetrators of grave human rights abuses including those abuses resulting from, or as the consequence of, colonization.¹⁷³ As early as 1600 colonial government’s faced several challenges resulting from business conduct which undermined the economic and social well-being of their States at home.¹⁷⁴ Business enterprises have since acted as vehicles for – or profited from – a range of gross human rights violations including: genocide;¹⁷⁵ human rights violations of military dictatorships;¹⁷⁶ apartheid;¹⁷⁷ and unlawful occupations.¹⁷⁸

¹⁷² ICJ, *Needs and Options for a New International Instrument In the Field of Business and Human Rights*, June 2014, p. 4, available at https://www.icj.org/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelcvers.compressed.pdf.

¹⁷³ Thomas Pakenham, *The Scramble for Africa*, Random House, 1990, pp. 386-387. See also generally, Stephen R Bown, *Merchant Kings: When Companies Ruled the World: 1600-1900*, 2009.

¹⁷⁴ Steven Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, in *Yale Law Journal*, Volume 111, 2001, p. 453.

¹⁷⁵ See, Adam Hochschild, *King Leopold’s Ghost*, 1998, which provides details, for example, on how a privately-run enterprise operated by the King of Belgium without support of the Belgian government resulted in the genocide of approximately 10 million people.

¹⁷⁶ Steven Ratner, *Corporations and Human Rights*, op. cit.

¹⁷⁷ H van Vuuren, *Apartheid, Guns and Money: a Tale of Profit*, 2017;

¹⁷⁸ Amnesty International “Destination: Occupation - Digital Tourism And Israel’s Illegal Settlements In The Occupied Palestinian Territories”, 2019 available at <https://www.amnesty.org/download/Documents/MDE1594902019ENGLISH.PDF>.

Such historical participation of business enterprises in human rights abuses should be considered in efforts to seek corporate accountability for human rights abuses through transitional justice mechanisms across the world.

States have, unfortunately, often been slow to respond to the increasing and diversifying range of challenges in the area of business and human rights. The international legal framework in respect of accountability of businesses for the impact of their activities on human rights remains unsettled, despite progress in normative development in this area. The historical development of such standards is outlined in the box immediately below. Thereafter, this chapter provides a summary of key existing standards on business and human rights with a particular focus on the UNGP.

A note of caution here is that the situation is highly fluid, with a Draft of a legally binding instrument in the area of business in human rights under negotiation at the United Nations. The UNGP, though not uncontested, largely reflect a minimal global standard accepted by States as applicable to business activities. They are widely invoked in international discourse by multiple stakeholders. States have endorsed the UNGP in multiple consensus resolutions at the Human Rights Council, and some States have developed National Action Plans with the UNGP as their governing framework. Some businesses have also adopted elements of them in their governance policies. In addition, the human rights treaty bodies, among other authorities, including Committee on Economic, Social and Cultural Rights (General Comment 24) and the Committee on the Rights of the Child (General Comment 16) have absorbed the UNGP into their jurisprudence.

Global and United Nations Initiatives on Business and Human Rights

**UN Global Compact
(2000)**



Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights

(2003)



**"Protect, Respect and Remedy" framework
(2008)**



**The OECD Guidelines for Multinational Enterprises
(2010)¹⁷⁹**



**UN Guiding Principles on Business and Human Rights
(2011)**



**First Draft Treaty on Transnational Corporations
(2019)**

In the 1970s the United Nations took tentative steps towards addressing the question of human rights responsibilities of businesses.¹⁸⁰ An early example of such efforts was the

¹⁷⁹ These Guidelines were revised in 2011: OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

mandate by the United Nations Economic and Social Council in 1972 when the UN Secretary-General appointed a study group of eminent persons to study the role of multinational corporations and their impact on the process of development. This resulted in the establishment of the Commission on Transnational Corporations.¹⁸¹

The main objective of the Commission was to draft recommendations that would provide the basis of a code of conduct for transnational corporations. In 1992 the Secretary General of the United Nations finally reported to the General Assembly that the delegates of the Commission on Transnational Corporations had not been able to reach a consensus.¹⁸²

In 2000, the United Nations launched the UN Global Compact, a non-binding, voluntary policy initiative for businesses that are committed to aligning their operations and strategies with universally accepted principles in the areas of human rights, labour and environment.¹⁸³ The Compact is a multi-stakeholder “public-private” partnership enterprise involving States, businesses, civil society and other actors. To date, thousands of business enterprises participate in the Global Compact and report publicly on steps they take to comply with the principles it sets out. However, as a result of its voluntary character, the Compact’s effectiveness has rightly been frequently questioned.

In 1998, the United Nations Sub Commission on the Promotion and Protection of Human Rights, the independent expert body established under the UN Human Rights Commission (predecessor body to the UN Human Rights Council) established a Working Group on the Working Methods and Activities of Transnational Corporations. The Working Group adopted the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights in 2003. While affirming that States have the primary responsibility to respect, protect and fulfil human rights, the Norms set out several primary human rights areas in respect of which business, “within their respective spheres of activity and influence” have similar obligations.¹⁸⁴

In April 2005 the UN Commission on Human Rights requested the Secretary General to appoint a Special Representative on the issue of Human Rights and Transnational

¹⁸⁰ Economic and Social Council, *Resolutions: Economic and Social Council, Official records, 53rd Session*, UN Doc. E/5209, 3-28 July 1972.

¹⁸¹ Economic and Social Council, *Resolutions*, *op. cit.*

¹⁸² General Assembly, *Report by the President of the Forty-Sixth Session of the General Assembly*, UN Doc. A/47/446, 15 September 1992, para. 2.

¹⁸³ See the United Nations Global Compact website, available at <https://www.unglobalcompact.org/> (Accessed on 13 November 2019).

¹⁸⁴ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 2003, available at <http://hrlibrary.umn.edu/links/norms-Aug2003.html>.

Corporations and other Business Enterprises,¹⁸⁵ whose mandate was subsequently absorbed by the nascent Human Rights Council in 2006. In 2008 the Special Representative, John Ruggie, presented the final report of his first three-year mandate, setting out the “Protect, Respect and Remedy” framework developed through three years of research and multi-stakeholder consultations.¹⁸⁶ This framework was the basis of the UN Guiding Principles on Business and Human Rights, developed during his second mandate, endorsed by consensus of the UN Human Rights Council in 2011.

Almost concurrently to the process of the approval of the UNGP, the Organisation for Economic Co-operation and Development undertook the process of the adoption and revision of *OECD Guidelines for Multinational Enterprises*.¹⁸⁷ The Commentary provided with the updated guidelines indicates that the guidelines’ treatment of human rights draws on the UNGP, directly using their protect, respect and remedy framework.¹⁸⁸

The OECD Guidelines themselves reinforce the responsibility of business enterprises themselves to respect human rights by: avoiding infringing human rights or causing or contributing to such; addressing adverse human rights impacts; preventing and mitigating adverse human rights impacts directly linked to their operations; adopting policy commitments to respect human rights; carrying out human rights due diligences; and providing for and cooperating in legitimate process to ensure remediation for adverse human rights impacts to which they have caused or contributed. Enforcement of these guidelines takes place primarily through National Contact Points mechanisms and rely on “reputational checks to influence corporate behavior”.¹⁸⁹

In June 2014 Ecuador and South Africa were lead sponsors in a resolution adopted by the UN Human Rights Council to start a process to establish a business and human rights treaty. The Human Rights Council accordingly established an “open ended intergovernmental working group” to elaborate “an international legally binding instrument to regulate, in international

¹⁸⁵ UN Commission on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/RES/2005/6920, April 2005, para 1; Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts”, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/4/035, 9 February 2007, para 2.

¹⁸⁶ There has been reasonable criticism about the genuineness of many such consultations, leading to criticism of the Guiding Principles content.

¹⁸⁷ *OECD Guidelines for Multinational Enterprises*, *op. cit.*

¹⁸⁸ *Ibid.*, para. 36.

¹⁸⁹ Cassidy Bolt, *Leveraging Reputation in Implicit Regulation of MNEs: An Analysis of the OECD Guidelines for Multinational Enterprises’ Capacity to Influence Corporate Behavior*, 20 January 2018, available at <https://sites.duke.edu/corporations/2018/01/20/leveraging-reputation-in-implicit-regulation-of-mnes-an-analysis-of-the-oecd-guidelines-for-multinational-enterprises-capacity-to-influence-corporate-behavior/>. The Guidelines themselves encourage governments to set up and ensure the effectiveness of National Contact Points. See, *OECD Guidelines for Multinational Enterprises*, *op.cit.*, I, para. 11.

human rights law, the activities of transnational corporations and other business enterprises".¹⁹⁰ At the time of the writing of this Guide, The Working Group, which is open to the participation of all UN Member States, had discussed the Chairperson's first "zero draft" draft of a legally binding instrument¹⁹¹ and the revised first draft.¹⁹²

Elaborating on the UN Guiding Principles on Business and Human Rights (UNGPs)

Importantly, the UNGP apply to "all States" – regardless of which international treaties they have signed, adopted or ratified – and "all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure".¹⁹³ The UNGP rest on a tripartite conceptual policy understanding set out in the 2008 Framework "Protect, Respect and Remedy":

1. States' *obligation* under international law to protect human rights;
2. Corporate *responsibility* to respect all human rights in their global operations;
3. State/Corporate *obligation* and responsibility to provide effective remedy.

The UNGP by their express terms and by their non-treaty character create no new legal obligations on either the States or business entities. The UNGP were also published alongside a brief commentary on the principles, which provides some further explanation of their content.¹⁹⁴

¹⁹⁰ Human Rights Council, *Resolution 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/RES/26/9, 14 July 2014, para. 1.

¹⁹¹ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and other Business Enterprises*, 16 July 2018, available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

¹⁹² Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, *Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises, Revised Draft*, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

Among the most important developments in the revised draft is that it affirms that the scope of the proposed treaty encompasses all business enterprises, not just transnational companies, while still adding emphasis to businesses with transnational activities. In addition, it aligns much of the provisions on prevention and due diligence with the UN Guiding Principles on Business and Human Rights (UNGPs) and proposes a comprehensive article on legal liability of business enterprises that is more in line with prevailing international law and national practice than the respective provisions in the "zero draft".

¹⁹³ UNGP, General Principles.

¹⁹⁴ OHCHR, *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. HR/PUB/11/04, 2011, available at https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.

Pillar 1: State duty to Protect

This section on States' duty to protect should be read with the analysis of the duty to protect provided above in Chapter 2. The UNGP indicate that the States' duty to protect individuals from human rights abuses resulting from business activities applies both "within their territory and/or jurisdiction by third parties". The duty to protect requires a broad range of State actions and generally means States must take "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."¹⁹⁵ This principle clearly reflects well established existing human rights law and was informed, among other sources, by a study the Special Representative carried out on human rights treaty body jurisprudence.¹⁹⁶

States are also generally required to "set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" (Principle 2) and are required to provide businesses with "effective guidance" in this regard through law and policy (Principle 3).

The UNGP also highlight the heightened burden on the State to ensure compliance with human rights by: 1) State-owned, controlled or supported businesses (Principle 4); 2) businesses the State has contracted to "provide services that may impact upon the enjoyment of human rights" (Principle 5); and 3) businesses which the State otherwise engages in commercial transactions with (Principle 6).

In general, and to ensure the effective implementation of States' duty to protect human rights, all State institutions, agencies and departments that "shape business practices" are obligated to be both "aware of and observe" human rights obligations. These institutions, agencies and departments must therefore be provided with "relevant information, training and support" (Principle 8).

States are required to meet the obligations in terms of duty to protect in interactions with other States and businesses (Principle 9) and participation in multilateral institutions (Principle 10).

Crucially, the UNGP do not differentiate between categories of rights, including ESCR and CPR rights with regard to the duty to protect: the duty applies to *all* internationally recognized human rights. In that regard, the UNGP's treatment of the duty to protect is consistent with

¹⁹⁵ UNGP, Principle 1.

¹⁹⁶ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative*, UN Doc. A/HRC/17/31/Add.2, 23 May 2011.

the CESCR's and other treaty bodies' standard articulation that "the obligation to protect requires States Parties to take measures that prevent third parties from interfering" with ESCR.¹⁹⁷

States are required "to take positive measures" including "regulating and monitoring the commercial and other activities of non-State actors that affect people's access to and equal enjoyment" of ESCR.¹⁹⁸ The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights describe the duty to protect as including an "obligation to regulate" non-State actors where States "are in a position to regulate" such non-State actors to ensure they "do not nullify or impair the enjoyment of economic, social and cultural rights".¹⁹⁹ However the UNGP themselves stop short of articulating an obligation to regulate in the General Obligation in Principle 3, speaking not of the adoption of, but merely the need to "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps".

Importantly for the context of this Guide, the UNGP acknowledge the increased risk of human rights abuses in conflict-affected areas. Principle 7 of the UNGP reflects the need for States to take active measures to prevent abuses of human rights by business enterprises. The UNGP alert States in particular to the need to engage "at the earliest stage possible with business enterprises" in order to "help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships". It also requires States to provide "adequate assistance" to business enterprises to assess and address "heightened risks" in conflict-affected areas and deny "public support and services" to enterprises involved in gross human rights abuses or unwilling to cooperate in preventing them. Finally, States are required in terms of the duty to protect to ensure that their legal and policy frameworks are "effective in addressing the risk of business involvement in gross human rights abuses".

Pillar 2: Corporate responsibility to respect

The UNGP deliberately employ the language of "responsibility" when referring to the human rights commitments of businesses as opposed to "obligation" when referring to States. While "responsibility" can certainly arise from obligations that are legal in nature, the sense in which the term is used in the UNGP is different. The "responsibilities of companies are not based on any international legal obligation or on any other international standard, but on

¹⁹⁷ See for example, CESCR, *General Comment No. 18*, *op. cit.*

¹⁹⁸ ACHPR, *Principles and Guidelines on the Implementation of ESCR*, *op. cit.*, para. 7.

¹⁹⁹ *Maastricht Principles*, *op. cit.*, para. 24.

social expectations".²⁰⁰ As the commentary to the UNGP stresses, the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. Pillar 2 begins in Principle 11 by pronouncing that, "business enterprises *should* respect human rights" not that they *must* do so.

In other words, in terms of the UNGP, while States have legally binding human rights commitments relating to business activities, businesses themselves have a social responsibility to "respect" human rights. A dereliction of this "responsibility" by a business "does not entail any legal responsibility" under international law.²⁰¹ This is why the UNGP, in line with most international legal authorities, refer to "adverse human rights impacts" or human rights abuses in the context of the business responsibility to protect instead of "human rights violations" which is reserved to States obligations. However, in domestic legal orders, businesses may be legally bound to respect human rights and their breach of such legal obligation may entail legal consequences. The assumptions undergirding the three pillars is that through exercising their duty to protect, the State will transform the social responsibility into a legal one through the adoption of domestic law and other measures.

Nevertheless, the UNGP do encourage businesses to treat the risk of causing or contributing to "gross human rights abuses" in particular as a "*legal* compliance issue" (Principle 23), reflecting the fact that for at least some human rights abuses, the international legal responsibility of businesses is necessarily engaged. This is so, for example, in cases of gross human rights abuses amounting to crimes under international law. As the Commentary to the UNGP points out, this is impelled by the:

"expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses".²⁰²

The responsibility to respect applies to businesses irrespective of any States' (whether the State in which the business is domiciled or the State in which it is operating) willingness or ability to protect human rights and applies to all "internationally recognized human rights" including ESCR (Principle 12).²⁰³ While the responsibility to respect necessarily applies to all businesses, the degree of the responsibility "may vary" depending on the "size, sector,

²⁰⁰ Carlos López, "The 'Ruggie process': from legal obligations to corporate social responsibility?", in *Human Rights Obligations of Business, Beyond the Corporate Responsibility to Respect?*, Surya Deva & David Bilchitz (eds), Cambridge University Press, 2013, p. 59.

²⁰¹ *Ibidem.*, p. 61.

²⁰² OHCHR, *Guiding Principles on Business and Human Rights*, *op cit.*, pp. 25-26.

²⁰³ In full, UNGP's Principle 12 indicates that: "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work". ICESCR is part of the International Bill of Rights.

operational context, ownership and structure” of the business and the “severity” of its “adverse human rights impacts” (Principle 14).

With this context in mind, UNGP indicate that the responsibility to respect human rights generally means that businesses “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved” (Principle 11). Generally, the responsibility requires businesses to avoid “causing or contributing to adverse human rights impacts through their own activities” (Principle 13a) and to “prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Principle 13b).

In general, the responsibility to respect requires businesses “in all contexts” to comply with applicable domestic laws and internationally recognized human rights. When there are “conflicting requirements” business should ensure that the principles of internationally recognized human rights are honored.

The UNGP also provide some guidance on practical measures that businesses should take to ensure that they meet the responsibility to respect human rights. Generally, the responsibility requires businesses to (Principle 15):

1. **Establish Human Rights Policy:** Businesses should make a clear policy commitment to meet the responsibility to respect human rights;
2. **Conduct Human Rights Due Diligence:** Corporate due diligence should include the exercise of “human rights due diligence” through which the business can “prevent, mitigate and account for how they address their impacts on human rights”; and
3. **Provide Remedial Process:** A remedial process which enables victims of “any adverse human rights impacts” caused or contributed to by the business to access remedies for such impacts. Such processes are developed in pillar three of the UNGP addressing remedies.

The UNGP also give further content to these three general principles of business responsibility to respect human rights. For example, with regard to businesses’ policies on human rights it does so by indicating how policies should be organizationally approved and operationalized, contextually informed, clearly defined and publicized (Principle 16). With regard to due diligence the UNGP explain the extent and range of adverse impacts they should cover, the variable complexity and depth of such exercises and the need for them to be continuous to keep up with changing contexts and business operations (Principle 17). Finally, regarding due diligence, the UNGP suggest that such processes should also be broadly and meaningfully consultative with experts and affected groups and be effectively incorporated within business operations (Principle 18).

Lastly, in respect to the provision of remedial processes, the UNGP require that when “business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes (Principle 22). Businesses should do so through operational level grievance mechanisms (Principle 29) and cooperate with industry-level and State-provided grievance mechanisms (Principle 30). Although operation level mechanisms can and should focus on speed, dialogue and consultation (Principle 31h), like all other grievance mechanisms their effectiveness is of paramount importance. The effectiveness of a grievance mechanism, according to the UNGP, requires each such mechanism to be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning (Principle 31a-g).

The table on page 55 sets out the above-mentioned principles, which comprise businesses’ responsibility to respect human rights.

Components of the Corporate Responsibility to Respect Human Rights under the UN Guiding Principles on Business and Human Rights²⁰⁴		
Establish Policy	Conduct Due Diligence	Remedial Process
Approved: policy should be approved at the most senior level of the business.	Coverage: due diligence should include actual and potential adverse human rights impacts that a business may: <ul style="list-style-type: none"> • Cause or contribute to through its activities; or • Be directly linked to through its operations, products or services related to its business relationships. 	Co-operation: Businesses should cooperate with all legitimate State and industry level remediation processes.
Informed: Ensure policy is informed by relevant internal and/or external expertise.	Complexity: the complexity of a due diligence varies depending on: <ul style="list-style-type: none"> • Business' size; • Business' complexity; • The severity of risk of adverse impacts; and • Nature and context of business' operations. 	Provision: Business should establish effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. These mechanisms should be: <ul style="list-style-type: none"> • Based on engagement, dialogue and consultations; and • Focus on dialogue as a means to address and resolve grievances.
Expectations clarified: Policy should stipulate businesses' expectations of personnel, partners and other parties directly linked to operations, products or services.	Continuity: due diligence is an ongoing exercise because risks of adverse impacts may change over time and as business operations and full context change.	Effectiveness: legitimate operation or industry level mechanism should, like all grievance mechanisms, be effective. This requires, at a minimum, that such mechanisms are: <ul style="list-style-type: none"> • Legitimate: to all stakeholders so as to enable trusts through fairness and accountability; • Accessible: known to

²⁰⁴ The content of this table is a detailed summary of the text of the UNGP with regard to the corporate responsibility to respect human rights designed to assist corporations in particular in understanding the magnitude and breadth of this responsibility.

		<p>all and providing adequate assistance to those who face barriers to access;</p> <ul style="list-style-type: none">• Predictable: clear and known procedure, time frames, outcomes available and means of monitoring implementation;• Equitable: aggrieved parties should have reasonable access to sources of information, advice and necessary expertise;• Transparent: all parties should be informed about progress of specific process and general performance of grievance mechanisms;• Rights-compatible: outcomes and remedies should accord with internationally recognized human rights; and• Continuous learning: grievance mechanisms should identify lessons for improving their own processes and preventing future grievances and harms.
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<p>Operationalized: Ensure policy is reflected in operational procedures and policies throughout the business.</p>	<p>Consultation: due diligence should draw on a wide range of stakeholders and include meaningful consultation with:</p> <ul style="list-style-type: none"> • Internal human rights expertise; • Independent human rights experts; • Affected groups; and • Other relevant stakeholders. 	
<p>Publicised: Ensure policy is publicly available and communicated internally and externally.</p>	<p>Appropriate Action: findings should be integrated within business processes, functions and actions taken to address risks of adverse impacts. What actions are appropriate will depend on context but may include:</p> <ul style="list-style-type: none"> • Addressing most severe adverse impacts first, because delayed response may make them irremediable; • Assigning responsibility internally to address adverse impacts; • Budget allocation and oversight processes; • Revising policies; • Using leverage to prevent further adverse impacts; • Ending relationships with partners causing adverse impacts; and/or • Communicating externally and fully about methods adopted to address adverse impacts in sufficient detail to allow for the evaluation of the adequacy of actions taken to address adverse impacts. 	

Pillar 3: Access to Remedy²⁰⁵

The ICJ's Practitioners Guide on "The Right to a Remedy and Reparation for Gross Human Rights Violations" provides a fulsome treatment of the right to remedy in international human rights law and international humanitarian law. This section is therefore best read in conjunction with the Practitioners Guide.²⁰⁶ The right to remedy is clearly established in international human rights law:

"States have an obligation to make available effective remedies to people whose rights are violated. Universal and regional standards guarantee the right to an effective remedy to all persons who allege that their human rights have been violated. It has frequently been qualified as one of the most fundamental and essential rights for the effective protection of all other human rights".²⁰⁷

The right is most authoritatively expressed in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*.²⁰⁸ These Principles are authoritative because the UN General Assembly adopted them by consensus. While many of the Principles and Guidelines address *gross* human rights violations and serious violations of international humanitarian law, the overarching Principle 3, covers *all* human rights violations:

"The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation..."²⁰⁹

²⁰⁵ See, John Ruggie, *Cross-national study conducted by the Special Representative*, *op. cit.*

²⁰⁶ ICJ, *The Right to a Remedy and Reparation*, *op. cit.*

²⁰⁷ ICJ, *The Right to a Remedy and Reparation*, *op. cit.*, p. 53. See, ICCPR, Article 2(3); CAT, Article 13; CERD, Article 6; UDHR, Article 8; Declaration on the Protection of All Persons from Enforced Disappearance, Articles 9 and 13; UN Principles on Extra-legal Executions, Principles 4 and 16; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 4-7; Vienna Declaration and Programme of Action, Article 27; Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Articles 13, 160-162 and 165; Declaration on Human Rights Defenders, Article 9; ECHR, Article 13; Charter of Fundamental Rights of the European Union, Article 47; ACHR, Article 25; American Declaration of the Rights and Duties of Man, Article XVIII; Inter-American Convention on Forced Disappearance of Persons, Article III(1); Inter-American Convention to Prevent and Punish Torture, Article 8(1); AfrCHPR, Article 7(1)(a); and Arab Charter on Human Rights, Article 9. See also, Special Representative on human rights defenders, *Report on human rights defenders*, UN Doc. A/56/341, 10 September 2001, para 9; Special Rapporteur on violence against women, its causes and consequences, *Report on cultural practices in the family that are violent towards women*, UN Doc. E/CN.4/2002/83, 31 January 2002, para 116.

²⁰⁸ UN Principles on Remedy and Reparation, *op. cit.*

²⁰⁹ UN Principles on Remedy and Reparation, Principle 3.

In addition, General Comment 16 of the CRC Committee affirms States' duty to ensure access to remedy for abuses by businesses of rights protected under CRC.²¹⁰ A similar principle is affirmed by General Comment 24 of CESCR.²¹¹ Moreover, as has been detailed in Chapter 1, access to remedy and reparation is in particular recognized as a central principle in the context of transitional justice mechanisms.

While the State, and the judiciary in particular, have the "primary" duty to ensure access to remedy, the inclusion in the UNGP of provision of remedies by businesses is a crucial acknowledgment of the role of non-State mechanism in ensuring the protection of the right to remedy.

Non-State mechanisms include "private mechanisms" which may be "administered and established by non-State entities, such as a business enterprise alone or with other stakeholders (e.g., trade unions), an industry association or a multi-stakeholder group".²¹² The Human Rights Council has noted that these mechanisms can "provide benefits as speed of access and remediation and reduced costs" especially when they are "aligned with" the UNGP.²¹³ Additional advantages of and potential concerns about private mechanisms raised by the UN Human Rights Council are illustrated in the table below. They may assist civil society organizations, governments and corporations to weigh up the merits of non-State mechanisms both in transitional justice contexts and more generally in attempts to secure corporate accountability.

It is important to note that "private mechanisms" may include a wide range of differently located and established mechanisms including: company mechanisms (operation-level grievance mechanisms); industry/multi-stakeholder/collaborative mechanisms; development finance institutions mechanisms; regional and international treaty body mechanisms; and community driven mechanisms. Though the UNGP place particular focus on the provision of company mechanisms to ensure remedy for adverse rights impacts, it is important to recall that they also indicate that co-operation with State and non-State mechanisms forms part of businesses' responsibility to respect human rights.

²¹⁰ CRC, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, UN Doc. CRC/C/GC/16, 17 April 2013, para 30.

²¹¹ CESCR, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: restricting marketing and advertising of certain goods to protect public health*, UN Doc. E/C.12/GC/24, 10 August 2017, para. 44.

²¹² See, OHCHR, *Accountability and Remedy Project Improving accountability and access to remedy in cases of business involvement in human rights abuses, Phase III: Enhancing the effectiveness of non-State-based Grievance Mechanisms*, 1 November 2018, pp. 8-9, available at <https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf>.

²¹³ *Ibid.*

Advantages of and Concerns with informal/private grievance mechanisms to ensure access to remedies²¹⁴	
Advantages	Concerns
<ul style="list-style-type: none"> • Quicker, cheaper and easier 	<ul style="list-style-type: none"> • Lack of independence
<ul style="list-style-type: none"> • Effective even when there is no valid legal cause of action 	<ul style="list-style-type: none"> • Lack of transparency
<ul style="list-style-type: none"> • Greater range of remedies and remedy tailoring 	<ul style="list-style-type: none"> • Lack of predictability
<ul style="list-style-type: none"> • May enhance access to remedies in the context of weak State ability to do so 	<ul style="list-style-type: none"> • Lack of confidence from victims of abuses by businesses facilitating them
<ul style="list-style-type: none"> • Help avoid escalation of human rights related conflicts 	<ul style="list-style-type: none"> • Judicial remedy may be more appropriate in certain circumstances (e.g. if crimes are alleged or other gross human rights violations)
<ul style="list-style-type: none"> • May act preemptively and at own initiative to prevent adverse impacts 	<ul style="list-style-type: none"> • Difficulties if more than one business is responsible for adverse impacts
<ul style="list-style-type: none"> • May prevent future adverse impacts 	<ul style="list-style-type: none"> • Existence of parallel procedures can create uncertainty for victims and additional barriers in accessing remedies
<ul style="list-style-type: none"> • May contribute to efficient and effective external and internal regulation of companies to ensure respect for human rights 	

For guidance on ensuring that operational-level grievance mechanisms (OGMs) are effective and compliant with international human rights law see the International Commission of Jurists' full guide on "Effective Operational-level Grievance Mechanisms".²¹⁵ The Guide observes that:

²¹⁴ *Ibid.* This table is based directly on the documents of the UN Human Rights Council's discussion in terms of its "Accountability and Right to Remedy Project", which is reflective of evolving United Nations thought and guidance in this regard.

²¹⁵ ICJ, Effective Operational-level Grievance Mechanisms (2019) available at <https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

“Operational Grievance Mechanisms need to be understood as a vital element in the broader relationship between the company, its stakeholders and the broader community where it operates. For companies, they should be part of a strategy to build the company’s legitimacy and acceptance in the community, cementing its social license to operate and translating into practice its purpose to be a factor for the development of their stakeholders and communities. For grievants and affected individuals, they are a potential source of redress and a way to actively participate in a business enterprise that is vital for social development. OGMs should be part of the company’s understanding of its place and role in society and a tool for the company to contribute to the well being and realization of human rights in its own immediate environs. This vision contrasts with the current situation, where these mechanisms are still often better in their design level than in their actual implementation in the field and there is significant opacity in their operations, reporting and monitoring.”²¹⁶

The Guide, which was produced in close consultation with an expert panel including jurists from across the world,²¹⁷ therefore makes detailed recommendations regarding: participation and consultation in OGMs; the scope of OGMs; the independence and legitimacy of OGMs; governance of OGMs; procedural fairness safeguards in OGMs; ensuring access to OGMs in supply chains; reporting and monitoring and evaluation of OGM performance; and links with other remedial mechanisms including judicial mechanisms.²¹⁸

The right to an effective remedy entails duties on State entities and responsibilities on businesses as extrapolated in the UNGP. As the UNGP indicate that all remedy mechanisms must be effective and, therefore, “rights compatible” (Principle 27), the general standards set out in the ICJ’s Practitioners Guide on *The Right to a Remedy and Reparation for Gross Human Rights Violations* are of significant use in understanding both States and business obligations and responsibilities in terms of the right to remedy adverse human rights impacts that result from business activities.²¹⁹

²¹⁶ Id, p 13.

²¹⁷ Justice Ian Binnie (then ICJ Commissioner, now Honorary Member, Chair of the Panel, formerly Justice of the Supreme Court of Canada) Justice John O’Meally (ICJ Commissioner, Australia, former Judge and arbitrator) Sheila Keetharuth (Expert member of the Working Group on Extractive Industries, Environment and Human Rights violations of the African Commission on Human and People’s Rights, and UN International Team of Experts on the Kasai region, Mauritius) Alejandro Salinas (ICJ Commissioner, Chile, lawyer, LL.M.) Professor Marco Sassoli (ICJ Commissioner, Switzerland, Director of the Geneva Academy of International Humanitarian Law and Human Rights).

²¹⁸ Id, pp 13-16 for a summary of the scope of the Guide’s recommendations.

²¹⁹ ICJ, *The Right to a Remedy and Reparation*, op. cit.

Regional Developments on Business and Human Rights

As international standards relating to business and human rights have developed there have increasingly been concurrent developments in regional human rights standards relating to business and human rights.

In Africa, for example, in 2009 the African Commission on Human and People's Rights "deeply concerned ... by human rights violations by non-state actors in particular the sector of extractive industries" issued a resolution creating a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa.²²⁰ Amongst other things, the Working Group's mandate is to "inform the African Commission on the possible liability of non-state actors for human and peoples' rights violations" and "formulate recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples' rights by extractive industries".

The Working Group has since its inception completed a range of country visits and sub-regional consultations in Southern, East, and Central Africa. In 2017 it lead the production of the African Commission's Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector.²²¹ In 2017, the African Commission also handed down a communication decision in *Institute for Human Rights and Development and Others v Democratic Republic of Congo*, Communication 393/10.²²² In this matter, the African Commission recognized the role of an Australian-Canadian mining company in the massacre of 70 people in Kilwa in 2004.

In this decision, the ACHPR stressed "the need and legal imperative for entities engaged in extractive industries to undertake their activities with due regard to the rights of host communities. They should at least avoid engaging in activities that violate rights of community members in their areas of operations. This includes the non-participation or non-support in the perpetration of violations of human and peoples' rights." The Commission also held that the government had not complied with its obligation to ensure the protection of African Charter rights since "not only it did not investigate and punish the participation of the mining company Anvil, but also it did not provide compensation to victims against the company for the role it played in the perpetration of the violations."²²³ For this and other reasons, the ACHPR recommended that the Democratic Republic of Congo pay 2.5 million US dollars in compensation to the eight victims and their families who had filed the complaint to the ACHPR.

Significantly, in 2018 it also produced the African Commission's *State Reporting Guidelines on Articles 21 and 24 of the African Charter on Human and Peoples' Rights Relating to the Operations of Extractive Industries*.²²⁴ Finally, in 2019 the Working Group published a draft study for public comment on the "Operations of the Extractive Industries Sector in Africa and

²²⁰ African Commission on Human and People's Rights *Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa* (2009) 148(XLVI)09 available at: <https://www.achpr.org/presspublic/publication?id=76>.

²²¹ African Commission on Human and People's Rights Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - ACHPR/Res. 367 (LX) 2017 available at <https://www.achpr.org/presspublic/publication?id=77>.

²²² The full decision in French and an English summary of the decision can be found here: <https://www.escri-net.org/caselaw/2018/institute-human-rights-and-development-and-others-v-democratic-republic-congo>.

²²³ The ICJ's full statement welcoming the decision can be found here: <https://www.icj.org/wp-content/uploads/2017/09/Universal-KilwaMassacre-News-2017-ENG.pdf>. The unofficial translations from French provided in the above passages are from the ICJ's statement.

²²⁴ African Commission on Human and People's Rights *State Reporting Guidelines and Principles on Articles 21 And 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* (2018) <https://www.achpr.org/presspublic/publication?id=75>.

its Impacts on the Realisation of Human and Peoples' Rights under the African Charter on Human and Peoples' Rights.²²⁵

Similarly, in the European context, norm development is proceeding incrementally. In 2016 the Council of Europe produced standards relating to business and human rights through *Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States*.²²⁶ In 2019, the Council thereafter also published a more comprehensive handbook on business and human rights for legal practitioners.²²⁷

Business and Human Rights and Transitional Justice

As Chapter 1 of this guide sets out, transitional justice mechanisms have sometimes taken into relevance the adverse human rights impacts of business activities in the context of conflicts and transitions from conflicts. Furthermore, United Nations approaches to business and human rights have consistently, albeit not comprehensively, acknowledged the need to pay particular attention to the potential adverse impacts of business activities in the context of conflicts and transitions.

Following this trend, Principles 7 and 23 of the UNGP deal directly with business and human rights in the context of conflict. It is clear that States' obligations to protect human rights from business activities with a potentially adverse impact on human rights apply with particular urgency in the context of conflicts (Principle 7).

As a result of the "heightened risk" of human rights abuses in the context of conflict, States are required to "help ensure that business enterprises operating in those contexts are not involved with such abuses" by:

- **Earliest Possible Engagement with Businesses:** States must ensure the earliest possible engagement with businesses to assist businesses to "identify, prevent and mitigate the human rights-related risks of their activities and business relationships";
- **Providing Adequate Assistance to Businesses:** States must provide adequate assistance to businesses to allow for the assessment of heightened risk of human rights abuse and measures to address such abuse;
- **Denying Support to Non-Compliant Businesses:** States must deny support to businesses if they are involved in human rights abuses or not willing to cooperate in addressing such abuses; and

²²⁵ African Commission on Human and People's Rights *Draft Study of the African Commission on Human and Peoples' Rights on Extractive Industries, Environment and Human Rights in Africa* <https://www.achpr.org/announcement/detail?id=75>.

²²⁶ Council of Europe *Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States: Human Rights and Business* available at <https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>.

²²⁷ Claire Methven O'Brien *Business and Human Rights: A Handbook for Legal Practitioners* (Council of Europe, 2019) available at: <https://www.business-humanrights.org/en/council-of-europe-publishes-new-handbook-for-legal-practitioners-on-business-human-rights>.

- **Ensuring Regulatory Measures are Effective:** to ensure policies, legislation, regulations and enforcement measures must be “effective in addressing the risk of business involvement in gross human rights abuses”. Such effectiveness requires both effectiveness in regulations content and implementation.

The UNGP reiterate that “in all contexts” businesses comply with the law, respect international human rights and in so doing “seek ways to honour” international human rights. Importantly for the context of transitional justice principles, businesses are implored by the UNGP to “treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate” (Principle 23).

Furthermore, as the UNGP purport to reflect existing international human rights law and standards, the widespread practice of accepting the relevance of businesses to human rights abuses in transitional justice mechanisms means that the UNGP’s three pillars of state protection, corporate responsibility and remedy should be understood consistently with existing transitional justice principles.

Business and Human Rights and Economic, Social and Cultural Rights

International law and standards in respect of business and human rights, particularly UN sources, do not maintain a binary differentiation between civil and political and economic, social and cultural rights. The ICESCR was listed in the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights as rights which businesses are “obligated to respect”. The Norms also recognize workers’ rights, including against “economic exploitation” and “forced labour”.²²⁸

The UN Global Compact indicates businesses “should support and respect the protection of internationally proclaimed human rights”.²²⁹ The Compact’s principles also refer to workers’ rights,²³⁰ environmental rights²³¹ and forms of economic crime impacting directly on ESCR.²³²

In the same vein, and acknowledging the potentially significant impacts of business activities on ESCR, the UNGP repeatedly refer to all “internationally recognized human rights” as the rights to which States’ duty to protect, business’s responsibility to respect and the right to a remedy apply.²³³ The UNGP further define internationally recognized rights in regard to the responsibility to respect as “understood, at a minimum, as those expressed in the

²²⁸ Norms on the Responsibilities of Transnational Corporations, *op. cit.*, Norms 5 to 9.

²²⁹ UN Global Compact, Principle 1.

²³⁰ *Ibid.*, Principles 3-6.

²³¹ *Ibid.*, Principles 7-9.

²³² *Ibid.*, Principle 10.

²³³ UNGP, Principles 12, 23 and 31.

International Bill of Human Rights”, which include ICESCR and several instruments relating to the right to work.²³⁴

The following chapter of this guide, Chapter 4, addresses the interaction between ESCR and business activities and operations. It does so primarily with reference to the CESCR’s elaboration of business and human rights standards. Nevertheless, from the outset, it must be acknowledged that international law and standards as a whole recognize and fully incorporate ESCR standards as equally relevant to all developing legal obligations and responsibilities relating to business activities.

Conclusion

International law on business and human rights is in flux, with the negotiation of an international treaty underway and developments at the global and regional level continuing. The UNGP, which are nearly universally accepted at least by States, maintain three pillars regarding business and human rights: 1) States’ *Obligation* to Protect human rights; 2) Corporate *Responsibility* to Respect human rights; and 3) State/Corporate *Obligation* to Remedy. Although not definitive nor a final word on corporate-related human rights obligations, as the UNGP reflect the lowest common denominator of agreement about *existing standards* in international human rights law, they provide an uncontroversial departure point for such discussions in the context of transitional justice mechanisms and measures. Indeed, the UNGP acknowledge directly the *heightened obligations* of States and *heightened responsibilities* of businesses in the context of conflict and emergency situations, though they do not expressly address post-conflict and transitional situations themselves. These heightened standards which are in place because of heightened risk are discussed and further detailed in the remaining chapters of this guide. It is important that, as the UNGP require, that businesses treat their human rights responsibilities in the context of conflict in particular as matters of legal compliance.

²³⁴ *Ibid.*, Principle 12.

Chapter 4: Business and Human Rights and Economic, Social and Cultural Rights

Business activities frequently and necessarily have an impact on the enjoyment of human rights, including ESCR. The impacts may be positive, negative or neutral. Businesses will sometimes have a role in facilitating the fulfilment of rights, since the goods and services needed to ensure ESCR may to varying degrees be delivered through the private sector. Businesses may often, however, conduct themselves in a manner that impairs human rights, and it is this aspect that must be addressed in transitional justice contexts. This understanding has been generally accepted by United Nations Treaty Bodies mechanisms and frequently informs the content of State's human rights obligations. CESCR, for example, notes that it is "regularly presented" with situations where "corporate activities negatively affected" ESCR.²³⁵

As such the responsibility of businesses to respect rights and the States' obligation to protect from adverse rights impacts caused by businesses are highly engaged with regard to ESCR, as with other rights.²³⁶ Indeed, the CESCR notes that situations in which business activities negatively affect ESCR may well occur "as a result of States' failure to ensure compliance with internationally recognized human rights under their jurisdiction".²³⁷

This chapter builds on preceding Chapters 2 and 3, which have set out the general principles of ESCR in international human rights and business and human rights respectively. It focuses on the interaction between ESCR and business activities, summarizing the relevant jurisprudence of CESCR in this regard. This jurisprudence includes its General Comments on specific rights, Statements it has adopted, examples of Concluding Observations to the Periodic Reports of specific States and decisions in individual communications. The Chapter is framed by CESCR's General Comment 24 on "State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities", adopted in 2017.²³⁸

The CESCR, as the supervisory body established under ICESCR, is competent to interpret the obligations under this instrument and these interpretations must be taken as authoritative. However, it is important to distinguish between two different types of iterations from the CESCR. The first type are pronouncements regarding the nature and scope of legal

²³⁵ CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc. E/C.12/2011/1, 12 July 2011, para. 1; CESCR, *General Comment No. 24, op.cit.*, para. 1.

²³⁶ UNGP, Principles 11 to 21.

²³⁷ CESCR, *General Comment No. 24, op.cit.*, para. 1.

²³⁸ CESCR, *General Comment No. 24, op.cit.*

obligations under the ICESCR, while the second are recommendations and opinions as to what is best practice.

The General Comments of the CESCR largely describe international legal ESCR obligations, although sometimes they also specify recommendations of best practice. Concluding Observations and Periodic Reports of States contain a mixture of the two, while the decisions on individual communications are mostly interpretations of legal obligations, since they are making determination of ICESCR violations. The question as to whether authoritative interpretations of the CESCR through General Comments and other jurisprudence are themselves legally binding is not straightforward. In a sense they cannot be legally binding, since the CESCR is not by itself a source of law and does not have judicial authority. However, the Covenant provisions that they interpret are of course legally binding, and as parties to the ICESCR, States have an obligation to at least take strongly into account the Committee's views, keeping in mind that it is the only international body with primary competency to interpret the instrument. The jurisprudence of the CESCR and other treaty bodies has been applied and cited by international, regional and domestic adjudicative authorities, including judicial authorities, as both persuasive and in some instances binding sources of authority on the meaning of ICESCR obligations.²³⁹

In this context, CESCR's General Comment 24 should be understood by governmental entities, CSOs and businesses as the best guidance and source of authority about the nature and content of their binding, enforceable business-related ESCR obligations in terms of ICESCR. General Comment 24 is therefore indispensable in assisting the development of international best practices and informing the content of all ESCR. ESCR, which, as has been established in Chapter 2, all States must respect protect, promote and fulfil, and, as has been indicated in Chapter 3, business should respect.

CESCR Statement on the obligations of States parties regarding the Business Sector

In a 2011 statement on "the obligations of States parties regarding the corporate sector", CESCR noted "multiple examples" of potential adverse impacts of business activities on ESCR ranging:

"from child labour and unsafe working conditions through restrictions on trade union rights and discrimination against female workers, to harmful impact on the right to health, standard of living, including of indigenous peoples, and the natural

²³⁹ See, ICJ, *Adjudicating Economic, Social and Cultural Rights at National Level*, *op. cit.*, p. 29; International Network for Economic, Social and Cultural Rights (ESCR-Net), *Claiming ESCR at the United Nations, A manual on utilizing the OP-ICESCR in strategic litigation*, March 2014, pp. 10, 11 and 13, available at <https://www.escr-net.org/sites/default/files/ESCR-NET-OP-Manual-FINAL.pdf>.

environment, to the destructive role of corruption”.²⁴⁰

Given that business activities may result in or contribute to ESCR violations:

“the obligation of States Parties to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities”.²⁴¹

The business responsibility to respect ESCR: varying risks of harm and responsibility

Depending on the nature of the specific businesses’ activities, some ESCR may be more susceptible to abuse than others. For example, extractive industries frequently have a significant impact on the environment and consequently affect ESCR such as the rights to water, adequate housing, health and other aspects of an adequate standard of living.

The UNGP acknowledge that where businesses’ activities have significant potential to impact negatively on a particular right, businesses have a responsibility to address such potential impacts and seek to prevent or mitigate adverse human rights impact that are directly linked to their operations²⁴². This includes potential negative effects on ESCR. To effectively address the impacts of the business on human rights, businesses must embed respect for human rights throughout its operations and interactions with partners, States and communities.²⁴³

CESCR’s General Comments

The most comprehensive and authoritative text issued by the CESCR Committee pertaining to business and human rights to date is General Comment 24, which focuses on the obligations of States Parties to the ICESCR in the context of business activities. General Comment 24 builds on the CESCR’s 2011 statement, the UNGP and the CESCR’s existing jurisprudence on business and ESCR.

It should be noted, however, that CESCR’s General Comments and other jurisprudence on specific ESCR have repeatedly – though sometimes inconsistently – grappled with rights and obligations relating to businesses and other or non-State actors. Direct references to “privatization” and the “private sector” pervade CESCR’s jurisprudence. Consistently with the UNGP, most of the CESCR’s references in this regard fall directly under the States’ duty to protect ESCR, which has been described in Chapters 2 and 3. Generally, CESCR observes that measures taken to realize ESCR “may reflect whatever mix of public and private sector measures considered appropriate” by a particular State as long as the chosen “mix” of

²⁴⁰ CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and ESCR*, *op. cit.*, para. 1.

²⁴¹ *Ibid.*

²⁴² UNGP, Principle 13.

²⁴³ *Ibid.*, Principle 17.

measures are “sufficient to realize the right for every individual in the shortest possible time”.²⁴⁴

Nevertheless, CESCR repeatedly considers that whatever role of the private sector in ESCR is in a particular context, it exists simultaneously with the necessary need to regulate and monitor such markets if and where they exist in terms of States’ duty to protect. In several instances, alive to the reality of privatization of the provision of ESCR such as education and healthcare, CESCR has detailed clearly what ICESCR requires of States, where the fulfilment of ESCR is carried out with a significant role for the private sector.

ICESCR, CESCR, the Right to Education and Private Sector

CESCR’s General Comment 13 on the right to education indicates that “education *in all its forms* and at all levels shall exhibit” certain “essential features” before detailing the availability, accessibility, acceptability and adaptability components of Covenant right to education. The qualifier “in all its forms” clearly covers public *and* private education (which is directly alluded in Article 13(4) of the Covenant).²⁴⁵

The CESCR indicates that private education, like public education, must “conform to the educational objectives” set out in ICESCR and “certain minimum standards” set and monitored by the State.²⁴⁶ Indeed, the setting of such minimum standards, a form of regulation of private education, is so important that is considered by ICESCR to be part of States’ minimum core obligations.²⁴⁷

As noted recently by the Special Rapporteur on extreme poverty and human rights, privatization of education has had “overwhelmingly negative” consequences, as “human rights standards are rarely included in privatization agreements”. In his report, privatization is characterized by “the essential unwillingness of the private sector to take on rights-related obligations, the inability of pared-down Governments to exercise meaningful supervision, the difficulty of monitoring disparate private providers, the removal of much economic decision-making from the purview of democratic contestation, and the wide-ranging consequences of empowering profit-seeking corporate actors in what used to be the public sphere”.²⁴⁸

In 2019 over 50 experts adopted the *Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education*, referred to as the “Abidjan Principles”.²⁴⁹ These expert principles, while they do not in themselves create binding obligations, have already been recognized in resolutions of the African

²⁴⁴ CESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UN Doc. E/1992/23, 13 December 1991, para. 14.

²⁴⁵ Which reads: “No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State”.

²⁴⁶ CESCR, *General Comment No. 13, The right to education*, UN Doc. E/C.12/1999/10, 8 December 1999, para. 29.

²⁴⁷ *Ibid.*, para. 57 read with para. 59, which describes failure to set such standards as an example of a violation of the right to education.

²⁴⁸ Special Rapporteur on extreme poverty and human rights, Philip Alston, *Report on extreme poverty and human rights*, UN Doc. A/73/396, 26 September 2018, paras. 83 and 85.

²⁴⁹ *Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education (Abidjan Principles)*, 12-13 February 2019, available at <https://static1.squarespace.com/static/5c2d081daf2096648cc801da/t/5cacc8127817f7da1e114c80/1554827292334/Abidjan-Principles-Designed-online.pdf>.

Commission and the Human Rights Council²⁵⁰. They provide extensive guidance on content of State obligations to regulate the involvement of private sector in education. The principles therefore assist in giving content to States' duties to protect the right to education through the regulation of private involvement in education and business enterprises' responsibilities to respect the right to education.²⁵¹

The principles have also been directly drawn on by a High Court in Uganda in the case of *Initiative for Social and Economic Rights v Attorney General* in the process of determining the outcome of litigation relating to private-public partnerships in education.²⁵² In coming to this conclusion, the Court found that the Abidjan Principles were "in sync with state obligations under different regional and international treaties and can be safely be relied on" in understanding State obligations relating to the right to education.²⁵³ The court therefore concluded in its final order that "government should seek guidance from the Abidjan principles in designing education programmes in the country."

The CESCR's General Comment 14 on the right to the highest attainable standard of health is even more explicit on the fact that the States' duty to protect the right to health includes the obligation to:

"adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct".²⁵⁴

ICESCR, CESCR, the Right to Health and Private Sector

CESCR goes even further in General Comment 14 noting that non-State entities including "the private business sector" have "responsibilities regarding the realization of the right to health" and that the State "should therefore provide an environment which facilitates the discharge of these responsibilities".²⁵⁵ Violations of the duty to protect therefore include the "failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others".²⁵⁶

Moreover, it is a minimum core obligation of the right to health for States to ensure "equitable distribution of all health facilities, goods and services" which evidence suggests may be compromised by under regulated private health sectors.²⁵⁷ CESCR's recognition of the

²⁵⁰ African Commission on Human and Peoples' Rights, *Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services*, Res. 420 (LXIV), 14 May 2019, available at <https://www.achpr.org/sessions/resolutions?id=444>; Human Rights Council, *The right to education: follow-up to Human Rights Council resolution 8/4*, UN Doc. A/HRC/41/L.26, 9 July 2019, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/208/94/PDF/G1920894.pdf?OpenElement>.

²⁵¹ Abidjan Principles, Overarching Principles 3 and 4.

²⁵² *Initiative for Social Economic Rights v. Attorney general*, High Court of Uganda, Civil Suit No. 353 of 2016, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ISER_judgment_2019.pdf.

²⁵³ *Ibid.*, para. 23.

²⁵⁴ CESCR, *General Comment No. 14*, *op. cit.*, para. 35.

²⁵⁵ *Ibid.*, para. 42.

²⁵⁶ *Ibid.*, para. 51.

²⁵⁷ *Ibid.*, para. 43(f).

responsibilities of businesses with regard to the right to health is consistent with the enunciation of such responsibilities with regard to all human rights under the UNGP.

What this general approach to business and human rights in CESCR's jurisprudence on ESCR suggests is that, even prior to the adoption by CESCR of General Comment 24, CESCR acknowledged and detailed:

1. **States' Duty to Regulate:** States duty to regulate businesses in order to ensure the protection of all ESCR in fulfilment of the duty to protect ESCR; and
2. **Business Responsibility to Respect:** Businesses' responsibility to respect all ESCR in compliance with ICESCR and domestic law implementing the ICESCR.

General Comment 24: State Obligations under ICESCR in the Context of Business Activities

Building CESCR's existing jurisprudence, General Comment 24 consolidates the CESCR's understanding of the human rights obligations of States and responsibilities of non-State actors regarding ESCR and business activities.²⁵⁸ The General Comment sets out to "clarify the duties of States parties to the Covenant" in order to assist in "preventing and addressing the adverse impacts of business activities on human rights".²⁵⁹ It does so not only considering CESCR's own jurisprudence, but also existing regional and global standards adopted by bodies such as the International Labour Organisation (ILO), the Council of Europe and the Human Rights Council. Most importantly, the General Comment reflects a conscious adoption and development of aspects of the UNGP.²⁶⁰

Taking its lead from the UNGP and similarly from the revised draft of the legally binding instrument on business and human rights,²⁶¹ the General Comment applies to "all activities of business entities, whether they operate transnationally or whether their activities are purely domestic".²⁶² CESCR is also clear that *all* business activities truly mean *all* business activities "whether fully privately owned or State-owned, regardless of size, sector, location, ownership and structure".²⁶³

²⁵⁸ CESCR, *General Comment No. 24, op. cit.*, paras. 4-5.

²⁵⁹ *Ibid.*, para. 1.

²⁶⁰ The UNGP are cited and referred to throughout the General Comment: see, paras. 2, 27, 59 and footnotes 17, 38, 42, 43, 83, 90, 104 and 107.

²⁶¹ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, *Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations And Other Business Enterprises, Revised Draft, op. cit.*

²⁶² CESCR, *General Comment No. 24, op. cit.*, para. 3. This is consistent with the approach of CESCR's General Comments on specific rights which do not generally distinguish between transnational and other corporations referring to "private sector", "business" and "corporations" without qualification.

²⁶³ *Ibid.*

Following the standard position in international human rights law, CESCR does not explicitly seek to detail any direct human rights duties, which may be held by non-State actors. Instead CESCR merely acknowledges with approval the existence of such direct duties on businesses as a matter of domestic law in some countries.²⁶⁴ It also emphasizes the “large number of domestic laws” relating to ESCR that “apply directly to business entities”.²⁶⁵

The General Comment therefore addresses itself to the State’s duty to protect against ESCR abuses resulting from business activities, corporate entities (who may have direct or indirect, domestic and international obligations to respect ESCR) and civil society organizations. With regard to business entities themselves, CESCR is clearly far from oppositional to the corporate sector’s involvement in ESCR provision, as the standards it sets out illustrate. The standards, it says:

“seek[] to assist the corporate sector in discharging their human rights obligations and assuming their responsibilities, thus mitigating any reputational risks that may be associated with violations of Covenant rights within their sphere of influence”.²⁶⁶

With this context set out, the CESCR divides the ESCR obligations relating to business activities into four categories:

- A. Obligations of non-discrimination;
- B. Obligations to respect, protect and fulfill;
- C. Extraterritorial obligations; and
- D. Remedy-related obligations.

To assist users of this Guide to follow CESCR understanding of ESCR obligations relating to business activities, the same categorizations will be followed below. The following summaries should be read in the context of, and consistently with chapters 2 and 3 of this Guide.

A. Obligations of Non-Discrimination

The rights to equality and equal protection and the prohibition of discrimination are core principles of international human rights law. There is a baseline of universal standards in respect of equality and non-discrimination that derive not in particular from ESCR doctrine, but rather from general principles of law.²⁶⁷ Particularized expressions of the principles of equality and non-discrimination are found in various treaties and other standards aimed at

²⁶⁴ *Ibid.*, see para. 4 and footnote 16.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*, para 5.

²⁶⁷ Article 26 of ICCPR; Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000; Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10 November 1989; Vienna Declaration and Programme of Action.

protecting individuals on status grounds, including those from groups that have been most vulnerable to discrimination and denial of equality and equal protection.²⁶⁸

Consistently with international human rights law, ICESCR requires that States ensure that ESCR can “be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.²⁶⁹ CESCR defines discrimination as “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination”.²⁷⁰ CESCR has given significant content to this obligation in the context of specific ESCR but has also issued General Comments on the rights of women,²⁷¹ persons with disabilities²⁷² and non-discrimination in general.²⁷³ General Comment 24’s treatment of non-discrimination should be understood in this context.

The Committee notes from the outset that discrimination relating to ESCR is “frequently found in private spheres”²⁷⁴ and that, more generally, business activities “disproportionately affect” persons from certain groups. Such groups identified by CESCR include those listed in ICESCR, such as women and girls, persons with disabilities, migrant workers (including asylum seekers and refugees) and ethnic and religious minorities, but importantly also include “peasants”, “fisherfolks”, indigenous persons and “other people working in rural areas”.²⁷⁵

Indicating that the right to equality requires the elimination of both formal and substantive forms of discrimination, CESCR reiterates that this obligation requires States to “prohibit discrimination by non-State entities in the exercise of economic, social and cultural rights”.²⁷⁶

Stressing an “intersectional” approach, which considers the individuals’ multiple identities and circumstances producing potentially compounding discrimination, the Committee highlights a range of different groups of women who experience “a greater risk of suffering” ESCR-related discrimination including: women facing eviction and/or resettlement; indigenous women;

²⁶⁸ These include: ICERD; CEDAW; CRC; CRPD; United Nations Declaration on the Rights of Indigenous Peoples; and, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

²⁶⁹ ICESCR, Article 2(2).

²⁷⁰ The grounds listed in Article 2(2) have been expanded to include further categories such as “sexual orientation”. See, CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2 July 2009.

²⁷¹ CESCR, *General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2005/4, 11 August 2005.

²⁷² CESCR, *General Comment No. 5: Persons with Disabilities*, UN Doc. E/1995/22, 9 December 1994.

²⁷³ CESCR, *General Comment No. 20, op. cit.*

²⁷⁴ CESCR, *General Comment No. 24, op. cit.*, para. 7; CESCR, *General Comment No. 20, op. cit.*, para. 11.

²⁷⁵ CESCR, *General Comment No. 24, op. cit.*, para. 8.

²⁷⁶ *Ibid.*, para. 7.

and, women who work in informal economies. It therefore stresses that States should “incorporate a gender perspective into all measures to regulate business activities that may adversely affect economic, social and cultural rights”²⁷⁷, including during the design and implementation of National Action Plans on Business and Human Rights.²⁷⁸

The elimination of all forms of discrimination relating to ESCR is an “immediate obligation” under the ICESCR, as is explained in Chapter 2. States are therefore advised to take urgent measures to ensure the elimination of discrimination within the private sector, including discrimination within business entities, against employees, including those involved in the “corporate decision-making processes”, and caused by the activities of businesses.²⁷⁹

Similarly, the UNGP indicate that all guiding principles, including business responsibility to respect human rights:

“should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized”.²⁸⁰

Ensuring non-discrimination in business activities and their impact on ESCR is therefore a binding obligation for States and a clear responsibility for businesses.

B. Obligation to respect, to protect and to fulfil

As is set out in Chapter 2, the obligations to respect, protect and fulfill human rights detailed by CESCR in General Comment 24 are obligations incumbent on the State under general international human rights law and the ICESCR. Although private actors are not directly accountable for violations of ESCR, they have clear responsibilities to respect ESCR. Nevertheless, the State, as part of its protective obligation, must hold businesses accountable for human rights abuses. The State may also be held directly responsible for the actions of a business as if that business’ action was attributable to the State’s conduct.

Direct State responsibility for Business Action or Inaction²⁸¹

States, in certain circumstances, may bear direct legal responsibility for the consequences of activities of businesses, arising from their relationship with that business. Indeed, as the International Law Commission’s Articles on State Responsibility, widely considered to reflect principles of customary international law, puts it: “the conduct of a person or entity which is not an organ of the State, but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular

²⁷⁷ *Ibid.*, para. 9.

²⁷⁸ *Ibid.*; Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, 1 December 2014.

²⁷⁹ CESCR, *General Comment No. 24*, *op. cit.*, para. 9.

²⁸⁰ OHCHR, *Guiding Principles on Business and Human Rights*, *op. cit.*, p. 1.

²⁸¹ CESCR, *General Comment No. 24*, *op. cit.*, para. 11.

instance”;²⁸² and “the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.²⁸³

Therefore, the State will be responsible in the following circumstances:

- a. **Acknowledgment:** A State acknowledges the conduct of a business as its own;
- b. **Instruction/Control:** A business is acting on the State’s “instruction” or “under its control or direction”;
- c. **Lawful Empowerment:** A business is empowered by the State’s legislation to “exercise elements of governmental authority”; and
- d. **Absence of authorities:** If, in the absence or default of official authorities, “circumstances call for such exercise of government functions” by a business.

The reasons for the extension of direct State responsibility for the actions or inactions of businesses is simple: States are not permitted to outsource their obligations and thereby escape accountability for their performance. As the South African Constitutional Court has put it: “government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity”.²⁸⁴ This mirrors the position in international human rights law and a wide range of other domestic jurisdictions.²⁸⁵

Aside from these limited circumstances, the focus of States’ obligations in terms of ICESCR is to ensure that the State takes action to ensure that business activities remain consistent with ESCR.

Obligation to Respect

In general, CESCR observes that the State’s obligation to respect ESCR is violated where a State “prioritize[s] the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights”.²⁸⁶ CESCR gives the example of forced evictions undertaken in the context of “investment projects”.²⁸⁷ The obligation to respect ESCR in this respect requires States to perform human rights impact assessments before concluding investment treaties and undertaking investment projects. It also requires States to respect the principle of free, prior and informed consent of indigenous peoples in all matters affecting their rights.²⁸⁸

The Duty to Respect ESCR and the Requirement of Free, Prior and Informed Consent of Indigenous Peoples

²⁸² UN International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/49, 2001, Article 5.

²⁸³ *Ibid.* Article 8.

²⁸⁴ *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another*, South African Constitutional Court, (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC), 28 July 2006, para. 40, available at <http://www.saflii.org/za/cases/ZACC/2006/9.html>.

²⁸⁵ *Ibid.*, paras. 31-40, in which the Court summarizes similar approaches in the United States of America, Canada and the United Kingdom.

²⁸⁶ CESCR, *General Comment No. 24*, *op. cit.*, para. 12.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*, paras. 12-13.

This principle derives from the United Nations Declaration on the Rights of Indigenous Peoples and requires to obtain the “free and informed consent” of indigenous peoples “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.²⁸⁹

The Committee on the Elimination of All Forms of Racial Discrimination has similarly observed that “in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms”. This comes as a result, in particular, of having “lost their land and resources to colonists, *commercial companies* and State enterprises” which ultimately jeopardizes even “the preservation of their culture and their historical identity” and violates their ESCR.²⁹⁰ It therefore notes that such persons must be provided with “conditions allowing for a sustainable economic and social development compatible with their cultural characteristics” and that to ensure this they must have “effective participation in public life” and that “no decisions directly relating to their rights and interests are taken without their informed consent”.²⁹¹

Building on this, in its General Comment 21 on “The Right of Everyone to Take Part In Cultural Life”, CESCR indicates that States must take measures to ensure indigenous peoples can “own, develop, control and use their communal lands, territories and resources” and return these “where they have been otherwise inhabited or used without their free and informed consent”.²⁹² The requirement of ensuring free, prior and informed consent is therefore a part of the States’ duty to respect ESCR. With regard to businesses, the States’ duty to protect ESCR would require it to ensure that free, prior and informed consent is obtained by businesses too.

The UNGP do not incorporate these principles, though they indicate that businesses should ensure “*meaningful consultation* with potentially affected groups”.²⁹³ This duty of consultations applies not only to indigenous peoples but to other groups, but there is no duty on businesses to gain the consent of such groups.

Somewhat related to the free prior and informed consent is the right to development, which is itself a developing concept in international human rights law.

The Right to Development and ESCR

The international standards on the right to development are set out in UN Declaration on the Right to Development, adopted by the UN General Assembly in 1986.²⁹⁴ A Working Group was tasked in 2018 to elaborate a draft treaty on the right to development “through a collaborative process of engagement, including on the content and scope of the future instrument”.²⁹⁵

²⁸⁹ United Nations Declaration on the Rights of Indigenous Peoples, Article 32, available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

See also, CESCR, *General Comment No. 24, op. cit.*, para. 12.

²⁹⁰ Committee on the Elimination of Racial Discrimination, *General recommendation XXIII on the rights of indigenous peoples*, para 3.

²⁹¹ *Ibid.*, para. 4.

²⁹² CESCR, *General Comment No. 21, Right of everyone to take part in cultural life*, UN Doc. E/C.12/GC/21, 21 December 2009, para. 36.

²⁹³ UNGP, Principle 18(b).

²⁹⁴ General Assembly, *Declaration on the Right to Development, Resolution 41/128*, 4 December 1986, available at <https://www.ohchr.org/Documents/ProfessionalInterest/rtd.pdf>.

²⁹⁵ Human Rights Council, *The right to development, Resolution 39/9*, UN Doc. A/HRC/RES/39/9, 27 September 2018, para. 17(e); a draft binding treaty on the right to development is under consideration at the time of writing of this guide.

Regionally, the right to development has, for example, been acknowledged in the African context. Article 22 of the African Charter indicates that “all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”.²⁹⁶

Irrespective of the status of a binding right to development in international human rights law, in determining development trajectories, various binding ICESCR rights and States’ corresponding obligations in this regard must be considered.

Obligation to Protect

The CESCR clarifies that the obligation to protect ESCR requires States to “effectively prevent the infringements” of ESCR “in the context of business activities”.²⁹⁷ This requires States to take “legislative, administrative, educational, as well as other appropriate measures” in order to provide “effective protection” against ESCR violations and access to “effective remedies” where such violations occur.²⁹⁸ As discussed in Chapter 2, this duty includes a duty to regulate businesses sufficiently so as to ensure they do not violate ESCR and are capable of fulfilling their responsibility to respect ESCR.

In General Comment 24, CESCR builds on this general obligation. It indicates that, in executing the positive duty to protect CESCR, States should at least take a non-exhaustive list of measures with regard to the full range of ESCR in the Covenant. The list is detailed in the box below.

The Duty to Protect: States’ obligations regarding business and human rights²⁹⁹

1. **Sanction Businesses for Actions:** Consider imposing administrative sanctions and penalties where business activities violate ESCR;
2. **Sanctions Businesses for Inaction:** Consider imposing administrative sanctions and penalties where businesses fail to act with due diligence to mitigate ESCR violations;³⁰⁰
3. **Enable Civil Suits against Businesses:** Enable civil litigation suits and other effective, affordable individual and collective means of claiming reparations for victims of ESCR violations resulting from business activities;³⁰¹
4. **Revoke Business Licenses and Subsidies:** Revoking business licenses and subsidies “to the extent necessary” of businesses whose activities impair the enjoyment of ESCR rights;³⁰²

²⁹⁶ AfrCHPR, Article 22(1).

²⁹⁷ *Ibid.*, Article 14.

²⁹⁸ *Ibid.*, Articles 14 and 16.

²⁹⁹ The list of obligations in this box is drawn directly from CESCR’s General Comment No. 24. They are paraphrased for ease of reference and amalgamated where there is overlap for the purposes of brevity.

³⁰⁰ *Ibid.*, paras. 15, 50 and 52.

³⁰¹ *Ibid.*, paras. 15 and 51.

³⁰² *Ibid.*, para. 15.

5. **Revise Support, Privileges and Advantages to Businesses:** Revising “State support, privileges and advantages” provided to businesses whose activities result in ESCR abuses to align “business incentives with human rights responsibilities”;³⁰³
6. **Review Laws Regulating Businesses:** Regularly review laws and address information gaps relating to ESCR infringements resulting from business activities;³⁰⁴
7. **Impose Due Diligence Requirements on Businesses:** Impose due diligence requirements to prevent ESCR infringements “in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners”;³⁰⁵ and
8. **Protect Whistleblowers:** Protect whistleblowers of corruption and establish independent, well-resourced and specialized mechanisms to combat corruption.³⁰⁶

In addition to this set of clear State obligations, CESCR clarifies that it is not sufficient that measures taken by States to protect ESCR are targeted solely at preventing *conduct actually leading* to ESCR abuses. In addition, States are required to “prevent” or “counter” businesses’ conduct which “has the foreseeable effect of leading” to ESCR rights being abused.³⁰⁷ Examples of actions that are likely to have such a foreseeable effect include:

- Lowering criteria for approving new medicines;
- Failing to require reasonable accommodation of persons with disabilities;
- Granting exploration and exploitation permits for natural resources without considering and consulting communities’ ESCR; and
- Exempting certain projects/geographical areas from laws protecting ESCR as may be the case in “Special Economic Zones”.³⁰⁸

Special Economic Zones, ESCR and the Duty to Protect

In its report on *Special Economic Zones in Myanmar and the State Duty to Protect Human Rights*, the ICJ draws attention to the impact of Special Economic Zones (SEZ) on ESCR rights in Myanmar. It concludes that the particular law enabling SEZ in Myanmar “does not conform to the State’s international law obligations to protect human rights”.³⁰⁹

“An SEZ is a delineated geographical area with a *special legal regime* for business activity”.³¹⁰ and in Myanmar, as elsewhere, the “special legal regime” in question may be aimed at “facilitate[ing] rapid economic development”. However, they have also involved relaxed legal regulatory requirements and, as a result “human rights violations and abuses have often accompanied SEZ”.³¹¹

³⁰³ *Ibid.*, paras. 15 and 31.

³⁰⁴ *Ibid.*, para. 15.

³⁰⁵ *Ibid.*, paras. 16 and 33.

³⁰⁶ *Ibid.*, para. 20.

³⁰⁷ *Ibid.*, para. 18.

³⁰⁸ *Ibid.*

³⁰⁹ ICJ, *Special Economic Zones in Myanmar and the State Duty to Protect Human Rights*, February 2017, p. i, available at <https://www.icj.org/wp-content/uploads/2017/02/Myanmar-SEZ-assessment-Publications-Reports-Thematic-reports-2017-ENG.pdf>.

³¹⁰ *Ibid.*, p. ii.

³¹¹ *Ibid.*

General Comment 24 is relevant to such SEZ. By citing the exemption of certain projects/geographical areas from laws protecting ESCR as an example of a State's action with the "foreseeable effect" of infringing ESCR, it warns States that ESCR obligations must be considered in the determination and application of SEZ regimes. This is particularly crucial in post-conflict situations such as is the case in Myanmar, during which "opportunities for reform" are likely to result in the initiation of development projects aimed at ensuring economic growth.³¹² These are situations of *heightened risk* to human rights violations abuses, as discussed in chapter 3 and chapters 5 and 6 below above. States' duties to protect and the responsibility of businesses to respect ESCR are particularly pronounced in such contexts.

CESCR is also explicit that the "positive duty" to protect ESCR will sometimes require "direct regulation and intervention" such as: restricting marketing and advertising of certain goods and services to protect the right to health; exercising rent control to protect the right housing; combating gender stereotyping and discrimination to protect women's ESCR; and, establishing a minimum wage consistent with a living wage and fair remuneration to protect the right to work.³¹³

Noting "the increased role and impact of private actors in traditionally public sectors", CESCR emphasizes that although privatization of the provision of ESCR is not "per se prohibited" by ICESCR:

"Privatization is not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong. Private providers should, however, be subject to strict regulations that impose on them so-called "public service obligations": in the provision of water or electricity, this may include requirements concerning universality of coverage and continuity of service, pricing policies, quality requirements, and user participation. Similarly, private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information. For instance, where health practitioners are allowed to invoke conscientious objection to refuse to provide certain sexual and reproductive health services, including abortion, they should refer the women or girls seeking such services to another practitioner within reasonable geographical reach who is willing to provide such services".³¹⁴

The CESCR also thereafter cautions that privatization "may result in a lack of accountability" for ESCR violations.³¹⁵

³¹² *Ibid.*

³¹³ CESCR, *General Comment No. 24, op. cit.*, para. 19.

³¹⁴ *Ibid.*, para. 21.

³¹⁵ *Ibid.*, para. 22.

States are therefore required in terms of the duty to protect ESCR to subject private businesses trading in markets such as healthcare, education or housing, to “strict regulations”. In this regard, CESCR warns that access to ESCR may become “less affordable” as a result of their provision in the private sector and that “quality may be sacrificed for the sake of increasing profits”.³¹⁶ Overall, what is clear is that:

“The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, thus creating new forms of socio-economic segregation”.³¹⁷

Obligation to Fulfil

The obligation to fulfil ESCR requires that States take all “necessary steps” to “facilitate and promote the enjoyment” of ESCR.³¹⁸ This includes, where appropriate, the State “directly provid[ing] goods and services” such as water, electricity, housing, healthcare and education.³¹⁹ CESCR indicates that in addition to these actions, the obligation to fulfill “may require seeking business cooperation and support to implement” ESCR and includes a duty to “direct the efforts of business entities towards the fulfilment of Covenant rights.”³²⁰

Two clear examples of such “direction” given by CESCR are State-enforced progressive taxation schemes and designing intellectual property laws to ensure intellectual property rights of businesses do not lead to violations or abuses of the rights to health, food and land. The State may, in this manner, “direct” innovation and advances in intellectual property towards the realization of ESCR instead of their violation.³²¹

Nothing in the international human rights framework, including under the CESCR, excludes private resources from the ambit of “maximum available resources” by means of which the State must fulfil ESCR. It is therefore arguable that “in addition to allowing and encouraging voluntary use of private resources, States must also consider strategies for their appropriation”.³²² State practice in the context of “the imposition of land reform and wealth taxes” validates this approach.³²³

³¹⁶ *Ibid.*, para. 22.

³¹⁷ *Ibid.*, para. 22.

³¹⁸ *Ibid.*, para. 23.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, para. 24.

³²¹ *Ibid.*, paras. 23-24.

³²² Robert E. Robertson, “Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social and Cultural Rights”, in *Human Rights Quarterly*, Vol. 16, No. 4, November 1994, p. 700.

³²³ *Ibid.*

States may therefore also, in seeking to fulfil ESCR, attempt to encourage private contributions to increase the resources available to realize ESCR. This may be particularly advisable in circumstances in which businesses, through their operations, risk severe adverse impacts on ESCR. Such attempts may be in the form of “corporate social responsibility” (CSR) required by laws, regulations, codes of good governance for business and policies, or they may be additional to such requirements.³²⁴

South Africa: Private resources as part of “maximum available resources” within which States must fulfil ESCR

South African courts have repeatedly accepted the relevance of considering private contributions as co-comprising “available resources” in the evaluation of compliance with ESCR violations. Three brief examples illustrate this acceptance.

In *Treatment Action Campaign*, for example, the Constitutional Court considered as fundamentally relevant to the reasonableness of the State’s refusal to make HIV treatment available that “the manufacturers of Nevirapine offered to make it available to the South African government free of charge for a period of five years”.³²⁵ The voluntary provision of HIV treatment was therefore included in the Court’s consideration of the States’ available resources within which it was compelled to realize the right to health.

In *Western Cape Forum for Intellectual Disability*, a High Court went even further in ordering the State to take “reasonable measures” including “*providing adequate funds to organizations which provide education* for severely and profoundly intellectually disabled children”.³²⁶ These organizations, who initiated the litigation that led to this order, were described by the Court as “non-governmental organisations which care for children ... with severe and profound intellectual disabilities”.³²⁷

Finally, in *Blue Moonlight*, the Constitutional Court held that owners of private property would have to be “somewhat patient” and allow unlawful occupiers whose eviction would render them homeless to continue to inhabit their land until the State could provide them with alternative accommodation.³²⁸ The clear implication is that though the state would be required to provide alternative accommodation it could, in the interim, require private owners to contribute their resources (in the form of land) towards the fulfillment of the right to housing.

³²⁴ The ICJ’s and Child Rights International Network’s joint publication on General Comment No. 16 summarizes a range of CSR related advocacy measures that civil society organizations may take more generally than in the context of children’s rights to ensure corporate accountability; see Chapter 6 below; and, ICJ & Child Rights International Network, *State Obligations regarding the Impact of the Business Sector on Children’s Rights*, op. cit.

³²⁵ *Minister of Health v Treatment Action Campaign (TAC)*, South African Constitutional Court, 5 July 2002, paras. 19, 48-51.

³²⁶ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*, Western Cape High Court, 11 November 2010, para. 52.

³²⁷ *Ibid.*, para. 2.

³²⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*, South African Constitutional Court, 1 December 2011, para. 40. See also, *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, South African Constitutional Court, 13 May 2005: in some though not all circumstances, private owners could be provided with compensation by the state in the form of “constitutional damages” for the duration of such continued occupation. See further, *Fischer v Persons listed on Annexure X ZAWCHC 99*; 2018 (2) SA 228 (WCC) (30 August 2017): the State may also be required to consider the expropriation of such private land subject to the usual considerations of public interest, use, market value, etc. in determining the just and equitable amount of compensation.

Extraterritorial Obligations

States' obligations to respect, protect and fulfill ESCR are widely understood to extend beyond activities undertaken within the geographical borders of that State. CESCR summarizes that under international law.³²⁹

"Extraterritorial obligations arise when a State Party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory".³³⁰

Extraterritorial obligations of States are particularly relevant in the context of business and human rights because in a globalized economy, companies based in one country commonly conduct business activities that transcend geographical borders. Indeed, the authoritative *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* note from the outset "the lack of human rights regulation and accountability of transnational corporations" as one of the key "gaps in human rights protection".³³¹

The Maastricht Principles, tracking the fundamental principles of State responsibility articulated in the International Law Commission's Articles on State Responsibility, indicate that direct State responsibility ensues for the actions of non-State actors, including businesses, when: a) their acts or omissions are "on the instructions or under the direction or control of the State"; or, b) where "corporations and other business enterprises ... are empowered by the State to exercise elements of governmental authority" and are "acting in that capacity".³³²

The fundamentals of the duty to protect in the extra-territorial context are spelled out in Principle 25, whereby States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:

- "a) the harm or threat of harm originates or occurs on its territory;
- b) where the non-State actor has the nationality of the State concerned;

³²⁹ Charter of the United Nations, Article 55; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004, paras. 109-112, available at <http://www.refworld.org/cases/ICJ,414ad9a719.html>; *Maastricht Principles*, *op. cit.*, p. 3.

³³⁰ CESCR, *General Comment No. 24*, *op. cit.*, para. 28.

³³¹ *Maastricht Principles*, *op. cit.*, p. 3.

³³² *Ibid.*, Article 12.

c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;

d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;

e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction."

In General Comment 24, CESCR builds on the Maastricht Principles' elaboration of States' extraterritorial obligations to respect, protect and fulfill ESCR in the context of business activities. Generally, though acknowledging that direct State responsibility for business activities is not the norm, CESCR indicates:

"it would be in breach of its obligations under the Covenant where the violation [of ESCR] reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event".³³³

Such "reasonable measures" could take the form of State actions taken to comply with the duties to respect, protect and fulfill ESCR respectively. Moreover, the obligation to respect ESCR, CESCR indicates, is "particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties, as well as to judicial cooperation".³³⁴

The Maastricht Principles describe the obligation to protect as including an "obligation to regulate" business activities of transnational corporations and other business enterprises in order to ensure they "do not nullify or impair the enjoyment of" ESCR.³³⁵ CESCR affirms that "regulation" and provision of "incentives" by States to ensure compliance with ESCR by businesses over which they exercise control fall within the State's obligation to protect ESCR.³³⁶ Which reasonable measures are required to comply with the obligation to protect will depend on the context. For example, the CESCR indicates that "the well documented risks" of ESCR violations "associated with the extractive industry" mean that "particular due diligence is required with respect to projects in mining and oil development projects".³³⁷

While what such regulation entails is flexible, the CESCR does expressly indicate that States should "require corporations to deploy their best efforts" to ensure that "entities whose

³³³ CESCR, *General Comment No. 24*, *op. cit.*, para. 32.

³³⁴ *Ibid.*, para. 29.

³³⁵ *Maastricht Principles*, *op. cit.*, Article 24.

³³⁶ CESCR, *General Comment No. 24*, *op. cit.*, para. 31.

³³⁷ *Ibid.*, para. 32.

conduct these corporations may influence” respect ESCR.³³⁸ CESCR gives subsidiaries and business partners (e.g. suppliers, supply chains, franchisees or sub-contractors) as key examples, also indicating that States should require businesses to “act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located”.³³⁹

Finally, the obligation to fulfill ESCR, in accordance with the Article 2(1) of ICESCR and the Maastricht Principles, extends to “persons within [States] territories and extraterritorially”.³⁴⁰ An individual State’s obligation to fulfill ESCR extraterritorially is “commensurate with, inter alia, its economic, technical and technological capacities, available resources, and influence in international decision-making processes”.³⁴¹

CESCR reiterates this aspect of the obligation to fulfill and adds that States should, in addition, “encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts” of States to realize ESCR. The CESCR pays particular attention to “tax evasion”, “tax avoidance”, “excessive protection to bank secrecy” and “lowering the rates of corporate taxes with a sole view to attracting investors encourages a race to the bottom” as measures which “ultimately undermine[]” realization of ESCR and are therefore “inconsistent” with ICESCR.³⁴²

Remedies for ESCR violations involving business activities

The CESCR considers the duty to protect to include an obligation on States to “create appropriate regulatory and policy frameworks and enforce such frameworks”. This requires “effective monitoring, investigation and accountability” mechanisms. CESCR expresses a clear available, effective and expeditious preference for judicial remedies to be available to “those whose Covenant rights have been violated in the context of business activities”.³⁴³ Though clearly contemplating other mechanisms of redress operating in tandem with judicial mechanisms the CESCR indicates that other remedies “could be rendered ineffective if they are not reinforced or complemented by judicial remedies”³⁴⁴.

Types of remedies that should be available to victims of ESCR violations in terms of General Comment 24:³⁴⁵

- Criminal prosecution of business enterprises;

³³⁸ CESCR, *General Comment No. 24, op. cit.*, para. 33.

³³⁹ *Ibid.*

³⁴⁰ *Maastricht Principles, op. cit.*, Article 28.

³⁴¹ *Ibid.*, Article 31.

³⁴² *Ibid.*, Article 37.

³⁴³ CESCR, *General Comment No. 24, op. cit.*, para. 38.

³⁴⁴ *Ibid.*, para. 39.

³⁴⁵ *Ibid.*, paras. 49-57. This list is paraphrased from General Comment No. 24 for brevity and clarity.

- Criminal prosecution of individuals, in their capacity as officers or employees of companies;
- Administrative sanctions and penalties by administrative and quasi-judicial mechanisms;
- Civil suits for damages against businesses under domestic law, such as through tort claims;
- Decisions and observations of national human rights institutions;
- Decisions of international and regional complaints mechanisms;
- Localized grievance mechanisms, including operation grievance mechanisms of companies; and
- Arbitration and mediation.³⁴⁶

Whether through judicial or non-judicial remedies victims must have “prompt access to an independent public authority, which must have the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress the harm done”.³⁴⁷ States may, and often already do, “make use of a wide range of administrative and quasi-judicial mechanisms” to ensure recourse to remedies. Common examples include “labour inspectorates and tribunals, consumer and environmental protection agencies and financial supervision authorities”.³⁴⁸

Reparation provided may vary but CESCR indicates that the reparation awarded “must take the views of those affected into account” and may include “restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition”. Non-repetition may involve further measures taken in terms of the duty to protect including “improving legislation and policies, which have proven ineffective to prevent the abuses”.³⁴⁹ Where non-judicial remedies are adopted they should be “adequately coordinated with available judicial mechanisms both in relation to the sanction and the compensation to victims”.³⁵⁰

Because all remedies must be “available, effective and expeditious”³⁵¹ to comply with their obligations States should “inform” all “individuals and groups of “their rights and the remedies accessible”. This is particularly emphasized by CESCR in the context of indigenous peoples to whom “information and guidance, including human rights impact assessments” should be made accessible.³⁵² In addition, States are required to “provide businesses with relevant information, training and support” to ensure that they understand ICESCR.³⁵³ All State-based non-judicial mechanisms are specifically required by CESCR to comply with Principle 31 of the UNGP which is detailed in full in Chapter 3 above.³⁵⁴

³⁴⁶ *Ibid.*, para. 6. Because of its focus on States’ obligations, General Comment No. 24 has less to say about operation level grievance mechanisms than the UNGP and is therefore best read with the UNGP in this regard. See Chapter 3 above.

³⁴⁷ *Ibid.*, para. 41.

³⁴⁸ *Ibid.*, para. 53.

³⁴⁹ *Ibid.*, para. 41.

³⁵⁰ *Ibid.*, para. 53.

³⁵¹ *Ibid.*, para. 41.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*, para. 55. See also, chapter 3 of this guide.

In addition to closing this information asymmetry, the CESCR indicates that States have a “duty to take necessary steps to address” challenges and barriers in accessing justice to “prevent a denial of justice and ensure the right to effective remedy and reparation”.³⁵⁵ The CESCR acknowledges that, at least, a variety of challenges summarized in the box below must be considered in execution of State obligations.

States’ obligations with regard to common barriers to access remedies	
Common barrier to access to remedy	State obligation in terms of General Comment 24 “remove substantive, procedural and practical barriers to remedies” (para. 44)
The “corporate veil”: a legal fiction by which a parent company seeks to avoid liability for the acts of the subsidiary company whose activities it could have or did influence.	<ul style="list-style-type: none"> States should take measures including through “establishing parent company or group liability regimes” in their legal systems (para. 44)
Access to corporate held information: information required by victims of ESCR violation to access justice is often held exclusively by the very businesses they allege have infringed their rights.	<ul style="list-style-type: none"> States should take measures to ensure the facilitation “of access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings” (para. 44) Introduce “mandatory disclosure laws” (para. 45) Introduce “procedural rules allowing victims to obtain the disclosure of evidence detained by the defendant” business. This may include: <ul style="list-style-type: none"> Shifting the burden of proof: if information relating to a claim lie “wholly or in part within the exclusive knowledge of the corporate defendant” (para. 45) Defining disclosure refusal restrictively: this can assist unnecessary or unwarranted “trade secrets” and privacy/confidentiality related refusals (para 45) Ensure cooperation between different States and judicial and enforcement agencies “in order to promote information sharing and transparency and prevent the denial of justice” (para. 45)
Collective redress mechanisms: violations may be widespread and diffuse and individuals may be reluctant to claim redress without community support.	<ul style="list-style-type: none"> States should take measures to allow for collective redress including “enabling human rights-related class actions and public interest litigation” (para. 44). States must take particular care to ensure that indigenous peoples have access to effective remedies which are “sensitive to indigenous cultures and accessible to indigenous peoples” (para. 46)

³⁵⁵ *Ibid.*, para. 44.

<p>High costs: in the absence of legal aid and other funding access to justice may be too expensive for victims of ESCR abuses in the face of ample resources of businesses.</p>	<ul style="list-style-type: none"> States should take measures including “providing legal aid and other funding schemes to claimants” (para. 44)
<p>Forum non-conveniens: courts in many jurisdictions decline jurisdiction to victims of ESCR abuses by businesses indicating that another forum or court should exercise jurisdiction. This is “often” done “without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction”.</p>	<ul style="list-style-type: none"> Courts should understand “the extent to which an effective remedy is available and realistic in the alternative jurisdiction” as “an overriding consideration” if applying a <i>forum non conveniens</i> doctrine (para. 44) Courts should not allow businesses to “abuse” litigation actions “to discourage individuals or groups from exercising remedies, for instance by alleging damage to the corporations’ reputation” (para. 44) States should ensure that judges and lawyers in particular “are well informed of the obligations under the Covenant linked to business activities” and “exercise their functions in complete independence” (para. 46).
<p>Harassment and prosecution of Human Rights Defenders: CESCR notes that it has “regularly come across accounts of threats and attacks aimed at those seeking to protect their own or others’ Covenant rights, particularly in the context of extractive and development projects”.</p>	<ul style="list-style-type: none"> States should take “all necessary measures” to “protect” human rights defenders in their attempts to defend their own and others rights (para. 48) States should in any way “obstruct” their attempts to defend their own and others rights (para. 48) States should “should refrain from resorting to criminal prosecution” that aims to/results in hindering their attempts to defend their own and others rights (para. 48) States should ensure that prosecuting authorities are generally “made aware of their role in upholding Covenant rights” (para. 49).

CESCR’s adoption of statements relating to business and human rights

In 1998, the CESCR adopted a statement on the impact of globalization on ESCR. The CESCR underscored that globalization had become “closely associated with a variety of specific trends and policies” including “reliance upon the free market”; “growth in the influence of international financial markets and institutions in determining the viability of national policy priorities”; “the privatization of various functions previously considered to be the exclusive

domain of the State” and “deregulation of range of activities with a view to facilitating investment”.³⁵⁶

These “trends and policies”, if not “complemented by appropriate additional policies” and “necessary safeguards”, could result in violations of ESCR. Therefore, CESCR indicated that such risks must be “guarded against, or compensated for” by States and international institutions such the IMF and the World Bank.³⁵⁷

Explicitly seeking to build on this 1998 statement,³⁵⁸ in 2011, CESCR adopted a further statement on obligations of State Parties regarding the business sector and ESCR within the context of globalization.³⁵⁹ Reiterating that States have “the *primary* obligation to respect, protect and fulfill” ESCR “of all persons under their jurisdiction” both in the context of “corporate activities” of private and State-owned enterprises,³⁶⁰ CESCR emphasized States should act to:

- Ensure corporate due diligence;
- Establish and monitor appropriate regulation of business activities (whether domestic or extraterritorial);
- Provide effective remedies for ESCR violations;
- Exercise influence “through legal or political means” to ensure realization of ESCR; and
- Obtain support from the “corporate sector” in the realization of ESCR and ensure its “home companies” operating abroad provide such support to other States in which they operate.

Of direct relevance to the context of this guide, CESCR emphasizes the need for the State to obtain support from its home companies in the pursuit of ESCR protection and realization where such companies operate “in situations of armed conflict and natural disaster”.

Finally, CESCR’s 2018 statement on climate change and ESCR also makes important reference to private actors noting “complying with human rights obligations in the context of climate change *is a duty of both State and non-State actors*”. Though not clarifying the nature and extent of the duties of State and non-State actors respectively CESCR indicates that, these duties require:

- States to respect ESCR “by refraining from the adoption of measures that could worsen climate change”;
- States to protect ESCR “by effectively regulating private actors to ensure that their actions do not worsen climate change”;

³⁵⁶ CESCR, *Report on the Eighteenth and Nineteenth Sessions, 27 April - 15 May 1998, 16 November - 4 December 1998*, Official Records, UN Doc. E/1999/22 & E/C.12/1998/26, 1999, pp. 92-94, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1998%2f26&Lang=en.

³⁵⁷ *Ibid.*

³⁵⁸ CESCR, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, UN Doc. E/C.12/2011/1, 12 July 2011, para. 2.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*, para. 3.

- States to fulfil ESCR “by adopting policies that can channel modes of production and consumption towards a more environmentally sustainable pathway”.
- Business to respect ESCR rights “regardless of whether national laws exist or are fully enforced in practice”.
- Courts and other human rights mechanisms to “ensure that business activities are appropriately regulated to ensure that they support, rather than undermine, the efforts of States to combat climate change”.

CESCR’s reference to businesses’ duty to respect, which draws on General Comment 24 for authority, is indicative of the heightened attention CESCR continues to give in respect of business and human rights. Though CESCR’s assertions in this regard are made in the context of climate change, they open up further room for human rights defenders and lawyers to advocate for a legally binding corporate obligation to respect ESCR with regard to all ICESCR rights.

In 2011, the Human Rights Council established the special procedure of the Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights).³⁶¹ The Working Group has in particular the mandate to promote the effective and comprehensive dissemination and implementation of the UNGP; to identify, exchange and promote good practices and lessons learned on the implementation of the UNGP and to assess and make recommendations thereon; and, to provide support for capacity-building and, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights.³⁶²

States, business enterprises and associations, civil society organizations, trade unions, victims, academics, students, the media and any other relevant stakeholder may access the Working Group through the Forum on Business and Human Rights, a key global platform to discuss trends and challenges in the implementation of the UNGP and promote dialogue and cooperation on issues linked to business and human rights.³⁶³

CESCR’s Individual Communications procedure

The Optional Protocol to ICESCR (OP-ICESCR) enables alleged victims of ICESCR violations to complain to CESCR through a communication³⁶⁴ procedure to secure a remedy. The State against whom the complaint is brought must be party to OP-ICESCR. Thereby, since the coming into force of OP-ICESCR, CESCR plays a quasi-judicial role in the evaluation of complaints regarding the violation of ESCR.

³⁶¹ Human Rights Council, *Resolution 17/4, Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/17/4, 6 July 2011.

³⁶² *Ibid.*, para. 6.

³⁶³ *Ibid.*, para. 12.

³⁶⁴ See OP-ICESCR, Article 1, for a definition of “communication”.

From the outset it should be noted that most of the principal human rights treaties, including those containing ESCR (such as CRC, CEDAW and the CRPD), contain similar communication procedures in respect of States that have accepted them. There are certain basic requirements common to OP-ICESCR and other communications mechanisms, including the need to first exhaust of domestic remedies³⁶⁵ or the requirement according to which the matter cannot concern facts occurred before the entry into force of OP-ICESCR or before the State became party to it.³⁶⁶ Moreover, the communications of both individuals and groups of individuals are authorized for violations committed by the State. However, this can entail a violation of its protective obligations *vis a vis* businesses and other non-State actors. In examining communications, the CESCR must consider the “reasonableness of the steps taken by the State Party”³⁶⁷ to realize ESCR. While the CESCR and treaty bodies have no direct enforcement powers, they may follow up on States’ action and responses undertaken pursuant to its decisions, especially in respect of whether the prescribed remedy has been implemented.³⁶⁸

CESCR’s decision in *IDG v Spain* indicates how its evaluation of individual complaints may assist victims of business-related ESCR violations to vindicate their ESCR and allow CESCR to further develop its business and human rights jurisprudence.³⁶⁹

IDG v Spain: Businesses and Housing Rights in context of Banks

Ms I.D.G, a Madrid resident and property owner, fell behind on her home loan repayment with her bank in the context of a prevailing economic crisis in Spain. A Spanish court ordered the initiation of the auction of her property without proof that she had been made aware of this process. On becoming aware of this process Ms IDG sought annulment for a violation of the Spanish Civil Code which she argued required the bank to take more effort to ensure she was notified prior to the commencement of the auction process. Her attempts failed in Court and the Spanish Constitutional Court dismissed her appeal. Ms IDG then approached CESCR, arguing that “she did not in practice have access to effective and timely judicial protection” with a resulting violation of her Covenant right to housing.

Drawing on its General Comment on forced evictions, CESCR observed that the right to housing requires States to establish and apply “procedural protections that will guarantee, among other things, a real opportunity for consultation with those affected and adequate and reasonable notice” when eviction may possibly occur as a result of legal and administrative processes. Such notice, it held, must be “adequate” to comply with the standard set by the right to housing. In the case at hand, CESCR found that despite “repeated efforts of the Court to personally notify” IDG, having failed to do so, the Court had not “exhausted all available means to serve notice in person”. CESCR deemed this “inadequate” notice and therefore constituting a violation of IDG’s housing rights because it had a “significant impact on the author’s right to defend her full enjoyment of her home”.

³⁶⁵ OP-ICESCR, Article 3(2)(a).

³⁶⁶ OP-ICESCR, Article 3(2)(b).

³⁶⁷ OP-ICESCR, Article 8(4).

³⁶⁸ OP-ICESCR, Article 9.

³⁶⁹ CESCR, *Communication No. 2/2014*, UN Doc. E/C.12/55/D/2/2014, 13 October 2015.

CESCR therefore recommended the State to ensure that the auction of Ms. IDG's property did "not proceed unless she has due procedural protection and due process" guaranteed under the ICESCR as interpreted by CESCR in General Comments 4 and 7 on the right to housing. It also indicated as part of an effective remedy for the violation of Ms. IDG's housing rights would be for the State to "reimburse the author for the legal costs incurred in the processing of this communication".

In addition to these specific findings, CESCR made several general recommendations to the State in *IDG v Spain*, which are more generally revealing of the content of the right to housing and against forced evictions. These general recommendations include the need for:

- 1. Non-repetition of Violations:** Ensure that its legislation and enforcement of legislation is consistent with ICESCR;
- 2. Accessible Remedies for Violations:** Ensure that legal remedies "for persons facing mortgage enforcement procedures for failure to repay loans" are "accessible";
- 3. Direct Notice Required for Eviction:** Ensure that legislative and administrative measures are adopted to ensure "notification by public posting" is "strictly limited"; and
- 4. Appropriate Procedural Rules:** Ensure legislation and regulation "contain appropriate requirements" consistent with ESCR and that these are followed "before going ahead with auction of a dwelling, or with eviction".

The CESCR's decision in *IDG v Spain*, although focusing on the obligations of the State relating to the right to housing, helps clarify the State's duty to protect the right to housing from abuses by private actors including businesses. In *IDG v Spain*, despite the auction and eviction proceedings being initiated by the bank (a private business), CESCR focused on the obligation of the State as a whole to ensure the protection of IDG's ESCR. It did so by engaging all branches of the government: the judiciary (through enforcement procedures), the legislature (through legislative amendment and enactment) and the executive (through legislative implementation and administrative policy) to ensure the protection of Ms IDG's ESCR from human rights infringement by a business.

In this decision, CESCR drew on its previous jurisprudence developed in general comments, in particular to assess the reasonableness of the State's conduct in terms of Article 8(4) of OP-ICESCR. In turn, the decision in this case will inform the subsequent jurisprudence of CESCR as it develops concluding observations to States parties and other General Comments. Importantly, to ensure non-repetition, CESCR also interprets its mandate in the context of communications to make more general prescriptions to States about how its duty to protect should be implemented to ensure the realization of ESCR. Such general prescriptions will have an important role in the future development of CESCR's jurisprudence on business and human rights and, therefore, should be carefully monitored by civil society organizations, governments and business enterprises concerned with ensuring compliance by businesses with international human rights standards relating to ESCR.

CESCR's Concluding Observations relevant to business and human rights

As with all human rights treaties, States are required under the ICESCR to submit regular reports to CESCR “on the measures which they have adopted and the progress made in achieving the observance” of their CESCR obligations.³⁷⁰ After considering the States’ periodic reports and reports submitted by other stakeholders (e.g. national human rights institutions, civil society, human rights defenders), CESCR issues recommendations as part of brief “concluding observations” to the State in question regarding its implementation of ICESCR obligations.³⁷¹

These observations and recommendations allow States Parties to benefit from CESCR’s considerable global experience and can assist States to improve their compliance with ESCR obligations and implementation of human rights obligations more generally. CESCR’s concluding observations, although specifically directed at particular countries, also contribute to norm development with regard to ESCR. These concluding observations substantially inform CESCR’s General Comments, statements and communications decisions.

A full exposition of CESCR’s approach to business and human rights in its concluding observations is beyond the scope of this Guide, although much of them have already been absorbed into General Comment 24, discussed above. Selected examples, however, may assist civil society organizations, governments, NHRI, businesses and other stakeholders to understand the potential role of such concluding observations in the clarification of human rights standards relating to business and human rights.

In its 2014 Concluding Observations to Vietnam, CESCR expressed concern at “the health protection divide in the society and at the adverse impact of privatization on the affordability of health care”³⁷² and recommended that Vietnam “actively recruit persons with disabilities in the public sector and reinstate the quota system, including in the private sector”.³⁷³ To address water contamination, CESCR recommended that Vietnam “enforce regulations on water treatment in industrial zones” and take measures “to protect water sources from contamination and ensure the safety of water”.³⁷⁴

³⁷⁰ ICESCR, Articles 16(1), 17-18.

³⁷¹ All CESCR Concluding Observations can be found at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5 (accessed on 15 November 2019).

³⁷² CESCR, *Concluding observations on the second to fourth periodic reports of Vietnam*, UN Doc. E/C.12/VNM/CO/2-4, 15 December 2014, para. 22.

³⁷³ *Ibid.*, para. 15(c).

³⁷⁴ *Ibid.*, para. 31(b); since 2005, provision of water services is carried out by private actors in Vietnam, a few of them being State-owned (see more at <https://vietnamnews.vn/economy/537921/private-sectors-public-goods-provision-necessary-but-needs-supervision.html#IGZATuzKo8BsiJ25.97>).

The CESCR has issued concluding observations on Germany's reports in 1994, 1998, 2001, 2011 and 2018. Given the range of concluding observations issued to Germany and the recent date of the final set of such recommendations, a brief analysis of CESCR's varied scrutiny and focus is useful in revealing its continuously evolving approach to business and human rights.

CESCR's Concluding Observations to Germany relating to Business and Human Rights

While no direct reference is made to the "private sector" including businesses in its 1994 and 1998 observations, by 2001 such references by CESCR had become explicit.

In its 2001 Concluding Observations to Germany, for example, CESCR raised concern about the "impediments" faced by women in accessing equal "wages for work of equal value, both in the private and public sectors" and that "prisoners who undertake labour for private companies may be doing so without having expressed their prior consent".³⁷⁵

In its 2011 Concluding Observations it followed up with recommendations on both the issues raised in its 2001 Observations³⁷⁶ and "expresse[d] concern that the State party's policy-making process in, as well as its support for, investments by German companies abroad does not give due consideration to human rights". CESCR therefore recommended that Germany "ensure that its policies on investments by German companies abroad" give due consideration to ESCR and "serve the economic, social and cultural rights in the host countries".³⁷⁷

By 2018, in addition to various other references to "private sector" and private companies, CESCR's concluding observations also included a separate subsection on "business and human rights".³⁷⁸ Under this heading CESCR expressed concern about the "the exclusively voluntary nature of the corporate due diligence obligations" set out in Germany's National Action Plan on Business and Human Rights. Furthermore, it highlighted Germany's unwillingness to unconditionally "introduce binding legislative measures" with potential effect according to CESCR of "a regulatory gap for the imposition of corporate due diligence obligations".³⁷⁹ It therefore recommended that the State:

- Ensure the effective implementation of the National Action Plan on Business and Human Rights "through a comprehensive and transparent monitoring process";
- Adopt a regulatory process to ensure German companies operating at home and abroad "identify, prevent and address" ESCR abuses and that "such companies can be held liable for violations" including dealing with:
 1. Practical obstacles to access to justice for non-nationals whose ESCR are infringed by companies abroad;
 2. General absence of a collective redress mechanisms in German law;
 3. Lack of criminal liability for businesses in German law; and,
 4. Lack of disclosure procedures which impedes claimants' access to justice against companies alleged to have violated their ESCR.

³⁷⁵ CESCR, *Concluding observations on Germany*, UN Doc. E/C.12/1/Add.68, 24 September 2001, paras. 19, 21, 37 and 39.

³⁷⁶ CESCR, *Concluding observations on Germany*, UN Doc. E/C.12/DEU/CO/5, 12 July 2011, paras. 15 and 19.

³⁷⁷ *Ibid.*, paras. 10 and 11.

³⁷⁸ CESCR, *Concluding observations on the sixth periodic report of Germany*, UN Doc. E/C.12/DEU/CO/6, 27 November 2018, paras. 7-11.

³⁷⁹ *Ibid.*

CESCR recommended that Germany take measures to remedy these problems³⁸⁰ by “including the provision of enhanced legal assistance for victims and the introduction of collective redress mechanisms in civil proceedings, criminal liability of corporations and disclosure procedures, to guarantee that the victims of human rights abuses by companies domiciled in Germany or under the country’s jurisdiction have access to effective remedies and compensation in Germany”.

As is evident from CESCR’s concluding observations to Vietnam and Germany, the CESCR is increasingly concerned with the harms to ESCR caused by business activities both at home and abroad. Of particular concern in CESCR’s concluding observations are “development” projects involving companies which require the extraction of natural resources through mining and other related activities. This echoes the similar concern about “extractive and development projects” raised by CESCR in General Comment 24 and discussed above.³⁸¹

This same trend is well illustrated by other CESCR Concluding Observations, issued in October and November 2018.³⁸² In addition to those addressed to Germany highlighted above, observations addressed to Argentina, Mali and South Africa make recommendations directly relevant to mining activities.³⁸³ This reflects an increasing trend in both State reporting on ESCR violations resulting from business activity and increased scrutiny from CESCR.

³⁸⁰ *Ibid.*

³⁸¹ CESCR, *General Comment No. 24, op. cit.*, paras. 32 and 48.

³⁸² CESCR, *Concluding observations on the second periodic report of Turkmenistan*, UN Doc. E/C.12/TKM/CO/2, 31 October 2018; CESCR, *Concluding observations on the fourth periodic report of Argentina*, UN Doc. E/C.12/ARG/CO/4, 1 November 2018; CESCR, *Concluding observations on the initial report of Mali*, UN Doc. E/C.12/MLI/CO/1, 6 November 2018; CESCR, *Concluding observations on the initial report of Cabo Verde*, UN Doc. E/C.12/CPV/CO/1, 27 November 2018; and, CESCR, *Concluding observations on the second periodic report of South Africa*, UN Doc. E/C.12/ZAF/CO/1, 29 November 2018.

³⁸³ CESCR, *Concluding observations on Mali, op. cit.*, paras. 43-44; CESCR, *Concluding observations on Argentina, op. cit.*, paras. 57-58; CESCR, *Concluding observations on South Africa, op. cit.*, paras. 37-38; CESCR, *Concluding observations on Germany, op. cit.*, paras. 11-14.

Chapter 5: Transitional Justice Mechanisms, ESCR and Corporate Accountability

Chapter 1 of this guide revealed that when States and international actors develop and implement transitional justice strategies, ESCR have not typically been taken on board, be it for corporate accountability generally or for ESCR abuses. One commentator has remarked that:

“the prevailing assumption seems to be that truth commissions, human rights trials and reparations programs are meant to engage mainly, if not exclusively, with civil and political rights violations that involve either physical integrity or personal freedom, and not with violations of economic and social rights, including such crimes as large-scale corruption and despoliation”.³⁸⁴

Human rights defenders of course have often had other priorities and it must be noted that ensuring accountability and access to justice for human rights violations and abuses of any kind have generally been a struggle for human rights advocates, with results patchy at best, and impunity more often than not the rule.

In recent years transitional justice efforts and practices have begun to evolve toward a more fulsome approach to human rights. As noted above, the division of human rights into classes of civil and political rights and economic social and cultural rights is artificial, as any fundamental conceptual distinction is superficial. More importantly, particular conduct giving rise to violations and abuses of rights often are compound, engaging violations of both ESCR and CPR. In situations of armed conflict, they may also entail violations of international humanitarian law: “For instance, an armed assault by a ...military force on a human settlement may involve both violations of the right to life and right to be free from ill-treatment. Concomitantly, they may involve unlawful attacks on civilian infrastructure [in violation of IHL], involving forced evictions in violation of the right to housing, and damage to water supplies and agriculture, violating the right the food or damage to school facilities undermining the right to education”.³⁸⁵

In recognition of this reality, an increasing acceptance that violations of civil and political rights cannot be separated from ESCR violations, including after armed conflict and other situations of crisis, now pervades international approaches to transitional justice, leading to

³⁸⁴ Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?”, in *The International Journal of Transitional Justice*, Vol. 2, 2008, pp. 310–330.

³⁸⁵ Ashfaq Khalfan & Ian Seiderman, “Extraterritorial human rights obligations: wider implications of the Maastricht Principles and the continuing accountability challenge”, in *Challenging Territoriality In Human Rights Law, Building Blocks for a Plural and Diverse Duty-Bearer Regime*, W. Vandenhole (éd.), Routledge, London, 2015, available at <https://www.taylorfrancis.com/books/e/9781315756035>.

an expansion of efforts by transitional justice practitioners in civil society, governments, and international organizations³⁸⁶ to gear transitional justice mechanisms and measures towards closing the impunity gap for a range of human rights violations and abuses.³⁸⁷

Having identified the legal framework guiding the interaction between ESCR and business and human rights standards in Chapter 4, this chapter turns to the question of how certain transitional justice mechanisms have approached ESCR violations particularly as they relate to businesses' actions and omissions. Below are illustrative examples of how transitional justice mechanisms in some countries have approached the issue of corporate accountability for human rights violations, with a particular focus on ESCR, and the attendant limitations and accountability gaps.

An analysis of the law and standards relating to ESCR and business and human rights will assist government, civil society organizations and corporate entities by providing guidance on how States and international organizations which whom they cooperate may ensure the effective inclusion of ESCR violations as they relate to businesses in transitional justice measures and mechanisms.

All human rights, including ESCR, are relevant to all transitional justice measures and mechanisms. Moreover, businesses' impact on ESCR rights is engaged in each and every transitional justice context, mechanism and measure. Nevertheless, the illustrative examples provided focus on two key transitional justice mechanisms: truth commissions and judicial actions. Government, civil society stakeholders and business entities are advised to remain wary of and ensure the compliance with ESCR and business and human rights standards in *all* transitional justice mechanisms. This is legally required by the norms set out in Chapter 1 (transitional justice), Chapter 2 (ESCR) and Chapters 3-4 (business and human rights).

Truth Commissions

From Chapter 2, it will be recalled that Truth Commissions can generally be broadly defined by the following characteristics:

- “(1) focus on the past, rather than ongoing events;
- (2) investigates a pattern of events that took place over a period of time;

³⁸⁶ See, for example, efforts of the ICJ to ensure protection and fulfilment of ESCR in the post conflict in Nepal. ICJ *Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes* (2010) available <https://www.icj.org/wp-content/uploads/2012/09/Nepal-Fundamental-Rights-Committee-ESCR-rights-analysis-brief-2010-eng.pdf>.

ICJ *The International Commission of Jurists' Submission to the UB Committee On Economic, Social And Cultural Rights In Advance Of The Examination Of Nepal's Third Periodic Report Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights* (2014) available: <https://www.icj.org/wp-content/uploads/2014/11/Nepal-CESCR53-LegalSubmission-2014-EN.pdf>.

³⁸⁷ *Ibid.* note 7.

- (3) engages directly and broadly with the affected population, gathering information on their experiences;
- (4) is a temporary body, with the aim of concluding with a final report;
- (5) is officially authorized or empowered by the state under review".³⁸⁸

These broad categories necessarily engage the consideration of both the CPR and ESCR, and the conduct of businesses, not just State conduct. The UN Secretary-General Guidance Note on the UN Approach to Transitional Justice has indicated that each truth commission is a "unique institution".³⁸⁹ Regardless of such uniqueness and context it remains important for States to ensure that the acts and omissions of all entities (State and non-State) who may have infringed rights are considered and that all harms requiring remedy and reparation (including infringements on ESCR) are taken into account.

Timor-Leste

The Timor-Leste Commission for Reception, Truth and Reconciliation is an early example of a transitional justice mechanism that took both ESCR violations and violations of all human rights by business entities into account. The twenty-four yearlong (1975-1999) Indonesian repressive invasion and occupation of Timor-Leste was marked by systematic gross human rights violations of both ESCR and CPR. Subsequently, in 2001, the country formed a Commission for Reception, Truth and Reconciliation. The Commission worked from 2002 until it was dissolved in December 2005, after handing over its detailed report to the President.

The necessity for a dual focus on a range of violations, including violations of the rights to food and health, is evidenced by the Commission's analysis of "fatal violations".³⁹⁰ During the relevant period, the Commission estimated that the total number of conflict-related deaths was of 102 800. Of these deaths an estimated 18 600 were a result of deliberate killings typically in the form of extrajudicial executions, while an estimated 84 200 deaths were "due to hunger and illness".³⁹¹ In addition, conflict resulted in damage to 77 percent of health facilities.³⁹²

Case Study: Timor-Leste Commission for Reception, Truth and Reconciliation

In June 2000, a workshop to consider the establishment of Transitional Justice mechanisms was organized between the East Timorese civil society, the Catholic Church and community leaders, with the support of the United Nations Transitional Administration in East Timor (UNTAET). The creation of a Commission was then proposed to the National Congress of the CNRT (*Conselho Nacional da Resistencia Timorese*), which unanimously endorsed it. A Committee composed of CNRT representatives, East Timorese human rights NGOs, women's

³⁸⁸ *Ibid.*, pp. 11-12.

³⁸⁹ *Guidance Note of the Secretary-General, op. cit.*, p. 8.

³⁹⁰ Commission for Reception, Truth and Reconciliation in East Timor (CAVR), *Chega! Final Report*, 2005, p. 488.

³⁹¹ *Ibid.*

³⁹² Evelyne Schmid, *Socio-Economic and Cultural Rights and Wrongs after Armed Conflicts, op. cit.*, p. 242.

groups, youth organizations, the Catholic Church, the Association of ex-Political Prisoners, Falintil, the UNTAET and UNHCR was formed.³⁹³ In July 2001, UNTAET Regulation 2001/10 established the Commission as an independent authority, not subject to the control or direction of any government official.³⁹⁴

The mandate of the Commission was to establish the truth regarding human rights violations committed in East Timor throughout its occupation. Part of its functions was to: investigate the nature, causes and extent of human rights violations (including their antecedents, circumstances, factors, context, motives and perspectives); to determine which persons, authorities, institutions and organisations were involved; and to determine whether human rights violations were the result of deliberate planning, policy or authorisation on the part of a State or any of its organs, or of any political organization, militia group, liberation movement, or other group or individual.³⁹⁵

The mandate clearly included the consideration of ICESCR protected rights.³⁹⁶ The Commission's mandate also included in its definition of human rights violations those "violations committed by both State and non-State actors".³⁹⁷

In keeping with this mandate, the report of the Commission sets out international law relevant to the Commission's considerations.³⁹⁸ The report makes reference to CESCR's general comments and concluding observations repeatedly.³⁹⁹ It dedicates a full chapter to violations of ESCR, including the rights to an adequate standard of living, health, and education, linking such violations directly to Indonesian policies and practices. The report also makes specific recommendations with regard to ESCR. However, despite this thorough treatment of ESCR, the Commission's design and application of a reparation framework was limited to violations of civil and political rights.⁴⁰⁰

Nevertheless, the Commission acknowledges that generally "powerful business interests and monopolies" have had a "damaging impact on the everyday lives of East Timorese".⁴⁰¹ It singled out for particular scrutiny "business corporations who supported the illegal occupation of Timor-Leste" and had therefore "indirectly allowed violations to take place",⁴⁰² as well as "business corporations which profited from the sale of weapons to Indonesia"⁴⁰³ requiring both to contribute towards reparations for victims of human rights violations and abuses. More generally, any businesses that "profited from war and related activities" should make contributions to a reparations trust fund.⁴⁰⁴ The Commission also recommended various anti-corruption measures involving the "private sector" including the need to "develop an anti-corruption code of conduct for business"⁴⁰⁵ and empower civil society to "hold[] business accountable".⁴⁰⁶

Liberia

The Liberian Truth Commission, one of the first of such commissions to directly include

³⁹³ CAVR, *Chega! Executive Summary*, 2005, p. 18, available at <https://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf>.

³⁹⁴ United Nations Transitional Administration in East Timor, *Regulation 2001/10*, UN Doc. UNTAET/REG/2001/10, 13 July 2001, Section 2.2.

³⁹⁵ United Nations Transitional Administration in East Timor, *Regulation 2001/10*, UN Doc. UNTAET/REG/2001/10, 13 July 2001, Section 13.1.a.ii to 13.1.a.iv.

³⁹⁶ CAVR, *Chega! Final Report*, *op. cit.*, p. 77.

³⁹⁷ *Ibid.*, p. 76.

³⁹⁸ *Ibid.*, pp. 102-103.

³⁹⁹ *Ibid.*, see footnotes 85-89, 192-94, as examples.

⁴⁰⁰ CAVR, *Chega! Final Report*, *op. cit.*, pp. 2618-2619.

⁴⁰¹ *Ibid.*, p. 355.

⁴⁰² *Ibid.*, p. 2619.

⁴⁰³ *Ibid.*, p. 2576.

⁴⁰⁴ *Ibid.*, p. 2610.

⁴⁰⁵ *Ibid.*, pp. 2592-2593.

⁴⁰⁶ *Ibid.*, p. 2588.

economic crimes and ESCR within its mandate, identified ESCR violations as a root cause of the conflict. However, it failed to consider binding human rights law and standards either relating to ESCR or to business and human rights. This had the result of significantly limiting the Commission's ability to establish the truth and ensure effective recommendations and reparation.

Case Study: Liberian Truth Commission

In Liberia, the 2005 Act to Establish the Truth and Reconciliation Commission (TRC) mandated the Commission to investigate gross human rights violations, violations of humanitarian law and "economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts" and determining those responsible.⁴⁰⁷

The Commission defined economic crimes "as any prohibited activity aimed at generating economic gain by a State or non-State actor whose economic activities fuelled the conflict, or contributed to gross human rights and/or humanitarian law violations, or who benefited economically from the conflict; or any activity of a public or private person aimed at generating illicit profit by engaging in conduct such as tax evasion, money laundering, looting, human trafficking and child labour".⁴⁰⁸ Although some of these, such as child labour and human trafficking, constitute clear ESCR violations, they were classified only as "economic crimes" by the Commission.

The Commission considered diverse economic crimes and their perpetrators (many of them businesses) in different economic sectors such as timber, logging and mining; it also looked at the role of corruption. In its analysis, it went as far as to appreciate that the State had played a role in these crimes and determined that "all Governments of the Republic of Liberia from ... 1979 to 2003 are responsible for the commission of those human rights violations including violations of international humanitarian law, international human rights law, war crimes, egregious domestic laws violations ... and economic crimes".⁴⁰⁹ It concluded that: "The major root causes of the conflict are attributable to poverty, greed, corruption, limited access to education, economic, social, civil and political inequalities; identity conflict, land tenure and distribution".⁴¹⁰

Despite this, the Commission did not take the opportunity to account for Liberia's responsibility under human rights law, even when some of the so-defined economic crimes also clearly amounted to human rights violations.⁴¹¹ The Commission failed to consider the application of international human rights law to non-State actors, clearly making findings identifying adverse impact of businesses on ESCR.⁴¹²

⁴⁰⁷ Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, 22 June 2005, available at <https://www.refworld.org/pdfid/473c6b3d2.pdf>.

⁴⁰⁸ Truth and Reconciliation Commission of Liberia, *Final Report, Vol. II, op. cit.*, Sect. 9.9.1.

⁴⁰⁹ *Ibid.*, p. 266.

⁴¹⁰ Truth and Reconciliation Commission of Liberia, *Final Report, Vol. I: Findings and Determinations*, 19 December 2008, p. 9, available at https://reliefweb.int/sites/reliefweb.int/files/resources/3B6FC3916E4E18C6492575EF00259DB6-Full_Report_1.pdf.

⁴¹¹ OHCHR, *Transitional Justice and Economic, Social and Cultural Rights, op. cit.*, p. 23.

⁴¹² Evelyne Schmid, "Liberia's Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice," in *PRAXIS: The Fletcher Journal of Human Security*, XXIV, 2009, pp. 13, where she concludes: "In short, the first volume of the report of the Liberian TRC exemplifies the tendency of transitional justice processes to marginalize ESCR. At the same time, the ongoing transitional justice experience of Liberia illustrates two arguments for abandoning this conceptual blind spot. First, international law obliges this action, and the Act establishing the Liberian TRC mandates the Commission to address violations of ESCR. Second, there are sound policy reasons to include ESCR in a transitional justice strategy."

Tunisia

The Tunisia Truth and Dignity Commission (Instance Vérité et Dignité, IVD) is a more recent example of a Transitional Justice mechanism with a mandate addressing ESCR among other human rights violations and abuses by business enterprises, some with human rights implications.

From 7 November 1987 to 14 January 2011, Tunisia was under the control of the regime of Zine El Abidine Ben Ali and his ruling party, the Constitutional Democracy Rally (Rassemblement Constitutionnel Démocratique). Throughout this period, as well as during the previous rule of Habib Bourguiba, many ESCR and other human rights violations were carried out along with other human rights violations.

In January 2011, the toppling of the Ben Ali regime marked the beginning of a wave of political and social changes in the Middle East and North Africa region, now commonly referred to as the “Arab Spring”.⁴¹³ Tunisia emerged as the most promising case of democratic transition among all of the countries that underwent a popular uprising. Following the fall of Ben Ali regime, on 23 October 2011 Tunisians elected, in their first democratic elections, the National Constituent Assembly (NCA). On 15 December 2013, the NCA adopted *the Organic Law on Establishing and Organizing Transitional Justice* (2013 Transitional Justice Law).⁴¹⁴ The 2013 Transitional Justice Law includes a broad definition of transitional justice⁴¹⁵ and of human rights violations and,⁴¹⁶ along with the IVD, it created various institutions with competence over violations that took place from 1 July 1955 until the date of its entry into force.

On 26 March 2019, after receiving more than 62 000 complaints from victims, the IVD published a five-volume report analyzing and exposing the institutional networks that facilitated the commission of human rights violations over the five decades preceding the 2013 Transitional Justice Law.⁴¹⁷ The report contains numerous recommendations for Tunisian authorities in relation to ESCR violations and abuses perpetrated by business actors.

⁴¹³ ICJ, *Achieving Justice for Gross Human Rights Violations in Tunisia*, Baseline Study, May 2018, p. 3.

⁴¹⁴ Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organization.

⁴¹⁵ Article 1 of the 2013 Transitional Justice Law defines transitional justice as an “integrated process of mechanisms and methods implemented to understand and deal with human rights violations committed in the past by revealing the truth, holding those responsible accountable, providing reparations for the victims and restoring their dignity in order to achieve national reconciliation, preserve and document the collective memory, guarantee the non-recurrence of such violations and allow the transition from an authoritarian state to a democratic system which contributes to consolidating human rights”.

⁴¹⁶ Article 3 of the 2013 Transitional Justice Law refers to “systematic infringements of human rights” committed by “organs of the State” or “groups or individuals who acted on its behalf or under its protection, even if they did not possess the quality or authority to act,” or by any “organized groups.”

⁴¹⁷ See <http://www.ivd.tn/%d8%aa%d8%b3%d9%84%d9%8a%d9%85-%d8%a7%d9%84%d8%aa%d9%82%d8%b1%d9%8a%d8%b1-%d8%a7%d9%84%d8%ae%d8%aa%d8%a7%d9%85%d9%8a->

Case Study: Tunisian Truth and Dignity Commission

The IVD's mandate included the investigation of ESCR violations, among other human rights violations.⁴¹⁸

In its final report, the IVD reported that it received 22654 complaints related to violations of the right to work and the right to just and favourable conditions of work,⁴¹⁹ 4308 complaints related to violations of the right to education,⁴²⁰ and 1613 complaints related to violations of the right to physical and mental health.⁴²¹ Further, the IVD investigated cases relating to violations of the right to a healthy environment,⁴²² of the right to housing,⁴²³ as well as of the right to privacy.⁴²⁴

In addition to ESCR violations, the IVD also investigated abuses perpetrated by business actors. These abuses related, for instance, to financial corruption, misuse of public funds, embezzlement and money laundering.⁴²⁵ Economic crimes, public maladministration and/or impropriety such as these examples illustrate commonly have a deleterious impact on human rights including ESCR.

In practice, the IVD's investigations suffered from lack of support from State institutions. Article 51 of the 2013 Transitional Justice Law requires State institutions to share information and evidence that could assist the IVD and mandates that documents and evidence should be given to the IVD directly at its request or that of the parties.⁴²⁶ Further, Article 54 of the same law adds that the principle of professional secrecy (or confidentiality) is not a valid reason to refuse to cooperate with a request for information or evidence issued by the IVD; it further adds that persons who disclose confidential documents to the IVD cannot be sanctioned for doing so.⁴²⁷ However, based on available information, practice shows that the IVD's access to State archives was limited.⁴²⁸

%d9%84%d9%84%d9%87%d9%8a%d8%a6%d8%a9-%d8%a5%d9%84%d9%89-%d8%a7%d8%a6%d8%aa%d9%84/

⁴¹⁸ Article 3 of the 2013 Transitional Justice Law. The 2013 Law entrusted the IVD with broad investigative powers. In order to enable the IVD to accomplish its mandate, article 40 granted the IVD a number of powers, including: (i) the power to investigate (using the French term "instruction," which under the CCP, refers specifically to the role of an investigative judge) all violations using all necessary means, including accessing archives and summoning any person it deems necessary or of assistance; (ii) the power to request the assistance of public officials to execute tasks related to investigation, instruction and protection; (iii) the power to search public and private places and seize documents, providing it with "the same powers as the judicial police, with the accompanying duty to safeguard procedural guarantees"; (iv) recourse to any other procedure or mechanism that may contribute to revealing the truth. The modalities of the IVD's investigative power were detailed in the IVD Investigation Committee Procedures Guide, which was adopted by the IVD's Council and constituted a set of internal rules of procedure. See article 6 of the IVD Investigation Committee Procedures Guide, issued on the basis of IVD's Decision No. 6 of 20 January 2016, available at: <https://www.docdroid.net/gShNixt/-pdf.html>, (last accessed 11 December 2019).

⁴¹⁹ IVD Final Report, volume no. IV "Reparation and rehabilitation", p. 177.

⁴²⁰ IVD Final Report, volume no. IV "Reparation and rehabilitation", p. 171. The report notes that the complaints related to violations of the right to education, represented 10% of the total amount of violations investigated by the IVD.

⁴²¹ IVD Final Report, volume no. IV "Reparation and rehabilitation", p. 173.

⁴²² IVD Final Report, Executive summary, p. 515.

⁴²³ IVD Final Report, Executive summary, p. 230.

⁴²⁴ IVD Final Report, volume no. IV "Reparation and rehabilitation", p. 165.

⁴²⁵ IVD Final Report, Executive summary, pp. 341-343.

⁴²⁶ Article 51 of the 2013 Transitional Justice Law.

⁴²⁷ Article 54 of the 2013 Transitional Justice Law.

⁴²⁸ Sihem Bensedrine, Interview with Justice Info Net on 18 April 2019, <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/in-depth-interviews/41158-sihem-bensedrine-france-and-the-world-bank-should-compensate-tunisian-victims.html> (Last accessed 11 December 2019).

Along with investigations, the IVD's mandate included also the establishment of an internal Arbitration and Conciliation Committee (ACC).⁴²⁹ The ACC was entrusted with reviewing cases and issuing judgments with respect to human rights violations, with the approval of victims and in accordance with principles of justice and fairness, and the recognized international standards, regardless of statute of limitations.⁴³⁰ As noted in the IVD's Final Report, the ACC received requests for reconciliation in relation to ESCR violations and other financial crimes.⁴³¹ According to the IVD's Final Report, 13 arbitration and conciliation agreements were concluded by the end of its mandate and two reconciliation judgments related to financial crimes were issued.⁴³²

This limited performance has raised concerns about the ACC potential acting as a means for perpetrators to escape judicial accountability.⁴³³ Approaches to the ACC by perpetrators may also be considered problematic as they do not necessarily include meaningful participation of victims of violations

Tunisia's ongoing transitional justice process therefore appears to have accepted, in principle, the need to address to some extent ESCR rights. Whether it has effectively contributed to achieving this aim in any significant way remains to be seen.

Tunisia is a party to ICESCR and it last submitted a report to CESCR in 2015 after the establishment of the IVD.⁴³⁴ While its report to CESCR refers to the "revolution of freedom and dignity" which "toppled the former regime", it makes no reference to the IVD work at all.⁴³⁵

Various other legal reforms in Tunisia have addressed ESCR. For example, the Constitution, adopted in 2014, provides for a variety of ESCR, including: work-related rights (Articles 36, 37 and 40); health (Article 38); education (Article 39); water (Article 44); and healthy environment (Article 45). It also requires the State to broadly "seek to achieve social justice, [and] sustainable development" (Article 12) and explicitly affirms that Tunisia's "natural resources belong to the people of Tunisia" (Article 13).⁴³⁶

⁴²⁹ Article 45 of the 2013 Transitional Justice Law. See also IVD Final Report, Executive Summary, p. 456.

⁴³⁰ Article 45 of the 2013 Transitional Justice Law. Under article 46 of the 2013 Transitional Justice Law, requests for arbitration and reconciliation agreement could be submitted by: (i) the victim including the affected state; (ii) the party to which the violation is imputed on condition of the victim's approval; (iii) with the State's approval in cases of financial corruption, if the case is related to public funds or to funds of institutions that receive State contributes to their capital, directly or indirectly; and (iv) referred by the National Anti-Corruption Commission based on an arbitration and reconciliation agreement between the involved parties.

⁴³¹ IVD Final Report, Executive summary, p. 459.

⁴³² IVD Final Report, Executive summary, p. 462.

⁴³³ Fondation Hirondelle, *Tunisia : The Price of Economic Reconciliation in the Transitional Justice Process*, available at 24 August 2016, <https://www.justiceinfo.net/en/truth-commissions/28851-tunisia-the-price-of-economic-reconciliation-in-the-transitional-justice-process.html> (accessed on 15 November 2019).

⁴³⁴ CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Third report of States parties due in 2000, Tunisia*, UN Doc. E/C.12/TUN/3, 30 June 2015.

⁴³⁵ *Ibid.*, para. 5.

⁴³⁶ Constitute Project, *Tunisia's Constitution of 2014*, March 2015, available at <https://issafrica.org/ctafira/uploads/TunisiaConstitution2014Eng.pdf>. For some criticism of the constitution from an IHRL perspective, see ICJ, *The Tunisian Constitution in light of International Law and Standards*, available at <https://www.icj.org/wp-content/uploads/2014/01/ICJ-Tunisian-Constitution-Position-Paper-31-01-14.pdf>. For some broader legal reforms required to ensure access to justice in Tunisia, see ICJ, *Achieving Justice for Gross Human Rights Violations in Tunisia, Baseline Study*, May

Despite these reforms, however, most recently, there have been some pushbacks from Tunisian authorities. For instance, in 2017, the Parliament adopted the Organic Law on the Administrative Reconciliation,⁴³⁷ which provided for the establishment of a Reconciliation Commission and removed from the IVD's mandate the duty to investigate certain economic crimes, thereby effectively ensuring amnesty for some categories of corrupt former officials.⁴³⁸

Mauritius

The consideration of ESCR violations as relevant in the transitional justice environment also opens up the possibility of Truth Commissions considering extremely long-term and systemic violations of human rights. This was the case in Mauritius, in which a Truth Commission was initiated to investigate the long-standing and on-going impact of slavery and indentured labour on Mauritian society in 2009.

Case Study: Mauritius created a Truth and Justice Commission

In 2009, the Parliament of Mauritius created a Truth and Justice Commission to examine slavery and indentured labour practices that "began 371 years earlier, changed in nature after two hundred years, and whose impact on society was still felt to the present day".⁴³⁹ The mandate of the Mauritius Truth and Justice Commission was unique because of its explicit focus on socio-economic abuses spanning over 370 years, the longest period that a truth commission has ever attempted to cover.⁴⁴⁰ This long lens on Transitional Justice is consistent with the approach of the African Union to Transitional Justice described in Chapter 1.

The final report examines the laws and economic structures that protect the sugar industry and land ownership by "the traditional economic elite who have today been joined by members of the state bureaucracy, politicians and the new business community".⁴⁴¹ The report finds that there is "a continuity in the economic system.. which produces exclusion, poverty and unemployment".⁴⁴² It also makes far-reaching observations and recommendation regarding education, healthcare and access to housing and land.

The report recommends the establishment of an affirmative action program and anti-discrimination unit to combat inequality and institutionalized racism in Mauritian society.⁴⁴³ It also recommends that the Mauritian government seek reparation from "historical slave trading nations, namely, the United Kingdom and France" in order to ensure the

2018, pp. 3-7, available at <https://www.icj.org/wp-content/uploads/2018/05/Tunisia-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>, pp. XX

⁴³⁷ Law 62-2017 of 24 October 2017 on the reconciliation in the administrative sector.

⁴³⁸ Under article 2 of the Law on administrative reconciliation, public officials responsible for corruption in accordance with articles 82 and 96 of the Criminal Code are entitled to amnesty. The Law has been severely criticized. See, i.e., Human Rights Watch, *The Law That Could be the Final Blow to Tunisia's Transition*, 23 May 2017, available at <https://www.hrw.org/news/2017/05/23/law-could-be-final-blow-tunisiass-transition> (accessed on 11 December 2019).

⁴³⁹ Priscilla Hayner, *Unspeakable Truths*, op. cit., p. 70.

⁴⁴⁰ USIP, *Truth Commission: Mauritius*, 9 February 2012, available at <http://www.usip.org/publications/truth-commission-mauritius> (accessed on 15 November 2019)

⁴⁴¹ Truth and Justice Commission, *Report, Volume I*, p. 4.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*, p. 403

"rehabilitation and reconstruction of communities and settlements where slave descendants are in the majority".⁴⁴⁴

Mauritius is party to the ICESCR and submitted state reports to CESCR in the year that the Truth Commission was created (2009), as well as more recently in the aftermath of the publication of the Commission's report (2017).⁴⁴⁵ No direct mention is made in either of these State reports of the Commission or its recommendations, the legacies of slavery, indentured labour and colonialism, or their impact on the realization of ESCR in Mauritius today.

Interestingly, in February 2019, the International Court of Justice issued an advisory opinion in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In its virtually unanimous opinion, the Court concluded that the process of the decolonization of Mauritius "was not lawfully completed" in 1968 because of the "unlawful detachment" of the Chagos Archipelago by the United Kingdom at the time.⁴⁴⁶ In order to use the island as a military base, the United Kingdom leveraged its position as colonial power to coerce Mauritius to assist in the forcible eviction of all the islands inhabitants during its transition to independence. This amounts to clear violation of the ESCR of the inhabitants of island and inhabitants of Mauritius's other islands more generally.

Judicial mechanisms and measures: domestic, foreign and international

Brazil

In Brazil, the National Truth Commission (NTC), which was formed in September 2011, ultimately empowered victims of human rights violations and abuses to file a civil suit against business entities for the consequences of their operations implicated by the Commission's report.

The Truth Commission had been initiated to investigate systemic and widespread human rights violations committed by security agents, particularly against trade unionists and political activists, during a military dictatorship between 1964 and 1985. The mandate of the NTC was soon extended to include human rights violations spanning the longer period of 1946-1988. Unlike two other transitional justice mechanisms initiated in Brazil (the CEMDP and the Amnesty Commission), the NTC was the first mechanism *independent* of military and executive control.⁴⁴⁷

⁴⁴⁴ *Ibid.*, p. 21.

⁴⁴⁵ CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Fifth periodic reports of States parties due in 2015, Mauritius*, UN Doc. E/C.12/MUS/5, 13 September 2017.

⁴⁴⁶ International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory opinion*, 25 February 2019, para. 174, available at <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>.

⁴⁴⁷ Marcelo Torelly, "Assessing a Late Truth Commission: Challenges and Achievements of the Brazilian National Truth Commission", in *International Journal of Transitional Justice*, 2018, pp. 9-12.

Case Study: Brazilian National Truth Commission

According to the final report of NTC, national and foreign companies played an active role in the repressive apparatus of the military regime. Some companies “actively supported the armed forces’ coup” leading to the military dictatorship and later “cooperated with and financed the dictatorship’s intelligence agencies”.⁴⁴⁸ Moreover, the NTC found that “support provided by companies and businesspeople for the creation and operation of structures used for the practice of serious human rights violations” including the “massacres of workers”.⁴⁴⁹

In total the NTC reveals that, in the context of the serious human rights violations it documented, 434 persons were killed by the authoritarian regime, though the complicity of the judicial system in Brazil with the regime “allowed political enemies to be prosecuted, imprisoned and expelled from the country in formal ways”.⁴⁵⁰ The Commission also acknowledged that at least 8’350 people from indigenous communities were killed during the military rule due to the direct action or omission of government agents⁴⁵¹ and recommended the initiation of a separate commission specifically to investigate the violation of indigenous people rights although this Commission was not ultimately established.⁴⁵²

The NTC also drew on a report of the Archdiocese of São Paulo highlighting the fact that military actions to fight left-wing groups were “financed by multinationals such as Ford, General Motors, and bankers”.⁴⁵³ All in all, the NTC’s report “included the names of 78 national and international businesses and entrepreneurs who collaborated with the regime”.⁴⁵⁴ Such published information formally recognized and legitimated by the NTC’s report lead several ex-employees of Volkswagen, for example, to launch a civil suit against Volkswagen alleging that they had been arrested and tortured at the Volkswagen factory.⁴⁵⁵

Finally, the Commission recommended that the “private files of companies and individuals that could help further the investigation of the serious human rights violations that occurred in Brazil should be considered of public and social interest”.⁴⁵⁶ Such further investigations may include criminal prosecution or civil litigation.

South Africa

The South African Truth and Reconciliation Commission, initiated as part of the process of constitutional reform between *apartheid* and constitutional democracy in South Africa, is an example of a mechanism whose insufficient focus on business violations of human rights and impacts on ESCR violations has resulted in social unrest, the development of civil society-initiated commissions and litigation.

⁴⁴⁸ PAX, *Peace, everyone’s business! Corporate accountability in transitional justice: lessons for Colombia*, Volume II, Texto 8, pp. 317–321.

⁴⁴⁹ Comissão Nacional da Verdade, *Relatório, Volume I, Parte V, Conclusões e Recomendações*, para. 45 (b); PAX, *Peace, everyone’s business*, op. cit., p. 76 citing Comissão Nacional da Verdade, *Relatório*, Volume II, Textos temáticos, Texto 8, p. 330.

⁴⁵⁰ Marcelo Torelly, *Assessing a Late Truth Commission*, op. cit., p. 3.

⁴⁵¹ CNV, *Relatório, Volume 2, Texto 5, Violações de Direitos Humanos dos Povos Indígenas*, p. 205, available at <http://cnv.memoriasreveladas.gov.br/images/pdf/relatorio/Volume%202%20-%20Texto%205.pdf>.

⁴⁵² CNV, *Relatório, Volume I, Parte V, Conclusões e Recomendações*, paras. 5 and 45g.

⁴⁵³ CNV, *Relatório, Volume II, Textos temáticos, Texto 8*, p. 330.

⁴⁵⁴ CNV, *Relatório, Volume I, Parte V, Conclusões e Recomendações*, pp. 959–973.

⁴⁵⁵ PAX, *Peace, everyone’s business*, op. cit., pp. 34, 77; Deutsche Welle, *Brazil’s National Truth Commission alleges torture at Volkswagen do Brasil*, 13 December 2014, available at <https://www.dw.com/en/brazils-national-truth-commission-alleges-torture-at-volkswagen-do-brasil/a-18126692> (accessed on 15 November 2019). Other car companies such as Mercedes, Ford and Toyota are also mentioned.

⁴⁵⁶ CNV, *Relatório, Volume I, Parte V, Conclusões e Recomendações*, para. 54.

Case Study: South African Truth and Reconciliation Commission

The South African Truth and Reconciliation was initiated, in line with the South African Constitution, to “recognise the injustices of past” and “heal the divisions of the past” in order to “establish a society based on democratic values, social justice and fundamental human rights”.⁴⁵⁷ The Constitution itself includes a range of justiciable ESCR, drawing directly on the wording of the ICESCR.⁴⁵⁸ Despite signing ICESCR as early as 1994, South African only ratified it in 2015 and submitted its Periodic Report to CESCR for the first time in 2017.⁴⁵⁹ Consistent with CESCR’s jurisprudence in General Comment 24, South Africa’s Constitution also allows the range of ESCR to apply directly to private individuals and companies.⁴⁶⁰

The “injustices of the past” included both colonialism and apartheid, which included systemic racial segregation and structural economic deprivation based on race. Realization of ESCR, such as in respect of the rights to education, housing, health and work, were all determined by race. For example, 87 percent of land was reserved for the white minority who also benefitted almost exclusively from the exploitation of the country’s wide range of mineral resources.

Despite this context, the Truth and Reconciliation Commission focused almost exclusively on politically motivated violations of CPR. It did so by adopting “a narrow definition of gross human rights violations and focus on isolated occurrences of physical violence against individuals”.⁴⁶¹ The TRC held “Business Hearings” and, perhaps uniquely among truth commissions, directly engaged with business actors. The three days of hearings involved “mining companies, insurance companies, historians, campaign groups and arms manufacturers” who were gathered by the TRC to discuss “the business sector’s role in human rights abuses committed under apartheid”.⁴⁶² However, the TRC did not use its subpoena powers to forced business to participate at the hearings and had no power to compel businesses to take any action whatsoever.⁴⁶³

The Commission ultimately recommended that the government consider the feasibility of a number of measures impacting on businesses including: “a wealth tax”; a “once off levy on corporate and private income”; a list of companies making a “once-off donation of 1% of [their] market capitalization”; a “retrospective surcharge on corporate profits extending” to a date to be determined; a “surcharge on golden handshakes given to senior public servants [of the apartheid government] since 1990; and the “suspension of all taxes on land and other material donations to formal disadvantaged communities”.⁴⁶⁴

Very few if any of these measures have been adopted or secured by the government.

As a consequence of the widely perceived deficiencies in the South African TRC process, South Africa provides a clear example of non-State initiated and long-term Transitional

⁴⁵⁷ South African Constitution, Preamble.

⁴⁵⁸ South African Constitution, Articles 23 to 29. Some exceptions included in ICESCR and not the in the South African Constitution include the right to work and the right to an adequate standard of living.

⁴⁵⁹ CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Initial reports of States parties due in 2017, South Africa*, UN Doc. E/C.12/ZAF/1, 7 June 2017.

⁴⁶⁰ South African Constitution, Article 8. CESCR, *General Comment No. 24, op. cit.*, para. 4 and footnote 16.

⁴⁶¹ Geeta Koska, “Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission”, in *Restorative Justice*, Vol. 4:1, 2016, p. 50.

⁴⁶² *Ibid.*, p. 51.

⁴⁶³ *Ibid.*

⁴⁶⁴ Truth and Reconciliation Commission of South Africa, *Report, Volume 5*, 1998, pp. 318-319, available at <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>.

Justice mechanisms and measures. Examples of such mechanisms are not uncommon and may include, as examples so-called “traditional” or “informal” transitional justice mechanisms (such as in Uganda and Sierra Leone) and localized community-initiated mechanisms (such as in Colombia).

South Africa: Peoples Tribunal on Economic Crime

In 2015, nearly two decades after the completion of the work of the South African TRC, a coalition of civil society organizations initiated the Peoples Tribunal on Economic Crime, to investigate, amongst other things, the corporate violations of economic sanctions on apartheid.

The Tribunal’s high-profile commissioners included a retired Constitutional Court judge, Zak Yacoob and the former UN High Commissioner for Human Rights, Navi Pillay. The Tribunal’s recommendations included in its widely publicized written report, with public hearings, specific reference to corporate entities for violations of sanctions.

The Tribunal, lacking its own State-provided powers, recommended further investigations by the government of South Africa and the independent National Prosecuting Authority which is responsible for all public criminal prosecution.⁴⁶⁵

Although “state-sanctioned transitional justice mechanisms often lack a component of corporate accountability”, an Oxford study found that “22 out of 39 truth commissions (56 percent) or 19 of the 30 countries (63 percent) named specific companies, business associations, or individual members of the business community involved in human rights violations”.⁴⁶⁶ The commissions who did so were almost exclusively countries in Latin America, Africa and Asia. This generally provides judicial bodies with initial areas of investigation in view of future litigation. The study indeed revealed that 22 of the named companies later faced judicial action in domestic and foreign criminal and civil courts.⁴⁶⁷ Such identification by truth commissions is a significant step in recognizing non-State business actors’ responsibility for human rights abuses. However, public awareness and visibility of these findings remains quite low, partly due to the fact that truth commissions rarely include corporate accountability and remedy mechanisms for corporate abuses in their recommendations. This, it has been correctly observed, “suggests a kind of governance gap, in which recognition of human rights violations by business exists without corresponding mechanisms to support victims’ rights to redress and remedy”.⁴⁶⁸

⁴⁶⁵ People’s Tribunal on Economic Crime in South Africa, *Interim Findings of the People’s Tribunal on Economic Crime*, 7 February 2018, available at <https://corruptiontribunal.org.za/site/wp-content/uploads/2018/02/Peoples-Tribunal-Preliminary-Findings-1.pdf>.

⁴⁶⁶ PAX, *Peace, everyone’s business*, *op. cit.*, pp. 32-33.

⁴⁶⁷ *Ibid.*, p. 33.

⁴⁶⁸ *Ibid.*, p. 35.

Colombia

The Colombian transitional justice process illustrates the important and extensive role that the judiciary may play in transitional justice processes. Such roles may extend beyond being venues for the adjudication of prosecution of perpetrators.

Case Study: Colombian judicial interaction with transitional justice mechanisms

The Colombian judiciary has had an unusually significant role to play in repeated and continuous transitional justice processes undertaken in the country as a result of long-lasting internal armed conflict within Colombia. The conflict has resulted in wide ranging violations of human rights and international human rights law including enforced disappearances, extra-judicial killings, torture and ill-treatment, including rape and other sexual violence, forced displacement, and forced recruitment of minors to bear arms.

There have been various transitional justice legal processes and mechanisms following from conflict in Colombia. Legislative enactments directed toward transitional justice include: the Justice and Peace Law (Law 975 of 2005); the Victims and Land Restitution Law (Law 1448 of 2011); the Legal Framework for Peace (Legislative Act 1 of 2012); and the Comprehensive System of Truth, Justice, Reparation and Non-Repetition ("SIVJNR", Legislative Act 01 of 2017). For a report on the implementation of the Special Jurisdiction for Peace, of which the SIVJNR is an important part see the ICJ's report "*Colombia: The Special Jurisdiction for Peace, Analysis One Year and a Half After its Entry into Operation*".⁴⁶⁹

In 2011 the Colombian Peace and Justice Court, a tribunal set up as a transitional justice instrument but operating within the ordinary jurisdiction of Colombian Courts, reduced the sentences of leaders which were found to be guilty of war crimes in exchange for confessions of truth and payment of reparation. In *El Aleman*, the Peace and Justice Court held to account paramilitary leader El Aleman for conflict-related crimes. Though these courts' central mandate is to assess the criminal responsibility of individuals involved in paramilitaries, in *El Aleman* the judge ordered the Attorney General of Colombia to investigate Chiquita Banana (a multinational banana company) and "take measures to seize its assets in the country".⁴⁷⁰

Colombian Courts have struck down provisions of the Colombian Code of Criminal Procedure severely limiting victims' rights in criminal proceedings⁴⁷¹ and upheld the constitutionality of the Peace and Justice Act, which allowed for reduced sentences for human rights violations in order to advance the cause of peace and transitional justice. (It also requiring compliance of the Act's provisions with certain principles of justice because "peace does not justify everything").⁴⁷² Importantly, for example, the Court held that the Act did not "establish

⁴⁶⁹ ICJ "Colombia: The Special Jurisdiction for Peace, Analysis One Year and a Half After its Entry into Operation Executive Summary" (2019) available in English at <https://www.icj.org/wp-content/uploads/2019/09/Colombia-Jurisd-para-la-paz-Exec-Summary-PUBLICATIONS-Reports-Fact-finding-mission-report-2019-ENG.pdf>. Full report in the process of translation from Spanish to English at the time of publication and is available in Spanish: <https://www.icj.org/wp-content/uploads/2019/06/Colombia-Jurisd-para-la-paz-PUBLICATIONS-Reports-Fact-finding-mission-report-2019-SPA.pdf>.

⁴⁷⁰ Ruben Carranza, *Transitional Justice, Corporate Responsibility and Learning from the Global South*, 28 April 2015, available at <http://jamesgstewart.com/transitional-justice-corporate-responsibility-and-learning-from-the-global-south/>.

⁴⁷¹ Colombian Constitutional Court, *Sentencia C-228/02, Demanda de inconstitucionalidad contra el artículo 137 de la Ley 600/00 Código de procedimiento penal*, 2 April 2002, translation accessible in Manuel Espinosa and David Landau, *Colombian Constitutional Law*, op. cit., p. 214.

⁴⁷² Colombian Constitutional Court, *Sentencia C-370/06*, translation accessible in Manuel Espinosa and David Landau, *Colombian Constitutional Law*, op. cit., pp. 218-219.

necessary and sufficient judicial mechanisms” to ensure the truth is revealed and the conflict resolved and understood and therefore ordered its revision.⁴⁷³

In another case, the Court also found the law unconstitutional to the extent that it did not require paramilitaries to reveal the locations of persons who were subject to “forced disappearances” in order to receive shorter sentences.⁴⁷⁴

Moreover, the Constitutional Court of Colombia has had significant involvement in guiding the transitional justice processes, including the constitutionality and compliance with international human rights law of legislated transitional justice processes. In so doing, drawing on international and regional human rights law sources, in one case decided in 2013, for example, it detailed the minimum guarantees that must be provided to victims:

“[A]ll victims must receive at minimum the following guarantees:

- (i) transparency in the process of selection and prioritization;
- (ii) an investigation that is serious, impartial, effective, and carried out in a reasonable time and with their participation;
- (iii) the existence of a recourse to challenge decisions on selection and prioritization,
- (iv) specialized assistance;
- (v) the right to truth, which in the event of a case not being prioritized should be guaranteed through non-criminal judicial means and non-judicial means;
- (vi) the right to reparations; and
- (vii) the right to know where to find the rest of their family members”.⁴⁷⁵

In this and similar ways and “in the process of implementing international norms” on transitional justice, Colombian Courts have “translated and adapted them in light of the particularities of the Colombian context”.⁴⁷⁶ This has result in a “dialogue” within Colombia about the fact that “international norms and values must be interpreted in light of the pressing needs of Colombian society”.⁴⁷⁷

Colombia is party to ICESCR, with its last report to CESCR having been submitted in 2016. The report deals with special measures taken to alleviate ESCR violations caused by “armed conflict” in Colombia explicitly throughout.⁴⁷⁸ This detailed acknowledgment of the impact of conflict on ESCR is reflected in CESCR’s concluding observations, which take strongly into account the conflict and peace process in making recommendations for the fulfillment of Colombian’s obligations in terms of ICESCR.⁴⁷⁹ The CESCR also includes a specific section on business and human rights recommending, for example, that Colombia “establish effective mechanisms to guarantee the conducting of human rights due diligence by companies”.⁴⁸⁰ It emphasizes that, as “victims of armed conflict” are disproportionality impacted by poverty, “efforts to combat poverty” should consider them to be a “marginalized or disadvantaged group” pursuant to its ICESCR obligations.⁴⁸¹

⁴⁷³ *Ibid.*, p. 221.

⁴⁷⁴ *Ibid.*, p. 222 and footnote 6.

⁴⁷⁵ Colombian Constitutional Court, *Sentencia C-579/13, Demanda de inconstitucionalidad contra el artículo 1º del Acto Legislativo 01 de 2012 (parcial)*, 28 August 2013, translation accessible in Manuel Espinosa and David Landau’s “Colombian Constitutional Law: Leading Cases”, Oxford University Press, 2017, p. 235.

⁴⁷⁶ Manuel Espinosa and David Landau, *Colombian Constitutional Law*, *op. cit.*, p. 214.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Sixth periodic reports of States parties due in 2015, Colombia*, UN Doc. E/C.12/COL/6, 21 July 2016, paras. 27-32 (women’s ESCR); paras. 41, 90 (work); para. 103 (social assistance); para. 146 (food); para. 176 (housing and forced eviction); para. 178 (health); paras. 204, 218 (education).

⁴⁷⁹ CESCR, *Concluding observations on the sixth periodic report of Colombia*, UN Doc. E/C.12/COL/CO/6, 19 October 2017, paras. 7-8.

⁴⁸⁰ *Ibid.*, paras. 12-14.

⁴⁸¹ *Ibid.*, para. 47.

Argentina

The involvement of the Argentinian judiciary in ensuring transitional justice illustrates, on the other hand that focused judicial interventions may contribute significantly towards the achievements of transitional justice. In Argentina, for example, courts have adopted international human rights law informed interpretations of ordinary criminal law rules of “prescription” or “statute of limitations” and can retrospectively help assist the pursuit of Transitional Justice.

Case Study: Argentina – Innovative use of Domestic Law to ensure Corporate Accountability

As has been detailed in this Guide, the first challenge facing any victim of any human rights violations as a result of corporate activity is establishing a court’s jurisdiction. In addition to the hurdle of *forum non-conveniens* doctrines, rules of “statute of limitations” or “prescription” are common in domestic legal systems around the world. Such laws require claimants to come forward with their claims within a particular time frame. Failure to do so may have the effect of distinguishing their right to make such a claim in a court of law entirely.

Argentinian courts have found creative ways of interpreting domestic legislation in light of international human rights law standards in order to prevent victims of human rights violations and abuses from losing their right to claim in this manner. The following decisions relate to violations of CPR in the context of workers’ rights and therefore provide useful examples of the intersection between civil and political and social and economic rights.

In *Ingenieros*, the claimant sought financial compensation for her father’s enforced disappearance during military dictatorship. She argued that Techint SA, a company, was partly responsible for this disappearance and that they were liable to pay her compensation pursuant to Argentinian Labour Law. However, she was barred by a two-year statute of limitations on worker safety claims, that had expired. The Argentinian Appeals Court ruled in her favour and found that the Act’s specific statute of limitation did not apply to compensation claims “linked to crimes against humanity”, as defined in international human rights law. In *Siderca*, the Provincial Supreme Court reached a similar conclusion regarding the non-application of the statute of limitation in an enforced disappearance case.⁴⁸²

In *Vildoza*, an Argentinian court ruled that a law enacted in 2004 could apply to incident of alleged money laundering from the 1970s during Argentine dictatorship. The court agreed to hear a case related to the money laundering after accepting that profit from the illegal sale of real estate by the military continued to benefit military officials who initially illegally seized the property.⁴⁸³

Most recently, in 2018, an Argentinian court convicted and sentenced two former executives of a local Ford Motors plant for their role in the abduction and torture of workers during the military dictatorship. Evidence presented to the court suggested that the executives had provided the military with “lists, addresses and photo IDs of workers they wanted arrested

⁴⁸² Leigh A. Payne & Gabriel Pereira, *Corporate complicity in international human rights violations*, op. cit., pp. 10-12.

⁴⁸³ *Ibid.*

and even provided space for an illegal detention centre at the plant where the abductees could be interrogated".⁴⁸⁴ Employees were "kidnapped right off the assembly line" and "immediately fired by the company".⁴⁸⁵ Though these cases were initially brought against Ford in 1983, they were halted by various amnesty laws that were ultimately only repealed in 2003, a decision which was upheld by the Supreme Court of Argentina in 2005. Affected individuals have also indicated that they are now considering filing a civil suit against Ford in US Courts.

Researching Transitional Justice Mechanisms

Further information about transitional justice mechanisms can be found on the "Transitional Justice Database Project" (TJDP), which includes a wide range of information relating to corporate accountability for human rights violations in the context of transitional justice.

Further Information: Transitional Justice Database Project and Corporate Accountability:

Academics and practitioners from various institutions created the TJDP. They have also begun to analyze the data in the database and this has led to the accumulation and analysis of a wide range of materials on corporate accountability and transitional justice mechanisms from across the world.

The purpose of collaboration on corporate accountability is described by participants of the project itself as to identify and code cases of corporate complicity in human rights violations during periods of repressive rule and armed conflicts throughout the world:

"In addition to generating statistical analysis to consider when, where, why, and how accountability for past business abuses is possible, the project aims to identify a set of models that could be adapted to gaining victims of such abuses remedy in other contexts".⁴⁸⁶

The database comprises incidents and actions dating back to 1945 and can be accessed online.⁴⁸⁷

One analysis of this dataset concluded that of 874 cases of business enterprises identified for their involvement in human rights violations, only 136 of them showed prosecutorial activity, hence suggesting a "low level of both judicial activity and judicial accountability" for such violations. Only 37 cases had "significant accountability results in terms of convictions of either companies or individuals working for a company".⁴⁸⁸

⁴⁸⁴ The Guardian, *Argentina: two ex-Ford executives convicted in torture case*, 11 December 2018, available at <https://www.theguardian.com/world/2018/dec/11/pedro-muller-hedro-sibilla-ford-executives-argentina-torture-case> (accessed on 15 November 2019).

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Leigh A. Payne, Gabriel Pereira, Josefina Doz Costa, Laura Bernal-Bermudez, "Can a Treaty on Business and Human Rights Help Achieve Transitional Justice Goals?", in Homa Publica, *Revista Internacional de Derechos Humanos e Empresas*, Vol. 1, July 2017, p. 7, available at <http://homacdhe.com/journal/wp-content/uploads/sites/3/2017/08/Artigo-6.pdf>.

⁴⁸⁷ The database is available at <https://sites.google.com/site/transitionaljusticedatabase/> (accessed on 15 November 2019).

⁴⁸⁸ Leigh A. Payne et al., *Can a Treaty on Business and Human Rights Help Achieve Transitional Justice Goals?*, *op. cit.*, p. 13.

Of the 874 companies recorded as being involved in human rights violations, such companies operated in 37 countries that had “transitioned from repressive or authoritarian rule or armed conflict”.⁴⁸⁹ This includes companies from, for example, Colombia (460), Brazil (123), Guatemala (47), Liberia (37), South Africa (36), and Chile (23).⁴⁹⁰

Conclusion

The examples laid out in this section illustrate that, given the far-reaching and devastating implications of conflicts on human rights, including ESCR rights, it is imperative that appropriate laws and mechanisms be established and, where they exist, be made effective to ensure accountability and access to justice, including for the conduct of business enterprises. They illustrate the realistic possibility of the consideration of corporate violations of ESCR in transitional justice mechanisms as is required by international human rights law. International human rights standards, detailed in Chapter 1 (Transitional Justice), Chapter 2 (ESCR) and Chapter 3-4 (business and human rights) should guide the determination, design and implementation of the full range of transitional justice mechanisms selected in any particular State.

This chapter has focused on highlighting historical examples of Truth Commissions and judicial actions as components of transitional justice mechanisms in countries from around the world, including South Africa, Colombia, Tunisia, Liberia, Argentina, Mauritius and East-Timor. Civil society organizations, governments and business entities are advised to engage with and learn lessons from the strengths and failures of transitional justice mechanisms in these countries.

Equipped with the benefit of hindsight, a set of clear standards on international human rights law as set out in this guide, and an impressive and growing bodies of research evaluating the impact of transitional justice mechanisms, existing civil society organizations, governments and corporate entities have an opportunity. The opportunity is the possibility of ensuring that future transitional justice mechanisms comply with international human rights standards and are capable of more effectively contributing to sustainable economic development, the establishment of the rule and protection of human rights, and the securing of peace in transitioning societies. Without effective corporate accountability for ESCR violations, such efforts will always be incomplete and such opportunities may be missed.

⁴⁸⁹ *Ibid.*, p. 8.

⁴⁹⁰ *Ibid.*

Chapter 6: Corporate Accountability for Violations of Children's ESCR in Transitional Settings

As underscored above, conflict, post-conflict and other traditional situations often have a particularly detrimental effect on those who already are in situations of vulnerability in society, including in particular, children. Under international human rights law, children, in addition to enjoying the full range of rights enjoyed by adults, are subject to a particular protective regime, governed by the UN Convention on the Rights of the Child and its optional protocols, and regional protective instruments. Addressing the rights of the child has also been increasingly recognized by stakeholders engaged in transitional justice and is deemed to be "necessary for its success".⁴⁹¹

Protecting both ESCR and CPR, the CRC protects the fundamental importance of the best interests of the child in any matters involving or effecting children. It also entrenches children's rights to survival and development, against discrimination and the right of the child to be heard. These key pillars and principles of CRC are discussed in greater detail below as part of the discussion on the CRC's General Comment 16.

The Convention on the Rights of the Child, which has attracted near-universal accession and/or ratification by States, addresses children's rights in the context of conflict directly in Articles 38 and 39.⁴⁹² As does the optional protocol (OP1-CRC) to the CRC Convention. States are required to "take all feasible measures" to ensure children under 15 "do not take a direct

⁴⁹¹ United Nations Children's Fund, *Children and transitional justice: Truth-telling, accountability and reconciliation*, March 2010, p. 6, available at https://www.unicef-irc.org/publications/pdf/tj_publication_eng.pdf.

⁴⁹² CRC, Article 38 reads as follows: "1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict";

Article 39 reads as follows: "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child".

part in hostilities"⁴⁹³ and to "undertake to respect and ensure respect for international humanitarian law" including by taking "all feasible measures to ensure protection and care of children affected by an armed conflict".⁴⁹⁴

Moreover, when conflicts begin to cease, as is the case in many "transitional justice" settings, the CRC requires States to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... armed conflicts", and specifically stipulates that such recovery and reintegration "shall take place in an environment which fosters the health, self-respect and dignity of the child".⁴⁹⁵

The First Optional protocol to the CRC relating to Children in Armed Conflict

In 2000, in order to more effectively address the prevalence of child soldiers in a number of armed conflicts, States adopted OP1-CRC applying specifically to "the involvement of children in armed conflict". The Protocol's preamble notes the "harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development".⁴⁹⁶ The protocol requires States to "take all feasible measures" to ensure that children below the age of 18 "do not take a direct part in hostilities" even where they are members of armed forces, and the Protocol prohibits compulsory conscription of those below the age of 18 into armed forces.⁴⁹⁷ The protocol strongly discourages any recruitment of those below the age of 18 to armed forces and subjects any such recruitment to strict requirements.⁴⁹⁸

Significantly for the present context, the Optional Protocol prohibits "armed groups that are distinct from the armed forces of a State" from "under any circumstances" recruiting or using children below the age of 18 in hostilities⁴⁹⁹ and requires States to take legal and other measures "necessary to prohibit and criminalize such practices".⁵⁰⁰ All States Parties to the protocol are required to cooperate in its implementation "including in the prevention of any activity contrary" to it.⁵⁰¹ This includes cooperation in the "rehabilitation and social reintegration of persons who are victims of acts" contrary to the protocol.⁵⁰²

At the time of this writing, the Protocol had 170 States Parties.⁵⁰³

The CRC also includes a full range of both CPR and ESCR, specifying in the latter the particular the need for the protection of children's rights to health;⁵⁰⁴ education;⁵⁰⁵ work;⁵⁰⁶ an adequate standard of living;⁵⁰⁷ social security;⁵⁰⁸ and rest and leisure.⁵⁰⁹ The jurisprudence

⁴⁹³ CRC, Article 38(2).

⁴⁹⁴ CRC, Article 38(4).

⁴⁹⁵ CRC, Article 39.

⁴⁹⁶ OP1-CRC, Preamble.

⁴⁹⁷ OP1-CRC, Articles 1-2

⁴⁹⁸ OP1-CRC, Article 3.

⁴⁹⁹ OP1-CRC, Article 4(1).

⁵⁰⁰ OP1-CRC, Article 4(2).

⁵⁰¹ OP1-CRC, Article 7.

⁵⁰² *Id.*

⁵⁰³ This second Optional Protocol sits alongside the first and third Optional Protocol's to the CRC on child pornography and communications to the CRC Committee respectively.

⁵⁰⁴ CRC, Article 24.

⁵⁰⁵ CRC, Article 28.

⁵⁰⁶ CRC, Article 32.

⁵⁰⁷ CRC, Article 27.

of the CRC Committee, including its General Comments, observations on Periodic States reports and decisions on individual communications under the CRC's third Optional Protocol clarify and serve to deepen the content of States' obligations under the CRC. The consideration of ESCR violations in transitional justice mechanisms is particularly crucial with regard to children's rights because: "while millions of children are victims of civil and political violations during armed conflict, the number of children exposed to displacement, hunger, disease and lack of education in war-affected countries is much greater."⁵¹⁰

Consistently with the development of the obligations of States and the responsibilities of business enterprises with regard to ESCR, the CRC has also adopted General Comment 16 "on State obligations regarding the impact of the business sector on children's rights".⁵¹¹ This General Comment is the key focus of this Chapter, which, using the case study of Sierra Leone as an example, illustrates how business activities during times of conflict may impact on the children's ESCR. It is as a result of this impact that transitional justice mechanisms such as the Sierra Leone Truth Commission must address corporate violations of children's ESCR consistently with international human rights law.

Children's ESCR are also protected regionally by a variety of international instruments and mechanisms. The African Charter on the Rights and Welfare of the Child, containing some of the elements of the CRC, was adopted in 1990 with specificities adapted to the African context; its respect and implementation are monitored by the African Committee of Experts on the Rights and Welfare of the Child. In the Inter-American system of human rights, there is no specific instrument on children's rights, which are protected by Article 19 of the American Convention on Human Rights and its Additional Protocol. In addition, a Special Rapporteur on Children's Rights established by the IACHR carries out studies, conducts country visits and compiles reports on the issues relating to children's rights. Lastly, in Europe, children's rights are not directly referred to in the ECHR, even though the rights it protects apply to children. The European Social Charter and the European Committee of Social Rights are complementary to ECHR and guarantee a certain number of children's rights, such as education and social protection.⁵¹²

This Chapter is best read alongside two Practical Guides the ICJ has co-authored:

⁵⁰⁸ CRC, Article 26.

⁵⁰⁹ CRC, Article 31.

⁵¹⁰ United Nations Children's Fund, *Children and transitional justice*, op. cit., p. 7.

⁵¹¹ CRC Committee, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, UN Doc. CRC/C/GC/16, 17 April 2013.

⁵¹² Save the Children, *International and Regional Child Rights Mechanisms, A guide to the monitoring mechanisms of the Child Rights Committee, the UN Universal Periodic Review and the Regional Child Rights Mechanisms*, 2011, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Save_the_Children_Guide_Monitoring_Mechanisms_2011.pdf.

- The *Practical Guide for Non-Governmental Organizations on How to Use the United Nations Committee on the Rights of the Child's General Comment no. 16*, co-authored by the ICJ and the Child Rights International Network,⁵¹³ and
- The *Practical Guide for States on how to implement the United Nations Committee on the Rights of the Child's General Comment no. 16*, co-authored by the ICJ and UNICEF.⁵¹⁴

These Guides will be instructive not only for State authorities and CSOs, but also for businesses, lawyers and other transitional justice stakeholders in developing an understanding of the normative standards clarified by the CRC in General Comment 16 with regard to corporate accountability for human rights violations and abuses.

Violations and Abuses of Children's Rights during Armed Conflict

Children are particularly vulnerable to rights violations during and after conflicts.⁵¹⁵ Overall the impact of conflict on children is devastating:

"Armed conflict and political violence expose children to the machinery of war. They become the victims of firearms, landmines, missiles and aerial bombardment. They witness the killing of family and friends. When their communities are attacked and forced to flee, children lose their homes and are deprived of food, health care and schooling. Girls and boys are also directly and systematically targeted for killing, torture, abduction, recruitment and sexual violence. They are targeted because they are young and within easy reach, precisely because of their vulnerability. Adolescents are often at greatest risk".⁵¹⁶

In addition to the direct violation and infringement of their own rights, children will necessarily be affected by violations and abuses perpetrated against adults, due to family relationships, guardianship and other social connections. ICESCR requires that "the widest possible protection and assistance should be accorded to the family" because it is "the fundamental group unit of society".⁵¹⁷ The CRC contains parallel obligations⁵¹⁸ and extends further protection to children from all forms of physical or mental violence and abuse.⁵¹⁹ It protects a child's right to not be "subjected to arbitrary or unlawful interference with his or her ... family".⁵²⁰

⁵¹³ ICJ & Child Rights International Network, *State Obligations regarding the Impact of the Business Sector on Children's Rights*, op. cit.

⁵¹⁴ ICJ & UNICEF, *Obligations and Actions on Children's Rights and Business, A practical guide for States on how to implement the United Nations Committee on the Rights of the Child's General Comment no. 16*, 2015, available at <https://www.icj.org/wp-content/uploads/2015/09/Report-UNICEFChildrenBusiness-2015-ENG.pdf>.

⁵¹⁵ UNICEF, *Children and transitional justice: Truth-telling, accountability and reconciliation*, Harvard University Press, 2010, available at https://www.unicef-irc.org/publications/pdf/tj_publication_eng.pdf.

⁵¹⁶ *Ibid.*, p. 2.

⁵¹⁷ ICESCR, Article 10.

⁵¹⁸ CRC, Preamble.

⁵¹⁹ CRC, Article 19.

⁵²⁰ CRC, Article 16.

The impact of armed conflict on children is best illustrated by direct examples from around the world. Sometimes children are forced to participate directly in armed conflicts as child soldiers, as was the case in Sierra Leone during the armed conflict of the 1990s and 2000s.

Case Study: Sierra Leone

During ten years of internal armed conflict, from 1991 to 2002, children in Sierra Leone were deliberately and routinely targeted for exploitation in pursuance of war, subjected to and suffering from widespread and systematic acts of violence and other abuse. The extent of the cruelty against children according to evidence received from UNICEF and others by Sierra Leone's Truth and Reconciliation Commission reached "a new level of cruelty ... setting the bar lower than ever imagined".⁵²¹ The Sierra Leone Truth and Reconciliation Commission estimated that more than ten thousand children were abducted and "associated with the fighting forces in one form or the other".⁵²² Thousands more were victims of sexual slavery and rape, amputation, mutilation, displacement and torture and other ill-treatment.⁵²³

It is important to note the range of violations children are exposed to during conflicts. Abductions of children, mostly particularly boys as child soldiers may also be accompanied by the abduction of girls. Abduction of girls has taken place both in Sierra Leone and Uganda and involved concomitant violations of a range of girls' human rights.

Case Study: Uganda

Beginning in 1998, the Lord's Resistance Army (LRA), a rebel force fighting the Government of Uganda, abducted over sixty thousand Ugandan children over approximately two decades.⁵²⁴ Among the war-affected population of northern Uganda, it is estimated that one in six female adolescents were abducted by the LRA.⁵²⁵ They have been forced to perform domestic labour (such as cooking, nursing, farming and collecting water) and have been subjected to "slavery-like conditions" and have been raped and forced to birth children.⁵²⁶ Women attempting to have abortions are subjected to "severe punishment" including execution.⁵²⁷ Children born in these circumstances "are vulnerable to rejection by the extended family, often regardless of whether the mother is accepted back".⁵²⁸

Abduction may also affect pregnant women, and, as a result, their children.

Case Study: Argentina

The National Commission on the Disappearance of Persons estimated that during Argentina's military dictatorship, approximately 30 000, of which an estimated 500 were either pregnant mothers or young children, were subjected to enforced disappearance.⁵²⁹ Some pregnant

⁵²¹ See, UNICEF, *Submission to the Sierra Leone Truth and Reconciliation Commission on the occasion of TRC Thematic Hearings on Children*, 17 June 2003, p. 2.

⁵²² Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 3B*, Chapter 4, para. 9.

⁵²³ *Ibid.*, para. 7. On the controversial "forced marriage", which is likely better described as sexual slavery and rape, see, *Prosecutor v. Brima*, Special Court for Sierra Leone, Case No. SCSL-2004-16-A, 22 February 2008, para. 181, available at http://hrlibrary.umn.edu/instree/SCSL/SCSL-04-16_Files/SCSL-04-16-A-675.htm.

⁵²⁴ UNICEF, *Children and transitional justice*, *op. cit.*, p. 236.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*, pp. 236-237.

⁵²⁷ *Ibid.*, pp. 244-245.

⁵²⁸ *Ibid.*, p. 248.

⁵²⁹ Between 1976 and 1983. See, UNICEF, *Children and transitional justice*, *op. cit.*, pp. 295, 302 and 303.

women were subject to torture and other ill-treatment up to the point of the birth of their children and were “never seen again”.⁵³⁰ Some of these children were placed randomly in other houses, including homes of military and police officers, and were issued falsified birth certificates.⁵³¹

The Argentinian example illustrates vividly how the human rights violations perpetrated against parents (such as forced disappearances of pregnant women) can directly affect children’s lives. The difficulties in reuniting children abducted, disappeared and placed in this manner was, as a result of submissions of the Argentine delegation, ultimately at the centre of the formulation of Article 8 of the CRC which requires States to “preserve [children’s] identity ... without unlawful interference” and where this obligation is violated “provide appropriate assistance and protection, with a view to speedily re-establishing” a child’s identity.⁵³²

It is important to note that children are often not merely passive victims during political conflicts. In South Africa, for example, children’s widespread open political opposition to the apartheid regime lead to various violations of both their civil and political and economic and social rights.

Case Study: South Africa

As is the case throughout the world, children frequently “played a catalytic and leading role” in resistance against apartheid regime in South Africa.⁵³³ The South African Truth and Reconciliation Commission describes children’s contributions to the struggle against apartheid as “heroic”.⁵³⁴ Children were therefore “a primary target of the apartheid government and its security forces” and victims of a wide range of human rights violations⁵³⁵. For example, though apartheid subsisted between 1948 and 1994, in just the two years between 1984 and 1986 the following violations of children’s rights have been recorded: 300 hundred children were killed and 1’000 wounded by the police; 11 000 children were detained without trial; 18 000 children were arrested on charges relating to protest; and a staggering 173 000 children were held awaiting trial in police cells. Children therefore constituted between a quarter and a full half of detainees at any one time during this short period.⁵³⁶

In addition, children were “killed, tortured, maimed, detained, interrogated, abducted, harassed and displaced” throughout apartheid.⁵³⁷ Children as young as 7 were arrested and “sometimes, entire schools were arrested en masse”.⁵³⁸ Schools were also general targets for police intimidation.⁵³⁹ The South African Truth and Reconciliation Commission held special

⁵³⁰ *Ibid.*, p. 295.

⁵³¹ *Ibid.*, p. 304. Abductions of children also occurred on a widespread basis in Chile during the Pinochet military government from 1973 to 1989, see, ICJ, *Chile: A Time of Reckoning*, 1992, available at <https://www.icj.org/wp-content/uploads/1992/01/Chile-time-of-reckoning-thematic-report-1992-eng.pdf>.

⁵³² CRC, Article 8. Also see, UNICEF, *Children and transitional justice*, op. cit., pp. 299-300.

⁵³³ UNICEF, *Children and transitional justice*, op. cit., p. 117.

⁵³⁴ South Africa Truth and Reconciliation Commission, *Final Report, Volume 4*, Chapter 9, p. 251, para. 4.

⁵³⁵ UNICEF, *Children and transitional justice*, op. cit., p. 118.

⁵³⁶ *Ibid.*

⁵³⁷ South Africa Truth and Reconciliation Commission, *Final Report, Volume 4*, Chapter 9, p. 270.

⁵³⁸ *Ibid.*, p. 262.

⁵³⁹ *Ibid.*, p. 266.

hearings to investigate children-specific rights violations and its final report includes a focused section on children and youth.⁵⁴⁰ Overall, this section of the TRC's report concludes: "those who grew up under conditions of violence will carry traces of their experiences into adulthood".⁵⁴¹

Overall, such violations of children's rights "exact a devastating toll on children" including "the severing of basic services" and "increased poverty, malnutrition and disease".⁵⁴² Though such violations may stem from States' actions, they may also involve the complicity of businesses, "complicit" with ESCR violations as a result of "enabling", "exacerbating" or "facilitating" such violations.⁵⁴³

A case study in depth: Corporate accountability and ESCR violations in Sierra Leone

An analysis of the impact of conflict in Sierra Leone and subsequent transitional justice mechanisms on children's rights is useful in illustrating the necessity for civil society organizations, lawyers, governments and businesses to approach all conflict and transitional justice measures and mechanisms in a child-sensitive manner. As referenced in Chapter 1, a child-sensitive approach is so important that the UN Secretary-General 2010 Guidance Note has included such approaches as one of the ten key guiding principles for all transitional justice mechanisms.

Corporate Children's Rights Abuses: Child Labourers in the Diamond Mines of Sierra Leone

The armed conflict took place from 1991 to 2002 between government armed forces, the Armed Forces Revolutionary Council (AFRC), and the Revolutionary United Front (RUF).⁵⁴⁴ A combination of factors, including poor governance, deteriorating socio-economic conditions, rural isolation and wide-scale social injustice contributed to the outbreak of civil war.⁵⁴⁵ The conflict became particularly brutal when militias and armed forces began to indiscriminately and violently attack civilian populations. Control of Sierra Leone's vast mineral resources was a significant driving force for internal power struggles and in drawing external forces into the conflict.⁵⁴⁶

⁵⁴⁰ South Africa Truth and Reconciliation Commission, *Final Report, Volume 4*, Chapter 9.

⁵⁴¹ *Ibid.*, p. 278.

⁵⁴² *Ibid.*, p. 5.

⁵⁴³ For examples such as see purchase and trade of diamonds during conflicts see, ICJ, *Corporate Complicity & Legal Accountability, Volume 1, Facing the Facts and Charting a Legal Path*, 2008, available at <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>.

⁵⁴⁴ Human Rights Watch, *The Armed Conflict in Sierra Leone*, 11 April 2012, available at <https://www.hrw.org/news/2012/04/11/armed-conflict-sierra-leone> (accessed on 18 November 2019).

⁵⁴⁵ Paul Richards, "Are 'Forest' Wars in Africa Resource Conflicts? The Case of Sierra Leone", in *Violent Environments*, Lee Peluso et al. (eds.), 2001, pp. 65-82; Victor A. B. Davies, *Sierra Leone: Irony Tragedy*, Addis Ababa: Economic Commission for Africa, 2000.

⁵⁴⁶ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 3A*, Chapter 1, para. 3.

In particular, the diamond industry became central to the conflict in Sierra Leone as “both an indirect cause and ... a fuelling factor”.⁵⁴⁷ Children were used both as combatants in the armed conflict and as sources of forced labour, both in diamond mines and for military related activities. Already victims of serious IHL violations and gross human rights violations and abuses themselves, children were also “forced to become perpetrators and were compelled to violate the rights of others”.⁵⁴⁸ In addition to being victims of abductions, forced “recruitment, sexual slavery and rape, amputations, mutilations, displacement, drugging and torture”, thousands of children were also separated from their parents, families and communities, used as forced labour and deprived of healthcare services and education.⁵⁴⁹ The conflict also “created a new phenomenon, that of children living on the streets”.⁵⁵⁰ In sum, “[d]uring the conflict, children in Sierra Leone were denied their childhood”.⁵⁵¹

Among the Truth Commission’s findings were that, contrary to international human rights law and international humanitarian law, “children aged between ten and 14 years were especially targeted for forced recruitment” and “girls between the ages of ten and 14 were targeted for rape and other sexual violence as sexual slaves”.⁵⁵²

The resulting Truth and Reconciliation Commission’s treatment of children was therefore framed “by the spirit, guiding principles and specific articles of the Convention on the Rights of the Child (CRC) as well as the African Charter on the Rights and Welfare of the Child (ACRWC)”.⁵⁵³ It is widely considered to be the first TRC to adopt a focus on children, child-friendly procedures and prepared a child-friendly version of its report.⁵⁵⁴

The Commission also made the crucial and general acknowledgment in its “primary findings” that “successive political elites plundered the nation’s assets, including its mineral riches, at the expense of the national good”, also clarifying that “political elites” include “the elite across the spectrum including the business elite and those occupying positions of power and influence in the public and private sectors”.⁵⁵⁵ The TRC’s report therefore brings into sharp focus the complicity of certain businesses in the full range of gross human rights violations and abuses perpetrated against children in Sierra Leone.

ESCR violations of children in Sierra Leone

Sierra Leone’s armed conflict left children in desperate need of education, family support and livelihoods. Post-war reconstruction efforts have not adequately addressed the needs of the country’s child soldiers and forced labourers. Today children continuing to work in diamond mines continue to represent a cross-section of the country’s most marginalized and disadvantaged groups, including former child soldiers, children living or working on the street, unaccompanied children and children from households living in extreme poverty.

⁵⁴⁷ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 2*, Chapter 1, para. 40; *Ibid.*, *Volume 3B*, Chapter 1.

⁵⁴⁸ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 2*, Chapter 1, para. 56.

⁵⁴⁹ *Ibid.*, p. 59; Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 2*, Chapter 2, paras. 489-490.

⁵⁵⁰ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 2*, Chapter 2, para. 493.

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*, paras. 22-23.

⁵⁵³ UNICEF, *Children and transitional justice*, *op. cit.*, p. 165.

⁵⁵⁴ Sierra Leone Truth and Reconciliation Commission, *Report for the Children of Sierra Leone, Child-Friendly Version*, 2004, available at <https://www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf>.

⁵⁵⁵ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 2*, Chapter 2, para. 14 and footnote 18.

Working under gruelling conditions for little or no pay, child miners personify a gross failure by the government of Sierra Leone, as well as donor agencies which through international assistance cooperation play a role in realizing ESCR, to deliver protection and fulfilment of human rights in the areas that were among those worst affected by the war. The situation facing these child miners results from and demonstrates the ESCR violations and abuses they experienced during war, which have left them vulnerable to continued exploitation and abuse.⁵⁵⁶

Other ESCR violations of children noted in the report include violations of the right to health (from increases to infant mortality and destruction of the public health system);⁵⁵⁷ violations of the right to education (economic devastation, abductions and forced labour resulting in children not accessing education);⁵⁵⁸ right to housing (as a result of forced displacements from homes and inability to return);⁵⁵⁹ and the right to food (including widespread malnutrition and the mixing of drugs and gunpowder in the food of child soldiers).⁵⁶⁰

Overall, there were numerous actors, including other States, which were said to have fuelled the war in Sierra Leone. Two of the most prominent were⁵⁶¹ Liberia and Burkina Faso, both recognized by the United Nations to be “fuelling the war in Sierra Leone by helping its notorious rebels sell diamonds and buy arms”.⁵⁶² Nevertheless, it is also clear that companies were active actors in the conflict in Sierra Leone, many of which profited directly from the sale of illegally mined “conflict diamonds” and others which used to provide the warring factions with illegal arms. As noted, “conflict diamonds” were mined by, in significant part, child miners, in the context of conflict in which child soldiers participated.

Sierra Leone Truth and Reconciliation Commission’s Recommendations: ending corporate corruption and rights violations

The Commission in its conclusions stressed that, “the central cause of the war was endemic greed, corruption and nepotism that deprived the nation of its dignity and reduced most people into a state of poverty”.⁵⁶³ It also affirmed that although it was common cause that the armed conflict in Sierra Leone was an internal armed conflict, there was substantial involvement from external actors. This external support included support from other States, international including regional intergovernmental organizations, and private actors, including private security firms and corporations.⁵⁶⁴

In its recommendations, the Commission also made recommendations targeted directly at ensuring corporate accountability. For example, with regard to the diamond industry, the Commission described as an “imperative recommendation” its recommendation that the corrupt “issuance of mining, dealing or exporting licenses” be investigated.⁵⁶⁵ It also recommended that the government improve regulation of the diamond industry by: ensuring

⁵⁵⁶ UNICEF, *Children and transitional justice, op. cit.*

⁵⁵⁷ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 3B*, Chapter 4, paras. 242, 281, 303, 306, 315-317.

⁵⁵⁸ *Ibid.*, paras. 239-241, 243.

⁵⁵⁹ *Ibid.*, para. 266.

⁵⁶⁰ *Ibid.*, paras. 309 and 316.

⁵⁶¹ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 3A*, Chapter 1, para. 3.

⁵⁶² News 24, *Liberia, Burkina Faso fuelling Sierra Leone war*, 2000, available at <https://www.news24.com/xArchive/Archive/Liberia-Burkina-Faso-fuelling-Sierra-Leone-war-US-20000801> (accessed on 18 November 2019).

⁵⁶³ Sierra Leone Truth and Reconciliation Commission, *Final Report, Volume 2*, Chapter 3, para. 121.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*, para. 186.

a fair and transparent bidding process for licenses;⁵⁶⁶ preventing smuggling;⁵⁶⁷ the full prohibition of child labour; and the permanent revoking of licenses of mines employing children.⁵⁶⁸

Finally, because it acknowledges that “much corruption happens only because there are willing accomplices in the business world” the Commission generally “calls the business sector to develop its own Code of Corporate Governance in order to build a culture of ethical conduct”. It also recommended businesses to cooperate in fighting corruption by “sharing information with each other and law enforcement agencies”.⁵⁶⁹

Unfortunately, Sierra Leone’s Commission missed an important point: the need to identify and engage the responsibility of businesses in violations and abuses of children’s rights, including ESCR, with which some companies were clearly directly responsible or complicit.

Although Sierra Leone’s report to the CRC Committee in 2006 does include reference to the report of the Commission and its recommendations, it does not provide a substantial treatment of what it purports of the implementation of the recommendations and the manner in which that discharges its obligations.⁵⁷⁰ Sierra Leone acceded to the ICESCR in 1996 despite still having never reported to the CESCR.⁵⁷¹ The government of Sierra Leone therefore missed an opportunity with mechanisms such as the CRC and CESCR reporting procedures to request advice on their implementation of Covenant obligations relating to the conflict and transparently provide information on the implementation of the Commission’s recommendations.

General Comment 16: The Impact of the Business Sector on Children's Rights

The CRC Committee’s general comment on business and human rights, like CESCR’s general comment 24 on business and human rights, builds on and refers the UN Guiding Principles.⁵⁷² It applies to “all business enterprises, both national and transnational, regardless of size, sector, location, ownership and structure”.⁵⁷³ Like General Comment 24, it focuses on State obligations relating to business and human rights, though also addressing corporate responsibilities with regard to children’s rights.⁵⁷⁴

⁵⁶⁶ *Ibid.*, para. 184.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Ibid.*, para. 188.

⁵⁶⁹ *Ibid.*, para. 165.

⁵⁷⁰ CRC Committee, *Concluding Observations: Sierra Leone*, UN Doc.CRC/C/SLE/2, 8 September 2006, paras. 301-309.

⁵⁷¹ OHCHR, *UN Treaty Body Database, Sierra Leone*, available at https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=156&Lang=EN (accessed on 18 November 2019).

⁵⁷² CRC Committee, *General Comment 16*, *op. cit.*, paras. 7 and 71, footnote 26.

⁵⁷³ *Ibid.*, para. 3.

⁵⁷⁴ *Ibid.*, para. 8. For more information on the legal status of General Comment 16 see, Paula Gerber, Joanna Kyriakakis & Katie O’Byrne, “General Comment 16 On State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect?”, in *Melbourne Journal of International Law*, Vol. 14(1), 2013, pp. 4-9.

From the outset, it is important to note that, as the UNGP, the drafting process of General Comment 16 involved extensive consultation with UN agencies, NGOs, trade unions and business associations.⁵⁷⁵

Consistent with its general approach to children's rights, the CRC Committee categorizes States obligations in relation to business and human rights along "four general principles":⁵⁷⁶

1. Non-discrimination;
2. The best interests of the child;
3. The right to life, survival and development; and
4. The right to be heard.

The ICJ/UNICEF and ICJ/CRIN publications have explained these principles in their respective analyses of General Comment 16.⁵⁷⁷ While drawing from these ICJ publications, the following analysis on these four core principles will specifically consider them in the context of a State in transition. General Comment 16 is particularly useful for States undergoing a transitional period because of its mix of "legal obligations and policy recommendations".⁵⁷⁸ Moreover, the General Comment is "aligned with" the UNGP in various respects thus allowing for States and civil society actors to gauge a coherent and consistent understanding of human rights obligations related to business activities.

CRC Committee General Comment 16: Four general principles on children's rights and business and human rights⁵⁷⁹	
Principle	State Obligations in Transitional Justice Settings
Non-discrimination	<ul style="list-style-type: none"> • Ensure that laws, policies and programme's relating to business are non-discriminatory to children; (para. 13) • Take steps to prevent discrimination in the private sector; (para. 13) • Provide effective remedies for private sector discrimination; (para. 13) • Collect disaggregated data to assist in identifying discrimination in the private sector; (para. 14) • Create a supportive environment for businesses to respect the right against discrimination by promoting knowledge of the right among businesses; (para. 14)
Best interests of the Child	<ul style="list-style-type: none"> • Ensure children's best interests are a "primary consideration in all actions concerning children"; (para. 15) • Integrate and apply the best interest principle in all "legislative,

⁵⁷⁵ *Ibid.*, paras. 12-13.

⁵⁷⁶ *Ibid.*, para. 12.

⁵⁷⁷ ICJ & UNICEF, *Obligations and Actions on Children's Rights and Business*, op. cit.; ICJ & Child Rights International Network, *State Obligations regarding the Impact of the Business Sector on Children's Rights*, op. cit., pp. 11-12.

⁵⁷⁸ Paula Gerber, Joanna Kyriakakis & Katie O'Byrne, *General Comment 16 On State Obligations Regarding the Impact of the Business Sector on Children's Rights*, op. cit., p. 22.

⁵⁷⁹ *Ibid.* For a more comprehensive summary of key extracts from General Comment 16, see Table 1, pp. 23-27.

	<p>administrative and judicial proceedings concerning business activities and operations”; (para. 15)</p> <ul style="list-style-type: none"> • Integrate and apply the best interest principle to businesses functioning “as private or public social welfare bodies by providing any form of direct services for children”; (para. 16) • Assess and determine the best interest of the child within the meaning of the CRC and its optional protocols; (para. 17) • Pay special attention to the best interest principle when “weighing competing priorities, such as short-term economic considerations and longer-term development decisions”; (para. 17) • Explain how the best interest principle has been considered and respected in “weighing competing considerations”; (para. 17)
Right to Life Survival and Development	<ul style="list-style-type: none"> • Adopt preventative measures including effective regulation to ensure that children’s rights to life, survival and development are respected; (para. 20) • Ensure an enabling environment within which businesses can fulfill their responsibility to respect children’s rights; (para. 20) • Ensure that laws and policies regulating businesses take account of the impact on adults has on the survival and development of children; (para. 20)
Right to be Heard	<ul style="list-style-type: none"> • Hear children’s views “regularly” when developing “business-related laws and policies” that may affect them; (para. 21) • In doing so make particular effort to consult with “children who face difficulties in making themselves heard”, including children of minority and indigenous children and children with disabilities; (para. 21) • Hear children when child-rights impact assessments are conducted in terms of law and policy; (para. 21) • Where businesses consult communities, they must consult with children about the impacts of business projects. States should provide businesses with guidance to ensure that such consultations are “accessible, inclusive and meaningful to children”; and (para. 23) • All participation of children should be voluntary and occur in a “child friendly environment” that does not perpetuate discrimination against children. (para. 23)

Each of these four principles may have particular application in both conflict and transitional justice settings. In order to locate the application of these principles in transitional settings, the Committee’s approach to children’s rights relating to business and human rights during “emergencies and conflict situations” should be considered. The Committee dedicates paragraphs 49-52 of General Comment 16 directly to children’s rights in emergency and conflict situations.

Children’s rights and Corporate Accountability in Conflict/Emergency Situations

The Committee recognizes the “particular challenges” that home/host States will have in meeting their obligations with regard to children’s rights when businesses are operating in “situations where protection institutions do not work properly because of conflict, disaster or the breakdown of social or legal order”. Nevertheless, because the CRC’s general obligations “apply at all times” without derogation, even during emergencies, the Committee provides

some further guidance to States in relation to their obligations in terms of children's rights during "conflict and emergency situations".⁵⁸⁰

The Committee warns States of particular risks of children's rights violations that are typically heightened in such situations. These include risks of: child labour being used by businesses; child soldiers used in conflicts; and the occurrence of corruption and tax evasion. The Committee indicates that the CRC therefore requires home States in particular to undertake various measures in order to prevent violations and abuses of children's rights from occurring as a result of business operations in host States. Such measures include home States':⁵⁸¹

- **Specific foreseeable risks:** Developing and implementing laws and policies that "address specific foreseeable risks to children's rights" resulting from businesses operating transnationally;
- **Strict child-right due diligence:** Requiring businesses operating in situations of emergency and conflict to "undertake stringent child-rights due diligence";
- **Business publicity of measures taken:** Requiring businesses operating in situations of emergency and conflict to "publish actions taken" by them to prevent violations of children's rights;
- **Arms and military assistance:** Prohibiting the "sale or transfer of arms and other forms of military assistance when the final destination is a country in which children are known to be, or may potentially be, recruited or used in hostilities;" and
- **Current, accurate and comprehensive information:** Providing businesses which are either operating or planning to operate in areas affected by conflict or emergency with "current, accurate and comprehensive information of the local children's rights context". This information "should emphasize that companies have identical responsibilities to respect children's rights in such settings as they do elsewhere".

Where businesses continue to operate in areas affected by conflict, the Committee acknowledges that such businesses may elect to "employ private security companies". The Committee warns that businesses doing so "may risk being involved in violations such as exploitation and/or use of violence against children in the course of protecting facilities or other operations". The Committee therefore recommends that home and hosts implement national legislation:⁵⁸²

- Prohibiting security companies from "recruiting children or using children in hostilities";
- Setting out requirements for such companies which ensure "effective measures to protect children from violence and exploitation"; and
- Providing for "mechanisms" for holding such security companies' personnel "accountable for abuses of children's rights" that occur.

In sum, the rights of the child in armed conflict and emergency situations clearly entail that:

- 1) State obligations in respect of the **CRC and its Optional Protocols generally apply with equal force** in such situations;
- 2) **Both home and host States of businesses** operating in the context of armed conflict and emergency situations **are subject to additional obligations** with regard to businesses operations in situations of heightened risk;
- 3) **Business enterprises** operating in situations of heightened risk themselves **have responsibilities to respect all children's rights** in such situations. They must both respect laws of their host and home States in this regard and also exercise care to

⁵⁸⁰ CRC Committee, *General Comment 16, op. cit.*, para. 49.

⁵⁸¹ *Ibid.*, paras. 50-51.

⁵⁸² *Ibid.*, para. 52.

ensure that their responsibility to respect international human rights of children are respected at all times;

- 4) **Both home and host States** are required to assist business enterprises in fulfilling their responsibility to respect children's rights in situations of heightened risk **by providing clear guidance through legislation, policy and information on children's rights in context** and generally creating a supportive, enabling environment for such corporations; and
- 5) Home States, host States and corporations operating in situations of heightened risk **must make effective remedies and reparation available and accessible to victims of human rights violations resulting from their activities.**

Advocating for Corporate accountability for Children's Rights Violations

The ICJ's Guide for non-governmental organisations on General Comment 16 includes a wide range of examples of corporate violations of children's rights extending beyond the transitional justice context.⁵⁸³ It provides comprehensive practical advice that can be used by civil society organizations on ways in which the international human rights norms outlined by the CRC in General Comment 16 can be used to advocate for the protection of children's rights. General Comment 16 may be used in various ways as part of a comprehensive strategy to ensure that states respect, protect, promote and fulfil children's rights.

General Comment 16: Advocating for children's rights

Options available to civil society organizations include a combination of human rights informed legal advocacy, such as:

- **Advocacy Measures:** Measures may include input into the development and implementation of National Action Plans on business and human rights, media advocacy and contributing to child-rights impact assessments.
- **Awareness Raising, Education, Capacity Building:** measures may be adopted to ensure that home States, host States and businesses themselves understand obligations and responsibilities relating to children's rights.
- **Corporate Social Responsibility Activism:** CSR activism could involve taking direct action with regard to specific children's rights violations by approaching businesses, their partners and investors to raise concerns.
- **Shareholder Activism:** Shareholder activism refers to attempts to persuade shareholders of companies to deal with violations or abuses of children's rights done by their business or with which their business is complicit. It may also include supporting activism initiated by shareholders themselves.
- **Monitoring and Reporting:** By monitoring children's rights violations in a particular context, civil society organizations can obtain crucial information which can then be reported to international and regional human rights treaty bodies such as the CRC Committee and the CESCR among others, as well as the Special Procedures of the UN

⁵⁸³ ICJ & Child Rights International Network, *State Obligations regarding the Impact of the Business Sector on Children's Rights*, *op. cit.*, p. 7, boxes 1, 2 and 3.

Human Rights Council.⁵⁸⁴ Reports may also be submitted to regional human rights mechanisms where appropriate.

- **Strategic Litigation:** Strategic Litigation, combined with a range of other advocacy measures, can assist in ensuring corporate accountability for children's rights violations. Such litigation could be considered in judicial and quasi-judicial forums domestically, regionally and internationally through judicial and treaty body mechanisms.⁵⁸⁵

These advocacy measures may also be useful in attempts to ensure corporate accountability for and abuses of children's rights in transitional justice contexts. Whatever combinations of advocacy measures are selected, it is vital for civil society groups to recognize that children's meaningful participation in and direction of advocacy measures is essential to ensure these measures' success in fulfilment of children's rights.⁵⁸⁶ This is consistent with children's right to be heard, a right that is of heightened significance in the context of transitional justice.

Children's Right to be Heard and Transitional Justice

The effective participation of children throughout Transitional Justice processes is crucial.⁵⁸⁷ According to UNICEF:

"A holistic transitional justice strategy must ensure that child rights and concerns are adequately addressed from the outset. This must include due regard for relevant international standards and guidelines, such as the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime. At the same time, such a strategy must take into account gender sensitivities and the best interests of the child, while embracing the principles of participation, nondiscrimination, empowerment and accountability".⁵⁸⁸

⁵⁸⁴ Among which the following Special Rapporteurs and Working Groups: Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the right to development; Special Rapporteur on the right to education; Special Rapporteur on the right to food; Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on extreme poverty and human rights; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Special Rapporteur on the human rights to safe drinking water and sanitation; Working Group on discrimination against women and girls; Special Rapporteur on trafficking in persons, especially women and children; and, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material.

⁵⁸⁵ If the State has accepted such a procedure, victims may for instance use the mechanism of individual communications provided for by various treaties such as ICCPR, ICESCR and CRC. The related Committees will analyze their claim and, where applicable, find violations and prescribe remedial measures to States. Complaint mechanisms are also available regionally as is the case with the African Commission on Human and Peoples' Rights, the African Committee Experts on the Rights and Welfare of the Child, IACHR's Special Rapporteur on Children's Rights and the European Committee of Social Rights.

⁵⁸⁶ ICJ & Child Rights International Network, *State Obligations regarding the Impact of the Business Sector on Children's Rights*, op. cit., p. 20.

⁵⁸⁷ UNICEF, *Machel Study 10-Year Strategic Review, Children and Conflict in a Changing World*, April 2009, p. 66, available at https://childrenandarmedconflict.un.org/publications/MachelStudy-10YearStrategicReview_en.pdf.

⁵⁸⁸ *Ibid.*, p. 70.

Nevertheless, there are times in which it is arguable that the best interests of the child principle and children's right to participate in transitional justice mechanisms and processes may come into conflict. Different Truth Commissions, for example, have taken differing approaches to the direct participation of children. Whatever solution is chosen by a specific Commission it must be consistent with international human rights law. In this regard, the right of the child to be heard is protected in Article 12 of the CRC as expanded upon in CRC Committee's General comment 12, which is summarized in more detail below.⁵⁸⁹ It is arguable, for example, that the approach of the South African Commission detailed immediately below excluded children's right to be directly heard and therefore amounted to a violation of the principles of international human rights law.

Case Study: Children's Participation in the South African Truth Commission

The Commission's mandate did not make direct reference to children and child-specific issues.⁵⁹⁰ Furthermore, because of its focus on human rights violations of civil and political rights, the "devastating social and economic consequences" of apartheid for children during and after apartheid was not adequately considered by the Commission.⁵⁹¹

On the advice of child rights activists and professionals, the South African Commission decided not to take statements or testimonies from any children.⁵⁹² The concern was that public hearings "might intimidate children and subject them to additional trauma".⁵⁹³ Adults whose rights were violated as children could testify, welfare professionals were allowed to testify on behalf of children and their family members reported "numerous violations" of children's rights.⁵⁹⁴ However, no children who at the time of the hearing were below 18 years old were allowed to testify.⁵⁹⁵

Moreover, because of "the number of cases in which children were involved and/or affected" the Commission held focused hearings on "children and youth hearings" and ultimately included a specific section in its report dedicated to these hearing.⁵⁹⁶ Most of the participants in these hearings were youth over the age of 18.⁵⁹⁷ Children below 18 attended some of these hearings and listened to the evidence being presented.⁵⁹⁸ Children performed plays and sang songs at a number of these hearings, including a play in one province on the uprising led by schoolchildren resisting the apartheid government's imposition of Afrikaans as a

⁵⁸⁹ CRC, Article 12 provides: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

⁵⁹⁰ UNICEF, *Children and transitional justice*, op. cit., p. 155.

⁵⁹¹ *Ibid.*, p. 156.

⁵⁹² *Ibid.*, p. 122.

⁵⁹³ *Ibid.*, p. 125.

⁵⁹⁴ *Ibid.*, p. 123.

⁵⁹⁵ *Ibid.*, p. 126.

⁵⁹⁶ *Ibid.*, p. 127; South Africa Truth and Reconciliation Commission, *Final Report, Volume 4*, Chapter 9; Children and youth hearings were conducted in the Commission's four regional offices and six additional hearings were conducted in six different South African cities.

⁵⁹⁷ *Ibid.*, p. 128.

⁵⁹⁸ *Ibid.*, p. 141.

medium of instruction in schools.⁵⁹⁹ At another hearing, children read out a submission written by two professors on the impact of apartheid on children.⁶⁰⁰

Although the Commission received a significant amount of information about the violation of children's rights and made detailed and extensive recommendations relating to children, it is arguable that "it marginalized the direct participation of children and thereby children's voices"⁶⁰¹ by excluding children from directly presenting testimony. The findings also do not closely assess violations of children's rights from the perspective of the CRC.⁶⁰²

The Sierra Leone Truth Commission took a different approach to children's participation, allowing children to participate directly in closed hearings and ensuring that children's rights were considered from the inception, including in determining guiding principles on children's participation procedures.

Case Study: Children's participation in the Sierra Leone Truth Commission

Initiated after the completion of the South African Truth and Reconciliation Commission, unlike its close predecessor, the Sierra Leone Truth and Reconciliation Commission's process involved statement-taking directly from children. It was the first Truth Commission to do so.⁶⁰³ Like in South Africa, this Commission included generalized public hearings and specialized children's hearings.⁶⁰⁴ Because of its intended inclusion of children as hearing participants, it deliberately set out to adopt child-friendly procedures from its inception which were "framed by the spirit, guiding principles and specific articles of the Convention on the Rights of the Child (CRC) as well as the African Charter on the Rights and Welfare of the Child (ACRWC)".⁶⁰⁵

The Commission's principles on child participation were produced in consultation with experts and with the contributions of children assisted social workers.⁶⁰⁶ These guiding principles included emphasis on:⁶⁰⁷

1. **Special Attention:** The need for special attention to be paid to violation of children's rights and their participation.
2. **Child Rights Focus:** The need for child rights standards to inform the process. Particular emphasis was placed on the "four general principles" on children's rights relating to the CRC and the ACRWC.
3. **Children as Witnesses:** The need for children to be considered primarily as "witnesses" of human rights violations rather than as victims and/or perpetrators.⁶⁰⁸
4. **Girls:** The different violations and abuses (including rape and other sexual violence), support needs (including support staff with expertise on gender-based violence) and data collection (including data on gender-based violence) was to receive special attention.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*, p. 142.

⁶⁰¹ *Ibid.*, p. 123.

⁶⁰² *Ibid.*, p. 157.

⁶⁰³ *Ibid.*, p. 161.

⁶⁰⁴ *Ibid.*, p. 164.

⁶⁰⁵ *Ibid.*, p. 165.

⁶⁰⁶ *Ibid.*, p. 166.

⁶⁰⁷ UNICEF & National Forum for Human Rights, *Children and the Truth and Reconciliation Commission for Sierra Leone: Recommendations for Policies and Procedures for Addressing and Involving Children in the Truth and Reconciliation Commission*, 2001, p. 16.

⁶⁰⁸ UNICEF, *Children and transitional justice*, *op. cit.*, p. 171. Indeed, the children's statement-taking forms of the Commission "omitted the section designated for perpetrators so that children were identified in the database only as victims or witnesses".

5. **Voluntary Participation:** The Commission was not to be empowered to subpoena children whose participation was to be strictly voluntary and with informed consent by children and their guardians.
6. **Confidentiality:** Statements and information by children was to be strictly confidential and not shared with any institution including the Special Court.
7. **Anonymity:** The Commission was to be bound to ensure that the names and identities of children were not revealed throughout the process.

Overall more than 300 statements were taken from children, although many girls, and particularly girls who were victims of sexual violence, were reluctant to give statements.⁶⁰⁹ Child Protection Agencies (CPA) assisted those taking statements in all aspects including: general advice and guidance on statement-taking from children; identifying children to give testimony; facilitating access for children to statement-takers; preparing children to give testimony and providing psycho-social support to children “before, during and after the statement-taking exercise”.⁶¹⁰ The guiding principles were agreed but were inconsistently applied in the processes because of delays and practical difficulties.⁶¹¹ For example, in some districts, statements were taken from children who did not have access to CPAs.⁶¹²

Not all children who gave statements were invited to testify at children’s hearings. A number of considerations, including the child’s ability to articulate themselves in the Commission’s setting, were factored in before children were selected for participation.⁶¹³ Children’s hearings were closed to ensure children’s privacy and confidentiality. Children testified directly to Commissioners in the presence of limited support staff, including to a psychosocial support worker and, at the child’s request, a CPA or parent.⁶¹⁴ Hearings included art and drama performances and excerpts of hearings, while ensuring confidentiality, were broadcast on radio and television to highlight the issues raised.⁶¹⁵

As in South Africa, Sierra Leone’s Commission dedicated a specific chapter to violations of children’s rights and recommendations in that regard. A child-friendly version of report was also produced and published. A significant effort was made to distribute this version of the report widely to children including through creative arts and in schools.⁶¹⁶

Unlike its South African counterpart, Sierra Leone’s Commission was to be supplemented by a specialized court “to prosecute crimes committed against children”.⁶¹⁷ The court was to have no jurisdiction to prosecute those below 15 years old. With regard to the prosecution of children between 15 and 18 years old, it was explicitly required to do so “in accordance with international human rights standards, in particular the rights of the child” and was given a range of flexible child-friendly remedial powers.⁶¹⁸ The prosecutor’s mandate instructs the prosecutor to “ensure that the child-rehabilitation programme is not placed at risk” and expresses some preference for a prosecutor to “resort ... to alternative truth and reconciliation mechanisms”.⁶¹⁹ The prosecutor’s team included a Victims and Witnesses Unit which included experts on “trauma related to crimes of sexual violence and violence against children”.⁶²⁰

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*, p. 172.

⁶¹¹ *Ibid.*, p. 169.

⁶¹² *Ibid.*, p. 172.

⁶¹³ *Ibid.*, p. 173.

⁶¹⁴ *Ibid.*, p. 174.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*, pp. 178-179.

⁶¹⁷ Statute of the Special Court for Sierra Leone, Article 5(a)(i-iii) (citing Prevention of Cruelty to Children (1926) Cap. (31) (Sierra Leone) including specific offenses against girls); Article 4(c) (listing as a serious violation of on international law “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities”).

⁶¹⁸ Statute of the Special Court for Sierra Leone, Article 7(1)-(2).

⁶¹⁹ Statute of the Special Court for Sierra Leone, Article 15(5).

⁶²⁰ Statute of the Special Court for Sierra Leone, Article 16(4).

One of the issues highlighted by children who participated in the trials after the Commission is a confusion between the mandates of the Commission and the Special Court which was not fully understood or sufficiently explained. Furthermore, some children expressed disappointment at not receiving reparation (compensation more specifically), which they expected to result from their participation.⁶²¹ In addition, even children who reported positive experiences with the Commission “expressed dissatisfaction ... in relation to the government’s inability to adequately link children’s truth-telling and reintegration to poverty alleviation and to the provision of basic services such as education and health care”.⁶²²

The exact participation in transitional justice mechanisms required for children may therefore vary from situation to situation. A balance must be struck between the need to protect children’s best interest from traumatization with their right to express agency and participate in any proceedings impacting on their rights. Expert authorities (including UNICEF) should be allowed to input into these processes though their input will have to be adapted to suit particular social and contextual factors.⁶²³

The CRC Committee’s General Comment 12 on the rights of children to be heard specifies that opportunities to be heard have to be provided in particular “in any judicial and administrative proceedings affecting the child”. This “applies to all relevant judicial proceedings” including those resulting from children being “victims of armed conflict and other emergencies”.⁶²⁴

Ensuring effective, ethical, meaningful participation: CRC General Comment 12

In General Comment 12, the CRC Committee recommends that States “integrate” the following requirements within all measures taken to ensure children’s participation and the protection of their right to be heard. Measures to ensure participation must be:

- **Transparent and Informative:** children are entitled to “full, accessible, diversity-sensitive and age-appropriate information” about their right to participate, how participation will be facilitated and scope and potential impact of their participation.
- **Voluntary:** children cannot be coerced or forced into participation. They have a right to cease participation at any stage and should be informed of this right. The Committee explicitly warns against “inconsiderate practice of this right” to participate. The risk is heightened in the context of hearings, which are often “a difficult process that can have a traumatic impact on the child”.⁶²⁵
- **Respectful:** children’s views must be “treated with respect” and children should be given opportunities to “initiate ideas and activities” instead of merely commenting on or reacting to them. All adults working with children should acknowledge and respect children’s contributions (e.g. in school, family and work environments as public

⁶²¹ UNICEF, *Children and transitional justice*, op. cit., p. 180.

⁶²² *Ibid.*, p. 181.

⁶²³ It is notable that expert submissions were included in both South Africa and Sierra Leone’s processes. UNICEF, for example, was involved both in advising the South African Commission to not allow participation of children of below 18 to make public submissions and in setting out the guidelines which specifically allowed children to do so in Sierra Leone.

⁶²⁴ CRC Committee, *General Comment No. 12, The right of the child to be heard*, UN Doc. CRC/C/GC/12, 20 July 2009, para. 32.

⁶²⁵ CRC Committee, *General Comment No. 12*, op. cit., paras. 21 and 16.

platforms). Such adults must also gain and show “understanding of the socio-economic, environmental and cultural context of children’s lives”.

- **Relevant:** children should be able to express views and participate in decisions with “real relevance to their lives”. Space should be created for children to “highlight and address” issues they themselves “identify as relevant and important”.
- **Child Friendly:** all participation must be child-friendly and therefore environments in which children participate must be “adapted to children’s capacities” which will evolve and develop. Children require such flexible, continuous adaption as well as sufficient time and resources for preparation and participation. The Committee warns against exposing children to “intimidating, hostile, insensitive or inappropriate” environments in the name of participation. In the context of court rooms, for example, it indicates that the “design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms” should be “accessible and child appropriate”.⁶²⁶
- **Inclusive:** children’s participation must avoid “existing patterns of discrimination” and involve “marginalized children”, including girls, minorities, children with disabilities, as children are not a single homogenous group. Children’s participation should be culturally sensitive, accessible and provide an equal opportunity for children from all communities.
- **Supported by Training:** adults facilitating children’s participation will need “preparation, skills and support to facilitate children’s participation effectively”. Children’s involvement in training and facilitation is desirable, and such children themselves will require training to equip them to do so. Training for children in this regard might include training on “awareness of their rights..., organizing meetings, raising funds, dealing with the media, public speaking and advocacy”.
- **Safe and Sensitive to Risk:** children’s participation may involve risk to them and/or their families in particular. Adults facilitating children’s participation must “take every precaution to minimize the risk to children of violence, exploitation or any other negative consequence of their participation”. Clear child protection strategies are needed to reduce such risks. Children should be made aware of protection available from harm resulting from their participation and how to access such protection.
- **Accountable:** follow up and evaluation of children’s participation is “essential” and should, where possible, involve children themselves. Children should be informed about how their expressed views have been interpreted and used and presented an opportunity to challenge and influence such interpretation and use. Wherever appropriate, children should be given an opportunity to participate in follow-up processes and activities.

Sierra Leone’s experience highlights in particular the importance of transitional justice measures and mechanisms being designed to ensure that children have access to prompt and effective remedies and reparation. This is an obligation that is engaged in accordance with the general right to an effective remedy, human rights treaties and their jurisprudence (including the CRC Committee’s General Comment 16) and general principles on business and human rights. Both the processes through which such remedies are determined and the remedies themselves should therefore be tailored taking into account children’s needs and views and in accordance with the principle of the best interest of the child.

⁶²⁶ CRC Committee, *General Comment No. 12, op. cit.*, para. 34.

While transitional justice has a role to play it cannot be the beginning and the end of “rebuilding of a child’s world”. Children themselves will continue this process for many years after Transitional Justice mechanisms end their mandates and the children become adults. Nevertheless, it is crucial to “allow[] children’s ideas an viewpoints to be heard and to influence the [transitional justice] process and outcomes”.

This is true from the early stages to the end of all transitional justice processes, including judicial, quasi-judicial and other processes such as truth commissions. The following diagram summarizes the requirements of CRC Committee’s General Comment 12 which highlights the different stages of proceedings and processes during which a child’s right to be heard should be respected and protected.

1. Preparation

- Child informed of right to express views and have views impact outcome of process.
- Child informed about right to express views directly or through a representative.
- Decision maker must adequately prepare child about where the hearing will occur, who will participate and how it will proceed.

2. Hearing

- The hearing environment must be "enabling and encouraging".
- Adult responsible for hearing must be willing to listen to child and seriously consider the child's views.
- A conversational style rather than an adversarial one-sided examination should be adopted.
- Children should, where possible, not be heard in open court but rather confidentially *in camera*.

3. Assessment of Capacity

- Child's views, once expressed, must be given due weight.
- A case by case analysis of capacity to express views should be undertaken to determine weight of views.
- If child's views expressed in a reasonable and independent manner they must be considered as a "significant factor" in the decision-maker's determination.

4. Feedback

- Decision maker informs child of outcome on weight placed on child's views and process adopted to determine this.
- Child may agree, disagree, make an alternate proposal or file an appeal/complaint. Should be informed of these rights by decision maker.

5. Complaints, Redress, Remedies

- Legislation must provide for complaints procedures and remedies where their views are disregarded or given insufficient weight. This possibility should exist in court processes and other institutions such as schools.
- Children should be informed how to access complaints procedures and be assured that children can use them with confidence and without facing victimization or punishment.

Conclusion

The examples highlighted from Uganda, Sierra Leone, South Africa and Argentina illustrate the devastating impact on children's human rights, including ESCR, resulting from the conduct of States and businesses. They also show how transitional mechanisms can begin to address these situations, even if they often fall short of providing full access to justice, the right to be heard, and effective remedy and reparation.

The starting point in international human rights law is the application of the four core CRC child-rights principles: 1) the right to non-discrimination; 2) the best interests of the child; 3) the right to life, survival and development; 4) and, the right to be heard.

Securing these rights in the context of business activities requires a clear understanding of the obligations set out in the CRC. The Committee on Children's Rights' General Comment 16, as detailed in this chapter and the ICJ's co-authored practical guides on general comment 16, provide civil society organizations, governments, businesses, lawyers and other stakeholders with clear guidance in this regard. This includes specific guidance on how to ensure corporate accountability for violations of human rights, including ESCR, in the context of conflicts and transitional mechanisms in the aftermath of conflicts.

Nevertheless, even effective remedies and reparation will unlikely be able to give back what children lose through ESCR and other human rights violations during conflicts. This is because:

"Children's recovery from grave human rights violations does not begin or end with transitional justice. Entire lives may be spent in the effort to reconcile, to recover. Yet there is reason to invest in the processes of transitional justice and to enable and protect children who want to bear witness to harms they have suffered or, in some cases, have perpetrated".⁶²⁷

⁶²⁷ UNICEF, *Children and transitional justice*, op. cit., p. 15.

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**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org