

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

Executive Summary

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## 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”.<sup>1</sup>

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.

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<sup>1</sup> 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*.<sup>2</sup>

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

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<sup>2</sup> 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*.<sup>3</sup>

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

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<sup>3</sup> 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*<sup>4</sup> 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

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<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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<sup>5</sup> 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>.

<sup>6</sup> 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/arrria-idpd2018>.



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