

Inputs for the UN Working Group on Business and Human Rights

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INTRODUCTION

In an effort to contribute to the UN Working Group on Business and Human Rights' project on business in conflict and post-conflict contexts, the Center for the Study of Law, Justice and Society - Dejusticia ("Dejusticia") is honored to present the recommendations and best practices presented in this report. As an action-research civil society organization based in Bogotá, Colombia, Dejusticia has been actively involved in the design and implementation of policies, laws, and advocacy efforts which have been aimed at increasing the accountability of States and economic actors in the respect and promotion of human rights. Additionally, since it was founded in 2005, Dejusticia has been a leading voice in the Global South on the suitable measures that can be taken in transitional societies - such as in Colombia with its long history of inequality and an armed conflict with many different actors - in order to satisfy the victims' rights.

In this regard, Dejusticia has contributed to the debate related to accountability for members of the State and economic actors who have committed grave violations of International Humanitarian Law and human rights law in the Colombian armed conflict. Dejusticia's unique experience of analyzing business and human rights both in contexts of armed conflict and post-conflict can offer pragmatic insights into the effective implementation of the UN Guiding Principles on Business and Human Rights, especially in States with similar conflict and post-conflict contexts.

The following report will be divided into two main sections. The first section contains recommendations and best practices for States and economic actors in the design and implementation of various transitional justice mechanisms. The second section proposes a set of recommendations and best practices for States and businesses with regard to land use and investment. Both sections will be divided into categories of recommendations. Each recommendation will be followed by a brief commentary containing an explanation and, when pertinent, best practices based on Dejusticia's experience working in the Colombian context. In addition, the concept of "business enterprise" enshrined in the UN Guiding Principles on Business and Human Rights will be broadly interpreted in this report to include all types of economic actors, both national and transnational, real and legal persons, individuals and corporations, and all other types of business actors. As such, this report uses the term "economic actors," given its broad coverage of a wide range of businesses and individuals.

SECTION 1: TRANSITIONAL JUSTICE MECHANISMS

I. Recommendations and Best Practices for States

General Measures

In transitional justice settings, States are faced with a whole set of obligations related to justice, truth, reparations, and guarantees of non-repetition. Recommendations in this section cover overarching obligations and best practices States should keep in mind in the development and implementation of mechanisms aimed at holding economic actors accountable.

Recommendation 1: States must ensure unimpeded access to justice for all victims of crimes during and after an armed conflict, as well as for civil society organizations and other entities with relevant information.

Commentary:

Even if post-conflict tribunals and truth commissions are created, the fear from threats and the lack of resources can prevent a victim or civil society organization from bringing their case before a relevant transitional justice mechanism. Therefore, the State must ensure that victims can access the justice system and also contribute to the historical record in an integral and unimpeded manner. From Dejusticia's experience, some examples of obstacles are the veto power of economic actors, the difficulty in accessing relevant evidence, the lack of knowledge about the transitional justice process and/or its complexity, and geographic and financial constraints.² Equally important to take into account is the large power imbalance that may exist between victims and large economic actors. In this regard, States must provide adequate measures of protection and resources for victims and organizations to access the justice system.

Recommendation 2: States must implement effective measures to hold accountable economic actors regarding the commission or facilitation of crimes during armed conflict. Among these measures, States must combat corruption that may exist between economic actors and State officials and other entities.

Commentary:

In societies transitioning from armed conflict to post-conflict settings, the State has an obligation to hold to account those who have participated in the commission of crimes in the armed conflict. This obligation extends to economic actors, such as those who financed armed groups or planned the commission of crimes. Oftentimes, economic actors hold an immense veto power regarding justice and truth, as States may have been directly involved in crimes perpetrated by economic actors or may simply not want to forfeit the economic and developmental benefits such actors provide. In many cases, local politicians or

² See Cuentas Claras: El papel de la Comisión de la Verdad en la develación de la responsabilidad de empresas en el conflicto armado colombiano, Sánchez et al., 2018, pg. 46. [hereinafter Cuentas Claras].

members of the judicial branch have been co-opted by business interests, which can result in large scale impunity and a deficit in the historical record of what actually occurred.³ Therefore, dismantling corrupt relations between the State officials and economic actors is key to ensuring the respect of human rights.

Recommendation 3: States should implement transparency and accountability measures to ensure they are not shielding economic actors from accountability due to the State's economic and development interests.

Commentary: Especially in post-conflict societies, States have an interest in development, as such projects can boost the economy and facilitate the transition from war to peace. Despite such economic and development concerns, States must not shield economic actors from accountability in transitional justice mechanisms. By implementing accountability and transparency measures and making such measures publicly available, States can avoid corruption or the perception of corruption, which can also aid in enhancing the legitimacy of transitional justice mechanisms.

Recommendation 4: States should ensure access to information by improving or creating a systemized and centralized database, which contains accurate and accessible information regarding economic actors' participation in the armed conflict.

Commentary:

In order to fulfill its obligation to investigate and prosecute perpetrators of human rights violations and international crimes, States need accessible information related to possible economic actor participation in crimes that occurred in the armed conflict. In Colombia, available information on such participation is fragmented and buried in a panoply of different State entities' databases. The extreme difficulty in accessing relevant information, that has been cross-checked and verified, remains a significant challenge for transitional justice mechanisms, such as Colombia's Special Jurisdiction for Peace ("SJP") and the Truth Commission. On the other hand, relevant information related to the participation of economic actors in crimes in the armed conflict, which is protected as intelligence and counterintelligence, should be shared with the transitional justice bodies involved in the prosecution or historical construction of such actor's participation.⁴ At any rate, information in these systematized and centralized databases should also contain information that does not directly show economic actors' complicity, but instead, may offer indirect or circumstantial evidence in this regard.⁵

³ Id. at pg. 65.

⁴ Id. at pg. 86.

⁵ Id. at pg. 87. This was the case with Decree 588 of 2017, which granted Colombia's Truth Commission access to confidential information that did not directly relate to economic actors' violations of human rights, but instead related to the business' corporate and tax information.

Recommendation 5: States should implement measures and policies which ensure effective inter-institutional cooperation and information sharing among involved entities. Among such measures and policies, the roles of involved entities and the channels of communication should be clearly delineated.

Commentary:

In transitional justice contexts, States are tasked with implementing ambitious frameworks, which, among other things, aim to put an end to conflict, transform societies, hold accountable the perpetrators of crimes, and guarantee the rights of the victims. As such, the various mechanisms and entities created and utilized make up a diverse, yet complex, web of State and civil society actors at the national and local levels. To ensure a smoother and more effective implementation of such mechanisms and processes, States should clearly delineate and define the different roles each actor will play in the implementation of the policy. Additionally, States should provide clear channels of communication and information sharing among the involved entities and actors to ensure efficiency and effectiveness in implementation.

This inter-institutional cooperation and information sharing has been a notable challenge in the Colombian context. Specifically, with regard to economic actors' accountability in the SJP, the transitional justice process has been impeded by the difficulty in accessing information regarding corporate actors that is held by the Office of the Attorney General of Colombia. Such jurisdictional conflicts with the ordinary criminal jurisdiction cause friction and may result in impunity (see Commentary on Recommendation 12).

Accountability Measures

In post-conflict settings, it is the duty of the State to hold accountable those economic actors who committed crimes in the armed conflict, as well as to guarantee the victims' rights to truth, justice, reparations, and guarantees of non-repetition. While accountability measures may take shape in a variety of ways, Dejusticia has decided to focus the discussion on truth commissions and post-conflict courts and tribunals, given its extensive experience in the design and implementation of such special bodies.

• *Truth Commissions*

Recommendation 6: From their inception, truth commissions should explicitly contain in their mandates a focus on exposing and documenting economic actors' responsibility for crimes committed in armed conflict.

Commentary:

The role of economic actors in the commission of crimes in armed conflicts is pervasive, and as a result, exploring their participation in the context of truth commissions can play an important role, especially in

guaranteeing the victims' rights to truth and non-repetition.⁶ In a study of 39 truth commissions from various countries, the complicity of economic actors was discussed in 30 truth commissions.⁷ Despite the prevalence of economic actors' participation in crimes in armed conflict and authoritarian regime settings, only one truth commission, that of Liberia, explicitly included in its mandate a focus on documenting the role of such actors in the commission of crimes.⁸ While the absence of such explicit mandate does not mean a truth commission will not document economic actors' participation, this omission may result in an underdeveloped understanding of these actors' roles in armed conflict. This omission may be compounded by the often short lifespans of truth commissions. By including in its mandate the investigation and documentation of economic actors' participation in armed conflict, a truth commission can prioritize this issue within its allotted time frame. Additionally, such explicit inclusion can aid economic actors in their understanding of the process and their role in the truth commission.

Recommendation 7: Truth Commissions and other transitional justice mechanisms should include in their regulations a broad conception of economic actors.

Commentary:

States should include a broad conception of economic actors in their truth commissions, which can help to shed light on the complexities of criminal networks involved in an armed conflict and the commission of crimes. With regard to the Colombian armed conflict, Dejusticia, in a study on corporate complicity, found there to be a host of economic actors involved in crimes committed, such as landowners, conglomerates, industrial unions, state-controlled businesses, and transnational corporations, etc.⁹ Conceptualizing economic actors in a broad sense can help prevent truth commissions from leaving critical economic actors outside of their documentation and investigative efforts.

Recommendation 8: Truth Commissions should devote particular attention to the complex dynamics of corporate financing of crimes and armed groups responsible for the commission of crimes.

Commentary:

One of the most prolific, yet most complex, forms of human rights violations committed in armed conflict is the financing of crimes or armed groups. This is especially true in the Colombian armed conflict, where, for example the principal modus operandi of economic actors was the financing of paramilitaries.¹⁰ In conducting their investigations and documentation, truth commissions should prioritize their focus on unraveling the complex dynamics of economic actors' financing activities in armed conflict. In this regard, truth commissions should be equipped with a broad interdisciplinary

⁶ Id. at pg. 8.

⁷ Id. at pg. 27. This study was carried out by Leigh Payne and Gabriel Pereira of the University of Oxford.

⁸ Id. at pg. 34.

⁹ Id. at pgs. 29-30.

¹⁰ Id. at pg. 59.

investigative team, which is able to analyze complex patterns and networks, as well as indirect financing channels.

Recommendation 9: Truth commissions should develop a strategy and incentives to establish the responsibility of economic actors.

Commentary:

Although truth commissions are usually extrajudicial and, as a result, cannot hold actors criminally responsible for participation in the armed conflict, they should include a strategy to establish the responsibility of economic actors. Since participation in a truth commission does not necessarily exempt someone from criminal prosecution in a tribunal, such strategies should take into account economic actors' legitimate hesitations about giving a complete account of what occurred. This strategy might include rules about confidentiality and anonymity, a certificate that denotes an actor's contribution to truth and justice, or reduced sentences for those economic actors who give a complete account before the truth commission, as is the case in Colombia's SJP.

Recommendation 10: Truth commissions should investigate the varying impacts of armed conflict on certain economic actors and should foment reconciliation for economic actors that are not responsible for human rights violations.

Commentary:

In some contexts, economic actors have themselves been victims of kidnapping, extortion, murder, or other crimes by armed groups (See Commentary on Recommendation 13). In other cases, an economic actor can be both a perpetrator and a victim at different times and to different degrees during an armed conflict. However, while victimization may mitigate culpability in some cases, the wrongdoing still must be assessed on its own. Therefore, truth commissions should clarify such cases and guarantee the right to truth for those economic actors. Moreover, this concession may not be used to disguise or shield economic actors from accountability for the commission or financing of crimes in armed conflict.

• *Post-conflict Courts and Tribunals*

Recommendation 11: Post-conflict tribunals should establish clear criteria for case selection and prioritization regarding economic actors' participation in crimes in armed conflict. These criteria should be publicly accessible to ensure transparency.

Commentary:

In post-conflict settings, the question of who to prosecute becomes critical, given the large number of actors involved in the commission of crimes in the armed conflict. Post-conflict tribunals face many limitations in their financial resources and the length of their mandate, which makes case selection and prioritization fundamental. According to the SJP, selection is a filter mechanism that focuses on which matters to process, while prioritization is a management strategy that determines the order in which to process selected matters.¹¹ As such, post-conflict tribunals should establish clear criteria for including economic actors in their selection and prioritization methodology. In particular, at the time of implementation, the participation of economic actors should be selected as a matter to process and should be given high priority.

Recommendation 12: Post-conflict tribunals should work in close coordination with the ordinary criminal jurisdiction to create incentives and pressure for economic actors to participate and to combat impunity.

Commentary:

Generally, in post-conflict tribunals, questions such as jurisdiction, applicable law, and penalties are completely distinct from the ordinary criminal system in a particular State. Additionally, special tribunals created in transitional justice contexts are faced with the complex issue of granting amnesties to particular perpetrators of crimes. Nevertheless, despite these differences with the ordinary criminal system, States should implement robust coordination and complementary measures to allow information sharing and collaborative efforts between the special jurisdiction and the ordinary criminal jurisdiction. This collaborative effort should especially be enforced when the special tribunal only has voluntary jurisdiction over economic actors. For example, in Colombia, the SJP only has voluntary jurisdiction over third-party actors, which includes economic actors.

In particular, it is crucial that the State ensure the ordinary criminal system is functioning effectively and expeditiously. Because Colombia's SJP only has voluntary jurisdiction over economic actors, it is imperative that the ordinary criminal jurisdiction prosecute those economic actors who have committed crimes in the armed conflict. The SJP has a unique tool at its disposal - the *compulsa de copias* - which essentially orders the SJP to send information about particular crimes committed by actors not under its mandatory jurisdiction to the ordinary criminal jurisdiction.¹² Such a tool can create an incentive for economic actors to submit to the SJP, but only if the ordinary criminal jurisdiction is effectively and expeditiously prosecuting such actors.¹³ Perhaps, the greatest incentive for economic actors to submit to a post-conflict tribunal therefore, is "that the ordinary jurisdiction carries out effective investigations and

¹¹ See Criterios y metodologías de priorización de casos y situaciones, Sala de reconocimiento de verdad, de responsabilidad, y de determinación de los hechos y conductas, Jurisdicción Especial para la Paz, 2018, par. 18.

¹² See Constitutional Court of Colombia, Sentence C-080 of 2018.

¹³ See A dos años de apertura de la JEP, los terceros van a medio camino, Gómez, 2020, El Espectador. https://www.elespectador.com/colombia2020/justicia/jep/dos-anos-de-apertura-de-la-jep-los-terceros-van-medio-camino-articulo-911901?fbclid=IwAR0lHXZmkGAVZBm7jYyISzxcM-XnZ_O3K2FVhpohtEe6lyCVUO4_acw65AI

prosecutions to break the perception that the competency of this jurisdiction, in practice, results in impunity.”¹⁴ Thus, ensuring an effective collaboration and functioning of both criminal and special jurisdictions can combat impunity of economic actors.

Recommendation 13: Post-conflict tribunals should include the criminal defense of coercion in their regulatory statutes.

Commentary:

Despite the large body of judicial and truth commission records and literature regarding the participation of economic actors in the commission of crimes in armed conflict, there is relatively little information about the *mens rea* of these economic actors’ participation, i.e. whether it was realized with intent, knowledge, under coercion, etc. Particularly, in Colombia, Dejusticia has researched and documented many cases of participation of economic actors through coercion and extortion by armed groups.¹⁵ Therefore, it is crucial for post-conflict tribunals to include coercion as a criminal defense in their statutes, in order to analyze each case in a rigorous manner. Moreover, the legal defense of coercion should be clearly defined and readily applicable to concrete cases. While including a legal framework to analyze cases of coercion is crucial, at the same time, special tribunals should not reject all cases in which there appears to be coercion because such action would limit economic actors’ ability to receive legal security in the form a renouncement of criminal prosecution and an end to any other judicial proceeding directed against them, including in the ordinary criminal jurisdiction.¹⁶

Recommendation 14: Post-conflict tribunals should view the judicial record as an important source of documentation. As such, these tribunals should provide as much detail as possible with regard to economic actors mentioned in the cases, even if such actors are not criminally responsible.

Commentary:

The importance of the judicial record created from post-conflict tribunals cannot be understated. Apart from exposing patterns of criminality and criminal responsibility of economic actors in the armed conflict, and thereby guaranteeing the victims’ rights to truth, justice, reparations, and non-repetition, the judicial record can prove essential for other ordinary criminal or transitional justice jurisdictions that subsequently take place. For example, during the implementation of the Justice and Peace Law in Colombia, which saw the demobilization of most paramilitaries, Colombia lost an important opportunity to shed light on the participation of economic actors in the armed conflict. In the Justice and Peace tribunals, demobilized members of armed groups, the majority of which were members of paramilitaries, were offered significantly reduced prison sentences for confessing their crimes. Because the focus was not on the responsibility of economic actors, the tribunals only included general references to economic

¹⁴ See Entre coacción y colaboración: Verdad judicial, actores económicos y conflicto armado en Colombia, Sánchez, 2018, pg. 201. [hereinafter Coacción y Colaboración].

¹⁵ Id. at pg. 117.

¹⁶ Id. at pg. 260.

actors' participation in crimes committed in the armed conflict.¹⁷ Additionally, the testimonies of many of the demobilized members of armed groups (*versiones libres*) are not accessible by the SJP. The lack of detailed information of economic actors' participation in the armed conflict in the Justice and Peace tribunal records and the inability to access many of the relevant testimonies have made it difficult for the SJP and the Truth Commission to gather relevant evidence regarding economic actors' participation.

II. Recommendations and Best Practices for Economic Actors

Accountability Measures

Recommendation 15: Economic actors should, to the greatest extent possible, actively and in good faith, participate in transitional justice mechanisms.

Commentary:

Because economic actors may be held responsible for human rights violations in transitional justice settings, they sometimes refuse to participate in such processes, even if they have not committed crimes. Economic actors should recognize the importance of contributing to transitional justice mechanisms, such as truth commissions and post-conflict tribunals, as such participation promotes and respects the human rights of the victims. They should also be apprised of the personal benefits afforded to them for their participation. For example, in Colombia's SJP, economic actors who have committed crimes in the armed conflict, can receive reduced sentences if they offer a full account of their actions and commit to non-repetition and reparations. On the other hand, economic actors who have not committed crimes in the armed conflict, or committed such crimes under coercion, can benefit from a final pronouncement of their innocence by the SJP.

SECTION 2: LAND USE AND INVESTMENT

I. Recommendations and Best Practices for States

Measures Related to Land and Investment

Although issues of land use and distribution, development, and investment do not, at first glance, seem to be related to armed conflict and post-conflict contexts, there is overwhelming empirical evidence that shows the intrinsic relation between land and armed conflict.¹⁸ Land use and ownership may be the

¹⁷ Id. at pg. 134.

¹⁸ See Derechos sobre la tierra y conflictos: Tierra en políticas de justicia transicional y escenarios de postconflicto, Sánchez, 2019, pg. 1. [hereinafter Derechos sobre la tierra].

historical cause of an armed conflict, the reason for its recurrence, or the impediment for its resolution.¹⁹ Similarly, land accumulation and the fight over natural resources, as well as forced displacement, dissolution of property rights, forced labor, etc. are particular dynamics of armed conflict that States must address in respecting, protecting, and remedying human rights violations. Additionally, measures implemented by States to address human rights must take into account the different stages of armed conflict and respond accordingly to the different contexts that each stage presents.²⁰

Therefore, both States and economic actors have a set of obligations with regard to the protection and remedial measures taken during and after armed conflicts, as well as prevention measures related to investment. Additionally, in societies such as Colombia, States and economic actors must take into account a host of other obstacles, such as inefficient rural development models, sub-utilization of productive land, extreme poverty, and weak State institutions.²¹ At the same time, States and economic actors must respect the rights of indigenous and other specially-protected ethnic groups, as well as the governing environmental and agrarian restrictions.

- *Conflict Settings*

Recommendation 16: In periods of armed conflict, States should implement early warning measures that aim to prevent the occurrence of human rights violations or protect such rights if violations occur.

Commentary:

In armed conflicts, economic actors have often resorted to violence or simply taken advantage of the general context of violence to buy up land or forcibly gain possession of it through land dispossession and forced abandonment. Therefore, States should implement measures aimed at preventing and protecting from such human rights violations. Such mechanisms should include variables which take into account threats to the rights of adequate living, the protection against forced evictions, the protection of the rights of indigenous populations, migrants, refugees, internally displaced persons, and stateless persons.²² In addition, such prevention and protection measures should be aligned with humanitarian responses related to land. For example, peace maintenance operations should include the protection of rights related to abandoned land (instead of just the protection of abandoned properties) and the protection of records and databases related to land rights, as well as the protection of different forms of land tenure, etc.²³ Moreover, these early warning measures should include the publishing of relevant information in order to inform investors, property owners, or laborers and prevent such actors from unknowingly contributing to human rights violations.

¹⁹ Id. at pg. 1.

²⁰ Id.

²¹ See Lineamientos para una acción empresarial responsable frente a los conflictos de tierras en Colombia, Sánchez, 2012, pgs. 2-12. [hereinafter Lineamientos].

²² Derechos sobre la tierra, pg. 1.

²³ Id. at pg. 2.

Recommendation 17: In periods of armed conflict, States should implement measures to protect the land rights of inhabitants who are forced to abandon their lands. In particular, such measures should include the freezing of transactions in war-affected zones.

Commentary:

During armed conflict, land owners, and possessors, occupants, and tenants of land are oftentimes forced to flee their properties. In fact, Colombia has one of the highest number of victims or forced displacement in the world, which has reached 7,992,981 at the end of February 2020.²⁴ In such contexts of massive displacement, economic actors can take advantage of the situation by buying up lands. Such economic actors can also be responsible for the forced displacement in the first place. Therefore, protecting the land rights of the victims of forced displacement is crucial. To face such a widespread concern, Colombia enacted Decree 2007 of 2001, which created the Protection of Land and Patrimony of the Displaced Population Project.²⁵ Among other things, this decree enables the government to issue declarations of forced displacement or imminent risk of forced displacement in certain zones, which, in turn freezes all transactions with regard to properties in these zones.²⁶ Such freezing can be lifted on a case-by-case basis. Not only are freezing measures important for a State to prevent and protect the human rights of its inhabitants, but also, such measures can also protect economic actors from investing in these zones, which may later become the subject of land rights disputes.

- *Post-Conflict Settings*

Recommendation 18: Especially in contexts in which land has been considered a cause or trigger of armed conflict, States must prioritize land issues and its associated conflicts both in the negotiations and construction of peace agreements.

Commentary:

In order to transition out of an armed conflict, which in large part was caused by land issues, a State must tackle this complex issue both in the negotiations and construction of peace agreement. Such processes should take into account both political and technical aspects which surround decisions regarding land governance.²⁷ Additionally, the negotiations and construction of a peace agreement should take a comprehensive and strategic approach to dealing with land issues, by including a focus on structural barriers of land access and use.²⁸

²⁴ See la Unidad para la Atención y Reparación Integral a las Víctimas, Statistics, 2020, <https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394>.

²⁵ See Decree 2007 of 2001.

²⁶ Id. at Article 1.

²⁷ See Derechos sobre la tierra, pg. 3.

²⁸ Id.

Recommendation 19: In land restitution processes, States should design a framework which takes into account the power imbalances and lack of evidence victims of land dispossession and forced abandonment are often faced with.

Commentary:

In armed conflict, forced displacement, land dispossession, and forced abandonment are common occurrences that often involve the participation of economic actors. As such, States implementing a land restitution process should take into account the particular vulnerabilities of the victims, the lack of available evidence, and the oftentimes powerful economic actors, such as corporations, who oppose such land restitution. In 2011, Colombia enacted Law 1448, the Victims and Land Restitution Law, which, among other things, aims to restore the land rights of victims of land dispossession and forced abandonment as a result of the armed conflict. Law 1448 implements two important legal concepts, the presumption of good faith and the inversion of the burden of proof, which help confront the particular problems victims may face in accessing the land restitution system.²⁹ According to the presumption of good faith, victims that claim land dispossession or forced abandonment will be presumed to be acting in good faith in presenting their claims. In addition, the land restitution process presumes the existence of land dispossession or forced abandonment in a variety of enumerated situations.³⁰ With regard to the inverted burden of proof, the land restitution process puts the burden of proof on the party opposing the land restitution, requiring them to prove their good faith which is also blameless (*buena fe exenta de culpa*).³¹ By including legal concepts such as the presumption of good faith and the inversion of the burden of proof, States can confront material and historical problems of inequality, which have contributed to land dispossession and forced abandonment in armed conflict.³²

- *General Investment Measures*

Recommendation 20: In granting licenses and concessions for economic actors to exploit and develop land, States must respect the rights of indigenous and other specially-protected ethnic groups, as well as the land rights of other vulnerable populations. This obligation should be enhanced in periods of armed conflict.

Commentary:

Economic investment and development concerns are powerful and important State interests, but States must always respect human rights in carrying out such projects. With regard to land inhabited by indigenous and other specially-protected ethnic groups, States must consult with such groups to try to gain free, prior, and informed consent before granting a license or concession (see Recommendation 21).

²⁹ See Law 1448 of 2011, Articles 5, 78, and 88.

³⁰ Id. at Article 77.

³¹ Id. at Articles 77 and 88.

³² See La buena fe en la restitución de tierras, Bolívar and Botero, 2017, pg. 96. [hereinafter Buena Fe].

Recommendation 21: Before granting any licenses or concessions to economic actors, States must consult with the indigenous and ethnic communities that may be affected, with the objective of gaining the communities' free, prior, and informed consent.

Commentary:

In countries like Colombia, with large indigenous populations and other specially-protected ethnic groups, States must consult with these populations with the objective of receiving free, prior, and informed consent before starting any project that may affect such population.³³ As such the State should design mechanisms to guarantee these populations' use of land, the protection of natural resources, as well as to guarantee protection and participation for such protected communities when faced with exploitation or expropriation of natural resources, which frequently occurs in armed conflict situations.³⁴ In this regard, States should also implement effective measures of redress for affected communities to receive a remedy for violations of free, prior, and informed consent. For example, in Colombia's land restitution process, the applicable decree permits specialized land restitution tribunals to order the suspension of projects that were started without the previous consultation of the affected indigenous or other specially-protected ethnic communities.³⁵

Recommendation 22: States should maintain and update land ownership and land tenure records, as well as systematize a comprehensive land cadastre and make such systems publicly accessible so economic actors can perform an accurate due diligence before investing.

Commentary:

In order to respect the land rights of other vulnerable populations, States should update and centralize information related to land ownership, occupation, possession, tenancy, and other forms of land tenure. In Colombia, the lack of a comprehensive land cadastre and the lack of accurate information about land titles and rights in the offices of registry and public instruments contributed to the massive land dispossessions and forced abandonments in the Colombian armed conflict. In addition, updating and centralizing such information will help economic actors and other investors perform a rigorous due diligence before purchasing land or initiating development projects.

³³ See United Nations Declaration on the Rights of Indigenous Peoples, Article 32(2).

³⁴ See Lineamientos, pg. 24.

³⁵ See Buena Fe, pg. 103.

II. Recommendations and Best Practices for Economic Actors

Measures Related to Land Use and Investment

Recommendation 23: In order to respect human rights and comply with the highest standards of corporate responsibility, before investing and developing a project, economic actors should understand the local context in which they plan to carry out business.

Commentary:

Before investing in a particular country or region, economic actors should learn about the complex dynamics regarding the past and present social, political, and economic conflicts related to property, tenancy, and land use.³⁶ For example, in Colombia, the rural sector has some particular characteristics that must be understood in order to implement an effective corporate responsibility policy: the extreme state of vulnerability of rural populations, the lack of access to basic goods and effective enjoyment of other rights, the unequal distribution of land and its access, and the minimal State presence in the rural areas. To demonstrate their understanding of a particular region, businesses can perform a human rights impact assessment and make such assessment publicly available. By first understanding the local contexts in which they plan to invest, economic actors can respect human rights and more effectively respond to and work with the local populations.

Recommendation 24: Economic actors should firmly commit to avoid contributing to existing patterns and structures of violence and inequality, as well as to avoid creating new forms of violence and unjust settings.

Commentary:

Once economic actors have undertaken efforts to understand the local contexts in which they desire to invest and develop projects, they can exercise corporate responsibility and promote human rights by firmly committing to not contribute to existing problems, nor create new problems. In the case of Colombia, economic actors should be especially careful to avoid taking measures that would further increase the already high levels of unequal concentration of land.³⁷ Measures which increase land concentration can limit access to the only productive asset rural communities have, and as a result, can contribute to their political exclusion and create conditions for other human rights violations.³⁸ Even further, economic actors can develop plans to work with vulnerable populations in the region, for example, by offering them employment.³⁹ It is crucial that any type of employment relationship between

³⁶ See Lineamientos, pg. 2.

³⁷ Id. at pg. 4.

³⁸ Id.

³⁹ Id. at pg. 15.

economic actors and inhabitants of the region should respect the highest standards of human rights and aim to combat explicit and implicit power inequalities between the parties.

Recommendation 25: In order to respect human rights and comply with the highest standards of corporate responsibility, economic actors should undertake a meticulous study regarding the ownership of the property and other land rights and make this study publicly available before investing in a project.

Commentary:

Before investing in a project, all economic actors should perform an enhanced due diligence of chain-of-title records and other publicly available information regarding a particular piece of land. In post-conflict societies, this due diligence should be undertaken in a more rigorous manner, considering the complex dynamics of forced displacement, land dispossession, and forced abandonment that may have taken place in armed conflict. At the same time, poor public records systems, informal titling, and falsified transactions can increase the complexity of such due diligence. However, to respect the human rights of the true owners, occupiers, possessors, and tenants of land, such meticulous studies are necessary.

In Colombia, economic actors hoping to invest have faced significant challenges in performing due diligence with regard to at least three types of properties: 1.) properties that are not attached to any official document of identification, 2.) properties with official records, but containing inconsistent, conflicting, or absent information or errors in geographical boundaries delineated, and 3.) properties with official records, but containing restrictions on sales, transfers, or land use.⁴⁰ To carry out business in a socially responsible manner and in accordance with the highest human rights standards, economic actors should pressure States to provide an accurate land cadaster (See Recommendation 22), as well as conduct enhanced due diligence aimed at resolving such land title issues.

Recommendation 26: Before investing or starting any development project, economic actors must wait for the State to consult with affected indigenous or specially-protected ethnic communities to try to obtain free, prior, and informed consent. In this regard, economic actors should abstain from intervening in the consultation process, as well as avoid engaging with the affected community in any way prior to or during the consultation.

Commentary:

It is the sole duty of the State to try to obtain free, prior, and informed consent from indigenous or specially-protected ethnic groups before starting a project that may affect them (see Recommendation 21). To ensure the consent is truly free, economic actors must avoid any interactions or engagement with such groups before and during the consultation with the State. By keeping the consultation process free from their influence, economic actors can protect themselves from later judicial action that may arise.

⁴⁰ Id. at pgs. 9-12.

Additionally, after an affected community has given free, prior, and informed consent to a State, economic actors should review such consent to ensure it was duly given. Finally, if an economic actor determines that the consent was not free, prior, and informed, it should withdraw from its proposed project; similarly, economic actors should comply with judicial decisions that find that the consent was not free, prior, and informed.

CONCLUSION

While this list of 26 recommendations is not in any way exhaustive, Dejusticia believes these recommendations clearly and concretely demonstrate practical ways in which States and economic actors can implement measures in line with the UN Guiding Principles on Business and Human Rights, and thereby abide by the three pillars of “Protect, Respect and Remedy” in conflict and post-conflict settings. Drawn from fifteen years of experience working in the Colombian context, Dejusticia emphasizes the crucial role that both States and economic actors have in protecting human rights and facilitating the transition of societies from armed conflict to post-conflict settings. Through the strengthening of transitional justice accountability mechanisms and the implementation of a socially responsible approach to land use and development, States and economic actors can contribute to victims’ rights to truth, justice, reparations, and non-repetition, and can avoid contributing to structures of inequality, which have been a leading cause of armed conflict.