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UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises Project on business in conflict and post-conflict contexts

Dear members of the Working Group,

I write to you in response to your call for inputs on your project on business in conflict and post-conflict contexts. I am a doctoral researcher at the Manchester International Law Centre, University of Manchester focusing on the role of economic actors in war. I have been researching the accountability of business enterprises in armed conflict for the past four years.

This brief submission draws on my research and analysis of two UN processes: the United Nations Public Hearings for Transnational Corporations in South Africa and Namibia (1983-1987) (the South African public hearings) and the development of the United Nations Database on business enterprises involved in Israeli settlements (2020) (the Israeli settlements database). Both case-studies provide rich assessments of the particularities of the involvement of business enterprises in armed conflict. They incorporate perspectives of the affected populations, ascertain an appreciation of the negotiating power of business enterprises in developing states affected by armed conflicts, and reflect upon the embedded nature and indirect effects of the involvement of business enterprises in the economy of armed conflict. The following are some of my findings concerning the contribution made by these two processes with the hope that they may provide useful input to your ongoing project.

(1) The need to place direct duties on business enterprises in the context of armed conflict and post-conflict areas, with emphasis on the duty not to benefit from or contribute to conditions and processes of systematic wrongdoing.

The ascertainment of direct duties upon business enterprises has been considered in the general framework of business and human rights.¹ Such direct duties were *de facto* incorporated in a prior attempt to regulate corporate conduct at the United Nations in the draft code for transnational corporations.² I urge the working group to consider supporting the position that such duties exist in conflict and post-conflict contexts, given the particularities of such business environments and their regulatory elusiveness resulting from the following

¹ Andrés Felipe LÓPEZ LATORRE, 'In defense of direct obligations for businesses under international human rights law' 5 (1) Business and Human Rights Journal (2020) 56-83.

² For example the draft code instated the duty '*to respect the national sovereignty in the countries in which they operate*' on TNCs. The United Nations Centre on Transnational Corporations, 'The United Nations Code of Conduct on Transnational Corporations' (the United Nations, 1988) (UN Doc. ST/CTC/SER.A/4.) article 6.

circumstances: (a) the weak position of the host State, and the fact that most armed conflicts occurs in developing states; (b) the possibility of aligning the political interests of home States and the economic interests of business enterprises through a policy that does not favour humanitarian considerations;³ (c) the complex prolonged, and low-intensity nature of many contemporary armed conflicts, in which war economics are in constant interaction with global value chains;⁴ (d) the positive contribution that business enterprises can have towards the cessation of the hostilities as repeatedly stressed in the South Africa public hearings;⁵ (e) and, finally, the heightened risk of humanitarian losses caused by the aggravation of hostilities.

One central duty that ought to be granularised is the duty not to benefit from or sustain a process or condition of systematic wrongdoing in the context of armed conflict. The rationale for this duty is found in the public hearings,⁶ the database,⁷ and the UN Fact finding mission in Myanmar's report on the 'Economic interests of the Myanmar military'.⁸ In short, existing normative frameworks fail to capture a corporate contribution that "*falls short of the standard of complicity but .. entails the conversion of wrongful rights and titles into financial gains*".⁹ Such forms of involvement can at times "*increase the longevity of conflict as well as its severity, frequency and the likelihood of Human Rights and other violations of International law*".¹⁰ Most frameworks, however, overlook such forms of what can be coined as 'indirect contribution',¹¹ thus limiting the breadth and substance of the assessments that business enterprises should undertake prior to any engagement in economic transactions linked with

³ Many home states benefitted from the influx of natural resources in Namibia, as well as the political position of south Africa, and refused to take a position against apartheid for a prolonged period of time. JP Brits, 'Tiptoeing along the Apartheid Tightrope: The United States, South Africa, and the United Nations in 1952' (2005) 27 *The International History Review* 754.

⁴ Mark B Taylor, 'War Economies and International Law - Regulating the Economic Activity of Armed Conflicts, An Introduction' Doctoral Thesis submitted to the University of Oslo (2017) available at: https://www.academia.edu/35803213/War_Economies_and_International_Law_-_Regulating_the_Economic_Activity_of_Armed_Conflicts_An_Introduction accessed 07 April 2020

⁵ Such possible positive role was repeatedly stressed in the course of the public hearings. The United Nations Public Hearings for Transnational Corporations in South Africa and Namibia (Vol I) Report of the Panel of Eminent Persons on Transnational Corporations. UN Doc. ST/CTC/68 (1986) at 55-63.

⁶ the Panel of Eminent on transnational Corporations called for an investigation of the activities of TNCs to the extent that they contribute and sustain the system of Apartheid. UN Doc. ST/CTC/68 at 41-42.

⁷ Human Right Council, 'Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem - Report of the United Nations High Commissioner for Human Rights' UN Doc A/HRC/37/39 (2018) ¶ 46

⁸ "*The mission concludes on reasonable grounds that the tatmadaw's business and military interest in jade and ruby extractive industries benefitted from and directly contributed to International Human Rights Law violations in conflict affected Kachin state*" The Human Rights Council, 'The economic interests of the Myanmar Military – Independent International fact finding mission on Myanmar' (5 August 2019) UN Doc. A/HRC/42/CRP.3. ¶ 100.

⁹ Valentina Azarova, 'Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel's Settlements' (2018) 3 *Business and Human Rights Journal* 197.

¹⁰ *Ibid.* 187, 193.

¹¹ Early literature providing an expansive interpretation of corporate complicity in armed conflict, referencing such forms of indirect contribution that falls outside the normative framework, includes: Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91.

such contexts.

(2) Directing attention towards rights relevant to the economic well-being of developing States

While business enterprises do at times benefit from and contribute to violations in the conduct of hostilities directly or indirectly, when, for example, they finance either belligerent. Such involvement can also arise from second level and third level economic dealings that sustain or ignite the armed conflict and its detrimental effects on society as a whole. To account for such longer term, debilitating effects, global south states stressed the need for directing attention towards the duty of business enterprises to respect certain rights touching upon macroeconomic considerations, in the context of the negotiations of the United Nations Code for transnational Corporations,¹² as well as during the South Africa public hearings and the Israeli settlements database. These rights include : (a) **the right to development:** protecting against the transactions of business enterprises that might contribute towards holding the economy of either belligerent captive ;¹³ (b) **the principle and corollary right to permanent sovereignty over natural resources:** breaches of which are a main result of resource wars;¹⁴ and (c) **labor rights and other socio-economic rights:** given that business enterprises can either directly or indirectly benefit from the absence of suitable regulation, and the improvised situation of the local population to accumulate profit.

Both the South Africa public hearings and the Israeli settlements database stress that through economic activities that are linked with systematic wrongdoing, home States of business enterprises implicitly afford recognition to an illegal situation in contravention **of their obligation not to recognise as lawful situations created by serious breaches of peremptory norms of international law.**¹⁵ The limits of the effects of this obligations, especially on the basic rights of individuals, was established by the International Court of Justice in the *Namibia* case.¹⁶ This reasoning demonstrates that the involvement of some business enterprises can result in the business' home State affording implicit recognition to serious breaches of peremptory norms by either belligerent, and thus further strengthen their position. An example is the effect of foreign investments administered by the Moroccan Government in the occupied Western Sahara, which due to the BITs concluded with third states and extended to the occupied territory result in the third states' contravention of their

¹² For a general discussion refer to: The United Nations Centre for Transnational Corporations, 'The United Nations Code of Conduct on Transnational Corporations: Issues involved in the formulation of the code. UN Doc E/C.10/17 (1967). One fundamental focus of the agenda of states of the global south at the time was the ascertainment of corporate duty to behave in accordance to the development goals of host states. 10-12.

¹³ The database stresses that settlements lead to the depression of the Palestinian economy, leading to a 'permanent unemployment crisis', forcing thousands of Palestinians to seek work of a low-wage, 'low-skill' work--typically manual labour- in Israeli settlements. (A/HRC/37/39) ¶ 49.

¹⁴ ST/CTC/68 (1986) V-VI.

¹⁵ Transnational Corporate "activities are according recognition to the statues of South Africa in Namibia and creating an aura of legitimacy for its regime" ST/CTC/68 (1986) at 113.

¹⁶ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971 ¶ 117-127.

obligation of non-recognition.¹⁷ Notably, efforts to abide by the obligation of non-recognition in the context of occupation have been met with narrow interpretations of the General agreement on Trade and Tariffs (GATT) where the decision not undertake economic dealings interlinked with a given occupation is deemed discriminatory according to some interpretations, leading **to a collision of rules that can only be resolved by a harmonized understanding of international law**, where public considerations override private considerations with relation to the context of armed conflict.¹⁸

On a relevant note, experts such as James Stewart endorse **an expansive interpretation of the crime of pillage**, so that the act of *appropriating natural resources indirectly from the owner by purchasing the commodities from an intermediary* are seen to constitute a direct breach of international humanitarian law by business enterprises.¹⁹ Such an interpretation reacts to the reality of corporate involvement in armed conflict; where activities often seen as ‘business as usual’ can feed into a chain of causality sustaining infringements in armed conflict.

I remain at your disposal to elaborate on these brief reflections, and thank you, in advance, for acknowledging receipt of my submission..

Sincerely,

Shahd Hammouri

¹⁷ See also Valentina Azarova, ‘The secret life of non-recognition: EU-Israel relations and the obligation of non-recognition in international law’ 4 (1) Global Affairs (2018) 23-37 . Valentina Azarova, ‘The Commission’s Proposals to Correct EU-Morocco Relations and the EU’s Obligation Not to Recognise as Lawful the “Illegal Situation” in Western Sahara’ (*EJIL: Talk!*, 13 July 2018) <<https://www.ejiltalk.org/the-commissions-proposals-to-correct-eu-morocco-relations-and-the-eus-obligation-not-to-recognise-as-lawful-the-illegal-situation-in-western-sahara/>> accessed 9 April 2020.

¹⁸ For a detailed account of the debate refer to: Tom Moerenhout, ‘The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and Their Economic Activity in Occupied Territories’ (2012) 3 Journal of International Humanitarian Legal Studies 344.

¹⁹ James Stewart, ‘Corporate War Crimes: Prosecuting the Pillage of Natural Resources’ 31,33 ¶36,37,38,40