



IACHR – Inputs to the Questionnaire for the thematic report on Business and Human Rights: Inter-American Standards

Introduction

For many years, various organizations that comprise the Corporate Accountability Working Group (CAWG) of the International Network on Economic, Social and Cultural Rights (ESCR-Net) have been working collectively to demonstrate how certain corporate activity can undermine human rights and harm communities and groups affected by their operations. CAWG members have been engaging collectively and conducting advocacy stressing the need to develop binding regulations to hold corporations accountable for the human rights impacts that their activities cause. We have been closely following the process initiated at the United Nations (UN) through the Human Rights Council (HRC) [Resolution 26/9](#) to create an inter-governmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG) with the mandate to elaborate an international legally binding instrument to regulate corporate activities. To contribute to the work of the UN IGWG, CAWG members presented two collective submissions, in **2016** and **2017**, related to the main issues that a binding treaty should contain. In addition to these submissions, ESCR-Net and the International Federation for Human Rights (FIDH) developed **10 key proposals for the treaty** in 2016. In 2017, ESCR-Net members

formulated three advocacy positions on **corporate capture**, **gender** and **human rights defenders** (HRDs).

This collective submission is presented in response to the **questionnaire** initiated by the Inter-American Commission on Human Rights (IACHR) to receive information for the preparation of the thematic report “Business and Human Rights: Inter-American Standards”. It is the result of the work of several of our members in the Inter-American region, coordinated by ESCR-Net CAWG. Interamerican Association for Environmental Defense – AIDA (regional), Centro de Estudios Legales y Sociales – CELS (Argentina), Colectivo de Abogados Jose Alvear Restrepo – CAJAR (Colombia), Comité Ambiental en Defensa de la Vida (Colombia), Conectas Direitos Humanos (Brazil), Due Process of Law Foundation – DPLF (regional), International Federation for Human Rights – FIDH (international), FoodFirst International Action Network – FIAN (international), International Accountability Project – IAP (international) and Project on Organizing, Development, Education, and Research – PODER (Mexico) are the members that contributed to this document, which has been revised and also endorsed by the following members: Center for International Environmental Law – CIEL (International), Foro Ciudadano de Participación por la Justicia y los Derechos Humanos – FOCO/INPADE (Argentina), Justiça Global (Brazil), Movimento dos Atingidos por Barragens – MAB (Brazil), National Union of Domestic Employees – NUDE (Trinidad and Tobago) and Terra de Direitos (Brazil). We hope this document is well received and useful to inform the work of IACHR, especially through the work of the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (SRESCER) in developing the thematic report.

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BLOCK I – Context

Question 1 - Provide information on the problems of greatest concern in your country and/or regionally within the American continent regarding direct or indirect human rights violations on groups in a particularly vulnerable situation in the framework of business activities. In particular:

a. Human Rights Defenders

Human rights defenders (HRDs), including journalists and whistleblowers, working in the field of corporate accountability play a valuable role in identifying and exposing the adverse human rights impacts caused, or contributed to, by corporate activity and development projects.¹ In highlighting the measures needed to develop a clear and binding international human rights legal framework on corporate regulation, ESCR-Net members have consistently prioritized the need to protect HRDs and ensure enabling environments for human rights activity.² In addition to the physical protection of HRD individuals and communities, this also requires measures to be taken to cease and protect them from restrictions on the spaces in which activity to protect and defend human rights takes place, and steps to ensure that affected communities are at the center of discussions related to the human rights impact of corporate activity.

The work of HRDs to ensure accountability for corporate-related human rights abuses is increasingly under threat. In recent years, there has been an increase in the numbers of killings of HRDs all over Latin America, particularly in Brazil, Mexico, Colombia, Nicaragua and Honduras. This trend is connected with common global conditions including unrestrained global economic development, impunity for harms and the prioritization of economic gains over human rights. For example, following the overthrow of democratically elected president Manuel Zelaya, in 2009, the new government in Honduras has aggressively promoted investment and development in mining, agri-business and large-scale energy infrastructure projects, even in natural reserves, with no consultation and without human rights and environmental rights impact assessment.³ There has been increasing privatization of land and water resources and the removal of barriers to large-scale development projects. The developers often disregard the land rights of indigenous and peasant communities, who are sometimes killed, usually by private security forces connected with the projects. For example, in Colombia 37 HRDs working to defend land and the environment were assassinated, 22 of whom were killed by paramilitary groups in 2016 alone.⁴ As economic interests over land grow, so do attacks against HRDs working on land and related rights. According to The Observatory for the Protection of Human Rights Defenders (Observatory), it was possible to document 43 cases of murder targeting land rights defenders between 2011 and 2014⁵

¹ ESCR-Net Members Joint Statement on ‘Protecting and supporting human rights defenders who work on issues of corporate accountability’, 2013 Peoples’ Forum on Human Rights and Business, available at: <https://www.forum-asia.org/?p=16570>.

² ESCR-Net Corporate Accountability Working Group, ‘Towards a Strong Treaty to Regulate Corporate Activity: Protecting Human Rights Defenders and Ensuring Enabling Environments for Human Rights Activity’ (2017), available at: <https://www.escr-net.org/corporateaccountability/hrbusinessstreaty>.

³ FIDH, CEHPRODEC and FUPNAPIB, ‘Endangered Protected Areas and Water Resources in Honduras, the Cuyamel II Hydroelectric Project in San Francisco, Atlántida’, 31 May 2017, available at: <https://www.fidh.org/IMG/pdf/hria691hondurasangweb.pdf>.

⁴ Global Witness, ‘Defender la Tierra’, 2017.

⁵ FIDH, Annual Report 2014, titled ‘We Are Not Afraid: land rights defenders targeted for confronting unbridled development’, available at: https://www.fidh.org/IMG/pdf/obs_2014-uk-web2.pdf.

particularly in Latin America and Asia.⁶ Also, in the same period, the Observatory has documented 32 situations of judicial harassment targeting 123 defenders around the world, sometimes together with arbitrary detention. In Latin America, this happened particularly in Ecuador, Guatemala, Mexico and Nicaragua⁷. These figures only reflect a small fraction of the real picture.

The types of attacks range from harassment, intimidation, threats, restrictions, criminalization, illegal surveillance, defamation campaigns, persecutions, arbitrary arrests, unjust imprisonment, judicial harassment, disappearances, ill-treatment and torture, and murder. HRDs denouncing corporate abuses are usually victims of various, interrelated types of attacks, which in some cases are chronologically connected to their HRD activities. State agencies, often at the behest of corporations, apply restrictive or vague laws to inhibit the work of HRDs, particularly laws relating to national security, counter-terrorism, defamation and sedition. This is contrary to the UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR General Comment 24), which reiterated that: “States Parties should take all necessary measures to protect human rights advocates and their work. They should refrain from resorting to criminal prosecution to hinder their work, or from otherwise obstructing their work”.⁸

The challenges facing HRDs responding to corporate activity are particularly acute for those belonging to, or working with, socially marginalized sections of society, including indigenous peoples, women HRDs, those working on issues of sexual orientation or gender identity and ethnic, religious and other minorities.

HRDs often are denied access to information about investment and other projects that might affect their lives, communities and the environment. Rarely is there any access to spaces for real dialogue, participation and consultation. In cases involving indigenous peoples, State authorities are often absent from the consultation process and communities lack information to make informed decisions. Such asymmetry of power (between corporations and local communities) prevents meaningful consultations in practice, and there is no clear regulation laying the ground for the exercise of communities’ rights to information and participation. For instance, in Honduras, where investments in renewable energy and particularly hydroelectric projects have considerably increased over the last decade, legislative reforms to attract investment in this sector have resulted in the reduction of safeguards such as the requirement for consultation and participation of local communities potentially affected by the projects.

The absence of communities from these consultation processes facilitates corruption and corporate capture of decision makers. Collusion between corporations and States, including through the privatization of public security forces, further aggravates the impacts on the rights of affected communities. The Observatory also found in its [report](#) that perpetrators of violence against HRDs are often the police, the military, private security agents and “henchmen”. The objective is to silence dissenting voices likely to slow down investment projects, either through surveillance or coercion. In Colombia, for instance, the government created “Energy and Mining battalions” to ensure the protection

⁶ According to Global Witness, more than 371 land and environmental activists were killed between 2011 and 2013, highlighting that land rights defenders are one of the most vulnerable categories of HRDs. Most of the murders took place in Asia and Latin America. See Global Witness Report, *Deadly Environment: The Dramatic Rise in Killings of Environmental and Land Defenders*, 2014.

⁷ FIDH, *Annual Report 2014*, titled “We Are Not Afraid: land rights defenders targeted for confronting unbridled development”, above note 5, 59 and 60.

⁸ UN Committee on Economic, Social and Cultural Rights, 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), para. 48. See also, CESCR, *Human Rights Defenders and Economic, Social and Cultural Rights - Statement by the Committee on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2016/2 (29 March 2017).

of project infrastructure related to extractive industries. These battalions are funded by multinational enterprises operating in the country.

This significant repression and criminalization of HRD activity is accompanied by a culture of impunity. As of late 2014, research shows that the vast majority of the cases of killings of HRDs remain unsolved.⁹ Attached to this report as Annex A¹⁰ is a list of recent cases documented by FIDH, which reflect the trends toward repression of HRDs working on business and human rights issues in Latin America.

b. Women

Corporate activities perpetuate widespread discrimination against women in workplaces, contribute to unstable and vulnerable working conditions and give rise to gender-specific and disproportionate human rights abuses. In this context, it is not sufficient that women be considered as an afterthought once corporate-related human rights abuses have already occurred, and characterized merely as victims. Instead, a gender perspective must be an integral part of corporate accountability frameworks. In ensuring that corporate accountability is informed by the leadership and experiences of women, ESCR-Net members consider that States must (among other actions): recognize and take appropriate measures to address the particular impacts experienced by socially marginalized women and women affected by multiple or intersectional forms of discrimination; address the widespread forms of discrimination against women in workplaces; ensure the full legal recognition, with associated benefits and protections, of all forms of work undertaken by women (including unpaid, informal, and precarious types of work); promote the reconciliation and sharing of work and family responsibilities for women and men; and investigate and address the different and disproportionate impacts of corporate human rights abuses on women and girls.¹¹

Corporate activities impact women's human rights in different ways, particularly through employment relations and through the impacts that corporate activities have on women's rights. In all regions, women are disproportionately represented in the most insecure, unsafe, lowest-paying and unstable forms of employment available. Corporations, their subsidiaries and partners in their supply chains, especially in the informal sectors of the economy, conduct these abuses. The forms of employment that are made available by these sectors are far more likely to be in the informal sector, where labor conditions, compared to jobs available to men, are less safe, with lower or inconsistent wages, shorter-term employment status, and irregular work hours. Women employed in these sectors are also particularly vulnerable to harassment and physical abuse, including sexual violence, in their workplace or traveling to and from work, especially in conflict and post-conflict environments. The negative impacts of corporate operations are compounded for marginalized sectors of women in society, particularly indigenous women, especially in industries focused on exploiting natural resources such as large-scale energy, forestry and mining, as well as agroindustry and garment manufacturing. In many communities, socially constructed gender roles mean that women are responsible for securing access to water and other basic needs. This means that women bear a disproportionate responsibility to care for children and other family members and are more likely to experience a greater loss of livelihood and social status in the case of loss of access to land, forests and other forms of natural resources. Moreover, corporate activities that result in land confiscation, displacement or environmental damage often go hand in hand with increasing vulnerability of women and children to violence, forced labor and trafficking. In addition, when corporate activity results in air, water

⁹ Global Witness Report, *Deadly Environment: The Dramatic Rise in Killings of Environmental and Land Defenders*, 2014, above note 6, 20.

¹⁰ Cases of HRD collected by FIDH in Colombia, Ecuador, Guatemala, Honduras and Nicaragua.

¹¹ ESCR-Net Corporate Accountability Working Group, *Towards a Strong Treaty to Regulate Corporate Activity: Corporate Accountability Informed by the Leadership and Lived Experiences of Women* (2017), available at: https://www.escr-net.org/sites/default/files/jgwg_advocacy_material_-_gender.pdf.

and soil contamination, women's sexual and reproductive health and small children are the first to be affected. At the level of corporate projects, the ones that attempt to engage with communities, for example by informing them of their operations or offering compensation for losses or damages, tend to meet with mostly or only men, such as with male village elders or perceived heads of households. The use of military or (private) security forces by corporations and/or States in connection with corporate activity is associated with gender-based violence, including sexual violence, as retaliation against women HRDs.

c. Indigenous Peoples

Indigenous peoples, traditional communities and communities of African descent remain among those most affected by human rights abuses involving corporations. Certain industries, especially the extractive sector, have a particularly significant impact on the rights of indigenous peoples. Investments in development projects in the extractive sector affect the land and territories of traditional occupation, as well as national resources, including water, forests and wildlife. The impact that investment in these industries has is often characterized by the interruption in the ability of indigenous peoples to maintain control of the decisions concerning their ways and models of life and culture, which are often intrinsically linked to land, water and forest habitats. The rights of indigenous peoples are recognized in various international legal instruments. Of particular relevance is the right to free, prior and informed consent (FPIC), already extensively developed in the Inter-American System on Human Rights by both the Inter-American Court on Human Rights (IACtHR or I/A Court H.R.) and the Commission, as well as the UN Declaration on the Rights of Indigenous Peoples.

k. Peasant Population

The advance of extractive businesses in the region has become the main threat for territories and peasant communities. The 2017 Global Witness report provides information about the relationship between some extractive businesses and illegal armed groups, and threats to *campesino* leaders and HRDs in Colombia.¹²

For example, the presence of the South African mining company Anglo Gold Ashanti (AGA) with the “La Colosa” mining project in the Tolima Department of Colombia is a risk factor for environmental and peasant organizations. It not only puts water, soil and air at risk due to the pollution from the chemical components used by AGA, but also threatening their physical safety because of the criminal tactics that AGA has employed in other countries. As Human Rights Watch reports, AGA made payments to paramilitary groups in the Congo to displace communities in order to be able to operate in the relevant area, violating the “Voluntary Principles of Safety and Human Rights” signed by the company.¹³ Peasant organizations, groups, and movements that oppose the company's activities are chosen as targets. For example, the Comité Ambiental en Defensa de la Vida (Comité Ambiental), an ESCR-Net member, which has been receiving threats since 2013.¹⁴

AGA has engaged in political and legislative interference which has created challenges for community organizing and communications. For example, security problems occasionally prevent follow-up of indigenous and peasant communities within the project zone and hinders the strengthening of political and organizational measures, putting at risk the rights to life and integrity of the people who make up the Comité Ambiental.

Indeed, through political maneuvering, AGA has influenced regulatory bodies such as the National Mining Agency, the Mining and Energy Ministry, the Energy Mining Planning Unity and even the

¹² Global Witness, “Defender la Tierra” 2017, above note 4.

¹³ Human Rights Watch, *The Curse of Gold* (2005), available at: <https://www.hrw.org/report/2005/06/01/curse-gold>.

¹⁴ For specific information regarding the threats against Comité Ambiental, see “Comunicado Respuesta Amenazas” (Annex B).

Colombian Congress. Its apparent aim is to create a regulatory framework for mining that is more friendly to corporate interests and that deregulates environmental norms. In terms of environmental assessments, these norms were stronger in the past. As for security and community protection, the main challenges that these communities face relate to activities by AGA to counter the work that grassroots organizations and social movements have been carrying out in the territories. The Comité Ambiental and the Colectivo Socio Ambiental Juvenil de Cajamarca (COAJUCA) have been reporting on the social, ecological, cultural and spiritual harms that this megaproject has been causing to the communities. As a result, they have been receiving individual and collective threats from armed actors, paramilitary and other unknown actors because of their work in defense of human and environmental rights.

In terms of an international human rights framework related to peasants' rights, in 2012, the Human Rights Council (HRC) established an open-ended intergovernmental working group (OEIWG) with the mandate to develop a UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (Declaration). The creation of this working group was the result of continued work by the global peasant movement, La Via Campesina, to develop and adopt an international instrument to address the systematic violation of the human rights of rural people. The OEIWG has since held five sessions to negotiate a Declaration, based on the draft declaration that was contained in the Advisory Committee's study. Chaired by Bolivia, these sessions have allowed for participation by social movements of small-scale food producers, indigenous peoples' organizations and trade unions, as well as a number of international experts. During the 5th session, the Chair-Rapporteur's report recommended submission of the Declaration text to the HRC for approval.

The Declaration makes a crucial contribution toward addressing the structural discrimination, marginalization and persistent and growing violence experienced by peasants and other people working in rural areas in many parts of the world, often committed by transnational corporations (TNCs). Peasants are facing concrete threats against their rights and livelihoods such as the concentration of control over land and other natural resources through "land grabbing", the expansion of industrial agriculture based on extensive use of agrochemicals, extractives and the effects of global warming. More recent trends such as the financialization of nature and digitalization also pose significant threats. In all these domains, corporations, including TNCs, are responsible for many abuses of the rights of rural people and the Declaration is, therefore, also a contribution to the maintenance of human rights in the context of business activities. We recommend that the Special Rapporteur considers this relevant international process as inspiration for the advancement of the debate on human rights and business within the IAHRs.

Question 2 - Provide information on existing obstacles to the realization and enjoyment of human rights within the following contexts:

a. Transitional justice processes and corporate accountability

ESCR-Net members working in Latin America have highlighted the importance of studying and analyzing the responsibility of corporate actors during and after the presence of dictatorships in the region, for the purpose of achieving redress for the human rights violations connected with these dictatorships and preventing similar situations in the future.

Argentina provides an example of the role that corporations have played during dictatorial regimes, specifically with regard to the civic-military dictatorship that occurred between 1976 and 1983. During the democratic transition that followed, the armed forces were identified as the main actors responsible for State terrorism. From the 1990s, and with greater momentum at the beginning of the 2000s, the responsibility of other sectors of society – including the media, the Church, and the political class – were publicly acknowledged as key components of this process. In the last decade, the consolidation of judgments against members of the security and armed forces and the reconstruction of the truth have helped make progress in clarifying the responsibilities of civil actors – including corporations – for serious

human rights violations committed during that period.¹⁵ In these cases, the facts under investigation are not economic crimes, but rather physical crimes committed by economic actors. The crimes charged against these business people and directors include illegal detention, torture, and homicide - the same crimes for which the majority of military members and security forces agents involved in State terrorism were charged.

Although the complicity between the military and businesses was denounced from the 1980s,¹⁶ it was only after such time that this collaboration was analyzed in greater detail. Current investigations focus on the connection between repressive State policies, such as the repression of union workers, and economic policies and objectives adopted by the *de facto* regime. Certain business and financial sectors, in addition to supporting the dictatorship, encouraged and collaborated in the commission of grave human rights violations. For example, numerous companies provided logistical support to armed and security forces and provided the State with lists of names of workers, who were subsequently kidnapped, tortured and disappeared by the State.

The National Commission on the Disappearance of Persons (CONADEP), responsible for investigating the fate of the victims of forced disappearance and other human rights violations, and the Juntas trial recorded testimony from workers who had participated in labor conflicts and identified business owners and directors of businesses as responsible for their kidnappings. The 1984 CONADEP report “Never Again” records, among other findings, the existence of a clandestine detention center in the tenements where the workers of the sugar factory La Fronterita in Tucumán lived, and the testimony of workers from Acindar, in Santa Fe, which recounts the company’s participation in the repression and use of a police station as a clandestine detention center.¹⁷ In 1985, the decision of the Juntas case, the first judicial validation of the systematic extermination plan deployed by the dictatorship, confirmed the kidnapping of several workers of Mercedes Benz.¹⁸

Repression against workers was also placed in evidence in the testimony provided in the Truth Trials.¹⁹ For example, in 1998, a worker from Alpargatas explained that he was kidnapped during a strike, and that the police that took him told him that “he had to go with him because there was a complaint from the Alpargatas plant”. In 2003, another worker recounted that when he returned to the plant after his kidnapping, the personnel manager told him, “no, be calm... we don’t have anything against you...”

Investigations regarding the kidnapping and disappearance of workers from the Ford and Mercedes Benz car manufacturing companies began in 2002, with the reopening of court cases for crimes against humanity following the annulment of mid-1980s amnesty laws and the court proceedings have started this year of 2018.²⁰

¹⁵ The current court process regarding the serious human rights violations committed during the former dictatorship began in 2001 with the first annulment of amnesty laws in the country (Punto Final and Obediencia Debida, issued during the 1980s).

¹⁶ In the Military Juntas Trial in 1984 the persecution and kidnapping of union leaders and workers was denounced, especially the ones who worked at Mercedes Benz.

¹⁷ CONADEP, Never Again and other crimes during the dictatorship, “El Nunca Mas y los crímenes de la dictadura”, 2015, 98, available at: https://librosycasas.cultura.gob.ar/wp-content/uploads/2015/11/LC_NuncaMas_Digital1.pdf.

¹⁸ National Chamber of Appeals Criminal and Correctional Federal of the Capital. Cause 13/84 against JORGE RAFAEL VIDELA et al, Judgment of December 9, 1985. Buenos Aires, Argentina.

¹⁹ National Direction of the Argentinean System or Legal Information, Corporate Accountability in crimes against humanity. Repression of workers during State terrorism. Tomo II 1st. Edition, 2015, 168 (Testimony of Jorge Eduardo Balboa in the Truth Trial, presented in 14/10/1998 before the Federal Chamber of Appeals in La Plata).

²⁰ Tribunal Oral Federal N°1 de San Martín, Trial n. Ford FSM 27004012/2003/TO4, crimes against humanity against 24 workers in the Ford’s General Pacheco plant.

b. Privatization of public services, in particular water and electricity, health, education, pension funds and security

Certain government policies, as well as many of the numerous current trade and investment treaties, not only facilitate but also promote the privatization of health, transportation, water, energy and other basic services and infrastructure development, which are areas of central importance for States to meet their obligations to respect, protect and fulfill human rights obligations. Transferring the building, operation and ownership of physical and social infrastructure to the private sector can prioritize the delivery of these services to corporate profit interests, rather than ensuring their conformity with human rights and environmental wellbeing, as has been widely noted, for example, in the privatization of water services globally.

For example, the right to education guarantees that everyone should enjoy a quality education, free from discrimination and exclusion. One of the most notable ways of deepening inequality, when it comes to education, is the recent trend towards privatization in education in many countries including in the Americas Brazil and Chile.²¹ The detrimental impacts related to private investment in provision of health care, water and sanitation infrastructure, and land, including “land-grabbing”, have increasingly been documented in recent years. Privatization of education appears to be the new horizon into which profit-making investors are rushing.

This trend is proving to have significant implications for the enjoyment of the human right to education, both in terms of quality and accessibility.²² In particular, concern has been raised that privatization of education can lead to greater discrimination and that wealth inequalities, between those who can afford to pay for private education providers and those who cannot, further pushes already vulnerable groups into poverty.

Also, privatization implies that States are no longer themselves providing education to the general public, instead they are allowing this role to be filled by non-State entities and institutions. Privatization, therefore, questions and weakens the role of the State in one of the most essential social services, even though under the international human rights framework States remain the duty-bearer when it comes to respecting, protecting and fulfilling the right to education. They also must ensure that there is no retrogression when it comes to the advancement and enjoyment of this right.

d. Business operations in sensitive and/or complex ecosystems

As outlined in the IACtHR’s Advisory Opinion 23-17, while the specificity of environmental and human rights impacts depends on the type of business operation in question, any major project in a sensitive or complex ecosystem can lead to significant environmental impacts and thus affect human rights.

²¹ In these two countries both the Committee on the Rights of the Child (CRC) and the Committee on Economic, Social and Cultural Rights (CESCR) have, during their reviews of the periodic reports of these countries, issued concluding observations related to the privatization of education and the impact they have in the exercise of this right related to obligation of non-discrimination. This information is consolidated in human rights bodies statements on private education September 2014 – November 2017, available at: http://globalinitiative-esrcr.org/wp-content/uploads/2016/10/GIESCR-CRC_CESCR_CEDAW-synthesis-statements-on-private-actors-in-education.pdf.

²² As the UN Special Rapporteur on the Right to Education highlighted in a recent report about the Millennium Development Goals Post-2015 Framework: “in many parts of the world inequalities in opportunities for education will be exacerbated by the growth of unregulated private providers of education, with wealth or economic status becoming the most important criterion to access a quality education.” UN Doc. A/68/294 (9 August 2013), para. 26.

Existing obstacles to the realization and enjoyment of human rights in the context of corporate operations in sensitive or complex ecosystems include, among others:

- 1) The lack of independent analysis by environmental and social scientists on the possible project impacts. Such analysis must take place, including an analysis of the extent of impacts and potential cumulative impacts.
- 2) The lack of commitment by States to demand that companies comply with the highest standards of environmental and human rights protection. In addition to setting standards, States must monitor company activities and compare the company-produced environmental impact and human rights impact assessments with official government and civil society data. States should undertake their own independent environmental and human rights impact assessments and ensure transparency and access to information throughout the project approval and implementation process.
- 3) The lack of civil society participation in company projects and practices in connection with complex or sensitive ecosystems. There are usually traditional communities that live and possess an intrinsic way of living with complex or sensitive ecosystems. States must ensure that no business operation compromises the livelihoods of existing communities. In addition, States should promote Independent consultations with these peoples, as well as respect and ensure that companies respect any manifestation of their will. By recognizing the interdependence of communities and peoples in their natural environment, States must take serious steps to mitigate damages or even limit undertakings so as not to compromise traditional ways of life. Finally, States must guarantee the role of communities in environmental conservation, respect their knowledge and include it in the project planning.

An example of sensitive ecosystems can be found in Colombia. While representing only 1 per cent of the earth's surface area, Colombia contains 10 per cent of the world's biodiversity. However, this is threatened by the activities of the multinational mining company Anglo Gold Ashanti (AGA). AGA specializes in gold extraction – through “Open pit mining with cyanide leaching” – in Tolima, and in particular in the zone of the Central Forest Reserve (high altitude, dry Andean forest), which covers the areas of Cajamarca, Salento, Pijao, and Quinchía, where there are around 33.15 million troy ounces of gold, in addition to other metals and minerals found in the Andean mountain range area. AGA has a strong interest in extracting this material and thus expanding its capital through new markets. Such activity affects the agricultural production of Cajamarca as the company has privatized a large part of the land, which prevents peasant communities from cultivating the land to produce food. The State has nearly totally abandoned the rural areas of the Colombia, which no longer produce the amounts they used to. Of the 50.91 million hectares of land available for agricultural uses, according to the Ministry of Agriculture, only 4.9 million hectares are cultivated in practice. This significant gap increases the loss of food sovereignty and security among the population. A similar situation is found in la Guajira, with the extraction of coal by the company Cerrejon, a joint venture of BHP Billiton, Glencore and Anglo American. In this case the whole ecosystem, an important tropical dry forest, has been suffering the negative impacts generated by the deviation of streams.

i. Public investment and development projects

Development finance institutions (DFIs) may cause or contribute to human rights violations in a number of ways. Firstly, in connection with their own actions, financial institutions may adopt discriminatory hiring processes. Secondly, through the provision of project finance, DFIs may contribute or be directly linked to an adverse human rights impact through actions or omissions. Examples are the imposition of unreasonable timelines to funding recipients, or when they fund infrastructure projects in conflict areas

without necessary safeguards or when adverse human rights impacts occur even after the adoption of the necessary safeguards.²³

Experience has shown that human rights violations associated with the operations of DFIs fall mostly in the category of these institutions “being linked to” or “contributing” to adverse impacts caused by their corporate clients. In the Americas region, this is particularly true in the context of projects funded by DFIs in the infrastructure sector.²⁴ Nonetheless, current domestic legal frameworks often fail to provide clear guidelines on the due diligence process DFIs should conduct to address, prevent and remedy human rights impacts. Given the transformative character of development projects, domestic legal frameworks should also provide guidelines on how DFIs should maximize potential positive human rights impacts.²⁵

DFIs are in a unique position to induce systemic changes in other private business enterprises. To ensure policy coherence (Principle 8 of the UNGPs), States should, among other actions, operationalize Principle 4 of the UN Guiding Principles, which declares that:

The State-Business Nexus: States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

Further, it is essential to ground any infrastructure plans on community priorities, to ensure any development is connected with human rights and environmental wellbeing. For this to occur, the journey must start from within the communities themselves.²⁶ Recently, ESCR-Net member International Accountability Project (IAP) and its partners surveyed 800 participants in eight countries around the globe who had been affected by development projects.²⁷ Strikingly, 82 per cent of the respondents made clear that their development priorities were different from the priorities of their governments.²⁸ The statistics collected clearly demonstrate that national and regional plans for projects largely do not correspond to the priorities of those most affected by them. Overwhelmingly, people on the ground are excluded from the undemocratic decision processes which establish priorities and decide impacts. Only 10

²³ OHCHR, Response to request from Bank Track for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, available at:

<http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>; Working Group on the issue of human rights and transnational corporations and other business enterprises, Letter to the Thun Group of Banks, available at:

http://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf.

²⁴ Conectas Human Rights, “Development for the People? The BNDES Financing and Human Rights,” 2014, available at:

<http://www.conectas.org/en/publications/download/development-people-bndes-financing-human-rights>; Inter-American Development Bank; Mueller, Sven-Uwe; Watkins, Graham (orgs.). Lessons from four decades of infrastructure project related conflicts in Latin America and the Caribbean. Inter-American Development Bank, 2017, available at:

<https://publications.iadb.org/handle/11319/8502>.

²⁵ Caio Borges, Karin Costa Vazquez and Supriya Roychoudhury, Building Infrastructure for 21st Century Sustainable Development: Lessons and Opportunities for the BRICS-led New Development Bank (Conectas Human Rights and Center for African, Latin American and Caribbean Studies – O.P. Jindal Global University, 2017), available at:

<http://www.conectas.org/noticias/infraestrutura-sustentavel>.

²⁶ John Mwebe. ‘The development journey of a community starts from within’ – the remarkable potential of community mapping’ (2016), available at: <https://medium.com/@accountability/the-development-journey-of-a-communitystarts-from-within-the-remarkable-potential-of-community-1adc839838af#.iz9s5fnjs>.

²⁷ International Accountability Project, Back to Development – A Call for What Development Could Be (2015), available at: <https://accountabilityproject.org/work/community-organizing/global-advocacy-team/>, 81.

²⁸ Ibid, 81

per cent of those surveyed believed the projects would benefit their communities, and only 14 per cent believed projects would benefit the country population.²⁹

The Sustainable Development Goals (SDGs) have been proposed as goals to “end poverty, protect the planet, and ensure prosperity for all.”³⁰ Given the failures of mega-infrastructure projects in the past in enhancing and nurturing social well-being, the Special Rapporteur should emphasize the need for changes that meaningfully incorporate the development priorities of the population at large, and most importantly, of any affected communities, in order to achieve development that supports the realization of human rights and environmental wellbeing.

g. Negotiation of investment treaties

Critiques of investor-state dispute settlement (ISDS) focus mainly on three aspects: (1) the extremely broad view taken by ISDS tribunals regarding the scope of provisions that investors seek to enforce, therefore impacting many areas relevant to the enjoyment of human rights; (2) the perceived or actual lack of consistency, transparency and impartiality of ISDS decisions; and (3) the direct undermining of States’ obligations to protect human rights, the environment, or promote equitable development, through the favoring of investor privileges over human rights. The current binding trade and investment framework can be contrasted with the very weak international enforcement mechanisms for compelling States to comply with their human rights obligations. In light of this asymmetry, with its serious implications for people whose enjoyment of human rights is impaired by corporations, States should ensure that their human rights obligations will be adequately safeguarded and will be given precedence in relation to obligations under trade and investment treaties.³¹ The Special Rapporteur can strengthen the implementation of the General Comment 24 of the CESCR and the UNGPs in order to ensure that States put human rights at the center of commercial agreements, above profit motivations. All commercial agreements must include human rights assessments prior, during and after implementation.

i. Public-Private associations

Across Latin America, the use of Public Private Partnerships (PPPs) in connection with development activities and the provision of public services has been increasing at a fast pace, with new norms being adopted in Brazil, Peru and Colombia. In general, these norms do not follow a human rights-based approach, raising concerns in four areas: procedural rights; public service obligations; non-discrimination; and accountability and mitigation.

First, the lack of clarity regarding each actor’s responsibilities makes PPPs particularly prone to the violation of procedural rights, and PPP regulation sometimes weakens socio-environmental guarantees.³² Moreover, PPP norms have been developed and adopted without the free, prior and informed consultation of traditional communities impacted by them. After the adoption of a regulatory framework, each partnership – and, in particular, infrastructure projects – must comply with such requirements, especially

²⁹ Ibid, 83.

³⁰ UN, Sustainable Development Goals, available at: <http://www.un.org/sustainabledevelopment/sustainable-development-goals>.

³¹ ESCR-Net Corporate Accountability Working Group, ‘Submission to the United Nations’ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (IGWG)’ (2016), available at: https://www.escr-net.org/sites/default/files/submission_igwg_english.pdf, 3.

³² The Brazilian legislation, for example, establishes certain infrastructure projects as national priorities and determines that all state institutions, including environmental licensing authorities and indigenous protection agencies, have a duty to “liberate” such projects in a manner compatible with their “priority” status. See Brazil Law n. 13.334 (2016), Article 17, available in Portuguese at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/L13334.htm.

the right to access information,³³ to participation,³⁴ and the right to free, prior and informed consent.³⁵ Nevertheless, the vision that PPP projects are national priorities, combined with lack of clarity with respect to how those requirements apply to these arrangements, may hinder the effectiveness of such guarantees.

Second, the lack of strict regulation and/or effective monitoring of private providers operating in traditionally public sectors may enable businesses to evade public service obligations, including quality requirements, pricing policies, and universality of coverage or access.³⁶ However, as determined by the UN Committee on Economic, Social and Cultural Rights: “States [...] retain at all times the obligation to regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs”.³⁷

Third, PPPs may lead to discriminatory action prohibited by articles 1.1 and 24 of the American Convention on Human Rights, as well as article II of the American Declaration on the Rights and Duties of Man. In particular, service providers may adopt business models that lead to discrimination because, although apparently neutral, they generate a disproportionate impact on particular groups.³⁸ Such a disproportionate impact may relate to the failure to ensure that goods are affordable, that facilities are physically accessible, and that services are culturally appropriate, among others.

Finally, PPPs may hinder accountability and the provision of remedy. This is a result of the lack of clear frameworks establishing the responsibilities of each party, especially regarding human rights issues. In order to comply with IASHR standards, the regulatory and legal framework must provide for mechanisms able to hold both the State and its private partners accountable for human rights violations, including that corporations involved with human rights violations are not considered for PPPs and provisions are made for comprehensive mitigation and redress.

1. Influence power of companies in the process of formulating norms and public policies related to the economic activity that they carry out

Civil society organizations are becoming increasingly more aware of the means by which corporations undermine the realization of human rights and the environment by exerting undue influence over domestic and international decisionmakers and public institutions,³⁹ including by using their influence to

³³ I/A Court H.R., *Claude Reyes et al Case (v. Chile)*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. para. 151.

³⁴ Rio Declaration on Environment and Development (1992). UN Doc. A/CONF.151/26 (Vol. I). Principle 10. Available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>; IACHR, Report on the Situation of Human Rights in Ecuador. Chapter VIII. OAS/SeriesL/V/II.96, doc. 10 rev. 1, April 24, 1997.

³⁵ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (2016), para. 107; IACHR, Merits Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)* (2004), para. 142; IACHR, Special Rapporteur on the right to freedom of expression, *The right to access to information in the Inter-American System*, OEA/Ser.L/V/II. CIDH/RELE/INF. 1/09 (December 30, 2009), para. 69.

³⁶ UN Committee on Economic, Social and Cultural Rights. 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), above note 8, para. 22, available at: <http://undocs.org/E/C.12/GC/24>.

³⁷ *Ibid.*, para. 22.

³⁸ I/A Court H.R., *Case of Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para 234-236.

³⁹ Statement of the Treaty Alliance, ‘UN Treaty Must Address Corporate Capture’, Rio de Janeiro, Brazil, 2016, available at: <http://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/57354276746fb9f00f573dae/1463108241728/%20UN+Treaty+Must+Address+Corporate+Capture+FINAL+ENG.pdf>.

soften (or inhibit implementation of) regulation, weaken the exercise of powers by regulatory authorities, bank-roll elections, privatize the conduct of State security services for use against communities, exercise revolving-door employment strategies, and many other practices. As such, the ever deepening corporate-government relationship is weakening the institutions and processes that are responsible for ensuring that States respect, protect and fulfill human rights. In this sense, ‘corporate capture’ is defined primarily by the undue influence that corporations exert over national and international public institutions, manipulating them to act according to their priorities at the expense of the public interest and the integrity of the systems required to safeguard human rights and the environment. The Universal Declaration of Human Rights has proclaimed that “the will of the people shall be the basis of the authority of government.” Corporate capture severely undermines this foundation and, as a result, is a root cause of many human rights abuses involving corporations.

In some specific industries the abilities of corporations to influence policy and regulation setting are curtailed. A pertinent example is the World Health Organization’s Framework Convention on Tobacco Control (FCTC). Under the FCTC, States must act to protect against interference from commercial and other vested interests of the tobacco industry in the establishment and implementation of national health policies. The FCTC also requires States to be accountable and transparent in all dealings with the tobacco industry, and those working to further their interests, including by ensuring all interactions are documented and disclosed to the public as well as avoiding conflicts of interest for government officials and employees. In the United States the ‘Revolving Door Ban’ prohibits for two years any employee of any federal executive agency working on any matter that involves their former employer(s), and vice versa for those leaving an executive agency to join the private sector. Accepting gifts from lobbyists is also prohibited under this law. We recommend that the Special Rapporteur makes specific recommendations regarding the identification and prevention of corporate and State practices related to various manifestations of corporate capture.⁴⁰

Question 3 - Provide observations and comments on international legal obligations and standards, in particular those from the Inter-American Human Rights System, which you consider applicable to OAS Member States in each of the situations identified in Question 2.

The instruments, normative and public policy frameworks described below generally do not focus on just one or two of the issues and situations addressed in question 2 but are instead relevant to several of them concurrently.

Some general observations are necessary. Firstly, international law has a fundamental role in the regulatory framework involving companies and human rights issues. The Charter of the Organization of American States (OAS Charter) shows the collective commitment of the relevant countries in cooperative international relations, solidarity, and progress based on international law. In particular, articles 3(a) and (b) of the Charter state:

American States reaffirm the following principals:

- a. International law is the standard of conduct of States in their reciprocal relations.

⁴⁰ Corporate capture refers to the means by which an economic elite undermine the realization of human rights and the environment by exerting undue influence over domestic and international decision-makers and public institutions. More information on how corporate capture manifests is available at: <https://www.escr-net.org/corporateaccountability/corporatecapture/characteristics-corporate-capture>.

- b. International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of the obligations derived from treaties, and other sources of international law.

Public policy frameworks should be interpreted within the principles and norms established in international law, especially the OAS Charter and the American Convention on Human Rights. The instruments called “soft law” are called upon to provide clarity to legally binding regulations, and to gradually progress the law through the application and adaptation of regulations to new or specific situations. For these reasons, the work of the Inter-American Commission on Human Rights (IACHR) in this field should be based on the rules contained in the instruments of international law.

Secondly, it should be noted that the applicable norms and standards, and American States that are part of the OAS Charter, do not apply or operate in total isolation from international norms and standards. Almost all American States have ratified most of the international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The interpretative commentary developed by the bodies responsible for overseeing such treaties – in the form of general comments and recommendations or concluding observations during reviews of state compliance with treaty obligations – is also applicable in the Inter-American field in conjunction with Inter-American instruments. The same treatment should be given to the fundamental Conventions adopted within the framework of the International Labor Organization, such as the Indigenous and Tribal Peoples Convention (Convention 169).

A third and final general observation refers to the debate on the application of international law directly to business companies. As mentioned before, the UN is currently in the process of developing a binding international human rights treaty to regulate corporate activity,⁴¹ which can inform the development of a robust corporate accountability framework in the inter-American system. In this regard, it is instructive to note that Article 36 of the OAS Charter states:

Transnational enterprises and foreign private investments shall be subjected to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties and should conform to the development policies of the recipient countries.

This article has been interpreted as a norm applicable to companies and deserves attention and clarification.

In addition to these general comments, we recommend that the Special Rapporteurship takes into consideration the numerous instruments that contain standards applicable to States and to companies. For example, in addition to international human rights and other treaties, and customary law, the treaty bodies issue general comments/recommendations which provide legitimate and authoritative interpretation of how such treaties are applied in the context of companies and human rights. These

⁴¹ At its 26th session, on 26 June 2014, the Human Rights Council adopted resolution 26/9 by which it decided “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”. Full text and more information available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>.

general observations are addressed to State parties to each treaty; however, it is emphasized that some of these rules are also applicable or relevant to companies.

At an international level, the UN Guiding Principles on Businesses and Human Rights stand out, which in addition to having received the endorsement of States in the Human Rights Council, contain standards which can be applied to States and companies (the latter is not based on the recognition of international legal obligations, but as global standards based on global expectations).

On a regional level, the American Convention on Human Rights and the jurisprudence of the IACHR and the Inter-American Court on Human Rights are the main sources of the applicable standards. This jurisprudence has also been outlined in the various studies carried out by the IACHR.

BLOCK II – Regulatory frameworks and Public Policies

Question 4: Provide information on regulatory frameworks (e.g., legislation, etc.) and public policies (e.g., National Action Plans) on business and human rights. Identify and provide current norms and policies related to the matter.

The UN 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) has strongly encouraged all States to develop, enact and update a national action plan on business and human rights as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights. In Latin America, only Colombia and Chile have produced a National Action Plan (NAP). Mexico and Argentina have started a process to develop a NAP. ESCR-Net members and allies in Mexico and Colombia have been following these processes to develop and implement NAPs. They have observed the following about the NAPs.

In Mexico, efforts have been made by civil society organizations and the government to include provisions related to respect for human rights in the context of business activities in the National Human Rights Program 2014–2018. In this regard, the Ministry of Interior began the process towards a national action plan (NAP) – albeit with a strong emphasis on the concept of corporate social responsibility rather than binding legal standards – and was responsible for gathering a multi-stakeholder working group that could influence the process and text using their own experience. A coalition of civil society organizations⁴² developed a **National Baseline Assessment for the implementation of the UN Guiding Principles on Business and Human Rights**⁴³ and, after two years through the process the coalition called on the Ministry of Interior to reassess several key topics in the draft NAP, as well as the process for its development, including consultation.

In particular, the draft NAP published online does not make clear the obligations of national and transnational companies, or the government, to guarantee respect for the human rights of people, groups and communities in the context of business activity, including investment and trade agreements. Such obligations include the realization of free, prior and informed consultations, that are culturally appropriate and conducted in good faith, for development projects that may affect the environment and put at risk the rights of indigenous and comparable communities, as well as other rural communities. The results of the consultations should be binding and contemplate the option to stop those projects that do not obtain the consent of the communities and/or anticipate negative impacts on human rights. Disclosure and public access to environmental impact assessments and social impact studies, before consulting the communities,

⁴² The Civil Society Focal Group on Business and Human Rights in Mexico is formed by Centro Mexicano de Derecho Ambiental (CEMDA), Centro de Información sobre Empresas y Derechos Humanos (CIEDH), Código DH, Oxfam México, Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC), Servicios y Asesoría para la Paz (Serapaz), coordinated by the Project on Organizing, Development, Education, and Research (PODER), and accompanied by the Interamerican Association for Environmental Defense (AIDA), and Peace Brigades International (PBI).

⁴³ Civil Society Focal Group on Business and Human Rights in Mexico, National Baseline Assessment for the implementation of the UN Guiding Principles on Business and Human Rights in Mexico (2016), available only in Spanish at <https://www.projectpoder.org/wp-content/uploads/2017/02/Libro-DiagnosticoLineaBase-WEB.pdf>.

is another aspect that must be guaranteed in the NAP, since this information allows informed decisions to be made. These evaluations and studies must be carried out together with the affected communities.

The NAP must comply with the recommendations of the UN Working Group on Business and Human Rights made during its official visit to Mexico,⁴⁴ and reinforce these through mitigation, reparation and access to justice mechanisms for affected peoples. These should include the constitutional protection measure (amparo) as a valuable mechanism to provide justice, measures to ensure compliance by businesses and the government with Supreme Court rulings and other judicial orders, and the guarantee of protection for the people and communities defending human rights, as well as for journalists who suffer attacks, intimidation and threats for opposing business projects.

It is also notable that the draft NAP does not provide for strengthened coordination between government agencies. For example, it does not establish concrete steps to strengthen the bodies in charge of the labor, social or environmental supervision, it does not strengthen the National Contact Point which is within the Ministry of Economy in order to receive and consider complaints against companies in the framework of the OECD Guidelines for Multinational Enterprises, and it does not take full advantage of what the National Human Rights Commission can contribute to the NAP. In this sense it is also necessary that key actors are involved, such as tax government agencies, the Ministry of Economy and the division of International Commerce and Investment, the Supreme Court of Justice and local justice tribunals, financial system actors, and independent worker unions, among others.

One more aspect to be reinforced are the mechanisms for dialogue that should include government, business and civil society organizations—particularly affected communities – and actors from all the different states in the country as well as local and federal authorities, to identify lessons learned and good practices to improve the NAP in the future. The Ministry of Interior needs to refocus the text of the NAP taking into account the observations made by civil society and, before publication, it should fulfill its obligation to undertake consultation on the draft NAP with indigenous and comparable communities according to international standards on participation and consultation. It is noted that the private sector entities which participated in previous multi-stakeholder dialogue thought that civil society should not participate in the monitoring and evaluation of the NAP implementation. We reiterate that all key stakeholders should be involved in all the process.

Colombia is an example in terms of normative frameworks, being one of the first countries to create a NAP. However, in analyzing the applicability of these norms, the findings are always at risk of being breached. For this reason, the Colombian Constitutional Court has resorted to protecting fundamental rights through deciding actions of protection (Acciones de Tutela). The Court has encountered several contradictions between laws that recognize fundamental rights and economic norms. Civil society organizations in Colombia have been participating in a technical roundtable to evaluate the NAP on business and human rights and have identified as main problems:

The process to create the NAP has been carried out without the participation of communities affected by corporate activity. The communities were approached as mere receptors of public policies, without giving them any effective participation in the formulation of the NAP. Even though the document affirms that it was created as a result of workshops held on territories and inter-sectional meetings that took place in Medellin and Cartagena, these workshops were in reality held to inform about the UN Guiding Principles

⁴⁴ UN, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico, UN Doc. A/HRC/35/32/Add.2 (27 April 2017).

on business and human rights (UNGPs) and not to create diagnosis of the harms caused to human rights by corporate activity, much less on the focus and objectives of the NAP.

The NAP does not recognize that corporations generate territorial conflicts, harms and human rights impacts while executing their activities. As a consequence, the NAP is not a mechanism proportional to effect, which could resolve conflicts or provide remedies for human rights impacts.

The NAP does not take into account the fact that many human rights impacts take place when national laws and the Constitution are not observed. The State has the duty to enforce the compliance of the laws, being by corporations or state agents. The respect for human rights cannot be consider a matter of corporate culture. The NAP focuses the role of the State in strengthening due diligence practices carried out by corporations, leaving aside the coercive and sanction functions of a State that can lead to the effective observance of the laws.

The NAP was not based on diagnosis made previously to its creation, related to regional context, existing legal loopholes on business and human rights, lack of remedies mechanisms, etc. In addition, since the NAP approaches the respect to human rights as a matter of “corporate competitive advantage”, this generates questions regarding the main objective of this plan. Is this a plan whose aims should address human rights impacts occurring in the territories? Or is it to offer a friendly environment with legal stability for a flow of investments in Colombia, based on international standards for corporate responsibility?

The NAP ignores the asymmetry in dialogue between corporations and affected communities and promotes multi-stakeholder spaces and non-judicial mechanisms as participatory means to prevent, mitigate, resolve conflicts, including access to remedies, in the face of the tensions and abuses related to corporate activity. This asymmetry between corporations, which have great resources and capacity to influence the design and formulation of public policies on one side, and communities on the other, often in a vulnerable situation, prevents equal and qualified participation and obstructs the possibility of a true exercise of rights, since the follow up mechanisms proposed by the NAP (through an eventual follow up by the Public Attorney – “Defensoria”) are insufficient to mitigate this asymmetry.

The NAP does not offer any sort of guarantees to the communities affected by corporate activity since the State ends up delegating i) the receipt of claims related to the adverse impacts on human rights; ii) the follow-up on the achievements related to mitigating negative impacts, and iii) the evaluation of possible or existing impacts related to corporate activities on the lives of people and on the environment. This planning does not take into account the “*pro persona*” principle, which must inspire all frameworks related to human rights. The victim ends up having to place a claim for their rights to the violating actor. In addition, the one evaluating the appropriateness of measures carried out is the company. The NAP does not foresee the existence of any mechanism to be used in the case of omission in relation this process.

The Colombian NAP, in using the framework of Corporations and Peace, omits the existing contradiction between policies that promote corporations as central actors in building peace and the numerous live conflicts that take place in the territories due to corporate activity and investments. In addition, the NAP does not address how to approach within the peace agreements the relationship between corporations and armed conflict, and how some of these entities have benefitted from the armed conflict to consolidate their investments in Colombia.

Question 7 - Provide information on good practices aimed at compliance with human rights standards in the framework of business activities.

Several examples of good practices come from the investigation of the role that corporations played during the dictatorial regime in Argentina.

Firstly, in November 2015, the Argentinian National Congress approved Law 27217, which created the Bicameral Commission for the Identification of Economic and Financial Complicity during the former military dictatorship. The aim is to produce a report that analyzes the characteristics and consequences of the economic, monetary, industrial, commercial and financial policies adopted by the military-civil dictatorship. Also, the report was intended to identify economic and technical actors who contributed to and/or benefited from such policies, through the contribution of economic, technical, political, logistic, or other support. The creation of the Commission in this regard received the support of independent experts and Special Rapporteurs of the UN Human Rights Council.⁴⁵ To this date, the Commission has not been constituted and its formation is pending, even though there were claims from human rights mechanisms in several instances, including the hearing before the IACHR in October 2017.

Secondly, the Secretariat of Human Rights, the Truth and Justice Program of the Ministry of Justice and Human Rights, the Economic and Technology Area of the Latin American Faculty of Social Sciences (FLASCO), and civil society organization Centro de Estudios Legales y Sociales (CELS) - an ESCR-Net member - collaborated to produce a report on business responsibility for crimes against humanity in Argentina.⁴⁶ This report provides evidence regarding the responsibility of the national and international business sector for violations of human rights committed against more than 900 workers and former workers. It addresses 25 businesses in different industry sectors and located in different regions of the country. Currently, nearly all these companies are being judicially investigated. The report, available only in Spanish, is attached as Annex C

Question 8 - Provide observations and comments on international legal obligations and standards, in particular those arising from the Inter-American Human Rights System, which you consider applicable to OAS Member States regarding the establishment and implementation of regulatory frameworks and public policies on business and human rights, including extraterritorial application where appropriate.

The State obligation to protect against human rights abuses by non-State actors, including transnational (TCNs) and national corporations, is a keystone of international human rights law and applies both within and outside State territory. States' extraterritorial obligations (ETOs) – being the human rights obligations of a government toward people situated outside of its own territory – are clarified, on the basis of existing international law, in the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).⁴⁷

However, while the application of ETOs to TNCs is supported by the opinions of international tribunals, treaty bodies, and UN Special Procedures, effective compliance with ETOs is lacking in practice. States often do not take necessary measures to respect human rights or protect against human rights abuse by TNCs extraterritorially, nor ensure accountability where such human rights violation or impairment occurs. Often the biggest challenge faced by people and communities whose human rights are impaired

⁴⁵ OHCHR South America Regional Office, *Expertos de la ONU apoyan la creación de una Comisión de la Verdad sobre las Complicidades Económicas en Argentina* (2015), available at: <http://acnudh.org/expertos-de-la-onu-apoyan-la-creacion-de-una-comision-de-la-verdad-sobre-las-complicidades-economicas-en-argentina> (in Spanish only).

⁴⁶ Victoria Basualdo and others, “Business accountability in crimes against humanity: repression on workers during State Terrorism” / “Responsabilidad empresarial en delitos de lesa humanidad: represión a trabajadores durante el terrorismo de Estado” / - 1a ed., (in Spanish only), available at: <http://flasco.org.ar/wp-content/uploads/2017/03/Responsabilidad-empresarial-en-delitos-de-lesa-humanidad-I.pdf> (Annex C).

⁴⁷ For more information about the Maastricht Principles, see <http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/>.

by TNC activity comes when remedies are unavailable or inadequate where they are located, and they try to access the courts or other remedial mechanisms in the TNC's 'home' State.⁴⁸ In this regard, inconsistencies across jurisdictions exist because different countries have different rules about whether or how a person harmed by a TNC operating in a host State can seek remedy in the TNC's home State. Further, the practical and legal difficulties in pursuing remedies, are exacerbated when pursuing a remedy across borders. Closing these governance gaps requires two things. First, States must take necessary measures to ensure that TNCs which they are in a position to regulate do not nullify or impair the enjoyment of human rights in any other State.⁴⁹ Second, States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their ETOs, extending to the ability of persons whose human rights are impaired by a TNC in a host State to enjoy the right to a prompt, accessible and effective remedy in the TNC's home State. A uniform framework for States to address these governance gaps and provide effective protection against human rights abuses connected to TNC activity extraterritorially is needed.

It is clearly recognized in the international human rights framework that State human rights obligations include the obligation to protect against human rights abuses by non-State actors. Similarly, in the Inter-American human rights system, the Inter-American Commission on Human Rights (IACHR) recognized that the duty to investigate human rights violations committed by private parties emerges from both the Convention⁵⁰ and American Declaration.⁵¹ The obligations to protect and guarantee human rights has been shown in the jurisprudence of the Inter-American Court since its earliest decisions,⁵² and was instrumental in the *Blake v. Guatemala* case.⁵³ In Advisory Opinion No. 18/03, on the legal status and rights of migrants,⁵⁴ the Inter-American Court intentionally referred to the so-called "horizontal effect of human rights" in evaluating the obligation of States to guarantee the right to equality and non-discrimination in the relationship between employers and migrant workers. It follows that State parties to the IAHRS have an obligation to take positive measures to guarantee human rights, including with respect to the activities of private parties.⁵⁵

However, parallel to the paradigm of binding obligations and attribution of States liability, there have been approaches around the issue of corporations and human rights, supported by the so-called "corporate social responsibility" or other perspectives based on voluntary commitments on behalf of the corporations. Therefore, it is essential that in the development of the thematic report, the IACHR reaffirm the paradigm that has always dominated the Inter-American System, and other supranational human rights systems. In other words, the approach to the relationship between corporations and human rights is based on

⁴⁸ Reference to 'home State' in this document is in accordance with Principle 25(c) of the Maastricht Principles, "...where the corporation, or its parent or controlling company, has its center of activity, is registered or domiciled, or has its main place of business or substantial business activities".

⁴⁹ For more information about the circumstances in which a State is in a position to regulate a TNC, see the bases for protection outlined in Principle 25 of the Maastricht Principles.

⁵⁰ IACHR, Simone André Diniz. Case No. 12.001. (Brasil). Merits. No. 66/06, October 21, 2006, para. 101.

⁵¹ IACHR, Jessica Lenahan (González) et al. Case No. 12.626. (United States). Merits. Report No. 80/11, July 21, 2011, para. 130 (establishes that States can be held responsible for violations of their duty to investigate and punish cases of domestic violence under the American Declaration).

⁵² I/A Court H.R., Case of Velázquez Rodríguez v. Honduras. July 29, 1988. Series C No.04, para. 176.

⁵³ I/A Court H.R., Case of Blake v. Guatemala. Preliminary exceptions. July 2, 1996. Serie C No.27.

⁵⁴ I/A Court H.R., Juridical Condition and Rights of the Migrants. Advisory opinion OC-18/03, September 17, 2003, para. 140, 147 and 150.

⁵⁵ For an analysis on the progression of the case law of the Inter-American Court regarding State obligations to guarantee human rights in relation to private parties, see Javier Mijangos y González, 'The doctrine of the *Drittwirkung der Grundrechte* in the case law of the Inter-American Court of Human Rights' (2008) *Journal for the Analysis of Law.*, available at: http://www.indret.com/pdf/496_en.pdf.

legally binding standards and obligations, and not on voluntary commitments by governments and businesses.

BLOCK III – Prevention and Supervision

Question 9 - Identify and describe existing local, regional and/or international mechanisms to address prevention, due diligence and supervision actions related to the exercise of human rights in the context of business activities. Specify the relevance and the obstacles associated with each mechanism.

ESCR-Net members working on corporate accountability have noted seven existing mechanisms in different levels that address prevention, due diligence, supervision and actions related to the exercise of human rights in the context of business activities:

(1) The National Contact Points (NCPs) for the OECD Guidelines for Multinational Enterprises:

Although these mechanisms have been set up in a significant number of countries, they still lack effectiveness in practice. Only a few cases have concluded successfully and, as a consequence, victims of corporate abuses are dissuaded from using this mechanism, due to the uncertainty of the possible outcome and the guarantees during the procedure itself. For instance, OECD Watch, recently launched the campaign “**Effective NCPs now! Remedy is the reason**” to improve the effectiveness of NCPs to ensure that the system can provide effective access to remedy for victims of business-related human right abuses.

(2) NAPs on Business and Human Rights:

As mentioned above in relation to Mexico, these have not reinforced the legal framework and available mechanisms significantly. For this reason, it is important to emphasize the trend towards binding legislation.

(3) National legislation and regulations regarding mandatory due diligence:

Some countries have been adopting legislative and administrative measures to require or encourage business enterprises to communicate and address their human rights impact. The Business and Human Rights Resource Center classifies them as public disclosure obligations (like the Brazilian “dirty list” of slave labor regulation), reporting obligations (like the UK Modern Slavery Act), and due diligence obligations (such as the French Corporate Duty of Vigilance law).⁵⁶

The Brazilian “Dirty List” of slave labor is considered by the International Labor Organization as a successful example of anti-slavery regulation. It is an administrative regulation that consists of a list periodically disclosed by authorities with the names of employers that have been found to submit workers to conditions analogous to slavery, according to the definition of Brazilian legislation.⁵⁷ The “Dirty List”

⁵⁶ Business and Human Rights Resource Centre, Examples of government regulations on human rights reporting & due diligence for companies (undated), available at: www.business-humanrights.org/en/examples-of-government-regulations-on-human-rights-reporting-due-diligence-for-companies.

⁵⁷ The Brazilian Criminal Code, in its article 149, criminalizes the following situations: submitting someone to work analogous to slavery by subjecting that person to forced labor, to an exhaustive journey, or to degrading working conditions, or by restricting by any means the worker’s freedom of movement because of a debt contracted with the employer or agent.

regulation itself does not establish any duty to carry out due diligence or to adopt measures to prevent human rights abuses. It only regulates the procedures that should be observed before an employer is included in the list, to ensure guarantees of due process. However, because public and private financial institutions decided, voluntarily, to include a consultation of the “Dirty List” in their decision-making regarding the extension of credit, it has had a positive impact in the building of a “culture of due diligence” amongst Brazilian business enterprises. Companies have increased their supply chain monitoring standards both as a means to avoid entering the list and being in a commercial relationship with a partner whose labor practices might lead to inclusion on it. Through the establishment of associations and institutions dedicated to the elimination of slave labor, such as the InPacto (National Pact for the Eradication of Slave Labor), Brazilian companies share knowledge and best practices in enhanced screening, continuous monitoring and reporting and disclosure of business relationships.

The main weakness with the “Dirty List” is that it was not established by law and therefore its legal status is thus uncertain and business groups constantly challenge its validity by arguing that an instrument of this nature should only be enacted after having gone through the legislative process in Congress. State actors also threaten to take regressive steps in terms of Brazilian anti-slavery regulation.⁵⁸ The publication of the “Dirty List” was suspended from 2014 to 2017 by the Brazilian Supreme Federal Court. Even after the Brazilian Supreme Federal Court decided that the “Dirty List” complied with constitutional provisions, the Labor Ministry refused to publish it and enacted an administrative provision conditioning the publication of the Dirty List to the political discretion of the Labor Minister – which was revoked after strong popular pressure.

(4) The Canadian Ombudsperson for Responsible Enterprise (CORE):

An example of a new prevention and reparation mechanism focused to specific industries, whose effectiveness is to be seen in the years to come.

(5) Public hearings regarding the execution of public resources in Colombia:

The Environmental Committee for the Defense of Life (CADV) has held public hearings⁵⁹ in order to clarify what the multinational mining company Anglo Gold Ashanti hopes to develop with the “La Colosa” mining project. The right for communities to participate in issues that affect them, within a legal and democratic framework, has been developed through popular consultations, as a legal tool to defend water, life, and land. In this context, the national government has attempted, at the request of companies, as well as on its own accord, to ignore this mechanism, which is established within the Colombian Constitution and is binding. In the face of this, CADV has been working with the support of other ESCR-Net members, such as the Center for the Study of Law, Justice, and Society (Dejusticia), the Inter-American Association for Environmental Defense (AIDA), and allied organizations that provide legal support and accompaniment, such as Tierra Digna, and others, to defend mechanisms for citizen participation before the Constitutional Court, the Council of State, the Supreme Court of Justice, and the National Congress, undertaking legal advocacy to protect the right to citizen participation.

⁵⁸ Conectas, ‘URGENT APPEAL: Unprecedented Attacks to the Brazilian System for the Fight against Contemporary Forms of Slavery’ (16 October 2017), Urgent appeal letter to the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, the Special Rapporteur on extreme poverty and human rights, and the Working Group on the issue of human rights and transnational corporations and other business enterprises, available at: <http://bit.ly/2ywNW2m>.

⁵⁹ The public hearing is a mechanism or space for participation. Law 489 of 1998, regarding the organization and functioning of national level entities, establishes parameters for citizens to express their opinion regarding the execution of public resources.

(6) The UN process towards a legally binding instrument on transnational corporations and other business enterprises:

This reinforces the trend towards binding regulations at the national, regional and international levels. The standards at the Inter-American level, which are in many elements more developed than in other region, should thus feed in the process at the international level to ensure the norms to be adopted are the most protective of human rights and the environment.

(7) UN treaty body reviews and UN Human Rights Council universal periodic review process

Question 10 - Provide information on prevention, due diligence and supervision in the States of origin of companies involved in human rights violations in territories of third States. Specify the relevance and the obstacles associate with each mechanism.

In line with the increasing trend towards the adoption of binding regulations regarding prevention, transparency and supervision globally, the Inter-American System of Human Rights should reinforce the already existing obligations at the regional level regarding the adoption of a strong and adequate legal framework for the protection of human rights. Some key examples of this global trend include:

The European Union (EU) non-financial disclosure directive: This require large companies to publish regular reports on the social and environmental impacts of their activities.

The EU regulation on conflict minerals: This was inspired by the US Dodd-Franck Act and requires EU importers of the 3TG minerals to comply with, and report on, supply chain due diligence obligations if the minerals originate (even potentially) from conflict-affected and high-risk areas. As a consequences EU companies will have to make sure they are importing minerals from responsible smelters and refiners.

French corporate duty of vigilance law: This law is an example of mandatory due diligence legislation and establishes a legally binding obligation for large business enterprises established in France to develop and effectively implement a vigilance plan. The plan should include information on procedures and actions to identify, prevent and mitigate adverse human rights and environmental impacts resulting from their own activities or the activities of their subsidiaries, from activities of companies they control and other companies with whom they have an established commercial relationship, in both France or abroad. The legislation does not create a mere obligation to document the measures undertaken in order to address adverse human rights impacts, but actually to *effectively implement* such measures.⁶⁰ However, the duty of vigilance consists of an “obligation of means”, rather than an “obligation of results”. In other words, the companies covered by the law do not have the obligation to respect human rights, but the obligation to adopt reasonable measures in order to avoid adverse human rights impacts that may be related to them.

Interested parties – including affected people and communities – are empowered to hold companies accountable if they have not fulfilled the requirements of the law. They can require judicial authorities to order a company to establish, publish and implement a vigilance plan, or account for its absence. Companies who fail to develop and implement a vigilance plan may be required to make periodic penalty

⁶⁰ France, Observations du Gouvernement sur la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (in English: Government's observations on the law related to parent companies' and contracting companies' duty of vigilance), March 28, 2017, available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290672&dateTexte=&categorieLien=id.

payments for the duration of the omission or may be held liable for damages that would have been avoided if they had such a plan. On the other hand, persons alleging damage hold the burden of proving that the vigilance plan would have avoided it. Therefore, business enterprises will not be liable if affected persons are unable to prove that there is causation between the absence of a vigilance plan and the abuse that the person had suffered. The new legislation may encourage business enterprises to adopt preventive measures to avoid adverse human rights impact, but it may also create a shield to protect from liability those who have adopted a vigilance plan.

The law has a narrow scope. It exempts French companies from the obligation to conduct due diligence across all the entities in their value chain or, at least, in the areas where the risk of adverse human rights impacts is most significant, as prescribed by the UNGPs (Commentary, UNGPs Principle 17). Such risks are frequently increased in the end of a company's value chain, where there is no established commercial relationship.⁶¹ In addition, further clarification is needed regarding the responsibility deriving from a lack of adequate due diligence processes and companies' liability in cases where due diligence was not enough to prevent human rights violations. In this regard, relevant decisions of the Court and the Commission in the inter-American system, should clarify and complement this trend by underlying States' duty to guarantee access to justice through investigation, sanction and access to adequate reparations for violations of human rights committed in these contexts.⁶²

The UK Modern Slavery Act: This requires large companies operating in the UK to report annually on the measures they have taken, if any, to prevent modern slavery taking place in any tier of their supply chains. It does not require the disclosure of specific information, but it suggests that the reports should cover six reporting areas: a.) organizational and supply chain structure; b.) company policies; c.) due diligence processes; d.) risk assessments; e.) effectiveness of measures in place; and f.) training. It was expected that the reporting obligation would be enough to create a reputational risk and to encourage business enterprises to adopt preventive measures in order to avoid modern slavery in their supply chains. However, according to the Business and Human Rights Resource Center, the response by the majority of the UK's largest listed companies was not satisfactory.⁶³ Additionally, a joint examination by Sancroft (an international sustainability consultancy) and Tussell (data source on UK government contracts) assessed the modern slavery reporting of the top 100 government suppliers and found that many companies reacted to the new law by only setting policies related to modern slavery but viewing the existence of this dedicated policy as a wholly sufficient response in itself in lieu of taking other practical steps.⁶⁴ These laws can run contrary to the intended goal of ensuring corporate compliance with human rights standards if they set a permissible environment in which companies are not under an incentive to effectively act in order to prevent and remedy adverse human rights impacts.

⁶¹ Anna Triponel and John Sherman, 'Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law' (May 17, 2017), available at: www.ibanet.org/Article/Detail.aspx?ArticleUid=E9DD87DE-CFE2-4A5D-9CCC-8240EDB67DE3.

⁶² IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (2015), above note 35.

⁶³ Business and Human Rights Resource Centre, *First year of FTSE 100 reports under the UK Modern Slavery Act: Towards elimination?* (December 2017), available at: <https://perma.cc/3MGT-3SDE>.

⁶⁴ Sancroft Tussell, *The Sancroft-Tussell Report: Eliminating Modern Slavery in Public Procurement* (2018), available at: sancroft.com/wp-content/uploads/2017/11/The-Sancroft-Tussell-Report.pdf.

Question 11 - Provide observations and comments on international legal obligations and standards, in particular those from the Inter-American Human Rights System, which you consider applicable to OAS Member States in matters of prevention, due diligence and supervision in matters of business and rights human rights, including extraterritorial application where appropriate.

Extraterritorial obligations – international standards

As of January 2018, the UN Committee on Economic, Social, and Cultural Rights has raised the issue of ETOs in five general comments (15, 19, 22, 23, and 24), as well as in concluding observations regarding several countries. Similarly, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child, and the Committee on the Elimination of Racial Discrimination have all established home states' obligations vis-à-vis the activities of companies domiciled or registered under their national laws.⁶⁵ Likewise, different UN Special Rapporteurs and Independent Experts have dedicated part of their thematic reports to ETOs in the context of corporate abuses.⁶⁶ Also, the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, legislative history and the lack of territorial limitation provisions in the text.⁶⁷

In particular, CESCR General Comment No. 24 clarified States' obligations under the ICESCR regarding business and human rights. It reaffirms that, under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or whether they are fully enforced in practice. It reminds that under international law State Parties can be held directly responsible for action or inaction of business entities (para 11). The Committee states that “the obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights” (para 16).

Regarding ETOs specifically, the Committee reiterates that “States Parties' obligations under the Covenant do not stop at their territorial borders”. States Parties are required to “take the necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they are incorporated under their laws, or have their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant” (para 26). The General Comment also stress that States Parties are required “to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.” (para 30)

This General Comment concurs with the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.⁶⁸ The Maastricht Principles stipulate that “States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means (...) as regards business enterprises, where the corporation, or

⁶⁵ See ESCR-Net, Global Economy, Global Rights: A Practitioner's Guide for Interpreting Human Rights Obligations in the Global Economy (2014), available at: <https://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf>.

⁶⁶ Ibid.

⁶⁷ I.C.J., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 136 (9 July), paras. 109-112.

⁶⁸ Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084, cmts. 3, 13.

its parent or controlling company, has its center of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.”⁶⁹

In relation to international criminal law, there are several treaties that suggest, and in some cases require, the exercise of extraterritorial jurisdiction to prosecute certain categories of transnational crimes, such as the **Inter-American and United Nations Conventions against Terrorism** (Arts. 5.2 and 6.1) and the **Inter-American Convention against Corruption** (Article V, clauses 3 and 4). In addition, the General Assembly of the United Nations has adopted two main international conventions related to terrorism that are worth noting, since they impose extraterritorial jurisdiction. They are the **International Convention for the Suppression of Terrorist Bombings** (art 7) and **International Convention for the Suppression of the Financing of Terrorism** (Art. 7). These two conventions only apply in cases of crimes of a transnational character (art. 3). The **OECD 2011 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions** (Art. 4) establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions. The **Council of Europe Criminal Law Convention on Corruption ETS No 173** (Arts. 2 onwards) also deal with criminal offenses committed abroad. Still in relation to transnational crimes, there are the **Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography** (Arts 1 and 3) and the **Convention Against Torture** (Art. 5).

Extraterritorial obligations – IASHR

At the Inter-American level, the most relevant pronouncement took place in April 2016, when the Inter-American Commission on Human Rights (IACHR) published the report **Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities**. The report addresses the obligation of corporations’ home States (where companies are headquartered or registered) and host States (where extractive projects are located) to bring their laws and policies into line with the obligation to prevent, mitigate, and redress human rights violations.

The IACHR has identified various legal obligations under the American Convention of Human Rights and IACtHR jurisprudence in contexts where extractive industries operate, in connection with the following six main components (which are each explained in detail in the abovementioned IACHR report):

(i) the duty to adopt an appropriate and effective regulatory framework, (ii) the obligation to prevent violations of human rights, (iii) the mandate to monitor and supervise extraction, exploitation, and development activities, (iv) the duty to guarantee mechanisms of effective participation and access to information, (v) the obligation to prevent illegal activities and forms of violence, and (vi) the duty to guarantee access to justice through investigation, punishment and access to adequate reparations for violations of human rights committed in these contexts.⁷⁰

This comprehensive approach to States’ obligations should be followed in order to ensure that the IASHR takes into account the full panorama of international obligations and that there is no regression on existing obligations.

⁶⁹ Maastricht Principles, para. 25

⁷⁰ IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (2015), above note 35.

Regarding development projects carried out both by private companies and the State itself, the Inter-American Court, in its Advisory Opinion 23/17,⁷¹ determined a State's obligations to respect and guarantee the rights to life and personal integrity in relation to environmental harm. The Court considered that States have the obligations to prevent significant environment damage, inside or outside of their territory. States must also act with due diligence and supervise business activities in order to prevent any damage to the environment and human rights. These obligations were developed in relation to the general duties to respect and guarantee the rights to life and personal integrity, as these were the rights to which Colombia referred in its request for an advisory opinion. However, the Court cautioned that this does not mean that these obligations do not also exist with respect to other rights that are particularly vulnerable to environmental degradation.

Prevention

The free, prior and informed consent standard (FPIC) has been established through the Inter-American Court's legally binding jurisprudence. In 2007, in *Saramaka v. Suriname*, the Court affirmed the obligation of the State to "ensure the effective participation of the members of the Saramaka People, in conformity with their customs, traditions, regarding any development, investment, exploration or extraction plan within the Saramaka territory".⁷² The court clearly stated this duty as the States' own obligation to actively consult, disseminate information, communicate with the parties involved. Later in 2012 decision on the case Kichwa Indigenous People of *Sarayaku v. Ecuador*, it specified that the State remained as the duty bearer and not the company or any third party, and as such the State must ensure it provides all mechanisms to guarantee the full exercise of indigenous peoples' right to FPIC.⁷³

The IACtHR's Advisory Opinion 23/17 elaborates on the obligations of prevention, due diligence, and State supervision in the case of development projects. While the IACtHR notes that it is not possible to make a detailed list of all the measures that could be adopted to comply with its obligation of prevention, since they will vary according to the right in question and according to the conditions of each State Party, it confirms that certain minimum obligations may be specified for States to adopt within their general obligation to take appropriate measures to prevent human rights violations as a result of environmental damage. In this regard, in order to comply with the obligation of prevention, States must: regulate and supervise the activities under their jurisdiction that may cause significant damage to the environment; carry out environmental impact studies when there exists a risk of significant damage to the environment; establish a contingency plan with security measures and procedures to minimize the possibility of major environmental accidents; and mitigate the significant environmental damage that would have occurred, even if it occurred despite preventive actions by the State.

In addition, within the framework of prevention, States have an obligation to cooperate, in good faith, to protect against environmental damage. To comply with the obligation of cooperation, States must notify other potentially affected States when they become aware that a planned activity under their jurisdiction could cause significant transborder damage and, in cases of environmental emergencies, also consult and negotiate with States potentially affected by significant transborder harm.

⁷¹ I/A Court H.R., The Environment and Human Rights. "State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity". Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23. paras. 140, available (Only in Spanish) at: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf, para. 140.

⁷² I/A Court H. R., Case of the Saramaka People v. Suriname, Judgment of November 28, 2007 Preliminary Objections, Merits, Reparations, and Costs, para. 129.

⁷³ I/A Court H. R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of June 27, 2012 Merits and Reparations, para. 166.

Finally, as procedural obligations within the framework of prevention, States must guarantee the right to access to information (Article 13, ACHR), the right to public participation of persons under their jurisdiction (Article 23.1, ACHR), and access to justice in relation to the state obligations for environmental protection outlined in Opinion 23-17.

Due diligence

The IACtHR has emphasized that the duty to act with due diligence corresponds, generally, to the obligation to ensure the free and full exercise of rights recognized in the American Convention to every person subject to its jurisdiction, according to which States must adopt all appropriate measures to protect and preserve the rights enshrined in the Convention, as well as organize the structures through which the exercise of public power is manifested, in such a way that they are able to legally ensure the full and free exercise of human rights.⁷⁴

Most environmental obligations are based upon this duty of due diligence. The Court reiterates that the adequate protection of the environment is essential for human welfare, as well as for the enjoyment of multiple human rights, particularly the right to life, personal integrity, health and the right to a healthy environment.

In the field of environmental law, the precautionary principle has implied that States have the “responsibility to ensure that activities carried out within their jurisdiction or under their control do not cause damage to the environment of other States or to areas outside the limits of national jurisdiction”.⁷⁵ This principle was expressly established in the Stockholm and Rio Declarations on the environment and is linked to the obligation of international due diligence to not cause or allow harm to other States.⁷⁶

In addition, the International Court of Justice has indicated that the duty of due diligence involves conducting an environmental impact study when there exists a risk that a proposed activity could have significant adverse impacts in a transborder context and, particularly, when it involves shared resources.⁷⁷ This obligation resides with the State that plans to carry out said activity or under whose jurisdiction the activity will be carried out.⁷⁸ In this regard, the International Court of Justice has explained that States must, before initiating any activity that has the potential to affect the environment, determine whether there exists a risk of significant transborder harm and, when appropriate, conduct an environmental impact study.⁷⁹

Human rights due diligence has different meaning under the UN Guiding Principles on Business and Human Rights (and, therefore, in the corporate world) than it does in human rights law or in general

⁷⁴ I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4., para. 166; I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298, para. 168, and Corte IDH. Caso Ortiz Hernández y otros Vs. Venezuela. Fondo, Reparaciones y Costas. Sentencia de 22 de agosto de 2017. Serie C No. 338, para. 100 y 101 (available only in Spanish).

⁷⁵ Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, UN Doc. A/CONF.151/26 (Vol. I), principle 2, and Stockholm Declaration of the United Nations Conference on the Human Environment, Stockholm, June 5- 16, 1972, UN Doc. ONU A/CONF.48/14/Rev.1, principle 21.

⁷⁶ I/A Court H.R. The Environment and Human Rights. Advisory Opinion OC-23/17, above note 71, paras. 95 to 103 and 128.

⁷⁷ I.C.J., Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of 20 April 2010 para. 204; I.C.J., Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of 16 December 2015, para. 104.

⁷⁸ I.C.J., Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of 16 December 2015, para. 153.

⁷⁹ I.C.J., Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of 16 December 2015, para. 104.

international law.⁸⁰ The International Law Association has stressed that “[n]ormative and institutional fragmentation has revealed significant divergences in the application of due diligence, both in terms of the scope of its application, and also seemingly its content.”⁸¹

Corporate human rights due diligence (derived from UNGPs and corporate practices) and *State* human rights due diligence (based on the Inter-American Court case law regarding the matter) have some common characteristics related to its content⁸² and to its practice,⁸³ as well as significant differences, most importantly the foundations of the legal obligation⁸⁴ to perform due diligence and the temporality⁸⁵ of such activity.

Regarding *State* human rights due diligence, the obligation to act with the necessary due diligence to protect individuals from human rights violations committed by private actors, including corporations, is well-established in the Inter-American jurisprudence. The recognition that the State can be held internationally responsible for human rights violations committed by third persons is present in the very first decision of the Inter-American Court of Human Rights in a contentious case:

[...] in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁸⁶

⁸⁰ Humberto Cantú Rivera, ‘Regional Approaches in the Business & Human Rights Field’ (2013) 35 *L’Observateur des Nations-Unies*, 27.

⁸¹ International Law Association, *ILA Study Group on Due Diligence in International Law: First Report*, 2014, 4.

⁸² “[A] common ground between due diligence exercised by the State and due diligence exercised as part of a corporate risk assessment exists, since due diligence generally entails taking positive steps to prevent harm from happening. The State, for example, must exercise due diligence to prevent human rights violations taking place within its jurisdiction, regardless of its origin (a State agent or a non-State actor committing the violation). This duty entails not just actions to prevent the violation from taking place—including the adaptation of its legal framework to ensure the State performs its duty of care—, but also any other measure available that may help to redress the damage if the State was unable to prevent it. Thus, its focus is on identifying probable risks that exist in relation to human rights, and acting accordingly to prevent such damages from happening, if possible.” Cantú Rivera, above note 80, 28.

⁸³ “[A]lthough different in their own context, States and corporations regularly conduct due diligence throughout their activities and operations to identify risks and act to prevent them, particularly in the form of impact assessments. To some extent, corporations are normally required under domestic law to undertake environmental and/or social impact assessments and report on their findings, in order to have access to permits and development projects. Inter-American case law has determined, on the other hand, that States must undertake environmental and social impact assessments prior to granting a concession for a development project to a company, in consultation with affected communities and acting in good faith. The fact that both subjects have practical experience in conducting such diligence exercises—or in commissioning them—reflects that at the very least, this issue is not new to them, and therefore can adapt their standards to meet the requirements set forth by the Ruggie mandate, as long as they have a clear understanding or guidance on what human rights due diligence, and particularly human rights impact assessments, require.” Cantú Rivera, above note 80, 29.

⁸⁴ Cantú Rivera, above note 80, 28.

⁸⁵ Cantú Rivera, above note 80, 29.

⁸⁶ I/A Court H. R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, above note 74, para. 166, 172 (emphasis added). See also I/A Court H.R., *Godinez Cruz Case v. Honduras*. Merits. Judgment of January 20, 1989. Series C No. 5, para. 181, 182, 187.

Indeed, the Inter-American Court has afterwards recognized the *erga omnes* character of the obligation to respect protective provisions of the American Convention on Human Rights, ensuring the effectiveness of the rights set forth therein under any circumstances and regarding all persons.⁸⁷ In the “*Mapiripán Massacre*” Case, the IACtHR stated that:

“The effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these *erga omnes* obligations embodied in Articles 1(1) and 2 of the Convention.”⁸⁸

In the case *Fazenda Brasil Verde v. Brazil*, the Court articulated a duty to perform due diligence in relation to cases of servitude, slavery, human trafficking and forced labor.⁸⁹ The Commission also maintained in its report on Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, that states have the duty to develop and implement an appropriate regulatory framework for the protection of human rights vis-à-vis corporations.⁹⁰ This entails significant changes to the laws applicable to corporate activities in order to make them consistent with human rights standards. It also reminded that the absence of provisions in domestic law ensuring accountability of state officials or private parties, or the existence of rules excluding such liability, can compromise the international responsibility of States.

Additionally, under the UNGPs, in order to meet their duty to protect human rights, States should enforce laws and regulate business enterprises activities related to the responsibility to respect human rights, as well as to encourage and to require them to communicate how they address their human rights impacts (UNGP Principle 3). It includes guidance on the development and implementation of effective *corporate* human rights due diligence to identify, prevent, mitigate and account for human rights impacts to which they are related. The UNGPs also provide that human rights due diligence is a four-step process, encompassing: (i) human rights impact assessment; (ii) concrete measures to prevent, mitigate, and remedy the impacts; (iii) monitoring the effectiveness of the measures; and (iii) reporting how the impacts are addressed (UNGP Principle 17).

The process is a means to protect and promote human rights. However, even when corporations adopt rules of corporate due diligence, showing every reasonable step was taken to avoid adverse human rights impacts, they should not assume that corporate human rights due diligence will exempt them from any liability for causing or contributing to such impacts (Commentary, UNGPs Principle 17). The draft elements for a legally binding treaty on business and human rights also provides that State Parties shall adopt measures to establish corporate liability for human rights abuses and to require business enterprises

⁸⁷ I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para 140; I/A Court H.R., “*Mapiripán Massacre*” Case v. Colombia. Merits, Reparations and Costs. Judgment of September 15, 2005, Series C No. 134, para. 111 and 112.

⁸⁸ I/A Court H.R., Case of the “*Mapiripán Massacre*” v. Colombia. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134 para. 111, in finis.

⁸⁹ I/A Court H. R., Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Series C No. 318 (October 20, 2016), para. 320.

⁹⁰ IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities (2016), para. 5.

to conduct human rights due diligence, but up to this point it does not provide for the relationship between these two obligations.⁹¹

The UN Working Group on Business and Human Rights already recognized that the failure to conduct an adequate due diligence process may impact the degree of involvement of a company with certain adverse human rights impacts.⁹² The obligation to remedy human rights abuses changes according to the degree of involvement of a business enterprise with such abuses. Business enterprises must enable the mitigation of any adverse human rights impacts they cause or to which they contribute (UNPG 15). Conducting appropriate *corporate* human rights due diligence - or the failure to do so - may ultimately impact the responsibility of business enterprises to provide the victims of abuses with effective remedies.

While mandatory due diligence laws might represent a significant opportunity for states to make corporate due diligence as set out in the UNGPs, some shortcomings could hinder the proper effectiveness of these instruments. Where liability for failure to conduct due diligence does not exist, then such efforts may not add to the quest for justice. Hence, there is a need to develop an effective legal framework that includes liability for business-related human rights abuses when inadequate corporate due diligence is conducted.

Supervision

Within the framework of environmental protection, the international responsibility of the State derived from the conduct of third parties may result from the lack of regulation, supervision, or control of the activities of these third parties that cause damage to the environment.

The Inter-American Court has indicated that, in certain occasions, States have the obligation to establish adequate mechanisms to supervise certain activities in order to guarantee human rights, protecting them from the actions of public entities as well as private persons. Also, in relation to the environment, in the case of the Kaliña and Lokono⁹³ people, the Court stated that the duty to protect natural reserve areas and the territories of indigenous communities implies a duty of supervision and control. On the other hand, in the framework of inter-state relations, the International Court of Justice has indicated that, as part of the obligation of prevention, States must monitor compliance with and implementation of their legislation or other regulations related to environmental protection, as well as exercise some form of administrative control over public and private operators by, for example, monitoring the activities of these operators.⁹⁴

Likewise, it has indicated that State control does not end with the realization of an environmental impact study, but that the States must monitor, in a continuous way, the effects of a project or activity on the environment.⁹⁵

In this regard, the Inter-American Court established that “it considers that States have a duty to supervise and control activities under their jurisdiction that may cause significant environmental harm. Therefore,

⁹¹ Chairmanship of the OEIGWG, Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (29 September 2017), available at: <https://perma.cc/SZX5-7YFJ>.

⁹² UN Working Group on Business and Human Rights, Letter to the Thun Group of Banks, above no. 23

⁹³ I/A Court H.R., Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, para. 221.

⁹⁴ I.C.J., Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of 20 April 2010 para. 197. See also, CONVEMAR, arts. 204 and 213.

⁹⁵ I.C.J., Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of 20 April 2010 para. 205; I.C.J., Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of 16 December 2015, para. 161.

States must develop and implement adequate and independent monitoring and accountability mechanisms. These mechanisms must not only include preventative measures, but also those appropriate to investigate, punish and repair possible abuses through appropriate policies, regulatory activities and submission to justice. The level of intensity needed in supervision and control will depend on the level of risk involved in the activity or behavior".⁹⁶

Without affecting the obligation of the States to supervise and check activities that could cause significant damage to the environment, in its Advisory Opinion 23/17, the Inter-American Court notes that, pursuant to the Guiding Principles on Business and Human Rights, "companies must act in compliance with the respect and protection of human rights, as well as preventing, mitigating and taking responsibility for the negative consequences of their activities on human rights".⁹⁷

⁹⁶ I/A Court H.R., Advisory Opinion 23/17 Environment and Human Rights, above note 71 para. 154.

⁹⁷ I/A Court H.R., Advisory Opinion 23/17 Environment and Human Rights, above note 71 para. 155.

BLOCK IV – Investigation, Accountability and Remedies

Question 13 - Describe obstacles (legal and practical) for the comprehensive reparation and access to justice for victims of human rights violations related to business activities in the American hemisphere.

Civil society organizations and victims' experiences in using judicial and nonjudicial mechanisms remain dishearteningly challenging. In theory, one could argue that there are several mechanisms to access remedy, being them intergovernmental, judicial, administrative, mediation and other complaint mechanisms. In reality, access to justice remains an illusion in the vast majority of corporate-related cases. Individuals affected by corporations' activities often have a low probability of obtaining redress. This is true for the jurisdictions where the activity is carried out (host country), the jurisdiction where the company is registered and has its place of business (home country) or the country where the investment was made. A lack of political will and insufficient legal capacity among local authorities (i.e. inadequate legislation, poor infrastructure, corporate capture, corruption, lack of legal aid, the politicization of the judiciary), at times due to pressures intended to attract foreign investment, are common in this area. Additionally, parent companies are rarely held liable for human rights abuses committed by their subsidiaries or along their supply chains. In some countries access to justice is becoming increasingly difficult as a result of legislative reforms or regressive judicial decisions. Some examples of the obstacles identified include

- The doctrine of *forum non conveniens*, whereby courts may refuse to accept jurisdiction in a matter where there is an apparently more appropriate forum, generally the jurisdiction in which the tort occurred. Strict use of this doctrine, however, often raises difficulties related to the fact that the legislative and judicial systems of certain countries where human rights abuses actually took place may be defective or incomplete and therefore do not provide optimal conditions for the legal pursuit of multinational corporations that commit violations.

Government bodies, including its federal agencies, and foreign States and multilateral financial institutions often enjoy sovereign immunity from all civil and criminal claims, unless they waive immunity or agree to be pursued in a particular case.

Defendants may also rely on the political question doctrine and the international comity doctrine to block lawsuits targeting them.

- The corporate veil can only be pierced under very limited circumstances as demonstrated once again by the recent UK Supreme Court decision in the *Okpabi v. Shell* case (regarding oil pollution by the Nigerian subsidiary of a London-based company).⁹⁸
- The narrow interpretation of laws and regulations having an extraterritorial dimension. For example, in *Kiobel v. Royal Dutch Petroleum*, the Supreme Court of the United States (US Supreme

⁹⁸ England and Wales Court of Appeal (Civil Division), Case No: A1/2017/0407 and 0406 *Okpabi & Ors v. Royal Dutch Shell Plc & Anor* (Rev 1) [2018] EWCA Civ 191 (14 February 2018).

Court) considered that the Alien Tort Statute (ATS) did not permit legal claims against companies for human rights violations overseas, unless they sufficiently “touch and concern” the US.⁹⁹ The “touch and concern” requirement has been applied in a very narrow way. Further, limitations seem to emerge in the recent US Supreme Court ruling in *Jesner v. Arab Bank*¹⁰⁰, in which Judge Sotomayor’s dissent may have the effect of excluding any suits under the ATS against US corporations for aiding and abetting human rights violations overseas (as opposed to committing violations directly).

Question 15 - Provide observations and comments on international legal obligations and standards, particularly those from the Inter-American Human Rights System, which you consider applicable to OAS Member States on investigation, accountability and remedies in matters of business and human rights, including extraterritorial application where appropriate.

We believe that it is necessary to be more clear and rigid in the criteria applicable to States regarding accountability and reparation for damages caused by companies to the environment and human rights.

The Inter-American Court considers that States have a duty to supervise and police activities under their jurisdiction that may cause significant damage to the environment. Therefore, States must develop and implement adequate and independent monitoring and accountability mechanisms. These mechanisms should not only include preventive measures, but also those appropriate to investigate, sanction and repair possible abuses, through appropriate policies, regulatory activities and submission to justice. The level of intensity needed in supervision and control will depend on the level of risk involved in the activity or conduct.

In this sense, we note that the mechanisms of accountability regarding the exercise of business activities must be regulated and monitored by the State, which must demand compliance with minimum standards of transparency and citizen participation. These standards should be further developed by IAHRs’ organs, aiming to establish the extension of the obligations of States with respect to business activities, especially in the development sector.

Additionally, the reparations related to human rights violations, especially when they are a consequence of environmental degradation, must be calculated according to the severity of the damage and the possibility of reversing it. Many times, in cases of environmental degradation and consequent violation of human rights of a social, economic and cultural nature, ways of life are completely compromised. Thus, it is necessary that the bodies of the IAHRs begin to outline minimum reparation standards applicable to cases of environmental degradation. Those should aim at the reversion of damages and environmental revitalization, which should be integrated with measures to preserve cultures, to promote the cooperation of affected communities with the implementation of environmental reparation measures, and to develop short and medium-term measures for social, economic and cultural sustenance while these populations adapt to the new way of life integrated with their territory and environment.

CESCR’s general comment no. 24 provides useful guidance regarding State obligations in connection to remedies for corporate-related human rights abuses. The Committee points out the need for criminal and administrative sanctions and penalties where corporations failed to act with due diligence (para 15). It suggests for example the revision of public procurement contracts, export credit and other form of State support, privileges and advantages in case of human rights violations (para 31; 50). The General Comment

⁹⁹ United States Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. (2013).

¹⁰⁰ United States Supreme Court, *Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 U.S. (2017).

also affirms that human rights should prevail on trade investment treaty (para 13), by stating that “investment treaties may deny protection to foreign investors of the other Party that have engaged in conduct leading to a violation of Covenant rights” (para 50).

The General Comment recognizes that victims of transnational corporate abuses face many obstacles in having access to remedy, and proposes concrete solutions to this end, recalling that States Parties have the duty to address these challenges in order to prevent a denial of justice and ensure the right to effective remedy. In that regard, the General Comment indicates that it requires States Parties to establish parent company or group liability regimes, provide legal aid and other funding schemes to claimants and enable human rights-related class actions and public interest litigation (para 44). It also affirms that “States Parties should facilitate access to relevant information through mandatory disclosure laws and by introducing procedural rules allowing victims to obtain the disclosure of evidence detained by the defendant. Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant.” (para 45). Further, judicial decisions relying on *forum non conveniens* doctrine should take in consideration “the extent to which an effective remedy is available and realistic in the alternative jurisdiction” (para 44).

States should also improve international cooperation to “reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in the inability for victims to obtain redress” (para 35).

Annex A - Cases of HRD collected by FIDH

Colombia

Defender	Organizational affiliation	Occurrence	More information available (Only in Spanish) at:
Temístocles Machado	Member of the Asociación de los Territorios Ganados al Mar en la Relación Campo Poblado and of the Comité Interorganizacional por la Defensa de los Territorios ganados al Mar of Buenaventura 2018	Killing	FIDH, Press Release. Colombia:Asesinato de líder social de Buenaventura, Temístocles Machado
Germán Garciano Posso	Legal Representative of the Peace Community of San José de Apartadó 2018	Threats and attempt of assassination	FIDH, Colombia: Intento de asesinato de Germán Graciano Posso, Representante legal de la Comunidad de Paz de San José de Apartadó
Hector Sanchez	Leader of the Environmental Committee of Puerto Gaitán 2016	Threats, judicial harassment, unjust imprisonment	FIDH, Colombia: Amenazas contra Héctor Sánchez Gómez y varios líderes comunitarios de Rubiales y Cuernavaca FIDH, Colombia: Rechazo a las amenazas del paramilitarismo contra el movimiento social y ambientalista en Colombia

Ecuador

Defender	Organizational affiliation	Occurrence	More information available (Only in Spanish) at:
	Acción Ecológica 2016	Threat of forced dissolution of the organization	FIDH, Ecuador: Decisión arbitraria de disolución de la ONG Acción Ecológica Carta Abierta a los candidatos a la presidencia del ECUADOR: Comprométanse a derogar los Decretos que habilitan la disolución de ONGs

Guatemala

Defender	Organizational affiliation	Occurrence	More information available (Only in Spanish) at:
Pedro Rafael Maldonado Flores	Director of the legal department at the Centre for Legal Environmental and Social Action in Guatemala (CALAS) 2017	Threat, intimidation	FIDH, Guatemala: Actos de intimidación en contra de Rafael Maldonado, Director del Área Legal de CALAS

Honduras

Defender	Organizational affiliation	Occurrence	More information available (Only in Spanish) at:
Suyapa Martinez	Centro de Estudios de la Mujer (CEM-H) 2017	Judicial harassment	FIDH, Honduras: organizaciones internacionales se solidarizan con la defensora de las mujeres Suyapa Martinez
Bertha Oliva	Comité de Familiares Detenidos y Desaparecidos en Honduras (COFADEH) 2016	Defamation	FIDH, Honduras: Calumnia, injuria y difamación en contra de Bertha Oliva y del COFADEH

Nicaragua

Defender	Organization affiliation	Occurrence	More information available (Only in Spanish) at:
Vilma Núñez de Escorcía	Centro Nicaragüense de Derechos Humanos (CENIDH) 2017	Threats and defamation campaigns	FIDH, Nicaragua: Escalamiento de la campaña de difamación contra el CENIDH y Vilma Núñez

Annex B - Threats against Comité Ambiental en Defensa de la Vida

Ibagué, junio 2016.



COMUNICADO A LA OPINIÓN PÚBLICA NACIONAL E INTERNACIONAL DE LA RED DE COMITES AMBIENTALES DEL TOLIMA

El día 3 de junio en el departamento del Tolima nos movilizamos en la 8va versión de la Marcha Carnaval más de 120.000 personas. En el departamento del Quindío y Caquetá también se sumaron manifestaciones culturales contra la “locomotora” minero-energética.

De manera pacífica, alegre, cultura y con contundencia rechazamos el modelo económico extractivista que se impone de manera dictatorial por el gobierno nacional y cuyo desarrollo afectaría el derecho al agua de quienes habitamos en este territorio colombiano y de las futuras generaciones.

Nuestras consignas de garantizar el derecho al agua, al ambiente sano, pero sobre todo a ese derecho universal a la vida de los seres humanos y naturaleza en general, sigue siendo un acto perseguido y estigmatizado no solo por el gobierno sino también por grupos armados que desean perpetuar los conflictos socio-ambientales en Colombia.

Rechazamos las amenazas por medio de panfletos que presuntamente el grupo paramilitar autodenominado “Las Águilas Negras” hacen contra el Comité Ambiental del Tolima, contra el Congreso de los Pueblos, Marcha Patriótica, el Consejo Regional Indígena del Tolima CRIT, Organización Nacional Indígena de Colombia ONIC, la Cumbre Agraria, Campesina, Étnica y Popular, las organizaciones defensoras de los derechos humanos y el alcalde de Ibagué Guillermo Alfonso Jaramillo.

Exigencias:

1. Exigimos al gobierno colombiano garantizar la integridad de todos los miembros de la Red de Comités Ambientales del Tolima y las demás organizaciones mencionadas en el panfleto amenazante.
2. Exigimos a la Fiscalía General de la Nación investigar y esclarecer los hechos rápidamente.
3. Exigimos al gobierno colombiano se otorguen las medidas de protección necesarias que garanticen el trabajo, la integridad y honra de los defensores del agua, la vida y el territorio.

Anexamos comunicado de las “Águilas Negras”



Junio de 2.016

BLOQUE CENTRAL COLOMBIANO.

nuestro grupo armado tiene pleno conocimiento de todos las intenciones, de seguir bloquiando vías, aser marchas y desinformar la gente solo para poner tropiezo en las buenas ideologias y en los proyectos de desarrollo en el tolima y en nuestra patria.

por esto son declarados objetivo militar los principales dirigentes de las siguientes organizaciones: marcha patriótica, los tales del comité ambiental, los del consejo regional de indios del tolima- crit y o.n.i.c, cumbre agraria, congresos de los pueblos, la belleza del alcalde de ibague y los que insistan liderando con el cuento de los derechos humanos, que con la estúpida paz de la porqueria de santos, todos uds hijos de puta de izquierda no son mas que colaboradores de las guerrillas de las farc-ep

se les ordena que cesen sus actividades yaaaa! Nada de paros, pues los tenemos ubicados, nuestros militantes los aran caer uno a uno,

NO SE TENDRA COMPACION!

Nota: Favor enviar sus notas de apoyo a:

JUAN MANUEL SANTOS CALDERÓN Presidente de la República Carrera 8 No. 7 -26
Palacio de Cauca Bogotá Fax. 5662071 Fax: (+571) 566.20.71
Email: comunicacionesvp@presidencia.gov.co

LUIS CARLOS VILLEGAS Ministro de la Defensa Carrera 54 N° 26-25 CAN Bogotá DC
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