BUSINESS AND HUMAN RIGHTS:

SUBMISSION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND THE SPECIAL RAPPORTEUR ON ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS

February 26, 2018

São Paulo | Bogotá

Table of Contents

Introduction

1. This document provides inputs to the Inter-American Commission on Human Rights (the Commission) and the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (SR ESCER) for their development of a report that examines standards and criteria related to Business and Human Rights (BHR) under the Inter-American System.

2. Dejusticia (Colombia) and Conectas Human Rights (Brazil), two Global South NGOs with an international perspective have been contributing to the development of standards on BHR, in part through a critical and constructive dialogue with international bodies charged with disseminating and implementing the Guiding Principles on Business and Human Rights (UNGPs).[1] In particular, Dejusticia and Conectas have engaged the Working Group on Business and Human Rights (WG) through their **Observatory on the UN Working Group on Business and Human Rights**, which publishes comments and critiques of the UNWG's annual and thematic reports and seeks to engage the UNWGs from a Global South Perspective. We have also participated and provided inputs during regional consultations, and are preparing the release of a comprehensive evaluation of the six years of the UNWG's mandate.

3. At the national level, both organizations have worked on a variety of issues regarding implementation and of aspects of BHR obligations, particularly in light of the UNGPs.

4. Conectas's national work on BHR includes the monitoring of development finance institutions (DFIs), notably the Brazilian Development Bank and the BRICS-led New Development Bank; the support to communities whose rights have been violated in the context of business-related activities, particularly in infrastructure and mining projects; advocacy for the domestic ratification of the Arms Trade Treaty (ATT) and tougher protocols for the export of arms by Brazilian companies to conflict-inflicted countries and authoritarian regimes; and the monitoring of the business and human rights policies and laws in Brazil. Conectas monitors the implementation of the recommendations of the Working Group on Business and Human Rights after their country visit in December 2015.

5. Dejusticia's national work on BHR includes an evaluation of Colombia's National Action Plan (NAP), co-authored with the International Corporate Accountability Roundtable (ICAR), an updated evaluation of the Colombian NAP, and its advocacy regarding industries that produce and distribute unhealthy foods. In that context, we have defended the right to information and successfully challenged attempts at censoring public health messages in the media and on frameworks. Dejusticia has also participated in campaigns for more effective regulation to protect the right to healthy nutrition and has sought to clarify corporate responsibility in the context of potentially unethical marketing to vulnerable communities.

6. The organizations are grateful for the opportunity to provide inputs to the SR ESCER as she develops a thematic report that collects inter-American standards and analyzes inter-American criteria to protect human rights in the context of business activities. In this submission, Conectas and Dejusticia will discuss access to remedies in judicial and non-judicial settings, human rights due

[1] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (2011) [hereinafter UNGPs].

diligence, indigenous rights, public-private partnerships, State-owned enterprises and financing and development.

Putting the Guiding Principles on Business and Human Rights in the Context of the Inter-American System

7. The UNGPs, while not themselves binding, were conceived as collecting and providing an "authoritative focus"[2] for already existing international human rights law and human rights treaty obligations. The "Guiding Principles are grounded in recognition of [...] States' **existing obligations** to respect, protect and fulfil human rights fundamental freedoms."[3] The Commentary to UNGP Principle 1 (State duty to protect human rights) clarifies that "States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/ or jurisdiction." The Commentary to UNGP Principle 25 (duty to protect against business-related human rights abuses) refers to regional human rights bodies as entities that can supplement or enhance state-based mechanisms for access to remedy.

8. States working to implement the UNGPs must comply with their existing human rights obligations. Under Inter-American jurisprudence, States Parties to the Convention have long had the obligation to not just respect the rights and freedoms enshrined under the Convention, but also "to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[4]

9. Moreover, OAS Member States, even those that have not ratified the American Convention, have binding human rights obligations:

> [A]ccording to the well-established and long-standing jurisprudence and practice of the inter-American human rights system, the American Declaration is recognized as constituting a source of legal obligation for OAS member states, including those States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter. Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined by the American Declaration, as well as the customary legal status of the rights protected under many of the Declaration's core provisions. The inter-American system has moreover held that the Declaration is a source of international obligation for all OAS member states, including those that have ratified the American Convention. The American Declaration is part of the human rights framework established by the OAS member states, one that refers to the obligations and responsibilities of States and mandates

[2] See J. Ruggie, *Just Business* (2013), pp. 82, 106.

[3] UNGPs *General Principles* (emphasis added).

[4] *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, ¶ 166.

> them to refrain from supporting, tolerating or acquiescing in acts or omissions that contravene their human rights commitments."[5]

10. In the case of *Kaliña and Lokono Peoples*, the Inter-American Court relied on the UNGPs to analyze **binding obligations** of States. The SR ESCER should provide additional clarity to States about the usefulness of the UNGPs in enhancing compliance and implementation of existing obligations, while emphasizing that nothing in the UNGPs reduces or undermines existing obligations.

11. In its November 2015 decision in the *Kaliña and Lokono Peoples* case, the Inter-American Court of Human Rights cited the UNGPs in its interpretation of State obligations with regard to regulating the activities of corporations.[6] In that case, the Court noted that it can interpret the content of certain binding obligations of the State under the American Convention on Human Rights in light of the Guiding Principles:

> The Court notes that the mining activities that resulted in the adverse impact on the environment and, consequently, on the rights of the indigenous peoples, were carried out by private agents; first by Suralco alone, and then by the joint venture, BHP Billiton-Suralco.
>
> In this regard, the Court takes note of the "Guiding Principles on Business and Human Rights," endorsed by the Human Rights Council of the United Nations, which establish that businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities. Hence, as reiterated by these principles, "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."[7]

12. The Court cited to the UNGPs in tandem with an OAS resolution of 2014, which further entrenched the UNGPs and noted that the "Organization of American States emphasized the need to continue implementing legally binding instruments for businesses and to facilitate 'the exchange of information and sharing of best practices on promotion and protection of human rights in business.'"[8] As the case had to do with two mining corporations' damage to the environment and violations of the rights of indigenous peoples in Suriname, the Court examined the conduct of the mines and that of the State in part by citing to the commentary to Principle 18 of the UNGPs (impact assessment) and contrasting its step-by-step recommendations to the actions of the mining companies. The failure of the businesses to abide by their responsibilities resulted in a finding against the State, for its own failures to regulate the activities of the mining companies:

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[5] *Jessica Lenahan (Gonzales) et al. v. United States*, Case No. 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 115-116 (2011) (citing, inter alia, I/A Court H.R. *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, Series A, No. 10 (1989), ¶ 35-45).

[6] *Case of the Kaliña and Lokono Peoples v. Suriname*. Judgment, Merits, Reparations and Costs. Inter-Am. Ct.H.R. Series C No. 309 (November 25, 2015), ¶¶ 223-226.

[7] *Id.*, at ¶¶ 223-224, quoting UNGPs, Principle 1, and referencing UNGPs, Principles 1, 11, 12, 13, 14, 15, 17, 18, 22, 25.

[8] *Id*, at ¶ 224 n. 261, referring to Resolution AG/RES. 2840 (XLIV-O/14), *On The Promotion and Protection of Human Rights in Business, adopted at the second plenary session held on June 4, 2014*. Available at: http://www.oas.org/en/sla/dil/docs/AG-RES_2840_XLIV-O-14.pdf

> Based on the above, the Court finds that, because the State did not ensure that an independent social and environmental impact assessment was made prior to the start-up of bauxite mining, and did not supervise the assessment that was made subsequently, it failed to comply with this safeguard; in particular, considering that the activities would be carried out in a protected nature reserve and within the traditional territories of several peoples.[9]

In this case, the basis for State liability was not the UNGPs. Instead, the Court relied on State obligations under the American Convention on Human Rights and its own jurisprudence regarding violations by individuals and the acts and omissions that can render the State liable for these violations:[10]

> [T]he State has the obligation to protect the areas of both the nature reserve and the traditional territories in order to prevent damage to the indigenous lands, even damage caused by third parties, with appropriate supervision and monitoring mechanisms that guarantee human rights; in particular by supervising and monitoring environmental impact assessments.[11]

Aside from enhancing the legitimacy of the obligations captured in the UNGPs, the Court's decision relied on its finding that the State failed to comply with the UNGPs as a sign that it has failed to comply with its international human rights obligations under binding treaties, including the American Convention on Human Rights.

13. We emphasize an important detail: in the *Kaliña and Lokono Peoples* case, the Court examined UNGP Principle 18 and its commentary, that is, a principle ensconced in the section of the UNGPs devoted to "The Corporate Responsibility to Respect Human Rights." That the responsibility belongs to corporations does not excuse the State from being responsible for effectively organizing its State apparatus to ensure that corporations comply with their responsibilities to respect. No corporation should assume that its responsibility to respect as outlined in the UNGPs is optional. States are bound to require compliance with these responsibilities with regard to businesses under their jurisdiction, as part of their binding obligations to protect from human rights violations.

14. The fact that these obligations are binding on States should not be lost on private enterprises: private enterprises, in their due diligence efforts, must not only evaluate what the national laws of States Parties to the American Convention and OAS Member States are; they must also consider that these States have binding obligations under international human rights standards and particularly under Inter-American Jurisprudence. Thus, a business's inquiry cannot end with national laws and regulatory standards. It must also consider the relevant State's obligations under the inter-American system regardless of whether that State is properly fulfilling its obligations.[12]

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[9] *Case of Kaliña and Lokono Peoples*, *supra* note 6, at ¶ 226.

[10] This jurisprudence begins with the court's first contentious case, *Velásquez Rodríguez v. Honduras*, *supra* note 4.

[11] *Case of Kaliña and Lokono Peoples*, *supra* note 6, at ¶ 221, citing *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs Inter-Am. Ct.H.R. Series C No. 261, ¶ 133 (May 21, 2013), and *Case of Gonzales Lluy el al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. Series C No. 298, ¶ 184 (September 1, 2015).

[12] For example, the Court has held in the past that "the members of the indigenous peoples who had involuntarily lost the possession of their lands, and these had been transferred lawfully to innocent third parties, had the right to recover them or to obtain other lands of the same size and quality." *Case of Kaliña and Lokono Peoples*, supra note 6 ¶ 131.

Recommendations:

15. The *Kaliña* case is a step forward in the efforts to clarify State obligations towards business enterprises and is a landmark in the strengthening of the dialogue between the American Convention and the UNGPs. As the number and complexity of cases involving corporate-related abuses grow in the Inter-American Human Rights System, the guidelines should address specific issues that should be considered by the IACHR and the IACtHR when dealing with cases that address business and human rights issues:

    - The IACHR should continuously draw on the lessons learned by handling individual cases to devise practical solutions. The most salient and systematic violations should form the basis for the **development of action plans targeted at specific realities, industries sectors and groups of rights-holders**;
    - The identified gaps in concrete cases should feed back into the standard-setting activities of the two mechanisms to ensure continuous improvement of the business and human rights standards, with a view to remove legal and practical barriers that represent an obstacle for access to justice and accountability for corporate-related abuses;
    - To prevent the backsliding of human rights that are protected by the Convention and its respective guarantees, the IACHR should clearly articulate the expectation that States should enact and enforce a framework of laws and policies in the area of business and human rights as a matter of compliance with the binding provisions of the Convention**. Soft guidance to assist countries to take additional steps should be clearly identified as such.**

Access to Remedies: Judicial and Non-Judicial Remedies, Monitoring Mechanisms, and National Action Plans

16. Access to judicial avenues for remedy is crucial for the effective implementation of human rights in the context of business enterprise activities and has been at the core of the concerns of advocates and affected communities and has animated the push for a binding treaty on business and human rights.[13]

17. While we highlight the importance of judicial remedies, in this submission we also focus on two non-judicial spaces relevant to access to remedy in the context of private enterprise activities: monitoring mechanisms and their effective design, and National Action Plans.

[13] Claret Vargas, "A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape" In C. Rodriguez-Garavito (Ed.), *Business and Human Rights: Beyond the End of the Beginning*, pp. 111-126 (Cambridge University Press, 2018) (citing FIDH Intervention, Panel VII "Building National and international mechanisms for access to remedy, including international judicial cooperation, with respect to human rights violations by TNCs and other business enterprises." OEWG, Resolution A/HRC/26/9. First session, (July 6–10, 2015); Asia Pacific Forum on Women, Law and Development (APWLD), "Shaping the treaty on business and human rights: views from Asia and the Pacific," http://www.escr-net.org/news/2015/shaping-treaty-business- and-human-rights-views-asia-and-pacific; Treaty Alliance Joint Statement, "Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse," available at http://www.treaty movement.com/statement).

State Obligations to Provide Access to Effective Judicial Remedies

18. The Third Pillar of the UNGPs (Access to Remedy) has been called the "forgotten pillar" and was the focus of the 2017 Forum on Business and Human Rights. The Working Group on Business and Human Rights (the UNWG) reiterated fundamental premises on the relationship of access to remedy and the enjoyment of human rights, including the fact that "access to effective remedy and accountability mechanisms are pre-requisites for realizing human rights and achieving sustainable development."[14]

19. The UNGPs make it clear that providing access to remedy is a State obligation: "States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate mean, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[15] In the Inter-American system, it has long been established that States have an obligation to provide effective remedies. The Court applied this fundamental principle to its analysis of access to remedies in the context of business enterprises in the *Kaliña and Lokono Peoples* case:

> States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), and these must be substantiated in accordance with the rules of due process of law (Article 8(1)), under the general State obligation to ensure to all persons subject to their jurisdiction the free and full exercise of the rights recognized by the Convention (Article 1(1)).[16]

20. The Court also expressed the notion that without a remedy there is no protection for rights: "the inexistence of an effective remedy for the violations of the rights recognized in the Convention entails a violation of the Convention by the State Party in which this situation occurs."[17]

21. The Court has often highlighted the importance of making remedies effective: "it is not enough for the remedies to exist formally, but rather it is essential that they be effective in the terms of that provision. This effectiveness means that, in addition to their formal existence, the remedies must produce results or responses to the violations of rights recognized in the Convention, the Constitution, or the law [...] those remedies that are found to be illusory, owing to the general

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[14] UN Working Group on Business and Human Rights, "Reflections on the theme of the 2017 Forum on Business and Human Rights", available at https://perma.cc/6LBZ-A797

[15] Principle No. 25, Guiding Principles on Business and Human Rights.

[16] *Case of Kaliña and Lokono Peoples*, *supra* note 6 ¶ 237, referencing *Velásquez Rodríguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987 Series C No.1, ¶ 91, and *Case of López Lone el al. v. Honduras.* Preliminary objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, ¶ 245. *See also Case of Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214 ¶ 139, quoting, *inter alia*, *Case of the "Dos Erres" Massacre v. Guatemala*, Preliminary objection, merits, reparations and costs. Judgment of November 24, 2009. Series C No. 211, ¶ 104, and *Case of Chitay Nech et al. v. Guatemala*. Preliminary objections, merits, reparations, and costs. Judgment of May 25, 2010. Series C No. 212, ¶ 190.

[17] *Case of Kaliña and Lokono Peoples*, *supra* note 6, at ¶ 237, referencing *Velásquez Rodríguez v. Honduras*, *supra* note 16. Preliminary Objections. Judgment of June 26, 1987 (Ser. C No.1), ¶ 91, and *Case of López Lone el al. v. Honduras.* Preliminary objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, ¶ 245; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, ¶ 113, and *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama.* Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 284, ¶¶ 193, 198. *See also* case of *Xákmok Kásek* ¶ 139, quoting, inter alia *Case of Palamara Iribarne v. Chile*. Merits, reparations and costs. Judgment of November 22, 2005. Series C No. 162, ¶ 183

conditions of the country or even the particular circumstances of a specific case, cannot be considered effective."[18]

22. The Court has stated multiple times that the State's obligation to provide effective remedies implies two steps:

> The first is to legislate and ensure the due application by the competent authorities of effective remedies that protect all persons subject to their jurisdiction against acts that violate their fundamental rights or that lead to the determination of their rights and obligations. The second is to guarantee the means to execute the respective decisions and final judgments issued by those competent authorities so that the rights that have been declared or recognized are truly protected.[19]

23. We urge the SR ESCER to remind States of the extensive inter-American jurisprudence that sets forth their fundamental obligations to provide effective remedies in the context of human rights violations by business enterprises and to underscore to States and business enterprises that implementation of the UNGPs requires, by the very definition of the UNGPs, compliance with existing human rights obligations under the inter-American system.

Recommendations

The guidelines should:

- Clearly articulate the duty of States to provide and ensure access to **judicial remedies** that are effective. The Court and the Commission have stated numerous times that remedies must be effective, and not merely formal. While taking into account that the specific circumstances of a case must be considered, the guidelines should collect and set forth criteria for the evaluation of the effectiveness of remedies, including illustrative examples of remedies that have been deemed ineffective.
- Reinforce that the **duty to provide effective judicial remedies, regardless of non-judiciary mechanisms for remedy and/or the existence of a regulatory regimes**. No "smart mix" of measures to "foster business respect for human rights"[20] can work without ensuring access to effective judicial remedies. Victims' access to remedies are fundamental sources of incentives for business to respect human rights. As the Commentary to Principle 3 of the UNGPs states: "The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice."
- Urge States to **evaluate and map the gaps and obstacles for access to justice, and develop plans to address these obstacles, with particular attention to access to justice of communities that are especially vulnerable to human rights violations**, and to contexts where human rights are particularly vulnerable, such as infrastructure projects, agroindustry and extractive industries. Remind States that so long as these obstacles to access to justice exist, the potential for State violations of Articles 8 and 25 are significant,

[18] *Case of Xákmok Kásek*, *supra* note 16, at ¶ 140.

[19] *Case of Kaliña and Lokono Peoples*, *supra* note 6, ¶ 239 (internal citations omitted). *See also Case of Xákmok Kásek*, *supra* note 16, at ¶ 141, referring, inter alia, to *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, ¶ 237.

[20] For a description of the "smart mix", *see* UNGPs, Principle 3, Commentary.

and business operations in contexts without effective access to justice are at risk of operating in a manner that violates human rights.

Monitoring and Grievance Mechanisms[21]

24. Our study of best practices shows that processes to protect human rights in the context of private enterprise activities must consider more seriously the *design* of enforcement mechanisms and, in particular, the inclusion of affected communities in the design of norms and mechanisms for implementation. As we will discuss in our section on National Action Plans, below, communities are too often included only when decisions have been made and it is time to "socialize" new norms or mechanisms[22]. Alternatively, communities are consulted at the outset of mechanism design processes, but are not included meaningfully in the design of the mechanisms, nor is there a clear way in which policy drafters are held accountable for failures to take into account community inputs.

25. At international forums on business and human rights communities and advocates have expressed concern about the absence of their voices in the development of mechanisms and norms, and have expressed the concern that this flawed process will lead to ineffective agreements and continued impunity for violations of their rights.[23]

26. In previous desk and participant observer research at the UN Forums on Business and Human Rights, Dejusticia documented a few examples of effective mechanisms that provide affected communities with meaningful access to remedy. These examples show that affected communities and their advocates are indispensable in the design of the most effective implementation and monitoring mechanisms.

27. For example, FFP, an initiative of the Coalition of Immokalee Workers (CIW) for "worker driven social responsibility," provides effective remedies to agricultural workers in 90% of the tomato industry in Florida. CIW representatives have underscored that the essential element of its success is that it is driven by "the very humans whose human rights are in question, and so the stakeholders with the most compelling and abiding interest in seeing those rights protected." Aside from having the participation of the they key affected community baked into the design of the mechanism, the FFP is also "backed by market consequences" so that employers know that the failure to comply includes real market consequences.[24] This process has also created an army of monitors (workers educated both on their rights and on the workings of the FFP) and this, in turn, makes enforcement more widespread.

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[21] This section is largely based on a prior publication by one of the authors of this submission (Vargas, 2017, supra note 13 pp. 121-125)

[22] Lack of consultation with affected communities in the design and implementation of remediation measures ranked as one of the main concerns of the UN Working Group on Business and Human Rights in the report on the country visit to Brazil. United Nations. 'Brazil must move forward on business and human rights – UN expert'.Geneva: OHCHR, 17/06/2016. Available at: https://perma.cc/EN9H-LKSM . Last accessed 24 February 2018.

[23] See "African Civil Society Seeking a Treaty to Stop Corporate Abuse and Provide Real Remedies for Affected People" (November 23, 2015), available at: https://perma.cc/8NWH-HFZG; "Indigenous Peoples Caucus Statement to the 4th UN Forum on Business and Human Rights," (November 20, 2015), available at https://perma.cc/5MG4-PSBC.

[24] Intervention by Greg Asbed, "Multi-stakeholder action across 'Protect, Respect and Remedy' – Addressing Specific Impacts," Nov. 18, 2015, Session II. *2015 United Nations Forum on Business and Human Rights* (November 16–18, 2015). Field notes.

28. The evidence of the success of this initiative is significant. Since 2011, the Fair Food Program claims, the following violations have been eliminated: "forced labor, sexual assault and violence toward workers in Florida's tomato industry".[25] They have also eliminated many of the worst actors from the industry and have received complaints about and resolved over 1200 other violations (such as wage theft and safety violations).[26] FFP recruited partners, that is, companies that purchased tomatoes from Florida growers by traditional means of corporate responsibility pressure (leveraging the prospect of reputational costs, for example, in college campuses) combined with a consideration that the premium that they asked partners to pay to support the FFP was minimal: 1 cent per pound of tomatoes. Once the purchasers had internalized the cost of participating in the FFP program, they assisted in getting growers to accept the program.

29. Recruiting one industry to put pressure on its supply chain is a known model, but it is not always successful. Some of the failures of initiatives to improve human rights conditions by engaging purchasers to demand more from their suppliers simply do not view affected communities and local NGOs as key sources of information. In the case of the Kimberley Process, for example, journalist and advocate Rafael Marquez Morais has expressed frustration about the way in which information is sought and acquired. He noted that in his work as investigative journalist and human rights advocate in Angola allowed him to speak to the EU parliament about Angola's extensive record of human rights abuses in the diamond industry, but when it came to the commission charged with investigating allegations of human rights violations by Angola, the commission sought no information from him or from affected peoples. Rather, it sought information from the State.[27] More importantly, even when information about conditions on the ground does make its way to relevant decision makers in the Kimberley Process, victims and advocates are not consulted about "what can be done to engage further with the partners."[28]

30. This last comment surfaces a problem that cannot be solved by fact-finding investigations. Affected communities should not only be sources of information about what violations occur, they should be consulted about the ways in which the system can be improved. Most often, they are not.

31. As the SR ESCER prepares guidelines to assist States in complying with their obligations under the Convention in the context of BHR, we suggest she highlight practices that include meaningful consultation and inclusion of community inputs in the design of norms and non-judicial mechanisms, and in the working of those mechanisms.

32. Indeed, if communities seek avenues to participate in the monitoring or in the evaluation and improvement of the mechanisms, business and State agencies involved in the design and implementation of these mechanisms must enable and facilitate their participation. While the specific FFP model may not be replicable outside the workers' rights context, the model of putting the victims of violations at the center of the knowledge construction and design of the accountability and complaint mechanisms and, if communities so desire, in a position to participate

[25] *Id.*

[26] *Id.*

[27] Intervention by Rafael Marques de Morais, speaker at "Leadership Panel I: Framing the Issues: Progress, Access to Remedy and Other Remaining Challenges," November 17, 2015. *High Level Opening Plenary, United Nations Forum on Business and Human Rights* (November 16–18, 2015). Field notes.

[28] *Id.*

in updating and ensuring the effective operation of those mechanisms, is a lesson with implications that go beyond the agricultural and workers' rights fields.[29]

33. Similar obstacles have been identified in the context of accountability mechanisms of state-owned financial institutions. Conectas, in partnership with CEDLA (Bolivia) and Global Witness (UK) filed a complaint with the Brazilian Development Bank's (BNDES) Ombudsman with allegations of violations of policy and legislative requirements on social, environmental and human rights due diligence that should be observed by the institution before the approval of projects involving the export of goods and services of Brazilian engineering companies to foreign countries. The concerned case involved the construction of a highway that would cut across and indigenous park protected by Bolivian law. Local communities did not have their right to FPIC respected, despite both Bolivia and Brazil being signatories to ILO Convention 169. The BNDES' Ombudsman failed to provide a meaningful response to the allegations raised by the organisations and to initiate a process of compliance review to address the shortcomings of its policies and practices. The mechanism also fell short of providing redress to the affected communities.[30] They were not consulted in any stage of treatment of the complaint.

34. In addition to the meaningful participation of the affected communities, the success of a non-judicial grievance mechanism also depends on strong institutional frameworks to guarantee their enforceability. In particular, the success of a non-judicial mechanism in providing an effective remedy depends upon *(i)* demonstrable good governance by the State of a particular country where there is state accountability; *(ii)* a culture of seeking and achieving corporate accountability; *(iii)* a strong and impartial judiciary that is available to enforce rights, and have a culture of holding states and companies accountable; and *(iv)* rights-holders have proper access to justice through the courts.

35. Therefore, it is vitally important that any process which leads to the creation of corporate-based grievance mechanisms is conducted independently of the actors whose conduct might have caused or contributed to the harm. Also, rights holders must have meaningful access to judicial mechanisms to enforce the terms of such mechanisms. These practices should serve to guide business enterprises and evaluate the genuineness and effectiveness of complaint and monitoring mechanisms in *protecting the human rights of affected populations*. The degree of meaningful protection of human rights, rather than the ability to efficiently resolve disputes must be at the center of any evaluation of a complaint or monitoring mechanism.

36. These mechanisms cannot replace the effective judicial remedies and regulatory regimes that States must implement in order to ensure that business entities respect human rights.

Recommendations

The guidelines should:

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[29] Additional examples of effective monitoring mechanisms that result from the direct participation of communities include: Aurelio Chino Dahua, (FEDIQUEP, Quechua Federation of the Upper Pastaza, Peru) and Wendy Pineda (AIDESEP, Interethnic Assoc. for the Development of the Peruvian Rainforest) "Community-Based Social & Environmental Monitoring; FPIC process." Panel, *Company commitments and community-led initiatives: making meaningful community engagement a best practice* (November 18, 2015). *United Nations Forum on Business and Human Rights* (November 16–18, 2015); Lorena Terrazas Arnez, "Experiencias de monitoreo socioambiental en el consejo de capitanes guaraníes de Chuquisaca" *Parallel Session, Recognizing Indigenous Peoples' Rights to Land, Territories and Resources, and Challenges in their Access to Mechanisms for Redress.* (November 16, 2016) *United Nations Forum on Business and Human Rights* (November 16–18, 2015)

[30] See Conectas Human Rights, "Interrupted Road". Available at: http://www.conectas.org/en/news/interrupted-road

- Articulate the role that non-judicial mechanisms can play **in combination with** effective judicial mechanisms in orders for States to discharge their duty to provide and ensure access to effective remedies. Specifically, the guidelines should emphasize that States must play a role in ensuring that non-judicial mechanisms are effective, both by providing access to remedies should those mechanisms fail, and by playing an active role in ensuring that the design and implementation of such mechanisms are rights-protective.
- **Highlight practices that include meaningful consultation and inclusion of community inputs in the design of norms and non-judicial mechanisms**, and in the working of those mechanisms. Indeed, the guidelines should highlight examples of remedies that have been considered merely formal, rather than effective, and develop working criteria for the evaluation of the effectiveness of the mechanisms.
- Emphasize that **the process of designing and implementing the mechanism must itself include consultation and participation of the affected communities in ways that are meaningful**, according to the needs and expressed wishes of the communities. Meaningful consultation requires more than merely meeting with communities to collect information or convening socialization workshops where communities are presented with information about the mechanisms or about existing national or international norms or practices.
- Reinforce that the **State's duty to provide effective remedies cannot be met with the mere existence of a non-judiciary mechanism**, absent circumstances that guarantee that such mechanisms provide actual, effective access to remedies.
- Emphasize that **non-judicial mechanisms must be paired with effective judicial mechanisms** in case the mechanisms fail.
- Establish that **non-judicial mechanisms are best suited for situations in which there is meaningful participation of the affected communities and where there are strong institutional frameworks to guarantee their enforceability**. Where a State cannot ensure the effectiveness of non-judicial mechanisms through a combination of effective governance, provision of information, and judicial mechanisms that can be activated if non-judicial mechanisms fail, a State should understand that encouraging and enabling non-judicial mechanisms may result in a violation of its obligations to provide access to remedy. In particular, the success of a non-judicial mechanism in providing an effective remedy depends upon *(i)* demonstrable good governance by the State of a particular country where there is state accountability; *(ii)* a culture of seeking and achieving corporate accountability; *(iii)* a strong and impartial judiciary that is available to enforce rights, and have a culture of holding states and companies accountable; and *(iv)* rights-holders have proper access to justice through the courts.
- Urge the **UNWG to collect examples of mechanisms that are identified as successful *by rights-holders*, rather than businesses or States,** and systematize those examples in order to develop robust recommendations for effective practices in multiple areas of business activities.

National Action Plans

37. The UNWG defines National Action Plans on Business and Human Rights (NAPs) as "[a]n evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights." NAPs have been strongly encouraged by the Working Group on Business and Human

Rights "as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights."[31]

38. The UNWG's Guidance Document, which can be found here, describes five phases in the development of a NAP: 1) Initiate, 2) Consult and assess, 3) Draft, 4) Implement, and 5) Update. These standard steps for the development of any public policy document can create a basic level of uniformity across different countries with different levels of access to justice, accountability and upstream participation by citizens. Countries, however, have not uniformly followed the guidance.

39. Colombia, for example, failed to conduct a national baseline assessment (NBA) which the UNWG has recognized as a key element for the development of an appropriate plan to address issues of human rights and business enterprises. As noted in Dejusticia and ICAR's evaluation of Colombia's National Action Plan, "the UN Working Group on Business and Human Rights has insisted, in its 2014 and 2015 thematic reports, on the importance of NBAs in the elaboration of NAPs as well as in the process of developing appropriate modes of measuring the impacts and implementation of a NAP".[32] Mexico, for its part, produced a draft that failed to articulate a plan to provide effective access to fundamental elements of the UNGPs, such as access to remedies. As a result, the leading NGOs that had participated in the roundtable to draft the document withdrew from the process.[33]

40. These problems can and should be addressed in future NAPs, for NAPs are explicitly contemplated as evolving, living documents, and as documents that "must be regularly reviewed and updated, with inbuilt monitoring mechanisms."[34] In the Americas, they should be updated and developed against the backdrop of better guidance by the UNWGs and new guidance by the SR ESCER.

41. In the context of the inter-American system, States that produce NAPs should take into account the fact that the UNGPs reflect existing international human rights law and human rights treaty obligations.[35] States must recall that they have binding obligations to regulate business enterprises in order to protect human rights.[36] The Inter-American Court's extensive jurisprudence regarding State obligations to provide effective remedies applies to effective remedies for violations committed by business entities, regardless of whether they are private or state-owned, national or transnational.[37]

42. The UNWG's guidance on National Action Plans explicitly seeks to enhance States' ability to comply with their existing human rights obligations in the framework of the UNGPs: "As an instrument to implement the UNGPs, NAPs *need to adequately reflect a State's duties under international human rights law* to protect against adverse business-related human rights impacts and provide

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[31] UN Working Group on Business and Human Rights, *State National Action Plans*, available at http://bit.ly/2CeQi8B

[32] See: Dejusticia; ICAR. Colombia NAP Evaluation, p. 3, referring to the 2014 and 2015 UNWG Reports to the General Assembly: A/70/216 ¶¶ 71-72 (July 30, 2015), and A/69/263 ¶¶ 20-24 (August 5, 2014). Available in: https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_888.pdf. Last accessed: 6 December 2017.

[33] See: *Carta de la sociedad civil sobre el Programa Nacional de Empresas y Derechos Humanos en México*, July 27, 2017. Last accessed: February 18, 2018, available at

[34] United Nations, General Assembly, *Report of The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/70/216 ¶ 73 (July 30, 2015).

[35] See supra, ¶ 7.

[36] See supra, ¶¶ 11-14, 18-20

[37] See supra, ¶ 18-20.

effective access to remedy."[38] The UNWG's NAP Guidance notes that "Governments should ensure the conformity of NAPs with the essential criteria set out in this Guidance, and their legal obligations at national and international levels."[39]

43. As the Commission and SR ESCER provide guidance regarding States' obligations under the inter-American system in the context of business entities and human rights, they should encourage States to integrate inter-American guidance into the development of NAPs. This would be a welcome tool for States to develop NAPs that engage more explicitly with important human rights obligations under the Inter-American System. In particular, this may help States engage more seriously with their obligation to provide access to remedy.

44. Indeed, NAPs have failed in providing clarity for businesses about the consequences they can face if they do not respect human rights. The Colombian NAP, for example, devotes an entire section of its NAP to promoting the idea that the respect for human rights can be a competitive advantage,[40] and while it mentions judicial avenues for redress, it merely proposes to map judicial mechanisms for redress, a task that should have been carried out as part of a baseline assessment in order to produce the NAP. Countries in the inter-American system are not alone in this lack of attention to access to remedies. The UK has been called to task for failing to provide clarity on the consequences for business entities to fail to comply with their human rights responsibilities.[41] The reality is that many situations of human rights violations cannot be addressed by appealing to the so-called business case for human rights.[42] Absent clarity regarding the incentives to comply with human rights obligations, including the consequences for failing to comply, regulatory regimes and specific avenues for victims to seek and obtain redress, businesses may treat their human rights responsibilities as optional.

45. In addition to helping draft better and more rights-protective NAPs, guidance from the Commission and the SR ESCER that explicitly references the UNGPs and the NAPs can contribute to preventing a potential sliding back of human rights protections. NAPs can risk being instruments that water down rather than assist in the implementation of human rights protections in the context of business activities, if their development and framing impede or distract from compliance with binding human rights obligations. The UNWG recognized this, warning that "[i]t is important to note that the duties and responsibilities of States and business enterprises under the UNGPs exist

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[38] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, at *i* (2016), available at http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf (hereinafter, "NAP guidance")

[39] *Id.* at 3.

[40] Consejería DDHH, Presidencia de la República, Plan Nacional de Acción de Derechos Humanos y Empresas, pag. 11 (2015), available at https://perma.cc/6Z4K-RJDD

[41] "[T]he Plan contains no real incentives for compliance or sanctions for non-compliance. This is despite the statement in the Plan that the Guiding Principles should be treated as a 'legal compliance issue' by companies and that the state has an overall obligation to protect victims from violations caused by business activities." Robert McCorquodale, *Expecting business to respect human rights without incentives or Sanctions*, UK Human Rights Blog (Sept. 4, 2013), available at https://ukhumanrightsblog.com/2013/09/04/expecting-business-to-respect-human-rights-without-incentives-or-sanctions-robert-mccorquodale/

[42] Taylor, for example, critiques the rhetoric of the business case for ethical behavior: "After all, there is also a business case for tax avoidance, deregulation, and even higher death rates. We do ourselves — and the world — no favors by locking ourselves into this instrumentalist argument. " Alison Taylor, *We Shouldn't Always Need a "Business Case" to Do the Right Thing*, Harvard Business Review (September 19, 2017), available at https://hbr.org/2017/09/we-shouldnt-always-need-a-business-case-to-do-the-right-thing.

independently of NAPs. Nothing in this guidance and in NAPs should be read to undermine the terms of the UNGPs or to delay UNGP implementation by States or business enterprises."[43]

46. Likewise, it is important to recall that nothing in the NAPs or the UNGPs can be read to undermine the human rights obligations that States have acquired under the Convention or the Declaration. Instead, the NAP process should be taken as an opportunity to assess the work that remains to be done to comply with international human rights obligations in the context of business enterprises, including obligations under the inter-American system, and to present a plan to achieve a greater degree of compliance with existing human rights obligations, including obligations under either the Convention and the Declaration.

47. Thus, as the Commission and the Court have, in the past, clarified the difference between merely formal or declaratory protections and effective protections (with regard to domestic remedies, for example[44]), so should the SR ESCER provide guidance with regard to what can constitute effective and ineffective access to remedies in the context of corporate activities. Guidance from the SR ESCER regarding NAPs that gives special attention to remedies would be a welcome and region-specific contribution to the development of more effective NAPs so that they can become instruments for the effective implementation of the UNGPs.

48. Thus far, NAPs being developed by States have been relatively weak tools. In assessing 8 NAPs developed until early 2016, the Homa - Human Rights and Business Center concluded that "the measures proposed in the totality of the National Plans analyzed are generic, do not provide enforcement mechanisms, do not have a clear methodology of evaluation and monitoring from civil society". In a collection of assessments of all the NAPs available in English, the International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ), and Dejusticia note the following common weakness across most NAPs[45]:

> One of the most significant weaknesses of the content of the assessed NAPs thus far is their failure to sufficiently explore regulatory options to ensure adequate human rights protections and access to remedy. The majority of action points included in the assessed NAPs are primarily focused on actions that involve awareness-raising, training, research, and other voluntary measures, with very little focus on supporting the development of regulatory actions. This is problematic as regulatory actions are more likely to effectively and efficiently address existing governance gaps. Similarly, while there have been improvements in the overall discussion of Pillar III [...] the majority of NAPs that address Pillar III more extensively largely lack specificity in the commitments made by the State to improve access to remedy and fail to seek to address domestic barriers to access judicial remedy for business-related human rights abuses.

49. Conectas, and Dejusticia, through their work with the Observatory on the UN Working Group on Business and Human Rights have urged the UNWGs to provide clearer and more specific guidance

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[43] NAP Guidance, *supra* note 38 at 8.

[44] I/A Court. *Case Rochac Hernández et al v. El Salvador*. Merits, Reparations and Costas. Judgement of October 14, 2014, Series C No. 285, ¶ 160. *Case of Garífuna Punta Piedra Community and its members v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 304, ¶¶ 231-232, 239. *Case of Argüelles et al. v. Argentina*. Preliminary Objections, Merits and Reparations. Judgment of November 20, 2014. Series C No. 288, ¶ 145.

[45] ICAR, ECCJ, Dejusticia, Assessment of Existing National Actions Plans (NAPs) on Business and Human Rights. 2017 Update, at 5.

for the production of NAPs. In addition, we have suggested that the UNWGs publish assessments of existing NAPs, perhaps producing a critical report of a sample of existing NAPs, as this would give an indication to States of good and bad features of an NAP. In the alternative, we have suggested that the UNWG endorse specific NAP evaluations, such as NAPs Checklist developed and published by ICAR and the Danish Institute for Human Rights (DIHR) as part of the ICAR-DIHR NAPs Toolkit, or select specific elements that are deficient in multiple NAPs and examine them closely.

50. In the context of the inter-American system, States that have produced NAPs could be assisted by a rights-based guidance for the production of NAPs. For example, as NAPs are intended to be policy strategies aimed at protecting against negative human rights impacts in conformity with the UNGPs, the SR ESCER could provide guidance on the issues, mechanisms and protections required to fulfill each of the pillars, starting with Pillar III, which has been neglected by most NAPs published thus far. In providing guidance for fulfillment of Pillar III, the SR ESCER could highlight the binding obligations that touch on the elements of Pillar III and could offer existing inter-American jurisprudence that gives content and provides example of State actions (or inaction) that constitute violations of the relevant rights, or that have been found to be sufficient for a showing that the State complied with its obligations under the Convention.

Recommendations

The guidelines should

- Recall that **National Action Plans** that aim to develop policies to implement the UNGPs, by definition, **must also include policies to implement binding obligations under the inter-American system**.
- Establish that **regardless of whether a NAP has been published or not, States remain bound by their human rights obligations** and are expected to develop policies to implement their abiding human rights obligations under the inter-American system.
- Clarify that, as States have binding obligations to respect human rights and to ensure the free and full exercise of human rights, in the context of business enterprises. The obligation to ensure includes the obligation to effectively regulate business activities and to provide effective remedies for violations committed by business entities, regardless of whether they are private or state-owned, national or transnational. In this context, **NAPs must provide specific roadmaps that not only acknowledge these obligations, but that make clear what accountability mechanisms and judicial avenues for remedy exist to enable States to ensure that businesses respect human rights**.
- Recommend that **NAPs provide more specific information on existing enforcement mechanisms or explicitly create new ones**. Clarify the consequences that currently exist for businesses that fail to respect human rights.
- Provide **guidance with regard to what can constitute effective and ineffective access to remedies** in the context of corporate activities
- Remind States that **effective baseline assessments**, particularly with regard to access to remedies, and with regard to the circumstances that enabled past actions or current practices that have resulted in human rights violations by business enterprises, are imperative for effective development of policies of implementation of the UNGPs.
- Urge States that choose to develop NAPs to develop or describe existing regulatory regimes aimed at ensuring the enjoyment of specific human rights. **States should be encouraged to**

move away from the bad practices (discussed above) of primarily focusing on awareness-raising, training, research, and other voluntary measures and focus instead on effective regulatory and accountability measures, and access to remedies.

- Recommend practices that build into the NAP drafting process mechanisms for democratic accountability and transparency. For example, recommend that **NAPs drafters not only enable public comment on NAP drafts, but that the NAP drafters be required document and publish such comments, and provide reasonable accounting of how and why such comments were incorporated or not into the final NAP.**

Human Rights Due Diligence

51. Before addressing Inter-American jurisprudence on human rights due diligence, it must be considered that the due diligence has different meaning in the UNGPs (and, therefore, in the corporate world) than it does in human rights law or in general international law.[46] As stressed by the International Law Association, "[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."[47]

52. Humberto Cantú Rivera has pointed out characteristics in common between the *corporate* human rights due diligence (derived from UNGPs and corporate practices) and the *State* human rights due diligence (based on the Inter-American Court case law regarding the matter), related to its content[48] and to its practice[49], and significant differences, most importantly the foundations of the legal obligation[50] to perform due diligence and the temporality[51] of such activity.

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[46] Cantú Rivera, Humberto. "Regional Approaches in the Business & Human Rights Field." *L'Observateur des Nations-Unies* 35 (2013), page 27.

[47] International Law Association, ILA Study Group on Due Diligence in International Law: First Report, 2014, page 4.

[48] "[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, *supra* note 46 at 28)

[49] "[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, *supra* note 46, page 29)

[50] Cantú Rivera, *supra* note 46, page 28.

[51] Cantú Rivera, *supra* note 46, page 29.

53. Taking into consideration the *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 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**.[52]

54. 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.[53] In the *"Mapiripán Massacre"* Case, the IACHR 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.[54]

55. Under the UNGPs, in turn, States should require business enterprises to develop and implement effective *corporate* human rights due diligence in order to identify, prevent, mitigate and account for human rights impacts to which they are related (Commentary, UNGP Principle 3). It also provides 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).

56. The process is not an end in itself, but rather a means to protect and promote human rights. However, it is unclear how the failure to conduct an effective human rights due diligence may result in corporate liability. According to the UNGPs, it may reduce the risks of legal claims by showing that every reasonable step was taken to avoid adverse human rights impacts, but business enterprises should not assume that it will exempt them from any liability for causing or contributing

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[52] *Velásquez Rodríguez.* Merits, *supra* note 4, ¶ 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. ¶¶ 181, 182 ,187.

[53] 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, ¶ 140; I/A Court H.R., *"Mapiripán Massacre" Case (v. Colombia)*. Merits, Reparations and Costs. Judgment of September 15, 2005, Series C No. 134, ¶¶ 111 and 112.

[54] IA Court, *"Mapiripán Massacre" Case*, supra note 53, ¶ 111, *in fini*.

to such impacts (Commentary, UNGPs Principle 17). The draft elements for a legally binding treaty on BHR also provides that State Parties shall adopt measures to establish corporate liability for human rights abuses and to require business enterprises to conduct human rights due diligence, but it does not provide for the relationship between these two obligations.[55]

57. Some countries have been adopting legislative measures to require business enterprises to communicate and address their human rights impact. One example is the French Corporate Duty of Vigilance Law, which requires 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 impacts resulting from their own activities or the activities of their subsidiaries and other companies with whom they have an established commercial relationship.

58. The business enterprise who fails to do so may be required to make periodic penalty payments for the duration of the omission or may be held liable for damages that would have been avoided in case they had published or implemented the plan. The victim who suffered the damage holds the burden of proving that the vigilance plan would have avoided it. In other words, business enterprises will not be liable if the victim is unable to prove that the absence of a vigilance plan holds a causal connection with 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**.

59. The UK Modern Slavery Act is another example of legislation encouraging businesses to conduct human rights due diligence. It requires large companies operating in the UK to annually report the measures they have taken, if any, to prevent modern slavery to take place in their supply chains. It does not require the disclosure of specific information, but it suggests that the reports should cover six reporting areas: organizational and supply chain structure, company policies, due diligence processes, risk assessments, effectiveness of measures in place, and training. It was expected that the reporting obligation would be enough 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, response of the majority of the UK's largest listed companies was not satisfactory.[56]

60. The Brazilian "Dirty List" of slave-labor is also considered by the International Labor Organization to be a successful example of anti-slavery regulation. It is an administrative regulation that consists in 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" regulation itself does not establish any duty to carry out due diligence, it only regulates the procedures that should be observed before an employer is included in the list, to ensure guarantees of due process, as well as conditions for exiting the list.

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[55] 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

[56] Business and Human Rights Resource Center. *First year of FTSE 100 reports under the UK Modern Slavery Act: Towards elimination?* December 2017, available at https://perma.cc/3MGT-3SDE

[57] The Brazilian Criminal Code, in its article 149, turns into a crime 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.

61. However, because public and private financial institutions decided, voluntarily, to include a consultation to the "Dirty List" in their decisions to extend 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, key elements of the due diligence process as per the UNGPs.

62. The main weakness with the "Dirty List" is that it was not established by law *strictu sensu*, unlike the French Duty of Vigilance Law and the UK Modern Slavery Act. The List's legal status is thus fraught with legal uncertainty, as business groups constantly challenge their constitutionality by arguing that an instrument of its nature should only be enacted after having gone through the legislative process in Congress. State actors also threat to fall back on Brazilian anti-slavery regulation.[58] Even after the Brazilian Supreme Federal Court decided that the 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 decision of the Labor Minister - which was revoked after strong popular pressure.

63. **The French Corporate Duty of Vigilance Law and the UK Modern Slavery Act are considered to be models of human rights due diligence legislation, but neither of them establish an effective legal framework on liability for business-related human rights abuses in connection with due diligence and reporting obligations**. The Brazilian "Dirty List" of slave labor is a successful example of an economic regulation, but it is incomplete in its legal design and it is thus under constant threats of retrocession.

64. The development of standards and guidance on how states may improve their legislative and administrative provisions is critical to ensure that human rights due diligence obligations succeed in enhancing corporate accountability, rather than creating a shield to aid business enterprises in evading their obligations or serving as a platform to challenge the legitimate functions of the State in shaping corporate behavior.

Recommendations

The guidelines should:

- Clearly articulate the duty of States, under the Convention, to **adopt a framework of laws, regulations and policies with mandatory standards of human rights due diligence (HRDD) to be carried out by companies**. These norms should also **set out minimum requirements for the HRDD**, both in terms of substance and procedures, that should be adaptable to the size, complexity, scale, sector and other particular characteristics of the operations of different business enterprises;
- Require States to **refrain from adopting legislation on HRDD that undermines, even if indirectly, victims' and affected groups' access to justice** and their right to an effective

[58] CONECTAS. *Unprecedented attacks to the Brazilian system for the fight against contemporary forms of slavery*. 16 October 2017. Available at: http://bit.ly/2ywNW2m.

remedy; or that establish ceilings of financial compensation; or that allocate the burden of the proof of irregularities in the due diligence process to non-corporate claimants. There should be a **legal presumption that adverse impacts are a failure of the due diligence process**, only rebuttable if the corporate entity demonstrates through the highest standards of evidence ("beyond reasonable doubt") that it undertook all the necessary steps to avoid and prevent the harm. In any case, States should regulate the conditions in which businesses will be judged under strict liability standards, which should not be restricted only to egregious human rights abuses;

- Encourage States to **lay down a robust framework of financial and non-financial incentives to drive businesses to engage in human rights due diligence activity**, notably by embedding the requirement in operational policies and contractual provisions of state-owned enterprises, development finance institutions, as well as procurement and tendering policies.

Indigenous Rights

65. The mandate of the Working Group on Business and Human Rights includes providing special attention to vulnerable populations. Recognizing the fact that indigenous peoples "are among the groups most severely affected by the activities of the extractive, agro-industrial and energy sectors," the UNWG produced a thematic report on the issue of business related impacts on the rights of indigenous peoples less than two years since the adoption of the UNGPs.[59] In 2016, the UNWG published another thematic report addressing the rights of indigenous peoples, this time in the context of agroindustrial businesses.[60]

66. As we emphasize throughout this submission, while the UNGPs are themselves a non-binding standard, they collect existing human rights obligations, many of them binding. Indeed, as the UNWG's 2013 on the rights of indigenous peoples points out "the duty to protect is derived from *existing human rights obligations* or commitments that States have undertaken and that are widely recognized by the international community."[61] In the context of OAS member States, these obligations include obligations acquired under inter-American human rights instruments and developed under inter-American jurisprudence.

67. Failures in implementation should not be conflated with a lack of binding obligations. While there continues to be a struggle to implement human rights protections enshrined in binding treaties,[62] the

[59] United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: 'Business-related impacts on the rights of indigenous peoples*," ¶ 1, UN Doc. A/68/279 (August 7, 2013) (hereinafter, "UNWG, *Business-related impacts on the rights of indigenous peoples report*")

[60] United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: "Addressing the human rights impacts of agro-industrial operations on indigenous and local communities: State duties and responsibilities of business enterprises."* UN Doc. A/71/291 (August 4, 2016) (hereinafter "UNWG *agro-industrial operations on indigenous and local communities report."*)

[61] UNWG, *Business-related impacts on the rights of indigenous peoples report*, *supra* note 59 ¶ 7 (emphasis added)

[62] *See*, e.g. *Implementación de las decisiones del Sistema Interamericano de Derechos Humanos. Jurisprudencia, normativa y experiencias nacionales*, Viviana Krsticevic and Lilian Tojo, coords. CEJIL (2007); Cavallaro, James L. and Stephanie Erin Brewer. R*eevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102(4) American

rights of indigenous peoples and the binding obligations of the State to protect and guarantee their rights is well established under inter-American jurisprudence. Moreover, protections due to indigenous peoples also extend to "Afro-descendant *peoples* and *communities* living as such and therefore [who] have particular characteristics that require special protection."[63]

68. In the thematic report by the Inter-American Commission, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources Report*, the Commission examined in detail the obligations of States with regard to extractive enterprises, development projects and other forms of exploitation of land resources. It reviewed inter-American jurisprudence standards with regard to the protection of indigenous peoples in the context of such activities. The Commission's thematic report focused on the adverse effects on indigenous and Afro-descendant communities in the context of development and extractive projects, and noted that multiple UN mechanisms have addressed the same impacts.[64] This report highlights the binding nature of the obligations collected in the UNGPs in the context of States under the inter-American system.[65]

69. We examine these issues with regard to Free Prior Informed Consent and Consultation, the identification of indigenous peoples, and the rights of indigenous peoples to share in the benefits of projects that have been consented to.

FPIC

70. In the case of Free, Prior and Informed Consent (FPIC), the UNWG's 2013 report recognized that, under the Inter-American system "in the context of large-scale development projects within the ancestral territories of indigenous and tribal peoples that had a significant impact on their property rights and on the use and enjoyment of such territories, States had a duty to consult them and to obtain their free, prior, informed consent according to their customs and traditions."[66]

71. However, the 2013 UNWG report also provides confusing and incompatible definitions of FPIC. One of the most concerning aspects of the UNWG's 2013 report on indigenous peoples' rights was that it cites to the International Finance Corporation Performance Standard 7 for a watered-down definition of FPIC. The IFC is part of the World Bank Group. Its Performance Standards are international benchmarks for businesses to identify and manage risk, including social risk, part of

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Journal of International Law, 768 (2008); David C. Baluarte, Christian de Vos, *The Inter-American Human Rights System*, in Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, 63-92 (2010).

[63] Inter-Am. Comm'n H.R., *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, ¶ 29, /Ser.L/V/II.Doc. 47/15 (Dec. 31, 2015) (Hereinafter, "IACHR *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources Report*") (emphasis in the original)

[64] *Id.*, ¶ 248 & n.430 (referring to UNWG, *Business-related impacts on the rights of indigenous peoples report*, ¶ 1 n. 1)

[65] "In particular, the Commission notes that according to the Guiding Principles, the States' duty to "protect" entails "taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication". In this sense, in respect to States under the Inter-American system, the Commission emphasizes that this duty to protect has a conventional basis in Inter-American instruments, and coincides with the aforementioned general obligation to guarantee human rights in the terms previously mentioned." *Id.*, at ¶ 52 (internal citations omitted).

[66] UNWG, *Business-related impacts on the rights of indigenous peoples report*, *surpa* note 59 ¶ 11, n. 13 (referencing *Saramaka People v. Suriname*, Judgment, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., Series C No. 172 (Nov. 28, 2007). *See also Saramaka*, ¶¶ 129, 133-137.

the IFC's Sustainability Framework.[67] The IFC Performance Standard 7 examines practices to manage risk in the context of projects that impact indigenous communities. The IFC Performance Standard 7 (2012) is neither a treaty nor another type of international instrument that can fairly be considered a legitimate source of international law.[68] Nonetheless, the 2013 UNWG report cites to it without qualification, for the incorrect proposition that FPIC need not be unanimous.[69]

72. The right to define the terms of FPIC belongs to indigenous peoples and, under inter-American jurisprudence, Afro-descendant communities.[70] The necessity or not of unanimity in the consultation process is something that each community has a right to decide. For example, article 4 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) establishes that indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal affairs.

73. Moreover, and in recognition that the UNGPs require that States comply with the human rights obligations they have, and not just with the human rights obligations that the UNGPs enumerate, it is crucial that the SR ESCER's report on BHR highlight the heightened protections that exist for indigenous communities under the inter-American system, and the specificity of the criteria to develop a project that encroaches on traditional indigenous lands:

> the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.[71]

74. There are situations in which restrictions of the right to communal property are impermissible, full stop. The Inter-American Court has previously ruled that under Article 21 of the Convention, "the State may restrict the right to use and enjoy [indigenous] traditionally owned lands and natural resources only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people."[72]

75. In addition, the right to prior consultation is understood as also requiring consent in specific situations that apply to many business enterprise projects in the context of indigenous peoples' traditional lands:

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[67] The 2011 Sustainability Framework (with an effective date of January 1, 2012) replaced the 2006 version. In 2016, a new version was published. World Bank. 2016. *The international bill of human rights and IFC sustainability framework (English).* IFC E&S. Washington, D.C. : World Bank Group. http://documents.worldbank.org/curated/en/470681480669101836/The-international-bill-of-human-rights-and-IFC-sustainability-framework

[68] Accepted sources of international law are: a) international conventions, whether general of particular; b) international custom, as evidence of a general practice accepted as law; c) general principles of law; d) subsidiarily, as means for the determination of rules of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations. See Statute of International Court of Justice, Article 38.

[69] UNWG, *Business-related impacts on the rights of indigenous peoples report*, *supra* note 59, ¶ 11.

[70] IACHR *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources Report*, *supra* note 63, ¶ 29.

[71] I/A Court H.R., *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of Nvembre 28, 2007, Series C No. 172, ¶ 127.

[72] *Id.*, ¶ 128.

> in addition to the consultation that is **always required** when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to **additionally require the free, prior, and informed consent** of the Saramakas, in accordance with their traditions and customs.[73]

76. In sharp contrast to the view of the World Bank and its IFC 2012 Performance Standard 7, the terms of FPIC are defined by the traditions and customs of the community that faces impacts from a business or development project, and cannot be defined by the business seeking to obtain consent, nor by technical experts consulted by such businesses.[74]

77. We urge the SR ESCER to restate the well-established protections and requirements surrounding FPIC, as developed in the inter-American system, in direct dialogue with the UNGPs, the comments to relevant principles, as well as the two reports by the UNWGs that relate to the rights of indigenous peoples.

The Right to Self-Identification

78. While the UNWG *Business-related impacts on the rights of indigenous peoples report* cited to the World Bank Group's IFC 2012 Performance Standard 7, this document is not a source of international law[75] and contains inaccurate information regarding the protections due to indigenous peoples under international law. For example, it defines indigenous peoples as possessing "to varying degrees" a number of attributes[76] when, in fact, indigenous peoples have long rejected checklists to identify them and have demanded and asserted the right to self-identification.[77]

79. Under the inter-American system there is "no precise definition of 'indigenous peoples' in international law, and the prevailing position is that such a definition is not necessary for purposes of protecting their human rights [...] a strict and closed definition will always risk being over- or under-inclusive."[78] The Inter-American Court has made it clear indigenous communities have a right to self-identification: "The identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy. This has been the Court's criterion in similar situations. Therefore, the Court and the State must restrict themselves to respecting the

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[73] *Id.*, ¶ 137 (emphasis added)

[74] IFC 2012 Performance Standard 7, ¶¶ 5, 7.

[75] See *supra* note 68

[76] IFC 2012 Performance Standard 7, ¶ 5. In ¶ 7, this document suggests that ascertaining whether a community is indigenous may "require the inputs of technical professionals" without requiring that such professionals apply existing international law regarding the right of indigenous peoples to self-determination and self-identification.

[77] See Working Group on Indigenous Populations (WGIP), *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"*. UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, ¶ 35 (noting that consulted indigenous leaders expressed that a definition of the concept of "indigenous people" is not necessary or desirable).

[78] Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, ¶ 25 (30 December 2009) (Hereinafter, "IACHR *2009 Report on Indigenous and Tribal People's Rights*").

corresponding decision made by the Community; in other words, the way in which it identifies itself."[79]

80. These are but some examples of the ways in which the UNGPs and the UNWG reports can risk undermining existing binding obligations and well-established jurisprudence in a regional system. For this reason, it is crucial that the SR ESCER clarify that, under the UNGPs, the obligations of States within the inter-American System must be fulfilled in order to fully implement the UNGPs.

81. The UNWG has received inputs and corrected some fundamental errors in their presentation of the rights of indigenous peoples. For example, while the 2013 UNWG *Business-related impacts on the rights of indigenous peoples report* does not mention that indigenous peoples have a right to withhold consent, the 2016 UNWG *agro-industrial operations on indigenous and local communities report* does clarify that any FPIC process must include the option of withholding consent.[80] Likewise, in the 2016 report, the UNWG clarifies that FPIC processes must be "determined and controlled by the indigenous peoples in question."[81]

82. It is evident, then, that the UNWG has thus far been open to dialogue and been willing to correct misunderstandings regarding its interpretation of binding international law. In particular with regard to the implementation of the UNGPs in the Americas, the SR ESCER could have a significant impact with an authoritative guidance on State obligations that organizes the well-established jurisprudence in explicit dialogue with the UNGPs. This would help harmonize instruments of human rights protections, and clarify the binding nature of State obligations.

Benefits sharing

83. Under inter-American jurisprudence, when there is a project that impacts an indigenous community, consultation on whether to carry out the project does not end the obligations of the State or of business enterprises.

> [T]he Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has suggested that, in order to guarantee "the human rights of indigenous peoples in relation to major development projects, [States should ensure] mutually acceptable benefit sharing […]." In this context, pursuant to Article 21(2) of the Convention, benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Saramaka people.[82]

84. Neither corporations nor States may define the terms of benefits-sharing one-sidedly. Benefits sharing must be mutually acceptable. For example, the Inter-American Court has made it clear that merely providing communities access to some of the public works that are created to benefit the activities of private corporations, such as a highway used to transport timber logged from indigenous collective territory, are woefully insufficient forms of benefit sharing, principally because they do not fulfill the requirements of mutually agreed-upon benefit sharing mechanisms. In the

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[79] *Xákmok Kásek Indigenous Community v. Paraguay*. Inter-Am. Ct. H.R., Merits, Reparations and Costs. Judgment, Series C No. 214, ¶ 37 (August 24, 2010). *See also Saramaka*, supra note 16, ¶ 164.

[80] UNWG *agro-industrial operations on indigenous and local communities report*, supra note 60, ¶ 71.

[81] *Id.* ¶ 70.

[82] *Saramaka, supra* note 71, ¶ 140

Kaliña and Lokono Peoples case, "the State argued that the minimum damage was caused [to the traditional lands] and that, in any case, the Kaliña and Lokono peoples had been compensated by the fact that they could use and enjoy the highway built in order to transport their timber."[83] The Court held:

> [E]ven though there is no dispute that the indigenous peoples use the highway, this access cannot be considered to provide a direct, mutually-agreed benefit for the peoples in light of the above-mentioned standards; above all, bearing in mind that the highway was part of the exploitation project that had an adverse impact on the natural resources of their territory. Hence, this requirement was not met either.[84]

Recommendations

The guidelines should:

- Continue the work of socializing States and entering into dialogue with the UNGPs in order to entrench the standards collected in the UNGPs and to **recall that the State obligations referenced in the UNGPs are binding under international instruments**, including the American Convention.
- **Restate inter-American jurisprudence regarding the rights of indigenous peoples that not only refers to and underscores important advances in the inter-American system, but that also enters in direct dialogue with UNGP** guidance which has not accurately or fully captured the protections owed to indigenous and Afro-descendant peoples.
- Restate the **parameters to evaluate benefits sharing that the inter-American system has developed** and remind States of their obligations to comply with these parameters.
- Restate the **recognized right to self-identification of indigenous peoples and encourage States to inform businesses of these international legal standards**, in counterpoise to misstatements by influential private institutions.
- Restate the **well-established protections and requirements surrounding FPIC**, as **developed in the inter-American system**, and engage in direct dialogue with the UNGPs, as well as the two reports by the UNWGs that relate to the rights of indigenous peoples: the 2013 UNWG *Business-related impacts on the rights of indigenous peoples report* and the 2016 UNWG *agro-industrial operations on indigenous and local communities report*

Public-Private Partnerships

85. In Latin-America, the use of the public-private framework within development activities and public services has been increasing at fast pace. In the recent past, new norms have been adopted in Brazil, Peru and Colombia, for example. This model has relevant human rights implications. As provided by the commentary to the UNGP:

[83] *Case of Kaliña and Lokono Peoples*, *supra* note 6, ¶ 128.

[84] *Case of Kaliña and Lokono Peoples*, *supra* note 6, ¶ 129.

> Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms."[85]

86. Nevertheless, the norms adopted in Latin-America do not follow a human rights based approach. The Commission should clarify the standards applicable to these arrangements, taking particular consideration to four areas of concern: procedural rights; public service obligations; non discrimination; and accountability and remediation.

87. The first concern with Public-Private Partnerships (PPP) is procedural. Norms and plans establishing the regulatory framework for PPPs must comply with the requirements of the Inter-American System on participation and transparency, as provided by article 13 of the American Convention and article IV of the American Declaration. Moreover, when such framework impacts indigenous peoples and traditional communities, States must initiate a free, prior and informed consultation procedure.[86] After the adoption of a regulatory framework, each partnership - and, in particular, infrastructure projects - must also comply with such requirements, especially the right to access information[87], to participation,[88] and the right to free, prior and informed consent.[89] These rights are not affected by whether a project is public, private, or executed through a Public-Private Partnership. Nevertheless, lack of clarity on each actor's responsibilities makes PPPs particularly prone to violations, and PPP regulation sometimes weakens socio-environmental guarantees.[90] Finally, when PPPs aim at the provision of services, the State must ensure that users take part in the assessment of their adequacy.[91]

88. Second, when private providers operate in traditionally public sectors (education, health, water and electricity, for example), the State must impose on them "public service obligations."[92] This means that there should be strict regulation requiring private providers to comply with quality

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[85] UNGP. Commentary to Principle 5.

[86] International Labor Organization. Convention 169 on Indigenous and Tribal Peoples (1989). Article 6; United Nations Declaration on the Rights of. Indigenous Peoples (2007). Article 19.

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

[88] Rio Declaration on Environment and Development (1992). 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.

[89] IA IACHR *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources Report*, *supra* note 63, ¶ 107; IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, ¶ 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, ¶ 69.

[90] 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.

[91] UN Committee on Economic, Social and Cultural Rights. *General comment No. 24* (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. E/C.12/GC/24. ¶ 22, available at http://undocs.org/E/C.12/GC/24

[92] *Id.* ¶ 21.

requirements, pricing policies, and universality of coverage or access.[93] The State must actively monitor private parties that act within traditionally public sectors, in order to ensure that such requirements are effective. In the words of 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"[94]

89. In *Gonzales Lluy v. Ecuador*, the Inter-American Court of Human Rights analyzed these obligations in a case pertaining to the provision of health services by a private actor.[95] The Court established article 4 and 5 of the American Convention depend on the provision of health care, and that in all cases health services, goods and facilities must comply with the following standards: (i) availability (they must exist in sufficient quantity and include proper personnel); (ii) accessibility (there must be no discrimination); (iii) acceptability (they must be ethical, confidential, and culturally appropriate); (iv) quality (they must be scientifically and medically appropriate).[96] When health services are provided by private parties, the State has a duty to regulate, monitor and supervise them.[97] The same standards may guide the provision of other public services by private actors, as indicated by the UN Committee on Economic, Social and Cultural Rights.[98]

90. Third, States must ensure that PPPs do not lead to discrimination prohibited by articles 1.1 and 24 of the American Convention, as well as article II of the American Declaration. This prohibition extends to actions that may appear neutral, but have a disproportionate impact in a designated group, as clarified by the Inter-American Court in the following passage:

> international human rights law not only prohibits policies and practices that are deliberately discriminatory, but also those whose impact could be discriminatory with regard to certain categories of individuals, even when it is not possible to prove a discriminatory intention. The Court considers that a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups. [...][99]

91. Such vulnerable groups may be defined by "reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."[100] The concept of *other social conditions* allows for the inclusion of other categories that have not been

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[93] *Id.*

[94] *Id.*, ¶ 22.

[95] *Case of Gonzales Lluy et al. v. Ecuador*. Judgment of September 1, 2015, s*upra* note 11.

[96] *Id.*, ¶ 173.

[97] I/A Court H.R., *Case of Ximenes Lopes v. Brazil*. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149; *Gonzales Lluy et al. v. Ecuador*, *supra* note 11.

[98] E.g. UN Committee on Economic, Social and Cultural Rights. *General Comment No. 15 (2003). The right to water*. E/C.12/2002/11. Available at http://undocs.org/E/C.12/2002/11

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

[100] American Convention on Human Rights, article 1.1.

explicitly indicated by the Convention[101] but make an individual or group more vulnerable and exacerbate harm in the case of violations, including socioeconomic status.[102]

92. In addition to the State duty to abstain from taking discriminatory measures and to adopt positive measures to reverse discrimination, there is a "special obligation of protection that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations".[103] Therefore, when establishing and monitoring a PPP, the State must ensure that private parties do not provide goods and services in a manner that disproportionately burdens vulnerable groups. This includes ensuring that goods are affordable, that facilities are physically accessible, that services are culturally appropriate, among others.

93. Finally, PPPs should never hinder accountability and the provision of remedy. Towards that end, responsibilities of each party must be clearly defined, especially in issues related to human rights. The regulatory and legal framework must provide for mechanisms able to hold both the State and its private partners for human rights violations within the context of PPPs, as well as to provide comprehensive remediation.

Recommendations

The guidelines should:

- Clearly articulate the **duty of States to ensure that the legal and regulatory framework applicable to Public Private Partnerships is compatible with international human rights law**. These norms should set the clear expectation that private parties abide to IHRL and establish a system to monitor private compliance with human rights duties.
- Reinforce that **PPP norms should be adopted through a transparent and participatory procedure**, which consults indigenous and traditional communities that may be affected by them in accordance with the standards set by precedents of the Inter-American System and ILO Convention 169.
- Urge States **not to adopt PPP frameworks that weaken socio-environmental rules**, especially in contexts where human rights are particularly vulnerable, such as infrastructure projects and extractive industries.
- Establish the duty of States to require goods and services provided through PPP arrangements to be available, accessible, acceptable, and high quality.
- Require States to **consider the disproportionate effects of PPPs on vulnerable communities**, prohibiting private parties of establishing systems that directly or indirectly discriminate against these groups.
- Encourage States to **adopt best practices in PPP decision-making, evaluation and monitoring**. At least, States should incorporate civil society participation in governance mechanisms, assess quality with the participation of users, and require operational level grievance mechanisms.

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[101] I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, ¶ 85.

[102] *Gonzales Lluy et al v. Ecuador* (2015), *supra* note 11, ¶ 285,

[103] *Xákmok Kásek Indigenous Community v. Paraguay* (2010), *supra* note 16, ¶ 271.

The State as an Economic Actor: State-owned Enterprises (SOEs) and Development Finance Institutions (DFIs)

94. The UN Guiding Principles on Business and Human Rights make a clear distinction between the responsibilities of states and companies for human rights. States have a primary duty to protect against human rights violations committed in their territory and/or their jurisdiction by third parties, including business enterprises (Principle 1). Businesses must respect human rights, which means that they must refrain from infringing the human rights of others and address the negative impacts on human rights in which they have some involvement (Principle 11).

95. However, under this dual approach — duty to protect vs. responsibility to respect — the human rights obligations of some institutions whose governance is not entirely State or market-based are somewhat unclear. Among them are state-owned enterprises (SOEs) and development finance institutions (DFIs), such as development banks and export credit agencies (ECAs). These entities can assume a variety of legal structures and shareholding schemes that make them more or less subject to State control and direction. Though variations in the State's assertiveness and powers in governance bodies and decision-making processes of SOEs and DFIs should be weighted as a relevant factor in concrete cases that appear before human rights mechanisms, this report addresses the issue in a more conceptual fashion.

96. In a report submitted to the UN Human Rights Council, the Special Representative of the Secretary-General on the issue of transnational and other business enterprises, John Ruggie, noted that the UN treaty bodies do not often separately discuss State-owned enterprises. He noted that under general international law the issue of whether particular business entities are State-owned or not is of less importance in deciding whether their acts can be attributed to the State; if a company has a legal personality distinct from the State, it will be treated like any other entity.[104] What matters is whether the business entity performs governmental duties or acts under the instructions, direction or control of the State. In fact, General Comment 24 (GC-24)[105] of the Committee on Economic, Social and Cultural Rights (CESCR), of August 2017, places under the definition of 'business activities' all activities of business entities, "whether they operate transnationally or their activities are purely domestic, **whether they are fully privately owned or State-owned**, and regardless of their size, sector, location, ownership and structure" (¶ 3).

97. In their report on the duty of States to protect against human rights abuses involving those business enterprises that they own or control, the UN Working Group on Business and Human Rights builds on Principle 4 of the UNGPs, which declares that:

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[104] Ruggie, J. G.: 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties', Prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. Kennedy School of Government and Harvard Law School. February 2007, p. 22, ¶ 78, available at https://perma.cc/W4WU-N5CV

[105] Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*. U.N. Doc. E/C.12/GC/24, 10 August 2017.

> **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.

98. To assist countries in "leading by example" (i.e. make their own laws, policies and enterprises more human rights-respectful to increase their legitimacy before private actors), the UNWG provided practical guidance about the actions that States could take to fulfil the obligation set forth in Principle 4, in an effort to clarify what could be those "additional steps" The document lists a range of actions under eight different categories, such as definition of expectations, mechanisms of oversight and monitoring, capacity-building, due diligence, disclosure and transparency, and effective remedies. While these recommendations hold their importance, the UNWG's report may not have significantly contributed to clarify or develop a host of thorny legal and conceptual issues related to the subject, such as (i) the dynamic and fluid nature of the concept of 'control' in corporate law and hot it affects the attribution of responsibility to States for actions or omissions of the entities they own, control and/or operate; (ii) the challenges of balancing between competing interests arising out of the operation of SOEs and DFIs (e.g. general welfare vs. profit maximization); (iii) the circumstances in which States are under an obligation to use their "leverage" to influence the behavior of SOEs and DFIs as opposed to a legally binding obligation to make SOEs and DFIs policies and practices more compatible with human rights standards through the use of hard law, including legislation, regulation and policy frameworks that set the conditions for the exercise of rights and duties in the management and direction of these institutions.

99. Systematic interpretation of international human rights law can provide a path to fill some of the above-mentioned gaps while simultaneously upholding the principle of primacy of human rights. UN Special Procedures and treaty bodies, as well as human rights courts, have progressively interpreted international human rights law as establishing the standard of conduct for SOEs under the "responsibility to respect". This means that violations committed by SOEs are directly attributed to the State, especially in circumstances where it exercises "typical functions of the State" or operates in a regime of monopoly.[106]

100. **The Inter-American Court jurisprudence has been clear in reinforcing the obligation of state supervision including both services provided by State, directly or indirectly,[107] and those offered by private individuals**.[108] According to the Inter-American Commission of Human Rights, this duty is stricter in certain circumstances, depending on the type of activity and nature of the business including a reinforced obligation of supervision regarding the actions of companies with close ties to the State, owned by the State, or under its control.[109] The need of a strict supervision is based on the perception that, in some cases, the State engages in profitable ventures,

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[106] On the criteria set forth by the European Court of Human Rights, see: Rajavuori, Mikko, *How Should States Own? Heinisch v Germany and the Emergence of Human Rights Sensitive State Ownership*, EJIL Vol 26 Nº 3, 2015, 727-746. See also Schönsteiner, Judith. "Attribution of State Responsibility pursuant to actions and omissions of state-owned enterprises in human rights matters". Paper presented at the Max Planck Institute, 1 December 2016.

[107] IACHR *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources Report*, see *supra* note 63, ¶ 99.

[108] I/A Court H.R. *Suarez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, ¶ 150; *Albán Cornejo v. Ecuador*. Merits, reparations and costs. Judgment of November 22, 2007, series C, number 171; *Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149.

[109] IACHR *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources Report*, see *supra* note 63, ¶ 100.

either through State-owned companies or companies administered by it, therefore blurring nonprofit and for-profit interests and the role of the State in ensuring a level playing ground for both sectors"[110]. Taking into consideration extractive and development projects implemented by State-run companies, the IACHR understands that the State is required "to implement measures of strict supervision, to be undertaken by entities which meet the minimum guarantees of independence and impartiality, and have the necessary powers to verify that human rights are fully respected in these contexts, and are equipped to respond when human rights violations take place."[111]

101. Regarding the obligations of DFIs, the international legal framework governing business and human rights is not conclusive in establishing how they should conduct their businesses in order to fulfill their responsibility to respect human rights. Under Pillar 2 of the UNGPs ("responsibility to respect"), business enterprises have different levels of responsibility depending on their degree of involvement with an adverse human rights impact. Business enterprises *causing* adverse human rights impacts should take the necessary steps to cease, prevent and remedy the impacts. When *contributing* to an impact, business enterprises should cease, prevent and remedy the impact to the extent of the contribution, as well as to use their leverage to mitigate the remaining impact. Finally, a business enterprise may not cause or contribute to an adverse human rights impact, but nevertheless be *directly linked* to that impact through their operations, products, services and business relationships. In that case, business enterprises should only use their leverage to cease the impact, if possible, and are not required to provide the victims with any sort of remedy.

102. DFIs may cause adverse human rights violations when they result from their own actions and there is no third-party involvement. For example, when financial institutions adopt discriminatory hiring processes. In project finance, development financial institutions will most likely contribute or be directly linked to an adverse human rights impact. They may contribute to human rights violations when, through actions or omissions, they encourage or facilitate abuses. It occurs, for example, when financial institutions impose unreasonable timelines to those who are receiving their funding, or when it funds infrastructure projects in conflict areas without the necessary safeguards. When adverse human rights impacts occur even after the adoption of the necessary safeguards, then the financial institution may be considered to be directly linked to the harm.[112]

103. Experience has shown that violations associated with the operations of DFIs fall mostly under the hypotheses of these institutions "being linked to" or "contributing" to adverse impacts caused by their corporate clients. In the region, this is particularly true in the context of projects funded by these institutions in the infrastructure sector.[113] Nonetheless, our researches have shown

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[110] United Nations. *Report Of The Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai*, April 28, 2015, A/HRC/29/25, ¶ 13.

[111] IACHR *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources Report*, see *supra* note 63, ¶ 101. See also *Case of Kaliña and Lokono Peoples*, *supra* note 6, ¶ 224.

[112] OHCHR. *Response to request from BankTrack 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.

[113] 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*

that **current domestic legal frameworks 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.[114]

104. SOEs and 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 actively work to close the divide between private and public law regimes that work as normative sources for the governance of SOEs and DFIs.

Recommendations

The guidelines should:

- **Clarify the circumstances where SOEs and DFIs' actions and omissions would be attributable to the State under the Convention**, upholding the authoritative statements and interpretations by human rights courts and bodies and the evolving interpretation that the exercise of control and direction over these entities could impose on them a 'duty to protect', and not only the 'responsibility to respect';
- Provide guidance **how States could design the liability regimes of DFIs (and financial institutions in general) and the corresponding obligations to provide and/or participate in remediation processes**, noting that **strict liability is an important factor in driving truly sustainable finance** and taking into account key principles of international human rights and environmental law, such as the precautionary principle and the right to an effective remedy;
- Require States to **embed mandatory human rights due diligence (HRDD) in the legal frameworks governing the commercial activities of SOEs and DFIs**. The same requirement should be extended to private businesses interested in establishing partnerships with, receiving loans and other forms of financial support from, SOEs and DFIs;
- Urge States to ensure policy coherence by taking active steps to create convergences between the private and public-law provisions that govern the operations of DFIs and SOEs. **Incompatible legislation, such as banking secrecy laws, should be reformed or removed to allow for the attainment, by such entities, of the highest standards on transparency and access to information, environmental and social impact assessment and evaluation, and reporting;**
- Encourage States to **seize all the opportunities to accelerate systemic changes and boost synergies by reforming frameworks** governing public procurement, recruitment of staff, internal incentives, rules of ownership and control, and investment allocation policies.

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project related conflicts in Latin America and the Caribbean. Inter-American Development Bank, 2017. Available at https://publications.iadb.org/handle/11319/8502

[114] 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.