Human Rights Due Diligence to Identify, Prevent and Account for Human Rights Impacts by Business Enterprises

168th Period of Sessions

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1. Introduction

The obligation to carry out human rights due diligence extends to both States and business enterprises, regarding the State's duty to protect and companies' obligation to respect. There are common characteristics between the *corporate human rights due diligence* (derived from United Nations Guiding Principles on Business and Human Rights and corporate practices) and the *state human rights due diligence* (based on the Inter-American Court case law).[1] However, there are also some significant differences, most importantly the foundations of the legal obligation to perform due diligence and the suitability of such obligation.[2]

The Inter-American System has significant precedents on *state* 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 Inter-American case-law, including the recognition that the State can be held internationally responsible for human rights violations committed by private actors.[3] In the case *Fazenda Brasil Verde v. Brazil*, the Court articulated a duty to perform due diligence in relation to servitude, slavery, human

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

[2] "[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." (Cantú Rivera, *supra* note 2, page 29)

[3] IACHR. *Simone André Diniz v. Brazil*. Case No. 12.001. Merits. Report No. 66/06, October 21, 2006, para. 101. IACHR. *Jessica Lenahan (Gonzáles) et al. v. United States*. Case No. 12.626. Merits. Report No. 80/11, July 21, 2011, para. 130

trafficking and forced labor.[4] The Commission has also stressed the duty to develop and implement an appropriate regulatory framework for the protection of human rights vis-à-vis corporations.[5] This duty entails significant changes to the laws applicable to corporate activities in order to make them consistent with human rights.

Human rights due diligence has a different meaning under the United Nations' Guiding Principles on Business and Human Rights (UNGP) - and, therefore, in the corporate world - than it does in human rights law or in general international law. The UNGP, unanimously endorsed by the UN Human Rights Council, clarified the roles and responsibilities of States and business enterprises towards the protection of human rights in the context of corporate-related activities. Reaffirming the existing body of international human rights law, the UNGP recognize that 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). In turn, 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).

Under the UNGP, in order to meet their duty to protect human rights, States should enforce laws and provide guidance to business enterprises on how to respect human rights, as well as to encourage - and, where appropriate, to require - them to communicate how they address their human rights impacts (UNGP Principle 3). It includes guidance on the development and implementation of effective *corporate* human rights due diligence in order to identify, prevent, mitigate and account for human rights impacts. The UNGP 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 on how the impacts are addressed (UNGP Principle 17).

The process is not an end in itself, but rather a means to protect and promote human rights. Therefore, its effectiveness depends on key elements such as transparency, liability, and participation. This document seeks to discuss recent trends in the operationalization of *corporate* due diligence, lessons learned from the efforts to legislate on the issue and the significance of enhanced due diligence requirements to avoid negative human rights impacts. Our findings are supported by case studies of due diligence failures that have resulted in human rights violations in the region.

The aim of this document is to present to the IACHR, as it develops a report with guidelines for Business and Human rights and as it engages more generally with human rights violations in the context of business activities, a summary of the main areas of concern with regard to human rights due diligence. As we explain in more detail below, a framework of effective human rights due diligence should include meaningful engagement with and participation of potentially affected communities. It should also include transparent processes of human rights impact assessment that are accompanied by measures for civil society to ensure that due diligence processes are carried out effectively, disclosed, and relied upon as businesses operate and as they assess the respect for human rights of the entire supply chain.

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[4] IA Court. Case of the *Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Series C No. 318 (October 20, 2016). Par. 320.

[5] IACHR. *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. December 31, 2015. Par. 5.

In the same vein, States should use National Action Plans (NAPs) as a means to devise effective policies to implement the UNGP and due diligence practices in particular. The IACHR should help States clarify their obligations to ensure effective due diligence practices, and States should, in turn, take up these guidances in the NAP drafting and updating process. Finally, due diligence should be more clearly tied to mechanisms for corporate accountability. In providing examples of recent developments in national legislations where this connection is made more clear, this document seeks to assist the IACHR in identifying State norms and practices that can best incentivize effective and meaningful human rights due diligence for business enterprises.

Finally, by presenting cases of human rights violations that could have been prevented or mitigated by specific due diligence activities, disclosure measures, or accountability mechanisms, this document aims to demonstrate both the importance and the potential of due diligence to improve human rights conditions on the ground.

2. Key issues in the due diligence process, policies and practices

Since the adoption of the UNGP, states, companies, and civil society have taken steps to advance the use of due diligence towards human rights protection. This experience has indicated key-areas to establishing effective due diligence procedures. This session explores such issues, discussing applicable norms and standards and analyzing practical examples. It aims to identifying points of concern, normative standards, and approaches that respond to current gaps and challenges.

The session is structured in four topics. Topic (a) discuss participation and community engagement, especially in the impact assessment stage. This discussion also includes Free Prior and Informed Consultation and Consent, and highlights community-led impact assessment as good practice. Topic (b) addresses transparency, disclosure, and reporting, focusing on how these principles apply to supply chain due diligence. Topic (c) focuses on due diligence within National Action Plans, indicating norms and guidance on the matter, as well as shortcomings of current plans. Topic (d) wraps up the session by discussing the relation between human rights due diligence and corporate liability, indicating the advantages and problems of three approaches to the issue.

a. Participation and community engagement

i. Human rights impact assessment

Human rights impact assessment is the starting point of any human rights due diligence process. This stage aims at identifying and assessing the nature of the risks and potential or actual impacts that a business enterprise may be involved either through its own activities or as a result of their business relationships.[6] It is worth noting that the risks that the UNGP 18 refers to are the risks that a business enterprise's operations pose to human rights. It differs from any risks that the involvement in human rights impacts may pose to the enterprise.[7] In other words, human rights impacts assessment focuses on the identification of social risks or impacts, rather than on financial risks or impacts that business enterprises may face.

[6] UNGP 18.

[7] The corporate responsibility to respect human rights: an interpretive guide. Answer to question 35. Available at: www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.

The assessment of human rights impacts, as well as human rights due diligence processes in general, is an ongoing process. It should be started as early as possible in the life of a particular business activity or relationship, and should be repeated whenever necessary.[8] Although there are different methodologies to conduct human rights impact assessments, the process should include at least (i) producing a diagnosis (or baseline) of the human rights situation prior to the activity; (ii) projecting how the activity will impact this context; (iii) mapping applicable norms, including internal rules, private standards, national laws, and international norms; (iv) identifying the human rights responsibilities of each actor.[9]

Generally speaking, it can be problematic when corporations carry out their own assessment processes by mere "paperwork" filling in order to obtain concessions and permits. Thus, it is essential that these processes are conducted or verified by independent parties, with meaningful participation from local communities, and that results are public and transparent, so that harm can be prevented.

Community-led human rights impact assessments

For some years now, a group of civil society practitioners have been implementing community-led human rights impact assessments. This methodology guides communities and NGOs to measure actual or potential human rights impacts of a project, and enables the drafting of a final report and recommendations which can serve as a basis for engagement with public and private actors involved in that project.[10]

The importance of community-based human rights impact assessments lies in the fact that, by using a bottom-up approach, they contribute to empowering affected communities to claim their rights and ensure accountability. Such assessments magnify the concerns of community stakeholders, putting them on a more equal footing with the public and private actors involved. This is particularly important in a global context of shrinking space for civil society and criminalization of defenders, particularly land and environmental rights defenders.

Community-based human rights impact assessments incorporate key components of due diligence (such as participation, transparency, and disclosure), and go further by contributing to a more balanced dialogue between all parties. In particular, they allow community members to identify their main areas of concern and actively ensure full access to information about the project and its risks for potentially affected actors.

ii. Consultation and consent

The participation of (potentially) affected communities should be at the heart of any due diligence process. This includes providing access to relevant information in appropriate formats and in a timely manner, and implementing mechanisms that are culturally adequate to facilitate

[8] Commentary to UNGP 18.
[9] FGV. Avaliação de Impacto em Direitos Humanos. Flavia Scabin e Malak Poppovic (coord.). Available in Portuguese at https://perma.cc/J85U-XU7P
[10] Getting it right: human rights impact assessment guide. Available at: http://hria.equalit.ie/en/ .

meaningful participation. The right to participation is particularly important when the potentially affected communities are traditional communities, given their position of special vulnerability and the constant threats and human rights violations they face in the Inter-American context.

An essential element related to participation is consultation. The Convention 169 of the International Labor Organization (ILO), on indigenous and tribal peoples, establishes the right to Free, Prior and Informed Consent (FPIC), according to which indigenous and equiparable communities have the right to be consulted on projects to be developed in their territories, and on any state's decision that could impact their rights. Throughout the consultation process, the communities should be given not only the opportunity to influence the process of implementation of a given project, but also to withhold their consent and to barr the execution of projects in their territory.

In the Americas, most infrastructure projects are implemented without proper FPIC, and there is a pattern of granting permits before consultation. Although many such licenses are conditioned to the results of FPIC procedures, experience shows that revoking those permits is highly unusual. Moreover, information is not provided with enough time to allow community members to effectively analyze it, and in most cases, the information provided is insufficient and it is not presented in appropriate language and format. Limitations and challenges of FPIC in the region involve ensuring security for those participating, as well as adapting community consultations in order to account for cultural specificities.

Likewise, indigenous peoples have the right to participate in the decision-making process of matters that may affect them. This right has been recognized by ILO Convention 169 in its articles 6 and 7 and through the jurisprudence of the Inter-American Court of Human Rights.[11] Due diligence policies directly influence the rights of these communities. It is thus of vital importance to consider FPIC as well as other channels for meaningful participation in their design, preparation, implementation, and development.

Communities have the right to give their consent - or not - to projects and other matters that directly affect them according to the highest international and national standards. For only then will indigenous peoples have effective control over their own economic, social and cultural development.

b. Transparency, disclosure, and reporting

Under the corporate responsibility to respect human rights, business enterprises are required to have in place "policies and practices through which they can both know and show that they respect human rights in practice."[12] The showing component is critical as it provides a "measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors."[13] The UNGP therefore require that business enterprises communicate externally about how they address their human rights impacts. This communication

[11] The Court develops the right of political participation in public affairs: Caso Yatama Vs. Nicaragua, Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de junio de 2005. Serie C Nº 127. Corte Interamericana de Derechos Humanos Chitay Nech y otros vs. Guatemala Excepciones Preliminares, Fondo, Reparaciones y Costas Sentencia del 25 de mayo de 2010.
[12] Commentary to UNGP 21.
[13] Commentary to UNGP 21.

should be in "a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences."[14]

Where unreasonably difficult to perform human rights due diligence across all the entities in a business enterprise's supply chain, the company is required to identify the areas in which there is an increased risk of human rights abuses and conduct human rights due diligence across such areas.[15] Therefore, mapping and disclosing an enterprise's supply chain is a critical part of due diligence. In order to make an adequate risk assessments, enterprises must first know the locations of entities within their supply chain. While a company may be able to identify some risks (such as risks linked to the enterprise's sourcing model) without knowledge of its supply chain, other risks (such as risks associated with the country of production) cannot be identified. Additionally, if the company itself does not know who its subcontractors are, it cannot communicate to potential or actual affected individuals the existence of grievance mechanisms nor of human rights abuse reporting mechanisms the company may have in place.

Moreover, publicly disclosing the names and locations of entities within an enterprise's supply chain is of critical importance. This type of disclosure will improve a company's own human rights due diligence processes. It will help the company to accurately identify risks in its supply chain and to acquire knowledge of adverse human rights impacts that require immediate remediation and mitigation (as well as prevention in the future). Transparency on the supply chain also better enables a company to collaborate with workers, unions, and civil society in identifying, assessing, and avoiding actual or potential adverse human rights impacts.

c. Due diligence in National Action Plans (NAPs)

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."[16] 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."[17]

The UNWG NAP Guidance Document, describes five phases in the development of a NAP: *(i)* initiate; *(ii)* consult and assess; *(iii)* draft; *(iv)* implement; and *(v)* update.[18] 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. The NAP Guidance encourages governments to use due diligence as a the "thread ensuring coherence in the Government's activities outlined in the NAP," to clarify expectations of business enterprises regarding due diligence, and to "promote, and elaborate on, the

[14] UNGP 21.
[15] Commentary to UNGP 17.
[16] United Nations, General Assembly, *Report of The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/69/263, ¶ 6 (August 5, 2014)
[17] UN Working Group on Business and Human Rights, *State National Action Plans*, *available at* http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx
[18] UN Working Group on Business And Human Rights, Guidance on National Action Plans on Business and Human Rights, at i-ii, (hereinafter, "UNWG NAP Guidance") *available at* http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf

concept of human rights due diligence in their measures to support, incentivize and require business enterprises to respect human rights."[19]

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 UNGP: "[a]s an instrument to implement the UNGP, 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 effective access to remedy."[20] In the Inter-American context, these include obligations under Inter-American instruments and jurisprudence. In this vein, the Commission and the SR ESCER should provide guidance for the development of NAPs that can lead to a more robust implementation of States' human rights obligations, including the obligations to ensure that private actors do not violate human rights.

The SR ESCER and the Commission should focus on the guidance that the UNWG has provided, as well as on specific NAPS evaluations, such as the National Action Plans on Business and Human Rights Toolkit, by ICAR and DIHR,[21] and strengthen it where Inter-American standards and jurisprudence warrant it. For example, the toolkit by ICAR and DIHR provides guidance on how states may adopt a human rights-based approach when drafting National Action Plans. According to the toolkit, states should base their NAPs on international human rights standards and principles, including participation, nondiscrimination, empowerment, transparency, and accountability. It also establishes a NAPs checklist to assess their compliance with such principles. The UNWG Guidance regarding the ways in which National Action Plans can contribute to disseminating and implementing a rights-protective concept of due diligence provides:

> The Working Group strongly encourages States to promote the concept and application of human rights due diligence. In their national action plans, Governments should state the expectations they have that business enterprises will carry out human rights due diligence in line with the second pillar of the Guiding Principles. Furthermore, States should include and elaborate on the established understanding of human rights due diligence when taking more proactive steps, such as developing guidance; defining the terms of human rights conditionality in public procurement or when export credit agencies are involved; outlining the specificities of reporting requirements; or considering the inclusion of human rights elements in corporate law.[22]

It also recommends specific measures that the State should consider when drafting NAPs, including "measures that encourage, incentivize and require business enterprises to implement their responsibilities under the second and third pillars."[23] Such measures apply to due diligence efforts. The UNWG Guidance Document on NAPs provides some detailed suggestions about measures that could encourage or incentivize due diligence activities. Guidance for Guiding Principle 3, for example, suggests that Governments not only clarify expectations regarding due diligence, but that they also introduce legally binding "non-financial reporting requirements on human rights due

[19] UN Working Group on Business And Human Rights, Guidance on National Action Plans on Business and Human Rights, at 13, available at http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf
[20] UNWG NAP Guidance, at i.
[21] ICAR, DIHR. National Action Plans on Business and Human Rights Toolkit. Available at https://perma.cc/A6ZX-45H7.
[22] *Id.* at ¶ 39.
[23] *Id.* at 44

diligence processes and the results thereof for companies working in or having substantial presence in the country's territory and/or jurisdiction".[24]

National Action Plans have, thus, the potential to provide a roadmap for States, business entities and civil society regarding the implementation of human rights protections, and the expectations that States have with regard to the due diligence activities of business entities. Because they are viewed as living documents, or evolving policy strategies to implement the UNGP, they can also serve the purpose of spurring dialogue amongst stakeholders, developing forums for education about human rights obligations and responsibilities, about Inter-American human rights standards and obligations,[25] and about models of appropriate due diligence activities.

This ideal has not yet become a reality. National Action Plans have not been developed with full and meaningful participation of civil society and affected communities, for example. Additionally, as noted in prior submissions to the Commission, NAPs have generally failed to provide clarity for businesses about the consequences they can face if they do not respect human rights.[26] Despite the issuance of these NAPs, the emphasis has been on information provision, rather than on explicit and clear incentives to carry out due diligence efforts.[27] In a systematic assessment of all National Action Plans available in English before April, 2017, ICAR, ECCJ and Dejusticia noted that "[t]he 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."[28]

Thus, while effective human rights due diligence efforts are recognized as *the* key activity to prevent, mitigate, address and remedy human rights violations, very little is being done, even at the level of planning documents, to encourage or require business enterprises to carry out adequate human rights due diligence activities. The SR ESCER and the Commission could assist States in developing better and more effective NAPs by encouraging States to consider their potential liability under Inter-American jurisprudence if they fail to ensure that business enterprises are carrying out due diligence activities that meaningfully protect the human rights of affected communities. It can, for example, highlight that NAPs must reflect a coherent plan for the State to fulfill its obligations to *ensure* effective human rights due diligence across the spectrum of business activities in each OAS country.[29] Indeed, a State's failure to require appropriate due diligence

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[24] *Id.* at 29.

[25] As is well recognized, the UNGP are grounded on the existing human rights obligations of States. (UNGP, *General Principles*). In the context of OAS countries, it is evident that these obligations include Inter-American human rights obligations.

[26] CONECTAS, Dejusticia, Business and Human Rights: Submission to the Inter-American Commission on Human Rights and the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, ¶ 44, *available at* https://perma.cc/555C-7Q7T.

[27] See, eg. ICAR, ECCJ, Dejusticia, Assessment of Existing National Actions Plans (NAPs) on Business and Human Rights. 2017 Update, at 46-47, 63-66, 187-188 (noting the weak or nonexistent incentives to influence corporations to carry out human rights due diligence in the first UK NAP, and the NAPs of The Netherlands and Colombia). *Available at* https://perma.cc/PLJ8-XVG7. *Id.* at 5 (noting education, information and similar actions as the predominant elements of NAPs, rather than specific regulatory measures).

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

[29] The responsibility to ensure the enjoyment of human rights, including by organizing "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" is well established in Inter-American jurisprudence. See *Case of Velásquez Rodríguez v. Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4, ¶ 166.

activities, as outlined in Pillar II of the Guiding Principles has already resulted in a finding by the Inter-American Court that the State is liable for violations committed by private enterprises.

In the *case of Kaliña and Lokono Peoples v. Suriname*, the Court reasoned that the obligation of a businesses enterprise to respect human rights is discharged in part through effective human rights due diligence.[30] On the other hand, the State's failure to ensure the business enterprise carry out appropriate due diligence activities was evaluated as follows:

> [T]he 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.

In short, Inter-American standards and case-law provide stronger footing for clearer and more forceful guidance regarding the content of NAPs which, in turn, can become useful tools for the effective implementation of the Guiding Principles on Business and Human Rights and the obligations of States in the Inter-American System to guarantee the enjoyment of human rights.[31]

d. Human rights due diligence and corporate liability and responsibility

Under the international legal framework, it is still unclear how the failure to conduct an effective corporate human rights due diligence relates to legal liability. According to the UNGP, conducting human rights due diligence 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 to such impacts.[32] 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.[33]

The failure to conduct human rights due diligence also influences the fulfillment of the corporate responsibility to respect.[34] The UN Working Group on Business and Human Rights already recognized that the failure to conduct an adequate due diligence process **may impact the degree of involvement of a company with certain adverse human rights impacts**.[35] The responsibility to remedy human rights abuses changes according to the degree of involvement of a

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[30] *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), ¶ 225, ¶ 225 n. 264 (emphasis added).

[31] As part of its recommendations to strengthen incentives and clarify State expectations that business enterprises conduct due diligence activities, there should be more guidance about effective and meaningful participation of affected communities and civil society organizations that work to defend human rights in the NAP drafting process. See e.g. Hopenhaym and González, (2017), *Las personas defensoras de derechos humanos en el contexto del Plan Nacional de Acción Nacional sobre Empresas y Derechos Humanos en México*. in H. Cantú (Coord., Ed.) *Derechos Humanos y Empresas: Reflexiones desde América Latina*. (pp. 391-404), at 395 (examining the need for broad participation of multiple sectors in order to produce a NAP).

[32] Commentary, UNGP Principle 17

[33] 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

[34] UNGP 12 recognizes that the responsibility of business enterprises to respect human rights is "distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions."

[35] UN Working Group on Business And Human Rights. Document SPB/SHD/UH/ff.

business enterprise with such abuses. Business enterprises must enable the remediation of any adverse human rights impacts they cause or to which they contribute.[36] In cases of direct linkage, in turn, business enterprises are not required to provide remediation, although they may play a role in doing so.[37] Therefore, conducting appropriate human rights due diligence processes - or the failure to do so - also impacts the responsibility of business enterprises to provide the victims of abuses with effective remedies.

Therefore, further guidance is needed to set out clear standards both on how the failure to conduct human rights due diligence affects the degree of involvement in human rights harms and on how it may be embedded into domestic liability regimes. Mandatory due diligence laws might represent a significant opportunity for states to require corporate due diligence as set out in the UNPG. Still, they may not be effective if they fail to establish a robust legal framework on liability for business-related human rights abuses in connection with due diligence obligations, as well as if they fail to provide rights holders with an effective remedy.

e. Binding legislations on human rights reporting and due diligence

Some countries have adopted legislative and administrative measures to require or encourage business enterprises to communicate and address their human rights impact. They can be classified as **State-based public disclosure obligations** (like the Brazilian "dirty list" of slave labor regulation), **reporting obligations** (like the UK Modern Slavery Act), and **due diligence obligations** (such as the US conflict minerals regulation, the California Transparency in Supply Chains Act, and the French Corporate Duty of Vigilance law).[38]

State-based public disclosure obligations follow an implicit logic that enhanced disclosure will encourage companies to conduct due diligence due to "naming and shaming" concerns. However, watchdogs may not be able to enforce human rights standards just by disclosing information on the companies that do not carry out adequate due diligence processes or do not comply with international human rights standards. Different markets are not uniform in the type of measures that are efficient to make them abide by human rights standards. Consumer-facing sectors may be under more pressure to address adverse human rights impacts. Companies that are less susceptible to naming and shaming strategies have less incentives to improve their transparency practices absent potentially relevant economic and reputational consequences to their operations. The same applies to reporting obligations, which alone may be insufficient to foster a culture of due diligence. **These laws can run contrary to the intended goal of ensuring corporate compliance with human rights standards if they set a permissible environment in which companies are not under an incentive to effectively act in order to prevent and remedy adverse human rights impacts**.

Due diligence obligations, in turn, require companies to actually implement processes to identify, prevent, mitigate and account for human rights impacts. However, where due diligence efforts fail, mechanisms should be in place that provide for liability. Issues that need to be considered include compensation, the proper allocation of the burden of proof, the legal status of

[36] UNGP 15
[37] UNGP 22
[38] BUSINESS AND HUMAN RIGHTS RESOURCE CENTER. *Examples of government regulations on human rights reporting & due diligence for companies*. Available at: https://perma.cc/C6ZK-XX2C .

the due diligence norm, and the lack of monitoring mechanisms of compliance. Additionally, where liability for failure to conduct due diligence does not exist, then such efforts may not add to the quest for justice.

Hence, there is a need to develop an effective legal framework that includes liability for business-related human rights abuses when inadequate due diligence is conducted. The development of standards and guidance on how states may improve their legislative and administrative provisions is critical to ensure that reporting, disclosure, and 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.

i. State-based public disclosure obligations

The **Brazilian "Dirty List" of slave-labor** is an example of state-based public disclosure norms, considered by the International Labor Organization as 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.[39] 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.

Public and private financial institutions decided, voluntarily, to include a consultation to the "Dirty List" in their decisions to extend credit. Therefore, the List 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 UNGP.

The main weakness with the "Dirty List" is that it was not established by law *strictu sensu*. 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 have also attempted to fall back on Brazilian anti-slavery regulation, trying to reduce the scope of the definition of "work analogous to slavery" to shrink the hypothesis that may lead to the inclusion of a name on the list.[40] 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

[39] 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.

[40] CONECTAS. *Unprecedented attacks to the Brazilian system for the fight against contemporary forms of slavery*. 16 October 2017. Available at: https://perma.cc/DR8S-NAM7.

publication of the Dirty List to the political decision of the Labor Minister - which was revoked after strong popular pressure.

ii. Transparency and reporting norms

The **UK Modern Slavery Act** 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 to create a reputational risk and to encourage business enterprises to adopt preventive measures in order to avoid modern slavery in their supply chains.

However, according to the Business and Human Rights Resource Center, the response of the majority of the UK's largest listed companies to the UK Modern Slavery Act was not satisfactory.[41] Additionally, a joint examination by Sancroft (an international sustainability consultancy) and Tussell (data source on UK government contracts) assessed the modern slavery reporting of the top 100 government suppliers. The study found that many companies reacted to the new law by only setting policies related to modern slavery, but viewing the existence of this dedicated policy as a wholly sufficient response in itself in lieu of taking other practical steps.[42]

iii. Due diligence obligations

The **French Corporate Duty of Vigilance Law** 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**. The law has, thus, a narrow scope. It exempts French companies from the obligation to conduct due diligence across all the entities in their value chain or, at least, in the areas where the risk of adverse human rights impacts is most significant, as prescribed by the UNGP.[43] Such risks are frequently increased in the end of a company's' value chain, where there is no established commercial relationship.[44]

Additionally, the French government stressed that the legislation did not create a mere obligation to document the measures undertaken in order to address adverse human rights impacts,

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[41] 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 >.

[42] SANCROFT; TUSSELL. *The Sancroft-Tussell Report: eliminating modern slavery in public procurement*. March 22, 2018. Available at: https://perma.cc/Y2UH-RFT2

[43] Commentary, UNGP Principle 17

[44] TRIPONEL, Anna. SHERMAN, John. *Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law*. May 17, 2017. Available at: https://perma.cc/5Q9K-CLYD

but actually to *effectively implement* such measures.[45] However, it also recognized that the duty of vigilance consists in an "obligation of means", rather than an "obligation of results". In other words, the companies comprised by the duty of vigilance law do not have the obligation to respect human rights, but the obligation to adopt reasonable measures in order to avoid adverse human rights impacts that may be related to them.

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. Therefore, business enterprises will not be liable if the victim is unable to prove that there is causation between the absence of a vigilance plan and the abuse that the person had suffered. The new legislation may encourage business enterprises to adopt preventive measures to avoid adverse human rights impact, **but it may also create a shield to protect from liability those who have adopted a vigilance plan**.

The **California Transparency in Supply Chains Act**[46] requires manufacturers and retailers to disclose their efforts to eradicate human trafficking and modern slavery in their supply chains. Such disclosure must include verification, audits, certification, internal accountability, and training - criteria that led the Business and Human Rights Resource Center to classify it as due diligence legislation.[47] Nevertheless, the Act does not establish mechanisms to assess the quality of the information disclosed by companies, does not provide sanctions for non-compliance, and limits the possibilities of litigation.[48] In some cases, minimum compliance with disclosing requirements has been used to shield companies from liability.[49]

The **US Conflict Minerals Regulation** required companies buying some "conflict minerals" to undertake due diligence. Section 1502 requires companies based in the United States to report Securities Exchange Commission whether certain designated minerals that are necessary to the functionality or production of a product made by the company originated from particular designated countries, and if those minerals are "conflict-free." If the company finds that the minerals originated from one of those designated countries, then it must undergo due diligence on the source and chain of custody, including **an independent audit of its report**. In the US, states have the primary authority to regulate corporate liability. In 2011, California became the first state to pass a law preventing companies under scrutiny for ineffective compliance with the Dodd-Frank conflict minerals supply chain reporting requirements from eligibility to bid on state procurement contracts.

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[45] FRANCE. *Observations du Gouvernement sur la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (in English: Government's observations on the law related to parent companies' and contracting companies' duty of vigilance). March 28, 2017. Available at: https://perma.cc/2B9H-SHJE.

[46] The California Transparency in Supply Chains Act is applicable to companies doing business in California with with more than U$ 100 million in annual gross receipts.

[47] Business and Human Rights Resource Center. *Examples of government regulations on human rights reporting & due diligence for companie*s. Available at: https://perma.cc/C6ZK-XX2C.

[48] Emma Cusumano, Charity Ryerson. *Is the California Transparency in Supply Chains Act doing more harm than good?* Corporate Accountability Lab. July 25, 2017. Available at: https://perma.cc/8SNL-5C76.

[49] Ibid.

3. Cases of failure to conduct due diligence

This section examines cases of human rights violations that could have been prevented or mitigated by specific due diligence activities, disclosure measures, or accountability mechanisms. Through each case, this section provides support for the specific standards for human rights due diligence that this document outlines.

a. Belo Sun (Brazil)

Belo Sun Mining Corp. is a Canadian company, created to explore gold in the Amazonian region *Volta Grande do Xingu*. The construction and operation of an open-pit mine in a forest-area inhabited by traditional communities would, *per se*, require a thorough impact assessment and a rigorous due diligence plan. These are even more important given that the communities are enduring the social and environmental consequences of the third largest hydropower plant in the world - consequences which, in accordance to the dam's environmental license, require at least six more years of measuring to be fully understood. Although Belo Sun produced an environmental impact assessment, it lacks meaningful consultations and fails to consider the cumulative impacts of the mine and the dam.

The lack of an impact assessment and a due diligence plan is causing grave violations even before the project formally starts. Human rights defenders have left the region due to persistent intimidation, life threats, and physical attacks. In addition, the company forbade artisanal gold prospecting, taking away the subsistence means of local garimpeiro families. With diminishing fish stocks because of the dam and forbidden to prospect gold, families are struggling to survive. Many entered into agreements with the company, and left their lands in exchange for small amounts of money. These agreements did not abide to international standards, and local organizations argue they were illegal.

b. Hydro Alunorte Alumina Refinery (Brazil)

On 17 February 2018, after rainstorms, the Hydro Alunorte plant flooded, unleashing untreated mining residues into the environment in Barcarena, in the state of Pará. Hydro Alunorte is the world's largest alumina refinery, owned by the Norwegian company Norsk Hydro, of which the Norwegian government owns a third of the capital. When investigating the flooding, authorities of the Ministry of Health visited the residue deposit and also discovered clandestine pipes through which Hydro was releasing more residues into the environment. Norsk Hydro admitted to have made multiple leakages through the clandestine pipes. The company argues that its purpose was to drain the refinery's treatment plant, which was under heavy pressure due to the rainy season.

Public authorities tested water samples collected in communities around the plant and found high levels of aluminum and other alterations that may be associated to the effluents produced by Hydro Alunorte. The communities living in Barcarena are already feeling the adverse impacts of the water contamination. They do not have access to piped water and, during the rainy season, the contaminated rivers and streams increase in volume and reach the artesian wells that supply them. Several health problems associated with the contact with contaminated water have been reported, including skin problems, gastrointestinal diseases and respiratory diseases. The contamination also reaches territories of traditional communities located in the area where the leakage occurred.

In Brazil, human rights are not fully addressed in the process of obtaining an environmental license. According to the Brazilian legislation, enlargements of existing licensed projects that may cause other human rights and environmental impacts must undergo a new process of environmental licensing in order to assess and address such impacts. The residue deposit that flooded was an enlargement of the Hydro Alunorte refinery plant, but it did not have an environmental license. The pipes through which the company released the mining residues into the environment were illegal and, thus, did not have a license to operate. The company even recognized that it did not have a license to unleash the residues and that the local communities were not warned in advance, although environmental authorities were aware of the practice.

c. Doce river dam disaster (Brazil)

The collapse of the Fundão tailing dam, owned by Samarco (a joint venture of Vale and BHP Billiton), took place on 5th November 2015. It is considered the worst socio-environmental disaster in Brazil's history and it claimed 19 lives, thousands displaced and polluted with heavy metals one of the main Brazilian rivers, the Doce river. The tailing dam failure unleashed over 35 million cubic meters of iron ore rejects, contaminating the soil, riverbanks and vital sources of water supply. Although there is no final assessment of the impacts, it is estimated that over 3 million people were affected and it may take up to 30 years to restore the environment.

Before the disaster, Samarco carried out a detailed human rights impact assessment, which allowed it to identify the risk of collapse and the extent of the adverse impacts that it would cause. Samarco assessed the potential impacts and expressly acknowledged that the company would be directly responsible for or accomplice in serious human rights impacts. It identified that the failure of the dam would cause approximately 20 fatalities and over 20 years of adverse impacts on the soil, on biodiversity, on water resources and on air quality. In addition, it identified that it could cause social collapse and severe damages to cultural assets.

Despite having successfully identified the potential risks, Samarco failed in taking concrete steps to prevent, mitigate or remedy the impacts. On the contrary, the company had been decreasing its spending on the safety of the Fundão dam since 2012. The dam also lacked an emergency communication system to alert and to give evacuation instructions to the workers and surrounding communities in case of collapse. Finally, the impact assessment only became public after the disaster, meaning that Samarco also failed to previously communicate such risks to the stakeholders.

A well developed human rights due diligence process could have avoided most of the adverse human rights impacts that the affected communities have been experiencing. Since the disaster, corporate and government actors have also been failing to provide the affected communities with effective remedies, violating the communities' rights to an effective remedy, to housing, to health, to water, to access information, to develop ways and projects of life, as well as indigenous and human rights defenders rights.

d. Sonora River (México)

On 8th August 2014, 40 millions of liters of heavy metals were spilled from a mine owned by Buenavista del Cobre (a subsidiary of Grupo México) into the Sonora and Bácanuchi rivers, in

Mexico. The disaster affected over 200 thousand people living alongside the Sonora River, who lost livestocks, crops, and do not have alternative sources of water supply. The affected communities were deprived from access to safe drinking water and started to suffer from health problems due to the exposure to toxic heavy metals.

The Ministry of Environment and Natural Resources and the office of the Federal Attorney for Environmental Protection found several irregularities in the mining company's activities. At the time of the disaster, the mine was operating without fully complying with environmental regulations, including without presenting its plan for a responsible management of hazardous waste. After the disaster, the company started to implement measures both to clean the river and to remedy the rights holders, including the implementation of a fund to be administered by federal authorities.

There was no meaningful consultation with the affected communities, who claim that such measures are insufficient, were not clearly designed, and have been only partially implemented; all of that being done opaquely. After over three years, victims are still awaiting justice, integral remediation and guarantees of non repetition, while the mine continues to operate and has been granted new permits to further expand. Proper due diligence wasn't conducted prior to the disaster, and hasn't been conducted in the incomplete and opaque remediation process.

e. Waterway Amazon Project (Peru)

In recent years, the country has been promoting a series of infrastructure projects in the Peruvian Amazon, overlaying large highway projects, waterways and transmission lines in socially and environmentally vulnerable territories. In this sense, one of the projects, promoted by the current government, is the Amazon Waterway. This project began with a trial before the violation of the right to prior consultation, which had to be demanded by the indigenous people through a judicial process that obliges the Ministry of Transport and Communications to carry out a process of prior consultation on the same terms of reference for the development of the detailed environmental impact assessment.

Subsequently, the prior consultation process will be carried out, and it will become a negative reaction that will affect the aquatic fauna and spawning areas of the fish, which in turn would affect the main source of food and income of the communities. . Likewise, it could cause an affectation to the indigenous worldview of the Kukama Kukamiria and Shipibo Conibo peoples and their sacred places in different parts of the rivers that are guardians of their past and identity.

As a result of this consultation process, an Act of prior consultation was signed, which according to article 15 of the Law of Prior Consultation, Law No. 29785, is mandatory. In said Act a series of environmental and social agreements were identified, and above all it has been requested that the mijano, which is the main food of the diet of the members of the indigenous peoples of the Amazonian river basins, should not be impacted. guarantees food safety. Likewise, and among other agreements, it was agreed that the multidisciplinary technical team in charge of preparing the Environmental Impact Study (EIA-d) will be made up of at least 3 indigenous scholars.

However, the Consultation Act was not complied with, since in the proposed Work Plan for the preparation of the Environmental Impact Study, the Environmental Study Area and the Direct

Social Study Area are reduced without technical justification and does not detail the methodology or the necessary resources for the identification and evaluation of environmental liabilities. Likewise, the proposal for the evaluation of the Surface Water Quality is weak and there is inconsistency in the use of categories for environmental quality standards for water. Finally, the Citizen Participation Plan proposal did not include all the communities that participated in the prior consultation process; thus, only 29 of the 424 are included

f. Gas Exploitation in Bajo Urubamba (Peru)

The Camisea project, located in the lower Urubamba area, began in 2004. It involves the extraction, transportation (by pipelines), export and distribution of natural gas from the Camisea field. In its first phase, it includes the development of gas fields in Block 88, and the construction of the fractioning plant (under the responsibility of Pluspetrol Peru Corporation). The second phase involves the transportation of dry gas to the Humay area for consumption in Lima and transportation of the condensates that reach Lobería beach in Paracas (this is under the responsibility of the Transportadora de Gas del Perú - TGP). Likewise, the lower Urubamba also houses the South Peruvian Gas Pipeline and Block 58, the latter under the responsibility of the National Petroleum Corporation of China (CNPC), which has confirmed gas reserves for a volume of 3.9 trillion cubic feet.

With the need to obtain more gas, it is worrisome that 15 years after the start of the exploitation of hydrocarbons in Camisea, there are no studies on soil and water quality in the area. In the same way, even with the royalties generated by the exploitation of gas, the malnutrition rate in children under 11 years has increased in the Camisea area, and deaths of newborns (under 28 days) recorded for the period 2004 - 2013 equals 21% of total deaths.

Currently, at the beginning of February 2018, there was a spill of liquid natural gas in the Kemariato stream, a tributary of the Urubamba River, in the area of influence of this project, product of the deterioration of the pipeline that is managed by the company Transportadora de Gas of Peru - TGP and operated by the Operating Company of Gas del Amazonas (Coga). As a consequence, the environment was affected, but above all, the life and integrity of the surrounding native communities was affected.

Regarding life and integrity, the spill affected 22 communities and 7 native settlements. The Health Network of the Convention assisted 27 affected people, who suffered from dizziness, nausea and vomiting due to exposure to gases. And regarding the environment, the Community Environmental Monitoring Program - PMAC Alto Urubamba, program of the Machiguenga Council of the Urubamba River - COMARU, a regional representative organization of said communities, indicated that the bodies of water of the Kemariato stream were contaminated, what could be seen dead animals and fish, as well as hydrocarbon spots[50].

Given the seriousness of the situation, and just as due diligence demands, an immediate action of the company was required, however this was not the case. The contingency plan was not activated nor was there timely communication from the company, the indigenous people learned about the "pongueros" that were passing through the area. Subsequently, and late, the company

[50] COMARU Pronouncement: New spill of natural gas liquid in the Lower Urubamba. We demand a comprehensive evaluation of TGP pipeline engineering.

placed four barriers in the Kemariato creek to mitigate the leakage of more hydrocarbon into the Urubamba River.

Moreover, the desire to extract gas is encouraging the Peruvian Government to promote more investments in the Bajo Urubamba basin, for which it is weakening the legal framework of the Territorial Reserves for indigenous people in voluntary isolation and initial contact. Currently, there is a process of re-categorization of the Kugapakori, Nahua, Nanti and others Territorial Reserve (RTKNN), from territorial reserve to indigenous reserve, which would generate greater pressure on the isolated indigenous population that inhabit this Reserve, weakening its protection. The Master Plans of the Protected Natural Areas have shown substantial changes, for example, reducing threats as Hydrocarbons.

These representative indigenous peoples and organizations have their rights restricted due to the lack of obligatory due diligence policies. That is why it is important and urgent that the Peruvian Government implements due diligence policies, especially when through the approval of the National Human Rights Plan 2018-2021 the State is committed to promoting the implementation of the Guiding Principles of the Organization of the United Nations on Business and Human Rights through the elaboration of a National Plan of Action in Business and Human Rights. However, in the elaboration it does not foresee the participation of the indigenous peoples and their representative organizations.

In addition, the fulfillment of human rights by companies is a duty and is not voluntary, therefore the National Plan of Action that is drawn up must be binding and incorporate mechanisms of effective participation of indigenous peoples and other stakeholders

g. Osorno Hydroelectric Project (Chile)

The Osorno Hydroelectric Project, owned by Hidroeléctrica Pilmaiquen, since 2015 controlled by the Norwegian state company Stafkraf, is located on the Pilmaiquén river in Southern Chile. If constructed, its dam and reservoir will flood 302.38 hectares, including the Ngen Mapu Kintuante, part of an important religious ceremonial complex of the Mapuche-Williche people, and regularly attended by communities of an extensive territory.

After an irregular environmental evaluation procedure (which included pressures from the then project holder to avoid a consultation process), the project was authorized in 2009, two months before ILO Convention 169 entered into force in Chile. The environmental license recognized the existence of the ceremonial complex and conditioned the project to a participatory process with three indigenous communities, but delegated this obligation to the company. The company adopted practices that deteriorated trust and the social fabric in the area, including strategies to divide the communities, individual negotiations, and corruption of leaders and authorities. Between 2013 and 2014 community leaders were prosecuted and detained, some of them subject to precautionary measures such as imprisonment or house arrest. In their absence, the company held meetings with the communities identified in the environmental permit. Still, the company has not yet managed to comply with the participation requirement established in the environmental license, but the evaluating Environmental Authority has continued to validate the process nonetheless.

h. La Coipa Mine (Chile)

La Coipa mine, owned by the Canadian company Kinross Gold Corporation, consists of an open-pit mining project located in the Atacama Region in the north of Chile, within the territory of communities of Colla Indigenous Peoples. The average extraction of the project is 50,000 tons per day, producing 180,000 ounces of gold per year.

In 2013, La Coipa mining operation was temporarily paralyzed due the depletion of its economically exploitable mining resources. In 2016, after the completion of exploration campaigns in a new deposit, another operational project was authorized, which allowed for the operations' continuity. The prospective programs, as well as the operational project, were environmentally assessed under the modality of summary assessment, meaning that the the Colla communities who use the territory were not consulted. These communities have suffered the confinement of the summer pastureland in their routes of nomadic pastoralism, traditional activity which depends on the preservation of meadows and Andean highland wetlands.

Kinross Gold Corporation has consistently denied the existence of Colla communities in the project's area of influence and has ignored the indigenous quality of the territory where it is located on the basis that a legal title recognizing such condition does not exist. This has been validated by the public agencies which issue comments and observations during the environmental assessment process, which is complemented by the information presented by the project holder. The impacts of gold mining on the territory of the Colla communities, their activities of nomadic pastoralism and water resources have never been assessed, even though the project is located upstream of the meadows and Andean highland wetlands used by the communities in their herding.

i. Case of the Kogui, Arhuaco, Kankuamo and Wiwa indigenous peoples of the Sierra Nevada of Santa Marta (SNSM) (Colombia)

According to the official data provided by the Ministry of Mines and Energy of Colombia, as of December 2017, there are 130 titles of mining concessions granted within the ancestral territory of the indigenous peoples of the SNSM, which is delimited by the protection area "Black Line", which cover a total concession area of 133 thousand hectares. Additionally, there are 244 concession requests in process.

These mining titles present registration records between 1990 and 2017, most of them being executed, without prior consultation with indigenous communities.

The omission of prior consultation and the violation of rights to the territory and the ethnic and cultural integrity of the SNSM peoples, in the development of mining projects or associated to them, has led indigenous peoples to institute legal actions through the figure of the "tutela action" as a mechanism to demand the protection of fundamental rights, which have led to judicial decisions that have made it necessary to carry out prior consultations when the projects are already in execution. These cases are:

1) The construction project of the Brisas multipurpose port in the jurisdiction of the corregimiento of Mingueo, Municipality of Dibulla, department of La Guajira. This

project was denounced by the traditional indigenous authorities of the 4 villages of the SNSM, on July 2, 2008, by means of a tutela action against the Ministry of the Interior and Justice, the Ministry of Environment, Housing and Territorial Development and the Empresa Port. Brisa SA, according to which the right to free, prior and informed consultation of the Kogui, Arhuaco, Kankuamo and Wiwa peoples of the SNSM was requested, since it is a manifestation of the right to participate in the decisions that affect them; to ethnic, social, cultural and religious diversity; to autonomy and due process, which were considered violated with the processing and issuance of Resolution 1298 of June 30, 2006. Through this resolution, the Ministry of Environment, Housing and Territorial Development granted environmental license to the company Brisa SA for the construction of a port in an area that is part of the ancestral territory of the indigenous communities of the SNSM. The case is finally resolved at the instance of the Constitutional Court by means of Sentence t-547 of July 1, 2010, deciding to grant the amparo requested, suspend the works that are advanced in execution of the Resolution, and the simultaneous realization of a consultation process oriented to establish the impacts that the execution of the project can generate on the indigenous communities of the SNSM, as well as the necessary measures to prevent, mitigate or avoid them.

2) The concession contract No. 0167-20 of December 29, 2004, with mining title No. HFXF-0, developed at first by Aggregates of Cesar EU, later by Pavimentos y Construcciones el Dorado LTDA, and finally by Pavimentos del Dorado SAS, for the exploitation of a deposit of construction materials, in the jurisdiction of the municipality of Valledupar, department of Cesar. The case was the subject of a lawsuit, under the figure of "tutela action" established by the Governor Council of the Arhuaco indigenous people, considering that the aforementioned project is located within the "Black Line" and violates the rights to prior consultation and ethnic and cultural integrity, among other rights. The aforementioned tutela action was admitted on November 15, 2013 and resolved by the Constitutional Court, in the instance of revision, by means of Sentence T-849 of November twelve (12) of two thousand fourteen (2014), deciding to grant the fundamental rights to self-determination, subsistence, ethnic diversity and prior consultation of differentiated ethnic communities, objects of special constitutional protection, that inhabit the sacred territory of the Sierra Nevada de Santa Marta and LEAVE WITHOUT VALUE AND EFFECT the Resolution 1646 of thirteen (13) December 2010, through which CORPOCESAR, granted Aggregates of Cesar EU, a global environmental license. It also warns the Ministry of the Interior, Corpocesar and those interested in projects of exploitation of resources, located within the Black Line that the procedure of prior consultation must be exhausted, not being enough the certification of the non-presence of indigenous people. the Ministry of the Interior for the processing of said projects.

As can be seen in the two previous examples, a claim through a guardianship action takes on average a year and a half (the first took two years - July 2, 2008 to July 1, 2010 - and the second, a year-November 15, 2013 to November 12, 2014-) from the admission in the first instance, until the promulgation of the judgment of revision of the Constitutional Court.

Although in the judicial decisions of the honorable Constitutional Court, the indigenous peoples have found, in the resolution of concrete cases, greater protection for our rights, this is not the line of reasoning with which the government usually comes; in fact, the Court has issued orders of compliance for the government, in the face of the failure of the State to guarantee the effective enjoyment of fundamental rights to indigenous peoples.

On the other hand, it is to be considered that the consultation processes have been extremely debilitating and unsatisfactory. Weaknesses due to the lack of previous studies, deep and without biases, that give an account of the real impacts that the projects entail, and the resistance to admit the damages inflicted to the native cultures observed in the light of the reasoning of the spiritual guides of the communities; and unsatisfactory because they finally resemble more a procedural formality than a real mechanism for defending the rights of indigenous peoples. In this regard, it is worth noting that both those interested in the projects and government officials point out that the purpose is to reach agreements for the execution of the project, that there is no veto, and that ultimately if an agreement is not reached , the government will determine the measures that the executor of the project must implement to minimize the damages or losses. Obviously, this position obeys to the way in which the government has regulated the prior consultation.

Mining projects, in particular, represent a greater threat, because of the predominant place and the encouragement that the government has granted them. In effect, the mining code (Law 685 of 2001) issued by the Congress of the Republic in line with the mining development policies of the government, gives the mining industry the character of public utility and social interest, allowing it to overcome it. other types of interests. Let's see what is said in article 13 of the mentioned norm:

> "In development of Article 58 of the Political Constitution, the mining industry in all its branches and phases shall be declared of public utility and social interest. Therefore, in their favor, at the request of an interested party and by the procedures established in this Code, the expropriations of the ownership of the real estate and other rights constituted thereon, which are necessary for its exercise and efficient development, may be decreed. The expropriation enshrined in this article, in no case proceed on the goods acquired, built or intended by the beneficiaries of a mining title, for exploration or exploitation or for the exercise of their corresponding servitudes. (Underlined out of text)

In summary, it is concluded that the ordinary ways and procedures for the protection of the human rights of these peoples are not effective because (1) the enormous amount of mining projects located in the ancestral territory of the indigenous peoples of the SNSM that would have to be consulted, (2) the extense and ineffective prior consultation processes to guarantee the rights of the indigenous peoples, and (3) the preponderance that has been given to the mining industry in Colombia. Also, the mechanism of judicial demand against such amount of mining projects is very productive, especially when it has been observed that in the first instance it is rarely found in favor of the indigenous plaintiffs, and it is generally in review decisions of the Constitutional Court where they are seen protected their rights.

j. Case of the community of San Albino - Nueva Segobia (Nicaragua).

The 39% of the territory of Nueva Segovia is concessioned for metallic mining, the concessions are concentrated mainly in the municipalities of Murra, Quilali, Wiwili of Nueva Segovia, Santa María, Ocotal, El Jícaro and Jalapa. Of these, the areas with the most concession are Murra with 39,951.49 ha, Quilali 25,842.40 ha and Wiwili de Nueva Segovia 24,078.53 ha.

The San Albino project is located in the community of San Albino, Municipality of El Jícaro in the department of Nueva Segovia, the project is adjacent to the Jobo community and has the Jícaro river as a tributary of the Coco River.

Within the project there is a mining lot which belongs to the mining company Nicoz Resources S.A. which is a subsidiary of the Golden Reight company of Canadian capital, likewise in the area there are two more lots that belong to the British capital company Cóndor S.A. the exploitation area will have a radius of 270 meters which would directly affect a small slope that is in the upper part of the river.

The San Albino Gold Deposit is located near the southwestern end of a 20 km long mineralization line defined by the Golden Reign as the Golden Crown. The deposit consists of a series of hosted surface dip sulphide veins. by graphite clay shale. The San Albino resource model consists of three high-grade vein systems, the San Albino, Naranjo and Arras veins, over 850 meters wide, with a minimum area of 925 meters and a minimum width of one meter. and an average true width of 2.6 meters. Only drilling tests have been carried out with only 0.6 square kilometers of the 2-square-kilometer zone of the San Albino mine, within the total of 138 square kilometers of the Company's land. All the mineralized zones remain open in depth and throughout the strike in both directions.

Given the open-pit mining concession to the Vancouver-based Canadian company Golden Reign Resources Ltd for the exploration and exploitation in the San Albino region of the Jicaro municipality of Nueva Segovia, the “Movimiento San Antonio de San Albino”, the “Movimiento Llegó la Hora de la Acción de Pueblo” and the “Movimiento de Mujeres Segovianas”, and in particular leaders of this community, were present on Friday, August 25, 2017, the development of "Public Hearing" convened by the subsidiary Nicoz Resources SA with the objective of presenting the Environmental Impact Studies, but their entry was prevented by the security guards in the premises of the House of Culture of the Municipality of the aforementioned municipality. Preventing access to information and raising the point of view of the most affected.

The impediment to the participation of these citizens violates the legal framework established both in the Constitution of the Republic and in several laws related to citizen participation and environmental rights of Nicaraguan citizenship.

4. Conclusion and recommendations

We ask the Special Rapporteur on ESCE Rights to incorporate the information documented during this hearing to its report on Business and Human Rights. In particular, we recommend that the report refer to specific cases in which weak regulatory frameworks and/or policy failures have resulted in non-compliance of corporations with their due diligence duties, leading to serious human rights violations.

In light of the information above, we also ask the Commission to recommend States:

1. Ensure companies' compliance with international norms and standards on human rights due diligence, especially in large-scale projects that generate grave socio-environmental impacts.

2. 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.

3. Adopt normative frameworks and public policies that are consistent with the state obligation to protect human rights and to prevent violations in the context of private activities, in accordance with the guidelines established by the IASHR.

4. Comply with norms on the right of access to information, participation and consultation, particularly in relation to state decisions related to natural resources.

5. Implement mechanisms of transparency and participation in processes of assessment, control and environmental monitoring.

6. Ensure mechanisms are in place to guarantee effective and intercultural participation, as well as transparency and access to information, in the design, preparation, implementation and development of policies, plans and programs on business and human rights.

7. Take steps to ensure impact assessments are community-led, as well as to institutionalize programs of indigenous environmental monitoring.

8. Develop norms, policies and institutions to protect environmental defenders and community members who oppose megaprojects in their territories from intimidation, harassment and criminalization by companies.

9. Ratify the regional agreement on access to information, citizen participation, and environmental justice.

10. Establish norms requiring companies registered or operating in their jurisdiction to engage in human rights due diligence and disclose information on their supply chains.

11. Refrain from adopting legislations that limit the scope of due diligence exempting companies from assessing and addressing human rights risks throughout their entire supply chain.

12. Refrain from adopting legislations that undermine rights holders' and affected groups' access to justice and their right to an effective 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.