







OEA/Ser.L/V/II  
CIDH/REDESCA/INF.1/19  
November 1st 2019  
Original: Español

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

# **Business and Human Rights: Inter-American Standards**

**Special Rapporteurship on Economic, Social, Cultural and  
Environmental Rights  
REDESCA**

**Soledad García Muñoz**

Special Rapporteur on Economic, Social, Cultural and Environmental Rights

2019  
cidh.org

### **OAS Cataloging-in-Publication Data**

Inter-American Commission on Human Rights. Special Rapporteurship on Economic, Social, Cultural and Environmental Rights.

Thematic Report on Business and Human Rights: Inter American standards. Approved by the Inter-American Commission on Human Rights, on November 1st, 2019 / [Elaborated by the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights of the Inter-American Commission on Human Rights].

p. ; cm. (OAS. Official Documents ; OEA/Ser.L/V/II)

ISBN 978-0-8270-6949-7

1. Business and Human Rights. 2. Americas I. García Muñoz, Soledad. II. Title. III. Series.

OEA/Ser.L/V/II

CIDH/REDESCA/INF.1/19

Report prepared thanks to the financial support of the Spanish Fund for the OAS/AECID. The opinions expressed in this report belong exclusively to the Inter-American Commission on Human Rights (IACHR) and its Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA), and do not reflect the position of the Spanish Fund for the OAS/AECID.



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The IACHR wishes to acknowledge the leadership of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, Soledad García Muñoz, in the process of preparing this report. In addition, the IACHR and the Special Rapporteur recognize and appreciate the outstanding work of the human rights lawyer, Luis Carlos Buob Concha, in support of this process, as well as the work of researching and drafting the report. The Special Rapporteur also places on record her gratitude for the support received from the IACHR, the REDESCA team and the Executive Secretariat, as well as from all the individuals, institutions and donors who have contributed to its realization..



Approved by the Inter-American Commission on Human Rights on November 1, 2019.





*"Let's Build Societies Capable of Coexisting in a Just, Dignified, and Life-for-Life Manner"*

Berta Cáceres

Indigenous woman who defends human rights and the environment that benefits from IACHR precautionary measures in the context of an energy business project. Killed on 3 March 2016.



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**CHAPTER 1**  
**INTRODUCTION**



# INTRODUCTION

## A. *Background*

1. The Inter-American Commission on Human Rights (Commission or IACHR) and its Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA, by its initials in Spanish) highlight the validity and particular relevance of dialogues and initiatives carried out in diverse spaces at the international and local level in the field known as “business and human rights.” Keeping in mind these developments and those of the Inter-American System, they find it essential to establish the meaning of the States’ international human rights obligations, analyzed from the context of business activities in light of the inter-American experience.
2. They also highlight the positive role that businesses and commerce can represent as generators of wealth, jobs, and greater well-being in societies, as well as drivers of the economy of the States called to contribute to the well-being of their populations and the reduction of poverty. This means that, regardless of their size, sector of activity, operational context, or structure,<sup>1</sup> companies certainly play a relevant role in political, economic, and social life of the peoples of the American continent. Therefore, the more sensitive and committed their actions are for human rights, the better they will contribute to human rights’ effectiveness. In this regard, the Commission has emphatically stated that there cannot be proper development without full respect for human rights. This imposes limitations and duties of mandatory compliance upon state authorities and can have direct legal consequences for non-state actors, such as businesses. As the IACHR has explained, “[t]he rules of the Inter-American human rights system neither prevent nor discourage development, but mandate that it takes place under conditions where the rights of individuals are respected and guaranteed.”<sup>2</sup> Therefore, development must be managed in a sustainable, fair, and equal manner with a view toward economic growth with equality and the consolidation of democracy, in a way that helps create

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<sup>1</sup> In relation with these characteristics when this report refers to businesses’ transnational operations and refers to the place the business enterprise is domiciled, it does so in a broad sense encompassing situations where, for example, it is registered, has its headquarters or central administration, or develops substantial commercial activities.

<sup>2</sup> IACHR. Indigenous Peoples, Communities of African Descent and Extractive Industries: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 56.

circumstances that allow the full enjoyment of all human rights as the purposes foreseen in the main sources of international human rights law.<sup>3</sup>

3. Thus, the IACHR and its REDESCA also recognize that, in accordance with their international obligations, the States must ensure that business activities are not carried out at the expense of individuals' or groups of individuals' fundamental rights and freedoms, including indigenous and tribal peoples, peasant communities or Afro-descendant populations as cohesive collectives, and with particular attention in the case of these collectives to free, prior, and informed consultation and consent in accordance with inter-American standards on the subject. Although all companies, without exception, have the responsibility to respect human rights, it is also important that the States keep in mind certain key variables when complying with the institutional design applicable to this field depending on the specific situation in question, such as: the human rights impact involved, the at-risk populations affected, the size of the business, the economic sector, the type of activity, the type of investment, whether it is a state company, etc. Such institutional design should be considered a key factor for respecting and ensuring human rights, not as a bureaucratic burden for the business or as obstacles to economic growth. The IACHR and its REDESCA emphasize that respecting and ensuring human rights in the context of business activities, far from being counterproductive, foster and strengthen responsible business practices, such as the increasing businesses' profitability and decreasing business' risk of suffering claims, damage to public image, or loss of opportunities. At any rate, for the IACHR and its REDESCA, economic benefits, whether individual or general, do not justify human rights violations.
4. Likewise, it is clear that business activities have increased due to greater globalization of our societies, and that business investment has the ability to create a great influence on economic and social development in the world. Thus, some businesses that initially began as national projects have been able to expand or establish branches in various parts of the world, have alliances with States or other private actors, and have diverse commercial relationships and supply chains at the transnational level. This also has generated greater availability of goods and services, employment opportunities, public revenue through paying taxes, and transference of new technologies and knowledge, which, although they may entail benefits and favorable results for the enjoyment of human rights, also pose complex challenges for human rights observance and enforcement.
5. In many cases, power imbalances between businesses and individuals or communities, including workers, as well as between businesses and some States especially States with weaker institutions, may contribute to reinforcing existing inequalities in societies, which by not considering

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<sup>3</sup> The Universal Declaration on Human Rights, for example, recognizes in its preamble the intrinsic dignity of persons as the equality and inalienability of the rights of all the members of the human family. The American Declaration on the Rights and Duties of Man (American Declaration), for its part, also refers in its preamble that all people are born free and equal in dignity and rights.



respect for human rights a basic obligation, creates the risk of sacrificing the weakest or most vulnerable sectors. In these contexts, the Commission and its REDESCA observe that these problems are accentuated when there are not adequate state mechanisms to prevent human rights violations, mitigate damages, provide integral reparations to victims, and, when applicable, punish the state authorities or businesses that are involved.

6. Through their different mechanisms, the Commission and its REDESCA have received constant information about noncompliance with States' human rights obligations in light of business activities and operations of distinct kinds and industries or productive sectors; whether through more direct intervention or some form of complicity or omission of their international duties; with effects at the local or transnational level; within the framework of current situations or relating to armed conflicts and repressive contexts of the past; and about all rights and populations in situations of vulnerability, such as the right to life, to property, to free, prior and informed consultation and consent, labor rights, environment, health, personal integrity, food, drinking water and sanitation, rights to freedom of expression, association, privacy and access to information, among others, affecting trade unions, workers, human rights defenders, indigenous peoples, peasant communities, people of African descent, migrants, refugees, displaced individuals, women, LGBTI communities, elders, those with disabilities, or children and adolescents.
7. Notwithstanding the validity and relevance of diverse discussions held regarding business and human rights,<sup>4</sup> the REDESCA observes that this topic has been the focus of particular attention for many years. One of the main legal precedents of formal and systematic work on this topic happened in 1994, when the then-Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which formed part of what was then the United Nations (UN) Commission on Human Rights, asked the UN Secretary-General, Mr. Boutros Boutros-Ghali, to study the relationship between transnational companies and human rights.<sup>5</sup> The study was presented in 1995.<sup>6</sup> Three years later, the same Sub-Commission decided to

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<sup>4</sup> See, inter alia, Cantú Rivera, Humberto (ed.). [Derechos humanos y empresas: reflexiones desde América Latina](#). [*Human Rights and Business: Reflections from Latin America*] Instituto Interamericano de Derechos Humanos, (2017); Rodríguez Garabito, Cesar (ed.). [Empresas y derechos humanos en el siglo XXI](#). [*Business and Human Rights in the 21st Century*] (only available in Spanish), Centro de Estudios de Derecho, Justicia y Sociedad - Dejusticia (2018)

<sup>5</sup> Sub-Commission on Prevention of Discrimination and Protection of Minority Rights. Resolution 1994/37, Measures towards the full realization of economic, social and cultural rights. UN Doc. E/CN.4/SUB.2/RES/1994/37, 26 August 1994, para. 8.g. For its part, the UN General Assembly, through Resolution 2542 had already declared in 1969 that "Social progress and development shall further aim at achieving [...] [t]he elimination of all forms of foreign economic exploitation, particularly that practised by international monopolies." Cf. General Assembly. Resolution No. 2542, Declaration on Social Progress and Development, 11 December 1969, Art. 12.c. Later, between the 1960s and 1980s, in the heart of the same organization a Commission and a Center on Transnational Corporations were established for the purpose of studying international business activities and preparing a Code of Conduct for corporations. However, these efforts were abandoned and the bodies were dissolved.

<sup>6</sup> UN. The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations: Background document by the Secretary-General. UN Doc. E/CN.4/Sub.2/1995/11, 24 July 1995.

form a working group made up of five experts assigned to studying and deepening the topic,<sup>7</sup> which after the analysis of various international standards, existing laws and codes, and an extensive consultation process, took a significant step forward by drafting the “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,”<sup>8</sup> which were approved by the Sub-Commission on the Promotion and Protection of Human Rights through Resolution 2003/16.<sup>9</sup> Although they were not supported at the time by the then-Commission on Human Rights, the Norms still laid the foundations for the development and progressive debate of the topic in international human rights law. Parallel to this, it is also worth highlighting that in 1999, the UN Secretary-General at that time, Mr. Kofi Annan, promoted the “Global Compact” initiative as a way to articulate and foster voluntary and responsible action by enterprises in the face of the challenges that come with globalization, sustainable development, and the enjoyment of human rights.<sup>10</sup>

8. Later, in 2005, the Commission on Human Rights asked the UN Secretary-General to name a Special Representative for the issue of human rights and transnational corporations and other business enterprises,<sup>11</sup> a mandate entrusted to Professor John Ruggie, who upon finishing his work created the Guiding Principles on Business and Human Rights; put into practice in the UN Framework to “Protect, Respect and Remedy” (Guiding Principles)<sup>12</sup>, supported by the Human Rights Council through Resolution 17/4 of 16 June 2011. Furthermore, they created a Working Group on the issue of human rights and transnational businesses and other business enterprises (Working Group on business and human rights) and an annual Forum about the subject under its direction.<sup>13</sup> In this regard, it is important to mention that among the powers of this special mechanism is carrying out country visits in order to dialogue with key actors and issue specific recommendations on the context of business and human rights that it evaluates. In this context, it is noteworthy that so far 6 of the 13 country

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<sup>7</sup> Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Resolution 1998/8, The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations. UN Doc. E/CN.4/SUB.2/RES/1998/8, 20 August 1998.

<sup>8</sup> Sub-Commission on the Promotion and Protection of Human Rights. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

<sup>9</sup> Sub-Commission on the Promotion and Protection of Human Rights. Resolution No. 2003/16. Responsibilities of transnational corporations and other business enterprises with regard to human rights. UN Doc. E/CN.4/Sub.2/2003/L.11 at 52, 14 August 2003.

<sup>10</sup> UN Press Release. [Secretary General proposes global compact on human rights, labour, environment, in address to World Economic Forum in Davos](#), February 1, 1999.

<sup>11</sup> Commission on Human Rights. Resolution No. 2005/69: Human rights and transnational corporations and other business enterprises. UN Doc. E/CN.4/2005/L.10/Add.17, 20 April 2005.

<sup>12</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011.

<sup>13</sup> Human Rights Council. Resolution No. 17/4: Human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/RES/17/4, 6 July 2011.

visits completed by the Working Group have been in our hemisphere: the United States,<sup>14</sup> Brazil,<sup>15</sup> Mexico,<sup>16</sup> Canada,<sup>17</sup> Peru,<sup>18</sup> and Honduras.<sup>19</sup>

9. It is widely known that the Guiding Principles are divided into three fundamental pillars: i) The States' duty to protect human rights; ii) Business' responsibility to respect human rights; and iii) Access to effective reparation mechanisms. The REDESCA recalls that they "should be understood as a coherent whole,"<sup>20</sup> which are interconnected and interact with each other, producing constant synergies. For example, the measures adopted by States under Pillar I should generate effects on the behavior of businesses within Pillar II, and they in turn are related to access to effective reparations mechanisms in accordance with Pillar III. On the other hand, business behavior that is respectful of human rights can also have a strengthening influence on States' actions to guarantee these rights' protection, and favor greater access to reparations for violations of these rights.
10. The Commission and its REDESCA recognize that the Guiding Principles have been consolidated as a referential minimum floor for global governance on the matter, and are an authoritative source for fostering an environment that prevents and remedies human rights violations within the framework of business activities or operations. Without prejudice to this, and to the limitations and questions that arise from them, both conceptually and in their implementation, the REDESCA emphasizes that, as the Special Representative indicated, the Guiding Principles did not claim to be the last word but rather "the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."<sup>21</sup>
11. Instead of considering them as isolated concepts, the IACHR and its REDESCA understand the Guiding Principles as a dynamic and evolving conceptual foundation, which permeates the aspects of discourse and action in the field of business and human rights in coexistence with other

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<sup>14</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises. Mission to the United States of America. UN Doc. A/HRC/26/25/Add.4, 6 May 2014.

<sup>15</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises. Mission to Brazil. UN Doc. A/HRC/32/45/Add.1, 12 May 2016.

<sup>16</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises. Mission to Mexico. UN Doc. A/HRC/35/32/Add.2, 27 April 2017.

<sup>17</sup> Working Group on the issue of human rights and transnational corporations and other business enterprise. Mission to Canada. UN Doc. A/HRC/38/48/Add.1, 23 April 2018.

<sup>18</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises. Mission to Peru. UN Doc. A/HRC/38/48/Add.2, 9 May 2018.

<sup>19</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises. [Statement at the end of visit to Honduras by the United Nations](#), August 28, 2019.

<sup>20</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011. General principles.

<sup>21</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, para. 13.

binding legal standards. Thus, they should be used as a starting point and complement to the analysis in this report, instead of considering them closed guidelines that foreclose opening spaces of development and convergence toward cumulative progress that takes into account the real impact on the lives of individuals and communities in these contexts, particularly taking into account inter-American norms, experience, and jurisprudence.

12. Within this framework, the Commission and its REDESCA also find it important to mention the initiative led by the States of Ecuador and South Africa, with the support of diverse civil society organizations, for the creation of a binding instrument on the subject. In this regard, they recall the “Statement on behalf of a Group of Countries at the 24th Sessions of the Human Rights Council,” which, although recognizing the progress that the Guiding Principles represent, also highlights the increase in cases of human rights infringements caused by transnational business activity, and “recalls the need to advance toward a legally binding framework to regulate the work of transnational corporations and to provide protection, justice and adequate reparations to the victims of human rights abuses, related to the activities of certain transnational corporations and other business enterprises.”<sup>22</sup>
13. Based on this initiative, on July 14, 2014 the Human Rights Council approved Resolution 26/9, in which it “decides to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>23</sup> It is worth highlighting that in October 2018, during the Council’s fourth working session, discussion and negotiation of the first proposal and draft of the treaty<sup>24</sup> and its additional protocol<sup>25</sup> began. In July 2019, a revised draft of the binding instrument was published.<sup>26</sup>
14. On the other hand, in the inter-American framework, the IACHR and its REDESCA also highlight the great interest of the General Assembly of the

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<sup>22</sup> [Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council](#). General Debate – Article 3 “Transnational Corporations and Human Rights,” Geneva, September 2013.

<sup>23</sup> Human Rights Council. Resolution No. 26/9: Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/RES/26/9, 14 July 2014, para. 1.

<sup>24</sup> Intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the activities of Transnational Corporations and other Business Enterprises (2018).

<sup>25</sup> Intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. [Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the activities of Transnational Corporations and other Business Enterprises](#) (2018).

<sup>26</sup> Intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. [Revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises](#) (2019)

Organization of American States (OAS) in continually addressing the debate and development of this issue.<sup>27</sup> Particularly, the IACHR highlights Resolution 2887 of June 14, 2016, which requests for the IACHR to “conduct [...] a study on inter-American standards on business and human rights based on an analysis of conventions, case law, and reports put forth by the inter-American system”; as well as Resolution 2928 of June 5, 2018 in which it requests that the REDESCA of the IACHR give a presentation on the progress of the consultations and work completed related to the creation of the report “Business and Human Rights: Inter-American Standards.” As of the publication of this report, the Special Rapporteur has appeared before the Committee on Juridical and Political Affairs (CJPA) of the OAS on two occasions.<sup>28</sup>

15. In this framework, as part of its 2017/2021 strategic plan,<sup>29</sup> the IACHR decided to include issues concerning the field of business and human rights within the mandate of its recently-created REDESCA, entrusting the Special Rapporteurship to lead the completion of this report; which also fulfills the General Assembly’s 2016 request for the study; as well as representing a first opportunity for the IACHR to deepen and develop its standards on the subject in the hemisphere and to foster understanding of the indivisibility and interdependence of all human rights. Thus, the IACHR takes as its own and fully supports the instant report developed by the REDESCA.
16. It is also worth mentioning, as background work within the OAS, the formulation of the “Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas”<sup>30</sup> and the report on the “Conscious and Effective Regulation of Business in the Area of Human Rights,”<sup>31</sup> approved by the Inter-American Juridical Committee in 2014 and 2017, respectively. In this regard, the first one refers to guidelines on shared responsibility and actions for businesses tending to protect human rights, the environment and the labor rights of workers and the populations where they operate, as well as of consumers. The second proposes to advance the conscious and effective regulation of

<sup>27</sup> See, inter alia: OAS. General Assembly. Resolution 1786, Promotion of Corporate Social Responsibility in the Hemisphere, AG/RES. 1786 (XXXI-O/01), 5 June 2001; OAS. General Assembly. Resolution 2753, Promotion of Corporate Social Responsibility in the Hemisphere, AG/RES. 2753 (XLII-O/12), 4 June 2012; OEA. General Assembly. Resolution 2840, Promotion and Protection of Human Rights in Business, AG/RES. 2840 (XLIV-O/14), 4 June 2014; OAS. General Assembly. Resolution 2887, Promotion and Protection of Human Rights, AG/RES. 2887 (XLVI-O/16), 14 June 2016; OAS. General Assembly. Resolution 2908, Promotion and Protection of Human Rights, AG/RES. 2908 (XLVII-O/17), 21 June 2017; and, OAS. General Assembly. Resolution 2928, Promotion and Protection of Human Rights, AG/RES. 2928 (XLVIII-O/18), 5 June 2018.

<sup>28</sup> OAS. CJPA Extraordinary Session on Promotion and Protection of human rights in the business sector, OEA/Ser.G CP/CAJP-3438/17 rev. 2, February 21, 2018. OAS. CJPA Extraordinary Session, OEA/Ser.G CP/CAJP-3488/18 rev. 1, March 7, 2019.

<sup>29</sup> IACHR. Strategic Plan 2017/2021, OEA/Ser.L/V/II.161 Doc. 27/17, 20 March 2017. Pages 35 and 36.

<sup>30</sup> Inter-American Juridical Committee. Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas. OEA/Ser.Q CJI/doc.449/14 rev.1 corr.1, 24 February 2014.

<sup>31</sup> Inter-American Juridical Committee. Conscious and Effective Regulation of Business in the Area of Human Rights. OEA/Ser.Q CJI/doc.522/17 rev.2, 9 March 2017. In addition, the work prepared by the Department of International Law in the matter, in its capacity as Technical Secretariat of the Inter-American Juridical Committee, can also be consulted. See; Document DDI/doc.03/17.

the businesses, incorporating the different sectors involved and a greater coordination of actions at a universal and regional level. In particular, on the role of the inter-American human rights system (inter-American system) in this area, the Committee stated that: “The inter-American human rights system should work to ensure that corporations respect human rights. To this end, States should duly supervise business activities and impose binding obligations on corporations, since the System has developed very good standards for the protection of these rights, in which prevention and dialogue play an important role.”<sup>32</sup>

17. For its part, the inter-American human rights system has not been unaware of these situations and its organs have repeatedly recognized, for example, that, under certain circumstances and conditions, the State may incur in international responsibility related to acts committed by businesses who have been involved in infringing human rights. As reflected in this report, several of the situations heard in the inter-American system through its different mechanisms have referred to human rights situations that involved businesses or economic actors in which noncompliance with state obligations were verified.
  
18. For example, in the 1997 “Report on the Situation of Human Rights in Ecuador,” after noting the serious impact of oil exploitation activities on the health and the life of a sector of the population, the Commission “exhort[ed] the State to take measures to avoid damages to the people affected due to the behavior of concessionaires and private actors.” The IACHR even had the opportunity in 2015 to analyze various inter-American precedents and develop fundamental standards in this regard through a specific thematic report on the extractive business sector, indigenous peoples and Afro-descendant communities, which represented a first major effort at the inter-American level to prepare a thematic report within this area. The IACHR and its REDESCA believe that it is not a coincidence that this initiative has focused primarily on this type of industry, given the recurrence of complaints and information received in the region in this regard. More recently, they received information and participated in dialogues about this subject with diverse actors in the framework of on-site visits to Honduras<sup>33</sup> and Brazil<sup>34</sup> in August and November 2018, respectively; as well as during the working visit to Costa Rica in October 2018, to monitor the situation of Nicaraguans seeking international protection.<sup>35</sup> For its part, and as will be highlighted later, during the process of preparing this report, the REDESCA has participated in numerous events and instances of discussion on the subject in order to enrich the approach and information needed for its preparation.

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<sup>32</sup> Inter-American Juridical Committee. Conscious and Effective Regulation of Business in the Area of Human Rights. OEA/Ser.Q CJI/doc.522/17 rev.2, 9 March 2017, page 12.

<sup>33</sup> IACHR. Situation of Human Rights in Honduras, OEA/Ser.L/V/II. Doc. 146, 27 August 2019, paras. 7, 69, 70, 108, 126, 135, 141, 142, 174, 175, 200, 201, 206, 269, 306, 367.11 and 367.26.

<sup>34</sup> IACHR. [Preliminary Observations from the IACHR's On-Site Visit to Brazil](#), November 2018.

<sup>35</sup> IACHR. Forced Migration of Nicaraguans in Costa Rica. OAS/Ser.L/V/II. Doc. 150, 8 September 2019, paras. 81-87, 251-255 and 263.

19. Several cases may also be mentioned that were admitted by the IACHR which allege noncompliance with States' obligations for business activities affecting human rights. As an example, the cases of the community of La Oroya in Peru, about allegations of environmental pollution and the right to health that had allegedly been caused by a metallurgical complex initially administrated by a business entity of the Peruvian State and then by a private foreign company,<sup>36</sup> or by reports of violations of numerous rights of an indigenous community due to the activity of a foreign mining company in the same country.<sup>37</sup> Likewise, at the admissibility stage, the IACHR has evaluated facts related to possible environmental and health effects as a result of the activities of 14 chemical industry plants that had exposed residents of the town of Mossville, in the United States, particularly African-American individuals, to disproportionate pollutant loads.<sup>38</sup> Petitions have also been admitted regarding complaints about the human rights impact of companies building housing centers on areas used for toxic waste in Brazil,<sup>39</sup> petitions alleging affectation of the rights to property and to water of the indigenous populations in Chile due to water use by a water bottling company<sup>40</sup> or by alleged violations of indigenous' rights by fishing and mining companies in the same country.<sup>41</sup> The IACHR and its REDESCA also observe that petitions have been admitted related to allegations of affectations to the right to health in the context of health services provided by businesses in Colombia<sup>42</sup> or regarding union rights and labor rights in various countries such as Colombia,<sup>43</sup> Peru,<sup>44</sup> and Costa Rica<sup>45</sup> in which business actors are involved. Regarding Belize, Guatemala, Honduras, Mexico, and Panama, petitions have been admitted regarding complaints of violations of the rights of indigenous peoples due to business activities in

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<sup>36</sup> IACHR. Admissibility Report No. 76/09. Community of La Oroya (Peru), 5 August 2009.

<sup>37</sup> IACHR. Admissibility Report No. 62/14. People of Quishque-Tapayrihua (Peru), 24 July 2014.

<sup>38</sup> IACHR. Admissibility Report No. 43/10. Mosville Environmental Action Now (United States), 17 March 2010.

<sup>39</sup> IACHR. Admissibility Report No. 71/12. Inhabitants of the "Barão de Mauá" Residential Complex (Brazil), 17 July 2012.

<sup>40</sup> IACHR. Admissibility Report No. 29/13. Aymara Indigenous Community of Chusmiza-Usmagama and its members (Chile), 20 March 2013.

<sup>41</sup> IACHR. Admissibility Report No. 36/18. Mapuche Huilliche Community "Pepiukelen" (Chile), 4 May 2018; IACHR. Admissibility Report No. 141/09. Diagueta Agricultural Communities of the Huascoaltinos and their members (Chile), 30 December 2009.

<sup>42</sup> IACHR. Admissibility Report No. 140/17. Fabián Pérez Owen (Colombia), 26 October 2017.

<sup>43</sup> IACHR. Admissibility Report No. 49/17. Workers Dismissed from Ecopetrol (Colombia), 25 May 2017; IACHR. Admissibility Report No. 112/17. Juan Alfonso Lara Zambrano and others (Colombia), 7 September 2017.

<sup>44</sup> IACHR. Admissibility Report No. 4/09. Members of the Single Workers Union of ECASA (Peru), 11 February 2009.

<sup>45</sup> IACHR. Admissibility Report No. 21/06. Association of Fertilizer Workers of Fertilizantes de Centroamérica (Costa Rica), 2 March 2006.

infrastructure,<sup>46</sup> mining,<sup>47</sup> tourism,<sup>48</sup> or hydroelectric power<sup>49</sup>, or more recently for facts related to dangerous activities and workplace safety.<sup>50</sup>

20. Within the mechanism of precautionary measures, the IACHR has also been able to analyze situations of risk for human rights in which business involvement is alleged. For example, there are the precautionary measures in favor of the Community of San Mateo de Huanchor in Peru, issued over 14 years ago, whether the petitioners reported that a mining company carried out its operations in violation of all environmental standards; specifically, they accused the company of harming the population's health, and in particular that of the children, with lead, mercury, and arsenic, highly harmful substances. Given this, the IACHR issued a precautionary measure, ordering that the toxic tailings be removed.<sup>51</sup>
21. More recently, in 2017, precautionary measures were issued to in favor of the Tres Islas native community<sup>52</sup> and the Cuninico and San Pedro communities<sup>53</sup> regarding the same country, who alleged threats to their rights in the context of mining and oil companies' business activities, respectively. The IACHR also decided to issue protective measures for indigenous families in Guatemala who were evicted from an area that would be claimed by a company.<sup>54</sup> In the beginning of 2018, in Honduras, the IACHR issued precautionary measures in favor of the populations consuming from the Mezapa River, who reported that a hydroelectric company had polluted the waters they used, making their consumption of water impossible. In view of this situation, the IACHR ordered the State to adopt measures aimed at mitigating, reducing and eliminating the identified sources of risk; make the necessary and pertinent diagnoses to the residents who were identified and ensure that they had access to potable water.<sup>55</sup> The IACHR also issued precautionary measures in favor of human rights defenders, including environmental rights defenders, at risk in the context of corporate activities, for example, in favor of the members

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<sup>46</sup> IACHR. Admissibility Report No. 48/15. Yaqui People (Mexico), 28 July 2015.

<sup>47</sup> IACHR. Admissibility Report No. 20/14. Maya Sipakepense and Mam Communities of the towns of Sipacapa and San Miguel Ixtahuacán (Guatemala), 3 April 2014.

<sup>48</sup> IACHR. Admissibility Report No. 37/14. San Juan Garifuna Community and its members (Honduras), 5 June 2014.

<sup>49</sup> IACHR. Admissibility Report No. 65/15. Mayan People and community members Cristo Rey, Belluet Tree, San Ignacio, Santa Elena and Santa Familia (Belize), 27 October 2015; IACHR. Admissibility Report No. 75/09. Ngöbe Indigenous Communities and their members in the valley of the Changuinola River (Panama), 5 August 2009.

<sup>50</sup> IACHR. Admissibility Report No. 12/18. 48 Workers Killed in the Explosion at Pasta de Conchos Mine (Mexico), 25 February 2018.

<sup>51</sup> IACHR. Precautionary Measures 2004. Oscar González Anchurayco and members of the San Mateo de Huanchor Community (Peru), para. 49.

<sup>52</sup> IACHR. Resolution 38/17. Precautionary Measures 113/16, Native Community "Tres Islas" of Madre de Dios (Peru), 8 September 2017.

<sup>53</sup> IACHR. Resolution 52/17. Precautionary Measures 52/17, Cuninico Community and others (Peru), 2 December 2017.

<sup>54</sup> IACHR. Resolution 3/18. Precautionary Measures 860/17. Indigenous Families from the Chaab'il Ch'och' Community (Guatemala), 25 January 2018.

<sup>55</sup> IACHR. Resolution 12/18. Precautionary Measures 772/17. Locals who consume water from the Mezapa River (Honduras), 24 February 2018.



of the Community Action Board of the Village of Rubiales in Colombia,<sup>56</sup> of leaders of peasant communities and peasant patrols (*Rondas Campesinas*) of Cajamarca in Peru,<sup>57</sup> of the defender of indigenous territories and the environment Lucila Bettina Cruz in Mexico,<sup>58</sup> or in Honduras regarding of peasant leaders from Bajo Aguán,<sup>59</sup> of human rights defenders from the Nueva Esperanza community and the Regional Board of the Florida Sector,<sup>60</sup> and of the members of the Broad Movement for Dignity and Justice and their families.<sup>61</sup> Also worth highlighting is the precautionary measure issued in favor of the Lenca leader and human rights defender Berta Cáceres in Honduras, about whose murder the IACHR expressed its vehement repudiation in March 2016.<sup>62</sup>

22. It is also worth highlighting the precautionary measures issued on April 23, 2019 by the IACHR in favor of the residents of the Emiliano Zapata *ejido* in Chiapas, Mexico, to protect their rights to life, personal integrity and health due to the alleged pollution related to an open-air dump and a sanitary landfill managed by a private company. In this matter the IACHR request that the State, among other measures, report on the actions taken to mitigate the alleged risk.<sup>63</sup>
23. The Inter-American Court of Human Rights (IA Court or Court), for its part, has also maintained constant jurisprudence in this regard. For example, the Advisory Opinion on the principle of equality and non-discrimination and migrant workers in 2003, requested by the State of Mexico is worth mention. There, the Court held that the States should not allow private employers to violate the rights of migrant workers, nor should the contractual relationship to violate international minimum standards.<sup>64</sup> Also worth emphasizing is the Advisory Opinion on the legal personhood of trade unions, federations, and confederations to appear before the Inter-American System in defense of their own rights, requested by the State of Panama;<sup>65</sup> and more recently, referring to the States' obligations for activities that may cause serious environmental impact, requested by the

<sup>56</sup> IACHR. Resolution 65/2016. Precautionary Measures 382/12. Members of the Community Action Board of the Village of Rubiales (Colombia), 17 December 2016.

<sup>57</sup> IACHR. Resolution 9/2014. Precautionary Measures 452/11. Leaders of Campesino Communities and Campesino Patrols of Cajamarca (Peru), 5 May 2014.

<sup>58</sup> CIDH. Resolución 1/2018. Medidas Cautelares 685/16. Lucila Bettina Cruz and her family (México), 4 de enero de 2018.

<sup>59</sup> IACHR. Resolution 11/2014. Precautionary Measures 50/14. Campesino Leaders of Bajo Aguán (Honduras), 8 May 2014.

<sup>60</sup> IACHR. Resolution 13/2013. Precautionary Measures 193/13. Leaders and Human Rights Defenders from the Nueva Esperanza Community and of the Regional Board of the Florida Sector (Honduras), 24 December 2013.

<sup>61</sup> IACHR. Resolution 12/2013. Precautionary Measure 416/13 18 Members of the Broad Movement for Dignity and Justice and their families (Honduras), 19 December 2013.

<sup>62</sup> IACHR. [IACHR Condemns the Killing of Berta Cáceres in Honduras](#), 4 March 2016. See also: GAIPE (Grupo Asesor Internacional de Personas Expertas). [Dam Violence: The Plan that Killed Berta Cáceres](#), November 2017.

<sup>63</sup> IACHR. Resolution 24/2019. Precautionary Measures No. 1498/18. Marcelino Díaz Sánchez and others (Mexico). 23 April 2019.

<sup>64</sup> I/A Court H.R. Advisory Opinion OC-18/03 of 17 September 2003. Series A No. 18.

<sup>65</sup> I/A Court H.R. Advisory Opinion OC-22/16 of 26 February 2016. Series A No. 22.

State of Colombia,<sup>66</sup> in which the Court reinforced the well-settled case law of the IACHR by holding that the States are obligated to respect and guarantee the human rights of all people under their jurisdiction, even if they are not within their territory, providing the foundation to continue developing the extraterritorial application of human rights norms, which require a particular analysis when businesses or economic actors are involved. Also worth mentioning are the case on the subject of slave labor called “Workers of Fazenda Brasil Verde” regarding Brazil;<sup>67</sup> the case of the Kaliña and Lokono Indigenous Peoples regarding Suriname,<sup>68</sup> related to the impacts of the extractive industry on the indigenous peoples; or the Lagos del Campo case regarding Peru<sup>69</sup>, which involved the lack of guarantees for the freedom of expression and association and labor rights of a leader of the workers at a private business in Peru; or the Muelle Flores case, regarding the effects on the right to social security of an older adult due to noncompliance with domestic judicial decisions in the context of a process of privatization of a state-run company in the same county.<sup>70</sup>

24. These precedents, among others cited throughout this report, allow us to continue laying the foundations and delineating the way to determine and apply inter-American norms and standards in situations related to the achievement and enjoyment of human rights in the context of business activities, from an analysis of the States’ own obligations in this area.

## **B. *Object and Scope***

25. The analysis carried out in this report starts with the States’ international human rights obligations in cases in which businesses are in some way involved with the realization or affectation of said rights. In this sense, it not only systematizes and brings together various holdings about the subject that have happened in the inter-American system, but from a systematic and evolutionary analysis, it seeks to clarify, organize, and develop said state duties and the effects these can have on businesses from the inter-American legal experience.
26. Under this framework, it should be reiterated that businesses can be positive agents for the respect and guarantee of human rights; generate or motivate key changes through their actions and behaviors; set an example

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<sup>66</sup> I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23.

<sup>67</sup> I/A Court H.R. Case of Workers of the Fazenda Brasil Verde v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of 20 October 2016. Series C No. 318.

<sup>68</sup> I/A Court H.R. Case of Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of 25 November 2015. Series C No. 309

<sup>69</sup> I/A Court H.R. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 31 August 2017. Series C No. 340.

<sup>70</sup> I/A Court. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 6 March 2019. Series C No. 375.

to transform experiences of impunity and human rights abuses, as well as to help achieve the Sustainable Development Goals of the 2030 Agenda.<sup>71</sup> In this sense, a public commitment by companies, in good faith, is essential for strengthening the initiatives being carried out, as well as building trust between businesses, authorities, and the population, so that it transcends the traditional vision of corporate social responsibility and moves toward binding parameters aimed at effective respect for human rights and the exercise of due diligence in the field of human rights. The broad participation of civil society, human rights defenders, affected communities, and victims of human rights violations, as well as the political will of authorities at all levels, are and will be essential factors for advancing national, regional, and universal efforts in the field by giving opportunities for prevention, and ensuring access to effective justice and reparation for affected parties.

27. In view of the breadth of multidisciplinary frameworks and tools for understanding and approaching the field of business and human rights, the technical specificity that the topic may entail, the effects of the existing fragmented nature of international law in this area, and recognizing the various efforts and dialogues that have been taking place at the local, regional and international levels, this report mainly focuses on providing a first approach to what the IACHR and its REDESCA have identified as core topics in the field of business and human rights, as well as laying general, common foundations for the continued development of the subject in ever increasing depth through the mechanisms of the inter-American human rights system, complementary to developments at the universal level, particularly through the UN human rights system. Taking into account the large amount of information analyzed, the thematic diversity and existing viewpoints, this report refers to some characteristics and trends identified, as well as to some specific situations as examples, without intending for the factual and legal information contained herein to be an exhaustive, definitive diagnostic or for it to address all the events about which the IACHR or its REDESCA have knowledge or concern.
28. Specifically, this report's main objective is to clarify the content of the States' obligations in this field and the effects that may generally be produced on businesses having as a central foundation the main inter-American instruments, particularly the American Convention on Human Rights (American Convention or ACHR) and the American Declaration on the Rights and Duties of the Men (American Declaration), the existing inter-American jurisprudence on the matter and the articulated inclusion of international advancements in this regard.
29. The report also seeks to contribute from the inter-American experience to: i) empower individuals, communities and unions to use inter-American legal instruments and standards in this area; ii) strengthen the actions of prevention and due diligence in these situations; iii) making greater and

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<sup>71</sup> UN General Assembly. Resolution No. 70/1. Transforming our world: the 2030 Agenda for sustainable development. 25 September 2015

more effective accountability for human rights violations and abuses in these contexts; and iv) improve access to timely and adequate reparations for victims of human rights violations in this area. In short, the report seeks to identify and establish some elements and inter-American standards that, although initial, will be central to the understanding of the subject from the IACHR's mandates, as well as creating an opportunity for States to evaluate and review the effectiveness or gaps in their domestic systems in the field of business and human rights. A first conclusion is that whatever the development initiative that arises in this area may be, it will not generate reasonable results on its own if it does not take into account applicable human rights norms and standards. The foregoing means not only analyzing and delimiting the forms of intervention and abstention demanded of the State in this field more specifically, but also reexamining the legal effects that may arise on businesses in order to overcome any conceptual or procedural obstacles that may arise in this area.

30. For these effects, it is important to point out the centrality of the evolutionary interpretation of human rights instruments for the elaboration of the standards that this report represents, since it constitutes a fundamental principle of international human rights law that has been consistently applied by diverse international supervisory bodies to guarantee the adequate protection of human rights.<sup>72</sup> In this regard, the Inter-American Court has held, in well-settled jurisprudence, that human rights treaties “are living instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.”<sup>73</sup> Furthermore, this evolutionary interpretation is consistent with the general rules of treaty interpretation, established in the Convention of Vienna, as well as the guidelines for interpretation contained in Article 29 of the American Convention.<sup>74</sup> For similar reasons, it is also essential to take into account the growing body of international instruments that are related to the protection of human rights in the face of businesses, insofar as they make it possible to further elucidate the content of the States' international obligations and influence the protection of the rights of the people living under their jurisdiction.<sup>75</sup>

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<sup>72</sup> See, inter alia, I/A Court H.R. Advisory Opinion OC-10/89 of 14 July 1989. Series A No. 10; I/A Court H.R. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of 17 June 2005. Series C No. 125; I/A Court H.R. Case of Artavia Murillo and others (In Vitro Fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 November 2012. Series C No. 257. See ECHR. Tyrer v. United Kingdom. Application No. 5856/72. 25 April 1978; Marckx v. Belgium Application no. 6833/74. 13 June 1979.

<sup>73</sup> I/A Court H.R. Case of the Mayagna (Sumo) Awas Tingni v. Nicaragua. Merits, Reparations and Costs. Judgment of 31 August 2001. Series C No. 79, para. 146. I/A Court H.R. Advisory Opinion OC-16/99 of 1 October 1999. Series A No. 16, para. 114.

<sup>74</sup> I/A Court H.R. Case of the “Street Children” (Villagrán Morales and others) v. Guatemala. Judgment of 19 November 1999. Series C No. 63, para. 193; and I/A Court H.R. Advisory Opinion OC-16/99 of 1 October 1999. Series A No. 16, para. 114.

<sup>75</sup> The interpretation of the inter-American system's instruments taking into account the existence of a *corpus juris* of international law is a consolidated practice of the bodies of the Inter-American System that has been applied in very diverse areas.

31. Likewise, it should be noted that this report does not claim to present an analysis of all the aspects and legal and contextual challenges on the matter, nor to address the particular challenges in human rights that arise in the different industries or economic sectors or in relation to certain populations in vulnerable situations. It also does not seek to give a factual account of the cases brought to the IACHR's attention, nor to compare how different national systems in the region work, or their pros and cons, on the subject.
32. Bearing in mind the foregoing, chapter II establishes 12 criteria used transversally in the report, which must be taken into account as fundamental and indispensable elements in addressing the issue within national and regional legal and political systems. Chapter III, as a central part of this report, will develop the obligations that should be followed in these contexts, from the perspective of the inter-American system. Starting from the state obligations derived from inter-American instruments, said section will identify the States' obligations in the specific context of business activities and human rights. Chapter IV will develop the extraterritorial scope of the States' obligations in this area, based on the preceding chapters. Chapter V will analyse the legal effects that might arise on businesses from the general state duties of respect and guarantee human rights. Chapter VI will make visible specific contexts or areas of special priority or concern for the IACHR and its REDESCA in this field in light of the information received. Next, chapter VII refers to some disparate impacts on populations in situations of vulnerability in the region. Subsequently, chapter VIII mentions, as examples, some initiatives that stand out as positive references on the topic. Finally, chapter IX formulates a series of recommendations, with the objective of guiding the efforts of the States of the hemisphere in this area.

## **C. *Methodology***

33. The REDESCA, as mandated by the IACHR, carried out various activities contributing to the preparation of this report, ensuring a process that maintains a broad level of dialogue and collaboration with a wide range of interested parties. REDESCA has organized or participated in workshops, events, working meetings, public hearings, public questionnaires and expert consultations, in order to gather information and fostering the participation of multiple regional actors. Those activities have included the participation of representatives from Member States and autonomous public bodies, civil society organizations, academia, and other interested actors.
34. The IACHR and its REDESCA highlight the organization of a Public Consultation on Business and Human Rights in the First Inter-American

Human Rights System Forum, as well as REDESCA's participation in the Third and Fourth Regional Consultation for Latin America and the Caribbean on "Business and Human Rights," organized by the Office of the High Commissioner on Human Rights, held in December of 2017 and September 2019, respectively. In these activities, dialogue platforms were also held between the Special Rapporteurship and the participants during several parallel sessions. Additionally, in the framework of the IACHR's 167th period of sessions, a workshop was organized in February 2018 on "Exchange of experiences on national plans of action for human rights and business," alongside officials from the Member States of Colombia, Chile and Mexico and Colombian civil society representatives. The REDESCA of the IACHR also participated in the "Technical Workshop on Challenges and Opportunities for the adoption and implementation of National Action Plans on Business and Human Rights in Latin America and the Caribbean," held in Santiago, Chile at the invitation of the Danish Institute for Human Rights in December of 2018. The Special Rapporteur also participated, at the invitation of the Republic of Argentina, in an International Seminar on the subject in July 2019. Additionally, for the drafting of this report, the IACHR and its REDESCA took into account information obtained from its participation in various dialogues, meetings, working visits and events concerning the issue since the launch of the Special Rapporteurship in late August of 2017.

35. They also highlight the REDESCA's central involvement in the sessions of the Committee on Juridical and Political Affairs of the OAS on February 21, 2018<sup>76</sup> and March 7, 2019.<sup>77</sup> These sessions addressed the field of business and human rights, wherein various Member States and experts contributed input and remarks to the dialogue that are relevant to this report.
36. Also, the IACHR has held several public hearings wherein relevant topics were discussed and the Commission provided valuable information that, either directly or in part, was used for this report regarding different aspects of business and human rights; among them, specifically, the following 37 public hearings between April of 2016 and September of 2019:
  1. Right to Health and Tobacco Addiction in the Americas. 157th Period of Sessions, April 5, 2016
  2. The Rights of Persons Deprived of Liberty and the Privatization of Prisons in Mexico. 157 Period of Sessions, April 7, 2016
  3. States, Business and Human Rights in South America. 158 Period of Sessions, June 7, 2016
  4. Human Rights in the Context of the "Arco Minero del Orinoco" Mining Project in Venezuela, 159 Period of Sessions, December 2, 2016

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<sup>76</sup> OAS. Committee on Juridical and Political Affairs. Special Session on the Promotion and Protection of Human Right in Business, OEA/Ser.G CP/CAJP-3438/17 rev. 2., 21 February 2018.

<sup>77</sup> OAS. Committee on Juridical and Political Affairs. Special Meeting on Promotion and Protection of Human Rights in Business, OEA/Ser.G CP/CAJP-3488/18 rev. 1., 7 March 2019.

5. Right to Health and Lack of Medicine in the Americas, 159 Period of Sessions, December 6, 2016
6. Human Rights Situation in the Context of the Implementation of the Trans-Pacific Partnership (TPP) in the Americas, 159 Period of Sessions, December 7, 2016
7. Right of Access to Information and Transparency in Environmental Management, Licensing, Monitoring, and Oversight of Extractive Activities in the Americas, 161 Period of Sessions, March 18, 2017
8. Reports of Criminalization of Human Rights Defenders who Oppose Hydroelectric Projects in Guatemala, 161 Period of Sessions, March 20, 2017
9. Human Rights and Extractive Industries in Peru. 162 Period of Sessions, May 25, 2017
10. Extractive Industries and the Right to Cultural Identity of Indigenous Peoples in Ecuador. 163 Period of Sessions, July 7, 2017
11. Measures to prevent human rights violations by Canadian extractive industries that operate in Latin America. 166 Period of Sessions, December 7, 2017
12. Labor rights in the automotive industry in the United States. 166 Period of Sessions, December 7, 2017
13. Situation of Cultural Rights of Indigenous Women in Guatemala, 167 Period of Sessions, February 26, 2018
14. Business and Human Rights in Venezuela. 167 Period of Sessions, February 27, 2018
15. Digital Intelligence, Cybersecurity and Freedom of Expression in the Americas. 167 Period of Sessions, Wednesday, February 28, 2018.
16. Business and Human Rights: Input for the Preparation of the Inter-American Guidelines. 167 Period of Sessions, March 2, 2018
17. Human Rights Situation of Indigenous Communities Affected by Oil Spills in Cuninico and Vista Alegre, Peru. 168 Period of Sessions, May 7, 2018
18. Reports of Human Rights Violations and Criminalization of Defenders in the Context of Extractive Industries in Nicaragua. 168 Period of Sessions, May 7, 2018
19. Measures for the Protection of Evidence in Forced Disappearance Cases in Colombia. 168 Period of Sessions, May 9, 2018
20. Reports of human rights violations in the context of evictions in Guatemala. 168 Period of Sessions, May 9, 2018.
21. Due Diligence, Prevention and Access to Justice for Human Rights Violations by Businesses in the Americas. 168 Period of Sessions, May 10, 2018
22. Control of Public Spending, Fiscal Policies and Economic, Social and Cultural Rights Guarantees in Latin America. 168 Period of Sessions, May 11, 2018

23. Citizen security and allegations of irregular use of police forces in the activities of exploration and exploitation of natural resources in Peru. 169 Period of Sessions, October 1, 2018.
  24. Serious Health Problems Experienced by Peruvian Miners and State and Corporate Responsibility. 169 Period of Sessions, October 1, 2018.
  25. Guarantees for Freedom of Expression, Association, and Peaceful Assembly for Trade Unions in the Americas. 169 Period of Sessions, October 2, 2018.
  26. Use of Hydraulic Fracturing (Fracking) and the Violation of Human Rights of Communities and Defenders of Environmental and Land Rights in the Americas, 169 Period of Sessions, October 3, 2018.
  27. Reports of Violations of the Rights to Healthcare and Social Security in the Dominican Republic, 169 Period of Sessions, October 5, 2018.
  28. Situation of indigenous people in the Peruvian Amazon, land and environment, 170 Period of Sessions, December 5, 2018.
  29. Situation of Environmental “Sacrifice Zones” and Consequences of Industrial Activities on the Right to Health in Chile, 171 Period of Sessions, February 13, 2019.
  30. Business and Human Rights in the Americas. 172 Period of Sessions, May 8, 2019
  31. Reports of Human Rights Violations against Persons Affected by Dams and Reservoirs in Brazil, 172 Period of Sessions, May 9, 2019
  32. Criminalization of Human Rights Defenders of Indigenous Peoples and the Extractive Industry in the United States. 172 Period of Sessions, May 9, 2019
  33. Human Rights of the Indigenous Peoples and the situation of isolation in the Peruvian Amazon, 172 Period of Sessions, May 10, 2019
  34. Protection of Indigenous Communities, Children, and Human Rights Defenders affected by Environmental Pollution in Peru, 173 Period of Sessions, September 24, 2019.
  35. Climate Change and ESCR of Women, Children, Indigenous Peoples and Rural Communities, 173 Period of Sessions, September 25, 2019.
  36. Misuse of Criminal Justice Systems to Retaliate against Environmental Human Rights Defenders, 173 Period of Sessions, September 26, 2019.
  37. Environmental Protection in the Amazon and the Rights of Indigenous Peoples in Brazil, 173 Period of Sessions, September 27, 2019.
37. Since the approval of the table of contents and the concept note of the thematic report by the plenary of the IACHR on March 2, 2018, the REDESCA created a questionnaire that was published in the month of April of the same year, for the purpose of collecting pertinent information from the Member States, civil society, and various interested stakeholders. Due to the multiple requests for extensions to receive input and comments, the Special



Rapporteurship decided to grant an additional extension in order to begin to execute its systematization. The IACHR and its REDESCA are grateful to many regional actors for their broad involvement and interest, in particular, to the Member States of Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, and Panama for sending official responses to the questionnaire, to 9 autonomous public bodies from the region that independently sent their input through the same process;<sup>78</sup> and to diverse civil society and academic organizations from whom, whether individually or collaboratively, 42 returns were received with substantive commentary and contributions.<sup>79</sup> Valuable contributions were also received from the

<sup>78</sup> The IACHR and its REDESCA are thankful for the participation of the following public institutions: Public Ministry for Defense (Argentina), Public Ministry of Labor (Brazil), Federal Public Ministry: Office of the Federal Prosecutor for Citizens' Rights (Brazil), Ombudsman (*Defensoría del Pueblo*) (Colombia), Judicial Investigation Body (*Organismo de Investigación Judicial*) (Costa Rica), National Commission on Human Rights (Mexico), Commission on Human Rights of the Federal District (Mexico), Council to Prevent and Eliminate Discrimination of the Mexico City (Mexico) and Ombudsman (*Defensoría del Pueblo*) (Peru).

<sup>79</sup> The IACHR and its REDESCA are thankful for the broad participation of diverse civil society and academic organizations. A non-exhaustive list of the organizations that sent their responses individually or as a group follows: Abogados y Abogadas del Noroeste Argentino en Derechos Humanos y Estudios Sociales (ANDHES), Acción Solidaria para el Desarrollo (CooperAcción), Amazon Frontlines, Amnesty International, Asociación Civil por la Igualdad y la Justicia (ACIJ), Asociación por los Derechos Civiles (ADC), Asociación Pro Derechos Humanos (APRODEH), Asociación Sindical de Trabajadores Agrícolas Bananeros y Campesinos (ASTAC) of Ecuador, Peace Brigades International (PBI), Business and Human Rights Resource Centre, Center for Economic and Social Rights (CESR), Central Autónoma de Trabajadores del Perú (CATP), Centro de Análisis Forense y Ciencias Aplicadas (CAFCA), Centro de Análisis e Investigación, la Iniciativa Social para la Democracia (ISD), Centro de Documentación e Información (CEDIB), Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), Center for Studies on Transitional Justice of the Federal University of Minas Gerais (CJT/UFMG), Centro de Estudios Legales y Sociales (CELS), Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE), Centro Mexicano de Derecho Ambiental (CEMDA), Ciudadanos al Día (CAD), Human Rights Clinic of the Federal University of Minas Gerais (CdH/UFMG), Coalición Latinoamérica Saludable (CLAS), Coding Rights, Columbia Center on Sustainable Investment (CCSI), Comisión Intereclesial de Justicia y Paz, International Commission of Jurists (ICJ), Conectas Derechos Humanos, Corporations and Human Rights Project, Derecho Ambiente y Recursos Naturales (DAR), Derechos Digitales: Derechos Humanos y Tecnología en América Latina, Due Process of Law Foundation (DPLF), Federación Argentina de Lesbianas, Gays, Bisexuales y Trans, International Federation for Human Rights (FIDH), Fundación Ambiente y Recursos Naturales (FARN), Fundación Forjando Futuros, FoodFirst International Action Network (FIAN International), Fundar: Centro de Análisis e Investigación, Fundación Karisma, Grupo de Estudos em Direito Internacional dos Direitos Humanos (GEDI-DH), Working Group on Corporate Accountability of the International Network for Economic, Social and Cultural Rights (ESCR Net), Homa – Centro de Direitos Humanos e Empresas da Universidade Federal de Juiz de Fora, Indian Law Resource Center, “Advancing Human Rights Accountability” Initiative (AHRA) of the University of Oxford, Interamerican Association for Environmental Defense (AIDA), International Budget Partnership (IBP), International Rivers, Instituto Centroamericano de Estudios Fiscales (ICEFI), Instituto de Democracia y Derechos Humanos (IDEHPUCP) of the Pontifical Catholic University of Peru, Instituto de Estudios Socioeconómicos (INESC), Justiça Global, Justice and Corporate Accountability Project, Observatorio Latinoamericano de Regulación de Medios y Convergencia (OBSERVACOM), Office for the Defence of Rights and Intersectionality (ODRI), Organizations working on Access to Medicine and Rational Use of Medicine in the Americas region, Oxfam Mexico, First Generation of the Master of Human Rights of the Faculty of Law and Criminology of the Autonomous University of Nuevo León, Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC), Project on Organizing, Development, Education, and Research (PODER), Programa Venezolano de Educación Acción en Derechos Humanos (PROVEA), Network in Defense of Digital Rights (R3D), Save the Children, Servicios y Asesoría para la Paz (Serapaz), Solidarity Center, Sonora Ciudadana, Terra de Direitos, Unidad de Defensores y Defensoras de Guatemala (UDEFEFUGUA), Unión Nacional de Instituciones para el Trabajo de Acción Social (UNITAS): Urban Program, University of Brasília, Universidade Estadual Paulista, Universidade

internal consultation with the IACHR. The REDESCA wishes to highlight the high level of interest, expectations, and participation there has been around the process of drafting this report, as well as the important challenge it has meant during the middle of the founding period of its mandate.

38. The REDESCA also organized a private consultation in October of 2018 with nine experts on the subject matter. The consultation session took place in Mexico City with the logistical support of the Observatory of the Inter-American System of the National Autonomous University of Mexico (UNAM), with the objective of reviewing and discussing a preliminary version of this report.
39. The information presented in this report is based on the analysis of all of these sources, the diverse dialogues in which the REDESCA participated, the internal research efforts and expert advice from its technical staff, the contributions that were sent as part of their monitoring duties, and the contributions made by the IACHR, as well as its respective thematic Rapporteurships during the process of approving this report.
40. Finally, the IACHR and its REDESCA are grateful for the valuable financial support from the Government of Spain, thanks to which the Office of the Special Rapporteur could get underway and draft this report.

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Federal de Goiás, Universidade Federal do Pará, Universidade Federal da Paraíba, Universidade de Fortaleza, Universidade do Vale do Rio Dos Sinos.

CHAPTER 2

FUNDAMENTAL INTER-  
AMERICAN CRITERIA ON  
BUSINESS AND HUMAN  
RIGHTS



## FUNDAMENTAL INTER-AMERICAN CRITERIA ON BUSINESS AND HUMAN RIGHTS

41. Given the multiplicity of existing initiatives as well as ongoing discussions on the subject, and bearing in mind that this is the first time that the inter-American system has comprehensively and directly addressed this subject, the IACHR and its Special Rapporteurship find it relevant to highlight the fundamental criteria, whose incorporation is essential when adopting normative frameworks, strategies, and mechanisms to address and guide how to deal with challenges in this field from a human rights focus. These criteria are derived from the general international human rights framework, specific developments in the inter-American regional system, and specialized bodies' progressive application of the subject in the analysis they've developed related to the field of business and human rights. These criteria have been taken into account transversely in drafting this report and should be read jointly and comprehensively as a coherent whole, given their interrelation and mutual significance arising in their application in this field.

### ***A. Centrality of the person and of human dignity:***

42. Human dignity is inherent to all people and constitutes the basis upon which human rights are developed. That is, human dignity is the foundation for the construction of the rights of people as free and equal subjects in dignity and rights. The field of business and human rights should make this centrality its own, since the value of human dignity represents the dynamic and interpretive axis of the entire system for human rights protection, which implies the pursuit of ensuring that every decision applies the *pro persona* principle in order to achieve the result that best protects human beings and least limits the realization of their fundamental rights.

### ***B. Universality, Indivisibility, Interdependence and interrelation of Human Rights***

43. The recognition of the universal, indivisible, interdependent and interrelated nature of human rights through the adoption and application of various instruments and treaties on the subject<sup>80</sup> requires closing the existing gaps in protection of economic, social, cultural, and environmental rights in comparison with civil and political rights, through the various fields that affect them. Given the connection and close relationship between one and the other, like their universal nature and inter-American roots, these principles must be reaffirmed by paying special attention to the realization of human rights, taking into account the multiple impacts that may arise in the context of business activities and operations.

### ***C. Equality and Non-Discrimination:***

44. The IACHR has consistently established that the principle of equality and non-discrimination is one of the pillars of any democratic system, as well as one of the fundamental foundations of the OAS's system of human rights protection. For its part, the Inter-American Court has considered it part of international "*jus cogens*."<sup>81</sup> Likewise, the Inter-American System has not only taken up a formal notion of equality, but it has moved toward a concept of material or structural equality based on the recognition that certain sectors of the population require the adoption of affirmative measures for equalization. Therefore, an intersectional and differential focus should be incorporated, including a gender perspective, which takes into consideration the possible aggravation and frequency of human rights violations due to conditions of vulnerability or historic discrimination of persons and collectives such as ethnic origin, age, sex, sexual orientation, gender identity, or economic position, among other conditions, in the framework of business activities and operations.

### ***D. Right to Development:***

45. The IACHR has addressed issues linked to the right to development in several of its thematic and country reports.<sup>82</sup> The particular value of the

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<sup>80</sup> For example, both the Preamble to the American Convention on Human Rights and the Protocol of San Salvador establish that "the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." In the same way, the Inter-American Democratic Charter points out that "democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility, and interdependence" (OAS. Inter-American Democratic Charter, 11 September 2001) and the Social Charter of the Americas reaffirms that "the universality, indivisibility, and interdependence of all the human rights and their essential role for social development and the realization of human potential" (OAS. Social Charter of the Americas. OEA/Ser.P AG/doc.5242/12 rev. 1, 4 June 2012). See also: World Conference on Human Rights. Vienna Declaration and Program of Action, UN Doc. A/CONF.157/23, 12 July 1993, para. 5.

<sup>81</sup> I/A Court HR. Advisory Opinion OC -18/03 of 17 September 2003 Serie A No. 18. Para. 101.

<sup>82</sup> See, inter alia, IACHR. Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities.

right to development is that it should be sustainable and thus should necessarily place its central focus on the wellbeing and rights of persons and communities more than on economic statistics and commodities, bearing in mind that the definition of the right to development includes the right to a particular process in which all human rights and fundamental freedoms are fully realized.<sup>83</sup> Its express incorporation into normative frameworks, strategies and policies that are developed in the field of business and human rights will better define the responsibilities of different actors involved, including businesses and investment and financing institutions, in such a process, in accordance with human rights norms, as well as linking businesses to national or global strategies on the matter, such as the 2030 Agenda and the Sustainable Development Goals.<sup>84</sup> Adequately conducting the realization of human rights, including the right to development, in processes of the development framework and business activity will require, fundamentally, empowering individuals and communities as rights holders, placing them at the center of how development is conceived and implemented, ensuring their free participation, applying the principle of non-discrimination, and equitably distributing the benefits of development. Economic growth is not an end in itself, but one more component of the realization of the right to development and human rights in general. The right to development thus allows us to observe how States and business entities fulfill their obligations and whether the procedures they follow are coherent with the human rights framework.

## ***E. Right to a healthy environment:***

46. The IACHR and its REDESCA reaffirm the close relationship between human rights, sustainable development, and the environment, whose interaction encompasses innumerable facets and scopes.<sup>85</sup> Thus, not only the States, by exercising regulatory, supervisory, and judicial powers, but also businesses, in the context of their activities and commercial relations, should bear in mind and respect the right to a healthy environment and the sustainable use and conservation of ecosystems and biological diversity, paying special attention to their close relationship with indigenous peoples, communities of African descent, and rural or peasant

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OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015; IACHR. Report on Poverty and Human Rights in the Americas. OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017; and, IACHR. Situation of Human Rights in Guatemala. OEA/Ser.L/V/II. Doc. 208/17, 31 diciembre 2017, paras. 37-50.

<sup>83</sup> UN General Assembly. Declaration on the Right to Development. Resolution 41/128, 4 December 1986; Fourth Report of the Independent Expert on the right to development. UN Doc. E/CN.4/2002/WG.18/2, 20 December 2001.

<sup>84</sup> UN General Assembly. Resolution No. 70/1. Transform Our World: The 2030 Agenda for Sustainable Development. 25 September 2015, page 3.

<sup>85</sup> I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, paras. 47-55. See also: Report of the Special Rapporteur on the issue of human rights related to the enjoyment of a safe, clean, healthy, sustainable environment. UN Doc. A/73/188, 19 July 2018.

populations. This includes ensuring and respecting, at minimum, all environmental laws in effect and inter-American standards or principles on the subject; launching due diligence processes regarding the impact of the environment and the climate on human rights; ensuring access to environmental information, processes for participation and accountability, and effective reparation to victims for environmental degradation. Attention should be paid not only to the individual dimension of the right to a healthy environment, but also to the need to make the right's collective component effective, in view of its universal and intergenerational scope. Likewise, due protection should be given to the environment's inherent characteristics as legal interests in and of themselves, independent of their connection to their usefulness to human beings.<sup>86</sup> In particular, at the regional level, the REDESCA emphasizes the importance of the States ratifying and applying the provisions of the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean, adopted in 2018, known as the Escazú Agreement,<sup>87</sup> and stresses the States' immediate obligation to implement strategies and policies based on human rights and with a gender perspective to reduce greenhouse gas emissions and the effects of climate change, which include business entities' legal responsibilities and due protection of environmental defenders.

## ***F. Right to Defend Human Rights:***

47. The inter-American system recognizes the right to defender human rights and has protected it through the components of other rights as vehicles for its realization<sup>88</sup>. Likewise, the Inter-American Court and the IACHR have emphasized that the work of human rights defenders, including the defense of the environment, is fundamental for the universal implementation of human rights, the existence of full and lasting democracy, and the consolidation of the rule of law. Therefore, States have the duty to provide the necessary means so that these individuals may freely carry out their activities; to protect them when they are threatened; to refrain from imposing obstacles that hinder the performance of their work; and to seriously and effectively investigate

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<sup>86</sup>I/A Court. Advisory Opinion OC-23/17 of 15 November 2017. Serie A No. 23, para. 62; IACHR. Situation of Human Rights of Indigenous and Tribal Peoples of the Pan-Amazon Region, OAS/Ser.L/V/II. Doc. 176, 29 September 2019, paras. 272-279; REDESCA. [SRESCER Welcomes Decisions Taken in the Region to Face Climate Change](#), 17 April 2018,.

<sup>87</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), adopted 4 March 2018.

<sup>88</sup> See, inter alia, I/A Court. Case of Escaleras Mejía et al. v. Honduras. Judgment of September 26, 2018. Series C No. 361, paras. 56-61



violations committed against them, fighting impunity.<sup>89</sup> Hence, the IACHR and its REDESCA emphasize the need to take into account the standards related to the protection of the right to defend human rights in the field of business and human rights, in particular to identify the possible patterns of attacks, aggressions and obstacles that defenders, community leaders, indigenous peoples, Afro-descendant communities, peasant populations, and justice operators face from businesses or economic actors, in order to prevent and, where appropriate, punish them. The State must establish a clear legal framework that provides for sanctions against businesses that are involved in criminalization, stigmatization, abuses, and violence against those who defend human rights, including private security companies and contractors who act on behalf of the company involved.

## ***G. Transparency and Access to Information:***

48. A human rights-based approach regarding business activities and operations opens a new perspective on efforts for respecting and ensuring such rights, with the dignity and the autonomy of persons as its center. In this sense, ensuring effective mechanisms for transparency and access to information in this field relating to the rights and freedoms that may be at stake, not only in the formulation of legislation and public policies by heads of State, but also in the mechanisms and plans led by the businesses themselves, will be essential in more suitably for identifying and facing the main challenges and risks identified to the realization of human rights, in accordance with the particularities of each context. To this end, access to information includes information that may be necessary for the exercise or protection of human rights in the context of businesses activities, which must be provided in a timely, accessible, and complete manner. In practice, businesses may possess a lot of information regarding the possible human rights impacts of their plans and operations, and often they hold this information exclusively. It is necessary to counteract the imbalance that may exist in the creation, interpretation, and dissemination of information between companies, who act to create and own the information, and communities and the authorities. Such guarantees will be central in processes and actions to prevent, supervise, and where appropriate investigate when there are abuses and violations of human rights.

## ***H. Prior, Free and Informed Consultation and General Mechanisms for Participation***

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<sup>89</sup> IACHR. Integral Protection Policies for Human Rights Defenders. OEA/Ser.L/V/II. Doc. 207/17, 29 December 2017. I/A Court. Case of Escaleras Mejía et al. v. Honduras. Judgment of September 26, 2018. Series C No. 361, paras. 56-78.

49. The IACHR and its REDESCA emphasize the importance of recognizing and strictly complying with inter-American standards on fulfilling the right to consultation and to prior, free and informed consultation and consent, as a more specific aspect of plans for participation, with respect to matters that involve the rights of indigenous peoples and tribal Afro-descendant peoples in the context of business activities. Likewise, they emphasize the States' obligation to ensure participatory and inclusive spaces, as it will allow those who may be at risk of having their fundamental rights and freedoms affected as a consequence of business activities to express their opinion and be taken seriously.<sup>90</sup> Thus, the States must bear in mind the circumstances of every case such as the type and degree of impacts on rights, the type of industry, and the populations involved, etc. Ensuring mechanisms for participation in the issues that involve the field of business and human rights must be broad, and must aim to effectively listen to the directly affected persons, communities, and populations; to human rights defenders; and to human rights organizations from civil society.<sup>91</sup>

## ***I. Prevention and Human Rights Due Diligence***

50. In the context of business and human rights, due diligence does not only refer to the actions required of the State broadly developed by the inter-American system for the purposes of guaranteeing human rights and protecting people from violations of their rights. It also includes human rights due diligence that the States must require of business entities at the domestic level, which constitutes a continuous management process that a company should carry out "in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights."<sup>92</sup> In this sense, the failure to carry out an adequate human rights due diligence process, by the State or by businesses, may affect the degree of participation of each agent in the adverse impacts on human rights and the subsequent attribution of responsibility for such acts. Thus, due diligence in the area of human rights is at the root of the establishment of effective human rights systems and processes, to identify, prevent, mitigate, and provide accountability

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<sup>90</sup> See, inter alia, IACHR. Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, paras. 106-118.

<sup>91</sup> For example, regarding the criteria of participation and involvement of the general population in making decisions regarding the realization of their rights and the activities of extractive industries, the IACHR and its REDESCCA have received information regarding judicial decisions on constitutional matters in which some of their implications have been discussed. See, for example, Judgment SU-133 of 2017 of the Constitutional Court of Colombia.

<sup>92</sup> OHCHR. [The Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (2012), page 7.

for damages they cause, to which they contribute, or with which they are associated.

## **J. *Accountability and Effective Reparation***

51. The obligation to investigate, sanction, and provide adequate redress for human rights violations can arise not only from international human rights treaties to which a State is a party, but also from customary international law and the States' own domestic legal order. In this context, the IACHR and its REDESCA emphasize the requirement that the mechanisms, policies, or normative frameworks implemented in the field of business and human rights fight impunity and aim to avoid future repetition of harmful acts through state authorities' and businesses' accountability, including effective access to justice, criminal, administrative, civil or other sanctions, as applicable, and adequate redress for the victims in light of international standards on the subject. Therefore, the REDESCA emphasizes the key role of the independence, impartiality, and effective ability of justice systems to deal with these situations.

## **K. *Extraterritoriality***

52. Given the complex forms of organization and operation of economic actors like their relation to the realization of human rights at the local, regional and global levels, the mechanisms, policies and normative frameworks aimed at facing challenges in this field should incorporate and recognize the extraterritorial application of obligations arising from international human rights law, whether with regard to the States or their effects over the businesses or non-state actors themselves, so as not to leave the involved people and communities unprotected, whether, for example, regulating, preventing, or creating effective remedies for investigation and redress, as appropriate. For these purposes, the special characteristics of each context, such as the levels of risk involved in the activity or conduct, the condition of vulnerability of the affected people or communities, the level of influence – or even control – of the alleged responsible party, or the relationship between the behavior in issue and the alleged negative effect, both of state and private nature, should be taken into account.

## ***L. Fighting Corruption and the Capture of the State***

53. The IACHR has held that corruption is a complex phenomenon that affects human rights in their entirety, including the right to development, and that has a differentiated impact on historically discriminated populations. It also has taken into account that corruption has multiple causes and effects, and numerous actors, both state actors and private entities or businesses, take part in its development, and the establishment of effective mechanisms are required to eradicate corruption in order to ensure human rights.<sup>93</sup> On the other hand, the undue and non-transparent interference of private agents, in this case companies, and the capture of institutions of the State or undue influence over public decision-makers, with the objective of influencing their behavior for their own benefit interests, in addition to weakening democratic values and the rule of law, can also have a decisive influence on the respect and guarantee of human rights, increase gaps of inequality and poverty, and even amount to illegal acts. While both practices may coincide and reflect each other, the mechanisms, policies, or normative frameworks designed to combat them must include specific strategies to address each one of these situations, identifying not only the political, economic or legal mechanisms through which the companies exert said abusive influence or practices of corruption, but also the criminal, civil, administrative, or other liabilities that may arise from each one. State actions to prevent, identify, and where appropriate sanction these corporate practices must be guided by the understanding and realization of human rights, good governance, and the rule of law, seeking the effectively curb corrupt acts and corporate capture.

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<sup>93</sup> IACHR. Resolution No. 1/18: Corruption and Human Rights. 2 March 2018.

CHAPTER 3

INTERNATIONAL  
OBLIGATIONS OF THE STATES  
IN THE CONTEXT OF  
BUSINESS ACTIVITIES IN  
LIGHT OF INTER-AMERICAN  
STANDARDS



## INTERNATIONAL OBLIGATIONS OF THE STATES IN THE CONTEXT OF BUSINESS ACTIVITIES IN LIGHT OF INTER-AMERICAN STANDARDS

54. The American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, as fundamental regional human rights instruments, establish a series of obligations at the head of States for the exercise and enjoyment of human rights.<sup>94</sup> Specifically, according to the jurisprudence and practices of the Inter-American Human Rights System, the American Declaration is a source of legal obligations for the Member States of the OAS, including the States that are not parties to the American Convention on Human Rights.<sup>95</sup> Thus, the Commission has broadly interpreted the scope of the obligations established in both instruments in the context of the UN and inter-American systems, in light of developments in the field of international human rights law. More specifically, different inter-American human rights treaties have gradually collected state obligations aimed at achieving more effective protection and promotion of the rights and freedoms of groups of people under the respective treaty.<sup>96</sup>
55. The American Convention, in Article 1.1, recognizes the States' obligation to respect the rights recognized in the treaty and to guarantee their free and full exercise to every person subject to their jurisdiction, without any discrimination. Article 2 contains the duty to adopt provisions of domestic law – legislative or otherwise – that may be necessary to give effect to the rights and freedoms contained in the American Convention. Article 26, for its part, determines additional progressive obligations and the obligation to adopt specific measures regarding economic, social, and cultural rights, including the right to a healthy environment.<sup>97</sup> Based on these provisions,

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<sup>94</sup> IACHR. Indigenous Peoples, Communities of African Descent, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para.37.

<sup>95</sup> I/A Court H.R. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, paras. 35-45; IACHR. Towards the Closure of Guantanamo. OEA/Ser.L/V/II. Doc. 20/15, 3 June 2015, paras. 16-23.

<sup>96</sup> In particular, the Inter-American Convention to Prevent and Punish Torture; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women; Inter-American Convention on Forced Disappearance of Persons; Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities; Inter-American Convention against Racism, Racial Discrimination and Connected Forms of Intolerance; Inter-American Convention Against All Forms of Discrimination and Intolerance; Inter-American Convention on Protection the Human Rights of Older Persons.

<sup>97</sup> The Inter-American Court of Human Rights recognized, through Advisory Opinion No. 23/17 that the right to a healthy environment is protected under Article 26 of the American Convention. I/A Court

the work of the Commission and the Court has been defining the content of the general obligations derived from the American Convention and the American Declaration in relation to specific cases and rights.

56. Thus, since its first judgment in a contentious case, the Inter-American Court has held that:

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights that can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.<sup>98</sup>

57. The international responsibility of the State may be based on acts or omissions of any power or body of the State that violates the American Convention, and is immediately generated by the attributed international infraction. In these cases, to establish that there has been a violation of the rights enshrined in the Convention does not require determining the guilt of the perpetrators or their intent, nor is it necessary to individually identify the agents to whom the violating act is attributed. It is sufficient to demonstrate that there have been State actions or omissions that have allowed the perpetration of these violations or that there is an obligation that the State has breached.<sup>99</sup> Ultimately, the obligations contained in Articles 1(1) and 2 of the Convention, similar to the general requirements made by the international human rights instruments, constitute the basis for determining a State's international responsibility for violations of the same, and require not only negative duties, or not doing, but also clear positive obligations to make human rights respected.

58. Thus, the organs of the Inter-American System have held that a violation of the human rights protected by the Convention compromises the international responsibility of a State Party not only when the violation is perpetrated by its own agents or institutions, but also that there may be international responsibility when the acts or omission that violate a certain right are committed by an individual, such as businesses or economic actors, provided that the State has acted with a lack of diligence to reasonably prevent the violation or deal with it in accordance with what the

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H.R. Environment and human rights. Advisory Opinion OC-23/17 of 15 November, 2017. Series A No. 23, para. 57.

<sup>98</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 164.

<sup>99</sup> I/A Court H.R. Case of González Medina and family v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 27, 2012 Series C No. 240, para. 133; I/A Court H.R. Case of the Massacre of Pueblo Bello v. Colombia, Judgment of January 31, 2006, Series C No. 140, para. 112.



Convention establishes.<sup>100</sup> The important thing is determining whether the illicit act has had state agents' support or tolerance, or has resulted from the State's breach of its obligation to reasonably prevent the human rights violations, to seriously investigate in order to identify and punish the perpetrators and provide adequate remedies to the victim or their family members for the harm caused.<sup>101</sup> Along the same lines, in its analysis of the legal obligations established in the American Declaration, the Commission has found that in circumstances the State may also be responsible for the behavior of non-state actors.<sup>102</sup>

59. For its part, the OAS Charter includes, in several provisions, aspects related to businesses and the States' obligations. Article 34(g) establishes that in order to achieve equal opportunities, eliminate poverty, and achieve integral development, the States must ensure fair wages, job opportunities, and acceptable working conditions for all. For its part subsection (m) of the same article refers to the promotion of private investment and initiatives in harmony with the public sector's actions. Article 45 establishes that for the achievement of a just social order, along with economic development and true peace, the operation of systems of public administration, banking and credit, enterprise, and distribution and sales should, in harmony with the public sector, work toward the requirements and interests of the entire society. Likewise, Article 36 refers to the fact that transnational corporations and foreign private investment are subject to the legislation and the jurisdiction of the competent national courts of the recipient countries, and to the international treaties and agreements to which they are a party.
60. Specific inter-American treaties also refer to the protection of human rights, and to the States' obligations when non-state actors, among which businesses are included, are involved in infringements upon human rights. Thus, for example, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) establishes that the States must guarantee the exercise of the rights established therein without discrimination (Art. 3), which includes the adoption of measures of protection by third parties such as businesses. In general, the IACHR and its REDESCA observe that in order to

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<sup>100</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 172; IACHR. Indigenous Peoples, Communities of African Descent, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 46.

<sup>101</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. Para. 173.

<sup>102</sup> IACHR, Report No. 40/04, Case N° 12.053, Mayan Indigenous Communities (Belize), 2004 IACHR Annual Report, paras. 136-156 (The Commission found the State of Belize responsible under the American Declaration for awarding timber and petroleum concessions to third parties to use the land that the Mayan peoples occupied, without an effective consultation and without the informed consent of this indigenous community, which led to substantial environmental damage); IACHR, Resolution No. 12/85, Case No. 7615, Brazil, 5 March 1985 (The Commission found the State of Brazil responsible under the American Declaration for not adopting opportune and effective measures to protect the Yanomani indigenous community from the acts of private individuals who settled in their territory – due to the construction of a highway – which led to a generalized incidence of epidemics and diseases).

progressively achieve the full realization of such rights (Art. 1), it is impossible to ignore or reject the role and impact that the business sector has on the multiplicity of situations in which such private actors are involved in the enjoyment of economic, social, cultural, and environmental rights; these rights could be seriously limited if the States do not adopt necessary measures to respect and guarantee rights within this field.

61. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) establishes that sexual harassment in the workplace, educational institutions, and health establishments is a form of violence against women (Art. 2(b)), and it will also be understood as violence against women when violence is perpetrated or tolerated by the State or its agents, wherever it may occur (Art. 2(c)). Likewise, it indicates that it is the State's duty to act with due diligence to prevent, investigate, and punish violence against women (Art. 7(b)) and that it must encourage the media to develop appropriate broadcasting guidelines that may contribute to the eradication of violence against women (Art. 8(g)).
62. The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities includes the duty of States to adopt measures to progressively eliminate discrimination and promote the integration of said persons by private entities that provide and supply goods, services, installations, programs, and activities (Art. III.1.a). In the same way, the Inter-American Convention against Racism, Racial Discrimination and Related Intolerance states that the States commit to prevent, eliminate, prohibit, and punish private support for racially discriminatory and racist activities, or activities that promote intolerance, including their financing (Art. 4.i), denial of private education, as well as scholarships for causes implying racial discrimination (Art. 4.xi), and the restriction of private places with public access for the same reasons (Art. 4.xv); more precisely, Article 7 indicates that the States Parties undertake to adopt legislation that clearly defines and prohibits racism, racial discrimination, and connected forms of intolerance, applicable to all legal entities, both in the public and private sectors, especially in the areas of employment, participation in professional activities, education, training, housing, health, social protection, exercise of economic activity, and access to public services, among others. Similar provisions are included in the Inter-American Convention against all forms of Discrimination and Intolerance (Art. 4 sections i, xi and xv, Art. 7).
63. For its part, the Inter-American Convention on the Protection of the Human Rights of Older Persons includes the duty of the States to establish mechanisms to prevent violence against the elderly in places where they receive long-term care services, whether public or private (Art. 9.c), and also indicates that private health institutions shall not administer any medical or surgical treatment, intervention, or investigation without the informed consent of the older person (Art. 11), that the States should adopt the necessary measures to prevent labor discrimination against older

persons (Art. 18) as well as fostering private sector collaboration for access to housing credits or other forms of financing without discrimination (Art. 24). On the other hand, the Inter-American Convention against Corruption, in Article VIII, provides for the prohibition and punishment of public officials' acts of corruption attributable to companies domiciled in the State Party's territory, for the exercise of transactions or economic or business activities in another State.

64. Finally, the American Declaration on the Rights of Indigenous Peoples<sup>103</sup> also includes provisions involving the actions of businesses with respect to the rights of indigenous peoples. For example, it indicates that States, together with indigenous peoples, shall adopt immediate and effective measures in order to eliminate exploitative labor practices, particularly of indigenous children, women, and older persons (Art. xxvii.2). The States shall also improve inspections and application of standards in the workplace, with particular attention to business and labor activities in which indigenous workers or employees take part (Art. xxvii.3.b). In particular, it establishes the right to prior consultation to obtain free, previous, and informed consent of indigenous peoples before approving any project which may affect their lands, territories, or resources and the right to effective measures to mitigate adverse ecological, economic, social, cultural, or spiritual impact due to the execution of development projects, which include restitution and compensation for any harm caused by private businesses and international financial organizations (Art. xxix, paragraphs 4 and 5).<sup>104</sup>
65. Within this framework, both the Inter-American Court and the IACHR have found international responsibility of the States for breaching their international obligations in cases where businesses or economic actors were involved in the commission of human rights abuses.<sup>105</sup> Specifically, the recognition of the non-state actors' capacity to negatively affect the enjoyment and exercise of human rights is the basis for demanding the States' actions to prevent or respond to such violations with a view to protecting the human dignity of the victims. The IACHR also has held various public hearings related to this field, through which it has been able

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<sup>103</sup> Regarding the rights of indigenous and tribal Afro-descendant peoples, it is important to emphasize that the inter-American system has systematically incorporated the existing guidelines on international law, justice, like the content of Convention 169 of the ILO, when interpreting the respective inter-American norms, particularly concerning issues relating to territory, lands, natural resources, prior consultation, and the environment.

<sup>104</sup> On the other hand, it is also worth mentioning the Ibero-American Convention on the Rights of Young People, adopted 11 October 2005, as an international source of obligations directed to the States, from which consequences flow for business entities, such as the prohibition of economic exploitation, forms of discrimination against young women in the workplace or the insertion and qualification of young people in work.

<sup>105</sup> I/A Court H.R. Case of Workers of Hacienda Brasil Verde v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318; I/A Court H.R. Case of Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309; IACHR. Merits Report No. 25/18. Employees of the Santo Antonio de Jesus Fireworks Factor and their families, Brazil (Brazil), 2 March 2018; IACHR. Merits Report No 25/09. Sebastiao Camargo Filho (Brasil) 19 March 2009.

to identify contexts of special concern in the region and gather valuable information for the preparation of this report.<sup>106</sup>

66. In this way, although the Commission and its REDESCA recognize the complex and diverse relationship the State and the business sector may have regarding the observance and the realization of human rights, there is no doubt that under the inter-American human rights system there are state obligations in the area of human rights explicitly linked to the actions of non-state actors, such as businesses, as well as specific standards for the effective respect and protection of said rights in such contexts.<sup>107</sup> Thus, the States, insofar as they are recipients of international obligations, must take special care in their compliance; and businesses, due attention so their behavior corresponds with the respect of human rights, not just as a responsibility based on a basic social expectation<sup>108</sup>, but as a legal consequence of compliance with the States' obligations in these contexts.

### ***A. Business or Economic Activities and the States' General Duty to Respect Human Rights***

67. Regarding the general duty to respect, the Inter-American Court has repeatedly held: "According to Article 1(1), any exercise of public power that violates the right recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention."<sup>109</sup> In this sense, "the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power."<sup>110</sup>
68. This conclusion is independent of whether the organ or official has acted contrary to provisions of domestic law or has exceeded the limits of its own competence, since it is a principle of international law that the State is responsible for the acts of its agents carried out under color of authority or for omissions of the same, even if they act outside of the limits of their competence or in violation of domestic law.<sup>111</sup> In similar terms, the IACHR

<sup>106</sup> See, inter alia, list of hearings announced in the introductory section of this report.

<sup>107</sup> See, for example, IACHR. Indigenous Peoples, Communities of African Descent, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 56.

<sup>108</sup> Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/8/5, 7 April 2008, paras. 54 and 55.

<sup>109</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 169; see also IACHR, Merits Report No. 11/10. Members of the Barrios Family (Venezuela), 16 March 2010, para. 91.

<sup>110</sup> I/A Court H.R. Advisory Opinion OC-6/86, Series A, N° 6, 9 May 1986. Para. 21.

<sup>111</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. Para. 170.

has also developed the duty to respect that the States must fulfill in relation to the human rights enshrined in the American Declaration.<sup>112</sup>

69. In this sense, within the field of business and human rights, the duty to respect entails that the States must refrain from deploying behaviors linked to business activities that contravene the exercise of human rights. This would happen, for example, if they adopt investment or commercial agreements in conflict with their human rights obligations<sup>113</sup> or if they assist, collaborate, instruct, or control the conduct of businesses, whether public or private, which entail human rights violations. This may even occur when the state assistance of control happens with respect to other international organisms linked to business activities.<sup>114</sup> In that regard, for example, the Working Group on business and human rights has indicated that “[t]here are situations in which the acts of a State-owned enterprise or the nature of its relationship to the State are more clearly associated with the State duty to respect [...] Under some circumstances, an abuse of human rights by such enterprises may entail a violation of the State’s own international law obligations.”<sup>115</sup> The existence of a closer connections between the States and businesses is also recognized by the Guiding Principles, thus “the closer the State is to the business entity or more dependent a public body on the support of the contributor, the more it’s justified that the State ensure that it respect human rights.”<sup>116</sup>
70. Although through the general obligation the direct behavior of state bodies or agents regarding the enjoyment of human rights is analyzed, in accordance with international law, in certain cases, the action or inaction of business entities may generate direct State responsibility through the duty to respect. In this regard, taking as a foundation the Articles on State Responsibility for Internationally Wrongful Acts adopted by the International Law Commission of the United Nations, the UN Committee on Economic, Social and Cultural rights finds that this would happen in the following cases: “(a) if the entity concerned is in fact acting on that State

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<sup>112</sup> IACHR. Report No. 80/11. Merits. Jessica Lenahan (Gonzalez) and others (United States), paras. 116 and 117; IACHR. Report No. 121/18, Merits. José Isabel Salas Galindo and others (United States), 5 October 2018. Para. 334.

<sup>113</sup> Regarding this situation, for example, the Guiding Principles refer to the States’ duty to ensure an adequate normative framework that protects human rights in the context of political agreements on corporate activities, such as investment treaties or contracts, without this meaning the end of offering necessary protection to investors. Cf. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principle 9 (Commentary).

<sup>114</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 24, UN Doc. E/C.12/GC/24, 10 August 2017, paras. 12 and 13; see, mutatis mutandi, International Commission of Jurists and the University of Maastricht. Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Maastricht, 28 September 2011, Principles 20 and 21; International Commission of Jurists, Urban Morgan Human Rights Institute, and the University of Maastricht. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 22-26 January 1997, para. 14.

<sup>115</sup> Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/32/45, 4 May 2016, paras. 33 and 89.

<sup>116</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principle 4 (Commentary).

party's instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts [as well as in the case of public business enterprises that are controlled by the States]; (b) when a business entity is empowered under the State party's legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities [such as through the provision of certain public services such as security, health and education, or in the administration of prisons or detention centers]; or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own."<sup>117</sup>

71. In the three situations mentioned in the foregoing paragraph, the primary source of conduct that originates the violation is a non-state actor, in this case business entities. This is derived from Articles 5<sup>118</sup>, 8<sup>119</sup>, and 11<sup>120</sup> of the Articles on State Responsibility for Internationally Wrongful Acts. For the purposes of this report, these three articles also contribute and correspond with inter-American hermeneutics given that they provide for attribution of responsibility directly to the State when the business entity exercises functions of public power (Art. 5). This could happen, for example, in issues related to certain public services, public security, or military functions when the State empowers companies to perform such functions. Of particular importance are not only the content of the faculties, but the form in which they are conferred upon an entity, the purposes for which they must be exercised, and the measures in which the entity must account for its exercise to the State.
72. Likewise, situations in which a business involved in human rights violations receives instructions from the State or is under its effective control (Art. 8) could happen, for example, in the context of a public works contract to build a highway through an indigenous territory without completing a free, prior and informed consultation. In this hypothetical scenario, although the business entity is the one that would infringe upon the indigenous territory, in order to determine its effects on direct State responsibility, whether it was under the instructions or protection of the State must be considered. The same could happen in the case of public businesses, when the State has

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<sup>117</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 24, UN Doc. E/C.12/GC/24, 10 August 2017, para. 11

<sup>118</sup> Article 5: Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

<sup>119</sup> Article 8: Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out that conduct.

<sup>120</sup> Article 11: Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

effective control over the behavior of said company in a specific case related to infringements on human rights.<sup>121</sup>

73. The final situation (Art. 11) refers to when the State unilaterally recognizes and adopts the act in question as its own.
74. The foregoing situations can even be broadened if one takes into account that under the doctrine of complicity it is also possible to establish state responsibility for breaching the duty to respect rights in relation to the actions of third parties, when there is evidence of any situation of acquiescence, tolerance or state collaboration in the acts that constitute the violation.<sup>122</sup> Although the inter-American experience analyzing these cases has particularly concentrated on the confluence of actions and omissions of state agents regarding the behavior of paramilitary or para-state actors in the context of human rights violations,<sup>123</sup> the IACHR and its REDESCA find that based on this theoretical jurisprudential foundation, the possible attribution of direct State responsibility for complicity in the field of business and human rights could continue to be developed.
75. Given the foregoing, in general terms, the behavior of businesses could also directly compromise the State's international responsibility as long as they are linked to conduct, whether action or omission, of state agents that entail their acquiescence or collaboration, in accordance with international standards. According to the Inter-American Court, "acquiescence would generate a more direct level of responsibility derived from the risk analysis, since it implies the consent of the State when the individual acts, whether

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<sup>121</sup> An example where there would be a combination of the situations of delegation of state capacity and direct control or instruction of the State is the reference the Inter-American Court made in the Case of *Ximenes Lopes v. Brazil*. In this case, the Court ruled that: "Such conduct [by a non-state actor], either by a natural or legal person, must be deemed to be an act by the State, inasmuch as such person acted in that capacity." Next it adds: "Hence, **the acts performed by any entity, either public or private,** which is empowered to act **in a State capacity,** may be deemed to be acts for which **the State is directly liable,** as it happens when services are rendered on behalf of the State" [...]. "In the instant case, the Casa de Reposo Guararapes (Guararapes Rest Home), where Damião Ximenes Lopes died, was a private health institution engaged by the State to render mental health services **under the coverage of Brazil's Single Health System and operating as a public health institution on behalf of the State** (infra para. 112.55). Therefore, the State is liable for the conduct of the staff of the Casa de Reposo Guararapes, which exercised the state authority in rendering public health services under Brazil's Single Health System." (**emphasis added**). See: I/A Court. Case of *Ximenes Lopes v. Brazil*, Judgment of 4 July 2006. Series C No. 149, paras. 86, 87 and 100.

<sup>122</sup> I/A Court H.R. Case of 19 *Tradesmen v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004, Series C No. 109, para. 135; I/A Court H.R. Case of *Yarce and others v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2016. Series C No. 325, para. 180; I/A Court H.R. Case of *Vereda La Esperanza v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341, paras. 152-168. See also: IACHR. Merits Report No 170/17. *Members and militants of the Patriotic Union (Colombia)*, 6 December 2017, para. 1444 et seq.

<sup>123</sup> I/A Court H.R. Case of 19 *Tradesmen v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004, Series C No. 109, para. 135; I/A Court H.R. Case of *Yarce and others v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 22, 2016. Series C No. 325, para. 180; I/A Court H.R. Case of *Vereda La Esperanza v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341, paras. 152-168. See also: IACHR. Merits Report No 170/17. *Members and militants of the Patriotic Union (Colombia)*, 6 December 2017, para. 1444 et seq.

through deliberate inaction or through its own action by having generated the conditions that allow the act to be executed by private parties.”<sup>124</sup> Likewise, the Inter-American Court has held that “in order to end state responsibility for transgressing the duty to respect in relation to the actions of third parties, a general situation of collaboration and acquiescence is not enough, but it is necessary that in the specific case the state acquiescence or collaboration unfolds in the circumstances it created itself.”<sup>125</sup> In this context, for the Commission and its Special Rapporteurship, deepening the doctrine of complicity would make it possible to move forward in the analysis of the State’s direct responsibility for the assistance it provides, whether through actions or omissions, in this case to businesses, in situations that entail human rights violations. It is thus important to analyze, for example, the situations of close connection or the level of protection, coordination, permissiveness, tolerance, inaction, or sponsorship that the transgressing business entities receive from the government apparatus within the context of the abuses committed.

76. For these purposes, it is useful to resort to works and studies on complicity in order to clarify the nature and scope of the concept in the field of business and human rights. One particularly noteworthy study is an extensive research investigation published by the International Commission of Jurists (ICJ) in 2008 regarding corporate complicity when the conduct of these actors contributes to the commission of specific human rights violations.<sup>126</sup> Although its analysis is not based on international human rights law, but rather from a comparative criminal and civil law approach, the study brings together important elements as an authorized guide that may inform and orient the approach toward certain situations from this branch of the law for the evaluation of state behavior. For the purposes of this report, it is sufficient to indicate that the study points out criteria for evaluating certain behaviors by businesses that could create liability for complicity. Particularly, it indicates that in order to assess the contribution to human rights violations, one should evaluate whether the conduct enables its occurrence, exacerbates or worsens it, or facilitates it. Furthermore, the elements of knowledge and predictability would be factors to account for in complicit conduct, insofar as it is required that the entity had known or should have known of the risk its conduct would have of violating human rights based on the totality of the circumstances, or if this risk was willfully or maliciously ignored. Finally, it also takes into account the proximate relationship to the human rights violation, for example the control or influence it had over the particular situation, whether geographic, of the duration, intensity or nature of the corresponding relationship, interactions

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<sup>124</sup> I/A Court. Case of López Soto and others v. Venezuela. Merits, Reparations and Costs. Judgment of 26 September 2018. Series C No. 362, para. 146.

<sup>125</sup> I/A Court. Case of Yarce and others v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of 22 November 2016. Series C No. 325, para. 180; I/A Court. Case of Vereda La Esperanza v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of 31 August 2017. Series C No. 341, para. 152.

<sup>126</sup> International Commission of Jurists. [Corporate Complicity and Legal Accountability](#) (2008).



or transactions.<sup>127</sup> Different types of corporate complicity have also been identified, such as direct complicity, complicity by benefit, or by silence or omission, with different legal and non-legal effects in each case.<sup>128</sup>

77. The IACHR and its REDESCA underscore that although each of these elements does not automatically apply in the evaluation of the possible international responsibility of the State, they may guide its factual and legal analysis according to the facts of each specific case; thus, the greater the involvement of the State in light of the aforementioned elements, the greater the likelihood it will be internationally responsible, whether through its duties of respect, for example verifying direct participation, control over the company, acquiescence, tolerance, or collaboration; or even seeing whether these elements can inform whether they correspond to their general duties to guarantee rights, as we will develop next.
78. On the other hand, the IACHR has also found that in certain cases, non-compliance with the duty to guarantee human rights in relation to the acts of private individuals may have implications regarding the duty to respect, considering them as a form of tolerance and acquiescence in view of the magnitude, seriousness, prolongation, and manifestations of the breach of the duties to prevent and investigate.<sup>129</sup>
79. In this context, for the IACHR and its REDESCA, when the State has knowledge of specific facts attributable to some business under its jurisdiction that threatens or violates human rights; and at the same time it verifies a sustained and prolonged breach of its duties to guarantee in the context of such facts, the commission constituting indirect responsibility takes the form of tolerance and acquiescence, and therefore can become observable in light of the duty to respect. For example, this could happen if a fundamental part of the lack of state response as a guarantor takes place as a consequence of the absence or lack of sustained diligence in the investigation and eventual punishment for serious and repeated violations of human rights involving the actions of a business entity.

## **B. *Business or Economic Activities and the States' General Duty to Guarantee Human Rights***

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<sup>127</sup> International Commission of Jurists. [Corporate Complicity and Legal Accountability. Volume 1: Facing the Facts and Charting a Legal Path](#) (2008).

<sup>128</sup> Carrillo, Nicolas. La responsabilidad internacional de las empresas por complicidad en violaciones graves de derechos humanos [International responsibility of companies for complicity in gross human rights violations]. In: Bohoslavsky, Juan Pablo (ed.). *El negocio del terrorismo de Estado: Los cómplices económicos de la dictadura uruguaya*. Penguin Random House (2016), pages 233-261 (only available in Spanish); Michalowski, Sabine and Juan Pablo Cardona. *Responsabilidad corporativa y justicia transicional [Corporate responsibility and transitional justice]*. Anuario de Derechos Humanos de la Universidad de Chile, No. 11, 2015, pages 173-182 (only available in Spanish).

<sup>129</sup> IACHR. Merits Report No 170/17. *Members and militants of the Patriotic Union (Colombia)*, 6 December 2017. paras. 1458-1462.

80. Regarding the States' general obligation to guarantee human rights, developed in the framework of the inter-American system, the IACHR recalls that it corresponds with the duty to protect human rights, recognized in Pillar I of the Guiding Principles, referring to the adoption of "all necessary steps to prevent, investigate, punish, and redress abuse through effective policies, legislation, regulations, and adjudication."<sup>130</sup> That is, the State's duty to protect human rights, developed in the field of business and human rights, has a basis in the treaty law of the inter-American instruments and coincides with the aforementioned general obligation to guarantee human rights.<sup>131</sup>
81. Regarding the States' obligation to ensure human rights recognized in the inter-American system, both the IACHR and the Inter-American Court have held that this entails the State Parties' duty to organize their entire governmental apparatus and, in general, all the structures that manifest the exercise of public power, in such a way that they are capable of legally ensuring the free and full exercise of human rights. As a consequence of this obligation, States must act with due diligence to prevent, investigate, and punish any violation of the rights recognized by the Convention and also seek to redress, if possible, the violated right and, where appropriate, remedy the harm produced by the violation of human rights.<sup>132</sup> The Guiding Principles also provide for state functions to ensure, for example, through regulation and supervision of businesses, respect for human rights, as well as offering access to efficient mechanisms for reparations.<sup>133</sup>
82. Regarding this obligation to guarantee, the IACHR has held that international instruments generally require that States Parties not only respect the rights enshrined in them, but also that they ensure that people under their jurisdiction can exercise those rights. The continuous and integrated nature of human rights obligations does not only demand abstention, but also positive action, of the States. Thus, regarding the application of the American Declaration, the Commission not only has required the States to abstain from committing human rights violations contravening the provisions of that instrument.<sup>134</sup> It also has demanded

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<sup>130</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/8/5, 7 April 2008, Principle 1.

<sup>131</sup> IACHR. Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 52

<sup>132</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of 29 July 1988. Series C No. 4. Para. 166.

<sup>133</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 3, 5 and 25.

<sup>134</sup> See for example, IACHR, Report No. 63/08, Case 12.534, Andrea Mortlock (United States), paras. 75-95; IACHR, Report No. 62/02, Case 12.285, Michael Domingues (United States), paras. 84-87.

that the States adopt affirmative measures to guarantee their effective exercise.<sup>135</sup>

83. In this sense, although this obligation can be fulfilled in different ways, depending on the specific right and the particular needs for protection,<sup>136</sup> the Inter-American Court has indicated that this obligation “is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.”<sup>137</sup>
84. For their part, both organs of the inter-American system have held that in certain contexts verifying that a victim belongs to a group in a situation of special vulnerability accentuates the State’s duty to guarantee, which means demands of the State a more active role to strike a balance and provide special protection to certain groups who have suffered historical or structural of discrimination or violence. Thus, for example, the Inter-American Court has stated that “(...) not only should the States refrain from violating such rights, but also adopt positive measures, to be determined according to the specific needs of protection of the rights holder, either because of his personal condition of the specific situation (s/)he is in.”<sup>138</sup>
85. On numerous occasions, the IACHR has also found the differentiated impact on the human rights of persons belonging to certain social groups by actions undertaken either by state or private agents.<sup>139</sup> For example, in a context of forced and violent evictions of rural workers in Brazil, carried out by non-state actors, in which a person had been murdered, the Commission took into account the situation of special vulnerability that affected the rural population in the north of the country, as well as the collusion among powerful groups of landowners, police forces, and state-level justice officials to attribute responsibility to the State for not having adopted specific preventive measures to avoid violence.<sup>140</sup>
86. In accordance with the standards issued in the framework of human rights protection under the inter-American system, and taking into account the rules of interpretation of these norms, as well as the Guiding Principles, the IACHR and the REDESCA identify four clear state duties for fulfilling the

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<sup>135</sup> See, for example, IACHR, Informe No. 81/10, Case 12.562, Wayne Smith, Hugo Armendariz et al. (United States), paras. 61-65; Report No. 40/04, Case N<sup>o</sup> 12.053, Mayan Indigenous Communities (Belize), Annual Report of the IACHR 2004, paras. 122-135, 162, and 193-196; Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), IACHR Annual Report 2002, para. 124-145.

<sup>136</sup> I/A Court H.R. Case of Vargas Areco v. Paraguay. Merits, Reparations and Costs. Judgment de September 26, 2006. Series C No. 155, para. 73; I/A Court H.R. Case of Massacre of Santo Domingo v. Colombia. Preliminary Objections, Merits and Reparations. Judgment de 30 November 2012. Series C No. 259, para. 189.

<sup>137</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment de 29 July 1988. Series C No. 4. para. 167.

<sup>138</sup> I/A Court H.R. Case of Ximenes Lopes v. Brasil, Judgment de 4 July 2006. Series C No. 149, para. 104.

<sup>139</sup> See, inter alia, IACHR. Report on Poverty and Human Rights in the Americas, OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017; IACHR. Access to Justice for Women Victims of Sexual Violence in the Americas. OEA/Ser.L/V/II. Doc. 65, 28 December 2011.

<sup>140</sup> IACHR. Merits Report No 25/09. Sebastiao Camargo Filho (Brasil), 19 March 2009. See also IACHR. [IACHR Expresses Concern about Acts of Violence against Rural Workers in Brazil](#). 18 January 2019.

obligation to guarantee in the context of business activities: (i) the duty to regulate and adopt provisions in domestic law, (ii) the duty to prevent human rights violations in the framework of business activities, (iii) the duty to supervise such activities, and (iv) the duty to investigate, punish, and ensure access to integral reparations for victims in said contexts. Without prejudice to each of these specific duties having its own characteristics, which should be analyzed under the facts of each case, they also have a reciprocal and interconnected relationship that contributes to the fulfillment of the general obligation to guarantee and may have consequences with respect to the general duty to respect human rights according to the particular case. Reference will be made to such duties below.

## **1. Duty to Prevent Human Rights Violations in the Context of Business Activities**

87. The duty to prevent is derived from the general obligation to guarantee human rights. In the words of the Inter-American Court, the duty to prevent includes “all those measures of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that eventual violations of those rights are examined and dealt with as wrongful acts that, as such, are susceptible to result in punishment for those who commit them, together with the obligation to compensate the victims for the negative consequences. Furthermore, it is plain that the obligation to prevent is an obligation of means or behavior and non-compliance is not proved by the mere fact that a right has been violated.”<sup>141</sup>
88. For its part, well-settled inter-American jurisprudence regarding the duty to prevent in the context of relations between private actors has underscored that the responsibility of the State is conditioned upon: (i) whether the State had or should have had knowledge of a situation of risk; (ii) whether said risk was real and immediate; (iii) the particular situation of the affected persons; and (iv) whether the State adopted measures reasonably expected to avoid said risk from materializing.<sup>142</sup> A warning

<sup>141</sup> I/A Court H.R. Case of Velásquez Rodríguez V. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 175; I/A Court H.R. Advisory Opinion OC-23/17 of November 17, 2017. Series A No. 23, para. 118. See also I/A Court H.R. Case of González and others (“Cotton Field”) v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 252; I/A Court H.R. Case of Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, paras. 221 and 222; and I/A Court H.R. Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 329, para. 208.

<sup>142</sup> See, inter alia, IACHR. Merits Report No 33/16, Linda Loayza López Soto and family (Venezuela), 29 July 2016, para. 163; IACHR. Merits Report No 25/18, Employees of the Santo Antônio de Jesus Fireworks factory (Brazil), 2 March 2018, para. 98. In this same sense, see: I/A Court H.R. Case of González and others (“Cotton Field”) v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No.205, para. 284; I/A Court H.R. Case of Workers of Hacienda Brasil Verde v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318. para. 323; I/A Court H.R. Case of López Soto and others v. Venezuela. Merits, Reparations and Costs. Judgment of September 26, 2018. Series C No. 362, para. 140.

creating knowledge of a particular risk may be, for example, through complaints and reports presented by the persons at risk or by third parties, or information that the State has or should have regarding the specific situation; which may also be associated with its general authority to monitor and surveil it, for example regarding business behavior in light of the exigencies that a business activity, product, or services demands. The realness or immediacy of the risk refers to it not being remote or merely hypothetical or eventual, but rather having a certain possibility of materializing. For its part, the required preventive measures should be determined in light of the characteristics and circumstances of each specific case, taking into account the reinforced duty to guarantee with regard to persons who, due to their condition or the context of the facts themselves require special protection from the State.

89. In that sense, for the purposes of this report, the duty to prevent demands that the applicable authorities adopt adequate measures to avoid real risks to human rights originating from the activities of businesses, of which they have or should have knowledge, from materializing. Among these institutions, for example, are the Police, the Judiciary, the Congress, the policymaking bodies related to commerce, investment, production, mining, energy, taxation, banking, agriculture, the environment, fishing, intellectual property, tourism, health, education, social security, the rights of indigenous peoples, and the rights of women, among others. Therefore, once the possible impacts and specific risks are identified, the States should adopt, or where appropriate, request and ensure that the business involved implement, the corresponding corrective measures.
90. The foregoing means that the State may not invoke the impossibility of preventing the consummation of a risk if it has not adopted the measures of guarantee that the situation requires. Although it is not possible to make a detailed list of all the measures that may be adopted to comply with the obligation to prevent, since these will vary depending on the right in question and the particular context of the facts, the IACHR and its REDESCA identifies some measures that may be expected of the States in order to establish that it has acted with due diligence in the context of business activities and human rights protection, in some cases said actions will directly form part of one of the other aforementioned specific duties. Thus, modifying normative frameworks to regulate business' actions in the field of human rights is a precondition that facilitates and reinforces the State's duty of prevention.<sup>143</sup> The same is true of the implementation of protection policies in cases of risky corporate activities, the creation of strategies to overcome widespread violations related to the activities of certain industries or economic sectors, or establishing or strengthening

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<sup>143</sup> See, for example, Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/73/163, 16 July 2018, paras. 31-34, 67-78.

mechanisms for judicial protection for cases of human rights violations involving businesses, among others.<sup>144</sup>

91. An illustrative case of the foregoing involves the responsibility of the Brazilian State for not having guaranteed the protection of 85 workers subjected to forms of contemporary slavery and human trafficking in a hacienda for raising livestock in the north of the country. The Inter-American Court's analysis not only referred to the duty of prevention required of the State once two of the victims filed specific complaints, but also to specific, prior duty of prevention due to the State's specific knowledge regarding slave labor practices and exploitation of workers that were happening at this hacienda. Thus, the Court held that despite the efforts it undertook, the State did not demonstrate that the public policies it implemented were sufficient and effective to prevent the 85 workers from being subjected to slavery.<sup>145</sup> In the same case, the IACHR itself indicated to the Court that this was verified, for example, by (i) the lack of periodic supervision of the hacienda despite the existence of serious prior findings; (ii) insufficient registration, verification, and collection of evidence in the audits; and (iii) the lack of consequences in the short and medium term after the audits.<sup>146</sup>
92. The Inter-American Court's Advisory Opinion 23/17 also details state prevention obligations regarding significant environmental damage where private companies may be involved. In this opinion, it held that in order to comply with the obligation to prevent, the States must: regulate and supervise the activities under its jurisdiction that may cause significant harm to the environment; undertake an environmental impact assessment when there is a risk that may cause significant harm to the environment, establish a contingency plan with security measures and procedures to minimize the possibility of serious environmental accidents; and mitigate the significant environmental damage that has occurred, even if it occurred in spite of the State's preventive actions.<sup>147</sup>
93. In the analysis of issuing a recent precautionary measure due to the alleged pollution attributed to the management of a sanitation landfill by a private company and the consequent risks to the rights to life, integrity, and health of the residents of an *ejido* in Mexico, the IACHR also emphasized the required state behavior within a preventive framework, thus stating that: "not only the high degrees of exposure to toxic or hazardous substances represent a risk to the rights to life, personal integrity and health, but also

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<sup>144</sup> See, for example, Report of the United Nations High Commissioner for Human Rights: Improving accountability and access to remedy for victims of business-related human rights abuse. UN Doc. A/HRC/32/19, 10 May 2016; and the complementary document on the guidelines of the report (UN Doc. A/HRC/32/19/Add.1, 12 May 2016). See also: Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/72/162, 18 July 2017.

<sup>145</sup> I/A Court H.R. Case of Workers of Hacienda Brasil Verde v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, paras. 322-328

<sup>146</sup> I/A Court H.R. Case of Workers of Hacienda Brasil Verde v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 215.

<sup>147</sup> I/A Court H.R. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 174.

the chronic and permanent exposure to low levels of such substances [...]. In order to protect the threatened human rights in such circumstances, the States have, among other obligations, the duty to generate, collect, evaluate, and update adequate information, communicate it effectively, particularly to the at-risk population, facilitate the right to participation of the rights holders in decision-making in such contexts, as well as implement actions so that the companies involved with the management of such substances carry out human rights due diligence.”<sup>148</sup>

94. The IACHR and its REDESCA recall that the prevention strategy should be holistic, which means it should seek to prevent the factors of risk and at the same time strengthen the institutions involved so that they may provide a more effective response to the situation being faced. Likewise, the States must adopt specific protective measures in situations in which it is evident that certain groups of persons, since they pertain to a vulnerable group, may be victims of violations of their rights in the context of the business activity in question.
95. For the Commission and its REDESCA, these situations create a reinforced obligation that affects the analysis of the attribution of international responsibility to the State for the acts of third parties, such as business actors. In such cases, on the one hand, the IACHR and its REDESCA understand that in order to consider the predictability of a particular risk, this reinforced or strict duty to prevent obligates the State to create or take into account adequate and pertinent statistical information that allows it to design and evaluate public policies on the subject, which limits the State’s margin to allege it lacks knowledge of the specific situation or, put another way, broadens the field for being able to allege the State’s knowledge of a particular situation of risk. On the other hand, it also contributes to defining criteria and factors to determine whether the state reaction system is adequate to face the risk and prevent it from materializing in the specific case, so that the margin to accept actions implemented by the State that do not comply with the identified conditions for reinforced risk prevention are narrower.
96. Finally, it is also important to mention that the fulfillment of the duty to guarantee and the specific duty to prevent may be at stake when the State itself creates or consolidates a situation of risk to the enjoyment of human rights. That means, in situations in which although it is not possible to confirm the existence of an individualized risk that activates the State’s duty to protect, the State may also breach these obligations if its prior behavior had created or decisively contributed to the existence of the risk for the commission of any violation in the specific case. In these situations of created risk, the State’s positive obligations are also intensified or accentuated, as the Inter-American Court has held.<sup>149</sup> In order to link an

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<sup>148</sup> IACHR. Resolution 24/2019. Precautionary Measures No. 1498/18. Marcelino Díaz Sánchez and others (Mexico). 23 April 2019, para. 24

<sup>149</sup> I/A Court H.R. Case of Massacre of Pueblo Bello v. Colombia. Judgment of January 31, 2006. Series C No. 140, para. 126.

instance of state conduct to the creation of the risk, it will be necessary to establish the connection between specific actions or omissions and the creation or consolidation of situations of real risk of the commission of human rights violations, in this case, linked to business activities.

## 2. The Duty to Supervise the Effective Enjoyment of Human Rights in the Context of Business Activities

97. The organs of the inter-American system have already referred to the special statute duty to supervise business' actions. The obligation of state supervision includes both services provided, directly or indirectly, by the State, and those offered by private individuals.<sup>150</sup> Thus, in cases of provision of essential public services for the guarantee of human rights, such as health or education, inter-American jurisprudence has consistently found that the States are responsible not only for actions or omissions of their own agents, such as health or education workers in state educational or health institutions.<sup>151</sup> States are also responsible for the behavior of third parties or private entities who provide these services, whether they act with State capacity, such as when the State contracts a private individual to provide a public service in their name,<sup>152</sup> or when the third party directly provides the service, and the State has not ensured, in its role as guarantor of the content of the rights in play, what the particular case required.<sup>153</sup> In all such cases, the State not only retains regulatory and supervisory authority, but also has an imperative duty to do so.<sup>154</sup>
98. In other words, in terms of business actors that provide services related to goods of the highest social interest, the public power is entrusted with the oversight of their performance, whether by granting the respective license or by the exercise of subsequent supervision and control over the behavior of such private actors. In the words of the Inter-American Court, "when related to the essential jurisdiction of the supervision and regulation of

<sup>150</sup> In this regard see: I/A Court H.R. Case of Ximenes Lopes v. Brasil. Judgment of July 4, 2006. Series C No. 149; I/A Court H.R. Case of Albán Cornejo v. Ecuador. Merits, Reparations and Costs. Judgment of November 22, 2007, Series C No. 171; I/A Court H.R. Case of Suárez Peralta v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261.

<sup>151</sup> I/A Court H.R. Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 329. para. 223, IACHR. Merits Report No. 110/18. Paola del Rosario Albarracín Guzmán and family (Ecuador), 5 October 2018.

<sup>152</sup> I/A Court H.R. Case of Ximenes Lopes v. Brasil. Judgment of July 4, 2006. Series C No. 149, paras. 141-146.

<sup>153</sup> I/A Court H.R. Case of Suárez Peralta v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 146-153; I/A Court H.R. Case of Gonzales Lluy and others v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298.

<sup>154</sup> I/A Court H.R. Case of Suárez Peralta v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, paras. 140-154; I/A Court H.R. Case of I.V. V. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 329, para. 223; I/A Court H.R. Case of Poblete Vilches and others v. Chile. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 349, paras. 124-135.



rendering the services of public interest, such as health, by private or public entities (as is the case of a private hospital), the state responsibility is generated by the omission of the duty to supervise the rendering of the public service to protect the respective right.”<sup>155</sup> Additionally, based on the foregoing the Court has also established that the design and implementation of the mechanisms designed to fulfill the duty of supervision in cases related to the enjoyment of economic, social, cultural, and environmental rights must aim to fulfill the content of the elements of availability, accessibility, acceptability, and quality.<sup>156</sup>

99. The inter-American system’s mechanisms for protection and promotion of human rights have also addressed the duty of supervision regarding labor rights and private activities. For example, the IACHR recommended that Honduras implement measures to control and monitor *maquila* workers’ workplaces, paying adequate attention to women workers’ rights, including proper control over working hours and accessible mechanisms for filing complaints.<sup>157</sup> The IACHR also urged the Honduran State to implement mechanisms to supervise all companies engaged in spearfishing due to the working conditions endured by divers, the majority of whom belong to the Miskito indigenous people, which was governed by informal contracts, a lack of workplace safety, deficient equipment, and labor exploitation.<sup>158</sup> In the case of the Dominican Republic, the IACHR recommended supervising the working conditions of Haitian migrant workers because they are often victims of labor exploitation in the agricultural industry, the sugarcane cultivation industry, and construction industry.<sup>159</sup> Regarding economic environments where slave labor is present, both organs of the inter-American system have urged the State to carry out enforcement actions aimed at protecting the human rights at stake.<sup>160</sup> On the other hand, another area in which said duty has been applied is in security issues. For example, the IACHR recommended that Honduras and Guatemala effectively

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<sup>155</sup> I/A Court H.R. Case of Albán Cornejo v. Ecuador. Merits, Reparations and Costs. Judgment of November 22, 2007, Series C No. 171, para. 119.

<sup>156</sup> I/A Court H.R. Case of Suárez Peralta v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261. para. 152

<sup>157</sup> IACHR. Situation of Human Rights in Honduras, OEA/Ser.L/V/II. Doc. 42/15, 31 December 2015, para. 405-415.

<sup>158</sup> IACHR. Situation of Human Rights in Honduras, OEA/Ser.L/V/II. Doc. 42/15, 31 December 2015, Paras.427-435.

<sup>159</sup> IACHR. Situation of Human Rights in the Dominican Republic. OEA/Ser.L/V/II. Doc. 45/15, 31 December 2015, paras. 565-574 and 653.14. Regarding the supervision and inspection of the workplace and the guarantee of the rights of migrants, the IACHR notes that the *de jure* or *de facto* incorporation of immigration control functions to workplace inspection officials, may make it difficult to protect migrants in the workplace and dissuade them from reporting abusive working conditions and cooperating with labor authorities. Thus, to guarantee their rights it is necessary that the States clearly separate these functions so that such officials may avoid sharing information related to migrants migration status, and focus instead on labor exploitation committed by businesses, which extends to other private authorities or agents who have direct intervention in the guarantee of human rights and contact with migrants, such as the health or education sectors. Cf. Report of the Special Rapporteur on the rights of migrants. UN Doc., A/HRC/26/35, 3 April 2014, paras. 62 and 101.

<sup>160</sup> See generally, IACHR. Captive Communities: Situation of the Guaraní Indigenous Peoples and Contemporary Forms of Slavery in the Chaco of Bolivia, OEA/Ser.L/V/II. Doc. 58, 24 December 2009; I/A Court H.R. Case of Workers of Hacienda Brasil Verde v. Brasil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318.

supervise and control private security companies and their agents,<sup>161</sup> not only because they tend to be sources of violence and there is a high risk they may be involved in human rights violations, but also because the operation of these companies cannot be a complement to or substitute for the States' obligations in matters of citizen security.<sup>162</sup>

100. Extraction, exploitation or development projects have been other areas in which the State's duty to oversee corporate activity may affect other human rights, including care for the environment. This is associated with the fact that many of these projects, by nature, tend to represent serious risks to human rights and require specific regulation and supervision by the State, although the required level of intensity of supervision and oversight will depend on the level of risk that the activity or conduct entails.<sup>163</sup> For example, given the significant number of peasant, Afro-descendant, and indigenous communities that face the risk of forced evictions in Guatemala, due to the interests of companies with investment projects in monocultures, mining, hydroelectric projects, petroleum, or tourism, the IACHR requested that the State carry out adequate supervision of corporate activities in light of human rights standards.<sup>164</sup> The IACHR also found that the absence of safeguards and mechanisms for supervision and control of the execution of timber concessions in Belize increased the environmental damage in the lands where Mayan communities hold communal property rights.<sup>165</sup>
101. In these contexts, the Inter-American Court has also referred to the States' duty to implement effective mechanisms for supervision and oversight to protect indigenous territories and natural reserves from damage that may arise from private actors' conduct, particularly through the supervision and oversight of environmental impact studies and, where there have been effects, rehabilitation of these territories or reserves.<sup>166</sup> The Court has referred to the States' duty to oversee business activities under their jurisdiction that may produce significant environmental damage in similar terms, through independent mechanisms for supervision and accountability.<sup>167</sup>

<sup>161</sup> IACHR. Situation of Human Rights in Guatemala. OEA/Ser.L/V/II. Doc. 43/15, 31 December 2015, para. 517.17; IACHR. Situation of Human Rights in Honduras, OEA/Ser.L/V/II. Doc. 42/15, 31 December 2015, para. 579.7.

<sup>162</sup> IACHR, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II, doc. 57, 31 December 2009, para. 73

<sup>163</sup> IACHR. Indigenous Peoples, Communities of African Descent, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, paras. 98-105; I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, paras. 152-155.

<sup>164</sup> IACHR. Situation of Human Rights in Guatemala, OEA/Ser.L/V/II. Doc. 208/17, 31 December 2017. para. 12 and 475.49.

<sup>165</sup> IACHR, Merits Report No 40/04, Indigenous Mayan Communities from the District of Toledo, (Belize) 12 October 2004, para. 147.

<sup>166</sup> I/A Court H.R. Case of Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, paras. 221 and 222.

<sup>167</sup> I/A Court H.R. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, paras. 154 and 163.

102. The IACHR has also ruled on the importance of fulfilling the duty to supervise in cases of dangerous activities, such as manufacturing fireworks, due to the impacts they may have on human rights. In this context, it has underscored the State's role as a guarantor, in spheres involving society's fundamental interests and individuals' basic rights.<sup>168</sup> The IACHR also observes that this duty to supervise shall not be exhausted through due diligence alone, through practices aimed at verifying cases in which risks to human rights arise in the context of business activities, but will also require States to take effective actions aimed at keeping the risks from consummating, in light of the aforementioned duty of prevention.<sup>169</sup>
103. In this way, the Commission and its REDESCA find that the obligation becomes stricter in certain cases, depending on the type of activity and the nature of the business entity. Therefore, when the businesses involved have close links to the State, whether through the State owning them or being able to exercise control or influence over them,<sup>170</sup> a stricter supervisory duty should be required over their activities and their potential human rights impact, including those of an extraterritorial nature.

### **3. Duty to regulate and adopt domestic law provisions in the framework of business activities and human rights**

104. Article 2 of the American Convention establishes the general obligation to adapt the domestic legal order to the norms of the American Convention. This duty implies that each State Party must adapt its domestic law to its provisions to guarantee the rights recognized therein, which implies that domestic legal measures must be effective (*effet utile*).<sup>171</sup> This duty implies, on the one hand, the suppression of laws and practices of any nature that entail violation of the guarantees provided for in the Convention and, on the other, the issuance of standards and the development of practices conducive to the effective observance of said guarantees.<sup>172</sup> The IACHR has also arranged the adoption and revision of legislative measures in order to guarantee the rights recognized in the American Declaration; for example, in the case of Mary and Carrie Dann, where the restriction on the use of indigenous lands and the presence and damage of these lands by private mining activity was alleged, the two recommendations issued by the IACHR

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<sup>168</sup> IACHR. Merits Report No 25/18, Workers of the Santo Antônio de Jesus fireworks factory (Brazil), 2 March 2018, para. 100; I/A Court H.R. Case of Workers of Hacienda Brasil Verde v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 319.

<sup>169</sup> I/A Court H.R. Case of Workers of Hacienda Brasil Verde v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 326 and 328.

<sup>170</sup> See, for example, Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/32/45, 4 May 2016.

<sup>171</sup> I/A Court H.R. Case of "The Last Temptation of Christ" (Olmedo-Bustos *et al.*) v. Chile. Merits, Reparations and Costs. Judgement from February 5, 2001. Series C No. 73, para. 87.

<sup>172</sup> I/A Court H.R. Case of Castillo Petruzzi *et al.* v. Peru. Merit, Reparations and Costs. Judgement from May 30, 1999. Series C No. 52, para. 207; I/A Court H.R. Case of Mendoza *et al.* v. Argentina. Preliminary objections, Merits, Reparations and Costs. Judgement from May 14, 2013 Series C No. 260. para. 293.

contain indications for the regulatory adaptation of the United States regarding the facts analyzed.<sup>173</sup>

105. It should also be recalled that, “[t]he State obligation to adapt its domestic laws to the provisions of the Convention is not limited to the constitutional or legislative texts but must permeate all the legal provisions of a regulatory nature and result in the practical application of the standards for the protection of human rights[.]”<sup>174</sup> Thus, an integral part of the process of effective implementation and enforcement through legal frameworks in this context is for the States to take the necessary measures to ensure not only that the actions of its agents comply with both national and international legal obligations,<sup>175</sup> but, in this case, to verify that the behavior of the businesses under its jurisdiction is adjusted to the standards recognized by international human rights law. For this reason, alongside the legal framework, it is necessary to have an institutional apparatus that makes it possible to make existing regulations effective, so as to ensure, in practice, the implementation of this duty.
106. In the field of business and human rights, for example, this obligation includes the adoption of domestic legislation and relevant policies for the protection of human rights in the context of the business activity in question. This means incorporating substantive and procedural guarantees that ensure respect for human rights under threat in those provisions that regulate businesses behavior, including the creation, operation, and dissolution of enterprises, as well as the corresponding repeal and prohibition of adopting legislation or policies that weaken, undermine or deny these rights, such as in the productive, commercial or investment field. Thus, for example, the Inter-American Court established a violation of Article 2 of the American Convention due to the lack of normative safeguards to prevent violations of the right to social security in processes of privatization of a state business that created impediments to an older adult in Peru from effectively collecting his pension payments.<sup>176</sup>
107. On the other hand, the IACHR's REDESCA notes that some governments in the region have been discussing the need to elaborate and implement National Action Plans (NAPs) on business and human rights, as a public policy strategy for protection of human rights related to business activities. Thus, it is aware that Argentina, Brazil, Guatemala, Honduras, Mexico, and Peru have been carrying out actions aimed at this end, while Colombia, the

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<sup>173</sup> IACHR. Merits Reports No. 75/02, Mary and Carrie Dann (United States of America), December 27, 2002, para. 173.1 and 173.2

<sup>174</sup> See, inter alia, I/A Court H.R. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21. para. 65.

<sup>175</sup> IACHR. Reporto n the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

<sup>176</sup> I/A Court. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 6 March 2019. Series C No. 375, para. 139.

United States, and Chile have already approved and published their respective plans.<sup>177</sup>

108. In this regard, the IACHR's REDESCA highlights the work done by the UN Working Group on Business and Human Rights to provide recommendations and guide the development and application of these public policy tools, criteria that should be considered in a special way by the States of the region that have decided to initiate processes for the preparation, evaluation or adjustment of NAPs, in particular ensuring the transparency, participation, and inclusion of the various stakeholders from their initial stages.<sup>178</sup> In order to comply with international standards regarding this issue, the REDESA also welcomes and values documents prepared by organizations specializing in the subject<sup>179</sup> and stress the importance that the States take them into consideration when preparing their NAPs. The IACHR and its REDESCA also emphasize that, whatever the public policy developed regarding this field may be, it must always be based on a human rights approach and comply with the parameters derived from that approach. In particular, recognizing the State as the guarantor of rights and as responsible for their promotion, defense, and protection; and to social groups and individuals as rights holders, who have the capacity and the right to access effective remedies to report threats to or violations of their rights and fundamental freedoms, and to effectively participate in the processes involving the enjoyment of the same.
109. Nevertheless – and bearing in mind that, in order to comply with the duty to respect and guarantee human rights, States must ensure the compatibility and effectiveness of their regulatory frameworks with international provisions in this subject matter – the Commission and its REDESCA underscore that in the context of human rights violations and business activities, the strategy or mechanism selected by the State for such purposes must emphasize the binding legal standards on human rights for the State concerned and the consequences that may arise from them for businesses under their jurisdiction, otherwise there could be serious regulatory gaps that later represent a breach of some of their international obligations.

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<sup>177</sup> Colombia. [National Action Plan on Human Rights and Business](#) (December, 2015); United States of America. [National Action Plan on Responsible Business Conduct](#) (2016); Chile. [National Action Plan on Business and Human Rights](#) (July, 2017). Mutatis mutandis see the project on responsible business conduct at Latin America and the Caribbean, where one of the main objectives is to collaborate with governments for the development and implementation of NAPs in this area. For more information, please consult: [Joint Project on Responsible Business Conduct in Latin America and the Caribbean](#) on the OHCHR web portal.

<sup>178</sup> UN Working Group on Business and Human Rights. [Guidance on National Action Plan on Business and Human Rights](#) (November, 2016)

<sup>179</sup> Danish Institute for Human Rights, International Corporate Accountability Roundtable and Unicef. [Children's Rights in National Action Plans](#) on Business and Human Rights (2015); International Service for Human Rights. (ISHR) and International Corporate Accountability Roundtable (ICAR) [Human Rights Defenders in National Plans of Action \(NAPs\) on Business and Human Rights](#) (2016); and Due Process of Law Foundation (DPLF) International Corporate Accountability Roundtable (ICAR). [Extractive and National Action Plans \(NAPs\) on Business and Human Rights](#) (2017).

110. Thus, for example, despite the positive consideration of the approval and enforcement of NPAs in the area of business and human rights, the Committee on Economic, Social and Cultural Rights has expressed its concern about the lack of regulatory frameworks that guarantee respect for human rights by businesses that are under the jurisdiction of a State, regardless of whether they operate within the State or their activities are carried out abroad.<sup>180</sup> Thus, the coadjuvant nature of these public policies is recognized as part of the State's verification of its capability to protect and guarantee human rights in these contexts, but also noting that, in no case, should it be interpreted as a substitute for the obligatory implementation of regulations, which is an obligation directly derived from international obligations on the issue of the human rights of States.
111. That means in order to guarantee respect for the human rights of individuals, groups and communities in the context of business activity, notwithstanding the preparation or existence of related public policies, it is necessary for States to adapt the corresponding normative framework and legislation from a human rights focus, both substantively and procedurally, and addressing areas such as civil, administrative, and criminal law, as well as their extraterritorial application when applicable. Generally, the States must take into account that there tend to be great imbalances between affected or at-risk individuals and communities and businesses, to the detriment of the former, to influence both the institutional processes that define the legal and practical framework on the subject, and when verifying and protecting the enjoyment of the human rights involved. Thus, it is essential that the States ensure effective spaces for participation and transparency when adapting their regulatory frameworks, in which the position of those whose rights may be threatened or infringed upon are seriously taken into account.
112. Such normative frameworks must clearly establish the States' obligations and the legal effect of the responsibilities of the businesses under their jurisdiction, whether national or transnational when they are involved in infringing upon human rights. They must also recognize, for example, that business conduct can result in negative impacts on human rights, the existence of inequalities between victims and companies in the business processes that define the legal and practical framework in this area, and that the delegation of the implementation of mechanisms to safeguard rights in the businesses themselves, without due guarantees that remain under the control of the State, could weaken their role as guarantor and lead to the breach of their international obligations. When appropriate, in the context of such regulatory adjustments, States should check that their

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<sup>180</sup> Committee on Economic, Social and Cultural Rights. Concluding Observations (the United Kingdom of Great Britain and Northern Ireland) UN Doc. E/C.12/GBR/CO/6, July 14, 2016, para. 11-13. See also: Cantú Rivera, Humberto. Planes de acción nacional sobre empresas y derechos humanos: sobre la instrumentalización del derecho internacional en el ámbito interno. [*National Action Plans on business and human rights: on the instrumentalization of international law in domestic law.*] In: Anuario Mexicano de Derechos Internacional, vol. XVII, 2017, pp. 113-144 and Cantú Rivera, Humberto. National Action Plans on Business and Human Rights: Progress or Mirage? In: Business and Human Rights Journal 4(2), 2019.

provisions on private international law respect inter-American human rights norms, particularly as regards judicial guarantees and access to justice, in order to ensure that the procedural mechanisms are adequate for ensuring human rights that may be affected by the business sector's transitional activities or operations.

113. Moreover, in certain contexts, the enforceability of additional guarantee measures will be necessary in the design of the regulatory framework, such as the express recognition of the performance of free, prior and informed consultations, which are culturally appropriate and carried out in good faith, for development projects that may affect the environment and pose a risk to the rights of indigenous and tribal peoples. It also requires disclosure and public access to assessments on environmental and social impact within these contexts or the implementation of specific strategies for human rights defenders, including journalists and communicators, who suffer attacks, intimidation and threats for their right to question certain projects, corruption practices, or activities that are averse to human rights where business actors are involved.
114. The REDESCA of the IACHR recalls that both organs of the inter-American system have already emphasized that the regulation of certain activities in society is a prerequisite for the enjoyment of human rights. For example, the Inter-American Court has held that the States have an obligation to regulate all activities that may cause significant harm to the environment,<sup>181</sup> which certainly may include certain practices and operations by companies. In the same vein, the IACHR has been clear in establishing that state responsibility may be generated due to the lack of regulation, or inappropriate regulation, of extractive activities, exploitation activities, or development activities carried out under a State's jurisdiction.<sup>182</sup> In the case of security companies, the Commission has also referred to the need that the domestic legal order regulate the functions that such actors may fulfill, the kind of weapons and material means they are authorized to use; adequate mechanisms to control their activities; the implementation of a public registry; while creating a system so that these private enterprises regularly report on the contracts they execute, specifying the type of activities they perform.<sup>183</sup>
115. The duty to regulate also acquires particular relevance in those activities related to the provision of public services that determine the exercise of human rights that can be provided by businesses, such as health care, education, drinking water, electricity or social security, among others. The IACHR's REDESCA reiterates that, as indicated above, the authority of the State to regulate how to control is imperative to verify compliance with the duties of protection and guarantee of human rights in these contexts. Thus,

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<sup>181</sup> I/A Court H.R. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 149.

<sup>182</sup> IACHR. Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, December 31, 2015, para. 66-76.

<sup>183</sup> IACHR, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II, doc. 57, December 31, 2009, para. 74.

for example, the Inter-American Court of Human Rights has indicated that “the States are responsible for regulating and supervising at all times the rendering of services and the implementation of the national programs regarding the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment.”<sup>184</sup>

116. Both human rights supervisory bodies and independent experts of the UN have pronounced in the same sense by indicating that the State must implement regulatory frameworks that ensure due protection of the rights at stake. For example, the Independent Expert on the issue of human rights obligations relating to access to drinking water and sanitation indicated that: “States must adopt strong regulatory frameworks for all service providers in line with human rights standards” and “ensure regulatory capacity and that regulatory functions are carried out independently.”<sup>185</sup> In addition, the Special Rapporteur on adequate housing underlined the “close association between laws and government policies that position housing as a commodity, and the unaffordability of housing for those in the lowest income brackets, leading to growing homelessness and displacement and increased concentration of wealth.”<sup>186</sup>
117. The Committee on Economic, Social and Cultural Rights, for its part, indicates that state responsibility may be incurred for “such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others.”<sup>187</sup> In the general context of corporate activities, it established that the adoption of a legal framework that requires due diligence of businesses on human rights issues is an inherent obligation to protect them, aimed not only at the identification, prevention and mitigation of threats against human rights that may arise, but to ensure accountability for the negative consequences on the enjoyment of human rights that businesses have either caused or contributed to causing through their decisions and operations.<sup>188</sup> This includes due diligence requirements for businesses under their jurisdiction not only with regard to their own commercial operations but also to the corporate structure they develop, for example, with respect to controlled entities or over those over which said companies exert influence or control such as their supply chains, subcontractors, suppliers, franchisees or other business partners, depending on the economic sector and human rights problem in question.

<sup>184</sup> I/A Court H.R. Case of Ximenes Lopes v. Brasil. Judgment of July 4, 2006. Series C No. 149, para. 99.

<sup>185</sup> Report of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. UN Doc. A/HRC/15/31, 29 June 2010, paras. 63 (i), (j).

<sup>186</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context. UN Doc A/HRC/37/53, 15 January 2018, para. 33.

<sup>187</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 14. UN Doc. E/C.12/2000/4, 11 August 2000, para. 51.

<sup>188</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 24. UN Doc. E/C.12/GC/24, 10 August 2017, para. 16.



118. Similar pronouncements have been issued regarding the States' duties to regulate the transnational activities and operations of companies headquartered in their territory or under their jurisdiction. Thus, the Committee for the Elimination of Racial Discrimination has recommended that States adopt legislative and administrative measures to prevent the activities of transnational companies from negatively impacting the human rights of persons located outside the territory of their home states.<sup>189</sup> The Committee on the Elimination of Discrimination against Women also said that it is necessary to strengthen the regulations that govern the behavior of companies incorporated under the jurisdiction of a State in other countries.<sup>190</sup> In regards to compliance with the obligations of States with respect to various social rights, the Committee on Economic, Social and Cultural Rights has also consistently emphasized their extraterritorial component, so that States adopt legislative or political measures to ensure that companies or third parties under their jurisdiction respect human rights in other countries.<sup>191</sup>
119. At the local level, within the OAS Member States, there are also examples linked to the obligation to regulate. For example, the Central Bank of Brazil issued Resolution No. 4,327/2014, which establishes financial institutions' obligation to create a social and environmental responsibility policy. Said financial institutions must consider data regarding loss due to social and environmental damage and undertake previous evaluation of the potential negative impact of their new products and services in this area.<sup>192</sup> In this context, it is noteworthy that in May 2019, the Brazilian Public Ministry of Labor filed suit against 7 banking entities requiring the creation of a responsibility policy in accordance with Resolution No. 4,327/2014 and for them to identify social and environmental risks relating to clients and users of products and services that may involve human rights violations in the area of labor, such as slave labor, child labor, occupational diseases, breaches of occupational safety and health standards, etc.<sup>193</sup> On the other hand, regarding the regulation of companies' transnational operations, there are also some examples in the hemisphere, particularly as regards companies' supply chains and the eradication of slave labor and human trafficking. Thus, in the United States, in the state of California, a law on

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<sup>189</sup> Committee for the Elimination of Racial Discrimination. Concluding Observations (United States of America), UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 30.

<sup>190</sup> Committee for the Elimination of Discrimination against Women. Concluding Observations (Switzerland). UN Doc. CEDAW/C/CHE/CO/4-5, 25 November 2016, para. 41

<sup>191</sup> See, inter alia, Committee on Economic, Social and Cultural Rights. General Comment No. 14. UN Doc. E/C.12/2000/4, 11 August 2000, para. 39; Committee on Economic, Social and Cultural Rights. General Comment No. 15. UN Doc. E/C.12/2002/11, 20 January 2003, para. 33; Committee on Economic, Social and Cultural Rights. General Comment No. 19. UN Doc. E/C.12/GC/19 4 February 2008, para. 54; Committee on Economic, Social and Cultural Rights. General Comment No. 23. UN Doc. E/C.12/GC/23, 27 April 2016, para. 70; Committee on Economic, Social and Cultural Rights. General Comment No 24. UN Doc. E/C.12/GC/24, 10 August 2017, paras. 30-35.

<sup>192</sup> Central Bank of Brazil. [Resolution 4.327, of 25 April 2014.](#)

<sup>193</sup> **Ministério Público do Trabalho (Public Ministry of Labor) (Brazil).** Public Civil Actions No. 1000620-60.2019.5.02.0062, 1000641-81.2019.5.02.0047, 1000639-03.2019.5.02.0083, 1000645-23.2019.5.02.0014, 1000686-37.2019.5.02.0063, 1000590-12.2019.5.02.0713, 1000618-68.2019.5.02.0037 presented to the Regional Court of Labor of the 2nd Region.

transparency in supply chains was approved in 2010.<sup>194</sup> The REDESCA was also informed that in Canada a bill on the same topic was presented in December 2018.<sup>195</sup> The IACHR and its REDESCA positively value these initiatives insofar as they would seek to strengthen the human rights protection framework in this area.

120. Regarding the foregoing, the IACHR and its REDESCA conclude that the States' general obligation to adapt their normative framework, as well as the specific duty to regulate, will imply having solid and effective legislation, both substantive and procedural. This legislation should be accompanied by public policies that demand business actors respect human rights, including those related to the respect of human rights in their transnational operations, with the purpose of discouraging threats to the most vulnerable human rights in the different contexts that arise in this field, particularly those sectors in which the greatest challenges or complaints about the enjoyment of human rights have been identified, such as the extractive sector, textile sector, agroindustrial sector, or business operations related to the provision of essential public services or within supply or value chains, among others.

#### **4. Duty to Investigate, Sanction, and Guarantee Access to Effective Reparation Mechanisms in Field of Business and Human Rights**

121. The IACHR and its REDESCA underscore and draw from the premise that access to justice is one of the three fundamental pillars of the United Nations Guiding Principles on the subject,<sup>196</sup> specifically through which States must take appropriate measures to ensure that the individuals and communities affected by human rights abused or violations produced under their jurisdiction may access effective mechanisms for redress, which includes accountability of the businesses and the determination of their criminal, civil, or administrative responsibility. For this, the state mechanisms must be the basis for a comprehensive reparations system in which the population must be informed of how to access it.<sup>197</sup>
122. Regarding the inter-American system, the jurisprudence of the IACHR and the Inter-American Court on the scope and content of the obligation to investigate, punish, and remedy is widely developed in various contexts of

<sup>194</sup> [California Transparency in Supply Chains Act of 2010. Civil Code Section 1714.43](#)

<sup>195</sup> House of Commons of Canada. Bill C-423 (An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff), December 13, 2018. Mutatis mutandis see also: [Modern Slavery Act 2018 \(Australia\)](#).

<sup>196</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 25-31.

<sup>197</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 25-31.

human rights violations. In general, they have established that every person who has suffered a violation of their human rights has the right “to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.”<sup>198</sup>

123. In this framework, both the IACHR and the Inter-American Court have indicated that Article 25.1 of the Convention establishes, in broad terms, the States’ obligation to offer all persons subject to their jurisdiction an effective judicial remedy against actions in violation of their fundamental rights.<sup>199</sup> The justice system is, in this context, the first line of defense and protection of rights at the national level, and its work plays a critical part in the protection of each of the rights referred to in this report.
124. The effectiveness of a remedy must be understood in relation to its possibility of determining the existence of violations of fundamental rights, to repair the damage caused and to carry out the punishment of those responsible.<sup>200</sup> Along the same lines, in relation to human rights violations in the framework of business activities, the ESCR Committee has indicated that “States parties must provide appropriate means of reparation to aggrieved individuals or groups and ensure corporate accountability,”<sup>201</sup> thus it is essential that there are available, effective, and fast remedies as well as access to pertinent information that allows them to resolve a complaint.<sup>202</sup>
125. Likewise, those remedies cannot be considered effective if, due to the general conditions of the country or even due to the particular circumstances of a given case, they turn out to be unattainable.<sup>203</sup> This may occur, for example, when the remedy’s futility has been proven by its practice, because it lacks the means to execute its decisions, or for any other situation that constitutes a denial of justice.<sup>204</sup> Thus, the proceeding should aim to achieve the protection of the right recognized in court’s

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<sup>198</sup> I/A Court H.R. Case *Barrios Altos v. Peru*. Judgment of March 14, 2001, Series C No. 75, para. 48.

<sup>199</sup> I/A Court H.R. Case of *Velásquez Rodríguez V. Honduras*. Preliminary Objections, para. 91; I/A Court H.R. Case of *Maldonado Ordóñez V. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 3 May 2016. Series C No. 311, para. 108.

<sup>200</sup> IACHR. Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards adopted by the Inter-American System of Human Rights . OEA/Ser.L/V/II.129. Doc. 4. 7 September 2007. para. 248. Also see: Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/72/162, 18 July 2017.

<sup>201</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 24, UN Doc. E/C.12/GC/24, August 10, 2017, para. 39. Also see: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principle 25.

<sup>202</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 24, UN Doc. E/C.12/GC/24, 10 August 2017. paras. 41 and 45.

<sup>203</sup> I/A Court H.R. Case of *Ivcher Bronstein V. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 7, para. 137; I/A Court H.R. Case of *Maldonado Ordóñez V. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 3 May 2016. Series C No. 311, para. 109.

<sup>204</sup> I/A Court H.R. Case of *Las Palmeras V. Colombia*. Reparations and Costs. Judgment of 26 Noviembre de 2002. Series C No. 96, para. 58.

judgment through the proper application of its ruling, which means that the State must not only ensure the proper application of effective remedies but also must guarantee the execution of the final decisions issued by competent authorities; the contrary means the very denial of the violated right.<sup>205</sup>

126. For example, the Inter-American Court recently found the Peruvian State internationally liable for the creation of impediments to the fulfillment of the right to social security in the context of privatization of a state company and the ineffectiveness of the judiciary to enforce compliance with its own decisions and reverse the negative effects of privatization in light of the State's international human rights obligations.<sup>206</sup>
127. For its part, the IACHR, in the analysis of a case of two undocumented migrants in the United States who suffered injuries as part of their work activities, the IACHR indicated that the judicial branch has not fully recognized the victims' right to non-discrimination and had neither adequately nor effectively protected their rights as workers in accordance with the provisions of the American Declaration. In this context, the IACHR held that despite the existence of lawsuits against the employers for failure to comply with the conditions of compensation for work-related accidents, the remedies were conditional, reduced, or denied based on the workers' migratory status.<sup>207</sup> The Commission was also informed of a context in which State agents cooperate with employers and insurance companies to deny labor benefits to workers in that situation, as well as a context that shows the uncertainty faced by undocumented workers regarding the outcome of their workers' compensation claims. In this context, the IACHR emphasized that the acts of the State had the effect of terminating the two claims for compensation due to work-related accidents, violating the rights to non-discrimination and social security of the victims.<sup>208</sup> Finally, among other recommendations, the IACHR ordered the State to ensure that undocumented workers have the same rights and remedies as documented workers for violations of their rights in the workplace, and to improve the detection of employers who violate undocumented workers' labor rights.<sup>209</sup>
128. The IACHR also has expressly requested that the States undertake "decisive actions to combat impunity for human rights violations committed in the context of business-related or illegal activities in the pan-Amazon region, by means of thorough and independent investigators that result in the

<sup>205</sup> I/A Court. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 6 March 2019. Series C No. 375, paras. 123-128.

<sup>206</sup> I/A Court. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 6 March 2019. Series C No. 375.

<sup>207</sup> IACHR. Merits Report No. 50/16. Undocumented Workers (United States) 30 November 2016, para. 111

<sup>208</sup> IACHR. Merits Report No. 50/16. Undocumented Workers (United States) 30 November 2016, paras. 23, 88, 113 and 131.

<sup>209</sup> IACHR. Merits Report No. 50/16. Undocumented Workers (United States) 30 November 2016, paras. 132.4 and 132.6.

punishment of the perpetrators and masterminds, and individual and collective redress for the victims.”<sup>210</sup>

129. It is also important to refer to a decision by the Human Rights Committee in which it found the Paraguayan State internationally responsible for the lack of control of respect for environmental norms in business activities in the agricultural sector that negatively affected several of the applicants’ human rights. In its analysis of the case, the Committee concluded that the lack of adequate state supervision and investigation of companies that carry out fumigations with agrochemicals may generate the State’s responsibility for its omission in its duty to protect human rights.<sup>211</sup>
130. The Commission and its REDESCA recall that the absence of investigation, punishment, and access to effective redress in response to human rights violations attributable to third parties, such as companies, may jeopardize the State’s accountability since such acts would, in a way, be aided by governmental authority by leaving them unpunished.<sup>212</sup> Inter-American jurisprudence has identified several obligations derived from the duty to investigate human rights violations. The Court has reiterated that due diligence in investigations requires that the investigating body carry out all those actions and inquiries necessary to achieve the desired outcome. This means it must be substantiated by all available legal means and aimed at identifying the truth.<sup>213</sup>
131. The IACHR and its Special Rapporteurship note with concern that in many cases and situations related to businesses, access to justice is not guaranteed, so people and communities in these contexts often have a low probability of obtaining an effective remedy. The REDESCA has received information that shows the existence of a combination of factors that impact the investigation, effective sanctions, and adequate reparation of the victims in these contexts.<sup>214</sup> In various public hearings, there have also been complaints concerning a political unwillingness to face these problems, along with the widespread identification of inadequate legislation, power of influence of companies or "corporate capture" on public entities, corruption, lack of legal assistance to victims, politicization of the judiciary,

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<sup>210</sup> IACHR. Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region, OAS/Ser.L/V/II. Doc. 176, 29 September 2019, para. 419.8.

<sup>211</sup> Human Rights Committee. Portillo Cáceres and others v. Paraguay (Communication No. 2751/2016), UN Doc. CCPR/C/126/D/2751/2016, 9 August 2019.

<sup>212</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4. para. 176; I/A Court H.R. Case of the Massacre of Pueblo Bello v. Colombia. Judgment of 31 January 2006. párr 145.

<sup>213</sup> I/A Court H.R. Case of Acosta and others v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs Judgment of 25 March 2017. para. 136.

<sup>214</sup> See, inter alia, Amnesty International and Business and Human Rights Resource Centre. Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse (2017). Independent Commission of Experts. The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases (2016).

the structure and the transnational operations of companies, among others.<sup>215</sup>

132. In this framework, the Commission and its REDESCA observe the difficulty in investigating parent companies for human rights abuses committed by their subsidiaries or through their supply chains located in other States. In this context, for example, the doctrine of *forum non conveniens*, by virtue of which the courts may refuse to accept jurisdiction to hear a case on an issue where there is a seemingly more appropriate forum, has also been questioned in light of the right to access to justice for victims of violations implicating transnational corporations. Given that the strict use of this doctrine has, in practice, impeded the investigation and eventual penalization of said companies, due to the ineffectiveness or weakness of judicial and legislative systems in certain States, where the human rights abuses took place, it also may prevent guaranteeing it.<sup>216</sup>
133. On the other hand, in other cases, the claim against the company in its home state will be the only way to observe the due conduct and eventual responsibility of the company in question with respect to the occurrence of human rights violations in other States relating to their commercial activities or relationships; and therefore, to obtain an effective remedy. This happens, for example, in schemes when one of the subsidiaries or business groups in which a company participates has been dissolved, is declared insolvent, or does not have sufficient resources to face a lawsuit for damages,<sup>217</sup> or when what is at issue is a company's lack of human rights due diligence with respect to its supply chain or commercial relations with actors located in third States that undermine or violate human rights, independently of the responsibility of the latter actors.<sup>218</sup> In this context, it is worth mentioning that the United Nations Working Group on Business and Human Rights recognizes that “[a]s part of their extraterritorial obligation to respect, protect and fulfill human rights, States should provide access to effective remedies even to foreign victims in appropriate cases.”<sup>219</sup>
134. The IACHR and its REDESCA identify that in order to ensure effective recourse and access to justice in these contexts, States must implement some measures, such as requiring the establishment of legal regimes for

<sup>215</sup> See, inter alia, IACHR. Business and Human Rights: Input for the Preparation of the Inter-American Guidelines 167 Period of Sessions, March 2, 2018; IACHR. Public Hearing. Due Diligence, Prevention and Access to Justice for Human Rights Violations by Private Companies in the Americas. 168 Period of Sessions, May 10, 2018.

<sup>216</sup> See, inter alia, Report of the Office of the High Commissioner for Human Rights. UN Doc. A/HRC/32/19, 10 May 2016; Amnesty International and Business and Human Rights Resource Centre. Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse (2017). Independent Commission of Experts. The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases (2016).

<sup>217</sup> Report of the Office of the High Commissioner for Human Rights. UN Doc. A/HRC/32/19, 10 May 2016, para. 22.

<sup>218</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association. UN Doc. A/71/385, 14 September 2016.

<sup>219</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/72/162, July 18, 2017, para. 64

shared liability of the parent company or the business group,<sup>220</sup> offer legal assistance and other financing systems to the plaintiff, allow collective demands related to human rights and litigation of public interest. It is also important to ensure access to information through mandatory disclosure legislation and procedural rules that allow victims to obtain the disclosure of evidence held by the accused company, including reversing the burden of proof when the defendant company has knowledge or control exclusive of all or part of the facts and relevant data to resolve a claim. In addition, regarding court decisions that are based on the doctrine of *forum non conveniens*, it is necessary to duly assess restrictions on the doctrine's application, as the realistic possibility that the complainants have access to an effective remedy and redress in the jurisdiction where the events occurred.<sup>221</sup> The REDESCA finds that several of these elements have also been considered by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in its report on access to effective remedies in the field of business and human rights.<sup>222</sup>

135. It is also necessary to ensure that the application of normative and institutional schemes that respond to corporate law do not threaten the fulfillment of human rights and access to justice. These frameworks generally may relate to the form of organization of companies, their spin-off, merger, acquisition and sale or eventual dissolution, the corporate veil doctrine, or the assessment of the causal links between the conduct of companies located in the territory of one State and the resulting infringement upon human rights in the territory of another. Technicalities in the field of corporate law cannot be used as absolute standards when their use ignores their social function, which gives them a purpose, and when they lead to impunity for violations of human rights. In fact, some States have noted that the fact that companies can often "jump", move, or "change jurisdiction" requires binding approaches to corporate conduct that generates problems from a human rights perspective, and that may

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<sup>220</sup> The concept of shared legal responsibility refers to those situations where multiple actors contribute to the same harm and whose legal liability for the harm is distributed among the actors contributing to it. On the other hand, for an analysis of shared responsibility from international law see: Nollkaemper, André, and Dov Jacobs. *Shared Responsibility in International Law: A Conceptual Framework*. MichJIL 34, no. 2 (2013); y Nollkaemper, André, and Ilias Plakokefalos. *Principles of Shared Responsibility in International Law*. First Edit. Cambridge University Press, 2014.

<sup>221</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 24. UN Doc. E/C.12/GC/24, 10 August 2017, paras. 44 and 45; and *Vedanta Resources PLC v. Lungowe*, [2019] UKSC 20; see also: Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. UN Doc. A/HRC/39/48, 3 August 2018, paras. 110-113; Report of the Office of the High Commissioner for Human Rights. UN Doc. A/HRC/32/19, 10 May 2016, Annex, and the complementary document regarding the orientations of such a report (UN Doc. A/HRC/32/19/Add.1, 12 May 2016). Regarding the doctrine of *forum non conveniens*, the IACHR notes, for example, that it may not be applied within the law of the European Union. Cf. European Court of Justice, *Owusu v. Jackson*, 1 March 2005, C-281/02.

<sup>222</sup> Report of the Office of the High Commissioner for Human Rights. UN Doc. A/HRC/32/19, 10 May 2016, Annex. Also see the complementary document regarding the orientations of such a report (UN Doc. A/HRC/32/19/Add.1, 12 May 2016)

overcome the limitations of purely voluntary initiatives on corporate responsibility.<sup>223</sup>

136. In any case, the IACHR and its REDESCA stress that the investigation and possible penalization of corporations domiciled in the territory or under the jurisdiction of a State that generate local or transnational infringements upon human rights does not necessarily mean abolishing the doctrine of the corporate veil, or discarding the existence of the separate legal entity, because it does not hold the parent company accountable for the actions of either its subsidiaries or the domestic companies for the acts of its business partners abroad, but for its own acts or omissions in the area of human rights regarding the aforementioned situation, such as respect for human rights and the application of due diligence in this area.<sup>224</sup>
137. In this context, the IACHR and its REDESCA find that in cases of businesses that are involved in human rights violations, it will also be necessary for the States to ensure that specific due process guarantees for the parties are recognized, such as equality of arms, due motivation, impartiality, and reasonable deadlines.
138. Regarding equality of arms specifically, the IACHR has held that during judicial proceedings for the defense of rights “the unequal economic or social status of the litigants frequently has the effect of rendering the possibility of defense unequal at trial”<sup>225</sup> and in this regard the Inter-American Court ruled “the presence of real disadvantages necessitates that the State adopt countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests.”<sup>226</sup>
139. For example, in the context of operations by extractive industries and development projects, the IACHR has also identified a series of judicial and administrative obstacles, for example, obstacles linked to the investigation and collection of evidence for presenting claims, to having counsel, to knowing their rights and available mechanisms, among others. The barriers to obtaining justice are also related to the high threshold that can be demanded of the victims to prove the alleged infringements and, therefore, the costs they entail. The foregoing may generate additional difficulties when access to mechanisms is conditioned on a specific statute of

<sup>223</sup> Human Rights Council. Report on the first period of sessions of the open intergovernmental working group on transnational corporations and other business enterprises with regards to human rights, with the mandate of preparing an international binding treaty. **UN Doc. A/HRC/31/50**, 5 February 2016, para. 50.

<sup>224</sup> See, for example, *Vedanta Resources PLC v. Lungowe*, [2019] UKSC 20; *Chandler v Cape plc* [2012] **EWCA Civ 525**. See also the Law on the duty to monitor parent companies in France of 2017, formally : “Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre”.

<sup>225</sup> IACHR. Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129. Doc. 4. 7 September 2007. Para. 185.

<sup>226</sup> IACHR. Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129. Doc. 4. 7 September 2007. Para. 188.



limitations. The difficult work of obtaining, preserving, and collecting evidence and providing testimonies is sometimes exacerbated by being faced with possible risks or effects on their safety, a situation not uncommon in contexts in which the company has direct interests involved and its liability may be compromised.<sup>227</sup> For the IACHR and its REDESCA, it is also evident that the large economic actors have the possibility of having and contracting highly qualified legal representation, and bearing the expenses demanded by judicial proceedings. By comparison, the plaintiffs, who usually do not have the possibility of fronting the economic cost that these kinds of proceedings imply on their own, make for notorious imbalances in many cases.

140. Given this situation, the IACHR and its REDESCA consider it reasonable for the States to evaluate procedural rules applicable to evidence and the discovery period, in cases in which these obstacles are verified, in order to reform them, when applicable, in order to balance the existing asymmetries in proceedings involving claims of human rights violations where businesses are involved, and thus facilitate access to justice and to an effective remedy. For these purposes, some principles applicable to evidentiary standards applicable to international human rights proceedings may inform the assessment of evidence in these contexts. For example, recognizing gradations that will depend on the nature of the dispute and the seriousness of the facts; the application of circumstantial evidence and presumptions from which conclusions consistent with the facts may be inferred; shifting the burden of proof when decisive information cannot be obtained without the involved business entity's cooperation or when there are evasive or ambiguous answers to the accusations made against them.
141. In turn, in order to ensure due process for all parties, and taking into account the centrality of the victims of human rights violations for access to justice and redress, the IACHR and its REDESCA emphasize the importance of respecting the standards developed in the inter-American system on guarantees of motivation, autonomy, and reasonable deadlines. For the purposes of this report, it suffices to say that ensuring that whoever decides shall not have a direct interest or involvement with any of the involved parties,<sup>228</sup> that there is a rationale for the decision that examines the arguments the parties invoked,<sup>229</sup> and that it is issued in a timely manner

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<sup>227</sup> IACHR. Indigenous Peoples, Afro-descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 137.

<sup>228</sup> See, *mutatis mutandis*, I/A Court H.R. Case of Apitz Barbera and others ("First Contentious Administrative Court") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 August 2008. Series C No. 182, para. 56; I/A Court H.R. Case of Acosta et al v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of 25 March 2017. Series C No. 334, para. 172.

<sup>229</sup> I/A Court H.R. Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 96; I/A Court H.R. Case of Maldonado Ordóñez V. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 3, 2016. Series C No. 311, para. 109; I/A Court H.R. Case of Dismissed Employees of Petroperu et al v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344, para. 168.

taking into account the criteria for due respect of a reasonable deadline.<sup>230</sup> This will not only grant greater credibility and trust in the administration of justice both for those who consider their rights infringed upon and for the accused companies, in order to diminish the risks of issuing decisions that are arbitrary or contrary to justice and the rule of law, and allowing, where appropriate, effective access to comprehensive reparations from a human rights framework.

142. The IACHR's REDESCA recalls that Pillar III of the Guiding Principles includes the minimum standards to be taken into account in these contexts. In particular, they recognize not only the mechanisms for access to reparations, but recognize that this can include apologies, restitution, rehabilitation, monetary or non-monetary compensation and punitive sanctions (whether criminal, civil or administrative), as well as measures of non-repetition.<sup>231</sup> Based on this, the REDESCA observes that these reparations coincide with those issued and developed by inter-American jurisprudence on reparations for State responsibility so that, as the case requires and with a strict observance to the limits imposed by them, they can serve as a parameter when determining the reparations demanded of the perpetrator businesses.
143. On the other hand, taking into account the broad scope of effects and threats to human rights that may result from business activities, the IACHR and its REDESCA take note that the existence of alternative mechanisms to judicial ones can streamline the accountability of the companies and due reparations for the victims from early stages. However, although in many cases they can act as a complement to those judicial mechanisms, they are not similar to or substitutes for the latter, so the existence of the former will not replace the judicial protection that is required according to the specific case.<sup>232</sup> In the same vein, the ESCR Committee has stated, regarding these mechanisms, that: "While they generally should not be seen as a substitute for judicial mechanisms (which often remain indispensable for effective protection against certain violations of Covenant rights), non-judicial remedies may contribute to providing effective remedy to victims whose Covenant rights have been violated by business actors and ensuring accountability for such violations."<sup>233</sup>
144. In particular, the REDESCA stresses the importance of States ensuring that such extrajudicial mechanisms meet at least the guarantee characteristics indicated in the United Nations Guiding Principles on the subject, such as

<sup>230</sup> IACHR. Merits Report No. 110/10. Sebastián Furlan and family (Argentina), October 21, 2010, para. 100.

<sup>231</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, March 21, 2011, Principles 25-31.

<sup>232</sup> Some of these extrajudicial mechanisms refer to administrative jurisdictions already existant in several of the States of the continent, for example, for employment; environmental; financial of supervision of public services such as water, electricity, telecommunications or transport; as well as consumer protection.

<sup>233</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 24, UN Doc. E/C.12/GC/24, August 10, 2017, para. 53.

accessibility, predictability, transparency, or fairness,<sup>234</sup> to fulfill the purpose for which they were created and inspire those affected to trust and use them. This is particularly important in those complaint mechanisms implemented by the companies themselves or by multilateral financing groups, as long as the alleged violation or threat is linked to their own behavior. For these purposes, the IACHR and its REDESCA also consider it reasonable that, in their design and operation, said mechanisms take into account the guarantees developed on equality of arms, motivation of decisions, impartiality of the decision-making body, and respect for reasonable deadlines, in order to provide an effective remedy and reparation to the victims while carrying out the corresponding sanctions and corrections.

145. Furthermore, these extrajudicial mechanisms must consider the cases of alleged transnational human rights abuses by companies in the territories of the States where they carry out their operations or that are related as part of their supply or value chain, in order to ensure access to the monitoring and investigation mechanisms implemented for the people affected in these contexts. In the particular case of business operations that impact indigenous populations, these extrajudicial mechanisms must prioritize their construction in a participatory manner and with respect to the right to prior, free, and informed consultation in accordance with inter-American standards on the subject.
146. Finally, the IACHR and its REDESCA highlight the fundamental role and central focus that victims should have, as rights holders, throughout the reparation process. Thus, the REDESCA shares the position of the Working Group on Business and Human Rights that reparation mechanisms must take into account “diverse experiences and expectations of rights holders; that remedies are accessible, affordable, adequate and timely from the perspective of those seeking them; that the affected rights holders are not victimized when seeking remedies; and that a bouquet of prevention, redress and deterrence remedies is available for each business-related human rights abuse”<sup>235</sup>.

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<sup>234</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, March 21, 2011, Principle 31.

<sup>235</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/72/162, July 18, 2017, para. 81.



CHAPTER 4

THE EXTRATERRITORIAL  
APPLICATION OF THE  
STATES' OBLIGATIONS IN  
THE CONTEXT OF BUSINESS  
ACTIVITIES AND THE DUTY  
TO COOPERATE



## THE EXTRATERRITORIAL APPLICATION OF THE STATES' OBLIGATIONS IN THE CONTEXT OF BUSINESS ACTIVITIES AND THE DUTY TO COOPERATE

147. The IACHR and its REDESCA cannot ignore the new and diverse ways in which human rights violations may be produced in a highly globalized society, since ultimately, being a regional human rights monitoring body, according to its faculties the Commission is called to observe the protection and guarantee of human rights. In this sense, they emphasize as a basic parameter that under Article 1.1 of the American Convention the notion of jurisdiction is a prior condition to determine whether a State has incurred liability for conduct that may be attributed to it and that are alleged to violate some right under the Convention.<sup>236</sup> In order to determine the ways in which the State may exercise jurisdiction outside its territory and the specific obligations that are generated in each case in the context of business activities, the IACHR and its REDESCA stress the importance of using the principles of interpretation of human rights norms that have guided decisions by the organs of the inter-American system throughout their history, in particular the evolutionary interpretation of human rights treaties, the *pro persona* principle, the principle of effectiveness of *effet utile*, and the use of the *corpus juris* of international human rights law as sources of interpretation.
148. Along this line of ideas, it should be emphasized that the IACHR has had the opportunity to refer to the extraterritorial application of States' human rights obligations in cases analyzed under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights on distinct occasions. The Commission's jurisprudence in this sense, giving a broad interpretation to the notion of jurisdiction, has argued that international responsibility may be generated by the State's acts or omissions that produce effects or are carried out outside its territory.<sup>237</sup> Since its early jurisprudence on the subject, the Commission has held that:

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<sup>236</sup> I/A Court. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, para. 72 Along the same lines, see, inter alia, ECHR, *Ilaşcu and others v. Moldavia and Russia* [GS], No. 48787/99. Judgment of 8 July 2004, para. 311; ECHR, *Al-Skeini and others v. United Kingdom* [GS], No. 55721/07. Judgment of 7 July 2011, para. 130, and ECHR, *Chiragov and others v. Armenia* [GS], No. 13216/05, Judgment of 16 June 2015, para. 168.

<sup>237</sup> IACHR. Inadmissibility Report No. 38/99. Victor Saldaño (Argentina), 11 March 1999, para. 17. The European Court of Human Rights has issued decisions in similar terms. In this regard, see: ECHR. *Al-Skeini et al v. United Kingdom*. Application N° 5572/107, 7 July 2011. para. 133; ECHR. *Ilaşcu et al v. Moldavia and Russia*. Application N° 48787/99. 8 July 2004. para. 317, 372-399.

“under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent but required by the pertinent norms. [...] Given that individual rights are inherent simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons with a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”<sup>238</sup>

149. In subsequent cases related to human rights violations attributable to a State outside its territory, the IACHR continued to find the existence of a factual relationship of control between the respondent State and the person affected, regardless of their location. For example, the IACHR declared admissible an interstate claim under the American Convention for the alleged responsibility of the Colombian State for the death of a person in the context of a military operation carried out in the territory of another State; it also subsequently admitted a petition regarding the alleged responsibility of the United States for events related to the detention and torture of a person in that country’s military bases located outside its territory. In both cases, the IACHR – using the doctrine of effective control – found that the respondent States exercised jurisdiction over the alleged events even though they did not occur in their territory.<sup>239</sup>
150. The Inter-American Court has also concluded that the concept of jurisdiction does not only encompass the national territory of a State.<sup>240</sup> Furthermore, it understands that “a person is subject to the jurisdiction of a State, with regards to conduct committed outside of the territory of said State (extraterritorial acts) or with effects outside of said territory, when said State is exercising authority over the person or when the person is

<sup>238</sup> IACHR. Merits Report No. 109/99. Coard et al (United States of America) 29 September 1999, para. 37; IACHR. Merits Report No. 86/99. Armando Alejandro Jr. et al (Cuba), 29 September 1999, paras. 23 and 25; IACHR. Merits Report No. 51/96. Haitian Interdiction (United States of America), 13 March 1997, paras. 149-181. See also: CERNA, Christina. [Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human rights to the Extraterritorial Application of Human Rights Law](#). Working Paper 6. Center for Human Rights and Global Justice (2006); CASSEL, Douglass. *Extraterritorial Application of Inter-American Human Rights Instruments in Fons Commans and Menno Kamminga* (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) page 175.

<sup>239</sup> IACHR. Admissibility Report No. 112/2010. Ecuador v. Colombia (Franklin Aisalla Molina), 21 October 2010, paras. 78 - 103; IACHR. Admissibility Report No. 17/12. Djamel Ameziane (United States), 20 March 2012, paras. 27-35.

<sup>240</sup> I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, para. 74.



under its effective control, whether inside or outside of its territory.”<sup>241</sup> The analysis that is performed to verify this situation may be carried out based on the factual and legal circumstances of each particular case.<sup>242</sup> It is also important to stress that in the context of human mobility, the organs of the inter-American human rights system have held that the State of origin of migrants, such as refugees, internally displaced people, and trafficking victims, among others, has special obligations to fulfill according to its personal jurisdiction over such individuals, independent of whether they are in another territory, emphasizing the state duty of prevention to ensure conditions so that its nationals are not forced to migrate and remedy the causes that generate migrant flows. Thus, regarding the protection of individuals in the context of migration, the term jurisdiction used by Article 1.1 of the American Convention includes the competence the State exercises, whether territorially, personally, or even through its competence over public services.<sup>243</sup>

151. For its part, the Human Rights Committee, even though the International Covenant on Civil and Political Rights (ICCPR) is drafted more strictly by establishing the duty of the States to respect and ensure human rights “to all individuals within its territory and subject to its jurisdiction,” has allowed for the extraterritorial application of the ICCPR.<sup>244</sup> In this regard it stressed that the notion of jurisdiction does not refer to the place the breach occurred, but to the relationship between the person and the State with respect to the alleged violation.<sup>245</sup>
152. For the IACHR and its REDESCA, the aforementioned developments recognize the extension of the exercise of a State’s jurisdiction outside of its territory for the purpose of assessing whether the actions or omissions attributed to it in these circumstances constitute a basis for the possible attribution of international responsibility for human rights violations. Within this framework, the term “jurisdiction” refers not only to a State’s territory but also to the control it may exercise, in factual terms, over the rights of persons who are outside its territory. However, it is also

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<sup>241</sup> I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, para. 81. See also: I/A Court H.R. Advisory Opinion OC-21/14 of 19 August 2014. Series A No. 21, para. 219.

<sup>242</sup> I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23. para. 93.

<sup>243</sup> IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking, and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 46/15, 31 December 2015, paras. 148-149; I/A Court. Advisory Opinion OC-21/14, 19 August 2014. Series A No. 21, paras. 61-64.

<sup>244</sup> Human Rights Committee. *López Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981; Human Rights Committee. *Celiberti v. Uruguay*, UN Doc. CCPR/C/13/D/56/1979, 29 July 1981; Human Rights Committee. *Concluding Observations (Cyprus)*, UN Doc. CCPR/C/79/Add.39, 21 September 1994, para.3; Human Rights Committee. *Concluding Observations (Israel)*, UN Doc. CCPR/C/79/Add.93, 18 August 1998, para.10; Human Rights Committee. *Concluding Observations (Israel)*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para.11; Human Rights Committee. *Concluding Observations (Belgium)*, UN Doc. CCPR/C/79/Add.99, 19 November 1998, para. 14; Human Rights Committee. *Concluding Observations (Netherlands)*, UN Doc. CCPR/CO/72/NET, 27 August 2001, para. 8; Human Rights Committee. *Concluding Observations (Belgium)*, UN Doc. ONU CCPR/CO/81/BEL, 12 August 2004, para. 6.

<sup>245</sup> Human Rights Committee. *López Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, paras. 12.2-12.3.

recognized that even in the absence of effective control or authority over a situation or person, a State may, through its conduct, influence or produce foreseeable effects on the enjoyment of human rights outside its territory.<sup>246</sup> Precisely, it is in this realm in which the analysis of the extraterritorial application of the human rights obligations of the States in the context of business activities is framed, insofar as – save for some exceptions – businesses’ behavior is not directly attributable to the State.<sup>247</sup> In these circumstances, the IACHR and its REDESCA understand that although there is no strict exercise of extraterritorial jurisdiction, in terms of the concepts of authority or effective control, by the home State, it does have a basis for exercising a degree of jurisdiction that has extraterritorial effects over the protection of human rights in terms of the possibility to influence, through its obligations to regulate, prevent, oversee, and where appropriate hold such companies accountable in accordance with international law.

153. The foregoing means that the measures home States take to regulate, supervise, prevent, or investigate the behavior of businesses domiciled in their territory that involve impact on the realization of human rights outside of their territory should not violate other principles of international public law,<sup>248</sup> such as the sovereignty of another State or the principle of equality of all States. In this way, these measures may be verified and analyzed, in general, under the general duty to ensure the enjoyment of human rights in accordance with Article 1.1 of the American Convention on Human Rights and other applicable inter-American instruments. The REDESCA notes that the foregoing does not contradict the Guiding Principles, insofar as the States must clearly indicate that businesses are expected to respect human rights in all their activities, including activities of a transnational nature.<sup>249</sup>
154. The IACHR had the opportunity to refer to this subject for the first time in its report on indigenous peoples, communities of African descent, and

<sup>246</sup> International Commission of Jurists and University of Maastricht. Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Maastricht, 28 September 2011, Principles 8, 9.b, 9.c and 25. In general see: De Schutter, Olivier and Others. Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights. *Human Rights Quarterly*, 34 (4), 2012, pp. 1084-1169.

<sup>247</sup> In this regard see International Commission of Jurists and University of Maastricht. Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Maastricht, 28 September 2011, Principles 11 and 12; Working Group on Mining and Human Rights in Latin America. [The impact of Canadian mining in Latin America and Canada’s responsibility](#), pages 48 and 49.

<sup>248</sup> International Commission of Jurists and University of Maastricht. Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Maastricht, 28 September 2011, Principles 10 and 25. See comments on Principles 10 and 25 in: De Schutter, Olivier and Others. Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights. *Human Rights Quarterly*, 34 (4), 2012, pp. 1084-1169. Likewise, as a legal precedent at an international level see: Permanent Court of International Justice. Case S.S. Lotus (France v. Turkey). Sentence N<sup>o</sup> 9, September 7, 1927.

<sup>249</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principle 2.

extractive industries. There, it recognized the importance of addressing the issue in the region, given the context involving companies' operations outside the territory where they have their headquarters. The Commission stressed the need to take into account the various levels of involvement of home states and host states in these contexts in order to establish responsibility and effectively fulfill human rights. Likewise, it took into account civil society's numerous calls for States' accountability for human rights violations and abuses by their corporate citizens in territories where they operate, and reiterated the possibility of finding a State internationally responsible for state acts or omissions that generate human rights violations outside of their territory in these contexts.<sup>250</sup>

155. For their part, various United Nations mechanisms have repeatedly expressed concern about violations and threats to the effective enjoyment of human rights linked to businesses' transnational behavior and operations, and have begun referring to the extraterritorial application of the States' obligations in this area. The REDESCA stresses the importance of taking into account these developments in order to consolidate understanding of the issue and apply them when appropriate in light of the rules of interpretation of the inter-American human rights system.
156. In this way, both the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have upheld the extraterritorial application of States' duties in relation to businesses' activities in this context, under the oversight mechanisms for the human rights treaties under their jurisdiction. For example, the Human Rights Committee expressed its concern that the forums that the involved State created were not sufficient to investigate national business entities with foreign activities linked to human rights violations.<sup>251</sup> This position was upheld in its most recent General Comment on the right to life, in which it concluded that the States must adopt any legislative and other measures that are necessary to ensure that the activities carried out in their jurisdiction that have a direct and reasonably foreseeable impact on the right of life of persons outside their territory are consistent with the content of the right to life. This includes regulating the activities of corporations and business entities based in their territories or under their jurisdiction, taking into account international standards on corporate responsibility, as well as victims' rights to an effective remedy.<sup>252</sup>
157. For its part, the Committee on Economic, Social and Cultural Rights also expressed its concern over the negative effects on human rights caused by businesses' activities outside of the State where they are registered or domiciled; and recommended the adoption of clear regulatory frameworks

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<sup>250</sup> IACHR. Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, paras. 14, 77-81.

<sup>251</sup> Human Rights Committee. Concluding Observations (Germany), UN Doc. CCPR/C/DEU/CO/6, 13 November 2012, para. 16.

<sup>252</sup> Human Rights Committee. General Comment No. 36, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 22.

and necessary measures to ensure that businesses assess the effects on human rights of their activities abroad, and that the victims of said activities may access justice before the national courts of the home state.<sup>253</sup>

158. Much more precisely, in the context of business activities, in its General Comment No. 24, the Committee on Economic, Social and Cultural Rights clearly held that: “Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.”<sup>254</sup>. Rulings in similar terms have also been issued by the Committee on the Rights of the Child, the Committee for the Elimination of Discrimination against Women, and the Committee for the Elimination of Racial Discrimination.<sup>255</sup> Independent United Nations experts, in turn, have favorably and progressively referred to the extraterritorial application of States’ obligations in these contexts.<sup>256</sup> For example, recently the Expert on foreign debt, States’ financial obligations, and human rights stated that “host and home States’ obligations to protect human rights, including their extraterritorial obligations, require the establishment of adequate safeguards against negative human rights impacts resulting from the conduct of private companies.”<sup>257</sup>
159. Likewise, from a regional experience, for example, the Council of Europe’s Committee of Ministers recommends to Member States to demand that their business enterprises respect human rights “throughout their operations abroad”; that the States encourage or demand that their businesses exercise human rights due diligence “throughout their operations”; that the States ensure that their national courts have jurisdiction over civil lawsuits for human rights abuses against business enterprises domiciled in their jurisdiction, without applying the doctrine of *forum non conveniens*; and that the States consider allowing their domestic

<sup>253</sup> Committee on Economic, Social and Cultural Rights. Concluding Observations (Canada), UN Doc. E/C.12/CAN/CO/6, 23 March 2016, paras. 15-16.

<sup>254</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 24, UN Doc. E/C.12/GC/24, 10 August 2017, para. 30

<sup>255</sup> Committee on the Rights of the Child. General Comment No. 16, UN Doc. CRC/C/GC/16, 17 April 2013, para. 43; Committee on the Elimination of Discrimination against Women. Concluding Observations (Switzerland). UN Doc. CEDAW/C/CHE/CO/4-5, 25 November 2016, para. 41; Committee on the Elimination of Discrimination against Women. General Recommendation No. 37. UN Doc. CEDAW/C/GC/37, March 13 2018, paras. 43-51; Committee for the Elimination of Racial Discrimination. Concluding Observations (Canada), UN Doc. CERD/C/CAN/CO/21-23, 13 September 2017, paras. 21-22; Committee for the Elimination of Racial Discrimination. Concluding Observations (Norway) UN Doc. CERD/C/NOR/CO/19-20, 8 April 2011, para.17.

<sup>256</sup> See, inter alia, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. UN Doc. A/HRC/39/48, 3 August 2018, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association. UN Doc. A/HRC/29/25, 28 April 2015; Report of the Special Rapporteur on the right to food, UN Doc. A/HRC/28/65, 12 January 2015, Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, UN Doc. A/HRC/27/55, 30 June 2014.

<sup>257</sup> Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights. UN Doc. A/HRC/40/57, 19 December 2018. Comment 16.2, see also Comment 15.3.

courts to exercise jurisdiction over civil claims against subsidiaries of business enterprises domiciled in their jurisdiction that are linked to human rights abuses, wherever their subsidiaries operate, if the parent company and its subsidiary are closely connected with the human rights infringement.<sup>258</sup>

160. Likewise, the African Commission on Human and Peoples' Rights affirms that the Member States of the African Charter on Human and Peoples' Rights must not only respect the life of individuals "outside [their] territory," but also have certain obligations to protect the right to life of such individuals, for example, when the States exercise effective authority, power, or control over the individual; when they exercise effective control over the territory where the victim's rights are affected; or when the State's conduct could reasonably be foreseen to result in an unlawful deprivation of life, including for failing to exercise due diligence to prevent the unlawful deprivation of life committed by non-state actors.<sup>259</sup>
161. At the local level, the REDESCA also considers it important to highlight recent judicial rulings of a civil nature, in which the courts hear matters involving human rights violations and abuses related to the action of companies outside of the territory in which they are domiciled. For example, in Canada matters were admitted related to the mining companies Hudbay Minerals, Tahoe Resources, and Nevsun Resources,<sup>260</sup> all of Canadian origin, which considered their liability for alleged human rights violations in Guatemala and Eritrea. Likewise, in the United States, a Court of Appeals reverse a trial court decision that had dismissed a case against the Newmont mining company where the plaintiff alleged damages to a human rights defender in Peru.<sup>261</sup> Additionally, the IACHR observes that local courts in Europe also have issued recent judgments with similar characteristics, allowing them to hear the merits of cases that involve events outside the territory where the companies are domiciled.<sup>262</sup>
162. From the foregoing, the IACHR and its REDESCA observe that in the area of business and human rights, the States may exercise important levels of influence over the behavior of private actors causing extraterritorial effects over the enjoyment of human rights, through regulation, supervision, or

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<sup>258</sup> Council of Europe, Recommendation [CM/Rec\(2016\)3 of the Committee of Ministers of the Members States on human rights and business](#). Adopted by the Committee of Ministers on 2 March 2016, paras. 13, 20, 34 and 35.

<sup>259</sup> African Commission on Human and Peoples' Rights. General Comment No. 3. Adopted during the 57th Ordinary Session held on 4 - 18 November 2015 in Banjul, Gambia, paras. 9 and 14.

<sup>260</sup> IACHR. [IACHR Welcomes Creation by Canada of an Ombudsperson to Oversee Canadian Companies Operating Abroad](#). 6 February 2018.

<sup>261</sup> United States Court of Appeals for the Third Circuit. [Case No. 18-2042. \*Máxima Acuña-Atalaya et al v. Newmont Mining Corporation et al\*](#), 20 March 2019.

<sup>262</sup> For example, the IACHR highlights the judgment of the Superior Regional Tribunal of Hamm in Germany, where it accepted going ahead to the merits phase of a case to determine the liability of an energy company for climate change and its effects on a resident of the Peruvian Andes. Cf. GermanWatch. [Court documents of the "Huaraz" case](#), December 13, 2017. In the same way, the Supreme Court of the United Kingdom admitted the possibility of hearing the merits of a case on alleged human rights violations in Zambia against a UK-based parent mining company and its subsidiary.. Cf. [Vedanta Resources PLC v. Lungowe](#), [2019] UKSC 20

accountability. In some specific cases, the level of state influence may be significant by having greater influence over certain private actors' behavior and end up involving their general obligations to respect.

163. In the case of the general level of influence, the adoption of a regulatory framework foresees rules of general application that in principle must be observed by their addressees; otherwise, the State may adopt measures for supervision, investigation, or eventual sanctions. Thus, the domestic legal framework postulates rules of conduct with general application, whose breach or non-fulfillment may cause the legal liability of its author, and may consequently exert certain effects and influence over the way in which the rule's addressees carry out their actions, within the home State or outside it.
164. On the other hand, regarding the more strict level of influence, the States may directly impose certain rules of conduct on business actors in specific contexts; for example, in public procurement, public tenders or purchases, or when dealing with public businesses or entities with state participation.<sup>263</sup> The foregoing creates a more decisive degree of influence on the part of the State, which effectively may demand and, when applicable, change certain conduct or behavior of the business actor to comply with certain human rights standards. The latter must not be confused with cases in which the business entity's acts may be directly attributed to the State according to international law; in such situations the analysis would apply the aforementioned "effective control" or "authority" criteria.
165. In this context, for the IACHR and its REDESCA, the foundation for the extraterritorial application, or with extraterritorial effects, of the States' human rights obligations, in contexts of business activities, lie in determining whether the State exercises authority or effective control with respect to the enjoyment of the human rights of individuals located within its territory in such contexts, or whether it is in a position to influence, in accordance with the limits of international law, whether through the executive, legislative, or judicial branch, the enjoyment of human rights linked to the transnational acts of business entities.
166. To determine whether a State is in a position to influence, the IACHR and its REDESCA find it useful to use the criteria mentioned in Principle 25 of the "Maastricht Principles on the Extraterritorial Obligations of States"<sup>264</sup>

<sup>263</sup> See, for example, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 4, 5 and 6.

<sup>264</sup> According to this principle: "States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances: a) the harm or threat of harm originates or occurs on its territory; b) where the non-State actor has the nationality of the State concerned; c) as regards business enterprises, where the corporation, or its parents or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory; e) where

together with the nationality principle or active personality principle recognized in international law.<sup>265</sup> Although its application will depend on the particular facts of each specific case, the REDESCA finds that they are objective elements that may be used as an approach to determine whether some level of protection with an extraterritorial reach is required of the State according to its international human rights obligations.

167. For the IACHR and its REDESCA, the stronger the degree of state influence over the enjoyment of human rights outside its territory, the stricter the analysis of its duties to respect and guarantee. Thus, for example, on one side of the spectrum we place a business that acts under the State's instructions or exercises attributes of public power outside the territory of said State; and on the other, we place a private business with transnational activities and operations whose only relationship and proximity with the home State is its place of domicile. In the first case, both the State's duty to guarantee and to respect human rights may be compromised, while in the second situation it is feasible to evaluate the state obligations to ensure human rights, for example by regulating said businesses' behaviors or, if applicable, by preventing and investigating the transnational corporate actions linked to violations or abuses of human rights, in accordance with the limits of international law. Along these lines, it is also worth mentioning that state regulation of transnational business behavior regarding human rights, and determining the legal consequences for eventual noncompliance, are not alien to the international experience. The REDESCA observes two recent examples of this trend: on the one hand, in France a law was enacted regarding due diligence in human rights related to business entities' transnational behavior;<sup>266</sup> on the other hand, in the Netherlands, legislation was recently enacted regarding due diligence and combatting child labor, also with transnational implications.<sup>267</sup>
168. In this sense, the States' obligation to make businesses respect human rights will primarily be verified through the design of institutions and legal provisions that regulate their transnational corporate behavior, through the implementation of adequate measures for reasonable prevention and supervision that reduce the existence of factors of foreseeable risks that facilitate said abuses or violations; and creating or strengthening effective remedies for the victims of said violations, in order to ensure that they have access to justice and due reparation in accordance with international

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any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction." International Commission of Jurists and the University of Maastricht. Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights, Maastricht, 28 September 2011, Principle 25.

<sup>265</sup> International Law Commission. Yearbook of the International Law Commission (2006). Volume II, Part II. Report on the work of its fifty-eighth session. Annex V (Extraterritorial Jurisdiction). UN Doc. A/CN.4/SER.A/2006/Add.1 (Annex) (Part 2), p. 231.

<sup>266</sup> [LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre](#) (France).

<sup>267</sup> Mvoplatform. [The Netherlands takes an historic step by adopting child labour due diligence law](#), May 14, 2019.

human rights law. The foregoing does not in any way diminish the human rights obligations of the host State, since the business entity, or its affiliates, subsidiaries, and business partners, among others, would be developing activities within the territory of that State and therefore within its territorial jurisdiction. The IACHR and its REDESCA recognize that the coexistence of the human rights obligations of the State that exercises territorial jurisdiction over the business entity and those of the business entity's home State that may be applied extraterritorially in light of the aforementioned criteria, could be the basis for, according to the specific case, the existence of shared responsibilities between the home State and the host State of the business entity, without prejudice to the individual acts of each State being considered separately in light of their applicable specific obligations.

169. Additionally, the IACHR and its REDESCA emphasize that, together with the general obligations to respect and guarantee, the States' **duty to cooperate** also arises. This duty of cooperation can be understood from two dimensions, a more general one related to the development of an international framework conducive to the realization of human rights in which the States provide assistance of various kinds for this purpose; and another more specific one, which implies cooperation to ensure that the States themselves, and non-state actors whose conduct they are in a position to influence, do not impede the enjoyment of human rights in other countries.
170. The duty of the State to cooperate is expressly recognized in international human rights standards, which particularly, but not exclusively, refer to economic, social, cultural, and environmental rights, such as Article 26 of the American Convention and its Additional Protocol on this subject.<sup>268</sup> This obligation is also affirmed through the principles and provisions of general international law instruments related to the giving human rights effect and achieving comprehensive development.<sup>269</sup> For its part, the 2030 Agenda on Sustainable Development Goals, as a global State commitment closely

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<sup>268</sup> In relevant part, Article 26 of the American Convention establishes that: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.". For its part, the Preamble of the Protocol of San Salvador, as well as Articles 1, 12 and 14 of the same treaty refer to this obligation. See also, for example, the Inter-American Convention on the Forced Disappearance of Persons, Articles I.c and XII; Inter-American Convention to Prevent and Punish Torture, Article 11; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Article 8.i, among others. Under the universal human rights protection system see, for example, the International Covenant on Economic, Social and Cultural Rights, Articles 2.1, 11.1, 22 and 23 or the Convention against Torture, Article 9.1, among others.

<sup>269</sup> At the time of describing the obligation of international cooperation, for example, the United Nations Charter refers in Article 55 to the adoption of state measures jointly or separately; the OAS Charter takes up the States' commitment to cooperate in various provisions, in particular for the integral development of their peoples (among others, Articles 30, 31 and 32) which have direct relation with ensuring human rights.



related to the fulfillment of human rights, also includes the state cooperation in a transversal way in order to achieve such goals.<sup>270</sup>

171. In particular, the REDESCA notes that this obligation constitutes an important rule when analyzing the States' behavior in the context of violations and abuses committed by businesses with transnational activities or operations due to the nature of the links that may be created between the home states and the host states. It also notes that the Guiding Principles include it under the state duty to promote mutual understanding and international cooperation in the management of problems related to business and human rights by participating in multilateral organizations.<sup>271</sup> One of the issues identified by the REDESCA in these contexts is the States' duty to collaborate with each other so that acts constituting human rights infringements in which businesses are involved do not remain in impunity.<sup>272</sup> This duty to cooperate acquires particular relevance, for example, due to the difficulties in bringing companies with transnational activities to justice, whose parent companies are located outside of the jurisdiction or territory of the State where their subsidiaries operate, or in cases of business partners situated in other countries who breach human rights norms. In these cases, the State where the events occur has very limited possibilities to investigate the behavior, participation, and eventual degree of responsibility of the business located in another territory, if not through interstate cooperation.
172. It may also include, among other conduct, establishing reciprocal judicial mechanisms that prioritize human rights standards and include collecting cross-border evidence and executing judgments related to mitigating and redressing corporate abuses in third States. For the IACHR and its REDESCA it is of the utmost importance that the States contribute to the delivery of information produced by the parent company or respective business partner, whether it is useful for access to information and the search for justice, and ensure that the substantive, procedural, and practical requirements of the home state do not imply the denial of effective remedies and effective reparation for victims.

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<sup>270</sup> UN General Assembly. Resolution No. 70/1. Transforming our world: the 2030 Agenda for Sustainable Development. 25 September 2015.

<sup>271</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 10.b and 10.c; *Mutatis mutandis*, see Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights. UN Doc. A/HRC/40/57, 19 December 2018. Principle 13. This document indicates that: "States have an obligation to provide international assistance and cooperation in order to facilitate the full realization of all rights. As part of their obligations with regard to international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights of people outside their borders."

<sup>272</sup> The IACHR highlights, for example, that the Working Group on business and human rights recommended to the States, in one of its recent reports: "Cooperate and collaborate with other States to provide more effective remedies locally and extraterritorially for all business-related human rights abuses." Cf. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/72/162, 18 July 2017, para. 86(h).

173. The IACHR has also recognized that in the case of indigenous peoples in voluntary isolation and initial contact, certain measures of protection required to the States have transnational implications, since such peoples' notions of territory do not tend to be based in the States' political and territorial limits. In this context, it has expressed the urgent need for the States to fulfill their duty of cooperation and address threats to the effective realization of these peoples' rights in a coordinated way.<sup>273</sup>
174. For its part, the Inter-American Court has had the opportunity to mention this duty to cooperate in general terms, regarding access to justice in cases related to gross human rights violations.<sup>274</sup> It also has referred categorically to "the duty to cooperate between State to promote and observe human rights is a norm of *erga omnes* nature, inasmuch as it must be fulfilled by all States, and is binding under international law."<sup>275</sup> More precisely, it has held that: "In the specific case of activities, projects or incidents that may generate significant transboundary environmental harm, the potentially affected State or States require the cooperation of the State of origin and vice-versa in order to adopt the measures of protection and mitigation needed to ensure the human rights of the persons under their jurisdiction."<sup>276</sup> In this regard, the Court adds that the verification of this duty to cooperate in such contexts will be important when evaluating the State's compliance with its international human rights obligations.<sup>277</sup> In this sense, if a home state, for example, knows or should have known a real situation of risk to human rights outside of its territory due to the actions of some business domiciled in it, the duty to cooperate with the host state and adopt adequate preventive measures that the situation requires will be activated. In these cases, the IACHR notes the possibility of assessing shared responsibility between both States, although by degrees and for different actions, to the extent that the breach of the required obligations of each State is verified.
175. In conclusion, for the IACHR and its REDESCA the contexts of businesses' transnational operations and activities relating to human rights violations may activate the exercise of the home state's jurisdiction and their corresponding international human rights obligations according to the applicable rules and facts of each particular case, in light of international human rights law and the standards on the duty to respect and guarantee indicated in this report. Likewise, verifying their noncompliance may entail the home State's international responsibility.

<sup>273</sup> IACHR. Situation of Human Rights of Indigenous and Tribal Peoples of the Pan-Amazon Region, OAS/Ser.L/V/II. Doc. 176, 29 September 2019, para. 373.

<sup>274</sup> I/A Court H.R. Case of Goiburú et al V. Paraguay. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 131; I/A Court H.R. Case of La Cantuta V. Peru. Merits, Reparations and Costs. Judgment of 29 November 2006. Series C No. 162, para. 160.

<sup>275</sup> I/A Court H.R. Advisory Opinion OC-25/18, of 30 May 2018. Series A No. 25, para. 199.

<sup>276</sup> I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, para. 182.

<sup>277</sup> I/A Court H.R. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, para. 182.

## CHAPTER 5

# THE EFFECTS OF THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF STATES ON BUSINESSES



## THE EFFECTS OF THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF STATES ON BUSINESSES

176. Although it is clear that the IACHR's functions are centered on state conduct and it only has competence to determine the States' liability for eventual human rights violations, the IACHR and its REDESCA also recognize that, when interpreting the content and scope of the human rights recognized in inter-American human rights instruments together with the respective obligations of the States, correlative legal effects on business in this area can be derived from them. Likewise, the IACHR and its REDESCA understand that to comprehensively comply with the promotion of the observance and defense of human rights in practice, and particularly to stimulate awareness about it in the peoples of the American continent, as part of one of its main functions set forth in Article 41.a of the ACHR, read in conjunction with Article 106 of the OAS Charter and Article 1 of its Statute and Rules of Procedure, it is not possible to ignore these threats or violations to the enjoyment of human rights in the context of business activities when analyzing the corresponding state behaviors.<sup>278</sup>
177. The idea that human rights are relevant not only for the States but also with respect to the behavior required of business entities has been developed under Pillar II of the Guiding Principles relating to businesses' responsibility to respect human rights.<sup>279</sup> Along these lines, the REDESCA also recalls that the Universal Declaration of Human Rights itself, as a source and foundation for the development of international human rights law, establishes in Article 30 that its provisions may not be interpreted so that either States or any group or person may perform acts aimed at suppressing human rights. Although in general current national legislation represents the legal framework for determining businesses' responsibility for violating internationally recognized human rights, it is widely accepted that the respect of human rights is a global norm of conduct applicable to

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<sup>278</sup> See, inter alia, IACHR. Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II, Doc. 56/09, 30 December 2009; IACHR. Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion, OEA/Ser.L/V/II, Doc. 43/15, 31 December 2015, paras. 137, 138, 140, 144, 216, 482, 494; IACHR. Situation of Human Rights in Honduras. OEA/Ser.L/V/II. Doc. 42/15, 31 December 2015, paras. 40, 51, 82, 395, 405-415, 427-435; IACHR. Violence, Children, and Organized Crime, OEA/Ser.L/V/II, Doc. 40/15, 11 November 2015, para. 85; IACHR. Indigenous Peoples, Afro-descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II, Doc. 47/15, 31 December 2015.

<sup>279</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 11-24.

all businesses in all situations, regardless of the existence of national laws that formalize it and of States' international obligations on the subject.<sup>280</sup>

178. In this regard, the former Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, recognized that “there are few if any internationally recognized rights business cannot impact – or be perceived to impact – in some manner.”<sup>281</sup> Although human rights obligations are fundamentally state-centered, the evolution of international human rights law has shown that other actors may have obligations in such a regime, as it is the case, for example, with certain provisions of the Convention on the Rights of Persons with Disability, which includes the possibility that certain international organizations sign and adhere to the treaty.<sup>282</sup> The analysis and use of customary norms, general legal principles, or other sources of international law, included those of a *jus cogens* nature, may also be useful for observing the existence of obligations that bind businesses and other economic actors with respect to human rights.<sup>283</sup> For example, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment emphasizes that “[f]or the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment to retain its practical relevance, however, it must also provide for practical protection against violations on the part of non-State actors.”<sup>284</sup>
179. In this sense, although both organs of the inter-American system have admitted that they have limits on their competence to rule on the eventual responsibility of non-state actors,<sup>285</sup> the IACHR and its REDESCA understand that such restrictions do not make it impossible for private actors, such as companies, to impact human rights in practice. The absence of a mechanism for international human rights compliance and supervision by private agents within international human rights law does not necessarily imply that the norms emanating from them are elusive for businesses or that such norms have no effect on those non-state actors. On the contrary, the underlying idea that explains the States' obligations to guarantee and protect human rights in these situations allows for assurance

<sup>280</sup> OHCHR. The Corporate Responsibility to Respect Human Rights. Interpretive Guide (2012).

<sup>281</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008, para. 52.

<sup>282</sup> Convention on the Rights of Persons with Disabilities, Arts. 42-44.

<sup>283</sup> See, inter alia, Nicolás Carrillo Santarelli, *Direct International Human Rights Obligations of Non-State Actors: A Legal and Ethical Necessity*, Wolf Legal Publishers, 2017.

<sup>284</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. A/HRC/34/54, 14 February 2017, para. 41. See also: IACHR. Merits Report No. 33/16. Linda Loayza Lopez Soto and family (Venezuela). July 29, 2016, para. 220. *I/A Court H.R. Case of López Soto et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of September 26, 2018. Series C No. 362, paras. 183-189.

<sup>285</sup> I/A Court H.R. Case of Cruz Sánchez et al V. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 17 April 2015. Series C No. 292, paras. 280-281.

that business actors may also impede or favor the realization of human rights.<sup>286</sup>

180. An example of the foregoing is found in the Inter-American Court's advisory opinion on migrant workers, in which it is affirmed that: "the obligation to respect and ensure human rights, which normally has effects on the relations between the State and the individuals subject to its jurisdiction, also has effects on relations between individuals."<sup>287</sup> In this context the Court explained that:

"In labor relations, employers must protect and respect the rights of workers, whether these relations occur in the public or private sector. The obligation to respect the human rights of migrant workers has a direct effect on any type of employment relationship, when the State is the employer, when the employer is a third party, and when the employer is a natural or legal person."<sup>288</sup>

181. In this way, IACHR and its REDESCA understand that international human rights obligations addressed to States may project effects on the behavior of third parties. The implications of such effects have been developed, even, in the analysis of contentious cases in which the Inter-American Court found the responsibility of the State concerned. Although it limits the analysis of liability to State action, it does not avoid referring, in its "whereas" section and in accordance to each factual context, to the involvement of corporations in the alleged human rights violations.
182. Thus, in several cases regarding collective land rights and the right to free, previous, and informed consultation of indigenous peoples, the Inter-American Court considered the consequences of the actions carried out by companies on the victims' human rights. For example, the Inter-American Court took into account the fact the concessions granted by the State of Suriname to logging companies did in fact affect natural resources necessary for the economic and cultural survival of the Saramaka people and indicated that: "[n]ot only have the members of the Saramaka people been left with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems, but they have no benefit from the logging in their territory."<sup>289</sup> In the merits judgment of the Sarayaku case, it also evaluated the behavior of the company involved in the events.

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<sup>286</sup> See, inter alia, HART, H.L.A., *The Concept of Law*, 3<sup>rd</sup>. ed., Oxford, Oxford University Press, 2012, p. 94; CHÉTAIL, Vincent, «The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward » in ALLAND, Denis et al. (dirs.), *Unité et diversité du droit international: Écrits en l'honneur du Professeur Pierre-Marie Dupuy*, Leiden, Martinus Nijhoff, 2014, pp. 124-129.

<sup>287</sup> I/A Court H.R. Advisory Opinion OC-18/03 of 17 September 2003. Series A No. 18, para. 146.

<sup>288</sup> I/A Court H.R. Advisory Opinion OC-18/03 of 17 September 2003. Series A No. 18, paras. 140 and 151.

<sup>289</sup> I/A Court H.R. Case of Pueblo Saramaka People V. Surinam. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 153.

For example, the Court found that “the company’s actions, by attempting to legitimate its oil exploration activities and justify its intervention in Sarayaku territory, failed to respect the established structures of authority and representation within and outside the communities” or that “the company’s actions did not form part of an informed consultation,”<sup>290</sup> which also happened in the prior issuance of provisional measures in the case.<sup>291</sup>

183. More directly, in the case of *Kaliña and Lokono v. Suriname*, the Inter-American Court found “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 a joint venture, BHP Billiton-Suralco,” and later found that third parties, including companies, may be involved in human rights violations within the territory and/or jurisdiction of a State and stressed that “businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility” referring to the United Nations Guiding Principles on the subject.<sup>292</sup>
184. The IACHR, for its part, has condemned actions of non-state actors that negatively affect human rights, making reference to the fact that the behavior of actors other than States is also relevant when evaluating state obligations in terms of the protection of human rights in the continent.<sup>293</sup> The IACHR starts from the recognition of human dignity as the foundation for internationally recognized human rights. This dignity is unconditional and, consequently, its protection and respect may not depend on extrinsic factors, including the identity of the aggressor.
185. Thus, to cite some examples, since 1993 the IACHR referred to companies’ actions through monitoring reports on human rights; at that time it referred to the situation of union rights and labor rights in Guatemala, expressly reporting on the continued persecution directed at the directors and members of the General Workers Union of the Guatemalan Telecommunications Company (*Sindicato General de Trabajadores de la Empresa Guatemalteca de Telecomunicaciones*), labor discrimination against the affiliates of the Union, and abuses in the *maquiladora* industry in terms of decent and legal working conditions, the minimum wage, child labor, forced overtime, the lack of sanitary conditions, dismissal of union leaders, etc.<sup>294</sup> In its 1997 report on Ecuador the IACHR referred to the shared responsibility of the State and companies in relation to the environmental damage produced by extractive industry activity;<sup>295</sup> in its 2007 report on Bolivia the IACHR

<sup>290</sup> I/A Court H.R. Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of 27 June 2012. Series C No. 245, paras. 194 and 209.

<sup>291</sup> I/A Court H.R. Matter of Sarayaku Indigenous People regarding Ecuador. Provisional Measures. Resolution of the Inter-American Court of Human Rights of 6 July 2004.

<sup>292</sup> I/A Court H.R. Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, paras. 223 and 224.

<sup>293</sup> IACHR. Report on terrorism and human rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 48; IACHR. [IACHR Condemns Terrorist Attack in Colombia](#), 20 January 2019.

<sup>294</sup> IACHR. Fourth Report on the Situation of Human Rights in Guatemala, 1 June 1993.

<sup>295</sup> IACHR. Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Chapter VIII.



reported on non-compliance with environmental laws and even criminal laws by companies as one of the causes of the high level of conflict in the country;<sup>296</sup> and in its 2013 report on Colombia the IACHR referred to the progressive assignment of the duties to protect people at risk to private security companies, the presence and settlement of extractive industries as a source of violations of indigenous peoples' rights, and referred to the intervention of a private company in the failure to deliver medicine and the poor quality of health services for persons deprived of liberty in prisons.<sup>297</sup>

186. More recently, in the framework of the preliminary observations for its on-site visit to Brazil in 2018, the Commission indicated that, in addition to the State's obligations to protect human rights in the context of social and environmental effects produced by the mining industry, the companies involved must respect human rights, which includes adequate redress to the affected victims and the mitigation of harm due to the business conduct in question, as well as the duty to exercise due diligence in matters of human rights,<sup>298</sup> a position that was reiterated through a statement in which the REDESCA of the IACHR expressed their concern over the breakdown of a dam of toxic mining waste operated by a private company in the same country. In this statement, the IACHR and its REDESCA emphasized some priority actions that not only the State but also the corporation involved should carry out; and called for effective reparations for the victims, the immediate mitigation of damages, and corporate accountability in the area of human rights.<sup>299</sup>
187. In the case system, for example, the IACHR also assessed whether the lack of guarantees that protect people from the improper actions of private companies related to the provision of health and social security could provide a basis for finding human rights violations. In this regard, it indicated that "the state obligation to ensure the effectiveness of human rights projects effects on relations between private individuals, who consequently have an obligation to respect these rights", thus it specified that "with respect to insurance companies, for example, the search for profitability and economic gain in the medical insurance system should not nullify the enjoyment of the rights protected by the American Convention."<sup>300</sup> In another case, it directly recognized the existence of human rights violations in the context of corporate underwater fishing activities in which indigenous workers were subjected to conditions of labor exploitation, taking advantage of their situation of vulnerability, including poverty; on that occasion, the IACHR found it clear that there was a close relationship between the behavior of the companies in their failure

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<sup>296</sup> IACHR. Access to Justice and Social Inclusion: The Path toward Strengthening Democracy in Bolivia, OEA/Ser.L/V/II. Doc. 34, 28 June 2007, para. 254

<sup>297</sup> IACHR. Truth, Justice and Reparation: Fourth report on the human rights situation in Colombia. OEA/Ser.L/V/II. Doc. 49/13, 31 December 2013, paras. 179, 761, 842, 843, 1081 - 1095

<sup>298</sup> IACHR. Preliminary Observations of the On-Site Visit to Brazil (November 2018).

<sup>299</sup> IACHR. [Special Rapporteurship ESCER of the IACHR expresses deep concerns about human, environmental and labor tragedy in Brumadinho \(Minas Gerais, Brazil\) and calls for the integral reparations for victims](#). 30 January 2019. See also: OHCHR. Brazil: [UN experts call for probe into deadly dam collapse](#). 30 January 2019.

<sup>300</sup> IACHR. Merits Report No. 107/18, Martina Rebeca Vera Rojas (Chile), 5 October 2018, para. 71.

to provide safe working conditions, the State's negligent attitude omitting oversight of the same, and the harmful effects on various human rights, such as the right to work, to just fair and equitable conditions, to health, and to social security.<sup>301</sup>

188. For its part, recently the IACHR together with its Office of the Special Rapporteur for Freedom of Expression affirmed, in the context of the rights of women journalists that companies in the information and communications technology sector have a decisive role in guaranteeing the rights of these professionals. In this regard, they recommended specific actions directed toward these economic actors, such as establishing internal policies with specific provisions on gender violence and gender-based discrimination, incorporating the active participation of women who work in each of the companies, or directly including in their conditions of service and their "community rules" the relevant principles of human rights law.<sup>302</sup>
189. Doctrine has also supported the argument that, from the international human rights organs' work of promoting human rights and safeguarding their validity, they are allowed to directly rule on non-state conduct, precisely to promote practices that entail greater effectiveness in the enjoyment of rights and fundamental freedoms.<sup>303</sup> At the same time, the REDESCA of the IACHR observes that in a consistent, sustained, and increasingly well-known way, several UN special rapporteurs and committees have directly addressed corporate behavior that directly affects the enjoyment of human rights, alluding not only to the States' obligations but also to those attributed to such companies. For example, the Committee on Economic, Social and Cultural Rights expressed that even when the laws' design does not adequately protect human rights, or if the work of state oversight of their compliance is not effective, corporations retain the duty to respect human rights.<sup>304</sup>

<sup>301</sup> IACHR. Merits Report No. 64/18. Opario Lemoth Morris et al (Buzos Miskitos) (Honduras), 8 May 2018.

<sup>302</sup> IACHR. Women Journalists and Freedom of Expression: Discrimination and gender-based violence faced by women journalists in the exercise of their profession (Office of the Special Rapporteur for Freedom of Expression). OEA/SER.L/V/II IACHR/RELE/INF.20/18, 31 October 2018, paras. 176.c and 179.d

<sup>303</sup> Nicolás Carrillo Santarelli, "The protection and promotion of human rights facing non-state violations by international organs," *Revista Electrónica de Estudios Internacionales*, Vol. 26, 2013, pp. 11-18; and Carrillo, Nicolás. The promotion and development of the protection of human rights in the face of corporate abuse in the inter-American system. In: Cantú Rivera, Humberto (ed.). [Derechos humanos y empresas: reflexiones desde América Latina](#). Instituto Interamericano de Derechos Humanos, 2017, pp. 87-118. See also, mutatis mutandis, Jordan J. Paust, "Human Rights Responsibilities of Private Corporations", *Vanderbilt Journal of Transnational Law*, Vol. 35, 2002, pp. 810-815; John H. Knox, "Horizontal Human Rights Law", *American Journal of International Law*, Vol. 102, 2008, pp. 18-31; Jan Klabbers, *International Law*, Cambridge University Press, 2013, pp. 137-139.

<sup>304</sup> Committee on Economic, Social and Cultural Rights. General Comment No 24. UN Doc. E/C.12/GC/24, 10 August 2017, para. 5; along the same lines, see: Committee on the Rights of the Child. General Comment No. 16. UN Doc. CRC/C/GC/16, 17 April 2013. In other General Comments, the Committee has clearly expressed that non-state actors like companies also have responsibilities regarding human rights. For example, it indicates: "Although only the States are parties to the Covenant, businesses, unions and all members of society have responsibilities to give effect to the right

190. For its part, the UN Special Rapporteur on rights to freedom of peaceful assembly and of association expressly urged companies to “[m]eet their obligations to respect the rights to freedom of peaceful assembly and of association. That includes respecting the rights of all workers to form and join trade unions and labour associations and to engage in collective bargaining and other collective actions, including the right to strike.”<sup>305</sup> The Special Rapporteur on the situation of human rights defenders also has clearly stated that: “Whether the link is direct or indirect, all business enterprises have an independent responsibility to ensure that defenders can effectively and safely address the human rights impacts linked to their operations.”<sup>306</sup>
191. The UN Special Rapporteur on adequate housing has also mentioned the need to pay greater attention to the obligations that companies from the real estate and financial sector have regarding the right to housing since, in certain contexts, the acquisition of homes is used like speculative financial products, distorting their market value and affecting access to adequate housing, particularly in populations in a situation of greater vulnerability;<sup>307</sup> and the UN Special Rapporteur on human rights and the environment stressed that companies must comply with all current environmental laws, put into process due diligence processes in the field of human rights, account for the environmental impact they cause, and facilitate reparations for the damages they cause.<sup>308</sup> Statements have been issued along these same lines regarding, for example, businesses and migrant workers,<sup>309</sup> agricultural industry companies, farm workers, and the

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to equitable and satisfactory working conditions.” Committee on Economic, Social and Cultural Rights. General Comment No. 23. UN Doc. E/C.12/GC/23, 27 April 2016, para. 74. With respect to cultural rights, it also indicated: “While compliance with the Covenant is mainly the responsibility of States parties, all members of civil society – individuals, groups, communities, minorities, indigenous peoples, religious bodies, private organizations, business and civil society in general – also have responsibilities in relation to the effective implementation of the right of everyone to take part in cultural life.” Committee on Economic, Social and Cultural Rights. General Comment No. 21. UN Doc. E/C.12/GC/21/Rev.1, 17 May 2010. para. 73.

<sup>305</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association. UN Doc. A/71/385, 14 September 2016, para. 99.

<sup>306</sup> Report of the Special Rapporteur on the situation of human rights defenders. UN Doc. A/72/170, 19 July 2017, para. 54.

<sup>307</sup> Report of the Special Rapporteur on adequate housing. UN Doc. A/HRC/34/51, 18 January 2017, paras. 62-66.

<sup>308</sup> Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc. A/HRC/37/59, 24 January 2018, paras. 22 and 35.

<sup>309</sup> In this respect, the Special Rapporteur on the rights of migrants stated: “International standards on business and human rights provide that private actors must as a minimum respect the human rights of their workers. The private sector, including recruitment agencies and employers, play an important role in labour exploitation of migrants, and must therefore be part of the solution. Governments must effectively regulate the recruitment industry.” Cf. Report of the Special Rapporteur on the rights of migrants. UN Doc., A/HRC/26/35, 3 April 2014, para. 68. More specifically, regarding businesses and labor recruitment and contracting of migrants see: Report of the Special Rapporteur on the rights of migrants. UN Doc. A/70/310, 11 August 2015; and regarding the key participation of companies together with the State for the protection of migrant rights see: Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration.” Draft outcome document of the Conference, Annex. UN Doc. A/CONF.231/3, 30 July 2018.

right to food,<sup>310</sup> business supply chains and the existence of contemporary forms of slavery,<sup>311</sup> corporate responsibility in the field of toxic chemical substances, pollution, and toxic waste<sup>312</sup>; or more specifically regarding workers' occupational exposure to toxic substances,<sup>313</sup> among others. From the field of international investment arbitration, there are also rulings in this sense, recognizing that "commercial entities and international companies are reached by the obligations resulting from international human rights law."<sup>314</sup>

192. Bearing in mind that the States, in order to fulfill their obligations to guarantee human rights, must establish the legal and regulatory framework in which private entities can carry out their activities and operations according to the industry and type of particular risk to human rights, the IACHR and its REDESCA understands that businesses do not operate in a vacuum that is beyond State control. Therefore, depending on voluntary corporate compliance is not sufficient, nor is it compatible, with the protection of human rights under the applicable international, and particularly inter-American, standards.
193. In this regard, it is necessary to specify that although there is a deficit in the adequacy or existence of secondary norms of international law that could help establish international responsibility for business actors for human rights violations, with the exception of those arising from international criminal law and without prejudice to the existing, relevant initiatives and discussions regarding an international treaty on the topic; for the IACHR and its REDESCA, the States – by effectively fulfilling their duties to respect and guarantee under international human rights law – will have to ensure that businesses have direct and binding obligations to respect human rights. In arriving at this transposition, although the attribution of responsibility directed toward the company will arise at the domestic level, the State should use the applicable standards and norms coming from primary sources of international human rights law such as those included in the American Declaration, the American Convention, or the Protocol of San Salvador to make them effective in the context of relations between

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<sup>310</sup> Report of the Special Rapporteur on the right to food. UN Doc. A/HRC/13/33, 22 December 2009, para. 21.

<sup>311</sup> Report of the Special Rapporteur on contemporary forms of slavery, including its causes and effects UN Doc. A/HRC/30/35, 8 July 2015.

<sup>312</sup> Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste. UN Doc. A/HRC/36/41, 20 July 2017, paras. 81-95.

<sup>313</sup> Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste. UN Doc. A/HRC/39/48, 3 August 2018, paras. 79, 80, 84, 87, 93, 94, 98, 109.

<sup>314</sup> CIADI Case No. ARB/07/26 (Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia ur Partzuergoa v. Argentina) Decision, 8 December 2016, para. 1159. Also see: CIADI Case No. UNCT/15/3 (Aven v. Costa Rica), Decision, 18 September 2018, para. 738; and CIADI Case No. ARB/11/28 (Tulip Real Estate v. Turquía) Decisions on Annulment, 30 December 2015, paras. 86-92

private parties, whether contractual or extra-contractual, that involve the realization of human rights.

194. The Commission and its REDESCA emphasize that under international human rights law, it is the State that originally assumes the obligations set forth therein directly. However, in the work of translating human rights into reality, they also recognize that businesses have the factual capacity to directly, and in some cases decisively, influence their realization. For the IACHR and its REDESCA, this situation cannot be dissociated or ignored in the application and interpretation of the normative content of each of these internationally protected rights. A comprehensive and reasonable assessment of the foregoing allows the competent international bodies to refer to the effects that may arise from said internationally-recognized rights for private actors, even if they lack the powers to legally rule on these actors' international liability. This not only orients the States about fulfilling their international obligations in these contexts, but also so that they comply by defense and raising awareness; and so that ultimately, and in such contexts, the object and purpose of international human rights treaties do not run the risk of being substituted, debilitated, or subordinated, in practice, to voluntary decisions or to well-intentioned manifestations of corporate actors.
195. Hence, full and effective compliance with the state obligation to guarantee human rights in the context of business activities and operations helps private business actors to take into account applicable international standards in accordance with the universal *ethos* of such rights and consequently to ensure fulfillment of the responsibility to effectively respect these rights. In this sense, the REDESCA reaffirms and emphasizes state action through its normative, supervisory, preventive, investigative, and punitive powers, as well as sustained political will on the matter, as prerequisites for achieving the effective protection of human rights. In short, human rights, based on human dignity, in addition to seeking the full development of people and communities in their interaction with nature, stand as a shield for their effective protection against oppression and abuses of power, its essence is focused on the inherent value of human beings, and its defense must not depend on the source of the threat or violation.
196. The criteria formulated above lead the IACHR and its REDESCA to conclude that, under the standing inter-American order, the legal content of human rights and the corresponding state obligations generate effects over businesses, although to a particular and differentiated degree and scope from those required of the States due to the nature of the system. This relationship is crystallized when the States formulate, supervise, and adjudicate express and binding legal responsibility at the domestic level aimed at companies respecting human rights, and the same are based on the international human rights norms and standards that competent bodies may determine for these purposes.

197. This means that the situations and specific aspects that the authorities should oversee in such contexts should be clarified, as well as the consequent knowledge by companies of what they must carry out to avoid incurring legal liability. In short, for the IACHR and its REDESCA, the content of internationally recognized human rights, and the effective application of the States' duties to ensure and respect, entail companies' responsibility in terms of avoiding provoking or contributing to human rights abuses and violations through their activities, exercising due diligence in this area, being accountable, and assuming the corresponding consequences, whether in criminal, civil, or administrative law. In relation to transnational activities and operations, this responsibility will mean, for example, the need to exercise due diligence over the activities of subsidiaries, business groups in which they participate, commercial relationships or supply or value chains, as well as not incurring in any extraterritorial human rights abuses directly. Their direct involvement, the total absence of due diligence, or their materially deficient performance may trigger the company's legal liability at the domestic level, and the consequent reparations to those affected.
198. Finally, in order to evaluate the meaning and requirements of due diligence in matters of human rights and business, the REDESCA underscores the importance of resorting to the respective provisions of the Guiding Principles as a starting point, which set minimum standards to bear in mind insofar as they represent a globally-accepted framework on the subject. In general terms, the Guiding Principles state that due diligence means a process to "identify, prevent, mitigate and account for how they address their impacts on human rights."<sup>315</sup> The due diligence process "should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."<sup>316</sup>

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<sup>315</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational

corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, principle 15 (b).

<sup>316</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational

corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, principle 17.

CHAPTER 6

INTER-AMERICAN CONTEXTS  
OF SPECIAL ATTENTION IN  
THE FIELD OF BUSINESS AND  
HUMAN RIGHTS





## **INTER-AMERICAN CONTEXTS OF SPECIAL ATTENTION IN THE FIELD OF BUSINESS AND HUMAN RIGHTS**

199. Next, the IACHR and its Special Rapporteurship will refer to some contexts of concern and interest and special attention in the region, starting with the information that was received about these issues through its different mechanisms. The REDESCA emphasizes that expressly mentioning these issues should encourage their development and going into greater depth about them, as well as progressive analysis of other areas that, although not developed in this report, are related to the protection of human rights and corporate activities in the region, such as the informal and unstructured economy, the relationship between poverty and inequality and the framework of business and human rights, or the analysis of sectors such as large-scale agriculture, livestock, fishing, or forestry from a human rights focus.
200. Likewise, they find it important to highlight that although studying the State's human rights obligations in the context of extractive industries and development projects are an area of great concern and monitoring for the Commission and its REDESCA, at this time there is space for analyzing the following situations, given the previous development carried out through a specific thematic report on the issue.<sup>317</sup>

### ***A. Transitional Justice and Accountability of Economic Actors***

201. Truth, justice, reparation, and guarantees of non-repetition make up the pillars of transitional justice, understood as a variety of processes and mechanisms associated with a society's attempts to resolve problems arising from a past of widespread abuses, in order to hold those responsible accountable for the actions, serve justice, and achieve reconciliation.<sup>318</sup> For

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<sup>317</sup>IACHR. Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015. The IACHR and its REDESCA emphasize that it will also be necessary to continue to deepen the analysis of impacts of these activities and industries on the exercise of rights of other populations in a situation of particular vulnerability, such as children, human rights and environmental defenders, women or elderly people.

<sup>318</sup> IACHR. Right to Truth in the Americas. OEA/Ser.L/V/II.152 Doc. 2, 13 August 2014, paras. 47-48.

his part, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence affirmed that: “Mass violations usually require not just complex organization of the ‘armed’ operations that immediately cause the violations, but the coordination of those operations with supportive political and economic actors, and even with social and cultural entrepreneurs, capable of mobilizing large groups and resources.”<sup>319</sup>

202. Therefore, internationally, trials for serious violations of human rights have been a fundamental tool in the reconstruction of democracies through transitional justice. Both the IACHR and the Inter-American Court have had the opportunity to evaluate these contexts and issue legal standards to face the lack of clarification, investigation, and punishment of those responsible for these serious violations in the continent.<sup>320</sup> Although the analysis of the responsibility of the State and economic actors is not new in the area of transitional justice,<sup>321</sup> the attention with respect to the state obligations and their consequences for companies’ actions in these contexts still has not been developed by the inter-American system.
203. Recent studies show that the work of various truth commissions relating to gross human rights violations has revealed the participation of economic actors or companies in such contexts worldwide. These studies also indicate that most of the truth commissions that identified corporate complicity are concentrated in Latin America, where corporate complicity had been identified in thus nine countries in the region. These commissions were able to identify 321 economic actors involved, with the commissions in Brazil (mentioning 123 economic actors) and Guatemala (mentioning 45 economic actors) being the ones that have most dealt with the issue.<sup>322</sup>

<sup>319</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/27/56, 27 August 2014, para. 72.

<sup>320</sup> See, inter alia, IACHR. Right to Truth in the Americas. OEA/Ser.L/V/II.152 Doc. 2 13 August 2014; I/A Court H.R. Case of Goiburú et al V. Paraguay. Judgment of 22 September 2006. Series C No. 153; Case of Contreras et al V. El Salvador. Merits, Reparations and Costs. Judgment of 31 August 2011, Series C No. 232.

<sup>321</sup> For example, when the atrocities of the Holocaust were adjudicated, there were already attempts in this area. Some studies reveal that more than 300 companies were prosecuted in relation to cases of crimes against humanity in Nuremberg and the subsequent trials by military tribunals and United States courts. See: Dejusticia. Cuentas Claras. El papel de la Comisión de la Verdad en la develación de las responsabilidades de empresas en el conflicto armado colombiano. [*Clear Accounts. The role of the Truth Commission in revealing the responsibility of corporations in the Colombian armed conflict*] (available only in Spanish) February 2018, page 26.

<sup>322</sup> Information provided by the Oxford University’s Initiative “Advancing Human Rights Accountability”(AHRA) in the framework of the questionnaire published for this report. AI see: Dejusticia. Cuentas Claras. El papel de la Comisión de la Verdad en la develación de las responsabilidades de empresas en el conflicto armado colombiano. [*Clear Accounts. The role of the Truth Commission in revealing the responsibility of corporations in the Colombian armed conflict*] February 2018, page 28. **Regarding corporate complicity see:** International Commission of Jurists. [Corporate Complicity and Legal Accountability](#) (2008). Carrillo, Nicolas. La responsabilidad internacional de las empresas por complicidad en violaciones graves de derechos humanos. [*The international responsibility of corporations for complicity in gross human rights violations*] In: Bohoslavsky, Juan Pablo (ed.). El negocio del terrorismo de Estado: Los cómplices económicos de la dictadura uruguaya. Penguin Random House (2016), pages 233-261; Michalowski, Sabine and Juan Pablo Cardona. Responsabilidad corporativa y justicia transicional. [*Corporate responsibility and*

Additionally, it was found that participation in human rights violations in these contexts not only refers to private companies but also to state companies, mixed public-private companies, associations of economic actors such as business owner associations, industrial unions, chambers of commerce, and individuals exercising economic activities, among others.<sup>323</sup>

204. On the other hand, as of 2016, academic studies on the subject record at least 717 economic actors involved in corporate complicity for gross human rights violations in 11 Latin American countries, in the context of authoritarian regimes and armed conflicts that have occurred from the 1960s to the present. Although the data compiled are a limited sample of the true magnitude of economic complicity indicated in the contexts being studied, it is worth note that Colombia accounts for 459 economic actors, followed by Brazil with 122, Guatemala with 45, Argentina with 27, and Chile with 25. In the vast majority of cases, the evidence suggests that the participation of these actors has been direct, either because they materially participated in the commission of a human rights violation, or because they made substantial contributions toward its commission, whether by, for example, providing personnel, essential information on victims, logistics, or even allowing the assembly of clandestine detention centers. In other cases, the evidence would suggest that these actors indirectly participated in the violations, consciously financing the repressive apparatus. It is also observed that of the 717 identified actors, 260 operated in the agricultural sector, 83 in commerce, 60 in natural resources, 38 in metals, and 14 in communications media, among others.<sup>324</sup>
205. For example, in the context of the Colombian armed conflict, there are studies that suggest the existence of a coincidence and symbiotic relationship between various cases of human rights violations, such as forced displacement, and the economic interests of paramilitaries and economic elites who have been involved and benefitted economically from such violations.<sup>325</sup> Thus, the REDESCA has learned of criminal convictions against business owners from the livestock and agricultural sectors, of palm oil in Colombia, like officials from the company Urapalama S.A., due to its association with paramilitaries in human rights violations and dispossession of lands of various communities in rural areas, this example

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*trensitional justice*] Anuario de Derechos Humanos de la Universidad de Chile, No. 11, 2015, pages 173-182 (available only in Spanish).

<sup>323</sup> Dejusticia. Cuentas Claras. El papel de la Comisión de la Verdad en la develación de las responsabilidades de empresas en el conflicto armado colombiano. [*Clear Accounts. The role of the Truth Commission in revealing the responsibility of corporations in the Colombian armed conflict*] February 2018, page 29 – 30 (available only in Spanish); Information provided by the Oxford University's Initiative "Advancing Human Rights Accountability"(AHRA) in the framework of the questionnaire published for this report.

<sup>324</sup> Information provided by the Oxford University's Initiative "Advancing Human Rights Accountability"(AHRA) in the framework of the questionnaire published for this report

<sup>325</sup> Dejusticia. Cuentas Claras. El papel de la Comisión de la Verdad en la develación de las responsabilidades de empresas en el conflicto armado colombiano. [*Clear Accounts. The role of the Truth Commission in revealing the responsibility of corporations in the Colombian armed conflict*] February 2018, pages 43-45 (available only in Spanish), Business & Human Rights Resource Centre. [Colombia: NGO presents summary of 25 business and persons named in judgments for restitution of land to displaced persons in the armed conflict.](#) (April 2018).

allows evidencing how lawsuits against business owners individually may serve to clarify the role of companies in the conflict in a country where there is no criminal liability for legal persons.<sup>326</sup> From another perspective, the IACHR also received troubling information that points to risks for the search and location of the whereabouts of disappeared persons in the context of Colombia's internal armed conflict, as a consequence of the construction and current operations of a hydroelectric project headed by a public company, due to the flooding of areas where there were said to be mass graves.<sup>327</sup>

206. On the other hand, regarding analysis of the era of the dictatorship in Chile, studies suggest that there also may have been a confluence of interests between the business sector and the *de facto* government for its sustainability,<sup>328</sup> an issue that had consolidated the alignment of the State's economic policy with corporate needs,<sup>329</sup> as well as through the role communications companies had in giving hegemony to this regime.<sup>330</sup> According to reports, "[t]here was a wide range of complicit conduct, ranging from requiring the DINA [Direction of National Intelligence] to assassinate union leaders, providing facilities and trucks for kidnapping and torture, receiving government assistance without asking too many questions, manipulation of journalistic information to guarantee criminals' impunity, up to developing scientific arguments to justify policies of exclusion and/or repression."<sup>331</sup>
207. In this same vein, in the context of the Uruguayan dictatorship, studies suggest that not only was there a political program imposed by force and terror, but that policy had benefitted certain business groups in exchange for crucial support for the regime, who in many cases would continue to maintain their influence in times of democracy, in order to ensure impunity

<sup>326</sup>Michalowski, Sabine and Juan Pablo Cardona. Responsabilidad corporativa y justicia transicional. [*Corporate responsibility and transitional justice*] Anuario de Derechos Humanos de la Universidad de Chile, No. 11, 2015, pages 177-179 (available only in Spanish); Fiscalía General de la Nación. [Partner of Urapalma sentence to ten years in prison for displacement and land dispossession in Bajo Atrato in Chocó](#), 8 June 2017 (available only in Spanish).

<sup>327</sup>IACHR. Public Hearing. Measures for the protection of evidence in cases of forced disappearance in Colombia. 168 Period of Sessions, 9 May 2018; Congress of the Republic of Colombia. News: [The dead that the zone of Hidroituango hides](#), 5 June 2018 (available only in Spanish); El Tiempo. [Families of disappeared in Ituango ask to stop filling dam](#), 15 February 2018 (available only in Spanish).

<sup>328</sup>National Truth and Reconciliation Commission. Report of the National Truth and Reconciliation Commission (1996), Volume 2, pages 722-727. See also Fernandez, Karinna and Magdalena Garcés, Los casos de la Pesquera Arauco y Colonia Dignidad [*The cases of Pesquera Arauco and Colonia Dignidad*]. In: Juan Pablo Bohoslavsky et al (eds.) *Complicidad económica con la dictadura chilena: Un país desigual a la fuerza* (2019), pages 389-404 (available only in Spanish).

<sup>329</sup>Araya Gomez, Rodrigo. El apoyo de las cámaras empresariales a la dictadura. [*The support of the chambers of business in the dictatorship*] In: Juan Pablo Bohoslavsky et al (eds.) *Complicidad económica con la dictadura chilena: Un país desigual a la fuerza* (2019), pages 217-224 (available only in Spanish).

<sup>330</sup>Moscoso Carla. Medios de comunicación en dictadura: entre el beneficio económico y la complicidad periodística. [*Communications media in the dictatorship: between the economic benefit and journalistic complicity*] In: Juan Pablo Bohoslavsky et al (eds.) *Complicidad económica con la dictadura chilena: Un país desigual a la fuerza* (2019), pages 225-244 (available only in Spanish).

<sup>331</sup>Bohoslavsky, Juan Pablo. La Complicidad en contexto: ¡Es la economía, estúpido! [*Complicity in context: It's the economy, stupid!*] In: Juan Pablo Bohoslavsky et al (eds.) *Complicidad económica con la dictadura chilena: Un país desigual a la fuerza* (2019), page 25 (available only in Spanish).

for their complicity with human rights violations.<sup>332</sup> For its part, in the case of Brazil, for example, a report presented by an independent expert at the request of the Volkswagen company revealed the collaboration of workers from this German company's Brazilian subsidiary with the State's repressive regime between 1964 and 1985<sup>333</sup>. The Truth Commission of the State of Minas Gerais in Brazil also identified the involvement of corporations in serious human rights violations during this era.<sup>334</sup>

208. In Argentina, the publication edited by the National Directorate of the Argentine Legal Information System proves helpful to understanding the link between companies and the repressive action of the State during the era of the dictatorship, through archival, judicial, press, and diverse testimonial sources, said study explores the participation of shareholders and directors of 25 business entities in different regions of the country in repressing workers.<sup>335</sup> On the other hand, regarding the same country, according to information provided to the REDESCA, for example, despite the initiation of criminal investigations related to corporate economic actors' liability in the context of transitional justice processes, there were only two cases in which trial began as such. One was against executives from the Ford company, who were found liable for the kidnapping and torture of the company's employees,<sup>336</sup> and the other was related to the owner of the company La Veloz del Norte, who was convicted of crimes against humanity by a lower court of the Judiciary, and whose case is currently still being reviewed by the country's Supreme Court of Justice.<sup>337</sup> Additionally, the REDESCA also received information regarding the possibility of using labor law to investigate the civil liability of Argentine business entities regarding the due protection of their workers in circumstances relating to crimes against humanity.<sup>338</sup>

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<sup>332</sup> Bohoslavsky, Juan Pablo (ed.). El negocio del terrorismo de Estado: Los cómplices económicos de la dictadura uruguaya. [*The business of State terrorism: the economic accomplices of the Uruguayan dictatorship*] Penguin Random House (2016) (available only in Spanish).

<sup>333</sup> Kooper, Christopher. A VW do Brasil durante a Ditadura Militar brasileira [*VW of Brazil during the Brazilian military dictatorship*] 1964-1985, (2017). Generally, articles can also be found in: Revista Anistia Política e Justiça de Transição, Ministério da Justiça do Brasil, No. 10, 2013 (published in 2014), que contiene el dossier: Cooperação Econômica com a Ditadura Brasileira; Revista Anistia Política e Justiça de Transição, Ministério da Justiça do Brasil, No. 06: 2011 (published in 2012) (available only in Portuguese).

<sup>334</sup> Comissão da Verdade em Minas Gerais. [Relatório Final](#) (2017).

<sup>335</sup> Ministerio de Justicia y Derechos Humanos de la Nación y otros. [Responsabilidad empresarial en delitos de lesa humanidad. Represión a trabajadores durante el terrorismo de Estado.](#) [*Corporate responsibility for crimes against humanity. Repression of workers during State terrorism.*] T. I, Editorial Ministerio de Justicia y Derechos Humanos de la Nación (2015) (available only in Spanish).

<sup>336</sup> El País. [Two former directors of Ford Argentina convicted for crimes against humanity during the dictatorship](#), 12 December 2018.

<sup>337</sup> Página12. [A conviction of the civilian wing of the dictatorship](#), 29 March 2016.

<sup>338</sup> Information provided by the Oxford University's Initiative "Advancing Human Rights Accountability" (AHRA) in the framework of the questionnaire published for this report; Gabriel Pereira and Leigh Payne, La complicidad corporativa en las violaciones de derechos humanos: ¿una innovación en la justicia transicional de Argentina? [*Corporate complicity in human rights violations: an innovation in Argentina's transitional justice?*] In: Cantú Rivera, Humberto (ed.). [Derechos humanos y empresas: reflexiones desde América Latina](#). Instituto Interamericano de Derechos Humanos, 2017, págs. 305-306 (available only in Spanish).

209. The IACHR and its REDESCA note that one of the main obstacles in the current context of transitional justice in the region is the persistence of impunity in cases that link business actors to gross human rights violations; and thus, due to the lack of access to justice and of integral reparation to the victims. The IACHR and its REDESCA emphasize that the efforts in terms of access to justice and reparation oriented toward the accountability of state actors in the region should not exclude or relativize the responsibility, as the case may be, of the companies and business owners involved in such crimes, since the absence of adequate actions for this purpose may, in fact, compromise their international responsibility.
210. Although the REDESCA observes that the region has a leading role in terms of growing recognition of economic and business actors' responsibility in these contexts, since, for example, it is the region with the greatest number of legal actions (51 lawsuits presented, which represents 50% of the lawsuits filed worldwide)<sup>339</sup>, the region's judicial authorities have marginally addressed this issue and the search for justice, truth, and guarantees of non-repetition are still limited for legal reasons, such as the absence of legal provisions establishing the criminal liability of legal persons or senior management of companies or obstacles in civil legal proceedings; or for political reasons, by limiting the truth commission's mandate on the issue.
211. As detailed above, the organs of the inter-American human rights system have developed extensive jurisprudence in which the main arguments are presented in support of state responsibility in cases in which non-state actors are involved in violating human rights. For these purposes, it is sufficient to indicate that since 1988, in its first contentious case, the Inter-American Court emphasized that the States may be obligated to respond internationally these cases: "(...) 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."<sup>340</sup>
212. Many of these situations refer to when the State fails to diligently investigate the violation of rights. In this situation, if the state apparatus "acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."<sup>341</sup>

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<sup>339</sup> Information provided by the Oxford University's Initiative "Advancing Human Rights Accountability"(AHRA) in the framework of the questionnaire published for this report

<sup>340</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, paras. 172 and 174.

<sup>341</sup> I/A Court H.R. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 176

213. The Inter-American Court has also identified different cases in which the action of private actors may end up causing the State's international responsibility *per se*, beyond the general obligation to guarantee or to apply due diligence in investigations. In these cases, the violation of rights is the result of a relation of complicity, collaboration, and/or acquiescence between private actors and state agents. Thus, for example, in the case of the *Mapiripán Massacre v. Colombia*, the Court held that "[c]ollaboration by members of the armed forces with the paramilitary was shown by a set of grave actions and omissions aimed at enabling the massacre to take place and at covering up the facts to seek impunity for those responsible."<sup>342</sup> In the case of the *Ituango Massacres v. Colombia*, the court found responsibility based on the acquiescence or tolerance on the part of the Army for the acts perpetrated by the paramilitaries.<sup>343</sup> Likewise, in relation with the case of *Operation Genesis v. Colombia*, the Court found the acquiescence of the State in the commission of the wrongful act on the basis of a "causality test," by virtue of which it considered it impossible to sustain a hypothesis in which the illicit act could have been committed without state assistance.<sup>344</sup>
214. In the aforementioned cases, situations were analyzed in which different non-state actors are involved in human rights violations acting with the complicity of state agents, from whom, for example, they received resources, armaments, information, etc. The IACHR notes that there would also be a similar situation of collaboration when there are companies that are operating in complicity, generating and facilitating the necessary conditions so that state agents directly commit human rights violations, understanding that the crimes committed by the latter would not have been committed if not for the participation of such economic actors. In this regard, according to the Guiding Principles on Business and Human Rights, due diligence in human rights demands that companies abstain from becoming complicit in human rights violations,<sup>345</sup> which means that they do not give substantial contributions or assistance that facilitates, permits, intensifies, encourages, or otherwise helps the commission of those violations.
215. The States' duty to adequately investigate and punish human rights violations becomes particularly relevant in these situations, since even if state agents are punished for some violation of the human rights protected under the treaty, the State has the obligation to make all efforts to investigate and punish all those responsible for the unlawful acts, including

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<sup>342</sup> I/A Court H.R. Case of the " Mapiripán Massacre" v. Colombia. Judgment of September 15, 2005. Series C No. 134, para. 121

<sup>343</sup> I/A Court H.R. Case of the Ituango Massacres v. Colombia. Judgment of July 1, 2006. Series C No. 148.

<sup>344</sup> I/A Court H.R. Case of Communities of African descent displaced from la Cuenca del Río Cacarica (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of 20 November 2013. Series C No. 270, para. 280.

<sup>345</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 7, 17 and 23 with Comments.



non-state agents.<sup>346</sup> For these purposes, it is important that competent national authorities take into account existing international standards to investigate the level of participation of economic actors and the ways to determine their responsibility, as well as the treatment of evidentiary issues in contexts of gross human rights violations that link state agents and business entities<sup>347</sup>, otherwise their international responsibility could be compromised.

216. The REDESCA notes the importance of advancing these investigations in a particularly agile manner, given that the passage of time may place obstacles in the way of clarifying the truth, together with other factors such as the possibility that the companies involved in the events have ceased to legally exist, have changed their corporate name, or have become other forms of business entities under the law. Without prejudice to the fact that, despite these situations, the State is responsible for clarifying the facts through the investigation and punishment of those responsible, the REDESCA recalls that the IACHR's jurisprudence has also established that an essential element of the effectiveness of investigations is their timeliness. The right to judicial protection requires that courts dictate and decide cases expeditiously, particularly in urgent cases,<sup>348</sup> such as those related to transitional justice processes, and provide adequate reparation to victims.
217. This will necessarily involve assessing whether the state structure is designed and equipped to provide equal treatment for victims of serious human rights violations committed in these contexts. For the REDESCA, these actions will also make it possible to give a more real and closer dimension to transitional justice processes, which transcends the traditional and dominant analysis of the behavior of state authorities, particularly military and security forces, without prejudice to the seriousness of their responsibility for the events, they may not cover all the scenarios and dynamics of repression and gross human rights violations in times of dictatorship or armed conflict. Therefore, the identification, investigation, and, where appropriate, punishment of corporate actors will not only reveal the truth but also will allow for full understanding, particularly of the relations and civilian-military bonds present, as well as their causes and effects, with the purpose of adopting measures to avoid similar situations in the future.
218. For its part, although traditionally the rights known as civil and political rights have been the ones linked to transitional justice processes due to the seriousness and visible impact on their enjoyment the REDESCA emphasizes the need for States, for example through judicial or

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<sup>346</sup> I/A Court H.R. Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs. Judgment of 25 November 2003. Series C No. 101, párr 217.

<sup>347</sup> In this regard see: Dejusticia. Between coercion and collaboration: Judicial truth, economic actors and armed conflict in Colombia (2018), pages 144 et seq. See also: International Commission of Jurists. [Corporate Complicity and Legal Accountability](#) (2008).

<sup>348</sup> IACHR. Admissibility Report No. 21/06. Workers of Fertilizantes de Centroamérica (FERTICA) (Costa Rica), 2 March 2006, para. 176.



administrative investigations, to give greater importance to the analysis of the effects these contexts have caused to economic, cultural, social, and environmental rights. The investigation and clarification of the role of some companies in this context, due to their relation to the enjoyment of social rights could help identify and address such violations. Likewise, taking into account the role and impact that these periods of repression had on workers, unions, and peasants, it is imperative to pay attention to labor rights, union rights, and rights related to peasant life that were violated in these periods of repression.

219. Finally, the IACHR and its REDESCA understand that as part of the rights to truth, justice, reparation, and guarantees of non-repetition, as pillars that guide these processes, the States have the obligation to generate reliable information about the benefits obtained from companies (in their equity and/or that of their main shareholders) as a consequence of the possibly complicit relationship established. In turn, the REDESCA identifies the need to deploy actions aimed at raising awareness about the impact that companies have had in the context of serious human rights violations and transitional justice processes, not only within public institutions directly linked to such processes, but also to educate the population of the countries that went through these types of conflicts and regimes.

## ***B. Essential Public Services for the Ensuring Human Rights and Contexts of Privatization***

220. Building on the idea that public services linked to the enjoyment of human rights are part of the States' functions, the Inter-American Court has indicated that in these contexts in which they are provided by private agents, States retain ownership over protecting the respective public good to ensure the effective protection of human rights of the people under their jurisdiction.<sup>349</sup> In these contexts, various civil society organizations have called the IACHR and its REDESCA's attention to government policies and commercial and investment treaties in the region that would facilitate and promote the provision of services directly related to health, education, water, or security, among others, by private companies or public-private associations, warning that in many circumstances dynamics are created in which providing these services is subordinated to business interests, instead of ensuring their conformity with the human rights at stake and the principle of non-discrimination.
221. In this regard, the Office of the Special Rapporteur observes that various international bodies and experts on human rights have spoken on the issue, emphasizing that there are strict and reinforced requirements on the State's

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<sup>349</sup> I/A Court H.R. Case of Ximenes Lopes v. Brasil. Judgment of 4 July 2006. Series C No. 149. para. 96.

obligations to ensure the realization of the human rights involved in these situations, with particular regard to historically excluded and discriminated populations.<sup>350</sup>

222. For example, regarding the right to health, the Committee on Economic, Social and Cultural Rights emphasized that it is the obligation of States to “ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability, and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.”<sup>351</sup> The Committee for the Elimination of Discrimination against Women (CEDAW) has repeatedly expressed concern regarding the negative consequences of privatization of health services on women’s rights.<sup>352</sup> The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health also stressed “the global trend towards privatization in health systems poses significant risks to the equitable availability and accessibility of health facilities, goods and services, especially for the poor and other vulnerable or marginalized groups.”<sup>353</sup>
223. Additionally, taking into account that access to medicines and health technologies, without discrimination in quality and affordability, is an essential part of the content of the right to health, the REDESCA observes that in the context of business and human rights, the activities and behaviors of the pharmaceutical industry has a decisive impact on the realization of such a right, for example, in relation with decision-making power over what medicines and types of diseases it researches and invests, what monopoly protections it has, what medicines it produces, where it markets them, and at what price it sells them. In this context, the Special Rapporteur on the right to health has called on the States to change the dominant paradigm about access to medicine based on profitability and the

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<sup>350</sup> For example, the Special Rapporteur on extreme poverty and human rights recently indicated that: “Privatization is premised on assumptions fundamentally different from those that underpin respect for human rights, such as dignity and equality. Profit is the overriding objective, and considerations such as equality and non-discrimination are inevitably sidelined.” Cf. Report of the Special Rapporteur on extreme poverty and human rights. UN Doc. A/73/396, 26 September 2018, para. 82.

<sup>351</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 14, UN Doc. E/C.12/GC/24, 10 August 2017, para. 35. As part of its monitoring work it also has expressed concern and given recommendations to particular States to keep their privatization schemes from violating the right to health. See, inter alia: Committee on Economic, Social and Cultural Rights. Concluding Observations (India) UN Doc. E/C.12/IND/CO/5, 8 August 2008, para. 38; Committee on Economic, Social and Cultural Rights. Concluding Observations (Poland). UN Doc. E/C.12/POL/CO/5, 2 December 2009, para. 29.

<sup>352</sup> Committee for the Elimination of Discrimination against Women. Concluding Observations (Armenia) UN Doc. A/52/38/Rev.1, 12 August 1997, Part. II, para. 60; Committee for the Elimination of Discrimination against Women. Concluding Observations (India) UN Doc. CEDAW/C/IND/CO/3, 2 February 2007, para. 40 and 41; Committee for the Elimination of Discrimination against Women. Concluding Observations (Pakistan). UN Doc. CEDAW/C/PAK/CO/4, 27 March 2013, paras. 31 and 32 e).

<sup>353</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard or physical and mental health. UN Doc. A/67/302, 13 August 2012, para. 3.

market, toward one that emphasizes the content of the right to health, with particular regard for the principles of non-discrimination, transparency, accountability, and participation.<sup>354</sup> The IACHR has already had the opportunity to receive information on how the lack of access to affordable medicines and health technologies directly affects patients, especially those with limited resources or poverty. For example, of 12 cancer treatments, 11 have a price of nearly 100,000 US dollars a year per patient, for hepatitis C one of the key medicines to fight the disease (*sofosbuvir*) costs 1,000 US dollars a day, and in the case of tuberculosis one effective diagnostic method can cost 4,500 dollars per patient, and its treatment can cost between 140,000 and 700,000 US dollars per year.<sup>355</sup>

224. The REDESCA also observes that the regulatory frameworks, oversight, and decisions that States take for this purpose, including commercial or investment agreements and regarding the responsibility of the companies directly involved as well as their transnational impacts, are crucial to ensuring access to medicines and health technologies. Thus, questions about restrictions on generic medicine, excessive prices of medicine, abuse of the use of patents and exclusive protection of testing data, factors of business profitability that influence medication or deficits in research and innovation for certain disease, should be duly confronted by the States in their reinforced role as guarantor that they acquire in these situations. In this regard, the REDESCA takes note of the serious problems regarding the lack of reliable diagnostic tests, effective treatments and vaccines for diseases that are concentrated in the poorer population of tropical countries, such as dengue, elephantiasis, chagas, or leishmaniasis, among others, given the little research and public and private investment despite the fact that the burden of morbidity is similar to other diseases such as malaria or tuberculosis. This lack of research and investment also has a disproportionate impact on treatments for vulnerable populations such as, for example, children with HIV, who cannot access adequate antiretrovirals according to their age.<sup>356</sup> The Office of the Special Rapporteur also notes with concern the existence of complaints about the harmful practices of pharmaceutical companies that undermine access to medicines and the right to health; among them, threats to sue the State before arbitral tribunals under commercial treaties or investment, lawsuits against State measures aimed at controlling the use of patents, campaigns to discredit generic medicines, corporate pressure within the framework of regulatory,

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<sup>354</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. UN Doc. A/HRC/23/42, 1 May 2013, paras. 67 and 69

<sup>355</sup> IACHR. Public Hearing. [Right to health and lack of medicines in the Americas](#), 159 Period of Sessions, 6 December 2016; within the regional literature on the subject, see, for example, Holguín, Germán. *La guerra contra los medicamentos genéricos: Un crimen silencioso*. [*The war against generic medicines: A silent crime*] AGUILAR (2014) (available only in Spanish).

<sup>356</sup> IACHR. Public Hearing. [Right to health and lack of medicines in the Americas](#), 159 Period of Sessions, 6 December 2016; United Nations. Report of the High-Level Panel on Access to Medicines, 12 September 2016.

oversight and judicial functions of the States as well as payment of economic stimuli to doctors to influence them to prescribe certain medicines, etc.<sup>357</sup>

225. Against this background, the IACHR and its REDESCA stress that ensuring the right to health also requires having the possibility to benefit from scientific and technological progress in this area, which is why it is necessary for the States to make use of the flexibility or exceptions clauses in intellectual property protection plans when appropriate, in a more emphatic and determined way, to counteract the negative effects on human rights. For example, this could be done by using compulsory licensing, parallel imports, facilitating experimentation with patented medicine for the manufacture of their generic equivalents after the expiration of the patent, strict analysis or prior consent of patent applications incorporating right to health criteria;<sup>358</sup> creating alternative, equitable, and sustainable financing systems for research and innovation on “forgotten diseases” in compliance with the state obligations of cooperation, progressivity, and guarantee of the right to health and access to medicine in the Americas; actively fighting against undue corporate blockading against generic medicines; politically and diplomatically supporting initiatives to ensure the right to health and access to medicine in the Americas; publishing accessible and complete databases on medicine, vaccines, and health technology patents; or applying tax strategies and price control schemes over essential medicines produced and distributed by the private sector.<sup>359</sup>
226. In this regard, the IACHR and its Special Rapporteurship understand that in order to comply with the international duties of respect, guarantee, progressivity, and cooperation for human rights – in this cases linked to the rights to health, life, and personal integrity – it is key that the States place the content of these rights at the center of their policies and plans defining their fulfillment, including those in which private actors or companies intervene, such as the production and distribution of medicine and health technologies or the provision of medical services. Otherwise, the risks of violation these rights will be more tangible and, in many cases, extreme. In other words, given the critical role of the State in ensuring access to medicine, health technology, and the right to health, the IACHR finds that evaluation of the absence or effectiveness of the State’s actions, which could generate a breach of their international human rights obligations, is stricter. For their part, private companies have the responsibility to pay due attention to this, particularly to individuals’ rights to health and life, thus the exercise of due diligence regarding the impact of their activities on these

<sup>357</sup> IACHR. Public Hearing. [Right to health and lack of medicines in the Americas](#), 159 Period of Sessions, 6 December 2016; United Nations. Report of the High-Level Panel on Access to Medicines, 12 September 2016; in the latter report, for example, the experts called attention to “the continuous filing of lawsuits by multiple multinational pharmaceutical companies against the strict criteria of patentability and the strict process of patent evaluation in Argentina and Brazil.”

<sup>358</sup> IACHR. Public Hearing. [Right to health and lack of medicines in the Americas](#), 159 Period of Sessions, 6 December 2016.

<sup>359</sup> For greater detail regarding determinantes of access to medicine and States’ actions to ensure the right to health in this context, see Report of the Special Rapporteur on the right to health. UN Doc. A/HRC/23/42, 1 May 2013. See also: United Nations. Report of the High-Level Panel on Access to Medicines, 12 September 2016.

rights, greater transparency in the operations, and accountability for infringements of access to medicine and medical technology in which they are involved will be crucial.

227. On the other hand, regarding the right to education, the Committee on the Rights of the Child has expressed its concern about the effects of privatization on education and has required States to ensure the effectiveness and efficiency of regulation and supervision of private education.<sup>360</sup> For example, the Committee expressed its concern about “the lack of a framework to regulate and supervise private schools” in Chile and recommended that the State adopt the necessary measures to reduce segregation in schools, whether public or private.<sup>361</sup> The Committee for the Elimination of Discrimination against Women has also held that “privatization has concrete negative consequences for girls and women, in particular for girls from the poorest families, who are deprived of education.”<sup>362</sup> The European Court of Human Rights has also stated that States have a duty to regulation, supervise, and protect in relation to possible abuses that may be committed within the framework of private educational institutions.<sup>363</sup>
228. The Special Rapporteur on the right to education also dedicated specific attention to the phenomenon of privatization, including public-private partnerships, in this area. The Special Rapporteur emphatically stated that: “Privatization often excludes marginalized groups, who are unable to pay, undermining the right of universal access to education. Some private providers inadequately respect the quality of education and undermine the status of teachers.”<sup>364</sup> Furthermore, he stressed that “States have the obligation, under human rights law, to establish conditions and standards for private education providers and to maintain a transparent and effective system to monitor those standards, with sanctions in case of abusive practices.”<sup>365</sup> For its part, he reiterated that education offered through public-private alliances does not change the right or the state obligations related to it.<sup>366</sup> The REDESCA also highlights the preparation of the Abidjan Principles by noted and renowned specialists, who extensively develop States’ international obligations in the framework of the provision of education services by private actors, which particularly mention that States

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<sup>360</sup> Committee on the Rights of the Child. Concluding Observations (Morocco) UN Doc. CRC/C/MAR/CO/3-4, 14 October 2014, paras. 60 (d) and 61 (c); Committee of the Rights of the Child. Concluding Observations (Ghana) UN Doc. CRC/C/GHA/CO/3-5, 13 July 2015, paras. 57 (f) and 58 (f).

<sup>361</sup> Committee on the Rights of the Child. Concluding Observations (Chile). UN Doc. CRC/C/CHL/CO/4-5, 29 October 2015 Para. 67.a and 68.a.

<sup>362</sup> Committee for the Elimination of Discrimination against Women. Recommendation No. 36. UN Doc. CEDAW/C/GC/36, 27 November 2017, para. 38 and 39.d

<sup>363</sup> European Court of Human Rights, Case of O’Keeffe v. Ireland, Judgment, 28 January 2014, paras. 144-152.

<sup>364</sup> Report of the Special Rapporteur on the right to education. UN Doc. A/69/402, 24 September 2014, para. 98

<sup>365</sup> Report of the Special Rapporteur on the right to education. UN Doc. A/69/402, 24 September 2014, para. 85.

<sup>366</sup> Report of the Special Rapporteur on the right to education. UN Doc. A/69/402, 24 September 2014, paras. 120-122.

must adopt effective measures, including regulatory, supervisory, and accountability measures, to ensure the right to education when private actors are involved, including their extraterritorial application.<sup>367</sup> The REDESCA generally supports said Principles, considering that they represent a valuable specialized source of interpretation of the issue in the framework of the inter-American system.

229. Even with their specificities and differences regarding the rights in play, there are similar holdings regarding the States' international obligations and the role they should play when non-state actors or companies participate in providing certain services for the enjoyment of other human rights, such as social security, including the pensions system;<sup>368</sup> personal security<sup>369</sup>; personal freedom<sup>370</sup>; or potable water.<sup>371</sup> In the case of water, for example, the UN Special Rapporteur on the human rights to safe drinking water and sanitation expressed her concern since "[o]ften profits made by private operators are almost fully distributed among shareholders, rather than being partially reinvested in maintaining and extending service provision, the result being increased prices for consumers, continued need for public investment, and potentially unsustainable services."<sup>372</sup> For its part, the REDESCA urged States to establish prevention policies and parameters for due diligence in order to reduce risks and avoid violations of the rights to water and sanitation; and to ensure the existence of procedures and effective legal remedies that allow redress for victims as accountability for state and non-state actors. The Office of the Special Rapporteur expressed particular concern over information reporting violations of these rights in contexts of cross-border water management and use, public and transnational companies, implementation of

<sup>367</sup> [Guiding Principles on the human Rights obligations of States to provide public education and to regulate private involvement education \(Abidjan Principles\)](#), 2019, 4, 8 and 9 overarching principles. *Al see*: Report of the Special Rapporteur on the right to education UN Doc. A/HRC/41/37, 10 April 2019.

<sup>368</sup> Committee on Economic, Social and Cultural Rights. General Comment No 19, UN Doc. E/C.12/GC/19, 4 February 2008, paras. 45, 46 and 54.

<sup>369</sup> Human Rights Committee, General Comment No 35, UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 8-9. See also Government of Switzerland and International Committee for the Red Cross. "[Document of Montreux](#)" regarding international legal obligations and best practices for States in relation to the operations of military companies and private security during armed conflicts, 17 September 2008; EarthRights International et al. [Agreements between the National Police and extractive companies in Peru](#), February 2019; and Van Genugten, Willem, Jägers, Nicola and Moyakine, Evgeni, "Private Military and Security Companies, Transnational Private Regulation and Public International Law: From the Public to the Private and Back Again?" in Letnar Cernic, Jernej and Van Ho, Tara, (eds.), *Human Rights and Business: Direct Corporate Accountability for Human Rights*, Oisterwijk, Wolf Legal Publishers, 2015, pages 387-406.

<sup>370</sup> IACHR. Public Hearing. [Rights of persons deprived of liberty and private prisons in Mexico](#). 157 Period of Sessions, 7 April 2016; Human Rights Committee. *Carlos Cabal and Marco Pasini Beltrán v. Australia*, Comm. No. 1020/2001, 7 August 2003, para. 7.2; Human Rights Committee. *Concluding Observations (New Zealand)*, UN Doc. CCPR/CO/75/NZL, 7 August 2002, para.13, and UN Doc. CCPR/C/NZL/CO/5, 7 April 2010, para. 11.

<sup>371</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 15. UN Doc. E/C.12/2002/11, 20 January 2003, para. 23 and 33.

<sup>372</sup> Report of the Special Rapporteur on the human rights to safe drinking water and sanitation. UN Doc. A/HRC/24/44, 11 July 2013, para. 44.

investment treaties, as well as in the execution and financing of development projects.<sup>373</sup>

230. Another situation demanding the IACHR and its REDESCA's particular attention refers to the existence of agreements between extractive companies and the National Police of Peru to give protection and security to the activities these companies carry out in said country. In this situation, it is not private companies that provide security services, but rather a public institution that holds the legitimate use of force is used and disposed for private purposes. According to the information received, it is concerning that the design and implementation of these agreements, together with the declaration of states of emergency by the State in such contexts, may facilitate human rights violations, weaken the institutional impartiality and independence of the police force, aggravate the existence of social conflicts relating to extractive activities, and threaten the work of human rights defenders and environmentalists. The information received also indicates that the existence of agreements for extraordinary police service with extractive companies in Peru are not consonant with inter-American jurisprudential development and the proportionality test on the principle of equality and non-discrimination.<sup>374</sup> The IACHR and its REDESCA find it important to emphasize that the existence of this kind of mechanisms, although they may be vested with legality, may not in any way, directly or indirectly, serve in practice as tools for transgressing the exercise of human rights, such as life, personal integrity, freedom of expression and freedom of assembly, and the right to defend human rights. The State must ensure that the public work and function of the police is not denaturalized to benefit business interests, and it is the State's obligation to ensure the full exercise of the population's human rights in these contexts.
231. Bearing in mind the high relevance of these services for respecting and guaranteeing human rights, the IACHR and its REDESCA emphasize that the States may not exempt themselves from their obligations in this area by involving non-state actors or business entities in the provision of services of this nature. Regardless of private actors' liability in these contexts, the State continues to be the main duty bearer in terms of the exercise of the human rights at stake, in light of the general duties to respect and ensure human rights.
232. Therefore, in these contexts, in order to comply with their international human rights obligations, States must establish clear regulatory frameworks and policies based on the contents of the rights at stake. They must also subject private providers to full accountability for their operations and to rigorous examination under transparent and efficient

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<sup>373</sup> IACHR. [SRESCER of the IACHR urges prioritizing actions aimed at realizing the rights to water and sanitation in the hemisphere](#). 23 March 2018.

<sup>374</sup> IACHR. Public Hearing. Human Rights and Extractive Industries in Peru. 162 Period of Sessions. 25 May 2017; IACHR. Public Hearing. Citizen security and complaints of the irregular use of police forces in activities of natural resource exploration and exploitation in Peru. 169 Period of Sessions, 1 October 2018; EarthRights International and others. [Agreements between the National Police and extractive companies in Peru](#), February 2019.

systems for oversight, providing for effective sanctions and adequate reparations for cases of non-compliance, and including, as appropriate, the extraterritorial application of their obligations.

### **C. *Climate Change and Environmental Degradation in the Context of Business and Human Rights***

233. The United Nations Framework Convention on Climate Change (UNFCCC), to which all OAS Member States are Parties, defines climate change in Article 1 paragraph 2 as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”<sup>375</sup> For its part, the Intergovernmental Panel on Climate Change stated that human influence has been a major component in climate change; in this regard, it states that “[a]nthropogenic greenhouse gas emissions have increased since the pre-industrial era, largely as a result of economic and demographic growth, and are currently greater than ever [...] CO<sub>2</sub> emissions from fossil fuel combustion and industrial processes contributed around 78% of the total increase in GHG [Greenhouse Gas] emissions from 1970 to 2010 [...],” and in this vein warns that “the increasing magnitudes of warning increase the probability of serious, generalized and irreversible effects for people, species, and ecosystems.”<sup>376</sup>
234. In this context, meteorological changes have been recorded including the contraction of snow-covered areas, rising sea levels, extreme temperatures, droughts, floods, soil salinization, erosion, increase of tropical cyclones, and forest fires, among others. These situations show and provide a clear picture of the serious, present and future, impacts and risks toward human beings and the planet’s ecosystems, such as worsening diseases, the alteration of the means of subsistence, the collapse of infrastructure networks and essential services, the impact on food and water security, the extinctions of species, and the loss of ecosystems and biodiversity.<sup>377</sup> For example, according to the World Health Organization, climate change may cause an additional 250,000 deaths a year between 2030 and 2050 due to malaria, malnutrition, diarrhea, and heat stroke, and cause 100 million people to enter into poverty.<sup>378</sup> The World Bank also has indicated that with warming of 2 degrees Centigrade, 100 to 400 million more people could go

<sup>375</sup> UN. United Nations Framework Convention on Climate Change (1991).

<sup>376</sup> Intergovernmental Panel on Climate Change. Climate Change 2014: Summary Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Working Group on Climate Change (2015), pp. 4, 5 and 69.

<sup>377</sup> Intergovernmental Panel on Climate Change. Climate Change 2014: Summary Report. Contributions of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Working Group on Climate Change (2015), pp. 41-44, 51-57 and 69.

<sup>378</sup> WHO. [COP 24 Special Report: Health and Climate Change](#) (WHO, 2018), p. 24.



hungry and another 1000 to 2000 individuals' right to water could be affected.<sup>379</sup> According to the ILO, 1.2 billion jobs (around 40% of global employment) depend on the environment being sustainable and healthy.<sup>380</sup> The United Nations Food and Agriculture Organization also warns that “[t]he adverse effects of climate change and the incidence of extreme climate events alter food systems as a whole, reduce productivity of the agricultural sector and directly affect the livelihoods of the population living in rural zones and, indirectly, of urban population as well.”<sup>381</sup>

235. The IACHR had the opportunity to discuss this topic and receive important information from diverse civil society organizations regarding the serious effects of climate change and environmental degradation, reflected in droughts, floods, landslides, melting ice caps, hurricanes, and various extreme climate events, which generate effects of human rights and that could multiply exponentially if measures are not taken to mitigate, remediate, and adapt, with a human rights focus. The international legal regime on climate change has been ratified by the majority of the countries of the hemisphere, and human rights have been gaining space in the dialogues in this context. These organizations identified that both the causes and the effects of climate change and environmental degradation are related to human rights violations, and that responses designed could also mean infringing on them. They noted that the use of fossil fuels, extractive or exploitation activities, and deforestation are the main causes of this crisis, compromising future generations' possibility of life and enjoyment of rights with disproportionate effects on vulnerable populations. The organizations also highlighted the role and responsibilities of business entities, financing and investment agents, and the States as regards the actions they must adopt to reduce the effects of climate change and environmental degradation.<sup>382</sup>
236. The IACHR and its REDESCA are concerned that the effects of climate change and environmental degradation are particularly more serious for historically excluded and discriminated populations, such as women, children, indigenous peoples, individuals with disabilities, and people living in rural areas or in poverty,<sup>383</sup> despite the fact their contributions to

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<sup>379</sup> World Bank. Report on World Development 2010: Development and Climate Change (2010), p. 5

<sup>380</sup> ILO, [Social and Employment Perspectives on the World 2018: Environmental sustainability with jobs](#), p. 7.

<sup>381</sup> FAO. [Climate change and food security and nutrition. Latin America and the Caribbean](#) (2016), p. 8.

<sup>382</sup> IACHR. Public Hearing. Climate Change and ESCR of Women, Children, Indigenous Peoples and Rural Communities, 173 Period of Sessions, 25 September 2019; IACHR. Public Hearing. Human Rights and Global Warming. 127 Period of Sessions, 1 March 2007; See also: Report presented by civil society organizations on Climate Change and Rights of Vulnerable Groups in the Americas in the framework of the public hearings convened by the IACHR in its 173 Period of Sessions (September 2019). For their part, the IACHR and its SRESCER also received information about deforestation in Brazil and the relationship it has with business activities and transnational financing. Cf. Amazon Watch. [Complicity in Destruction: How northern consumers and financiers sustain the assault on the Brazilian Amazon and its peoples](#) (2018); Amazon Watch. [Complicity in Destruction: How northern consumers and financiers sustain the assault on the Brazilian Amazon and its peoples II](#) (2019).

<sup>383</sup> United Nations Office of the High Commissioner on Human Rights. [“Five UN human rights treaty bodies issue a joint statement on human rights and climate change: Joint Statement on “Human Rights](#)

greenhouse gas emissions, the main cause of this phenomenon, have been marginal.<sup>384</sup> More globally, developing countries are more exposed to the effects of climate change, and suffer disproportionately negative impacts, whether due to limitations on their institutional capacity to respond and/or due to geographical factors. According to the Global Climate Risk Index, which indicates the level exposure and vulnerability to extreme climate phenomena and the socioeconomic data associated with them, several countries in Latin America and the Caribbean show high levels of vulnerability. These countries have been severely affected by climate disasters, such as hurricanes and floods, the severity and frequency of which can be attributed to climate change.<sup>385</sup> Between 1998 and 2017, the countries that top the global lists of the countries most affected by climate disasters are Puerto Rico, Honduras, Haiti, and Nicaragua, while the most affected countries in 2017 were Dominica and Peru.<sup>386</sup> For its part, the climate vulnerability index, prepared by the University of Notre Dame, places Haiti, Bolivia, Venezuela, Honduras, and Belize as the five countries in the region most exposed to climate change.<sup>387</sup>

237. However, in the framework of the OAS, the relationship between the environment and human rights can be identified in several of the General Assembly's statements. For example, it has recognized "that climate change generates adverse impacts throughout the Hemisphere, causing deterioration in the quality of life and the environment for present and future generations."<sup>388</sup> For its part, the IACHR has already recognized the close link between the subsistence of human beings and the preservation of a healthy environment, and warns that environmental degradation can adversely affect water access and the enjoyment of various human rights,<sup>389</sup> such as the rights to life, health, development or self-determination. It particularly stressed that the links between climate change and the occurrence of increasingly recurrent environmental disasters threaten the exercise of various human rights, including by generating forced displacement of persons and increasing inequality and poverty.<sup>390</sup> Both the IACHR and the Inter-American Court have also stressed environmental

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[and Climate Change](#)", 16 September 2019. Report of the Special Rapporteur on extreme poverty and human rights. UN Doc. A/HRC/41/39, 17 July 2019.

<sup>384</sup> Intergovernmental Panel on Climate Change. *Climate Change 2014: Summary Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Work Group on Climate Change* (2015), p. 74.

<sup>385</sup> David Eckstein and others, [Global Climate Risk Index 2019 Who Suffers Most From Extreme Weather Events? Weather-Related Loss Events in 2017 and 1998 to 2017](#), Germanwatch (2018).

<sup>386</sup> David Eckstein and others, [Global Climate Risk Index 2019 Who Suffers Most From Extreme Weather Events? Weather-Related Loss Events in 2017 and 1998 to 2017](#) Germanwatch (2018).

<sup>387</sup> University of Notre Dame. [Notre Dame Global Adaptation Initiative Country Index: Vulnerability and Readiness](#) (2017)

<sup>388</sup> OAS. General Assembly. *Climate Change in the Context of Sustainable Development in the Hemisphere.. AG/RES. 2818 (XLIV-O/14)*, 4 June 2014.

<sup>389</sup> IACHR. *Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. OEA/Ser.L/V/II.Doc. 47/15, 2016, para. 62.

<sup>390</sup> IACHR. [IACHR and its SRESCER express solidarity with the peoples of the Bahamas for the harm caused by Hurricane Dorian and call for urgent implementaiton of a human rights-based response](#), 23 September 2019.

defenders' positive and relevant role, as well as the need to give special recognition and protection to their work and activities in defense of human rights, which they consider essential to strengthening human rights and the rule of law.<sup>391</sup> Thus, the IACHR and its REDESCA find it important to emphasize the contribution these actors make toward the observance of human rights through environmental protection, and reiterate the essential role that they play within the States and the inter-American system itself in the fight against climate change and environmental degradation.

238. For its part, the Inter-American Corte of Human Rights, through its Advisory Opinion OC-23/17, held that, to respect and ensure the rights to life and integrity of the persons under their jurisdiction, in the context of significant environmental damage, the States have several substantive and procedural duties to fulfill.<sup>392</sup> Also, the Inter-American Court not only stressed that Article 11 of the Protocol of San Salvador expressly includes the right to a healthy environment, but that it also must be considered protected under Article 26 of the ACHR, regarding economic, social and cultural rights. To this end, the Inter-American Court took into account the fact that the OAS Charter, the instrument to which this article refers, includes the Member States' commitment to achieving integral development, and that since there is a close relationship between environmental protection, sustainable development, and human rights, the right to a healthy environment can be recognized as a right in and of itself.<sup>393</sup>
239. Additionally, the IACHR and its REDESCA find it appropriate to reiterate that, given that the object of the OAS Charter was not to individualize rights but to create an international organism, based on Article 29 of the American Convention it is necessary to resort to auxiliary tests to identify the rights that can be derived from the provisions of this instrument, including fundamentally the American Declaration and other relevant norms of the international *corpus juris* on the subject. In this sense, it is important to mention Article XI of the American Declaration, which establishes the right of every person to have their health preserved through social and health measures. The health and social measures this provision alludes to also include those that environmental protection may require, since environmental damages can directly affect the full enjoyment of the right to health and a wide range of human rights, in view of the deep links between the physical environment and human rights. For example, the World Health Organization considers the environment one of the basic determinants of health, and has indicated that climate change is already adversely affecting health and undermining this right.<sup>394</sup>

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<sup>391</sup> I/A Court. Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of 3 April 2009. Series C No. 196, paras. 147-149; I/A Court. Case of Escaleras Mejía and others v. Honduras. Judgment of 26 September 2018. Series C No. 361, paras. 56, 64-70; IACHR. Merits Report No. 43/14, Carlos Escaleras Mejía and family (Honduras), 17 July 2014; paras. 202-205.

<sup>392</sup> I/A Court. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23.

<sup>393</sup> I/A Court. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, paras. 57 y 58.

<sup>394</sup> WHO. [COP 24 Special Report: Health and Climate Change](#) (OMS, 2018). See also the work of the [Department of Public Health, Environment, and Social Determinants of Health](#) of the WHO. Bearing in

240. The Inter-American Court also affirmed “as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.”<sup>395</sup> In the same vein, in April 2018 the IACHR’s REDESCA welcomed the ruling by the Supreme Court of Justice of Colombia, STC 4360-2018, which protected the right to a healthy environment and recognized the Colombian Amazon as the subject of rights by stating that forests play an important role in mitigating climate change and that they may be subject to legal protection in themselves. In the same statement, the REDESCA celebrated the adoption of a framework law on climate change in Peru, which aims to establish general provisions for planning, executing, articulating, monitoring, evaluating, reporting, and disseminating the management of measures to adapt and mitigate climate change; in addition to legislation and policies on the issue enacted in other countries such as Mexico, Guatemala, Honduras, Colombia, Brazil, and Paraguay.<sup>396</sup> In this regard, the IACHR’s REDESCA emphasized “that the countries of the hemisphere have a commitment in the framework of the approval of the Sustainable Development Goals to adopt urgent measures to combat climate change and its effects which requires a coordinated and cooperative work of the international community because it is an issue that clearly transcends borders.”<sup>397</sup>
241. The IACHR and its REDESCA observe that business entities’ activities, products, and services cause an important share of global emissions. This, together with the current systems of intense consumption, substantially contributes to climate change and environmental degradation and places the enjoyment of human rights at risk. This situation raises concrete actions for the States and companies, including financing and investment actors, to assume their legal responsibilities.<sup>398</sup> Since climate change and environmental degradation are human rights problems, the principles and standards that govern international human rights law should also guide

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mind the obligations of the States to respect recognized human rights, to ensure them, and to conduct their actions toward their full realization and effectiveness, the right to a healthy environment is not derived as a vacuous concept or without legal repercussions waiting for content, but rather it has been clarified through the application of current human rights norms to environmental issues, just as is reflected in Advisory Opinion OC 23/17 of the Inter-American Court. For the IACHR and its REDESCA, making an autonomous recognition of the right to a healthy environment, beginning with the interpretation of the inter-American legal framework for protection of human rights, means that it complies with being congruent with the set of human rights norms in force, it stems from the dignity of the human being, it has a fundamental character for this, and it gives realistic means for protection through existing, identifiable obligations for the States on the subject.

<sup>395</sup> I/A Court. Advisory Opinion OC-23/17 of 17 November 2017. Series A No. 23, para. 62.

<sup>396</sup> REDESCA. [SRESCER welcomes decisions taken in the region to face climate change](#), 17 April 2018.

<sup>397</sup> REDESCA. [SRESCER Welcomes Decisions Taken in the Region to Face Climate Change](#), 17 April 2018.

<sup>398</sup> Expert Group on Climate Obligations of Enterprises. [Principles on Climate Obligation of Enterprises](#) (2018), pp. 28-29. See also: Group of Experts on Climate Obligations. [Oslo Principles on Global Climate Change Obligations](#) (2015)

solutions that arise in this area; it thus becomes essential to integrate the human rights framework in climate change policies.<sup>399</sup>

242. From the field of international human rights law, specialized bodies have progressively referred to the nexus between climate change and human rights, addressing the States' obligations in this area as well as the link with non-state actors such as business entities or financing or investment institutions.<sup>400</sup> In particular, they have clearly emphasized that the absence of measures to prevent foreseeable infringements upon human rights caused by climate change or the lack of regulation of activities, which may involve private actors such as business entities, which contribute to such infringements, may generate international liability for the involved State.<sup>401</sup> More specifically, the Human Rights Committee has stated that environmental degradation is one of the most serious threats to the enjoyment of the right to life; in this sense, the States must implement measures to preserve the environment and protect it from damage, pollution, and climate change, whether caused by public or private actors.<sup>402</sup> The CESCR has also indicated that the human rights mechanisms have an important role in ensuring that the states avoid taking measures that accelerate climate change and dedicate adequate resources for effective actions regarding the phenomenon, including adequately regulating companies in this regard.<sup>403</sup>
243. In 2019, the Commission and its REDESCA, for their part, have referred to situations involving private actors with serious infringements on the right to a healthy environment and other human rights due to oil spills, toxic waste management and deforestation. They have also referred to human rights impacts in the face of extreme climate events, and have highlighted

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<sup>399</sup> Report of the United Nations Office of the High Commissioner for Human Rights. Understanding Human Rights and Climate Change (Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change), 27 November 2015.

<sup>400</sup> See, inter alia, Committee on the Rights of the Child. Concluding Observations (Spain), UN Doc. CRC/C/ESP/CO/5-6, 5 March 2018, para. 36; Committee for the Elimination of Discrimination against Women. General Comment No. 37. UN Doc. CEDAW/C/GC/37, 13 March 2018; Report of the United Nations Office of the High Commissioner for Human Rights. Migration and Displacement in the Context of Climate Change. UN Doc. A/HRC/38/21, 23 April 2018; Report of the United Nations Office of the High Commissioner for Human Rights. Analytical study on the relationship between climate change and the human rights of everyone to the enjoyment of the highest attainable standard or physical and mental health. UN Doc. A/HRC/32/23, 6 May 2016; Report of the United Nations Office of the High Commissioner for Human Rights. Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, A/HRC/35/13, 4 May 2017. Report of the United Nations Office of the High Commissioner for Human Rights. Understanding Human Rights and Climate Change (Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change), 27 de noviembre de 2015.

<sup>401</sup> United Nations Office of the High Commissioner for Human Rights. "[Five UN human rights treaty bodies issue a joint statement on human rights and climate change: Joint Statement on "Human Rights and Climate Change"](#)", 16 September 2019. Report of the Special Rapporteur on extreme poverty and human rights. UN Doc. A/HRC/41/39, 17 July 2019.

<sup>402</sup> Human Rights Committee. General Comment No. 36. UN Doc. CCPR/C/GC/36, 3 September 2019 para. 62.

<sup>403</sup> CESCR. [Declaration on climate change and the International Covenant on Economic, Social and Cultural Rights](#), 8 October 2018.

certain obligations of States in these contexts.<sup>404</sup> For example, in a public hearing they received information on reports of the critical situation of vulnerability of the Kichwa, Quechua, Achuar, Kukuma, and Urarinas communities in Peru due to companies' extractive activities in Lots 8 and 192 and the Norperuano oil pipeline. They indicated that until 2009, around 1 million barrels of production water per day were poured into the rivers the communities use for their consumption. In the last 4 years 140 oil spills were reported in these places, profoundly contaminating the ecosystem with lead, arsenic, mercury, hydrocarbons, among other contaminants, as a result.<sup>405</sup> This kind of information was also documented and reported in civil society reports; for example, regarding the indigenous communities in the localities of Cuninico and Espinar in Peru, infringements on this population's right of health were found, due to their exposure to toxic substances, pollution of the environment and water sources.<sup>406</sup> In this framework, the Commission and its REDESCA recall that actions aimed at protecting the right to a healthy environment not only mean a formal recognition of the right, but also must be accompanied by compliance and effective application of its content. The above materializes not only by fulfilling the state obligations to respect and ensure human rights, developed above, but also by the protection of environmental defenders and the consequent actions required of business entities in relation to the right to a healthy environment and the fight against climate change.

244. The IACHR and its REDESCA emphasize that strategies against climate change and environmental damage must not be isolated. The Member States of the OAS as a whole must coordinate efforts with each other to overcome the challenges that this situation poses, including those related to business activity. The Commission and its REDESCA recall that Article 30 of the OAS Charter establishes the Member States' commitment to achieve integral development as an indispensable condition for peace and security; likewise, Article 31 of the Charter establishes that "integral development is the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the inter-American system." More specifically, Article 26 of the American Convention establishes an obligation to cooperate among the States for the fulfillment of economic, social and cultural rights, among which, as mentioned previously, the right to a healthy environment is included. This duty of cooperation encompasses not only the equitable distribution of economic

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<sup>404</sup> REDESCA. [Special Rapporteurship ESCER of the IACHR expresses deep concern for the human, environmental, and labor tragedy in Brumadinho \(Minas Gerais, Brazil\) and calls for integral reparation to the victims](#), 30 January 2019; IACHR. [IACHR and its SRESCER express high concern for oil spills in Peru and call on the State to take urgent prevention, mitigation, and investigation actions](#), 26 July 2019; IACHR. [IACHR and its SRESCER express deep concern over deforestation and fires in the Amazon](#), 3 September 2019; IACHR. [IACHR and its SRESCER express solidarity with the people of the Bahamas for the damage caused by Hurricane Dorian and call for urgent implementation of a human rights-based response](#), 23 September 2019.

<sup>405</sup> IACHR. Public Hearing. Protection for Indigenous Communities, Children, and Human Rights Defenders affected by the Environmental Contamination in Peru, 173 Period of Sessions, 24 September 2019.

<sup>406</sup> Amnesty International. [Toxic State: Right to health violations of the indigenous peoples in Cuninica and Espinar, Peru](#) (2017).

resources, but also sharing specialized knowledge and technology aimed at facing environmental degradation, reducing greenhouse gas emissions, and fighting against climate change in general, including coordinated responses to business entities' actions in this regard, and with respect to conflicts, risks, and particularly migration or forced displacement related to climate change and environmental degradation.

245. The IACHR and its REDESCA emphasize that the human right to development, recognized in 1986 through a Declaration of the United Nations General Assembly, also plays a transcendental role in these contexts.<sup>407</sup> It is not possible to undercut environmental protection in the development initiatives that are presented since, in light of this right, the States must create conditions for the full realization of human rights as a whole, and ensure a participatory process aimed at expanding the possibilities and freedoms of individuals and peoples to increase their wellbeing and quality of life sustainably and without any discrimination. In other words, if the plans, policies, projects, or norms regarding a country's economic and social development do not include environmental protection, or they include it in a deficient way, without the consequent legal responsibilities of business entities as key actors in these processes, the right to development will be seriously limited. Thus, for the IACHR and its REDESCA, every economic development framework or development program must ensure the materialization of human rights in their whole and interdependent exercise, which allows for making their reciprocal influence visible as well as the determinants for their realization. Among them, the protection of the environment clearly constitutes a critical component for their current and future achievement. This means defining environmental obligations as clearly as possible for every one of the actors that form part of development processes, including the business sector and investment and financing institutions, in accordance with human rights standards. In short, the constant improvement of the wellbeing of the whole population as the protection of ecosystems should be the center, as part of the right to development from the principle of equity.<sup>408</sup>
246. To that extent, for the Commission and its REDESCA, all public policies and normative frameworks implemented for mitigation, adaptation, and resilience to climate change, as well as facing significant environmental damages, must be carried out with a rights-based approach, and include the impacts and infringements produced by businesses, including financing and investment agents. This ensures that these actions are carried out based on principles of transparency and access to information, accountability, inclusion, and non-discrimination. In this context, for example, the CDESCR has emphasized the state obligation to effectively regulate private actors to ensure that their behavior and commercial relations do not worsen climate

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<sup>407</sup> UN General Assembly. Declaration on the right to development. Resolution 41/128, 4 December 1986.

<sup>408</sup> See, inter alia, Fourth Report of the Independent Expert on the Right to Development. UN Doc. E/CN.4/2002/WG.18/2, 20 December 2001; Report of the Special Rapporteur on the right to development. UN Doc. A/HRC/42/38, 2 July 2019, for example see paragraphs: 9, 10, 25, 45, 56, 64, 65, 72, 76, 90, 91, 129, among others.



change, as well as the obligation to adopt measures that allow forms of environmentally sustainable production and consumption, which undoubtedly involves businesses.<sup>409</sup> It is necessary for the States to base their policies and legislation on this issue on current scientific evidence, in compliance with the environmental precautionary principle.<sup>410</sup> The REDESCA also highlights that the States must promote the development, use, and dissemination of new technologies aimed at mitigation and climate adaptation, including sustainable production and consumption technologies, in an accessible and equitable way so that the right to enjoy the benefits of scientific progress and its application, referred to in Article 14.1.b of the Protocol of San Salvador, Article XIII of the American Declaration, Article 26 of the American Convention, and Articles 38, 47, 48, and 51 of the OAS Charter, materialize in the climate and environment fields.

247. Based on the States' general obligations to respect and ensure human rights, the States must ensure that both public and private entities generating carbon emissions reduce such emissions and be held accountable for the damage they may cause to the environment, specifically to the climate. Therefore, it should be emphasized that States have to carry out all the required control actions (duties to prevent, supervise, regulate, and provide access to justice) so that companies, particularly those that are major contributors to increasing effects of climate change and environmental degradation, assume their responsibilities in this field. This means the States must take affirmative measures to face infringements on human rights caused by climate change and environmental degradation where companies are involved, which includes effective environmental adaptation and mitigation measures; effectively protecting defenders of the environment as human rights defenders; and ensuring the respect and application of the principle of equality and non-discrimination in such measures to combat and remedy the disproportionate effects that this phenomenon causes in the most vulnerable groups.
248. Part of this state responsibility includes avoiding financial and fiscal incentives for activities, whether public or private, that are not framed within the carbon footprint reduction mechanisms, thus creating a mitigation measure that prevents further risk and harm. It also means ensuring and increasing actions toward a policy of transitioning to sources of clean and renewable energy as well as low-emissions development strategies. In these processes, the States must ensure the respect of human rights in their entirety. Every climate action must be coherent with the human rights framework, must be fair, transparent, participatory, and must not generate new forms of human rights violations in its implementation.

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<sup>409</sup> CESCR. [Declaration on climate change and the International Covenant on Economic, Social and Cultural Rights](#), 8 October 2018.

<sup>410</sup> See, inter alia, I/A Court. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, paras. 72-75; United Nations Conference on Environment and Development. Declaration of Rio on Environment and Development, 3 - 14 June 1992, Principle 15.



The development of clean and renewable energy projects must also respect human rights.

249. The IACHR and its REDESCA also observe that the cross-border nature of climate change, and in many cases of environmental damage and degradation, makes the obligation of cooperation and the extraterritorial application of State obligations more visible. This includes ensuring, through institutional and normative systems, that private actors do not undermine efforts against climate change and take responsibility for environmental damages they cause, whether locally or transnationally.<sup>411</sup> Thus, for example, the Office of the United Nations High Commissioner for Human Rights held that: “The obligations of States in the context of climate change and other environmental harm extend to all rights holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights holders for their contributions to climate change, including for failure to adequately regulate the emissions of businesses under their jurisdiction.”<sup>412</sup>
250. In this regard, through their institutional and regulatory design, States must direct their efforts to ensure that companies avoid causing or contributing to a negative impact on human rights through environmental damage in general and climate change in particular. Companies must face these consequences when they arise, and exercise due diligence, including environmental adaptation and mitigation measures, to prevent infringements upon human rights directly related to operations, products, or services provided in the context of their commercial relationships that cause damage to the environment.<sup>413</sup> This is particularly relevant for companies involved in the fossil fuel industry and those that cause deforestation because they are the businesses that most drive climate change.<sup>414</sup> Investment and finance institutions, whether public or private, also must direct their actions in consonance with reducing and limiting greenhouse gas emissions and respecting the right to a healthy environment. In general, all companies must seek to reduce their greenhouse gas emissions, avoid excessive emissions, publish accessible information regarding actions aimed at this end, and not impede access to remedies for protection, the work of human rights defenders on

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<sup>411</sup>Report of the United Nations Office of the High Commissioner on Human Rights. Understanding Human Rights and Climate Change (Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change), 27 November 2015, p. 2.

<sup>412</sup> Report of the United Nations Office of the High Commissioner on Human Rights. Analytical study on the relationship between climate change and the human rights of everyone to the enjoyment of the highest attainable standard of physical and mental health. UN Doc. A/HRC/32/23, 6 May 2016, para. 38.

<sup>413</sup> See, inter alia, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc. A/HRC/37/59, 24 January 2018; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/74/161, 15 July 2019.

<sup>414</sup> See, inter alia, Report of the Special Rapporteur on extreme poverty and human rights. UN Doc. A/HRC/41/39, 17 July 2019, paras. 33-36.; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/74/161, 15 July 2019, 76-79.

environmental issues, or the policies and normative frameworks aimed at addressing climate change and environmental degradation, even in those commercial activities that are transnational in nature.<sup>415</sup>

251. For the Commission and its REDESCA, it is also a priority for the States to guarantee access to justice and to reparation of environmental damage.<sup>416</sup> This obligation requires the States to ensure there are accessible, affordable, timely, and effective mechanisms to challenge those actions or omissions that may affect human rights due to climate change and environmental degradation and to obtain remedies for damages arising from climate risks and the policies that are taken in this regard, whether these actions come from the State or the behavior of business entities.<sup>417</sup>
252. As indicated, climate change has a more severe impact on countries and sectors that are most vulnerable. It is estimated that the burden of approximately 75% to 80% of the costs of the impact of climate change will fall on developing countries.<sup>418</sup> Faced with this reality, it is important to highlight that the actions required of States and businesses in this area must be anchored within the concept of climate justice, understood as the actions taken by States to face the effects of climate change, through the application of international principles, obligations, standards, and agreements on the environment and human rights. This concept allows for protecting the groups of people in the greatest situation of vulnerability and demand that States with greater strengths in these contexts eliminate injustice and historic discrimination toward those who have least contributed to climate change, but who nonetheless suffer disproportionately from its effects. Such persons and peoples must be key actors in building solutions and the main beneficiaries of the measures taken, and must have access to effective remedies and reparations.<sup>419</sup>
253. Finally, the REDESCA observes that although traditionally, in the face of domestic justice systems, lawsuits have been presented against governments regarding environmental issues, increasingly there are legal

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<sup>415</sup> Expert Group on Climate Obligations of Enterprises. [Principles on Climate Obligation of Enterprises](#) (2018), pp. 2-9. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/74/161, 15 July 2019, para. 71-72

<sup>416</sup> I/A Court. Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, para. 233-240; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc. A/HRC/37/59, 24 January 2018, Framework Principle 10; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) adopted 4 March 2018, Art. 8.

<sup>417</sup> See, inter alia, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/74/161, 15 July 2019, para. 64.c

<sup>418</sup> Report of the Special Rapporteur on extreme poverty and human rights. UN Doc. A/HRC/41/39, 17 July 2019, para. 11.

<sup>419</sup> Report of the United Nations Office of the High Commissioner on Human Rights. Understanding Human Rights and Climate Change (Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change), 27 November 2015.

claims directly against business entities regarding the climate, for example, to recover the costs of adaptation and resilience to climate change, or to demand responsibilities from polluters and promote climate-responsible policies. These spaces have also allowed for greater interdisciplinary collaboration between human rights specialists and environmental specialists in order to establish evidence and legal arguments,<sup>420</sup> a situation that ultimately contributes to vigilance on these issues in the sphere of international human rights.

#### ***D. Fiscal Policies, Corporate Tax Practices, and Influence over Public Decision-making***

254. The IACHR has stated that “it is not possible to analyze States’ efforts to eradicate poverty without examining their fiscal policy, understood as the policy to collect and allocate public resources.”<sup>421</sup> This is due to the role that fiscal policies play in mobilizing resources aimed at guaranteeing human rights, and reducing economic, social, and gender inequalities. Regarding taxation, among the factors that may hinder the fulfillment of this purpose is income that governments fail to receive, attributed to the design and implementation of so-called tax expenditures. Thus, the Commission has found that tax revenue “has been insufficient due to the low tax burden and the regressive profile of some of the most important taxes in these countries – together with numerous tax dedications, exemptions, and legal loopholes, as well as tax evasion, avoidance, and similar practices.”<sup>422</sup>
255. In the context of fiscal policy, the relationship between human rights and business manifests through businesses’ payment of tax contributions to the treasury, which in turn the State allocates to fulfill its human rights obligations through public spending. The Special Rapporteur on Extreme Poverty and Human Rights defines it in the following way: “tax policy is, in many respects, human rights policy [...] Appropriate redistributive measures through taxation and other fiscal policies must be seen as an

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<sup>420</sup> For example, according to the Business and Human Rights Resource Centre: “In the USA, around 20 new climate lawsuits are now filed each year, up from just a couple in 2002. Outside the USA, 64 climate cases have been filed in the past 15 years, 21 of which have been filed since 2015. Traditionally, these cases have been brought against governments, but there is now a steep rise in climate lawsuits brought directly against companies: in the USA seven climate lawsuits were filed against companies in 2017, and six had so far been filed by May 2018.” Business and Human Rights Resource Center. [Turning up the heat: Corporate legal accountability for climate change](#) (2018). See also: Business and Human Rights Resource Centre. [Climate Litigation against Companies: Overview of legal arguments](#) (2019).

<sup>421</sup> IACHR, Report on Poverty and Human Rights in the Americas. OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017, para. 494.

<sup>422</sup> IACHR, Report on Poverty and Human Rights in the Americas. OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017, paras. 495-496.

integral part of a commitment to ensuring full respect for human rights across the entire society.”<sup>423</sup>

256. In this regard, the REDESCA considers that this report is an opportunity to deepen the analysis of this field in light of general human rights obligations under inter-American law, taking into account that certain tax practices implemented by businesses and the plan for state control over them may generate a harmful impact on the exercise of human rights. According to the information received by the IACHR and its REDESCA<sup>424</sup> and other relevant documents on the matter, two problems stand out that impede achieving a public financing system adequately aligned with respect and guarantee of human rights in the region.
257. On the one hand, the IACHR has identified practices by transnational corporations that prevent the State from collecting taxes by diverting large amounts of money that should be destined to it as part of their tax obligations, for example through tax evasion or avoidance. Every year in Latin America and the Caribbean, an estimated 31 billion dollars – that is, between 10% and 15% of the effective collection of taxes from corporate revenue—are lost due to the manipulation of international trade prices, which is one of various corporate tax abuses.<sup>425</sup> Additionally, the Organization for Economic Cooperation and Development (OECD) estimated that maneuvers to erode the tax base and transfer profits are creating annual losses of between 100 and 240 billion dollars, that are between 4% and 10% of state income from corporate income tax.<sup>426</sup> These practices are reproduced for several reasons, including domestic factors such as the reduced capacity of tax administration, but also due to extraterritorial factors such as the excessive protection of financial secrets and the lack of financial transparency allowed by certain countries, as well as weak points in the system of international rules on the taxation of multinational corporations that reproduces the possibilities of legal and regulatory arbitration, thus allowing the artificial attribution of profits to the subsidiaries of such companies in tax havens’ jurisdictions.<sup>427</sup>
258. For example, the Committee for the Elimination of Discrimination against Women expressed its concern over financial secrecy policies in some States

<sup>423</sup> Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, UN. Doc. A/HRC/29/31, 27 May 2015, para. 53.

<sup>424</sup> See, inter alia, IACHR. Public Hearing. Control of public spending control, tax policies and ensuring economic, social and cultural rights in Latin America. 168 Period of Sessions, 11 May 2018; IACHR. Public Hearing. Public debt, tax policy and poverty in Puerto Rico, United States. 157 Period of Sessions, 4 April 2016; IACHR. Public Hearing. Human rights and impact of fiscal policies in the Americas, 22 October 2015.

<sup>425</sup> Organization for Economic Cooperation and Development (OECD). [Measuring and Monitoring BEPS: Action 11-2015 Final Report](#). OECD/G20 Base Erosion and Profit Shifting Project. Paris (2015).

<sup>426</sup> Economic Commission for Latin America and the Caribbean. [Fiscal Panorama of Latin America and the Caribbean: The challenges of public policy in the framework of the 2030 Agenda](#) (2018) page 61-62 (available only in Spanish).

<sup>427</sup> See, inter alia, Independent Commission for the Reform of International Corporate Taxation. [“Declaration”](#) (2015); The World Bank. World Development Report 2019: The Changing Nature of Work. (2019), page 43.

and their extraterritorial effects over women's rights, recommending independent, periodic, and participatory evaluations of the extraterritorial impact of tax policies and financial secrecy applicable to corporations.<sup>428</sup> For their part, the Guiding Principles on the Human Rights Impact Assessments of Economic Reforms state: "States are obliged to manage their fiscal affairs and to adopt economic policies to ensure that they respect, protect and fulfil all human rights.." Under this framework, it is highlighted the States' obligation to fight against tax evasion and avoidance, to determine an adequate tax base on multinational corporations, and to determine that the collection of taxes and determination of public spending priorities are oriented to the effective financing of public services relating to the enjoyment of human rights.<sup>429</sup>

259. Another element identified as a barrier to the guarantee of human rights in this context is the existence of fiscal privileges enjoyed by certain business actors in the region. Granting these tax privileges generates fiscal expenses for the States, resulting in the sacrifice or waiver of tax income necessary to finance essential human rights issues. Studies show that tax expenditures in the region are generally above two percentage points of the Gross Domestic Product (GDP), representing between 15% and 30% of effective tax collection in most countries, but in some cases they exceed 35% of the GDP.<sup>430</sup> In fact, in countries like Guatemala, Costa Rica, and Dominican Republic, during the 2008-2012 period, this figure was much higher, above 40%.<sup>431</sup>
260. Added to this are complaints regarding certain groups' and actors' great power to influence decision-making processes over fiscal matters, over which there are no mechanisms to control their interference in lawmaking in their favor through lobbying, "revolving doors," corruption, and other mechanisms,<sup>432</sup> which deepens the citizenry's distrust and exacerbates democratic challenges in the region. On this subject, the United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights specifies that during the process of designing their economic policies, States "should be free from undue influence from corporations or those working to further their interests that seek to privilege corporate economic

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<sup>428</sup> Committee for the Elimination of Discrimination against Women. Concluding Observations (Switzerland). UN Doc. CEDAW/C/CHE/CO/4-5, 25 November 2016, paras. 40 and 41. See also Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights. Mission to Panama. UN Doc. A/HRC/37/54/Add.2, 19 December 2017, paras. 83 and 84.

<sup>429</sup> Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights. UN Doc. A/HRC/40/57, 19 December 2018. Principles 2 and 9, Comment 9.2.

<sup>430</sup> Economic Commission for Latin America and the Caribbean. '[Fiscal Panorama of Latin America and the Caribbean: The challenges of public policy in the framework of the 2030 Agenda](#)' (2018) page 58-59 (available only in Spanish).

<sup>431</sup> Centro Interamericano de Administraciones Tributarias. '[Gastos tributarios en América Latina: 2008-2012](#)'. (2014).

<sup>432</sup> In this regard, see Donald, K. "[Squeezing the State: corporate influence over tax policy and the repercussions for national and global inequality](#)." Spotlight on Sustainable Development Report (2017).

interests over, or otherwise disrupt, the realization of human rights[.]”<sup>433</sup> For its part, the Economic Center for Latin America and the Caribbean has indicated, in this regard: “The tax system of the region expresses this culture of privilege [...] The meager redistributive effect of taxation, either by composition or tax burden, due to the lack of effective oversight or for existing royalties, is part of a system of privileges in which those who have more do not perceive the social commitment to contribute to the common good through taxation.”<sup>434</sup> In this context, the IACHR and its REDESCA emphasize the duty of States to identify and prevent potential conflicts of interest for companies, ensuring adequate frameworks of transparency, citizen participation, due diligence, and accountability.

261. The REDESCA observes that the lack of transparency and analysis of the social costs and benefits of said tax privileges, usually to incentivize corporate investment, raise questions about their effectiveness and validity.<sup>435</sup> In this way, the income that the States fail to receive due to tax avoidance or evasion, together with the tax incentives they could grant to certain sectors themselves, reinforced by the phenomenon of the capture of the State by business entities, deprives them of receiving the necessary resources to comply with their human rights obligations.<sup>436</sup>
262. Human rights norms provide a frame of reference to guide both corporate practices in tax matters and the States’ judicial and policy responses to them. The IACHR and its REDESCA reiterate that the principles of participation, accountability, transparency, and access to information are fundamental for the design, operation, and evaluation of tax systems,<sup>437</sup> since it means generating an adequate democratic debate and deliberation over the sufficiency and impact of a country’s fiscal framework, as well as limiting secrecy and closed processes prone to arbitrary decisions.
263. The IACHR and its REDESCA also take note of information received from civil society organizations denouncing the close relationship between corporate elites and high-ranking State authorities to obtain certain prerogatives and benefits, in some cases illegally. This would exceed the scope of fiscal or tax policy, and also are oriented toward strict regulations of public interest goods such as health, the environment, or adequate food for the population, allowing impunity and corruption to advance to the

<sup>433</sup> Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights. UN Doc. A/HRC/40/57, 19 December 2018, Comment 14.3.

<sup>434</sup> Economic Commission for Latin America and the Caribbean. “The Inefficiency of Inequality” (2018) page 53.

<sup>435</sup> See, inter alia, Economic Commission for Latin America and the Caribbean, “[Tax policy to improve investment and growth in Latin America](#)” (2013); CBI, Christian Aid, and Oxfam. “[Tax Incentives in the Global South: A business and civil society briefing](#)” (2018).

<sup>436</sup> Center for Economic and Social Rights. “[Fiscal Policy for Human Rights and Equality. Map of debates, initiatives and actors from the Andean Region](#)” (2017).

<sup>437</sup> IACHR. Report on Poverty and Human Rights in the Americas. OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017.

detriment of the fulfillment of human rights.<sup>438</sup> This is clearly reflected in what the United Nations Special Rapporteur on the management of hazardous substances and their impact on human rights expressed: “For economic gain, business enterprises have sought to delay the adoption of protective laws and regulations through targeted campaigns to distort science [...] [businesses] have engaged in targeted marketing campaigns to manufacture doubt and uncertainty regarding results of scientific studies that illustrate the risks and impacts upon the health of workers.”<sup>439</sup>

264. The REDESCA stresses that this problem was also a topic of discussion at the Third Regional Consultation for Latin America and the Caribbean on Business and Human Rights held in December 2017 in Chile. During the event, concern was expressed about the persistent impact of corruption on human rights in the region. In this sense, the involvement of companies with operations in Latin America in corruption scandals was pointed out, which created situations of political crisis in several countries in the region.
265. For example, the REDESCA highlights a recent study<sup>440</sup> that mentions companies’ strong opposition to policies or initiatives that seek to face problems like obesity, malnutrition, and climate change, due to their commercial interests. The report shows that climate change is interrelated with the increase of negative health effects on a global level, reflected by obesity and malnutrition, disproportionately affecting people in poverty by not having access to healthy food, water, and environment. In the context of this phenomenon, it is underlined the weakening of the regulatory and oversight functions of the States as a result of certain companies’ dominant power when exerting pressure or influence on state authorities, guided only by the objectives of profitability and financial returns on their investments. Economic power is thus reflected in the companies’ political and legal ability to influence for their own benefit, for example, when “the transnational corporations lobby for fewer regulations that apply to them (e.g. no regulations on marketing unhealthy food to children or warning labels on processed foods), promote regulations that apply to other sectors (e.g., trade and investment agreements that bind governments to protect corporate investment interests), resist or reject taxes that apply to their products (e.g., taxes on sugary drinks and energy-dense, nutrient-poor foods), and lobby policy makers for subsidies that benefit their businesses

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<sup>438</sup> See, for example, Dejusticia. [La Ley de Financiamiento contradice las recomendaciones de la OMS](#), 9 November 2018; Dejusticia. [Lo que se le escapa a la Ley de Financiamiento](#), 21 November 2018; Dejusticia. [Coca-Cola ¿Qué hay detrás de tus advertencias?](#), 17 December 2018 (available only in Spanish).

<sup>439</sup> Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes. UN Doc. A/HRC/39/48, 3 August 2018, para. 56 and 57; likewise, the Special Rapporteur on the human rights of migrants has shown concern about “the extent to which transnational corporate interests have prevailed over public discourse and accountability for observing human rights standards.” Cf. Report of the Special Rapporteur on the human rights of migrants. UN Doc. A/HRC/32/40, 4 May 2016, para. 64.

<sup>440</sup> The Lancet. [The Global Syndemic of Obesity, Undernutrition, and Climate Change: The Lancet Commission report](#). 27 January 2019.



(e.g., agricultural and transportation subsidies).”<sup>441</sup> The IACHR and its REDESCA observe with concern that these power dynamics and discrimination have differentiated impacts on populations in situations of greater vulnerability, due to the direct impact on the realization of specific human rights such as their rights to health, food, water, and the environment.

266. In this way, the IACHR and its REDESCA consider that in order to ensure the States protect human rights and business actors respect these rights, it is essential to ensure the highest levels of transparency about those relationships that link business entities and economic actors with the States. Regarding the fiscal system, this will include both direct economic transfers and, when dealing with regimes for promoting certain activities or support for specific sectors. This will entail, for example, reviewing the fiscal privileges that favor certain groups, chiefly large corporations and industries, in terms of human rights<sup>442</sup>; and activating the institutional administrative machinery to prevent, mitigate, and sanction practices of illegal financial flows, tax avoidance or evasion<sup>443</sup>, including their transnational effects. Regarding the case of transnational effects, the activation of the duty to cooperate is key, given that it means States should contribute to the construction of a system of international rules on the taxation of companies that aims to close the legal gaps that allow their cross-border tax abuse.<sup>444</sup>
267. In short, it is essential to take safeguards to identify, give visibility, and reduce conflicts of interest that may arise in these situations, paying particular attention when individuals move between the public sector and the business sector. Although the latter situation does not per se mean there are improper or corrupt acts, there are associated risks that may erode democratic institutions and weaken the framework for the realization of human rights, precisely because of the ease of using public powers to generate undue private benefits. Therefore, the IACHR and its REDESCA reiterate that the processes for creating policies and laws must give broad participation to all interested sectors and be endowed with transparency and constructive dialogue.

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<sup>441</sup> The Lancet. [The Global Syndemic of Obesity, Undernutrition, and Climate Change: The Lancet Commission report](#). 27 January 2019, page 12.

<sup>442</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations (Burundi) UN Doc. E/C.12/BDI/CO/1, 15 Octubre de 2015, para. 14; Committee on Economic, Social and Cultural Rights, Concluding Observations (Guatemala) UN Doc. E/C.12/GTM/CO/3, 8 December 2014, para. 8.

<sup>443</sup> Committee on Economic, Social and Cultural Rights. Concluding Observations (Spain) UN Doc. E/C.12/ESP/CO/6, 25 April 2018, para. 16.1.

<sup>444</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 24. UN. Doc. E/C.12/GC/24 2017, 10 August 2017, para. 20. See also Committee on Economic, Social and Cultural Rights. Concluding Observations (United Kingdom) UN Doc. E/C.12/GBR/CO/6, 13 July 2016, para. 16 and 17.



## E. *The States and Businesses in the Field of Information and Communication Technologies*

268. Another situation that draws the IACHR and its REDESCA's attention refers to the activities of companies in the field of technology, Internet service, big data, and cyber-surveillance with regard to the enjoyment of human rights. The REDESCA observes that the Internet and various electronic or digital communications media constitute a platform for exercising human rights, including civil and political rights, as well as economic, social, cultural, and environmental rights.<sup>445</sup> Companies' development of technology in recent years has particularly contributed to creating platforms, products, and services that result in a better quality of life, better access to education, culture, information or exercise of freedom of expression; and even as tools that may strengthen the identification and documentation of human rights violations and greater protection of people.<sup>446</sup> However, companies' activities in the area of new technologies and digital networks and the different relationship they can have with the States also present growing challenges and can generate various threats to the enjoyment of these rights.<sup>447</sup> In this context, for example, the United Nations Special Rapporteur on freedom of opinion and expression pointed out, in reference to this field, that: "the companies remain enigmatic regulators, establishing a kind of 'platform law' in which clarity, consistency, accountability and remedy are elusive."<sup>448</sup>
269. The IACHR and its Office of the Special Rapporteur for Freedom of Expression had the opportunity to analyze some regional concerns in this area through a public hearing in 2018. In this, several organizations from the region raised various problems regarding the collection of digital

<sup>445</sup> Association for Progressive Communications (APC) and International Development Research Centre (IDRC). [Global Information Society Watch 2016 Economic, social and cultural rights and the internet](#) (2016)

<sup>446</sup> For example, the Interdisciplinary Group of Independent Experts (GIEI) formed at the IACHR's initiative in Nicaragua used these tools and platforms for the preparation of this report. Cf. GIEI. Nicaragua: Report for investigation of the events of violence occurring in the period of 18 April to 30 May. December 2018, pages 62 and 63 and Annex 7. The IACHR also referred to the use of technology and analysis of telephonic data in its final report on the matter of Ayotzinapa. Cf. IACHR. Report of the Special Follow-up Mechanism on the Matter of Ayotzinapa, OEA/Ser.L/V/II. Doc. 156, 25 November 2018, paras. 51-55 and 221-243. Furthermore see, inter alia: USC Annenberg Center on Communication Leadership & Policy. [Technology and Labor Trafficking in a Network Society](#) (2015); USC Annenberg Center on Communication Leadership & Policy [Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds](#) (2011); The Engine Room. [Blog \(Technology, data and Human Rights\)](#); Amnesty International (USA). [Human Rights Now Blog \(Christoph Koettl\)](#).

<sup>447</sup> Report of the Special Rapporteur on the sale of children, child prostitution and the use of children in pornography. UN Doc. A/HRC/28/56, 22 December 2014, paras. 17-89; Business and Human Rights Resource Centre. [Information Technology: The Power and Responsibility of Business](#) (2014); Amnesty International. Destination Occupation: Digital Tourism and Israel's illegal settlements in the occupied Palestinian territories (2019); Amnesty International. [Toxic Twitter](#) (Interactive website about harassment against women on Twitter). December 2018; Maréchal, Nathalie. [Targeted Advertising Is Ruining the Internet and Breaking the World](#), en Motherboard. 16 November 2018. Phys. [Study details link between social media and sex trafficking](#), 8 de octubre de 2018.

<sup>448</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 1.

evidence in criminal proceedings, the violation of the right to privacy and freedom of expression through digital surveillance, espionage software, cybersecurity policies, blocking of online content, access to cross-border data, mass and indiscriminate data collection and storage, as well as the permanent existence of online sexist violence against women journalists and high-profile women.<sup>449</sup> Regarding this last point, recently, the Commission together with the Office of the Special Rapporteur for Freedom of Expression deepened their analysis and held that: “online intermediaries or platforms should adopt transparent, accessible, and effective complaint mechanisms for cases of online violence against women that take account of the needs of women journalists.”<sup>450</sup> They even indicated that these companies’ policies and terms of service on harassment “should explain their decisions to complainants and demonstrate that the decision is consistent with their international obligations in this area, including the principles against arbitrary censorship”<sup>451</sup>; and additionally held that communications media should significantly contribute to the eradication of discriminatory socio-cultural patterns against women.<sup>452</sup>

270. The Special Rapporteurs for freedom of expression from both the Inter-American System and the United Nations also have echoed complaints of harassment, abuse, and violence against groups in situations of vulnerability through the platforms of companies and intermediaries linked to the Internet and social media,<sup>453</sup> including some modalities of disinformation and propaganda that may infringe on human rights;<sup>454</sup> and the United Nations High Commissioner for Human Rights warned about threats and human rights violations directed at human rights defenders and women’s organizations in these same contexts.<sup>455</sup> For its part, the IACHR also noted the possibility of the use of social media and other means of communication with the purpose of sending threats and spreading stigmatizing and delegitimizing messages against human rights

<sup>449</sup> IACHR. Public Hearing. [Digital Intelligence, Cybersecurity and Freedom of Expression in the Americas](#). 167 Period of Sessions, 28 February 2018.

<sup>450</sup> IACHR. Women Journalists and Freedom of Expression: Discrimination and gender-based violence faced by women journalists in the exercise of their profession (Office of the Special Rapporteur for Freedom of Expression). OEA/SER.L/V/II IACHR/RELE/INF.20/18, 31 October 2018, para. 141.

<sup>451</sup> IACHR. Women Journalists and Freedom of Expression: Discrimination and gender-based violence faced by women journalists in the exercise of their profession (Office of the Special Rapporteur for Freedom of Expression). OEA/SER.L/V/II IACHR/RELE/INF.20/18, 31 October 2018, para. 142.

<sup>452</sup> IACHR. Women Journalists and Freedom of Expression: Discrimination and gender-based violence faced by women journalists in the exercise of their profession (Office of the Special Rapporteur for Freedom of Expression). OEA/SER.L/V/II IACHR/RELE/INF.20/18, 31 October 2018, para. 154.

<sup>453</sup> IACHR. 2015 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter IV (Hate speech and incitement to violence against LGBTI persons in the Americas). OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015; Report of the Special Rapporteur for the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/38/35, 6 April 2018, para. 27.

<sup>454</sup> Likewise, they indicated that: “States have a positive obligation to promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda.” In this regard, see UN Special Rapporteur for Freedom of Expression, *et al.* [Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda](#), 3 March 2017, Principle 3.a.

<sup>455</sup> Statement by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein. [The impact of online violence on women human rights defenders and women’s organisations](#). June 21, 2018.

defenders;<sup>456</sup> it also referred to the role of these companies in mitigating and preventing the content that facilitates hate speech, racist movements' discourse, disinformation in the content generated by users, as well as the dissemination of messages that incite abuse against migrants, asylum seekers, and refugees.<sup>457</sup> For the IACHR and its REDESCA it is evidently important that companies linked to the Internet, online platforms, or media in all its forms comply by taking into account these negative impacts, particularly on historically discriminated groups, and organize their services and activities in a way that does not infringe upon the parameters established by the human rights framework.

271. For the IACHR and its REDESCA, the presence of companies located throughout all layers in the field of the Internet and digital technologies is clear, accounting for activities ranging from the connection to the online service platforms and digital data storage, which additionally includes companies producing software, digital security or surveillance, among others. Furthermore, due to the open, global, and decentralized nature of the Internet and the use of various technologies in this area, the companies' activities tend to have a clear extraterritorial connotation. Thus, for example, freedom of expression experts from different regional systems emphasized that the standards regarding the limits of restricting freedom of expression "apply regardless of frontiers so as to limit restrictions not only within a jurisdiction but also those which affect media outlets and other communications systems operating from outside of the jurisdiction of a State as well as those reaching populations in States other than the State of origin."<sup>458</sup>
272. In these contexts, the IACHR and its REDESCA reiterate that the application of human rights norms and standards is the framework that should be taken into account for the purposes of evaluating actions required of the States and of business entities. In this regard, the Office of the Special Rapporteur for Freedom of Expression has insisted that in the digital environment it is necessary to adapt public policies and the actions of private individuals to guiding principles, which include: non-discrimination and privacy, equal access, pluralism, as well as multisectoral governance and net neutrality as cross-cutting components of these principles.<sup>459</sup> For example, the guarantee of a legal framework and public policy to increase Internet access in the States is not limited to the possibility of connecting to the network, but, according to the principle of universal access, also must ensure that such connection has characteristics of affordability, stability, quality, and accessibility that allows it to be used as an efficient tool for the exercise of

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<sup>456</sup> IACHR. Serious human rights violations in the context of social protest in Nicaragua, OEA/Ser.L/V/II. Doc. 86, 21 June 2018. para. 264.

<sup>457</sup> IACHR. Forced migration of Nicaraguans to Costa Rica. OAS/Ser.L/V/II. Doc. 150, 8 September 2019, paras. 78-87.

<sup>458</sup> UN Special Rapporteur for Freedom of Expression, *et al.* [Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda](#), 3 March 2017, Principle 1.c.

<sup>459</sup> IACHR. 2016 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for a free, open, and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, para.6.

various human rights under the State's jurisdiction. Such platforms also should consider accessible languages and formats to promote effective access by vulnerable sectors of the population, particularly those in situations of greater vulnerability, such as conditions of disability, illiteracy, geographic location, ethnic or minority group membership, gender, or age,<sup>460</sup> in order to reduce the digital divide and guarantee digital opportunities for the entire population.

273. Therefore, the companies and bodies involved in the management and administration of the network and the information contained therein must not only take care not to place disproportionate or arbitrary barriers to said access, or not restrict human rights through corporate activities, but furthermore have the affirmative obligation to create an environment in which human rights are respected.<sup>461</sup> Likewise, it is worth recalling that "the internet has been and is developed and operated by a series of private companies performing different functions. However, its character as a communication medium is that of a public space and hence its governance should be guided according to the principles of a public resources rather than simply being a matter of private contracts."<sup>462</sup>
274. Thus, the enjoyment of the rights of children is a specific area in which concerns have been expressed about the risks that information and communication technologies may generate. The United Nations Special Rapporteur on the sale of children, child prostitution and child pornography has highlighted companies' responsibilities in this area, for example as providers of Internet service and content, in order to increase children's safety online.<sup>463</sup> This is due to the power that this industry can exercise over consumers, both adults and children, as well as serving as a conduit for reporting suspicious material and properly managing, through clear filtering and blocking policies, online content that facilitates exploitation or harassment of children, or affects their safety in general. It is also pertinent to point out that the IACHR and its Office of the Special Rapporteur for Freedom of Expression have repeatedly held that child pornography, as a discursive form that violently damages the rights of children and their best interests, is a type of discourse that is excluded from the scope of protection of the right to freedom of expression.<sup>464</sup> For the IACHR and its REDESCA, the companies linked to the industry of new

<sup>460</sup> IACHR. 2016 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standard for a free, open and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, paras. 210-226.

<sup>461</sup> IACHR. 2016 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standard for a free, open and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, paras. 95-120.

<sup>462</sup> IACHR. 2016 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for free, open and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, para. 50.

<sup>463</sup> Report of the Special Rapporteur on the sale of children, child prostitution and child pornography. UN Doc. A/HRC/28/56, 22 December 2014, para. 89.

<sup>464</sup> IACHR. 2016 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for a free, open, and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, para. 78

technologies and communication has a crucial role in the creation of solutions for the safer use of Internet-based services and other technologies. The States must promote having such companies pay special attention to how the design and implementation of their systems and operations put the rights of this age group at risk, paying particular attention to the protection of their privacy, personal information, personal security, and the exercise of their freedom of expression.

275. On the other hand, among other highlights in this area, there is also concern over the use of big data without the correlative adoption of appropriate checks and balances, which may violate the individuals' human rights. Among the potentially risky fields, the IACHR identifies privacy and data protection (the results of the data analysis can reveal personal information that corresponds to their private space, without any need or proportionality), anonymous data (insufficient guarantees to ensure that the data analyzed is not directly related to specific people), and the possibility of discrimination against certain groups due to the lack of transparency in the algorithms used for data analysis.<sup>465</sup> More recently, the exploitation of large volumes of data for electoral purposes by private companies hired by various political parties has also raised criticisms and alarms over the manipulation of information and the classification of persons into categories without knowledge or consent.<sup>466</sup>
276. According to public data, it is known that by 2018 there will be 375.1 million Internet users in Latin America and it is projected that by 2019 it will reach 387.2 million. It also identifies a single company (Google) with an almost absolute participation (90%) in the search engine market in several countries in the region, and it is expected that the Facebook company will reach 282.2 million users by 2019. On the other hand, the number of electronic buyers has also increased in the region, and will reach an estimated 155.5 million in 2019.<sup>467</sup> Insofar as through these technological tools it is possible to obtain a complete profile of the behaviors of people in each of the spheres in which they manifest, the availability of large volumes of digital data and the possibility of crossing them from the use of big data and the digital economy, for the REDESCA it is clear that companies that are in a position to control such technologies can have a direct impact on human rights, in particular when making decisions that may be discriminatory and without people having security or control over what happens to their data. In this regard, the IACHR and its Office of the Special Rapporteur for Freedom of Expression have indicated that "States should ensure that the appropriate technology for using mass data is used both in the public and

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<sup>465</sup> Fundación Karisma. Big Data: A contribution for the discussion of public policy in Colombia. 2 November 2016 (available only in Spanish).

<sup>466</sup> Tactical Technology Collective. [The Influence Industry: The Global Business of Using Your Data in Elections](#). 20 April 2018.

<sup>467</sup> Dejusticia. [Rendición de Cuentas de Google y otros negocios en Colombia](#). La protección de datos personales en la era digital (enero, 2019), page 16 (available only in Spanish).

private spheres, guaranteeing due protection of human rights on the Internet.”<sup>468</sup>

277. In turn, taking into account that the reason for Internet search engines is facilitating the search for information that their users want to find, the companies that have developed them have created a series of criteria and procedures that allow them to facilitate this objective. A fundamental part of this function is carried out through the development of artificial intelligence that, through algorithms, allows decisions to be automated in light of the large amount of information available on the Internet.<sup>469</sup>
278. The IACHR and its REDESCA emphasize that for the purpose of evaluating the guarantee of human rights in this context, it is important to know whether the criteria used by companies to adopt decisions by and for users (in this case: the order of search results) are transparent, legitimate, and based on the general interest. In other words, that they be neutral and not biased or discriminatory, and that they do not affect people’s right to a free and open Internet, to diversity and pluralism of information, ideas and opinions available on the Internet, both from a focus of content “search” agents, and of “producer and disseminator” agents of the same, who are interested in their information and opinion reaching others.
279. Hence, it is not only necessary for the States of the region to regulate and develop adequate policies of supervision in these contexts of constant and rapid digital development, but for companies to incorporate the analysis of the risks and effects that could occur for the exercise of such rights in their decisions and processes, guiding their behavior by existing international standards. Bearing in mind that data is a diffuse asset, that is generated everywhere and easily crosses borders, and that in general large Internet companies have a privileged position given the economic, technological, and social power they hold; regional cooperation, collective initiatives, and inclusive and participatory space for the exchange of experiences with a human rights focus, particularly on the rights to privacy, freedom of expression and non-discrimination, could provide a solid and suitable regional legal framework for these purposes.<sup>470</sup>
280. Also, as technology advances and societies become digitalized, surveillance tools also give greater power to those who acquire or manage these technologies for purposes that may deteriorate, restrict, and violate human rights. This is done, for example, by means of malicious software that works

<sup>468</sup> IACHR. 2016 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for a free, open, and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, para. 233.

<sup>469</sup> MIT Technology Review. [Inspecting Algorithms for Bias](#), June 12, 2017.

<sup>470</sup> In the inter-American framework, for example, the OAS General Assembly has issued Resolution AG/RES.2842 (XLIV-O/14) of 4 June 2014, through which it reaffirms the protection of personal data and the right to privacy; the Inter-American Juridical Committee has also issued some relevant documents on the matter such as CJI/doc. 465/14; CJI/doc. 450/14; and CJI/doc.474/15 rev.2. At the local level, there have also been studies on the personal data regime in terms of diverse digital practices, for example see: Dejusticia. [Rendición de Cuentas de Google y otros negocios en Colombia](#). La protección de datos personales en la era digital (enero, 2019).

by sending text messages containing infectious links that allows access to all the information stored on the device, its geographical location, as well as the inadvertent activation of the microphone and camera.<sup>471</sup> Within the use of this kind of technology there is also surveillance through interference with computers, illegal access to mobile devices, interference with communications, and the use of facial or emotional recognition, among others. Added to this is the background provided by the report of the United Nations Special Rapporteur on the situation of human rights defenders, who recognizes that defenders have been victims of a series of aggressions that includes, among many others, illegal surveillance and the use of the Internet to hinder their work.<sup>472</sup>

281. Recently, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also has expressed its concern over the continuing violations of human rights cause by the abuse of targeted surveillance technologies (often toward journalists, activists, human rights defenders, opposition figures, critics, and others who exercise their right to freedom of expression).<sup>473</sup> The United Nations Office of the High Commissioner for Human Rights also has highlighted this in reference to the lack of adequate legislation that faces the greatest challenges in this area or lack of proper application of it, insufficient procedural guarantees, and lack of adequate supervisory capacity regarding improper digital surveillance.<sup>474</sup>
282. In this context, it is worth recalling, as stated by the Office of the Special Rapporteur for Freedom of Expression, that: “(t)he protection of the right to private life involves at least two specific policies related to the exercise of the right to freedom of thought and expression: the protection of anonymous speech and the protection of personal data.”<sup>475</sup> It also held that “States are required to prohibit the use of personal data for purposes inconsistent with the human rights treaties and to establish rights to information, correction and – if necessary and proportionate – deletion of data, as well as to create effective supervision mechanisms.”<sup>476</sup> Regarding the surveillance of digital communications, the IACHR highlights that

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<sup>471</sup> Working Group of civil society organizations on transparency and human rights in surveillance technology policies. [Recommendations for Transparency and Anti-Corruption in the Buying and Use of Surveillance Technologies by the American States](#), March 2018.

<sup>472</sup> Report of the Special Rapporteur on the situation of human rights defenders. UN Doc. A/70/217, 30 July 2015.

<sup>473</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/41/35, 28 May 2019.

<sup>474</sup> Report of the United Nations Office of the High Commissioner for Human Rights (The right to privacy in the digital age). UN Doc. A/HRC/27/37, 30 June 2014.

<sup>475</sup> IACHR. 2013 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter IV (Freedom of Expression and Internet). OEA/Ser.L/V/II.149. Doc. 31 December 2013, para. 133.

<sup>476</sup> IACHR. 2013 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter IV (Freedom of Expression and Internet). OEA/Ser.L/V/II.149. Doc. 31 December 2013, para. 139.



“surveillance in all its forms constitutes interference in private life.”<sup>477</sup> However, “not all interference is *per se* illegitimate, and in exceptional cases, different degrees of interference are justifiable depending on the circumstances.”<sup>478</sup> In this way, to verify the legitimacy of any state or non-state interference in private life, the inter-American system, consonant with the UN and European system, established a three-part test. According to this test, the surveillance measure must be supported by law, and in a formal and material sense, must be necessary and proportional.<sup>479</sup> In this regard, it is important to emphasize that the IACHR and its Office of the Special Rapporteur for Freedom of Expression have indicated that “the surveillance measures must be ordered by a competent, independent, and impartial judge or court, and the order itself must be properly reasoned in order to be legitimate.”<sup>480</sup>

283. Among the actions that States must take into account are, for example, the revision or adoption of clear legal frameworks that empower and fix the conditions of lawful use of this type of technology in accordance with democratic values and human rights norms; as well as the existence of independent and effective safeguards of due process, transparency, oversight, and investigation and effective accountability. The IACHR and its REDESCA also take into account information regarding the fragmentation of regulatory systems in this area and the institutional weaknesses for ensuring compliance with provisions in force as one of the region’s greatest challenges. They also recognize that there are concerns about the lack of transparency, and even corruption, and reduced or null spaces for social participation in the state forums that make decisions in this area, in particular with respect to the acquisition and operation of surveillance technologies.<sup>481</sup>
284. Along these lines, the IACHR and its REDESCA also observe that in their recent Report on Surveillance and Human Rights, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression recommended that the States impose an immediate moratorium on the sale, transfer, and use of surveillance technology that is developed by private actors until a regime of guarantees based on human rights is implemented. The Special Rapporteur indicated that the States

<sup>477</sup> IACHR. Annual Report 2016. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for a free, open, and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, para. 213.

<sup>478</sup> IACHR. Annual Report 2016. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for a free, open, and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, para. 215.

<sup>479</sup> IACHR. 2016 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standard for a free, open and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, paras. 210-226.

<sup>480</sup> IACHR. Annual Report 2016. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for a free, open, and inclusive Internet). OEA/Ser.L/V/II. Doc.22. 15 March 2017, para. 224.

<sup>481</sup> Working Group of civil society organizations on transparency and human rights in surveillance technology policies. [Recommendations for Transparency and Anti-Corruption in the Buying and Use of Surveillance Technologies by the American States](#), March 2018.



should ensure that the use of these technologies are in line with human rights standards, including prior judicial authorization to intercept communications from any person, having effective mechanisms for redress consistent with their international obligations, and ensure public control and supervision of the surveillance technologies' use and sale.<sup>482</sup>

285. The IACHR and its REDESCA find that any strategy regarding the development of the States' public policies or normative regulation in the region regarding the use of these technologies must have a sustainable development focus, which places emphasis not only on the effectiveness of technology to promote economic growth, but on their relationship with and impact on the exercise of human rights. In short, they must be adopted and implemented transparently, facilitating social control, both in state and private management of issues related to the ensuring human rights in this area, including their extraterritorial scope. Thus, the same companies involved must also implement efficient systems for supervision, human rights impact evaluations, and accessible complaint systems for harm caused by their services or activities, including cross-border operations. When they detect that their products and services are being used to violate human rights they must take necessary measures to keep such practices from continuing, and report such situations to competent supervisory bodies.

## ***F. States' Obligations in Other Relevant Contexts in the Field of the Exercise of Human Rights and Business Activities***

286. The REDESCA also identifies other relevant contexts within the framework of States' human rights obligations and business activities, which warrant mention.
287. Such is the case of States' participation in the negotiation, implementation, and dispute resolution in the framework of **bilateral or multilateral trade investment or trade agreements**, which in some cases have been identified as sources of threats to the enjoyment of certain human rights or under which violations of these rights are produced. According to the information received for the preparation of this report, the REDESCA observes that contexts of a lack of transparency and participatory spaces in these processes and potential conflicts between bilateral and multilateral investment and trade treaties and international human rights law, may directly undermine the States' human rights obligations and directly impact legislation and public policies related to the enjoyment of such rights as water, freedom of assembly and association, food, freedom of expression,

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<sup>482</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UN Doc. A/HRC/41/35, 28 May 2019. para. 66.

housing, environment, or the rights of indigenous peoples and human rights defenders. The IACHR also had the opportunity to receive specific information through a public hearing on the problems for the realization of human rights within the framework of the so-called “Trans-Pacific Partnership Agreement,” particularly from the experiences of Mexico, Chile, and Peru.<sup>483</sup>

288. In this regard, the IACHR and its REDESCA take as their starting point that the Guiding Principles reflect that States must respect their human rights obligations when they sign political agreements on business activities and that their bodies and agents related to this field, such as trade law, exports, securities markets or investments, respect and are informed on the legal framework for human rights.<sup>484</sup>
289. The far-reaching impacts of investment or trade agreements and arbitration regimes between investors and States in the public sphere, including the States’ ability to comply with their human rights obligations, have caused various concerns about the current frameworks of governance and international investment.<sup>485</sup> Among some repeatedly alerted aspects, for example, are the power imbalances between the negotiating States and later Parties to the agreements; the legal flexibilization and legal reforms that harm human rights as a way of operationalizing and implementing the trade and investment agreements; the asymmetric legal protection of

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<sup>483</sup> IACHR. Public Hearing. Situation of human rights in the context of the implementation of the Trans-Pacific Partnership (TPP) in the Americas, 159 Period of Sessions, 7 December 2016. See also: Coleman, Jesse and Others. Human Rights Law and the Investment Treaty Regime, in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Ltd, forthcoming 2019); Columbia Center on Sustainable Investment, Due Process of Law Foundation, and Others. *Human Rights and the International Investment Treaty Regime in the Americas* (forthcoming 2019).

<sup>484</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 8 and 9. The Working Group on business and human rights also recently examined the role of the State within its activities and promoting investment and commerce. Cf. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/38/48, 2 May 2018. For its part, it is worth mentioning that within the discussions underway relating to the reform of the international investment system, there are also references to compliance with human rights norms and principles. Cf. UNCTAD. Phase 2 of UNCTAD’s Roadmap for IIA Reform ([Modernizing the existing stock of old-generation treaties](#)), June 2017; UNCTAD. Phase 2 of UNCTAD’s Roadmap for IIA Reform ([Reforming investment dispute settlement: A stocktaking](#)), March, 2019.

<sup>485</sup> In March 2019, for example, different independent United Nations human rights mandate-holders expressed concerns over the process of reforming the international investment system and suggested some avenues to better reflect human rights norms ([Letter OL ARM 1/2019](#), March, 7 2019). In general, see, IACHR. Public Hearing. Situation of human rights in the context of the implementation of the Trans-Pacific Partnership (TPP) in the Americas, 159 Period of Sessions, 7 December 2016; Committee on Economic, Social and Cultural Rights. General Observation No 24. UN Doc. E/C.12/GC/24, 10 August 2017, para.13; Report of the Special Rapporteur on the right to food. UN Doc. A/HRC/19/59/Add.5, 19 December 2011; Report of the Special Rapporteur on the right to health. UN Doc. A/69/299, 11 August 2014; Report of the Independent Expert on the promotion of a democratic and equitable international order, UN Doc. A/HRC/30/44, 14 July 2015; Report of the Special Rapporteur on the rights of indigenous peoples. UN Doc. A/70/301, 7 August 2015; Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights. UN Doc. A/72/153, 17 July 2017.

companies and investments to the detriment of victims of violations of their rights as a result of their activities and operations; and the use of international arbitrations to question governmental measures related to the protection of a wide range of human rights. For example, this includes through stricter environmental regulations, restrictions on industries in ecologically-sensitive areas, protections of the collective territories and resources of indigenous peoples and tribal Afro-descendant collectives, consultations seeking community consent or social impact evaluations, governmental decisions on fees for essential public services, or judicial cases and judgments seeking remedies for environmental damage, among others. It is also reported that in the majority of companies' arbitration claims, the tribunals in charge do not adequately address the human rights problems involved, or ignore them, are not transparent and prevent victims of human rights violations where they are involved from having access to the dispute resolution system and obtaining proper redress.<sup>486</sup> Even in instances in which the States is not sanctioned in an arbitration dispute, attention has been drawn regarding the high defense costs that must be incurred and the possible negative impacts for attracting future financing.<sup>487</sup>

290. This situation of potential conflict between the international investment regime and human rights norms may in fact inhibit States from taking the measures required by their human rights obligations, for example by not adopting regulatory frameworks or necessary policies to guarantee fundamental rights and freedoms by understanding them to be adverse to business interests, or preventing access to justice for victims of human rights violations in these contexts, all in order to avoid international complaints before arbitral tribunals. The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health highlighted, in this sense, that "international investment agreements and investor-State dispute settlement systems benefit transnational corporations at the cost of States' sovereign functions of legislation and adjudication. Existing international investment agreements have no checks on the activities of transnational corporations and many do not recognize States' prerogative to legislate and enforce health-related laws."<sup>488</sup>

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<sup>486</sup> See, inter alia, IACHR. Public Hearing. Public Hearing. Situation of human rights in the context of the implementation of the Trans-Pacific Partnership (TPP) in the Americas, 159 Period of Sessions, 7 December 2016; Cotula, Lorenzo y Mika Schröder. [Community Perspectives in Investor-State Arbitration. International Institute for Environment and Development](#). IIED (2017); El-Hosseny, Farouk. Civil Society in Investment Treaty Arbitration: Status and Prospects. Brill Nijhoff (2018) page 178; Coleman, Jesse and Others. Human Rights Law and the Investment Treaty Regime, in Surya Deva and David Birchall (eds), Research Handbook on Human Rights and Business (Edward Elgar Publishing Ltd, forthcoming 2019); Columbia Center on Sustainable Investment, Due Process of Law Foundation, and Others. Human Rights and the International Investment Treaty Regime in the Americas (forthcoming 2019).

<sup>487</sup> See, inter alia, Johnson, Lise and Lisa Sachs. [The Outsized Costs of Investor-State Dispute Settlement](#). AIB Insights 16(1) (2016).

<sup>488</sup> Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health. UN Doc. A/69/299, 11 August 2014, para. 4.

291. For his part, the United Nations Special Rapporteur on the rights of migrants also recommended that trade agreements include provisions on labor mobility and that the dispute settlement mechanisms foreseen in such agreements not undermine the ability of States to protect the rights of migrants.<sup>489</sup> In the same way, the United Nations Special Rapporteur on the rights of indigenous peoples “has become increasingly concerned about the actual and potential detrimental impacts of international investment and free trade agreements on the rights of indigenous peoples,” and in this sense highlighted, for example, that “[a]ll indigenous self-governance structures should be formally included in the decision-making relating to international investment agreements.”<sup>490</sup>
292. It is worth recalling that, “while business and investment is a laudable objective to be encouraged, it must be carried out on a platform that enhances and does not undermine human rights, within or beyond national borders.”<sup>491</sup> The Inter-American Court also has held that “[...] the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that standard in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.”<sup>492</sup> The IACHR and its REDESCA find it relevant to highlight, like the CESCR, that in these contexts States must refrain from signing agreements that may undermine their international human rights obligations, make continuous revisions of these regimes to make the necessary corrections and ensure compatible interpretations of investment rules with human rights, as is clear from the systematic interpretation provided for in Article 31(3)(c) of the Vienna Convention on the Law of Treaties,<sup>493</sup> measures that must be

<sup>489</sup> Additionally, he refers to the need for these commercial negotiations to “undertake comprehensive ex ante and ex post human rights impact assessments that consider the rights of migrants through direct consultations with migrants, migrants’ associations and trade unions, and, on the basis of these assessments, include relevant general exception clauses and other compensatory, adjustment, grievance and remedial mechanisms.” Cf. Report of the Special Rapporteur on the rights of migrants. UN Doc. A/HRC/32/40, 4 May 2016, para. 93 (c), (g) and (h).

<sup>490</sup> In particular, she has indicated that “fundamental and systemic reform of the international management of investment and free trade is necessary within the context of broader efforts to address the human rights issues associated with business activities. The situation whereby companies and investors enjoy exceptionally strong rights and remedies while the only mechanisms available to hold them to account for any human and indigenous rights violations are voluntary and/or have a weak standing in international law cannot be allowed to continue. Furthermore, indigenous peoples continue to bear an unequal share of the burden that situation creates, and suffer from a spectrum of severe rights violations within the context of corporate activities and the related managements of the globalized economy.” Cf. Report of the Special Rapporteur on the rights of indigenous peoples. UN Doc. A/70/301, 7 August 2015, paras. 7, 74 and 77.b.

<sup>491</sup> IACHR. Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 81.

<sup>492</sup> I/A Court H.R. Case of Sawhoyamaya Indigenous Community v. Paraguay, Judgment of 29 March 2006, Series C No. 146, para. 140

<sup>493</sup> It is also relevant to recall that the IACHR has already indicated that the State should take into account and ensure compliance with its international human rights commitments in its commercial relations with third parties, whether with States, companies, or other non-state entities. See IACHR.

implemented in order to comply with the obligations to respect and ensure human rights in accordance with the American Convention, in the context of negotiation, conclusion, implementation, dispute resolution and, where appropriate, review of trade agreements or investment treaties.

293. One of the ways to ensure the foregoing, for example, is the express inclusion of clauses respecting and protecting human rights in trade agreements, investment treaties, or economic integration agreements,<sup>494</sup> as well as ensuring transparency frameworks and greater public scrutiny in the processes of negotiation and review of these international treaties, even when they are already in effect. Expressly acknowledging the behavior required by human rights obligations within the investment or trade agreement both by the States Parties and by the companies or investors; including exception clauses to safeguard compliance with human rights norms and standards; or requiring permanent assessments of the human rights impact of investment or trade treaties,<sup>495</sup> will help to avoid conflicts or handle in a more appropriate manner the possible tensions that arise between both regimes.
294. In the same way, when there are arbitration mechanisms for the settlement of investment disputes, for example, it will be pertinent to recognize specific rights so that affected individuals and communities can intervene as third parties; ensure full access to all materials relevant to the protection of human rights; and to demand certain experience and knowledge in human rights matters for those who perform the arbitration function and more effective rules to regulate their conduct; even the evaluation of the loss of arbitration jurisdiction in certain cases or the possibility of accessing the courts of the investors' home states for claims of civil liability will be necessary.<sup>496</sup>
295. For the IACHR and its REDESCA, the inclusion of these clauses and the broad participation processes reaffirm the need for investment and development

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Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 74; Committee on Economic, Social and Cultural Rights. General Comment No. 24. UN. Doc. E/C.12/GC/24 2017, 10 August 2017, para. 13. In this sense, see also Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights. UN Doc. A/72/153, 17 July 2017.

<sup>494</sup> See, inter alia, Van Ho Tara and Others. [Proposed Investment Treaty Provisions](#). Essex Business & Human Rights Project. University of Essex (2018), and Coleman, Jesse and Others. Human Rights Law and the Investment Treaty Regime, in Surya Deva and David Birchall (eds), Research Handbook on Human Rights and Business (Edward Elgar Publishing Ltd, forthcoming 2019).

<sup>495</sup> In this regard see the Guiding Principles on human rights impact assessments of trade and investment agreements. Cf. Report of the Special Rapporteur on the right to food. UN Doc. A/HRC/19/59/Add.5, 19 December 2011.

<sup>496</sup> See, inter alia, Cotula, Lorenzo and Mika Schröder. [Community Perspectives in Investor-State Arbitration. International Institute for Environment and Development](#). IIED (2017); Van Ho Tara and Others. [Proposed Investment Treaty Provisions](#). Essex Business & Human Rights Project. University of Essex (2018), and Coleman, Jesse and Others. Human Rights Law and the Investment Treaty Regime, in Surya Deva and David Birchall (eds), Research Handbook on Human Rights and Business (Edward Elgar Publishing Ltd, forthcoming 2019).

to happen in accordance with the protection of human rights. They additionally facilitate safeguarding the State's faculty to adopt measures on the matter in order to ensure that investment activities are carried out in a manner that respects human rights standards and disincentivizes any investment that encourages undermining such standards.

296. The IACHR and its REDESCA also emphasize that it is also important to foresee, within these trade or investment agreements, mechanisms that ensure the effective compliance, monitoring, and application of such clauses, including not only rights but responsibilities, and eventual sanctions for companies that breach the agreement, and even allowing any of the contracting Parties to legitimately suspend the agreement in particular cases on non-compliance, or in extreme cases to terminate it. That is, establishing greater balance between the rights and responsibilities of the economic actors directly involved in order to avoid extended situations of corporate impunity. Although the IACHR and its REDESCA recognize that possible material and procedural reforms of the international investment and trade regime that take into account a human rights focus may take a long time and require extensive economic resources, they also stress that States continue to maintain specific human rights obligations and companies maintain the responsibility to respect them in light of the standards developed in this report. Therefore, the search for shorter-term alternatives, for example, to maintain a certain margin of regulation and reasonable capacity for accountability and effective reparation for victims when the conditions or effects of investment or trade may affect the exercise and enjoyment of human rights is necessary.<sup>497</sup>
297. On the other hand, the field of business and human rights also is particularly relevant as a parameter for the behavior and action of **multilateral credit bodies or international financing institutions**, such as the World Bank, the Inter-American Development Bank, the Development Bank of Latin America, the Central American Bank for Economic Integration, the National Development and Social Bank of Brazil, etc. The IACHR and its REDESCA recognize that said institutions play an important role in advancing toward achieving sustainable development and the reduction of poverty and, thus with transcendental influence in such contexts over better or worse effective enjoyment of human rights. Thus the express incorporation of human rights standards and safeguards within their structure, their policies, their operative frameworks, and their risk analysis are essential to reduce the possibility of being involved in contexts of financing and project development that compromise the enjoyment of such rights and fundamental freedoms. The IACHR and its REDESCA note that the human rights violations associated with the operations of these institutions mainly fall on the allegations of absence of adequate due diligence frameworks to prevent, monitor, and mitigate human rights risks in the projects they

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<sup>497</sup> See, inter alia. Johnson Lise and Others. [Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law](#). Columbia Center on Sustainable Investment (April, 2018)

finance; and in the absence of effective accountability mechanisms relating to human rights violations.<sup>498</sup>

298. Given considerable influence of these institutions in contexts relating to the enjoyment of human rights and the diverse range of relationships that they can establish with other private or public actors regarding their human rights responsibilities, the IACHR and its REDESCA highlight the importance that the Member States of the OAS sustain clear requirements and accountability mechanisms regarding respect for human rights regarding financing institutions in which they participate; without prejudice to said institutions having some type of protocol on the matter or autonomous monitoring or complaint mechanisms at an internal level.<sup>499</sup>
299. For their part, the States in whose jurisdiction projects are financed or in which such institutions are domiciled should also work to clearly demand respect for human rights. In this regard, it is highly important the decision issued by the Supreme Court of the United States of America in the case of *Jam v. International Finance Corporation*, in which the Court ruled that international organizations such as the World Bank may be sued in that country's courts for their commercial activities, overcoming the absolute immunity approach that traditionally had prevented these entities' accountability.<sup>500</sup>
300. Likewise, in looking to generate a climate that traditionally has been understood as favorable to investment by some sectors, there is the possibility that the States tend to weaken local social and environmental protections that serve as parameters for supervising corporate conduct or carrying out public policy reforms to this end.<sup>501</sup> Therefore, the Commission and its REDESCA view with concern civil society organizations' reports regarding the lack of prioritization of human rights in processes of said institutions' evaluation of risks that they tend to conduct at the moment they decide on financing a specific project. For the IACHR and its REDESCA,

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<sup>498</sup> See, inter alia, Indian Law Resource Center. [International Legal Standards for the World Bank and other Multilateral Development Banks. Written Statement presented to the 24th Regular Session of the UN Human Rights Council](#). August 21, 2013; Business and Human Rights Resource Centre. [Over 40 NGOs ask the Inter-American Development Bank to include a human rights focus in their call for investment](#), 14 June 2017; Coalition for Human Rights in Development. [Uncalculated Risk: Threats and attacks against human rights defenders and the role of development financiers](#) (2019).

<sup>499</sup> For more information on these mechanisms, consult, for example, the webpages of: [CAO \(Compliance Advisory Ombudsman\)](#) for bodies of the World Bank Group or the [MICI \(Mecanismo Independiente de Consulta e Investigación\)](#) for the Inter-American Development Bank group.

<sup>500</sup> Regarding the history and main documents of the case see: Earthrights. [Budha Ismail Jam, et al v. IFC An Indian fishing community takes on the World Bank](#) (2019).

<sup>501</sup> Nonetheless, the IACHR also observes that some initiatives recognize that non-compliance with standards regarding respect for human rights also creates risks for commercial projects or affect investment portfolios. Thus, for example, the [Principles for Responsible Investment](#), an initiative backed by the UN, point toward incorporating actions relating to environmental, social, and governance issues in the analysis and decision-making on investments. In the same way, the Principles for Responsible Contracting guide the integration of risk management related to human rights between the States and investors to optimize the benefits of investment and prevent or mitigate their potential negative effects on individuals and communities. In this regard, see: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/17/31/Add.3, 25 May 2011.

it is essential that the States promote these institutions incorporating within them an express culture of human rights and ensure specific guarantees to protect them as key elements in their processes of risk evaluation and operational systems when deciding their investments and selecting, designing, or monitoring projects, so that they do not contravene international human rights standards.

301. The foregoing also must include paying special attention to the risks to human rights linked to their business clients' operations themselves, the industrial sector they relate to, or even, third parties related with the project. It also requires integrating analysis of contextual risks relating to the enjoyment of human rights in the zone of influence of the project or business activity linked to the investment, since said analysis will provide valuable indicators to reduce existing threats or determine the viability of the same in light of their human rights impact.
302. A useful tool for these purposes, for example, may be generated if these financing and investment institutions include and give due consideration of the analysis, pronouncements, standards, and alerts that the regional or universal human rights system generates, regarding certain contexts, cases, or situations that threaten human rights and where said institutions are or may become involved. In this way, they may make adjustments or rethink the appropriate actions, not just before implementing a project but also during its life cycle. The inclusion of these elements coming from specialized human rights bodies may help prevent their activities or behavior from contravening these rights, whether their application to specific situations or to more general frameworks of due diligence in the field of human rights.
303. On the other hand, the IACHR and its REDESCA observe the existence of difficulties in identifying levels of responsibility among the involved actors and opacity to demand preventive actions, like human rights due diligence, accountability, and integral reparation, for example when there are joint or combined sources of financing and loans through financial intermediaries who do not comply with human rights safeguards, or under schemes that place pressure on the States putting their compliance with international obligations at risk.
304. By extending the link between these financial institutions and other private or public business actors, the latter acquire a more prominent role as recipients of development financing and as executors of the activities involved. Thus, the importance of respecting human rights in these circumstances may translate, for example, into robust human rights demands on borrowers in the design, implementation, and closure stages of the project, as well as the leadership of international financial or investment institutions and States that are members of them or that host the project in which corresponding human rights due diligence actions are implemented. Such as: preparing lists of companies with a long history of threats or harm to human rights for exclusion, suspending contracts, and specific sanctions



for breaching the duty to respect human rights, early warning tests, visits from independent experts with human rights knowledge, accessible complaint and participation mechanisms, designing plans or protocols to mitigate risks relating to the enjoyment of human rights, periodic reviews of the project as regards the enjoyment of the human rights involved, and support for the work of human rights defenders in these contexts. It is essential to facilitate public participation and adequate frameworks for transparency, in which affected people and communities have effective access to pertinent information and spaces so that they may freely express their concerns, including possible opposition to the project.

305. In general, projects or activities that have a high probability of producing serious human rights violations or exacerbating significant risks to human rights must be avoided. The risk analysis for financing projects should not only be centered on the probability that the loan will be repaid in the future and its profitability, but on ensuring the evaluation of the effects that granting the loan will have on the affected population and on the enjoyment of human rights, ensuring the participation of the involved people and communities in decision-making, including standards on free, prior, and informed consultation and consent from the earliest stages. In short, for the IACHR and its REDESCA, human rights must be a determinant factor both in the decision to invest and in actions to respond that are taken during the life cycle of the project or investment in question.
306. On the other hand, the IACHR and its REDESCA also view with concern information on allegations of human rights violations associated with **public procurement and purchases of goods and services, public contracts (for example for the completion of public works and infrastructure), operations of state-owned enterprises, public-private partnerships, systems for promoting exports, and public financing as well as diplomatic activities related to investment and trade under so-called “economic diplomacy.”**<sup>502</sup>
307. With respect to these cases, the REDESCA notes that the Guiding Principles indicate, for example, that the States that participate in multilateral institutions related with companies should respect human rights obligations in this field, and consistently act in a way that does not hinder or limit the observance of human rights.<sup>503</sup> They also include provisions referring to additional measures that States must take to protect human rights when companies they own or control are involved, or when state bodies facilitate public resources and credit, investment, or financing

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<sup>502</sup> In this regard, see, for example: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/32/45, 4 May 2016; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/38/48, 2 May 2018.

<sup>503</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principle 10.

services.<sup>504</sup> In the same way, they establish the key role of the State in ensuring human rights in contexts of public procurement and commercial transactions with companies.<sup>505</sup>

308. Given the direct intervention of state agents in this type of situations or their possibility of influencing or controlling them in regard to the creation of risks to the realization of human rights according to the particular facts of each case, the IACHR and its REDESCA consider that under these scenarios it is plausible that the States could incur international responsibility for breaching the aforementioned general duties to respect and guarantee. The absence of ineffectiveness of legal and institutional frameworks that provide clear and binding guidelines for due diligence in the field of human rights directly affects the creation of risks for the exercise of these rights, in the same way that it may generate barriers for accountability and adequate reparation for the victims.
309. For example, the REDESCA highlights the obligation of public credit and financing entities to incorporate standards on human rights and that due diligence or feasibility studies include, obligatorily, a study of the impact that the financing project may have on human rights, including the environment and labor rights. In these contexts, it is a priority for the IACHR and its REDESCA that there be clarity and transparency regarding the specific criteria adopted and the due diligence actions implemented by competent state bodies at the time of issuing this type of financial services. Likewise, it is necessary that the design of the human rights due diligence process provides for public access to said bodies' reports. While ensuring respect for the confidentiality of certain information about the investor, privacy does not imply secrecy; and therefore, privacy cannot serve as a mechanism to avoid making a project's possible implications on human rights known.
310. Just as in the contexts of privatization of essential public services for ensuring human rights or certain corporate activities or industries that by nature create predictable and significant risk for human rights, the IACHR and its REDESCA find that in these cases, the States should adopt additional protection measures, for example, in the framework of its processes for public procurement, against the abuses of companies they own or control, or through signing and applying investment treaties. Even actions or omissions attributable to the States in these contexts could generate a breach of their duty to respect human rights depending on the specific facts of the case. For example, in the context of extractive industries and development projects, the Commission has already emphasized that when it is the State itself implementing such activities, the state has direct

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<sup>504</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principle 4.

<sup>505</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principles 5 and 6.

obligations to respect and guarantee the human rights involved, with due diligence.<sup>506</sup>

311. For its part, in its analysis, the European Court on Human Rights has also taken into account the degree to which the State is linked to companies it owns or controls, to determine its international human rights responsibility. It has thus held that the separate legal status of a state enterprise, domestically, does not in itself relieve the State of its responsibilities under the European Convention on Human Rights for the business's actions or omissions, which may, according to the particular factual situation, generate direct state responsibility.<sup>507</sup> In addition to the domestic legal status of the business entity, the IACHR and its REDESCA observe that the European Court considered the nature of the activities it performs, the context in which the activities occur, and the degree of independence, whether operational or institutional, of the company from state authorities,<sup>508</sup> so that not only the obligations to ensure but also to respect human rights may be activated.
312. The evaluation of the actions due in each case will depend, to a large extent, on the level of relationship between the State's behavior and the factors that threaten or allow human rights violations related to corporate activities. For example, the relationship between the State and a public company is considered very close, regardless of whether the latter is a subject of private law and in a strict sense does not have the capacity to act as the state, or does not exercise any public function, unless the contrary is shown. This is because the State will always have, or should have, more means to oversee respect for human rights in these circumstances, as well as the possibility of exercising a greater level of control or influence over the company or, due to the nature of the involved business entity's activity. A similar situation arises when the State develops protocols or strategies for procurement or public purchases, negotiates or implements investment treaties, facilitates export credit, or participates in multilateral financing institutions. In all these circumstances, the States are required to exercise extreme caution to fulfill their duties to respect and ensure human rights and their impacts outside their territories.

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<sup>506</sup> IACHR. Indigenous Peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, para. 85.

<sup>507</sup> ECHR. Yershova v. Russia, (Application no. 1387/04) 8 April 2010, para. 98; ECHR. Krndija et al. v. Serbia, (Applications no. 30723/09 and 3 others), 27 June 2017, para. 66.

<sup>508</sup> ECHR. Mykhaylenky v. Ukraine, (Applications No. 35091/02 and 9 others), 6 June 2005, para. 45; ECHR. Yershova v. Russia, (Application no. 1387/04) 8 April 2010, para. 55 and 62; ECHR. Ališič et al. v. Bosnia & Herzegovina et al. (Applicationno. 60642/08) Grand Chamber, 16 July 2014, para. 114.



## CHAPTER 7

# THE CENTRALITY OF THE VICTIMS AND THE DISPARATE IMPACTS ON VULNERABLE POPULATIONS IN THE FIELD OF BUSINESS AND HUMAN RIGHTS IN THE REGION



## **THE CENTRALITY OF THE VICTIMS AND THE DISPARATE IMPACTS ON VULNERABLE POPULATIONS IN THE FIELD OF BUSINESS AND HUMAN RIGHTS IN THE REGION**

313. The IACHR stresses that the focus of its attention on individuals and victims of human rights violations and their dignity is a basic guideline in the regional work that guides its action within the hemisphere. This criterion also is essential when analyzing the different situations that may arise in the field of business and human rights, particularly those individuals or groups who are in situations of particular vulnerability.
314. The IACHR and its REDESCA find it important to stress that, based on the Member States' previously described obligations, they have the duty to pay special attention to social groups and people that have suffered forms of historical exclusion or are victims of prejudices or persistent threats, and adopt immediate and socioculturally adequate measures needed to prevent, reduce, and eliminate the conditions and dispositions that generate or perpetuate infringements of their human rights. Under the field of business and human rights, the IACHR and its REDESCA stress that the States' obligations to respect and ensure human rights in this area, as previously noted, play a critical and fundamental role, a breach of which could materialize human rights violations; thus it is crucial not only that the States respect human rights in these contexts and make efforts to ensure that businesses, including investment and financing institutions, also comply in respecting human rights, but that the same companies pay special attention to whether their operations and projects generate or play a part in generating differential, compounded, and intersectional negative effects on these individuals or groups in situations of vulnerability.
315. Businesses have a key role to play in the sustainable and equitable development of the people, and in this regard to foster greater effectiveness of the enjoyment of human rights and respect for the environment through their own activities, as long as they incorporate a human rights focus in their operations. Thus, the incorporation of due diligence for human rights with regard to their operations, effective accountability or public support for the effective exercise of certain vulnerable groups' rights, such as the LGBTI population, women, children and youth, or human rights defenders, including environmental rights defenders, are positive example that foster this result.
316. General information was provided by the Member States and civil society

organizations about some challenges and risks that these populations face in the inter-American context within the field of business and human rights. This illustrates some of the disparate effects regarding said people and groups. By no means do the following paragraphs comprise either complete or exhaustive data on all the situations of infringement or corporate practices in the region that impact these groups, nor on other groups that are also in a particular position of vulnerability in these contexts, such as young people, people living with HIV, people that suffer particular sicknesses or viruses, such as cancer or tropical diseases, people living on the street, and those in poverty or extreme poverty. The IACHR and its REDESCA also intend to use this section as a request of information to continue to build knowledge in a differentiated manner, based on their respective experiences and knowledge, as to the particularities that these populations face in the field of business and human rights.

## **A. *Human Rights Defenders***

317. Regarding human rights defenders, which also include unionists, environmentalists, journalists, activists, and professionals that work in the field of prevention of and accountability for human rights violations relating to business activities, the IACHR and its REDESCA consider it a priority to emphatically reiterate the importance of these individuals' work not only for the effective realization of human rights but also for the consolidation of democracy, sustainable development, and the rule of law. Likewise, they reiterate that the States must establish a clear legal framework, which provides for sanctions against companies that are involved in the criminalization, stigmatization or abuse against those who defend human rights.<sup>509</sup> In this regard, the IACHR and its REDESCA have observed with deep concern, the increase in risks, harassment, criminalization, and attacks that these individuals have been facing in the region. According to the Business and Human Rights Resource Centre, Latin America accounts for almost 50% of all attacks against human rights defenders worldwide, relating to corporate activities. The types of abuse include restrictions on freedom of speech and assembly, beatings, eviction, intimidation, smear campaigns, and judicial harassment and even torture and killings. Moreover, the main industries involved in such threats and infringements are the agricultural, mining, energy (petroleum, gas and hydroelectric), and forestry industries. In such situations, human rights defense was linked to

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<sup>509</sup> IACHR, Towards Effective Integral Protection Policies for Human Rights Defenders. OEA/Ser.L/V/II. Doc. 207/17. 29 December 2017. para. 143; IACHR. Public Hearing. Improper use of criminal justice systems to retaliate against defenders of human rights and the environment, 173 Period of Sessions, 26 September 2019.



the protection of land and territory (36%), the environment (31%) and labor rights (21%).<sup>510</sup> Also, according to data collected by Global Witness, the year 2017 was the most dangerous year for land and environmental defenders due to the large amount of reported killings; in particular they point out that at the regional level, Brazil, Colombia, Mexico, Honduras, Peru, and Nicaragua are the countries that have the most reported killings; and on the global scale, Latin America accounts for almost 60% of serious violations and 7 of the 10 most dangerous countries.<sup>511</sup>

318. From a global context, the UN Human Rights Council also expressed its deep concern in response to the threats and attacks against environmental defenders and acknowledged the significant role of these individuals in identifying, preventing, and raising awareness about human rights impact linked to development projects and corporate activities; thus, the IACHR and its REDESCA support the Human Rights Council's emphasis on the need to guarantee the safety and protection of such people in those contexts.<sup>512</sup> Other studies show the ongoing and grave conditions of threats and attacks against people in the framework of activities in the development industry, emphasizing the role of international financial institutions, specifically, pointing out that, despite commitments to ensure social and environmental safeguards, and even having some guidelines to handle these situations, said institutions continue to finance activities and projects that cause significant harm in communities and infringements on the work and rights of human rights defenders, thus failing to exercise due diligence as to human rights, ignoring risks or threats, and not using the tools and privileged position that they hold to respond effectively to such situations of threats.<sup>513</sup> Given the role of the States as being part of these institutions and facilitate financing the implementation of this type of projects, the IACHR and its REDESCA highlight the importance of creating independent and collaborative systems, in which the concerns of the human rights defenders are taken into account, as well as emphatically supporting the work that they perform and provide timely and effective responses when in danger.
319. The IACHR also has repeatedly expressed its concern regarding this kind of aggression and threats. In 2018 alone, the IACHR condemned multiple reported killings of human rights defenders in Brazil, Colombia, and Guatemala, many of which were related to protecting land and the environment.<sup>514</sup> The Special Rapporteur on the situation of human rights

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<sup>510</sup> Business and Human Rights Resource Centre. [Business, Civic Freedom & Human Rights Defenders Portal](#) (April 2019). Business and Human Rights Resource Centre. [Focus on Human Rights Defenders under threat and attack](#) (January 2017).

<sup>511</sup> Global Witness. [At what cost? Irresponsible business and the murder of land and environmental defenders in 2017](#) (July 2018).

<sup>512</sup> Human Rights Council. Resolution No. 40/12, UN Doc. A/HRC/40/L.22/Rev.1, March 20, 2019.

<sup>513</sup> [Coalition for Human Rights in Development. Uncalculated Risk: Threats and attacks against human rights defenders and the role of development financiers \(2019\)](#)

<sup>514</sup> IACHR. [IACHR Condemns Murders of Human Rights Defenders and Social Leaders in Colombia, July 19, 2018](#); IACHR. [IACHR Condemns Murders of Human Rights Defenders Linked to Environmental and Land Rights and to Rural Laborers in Brazil, July 27, 2018](#); IACHR. [IACHR](#)

defenders recently issued the first global report, categorized by country, on the situation of this group of people stating that, although there may be a relation between support and collaboration and business and human rights defenders, there are also concerns for the negative effects generated towards them; included in the report are various situations of infringement in the countries of this region in such contexts.<sup>515</sup>

320. In this regard, among the complaints received for this report, for example, the International Network for Economic, Social and Cultural Rights mention the threats and harassment against peasant communities and movements that oppose the “La Colosa” mining project operated by foreign company Anglo Gold Ashanti in the department of Tolima in Colombia. For its part, the law department at the University of Arizona made the IACHR aware of the serious situation of repression, threats, and criminalization of indigenous human rights defenders in the United States who opposed the “Dakota Access Pipeline” project in Standing Rock related with the development of the extractive industries in their territories without having completed a free, prior, and informed consultation. In this regard, they indicated the significant threat over their right to water and their sacred sites, as well as their physical and cultural survival. According to reports, the police, private security forces, and the company in charge of the project exercised an unjustified use of force and violence against the protesters, in many cases these individuals were arrested and criminally charged. According to reports, 841 individuals were detained for exercising their rights to defend water, to freedom of expression, and to freedom of peaceful assembly. They also alleged being subjected to surveillance by public authorities and the company, as well as the existence of several initiatives to reform legal rules in order to restrict the protest and criminalize the opposition to these matters to the benefit of extractive industries.<sup>516</sup> Another matter that the IACHR and its REDESCA observe with concern is the threat to the rights of these individuals in the framework of corporate activities, for example, the situation of risk of the Broad Movement for Dignity and Justice and their families in Honduras, to whom the IACHR issued precautionary measures in 2013, due to complaints of aggression, harassment, and death threats in the context of their work defending human rights arising from corporate extractive activities and projects for exploiting natural resources.<sup>517</sup>

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**[Expresses Alarm over the Increase in Murders and Aggressions against Human Rights Defenders in Guatemala, October 31, 2018.](#)**

<sup>515</sup> UN Special Rapporteur on the Situation of Human Rights Defenders. [World Report on the situation of human rights defenders: Americas](#) (December, 2018), Pages 154-224.

<sup>516</sup> The University of Arizona, Rogers College of Law. Report to the IACHR: Criminalization of Human Rights Defenders of Indigenous Peoples Resisting Extractive Industries in the United States (June, 2019). Al respecto ver: CIDH. Audiencia Pública. Criminalización de personas defensoras de derechos humanos de pueblos indígenas y la industria extractiva en Estados Unidos, 172 Período de Sesiones, 9 de mayo de 2019; Informe de la Relatora Especial sobre los derechos de los pueblos indígenas relativo a su misión a los Estados Unidos de América. UN Doc. A/HRC/36/46/Add.1, 9 de agosto de 2017.

<sup>517</sup> IACHR. Resolution 12/2013. Precautionary Measure 416/13 18 members of the Broad Movement for Dignity and Justice and their families (Honduras), 19 December 2013. Among other protection measures issued by the IACHR see also: IACHR. Resolution 65/2016. Precautionary Measures 382/12.

321. The Inter-American Court has also given visibility to the situation of vulnerability of human rights defenders in the context of corporate activities. For example, it has found State responsibility for the murder of an environmental leader in Honduras due to “the existence of signs of state participation and the lack of a diligent investigation that adequately addresses lines of investigation linked to his environmental defense work.” Likewise, in the analysis of the case, the Court recognized Carlos Escaleras’ human rights defense work, particularly environmental defense work, as an essential element, as well as his opposition to corporations’ activities that harmed the environment and held that there had been “signs that the attack against his life happened based on his environmental defense work, particularly his fight against the construction of an extractive plant near the Tocoa river [...]”<sup>518</sup>
322. For its part, the Commission has voiced its concern over the use of criminal law against indigenous, Afro-descendant, campesino and community leaders, as well as against defenders associated with the protection of the land, natural resources and the environment, in retaliation for their opposition to extractive activities and for decrying the negative impact that said projects have on the ecological balance, on human health, on community relationships, or on the enjoyment of other rights.<sup>519</sup> In particular, the Commission points out that private companies not only file complaints for unfounded criminal prosecutions, but sometimes conduct smear campaigns against human rights defenders in order to affect their credibility, as well as forming alliances with military and police officers to obtain their arrest.<sup>520</sup>
323. In general, the Commission and its REDESCA emphatically reject the undue use of the criminal justice system against these individuals by the authorities and by corporations themselves in order to curtail their work. This situation does not just individually threaten these human rights defenders’ work, but it also broadly puts in check the due protection of human rights, including the right to a clean environment, by intimidating, criminalizing, and generating a hostile environment for those who dedicate themselves to this important work.<sup>521</sup> In particular, the IACHR and its

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Board of Community Action of the Rubiales neighborhood (Colombia), 17 December 2016; IACHR. Resolution 9/2014. Precautionary measures 452/11. Leaders of peasant communities and Rondas Campesinas of Cajamarca (Peru), 5 May 2014; IACHR. Resolution 11/2014. Precautionary Measures 50/14. Campesino Leaders of Bajo Aguán (Honduras), 8 May 2014; IACHR. Resolution 13/2013. Precautionary Measures 193/13. Leaders and human rights defenders from the Nueva Esperanza community and the Regional Board of the Florida Sector (Honduras), 24 December 2013.

<sup>518</sup> I/A Court. Case of Escaleras Mejía and others v. Honduras. Judgment of 26 September 2018. Series C No. 361, paras. 67 and 68.

<sup>519</sup> IACHR. [IACHR issues call for OAS States to Protect Defenders of the Land and Environment](#), June 5, 2017.

<sup>520</sup> IACHR. Report on the Criminalization of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15, December 31, 2015, para. 68.

<sup>521</sup> In this regard, the Inter-American Court has also held that “This social effect of intimidation, given the importance of the work performed by human rights defenders, causes severe harm for the community as a whole, since when the work of human rights defenders is trying to be silenced, beyond violating their personal guarantees, the citizenry is denied the possibility of obtaining justice for human rights violations, socially verifying their compliance, and supporting and accompanying

REDESCA stress that environmental defenders are particularly severely and increasingly threatened in the continent, given the demand for exploitation and usage of natural resources and the existence of private interests with the ability to influence the institutions of the State, for example, by weakening or avoiding the full exercise of the regulatory and supervisory functions of the competent government bodies, or by unduly influencing the justice system or making abusive use of criminal laws.

324. The IACHR and its REDESCA continue to receive concerning information about the situation of extreme vulnerability in which the continent's environmental defenders find themselves subjected to situations that, in addition to physical and psychological aggression and harassment, could entail unfounded criminal charges, politically motivated application of criminal laws, due process violations, arbitrary use of preventive detention, infringements on the right to defense and to a reasonable time in criminal proceedings, forced evictions, improper criminal investigations, arbitrary detentions, irregular arrests, as well as strategies of defamation and smear campaigns as means of intimidation and coercion by public authorities and particularly by businesses.<sup>522</sup>
325. In particular, criminalization and public stigmatization of human rights defenders pose serious threats and impacts that tend to be less visible in society, since they appear to be an apparent legitimate use of legal tools, but in reality they are intended to manipulate public opinion or the justice system itself for private benefits. The IACHR and its REDESCA observe that these forms of repression become more subtle in their obstruction of human rights defense work, since abusing the criminal justice system does not tend to draw as much attention as death threats, attacks, or more direct aggression, identifying them is more complex and documenting them is certainly difficult. The appearance of neutrality in the use of criminal laws or the dissemination of misleading and false discourse against human rights defenders make it more difficult to fight it and more difficult to protect these individuals.<sup>523</sup> Thus, they stress the importance of duly weighing these individuals' immediate need for protection in this kind of situations of risk so that, for example, certain formal or evidentiary requirements do not impede their protection.
326. The IACHR and its REDESCA also consider it important to highlight that, generally, the criminalization and stigmatization of these individuals

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victims." Cf. I/A Court. Case of Escaleras Mejía and others v. Honduras. Judgment of 26 September 2018. Series C No. 361, para. 70.

<sup>522</sup> IACHR. Public Hearing. Improper use of criminal justice systems to retaliate against defenders of human rights and the environment, 173 Period of Sessions, 26 September 2019. See also: Report on the improper use of criminal justice systems to retaliate against defenders of human rights and the environment presented by civil society organizations in the context of the 173 Period of Sessions of the IACHR, 21 September 2019.

<sup>523</sup> See, inter alia, IACHR. Public Hearing. Improper use of criminal justice systems to retaliate against defenders of human rights and the environment, 173 Period of Sessions, 26 September 2019. See also: Report on the improper use of criminal justice systems to retaliate against defenders of human rights and the environment presented by civil society organizations in the context of the 173 Period of Sessions of the IACHR, 21 September 2019.

produce serious psychological, professional, and material impact for victims and their families, rupture community ties, reduce the space for civic participation and human rights defense, weaken the rule of law, and in the case of criminalization of environmental defenders, directly threaten the right to a healthy environment, and connected human rights, by allowing a greater margin of impunity both for the state actors and the companies that infringe upon them.

327. Generally, the IACHR and its REDESCA reiterate their serious concern over the situation of human rights defenders, and particularly those who defend the environment in the context of corporate activities, by being a target for diverse kinds of attacks throughout the continent. In this regard, they recall that the States are the first ones responsible for ensuring that violations against human rights defenders are prevented, identified, and punished. It is urgent that the States, and businesses themselves, including investment and financing institutions, implement effective actions that stop the growing forms of aggression, criminalization, and surveillance against these individuals, and impunity, in the framework of corporate activities.
328. Similarly, and bearing in mind what has been discussed *supra* regarding the extraterritorial application of the Member States' human rights obligations, it is important to highlight the decision of the U.S. Court of Appeals for the Third Circuit, which allows further analysis of a lawsuit against a corporation based in the United States, but whose operations, through its subsidiaries, have allegedly resulted in violations and abuse of a human rights defender and her family in Peru.<sup>524</sup> To the IACHR and its REDESCA, such decisions not only serve to continue defining and adjusting the behavior expected of companies located outside of their country of origin through judicial supervision at the head of the State, but also allow for protective provisions to be made for people in a situation of risk, such as human rights defenders.
329. In the case of women human rights defenders, in the context of corporate activities, specifically those relating to exploitation of natural resources projects, the IACHR and its REDESCA note that they face threats and specific challenges due to their gender, such as rape and sexual harassment, physical and psychological violence, discrimination, economic marginalization and stigmatization or misogynist defamation, among others; for which, Member States, must take further action to eliminate the mainstreamed sexism and machismo in these situations. For example, the Commission has been following, with great concern, the situation of the Zapotec indigenous defender Lucila Bettina Cruz, a beneficiary of precautionary measures, due to the risks faced in the framework of development of a wind-powered energy project in Mexico. According to the facts analyzed, the defender is subjected to media smear campaigns and defamation, having receiving death threats, as well as being subjected to acts or harassment and aggression based on her human rights defense work

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<sup>524</sup> **United States Court of Appeals for the Third Circuit. [Case No. 18-2042, \*Máxima Acuña-Atalaya, et al. v. Newmont Mining Corporation, et al.\*](#), March 20, 2019.**

in the context of the activities of public authorities and the company “Eólica del Sur.”<sup>525</sup>

330. Finally, the IACHR and its REDESCA also received troubling reports stating that union members and other workers identified as human rights defenders have been and are specific targets of attacks, whether in the context of armed conflict and past dictatorships, or within other contemporary regional situations.<sup>526</sup> Additionally, various reports and complaints have been received reporting economic actors, whether independently or with complicity of the State, concerning threats, murder, arbitrary detention, surveillance and wire tapping, blackmail, harassment and dismissals, stigmatization campaigns and criminal prosecution, among other forms of aggression carried out in order to undermine the position of the workers, restricting their enjoyment of labor rights and hinder their union rights, including the right to collective bargaining and strike. The IACHR and its REDESCA note that there are several public complaints, and they refer to both public and private business entities, within various countries and in diverse industries. For example, the defense of union rights in melon plantations in Honduras,<sup>527</sup> food processing in Guatemala,<sup>528</sup> the cement industry in México,<sup>529</sup> the civil aviation sector and union leaders in general in Colombia,<sup>530</sup> or the press in Argentina,<sup>531</sup> among many others.

## B. Women

331. The IACHR and its REDESCA deem it necessary to highlight that the States have a key role when guaranteeing the human rights of women in the context of business activities, insofar as such activities impact the enjoyment of these rights. Generally, the threats that women face in this

<sup>525</sup> IACHR. Resolution 1/2018. Precautionary Measures 685/16. Lucila Bettina Cruz and her family (Mexico), 4 January 2018.

<sup>526</sup> IACHR. Public Hearing. Guarantees for Freedom of Expression, Association, and Peaceful Assembly for Trade Unions in the Americas. 169 Period of Sessions, October 2, 2018

<sup>527</sup> See, inter alia, In These Times. [Labor unrest is erupting on Honduran plantations and rattling the global supply chains](#), February 13, 2019; The Times. [Union row costs Fyffes its ethical recognition](#), March 26, 2019.

<sup>528</sup> Confederación Sindical de Trabajadores/as de las Américas. [CSA and CSI condemn new murder against union leader in Guatemala](#), September 4, 2017; Solidarity Center. [Guatemala: Another unión leader murdered](#), September 7, 2017.

<sup>529</sup> El Sol de Hermosillo. [Employees of cement company report unjustified layoffs](#), 22 January 2019; Industriaall-union. [LafargeHolcim fires workers for organizing unión in Mexico](#), April 2, 2019.

<sup>530</sup> See, inter alia, Business and Human Rights Resource Centre. Colombia: Firings of 107 pilots and punishment for 109 participants in the Avianca strike: international unions express solidarity (information collected between 2017 and 2018); El Espectador. [The Avianca chapter in the illegal wiretaps](#), December 22, 2018; Industriaall-union. Union leaders in Colombia suffer threats and violence, August 27, 2018.

<sup>531</sup> See, inter alia, TELAM. [La agencia Telam tiene futuro](#). June 26, 2018; El País. [Argentina protests over the firing of 354 works from the state news agency](#), June 5, 2018; Tiempo. [The Works of Telam protested against the punishment of journalists for protesting on 8M](#), March 22, 2018. Pagina 12. [Fired after protesting the 8m](#), March 21, 2018

field are always distinguished by the amount of prevalent discrimination and gender violence in societies, the power imbalance between corporate actors and women, the State's omissions in their protection, the impunity for these acts and the lack of complaint mechanisms, as well as the intersectional impact over them when different factors of discrimination coexist. This is worsened by the fact that such situations and behaviors are part of a social, political and patriarchal structure context that supports and conceals them; for example, undermining their right to fair and equal labor conditions compared to men, having less access to and participation in the use of land and natural resources in their interaction in corporate activities, or the disproportionate burden that may be placed on girls and women in contexts of privatization of basic services, such as it is the education field.

332. While recognizing the extent of the areas compromised in the respect and protection of women's rights in this context, such as land and natural resource management, privatization and essential services for the enjoyment of human rights, trade and investment, access to effective remedy, contexts of armed conflict and transitional justice, or employment and labor rights,<sup>532</sup> among others, as well as the need to extensively examine each of these topics, general reference will only be made to the issue of employment and labor rights, considering the scope and focus of this report. Nevertheless, the IACHR and its REDESCA stress the need to integrate, on a mandatory basis, a gender-based perspective in the context of the actions taken by the States relating to this field, as well as in the context of the due diligence processes demanded of employers on human rights matters; specifically, this requires a comprehensive approach to the impact that operations and business structure have on women and a comprehensive approach to observing the intricacies and specific needs in the framework of prevention, supervision, or accountability related to violations of women's human rights.<sup>533</sup>
333. In this context, regarding the field of the employment and labor rights, the State of Argentina, for example, highlighted the unequal distribution between men and women, as well as the unequal distribution of unpaid household chores and caregiving. In this sense, Argentina expressed its support of initiatives to a) increase the participation of women in the economy; b) reduce the gender pay gap; and c) promote the participation of women in leadership positions; they also highlighted the existence of the Commission on Equal Opportunity as a cross-sectional space where

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<sup>532</sup> The Danish Institute for Human Rights. [Women in Business and Human Rights](#) (2018); Bourke Joanna and Elizabeth Umlas. [Gender-responsive due diligence for business actors: Human Rights-based approaches](#). Geneva Academy, December 2018; Marston, Ama. [Women, Business and Human Rights: A background paper for the UN Working Group on Discrimination Against Women in Law and Practice](#). Marston Consulting, March 7 2014.

<sup>533</sup> In this regard, the Working Group on business and human rights has found that: "To eliminate all forms of discrimination against women and achieve substantive gender equality, States and business enterprises should work together with women's organizations and all other relevant actors to ensure systematic changes to discriminatory power structures, social norms and hostile environments that are barriers to women's equal enjoyment of human rights in all spheres." Cf. Working Group on the issue of human rights and transnational corporations and other business enterprises. UN Doc. A/HRC/41/43, 23 May 2019, para. 44.



involving various actors from the union, business and public sectors, as well as the work carried out by the National Communications Agency on the prevention of media violence against women, as well as the *Oficina de Asesoramiento sobre Violencia Laboral* [Advice Bureau on Violence in the Workplace] which pointed out that during the first half of 2017, 87% of complaints were submitted within the private sector and that 78% of the victims were women. On the other hand, Ecuador, named the following among the major concerns in the workplace: the gender pay gap to the disadvantage of women, weak monitoring mechanisms on the labor conditions for women in all economic sectors, limitations to time off and maternity leave, and intersectionality of different forms of discrimination against women.

334. Along these lines, the Brazilian Ministry of Labor commented on the major inequality between men and women in access to the job market. According to the information provided, the average salary of women figured to 77.5% of what is paid to men. Moreover, it indicates that, from the point of view of the role of businesses in the framework of guaranteeing women's rights, there are no effective policies to guarantee equality and representation in access to leadership positions and that they continue to face discriminatory practices in the workplace. Patriarchal structures and the prevalence of negative and harmful gender stereotypes about women not only creates serious obstacles to women leading and directing companies, but also influences many business marketing and business practices that normalize discriminatory social norms against women. In this sense, the States must take special measures so that women are not objectified in the processes of production or the provision of businesses' services and to take concrete action to promote women's promotion to leadership and management positions.
335. The Commission and its REDESCA emphasize that the influence of these negative sociocultural stereotypes may also seriously affect investigations in cases of workplace violence and harassment, by being marked by stereotypical notions of how women should behave. Hence the importance of States fighting to eradicate them. For example, in cases of violence against women, including those related to business activities, the general obligations established in Articles 8 and 25 of the American Convention are complemented and reinforced, for those States that are Parties, with the obligations derived from the specific inter-American treaty on the subject, the Convention of Belém do Pará. Article 7(b) of this Convention specifically obligates the States Parties to utilize due diligence to prevent, punish, and eradicate violence against women. Thus, when faced with an act of violence against a woman, in the context of business activities, it is particularly important that the authorities in charge of the investigation carry it out with determination and effectiveness, taking into account society's duty to reject violence against women and the State's obligations to eradicate it and to give victims confidence in the state institutions for their protection.



336. The Commission and its REDESCA emphasize, in particular, the importance of women's contribution on the effectiveness, innovation and profits that businesses make, in addition to the general contribution that they provide to every national economy. Further, they recall with concern that, despite the significant increase of female participation in the labor market within the region, this income still does not translate into truly equal opportunities for women, a condition that is worsened among indigenous and Afrodescendant women, whether in the workplace, in access to quality jobs, or in the establishment of labor relations based on equality.<sup>534</sup> This situation has an impact on the full enjoyment of other human rights, thus the States should redouble their actions to overcome these challenges. In this context, the IACHR and its REDESCA emphasize the importance of implementing the Beijing Platform for Action as a roadmap for achieving gender equality on these issues. In particular, they call attention to women's contribution to development not just through paid work but also through important unpaid work, for example, related to domestic work, childcare, children and older individuals in the homes, protection of the environment, or unpaid work in family businesses, among others. Greater visibility of this work will contribute to better sharing these responsibilities with men and seeing women's rights guaranteed. Thus the States, for example, must take concrete and effective actions to determine the value of the unpaid work of women and to reflect this in their employment and social security policies, or in reviewing and reformulating policies or norms regarding the field of business or commerce in order to ensure that there is not discrimination against women.<sup>535</sup>
337. The IACHR and its REDESCA have received information on business activities that, together with the lack of protection by the State, contribute to the perpetuation of discrimination and pervasive violence against women, contribute to maintaining unstable and vulnerable labor conditions, and give rise to disproportionate and specific abuses based on gender. For example, violence and harassment in the workplace, including sexual harassment, continue to be situations of great concern for the Commission and its REDESCA since they do not only limit women's professional development but also directly violate the enjoyment of their human rights, with serious consequences. The IACHR and its REDESCA emphasize the importance of the recent adoption of a treaty on this subject and its recommendations within the ILO, which will guide the behavior demanded of the States Parties in a more concrete way;<sup>536</sup> however, they also emphasize that in light of the interpretation of other sources of international law regarding women's rights, the States are obligated to respect and guarantee their rights in the workplace,<sup>537</sup> which includes, for

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<sup>534</sup> IACHR. The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social, and Cultural Rights, OEA/Ser.L/V/II.143 Doc. 59, November 3, 2011, para. 81

<sup>535</sup> Beijing Platform for Action. Fourth World Conference on Women held 4 - 15 September 1995, paras. 150 - 180.

<sup>536</sup> ILO. Convention No. 190 Concerning the Elimination of Violence and Harassment in the World of Work, June 21, 2019.

<sup>537</sup> In this regard, see, for example, the statement issued by diverse international experts on the rights of women, ["Violence and harassment against women and girls in the world of work is a human rights](#)

example, implementing laws for the eradication of violence and harassment at work, preventive measures that involve the policies of the companies themselves, and effective access to remedies and reparations for women who are victims of workplace harassment and violence. On its part, the irregular application of maternity leave or the lack of access to this right, added to an absence or dearth of paternity leave in the region in the context of business activities, also directly infringe upon the autonomy of women who have to take on disproportionate burdens in caretaking for their children; hence the importance that States establish clear, binding rules, and monitoring and supervision actions, aimed at effectively protecting women's rights in these contexts.

338. On the other hand, other situations in which the Commission and its REDESCA have been informed about infringements upon the rights of women in the context of business activities refer to the conditions that women working in the assembly and textile industries experience, including having to work under hazardous, precarious and unhealthy conditions, being required to undergo pregnancy test in order to be hired, and being made to work double shifts, and other such violations.<sup>538</sup> Research conducted on this subject matter shows serious violations against labor rights of these female workers, specifically, in Nicaragua, Guatemala, El Salvador, and Honduras. In this scenario, the privileges offered by the States to these companies (especially financially) and their omissions in supervising compliance with labor laws, contrast with the exhausting workdays to which the workers are subjected. This adds to factors that violate their dignity, such as the hygienic conditions of the factories or restrictions on bathroom access.<sup>539</sup> In this sense, REDESCA also received information about women that work in rural activities: like the trade union association ASTAC (*Asociación Sindical de Trabajadores Agrícolas Bananeros y Campesinos*) in Ecuador, reporting that female banana farm workers receive lower salaries than men, even though they do the same work. Sometimes their managers subject them to sexual harassment. Likewise, the IACHR and its REDESCA learned that in the context of the collapse of a tailings dam in the tragedy in Mariana, Brazil in 2015, the work of the affected women was not recognized as a basis for receiving equal compensation to the men, considering women dependent on their partners and assuming they do not pay their own rent, and thereby limiting their participation in existing forums for discussion in the reparation process.
339. Lastly, the Commission and its REDESCA express their concern that women are not only underrepresented in leadership and management positions within businesses, but also are forced to resort to insecure, dangerous and unstable kinds of employment. The types of jobs available to women are far more likely to be in the informal sector, where the labor conditions, in

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[violation, say independent human rights mechanisms on violence against women and women's rights](#)," May 31, 2019.

<sup>538</sup> IACHR. *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social, and Cultural Rights*, OEA/Ser.L/V/II.143 Doc. 59, November 3, 2011, para. 115

<sup>539</sup> OXFAM. *Rights that hang by a thread*, April 2015.

comparison to jobs available to men, are less safe, offer lower or inconsistent salaries, the employment status is mostly short term and the work hours are irregular. The women working in this sector also are particularly vulnerable to harassment, physical abuse, including sexual violence, both in the work place as well as during the commute to work, especially in conflict and post-conflict environments.

### **C. *Indigenous peoples, Afro-descendant communities and rural population***

340. It is noteworthy to remember that the first report that the Commission decided to prepare regarding the field of business and human rights focused explicitly on developing standards to guarantee the rights of indigenous peoples and Afro-descendant communities within the framework of the business activities of extractive industries and development projects. This was due to the extensive information and complaints concerning the differentiated and significant impact that this sector generates regarding these populations in the region, insofar as the extraction and development projects are often implemented in territories historically occupied by these groups that host a large quantity of natural resources. The IACHR also mentioned that their impacts are multiple, complex, and intertwined with other situations of violations of rights, such as poverty and extreme poverty, historical exclusion and discrimination, as practices of assimilation, territorial dispossession and denial of their rights.<sup>540</sup>
341. Previously, the Commission also addressed how the activity of certain businesses, and natural resource development, exploitation, and extraction activities directly and indirectly threatened the enjoyment of the rights of indigenous peoples in voluntary isolation and first contact. For example, it indicated that the extraction of timber with high commercial value and hydrocarbon activities represent two of the main threats to the physical and cultural survival of these peoples, not only due to the negative impacts of such activities themselves, but also due to the high risk of contact with third parties or workers from the companies.<sup>541</sup> The Commission continued analyzing these threats and placed particular attention on specific indigenous and tribal populations. For example, it identified that business activities related to mining, infrastructure, hydroelectric power, energy, hydrocarbons, and agroindustry, the pollution they generate, deforestation and the loss of biodiversity are obstacles and serious threats to the use and enjoyment of Pan-Amazonian indigenous territories and human rights in

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<sup>540</sup> IACHR. *Indigenous Peoples, Afro-descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. OEA/Ser.L/V/II. Doc. 47/15, December 31, 2015, para. 16 and 149

<sup>541</sup> IACHR. *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the full respect of their rights*, OEA/Ser.L/V/II., 30 December 2013, Chapter V.

general.<sup>542</sup> The Commission concluded that the arrival and expansion of outside economic activities in the pan-Amazon region generated changes in these indigenous populations' way of life there, without respecting their right to development or their worldview.<sup>543</sup>

342. In this regard, the IACHR stressed that overcoming these peoples' situation of vulnerability, as well as their recognition and protection as peoples who have their traditional and ancestral ways of life, requires extensive political and institutional structures that allow them to participate in public life, and protect their cultural, social, economic and political institutions in decision making. This requires, among other actions, the promotion of an intercultural citizenship based on dialogue, the creation of services equipped with cultural adaption, and a differentiated attention to matters that concern them. For example, based on the Inter-American Court's rulings, pursuant to Article 21 of the ACHR, and taking into account ILO Convention No. 169, the States must respect the special relationship that members of indigenous and tribal peoples have with their territory by ensuring their social, cultural, and economic survival. Said protection of collective property in terms of Article 21 of the Convention, read in conjunction with Articles 1.1 and 2 of the same legal instrument, assigns States the positive obligation to adopt special measures to ensure indigenous and tribal peoples' full and equal exercise of the right to their territories that they have traditionally used and occupied, including protection with regard to actions coming from business actors.<sup>544</sup>
343. Additionally, the States have the obligation to guarantee their effective participation in decisions regarding any measure that affects them, including those of a business or private nature, by respecting the right to consultation and prior, free and informed consent; conducting environmental and social impact studies by independent entities to protect the special relationship of these groups with their territories, as well as the right to reasonable participation in the benefits of the project that affects them. In addition, special consideration must be given to the right to collective property over their lands, territories and natural resources, and the standards developed in this regard within the inter-American human rights system, as they protect a series of elements link to their worldview, spiritual life, self-determination and own forms of subsistence.<sup>545</sup>
344. One of the specific situations where the importance of protection of their territories is linked to the exercise of other essential rights is shown, for example, in the safeguards that the States must implement so that business

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<sup>542</sup> IACHR. Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region, OAS/Ser.L/V/II. Doc. 176, 29 September 2019, Chapter 2.

<sup>543</sup> CIDH. Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region, OAS/Ser.L/V/II. Doc. 176, 29 September 2019, para. 415.

<sup>544</sup> I/A Court. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 November 2007. Series C No. 172, para. 92.

<sup>545</sup> IACHR. Indigenous Peoples, Afro-descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, December 31, 2015, para. 149-246.

actors do not limit access to sources of food and subsistence of indigenous peoples, commonly related to the implementation of projects in their territories, impact their right to food and place their life and cultural existence as peoples at risk.<sup>546</sup> Likewise, contexts of land grabbing and land concentration, deforestation, and ground use changes in these zones, related to business activities, may significantly threaten the effective enjoyment of the right to food, for example, by creating forced displacements, impeding legal tenure and security over these populations' lands, preventing access to seeds and traditional sources of food, or impeding the production of their basic food due to a lack of protection of the genetic diversity of their crops or the smaller size and quality of their lands.<sup>547</sup>

345. For its part, the IACHR observes that, albeit less visible due to the structural racism to which they are subjected, Afro-descendant communities also suffer profound impacts in the region owing to business activities specifically including, but not limited to the extraction of natural resources in their territories, or those that they claim as such. In this sense, as regards Afro-descendant tribal peoples, it is important to stress that the bodies of the Inter-American System have noted that the international protection standards concerning indigenous peoples are also applicable to communities or ethnic groups that share similar characteristics to the former as long as it is verified, on one hand, that they share social, cultural or economic traditions that are different than the other areas of the national community, identify with their ancestral land and are governed, at least partially, by their own rules, customs or traditions; and, on the other hand, their self-identification, as an awareness of the respective community regarding its differentiated identity, that is, an awareness of group identity that makes its members consider themselves as members of a collective.<sup>548</sup>
346. Thus, the IACHR and the Inter-American Court have mentioned, for example, that different Afro-descendant communities maintain a special and collective relationship with the territory they inhabit, which implies

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<sup>546</sup> IACHR. *Indigenous Peoples, Communities of African Descent, and Extractive Industries: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. OEA/Ser.L/V/II.Doc. 47/15, 2016, para. 288.

<sup>547</sup> Regarding the right to food, the IACHR and its REDESCA recall that normatively one should bear in mind that Article XI of the American Declaration, cited above, in which food is established as a right for the wellbeing and health of the person, Article 26 of the American Convention referring to economic, social, and cultural rights, as well as Article 34(j) of the OAS Charter, which establishes the States' commitment to achieve adequate nutrition of persons. For its part, Article 12 of the Protocol of San Salvador also expressly holds that "everyone has the right to adequate nutritio." In this framework, it is important to note, regarding the protected content of this right, that the United Nations Committee on Economic, Social and Cultural Rights has recognized that special attention should be paid to the physical accessibility of adequate food, especially in the case of vulnerable groups like indigenous peoples, whose access to their lands may be threatened. Cf. CESCR. General Comment No. 11, UN Doc. E/C.12/1999/5. 12 May 1999.

<sup>548</sup> IACHR. *Indigenous Peoples, Afro-descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. OEA/Ser.L/V/II. Doc. 47/15, December 31, 2015, para. 28-32; See also I/A Court HR. *Case of the Community Garifuna Triunfo de la Cruz and its members v. Honduras*. Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 305, para. 46-57.

some type of system of customary ownership; they also present their own forms of organization, livelihoods, language, or other elements that account for the habitual use of their self-determination.<sup>549</sup> Thus, for the IACHR and its REDESCA, beyond the denomination they may receive in domestic law or whether their existence is formally recognized by the State, the relevant issue is that they maintain their own cultural and traditional practices, and they recognize themselves as members of a collective with an identity differentiated from the rest of society.

347. In addition, the situation of systemic poverty and discrimination as structural causes underling the violations of the human rights of these groups, must be taken into account. Thus, the behavior of the States regarding the lack of consultation for the imposition of a hydroelectric power plant, the implementation of commercial projects without considering the rights of such communities, or the facilitation of the sale of lands historically occupied by Afro-descendant populations, and the hoarding of them by businesses and private actors for livestock and extensive crops or monoculture – such as sugar cane, soy, and palm oil<sup>550</sup> – may express this discrimination. For their part, the IACHR and its REDESCA also highlight the importance that the States ensure the rights of these peoples and communities in the context of the risks they may face in situations of exploitation, industrialization, or commercialization of their genetic resources and traditional knowledge or practices by different kinds of business entities,<sup>551</sup> such as textile, food, tourism, or medical companies.
348. In general, the IACHR and its REDESCA observe that from Canada to Argentina, violations of the rights of these groups in these contexts are often characterized by the breach of the States' obligations in this area such as by the interruption that business activities provoke in relation to the earth and natural resources, such as water or forest habitats, and the obstacles this represents to the ability of indigenous and tribal Afro-descendent peoples to maintain control over decisions about their ways of life and cultural models.<sup>552</sup>

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<sup>549</sup> In several countries in the continent, some people of African descent remain as ethnically and culturally differentiated collectives, who share a common identity, origin, history, and tradition, such as the Maroon people in Suriname, the Quilombos in Brazil, or the Afro-descendant communities in Colombia and Ecuador. In some cases, they went through processes of syncretism with indigenous peoples in the region, giving rise to differentiated ethnic groups, such as the Garifuna who inhabit the Atlantic coast of Honduras, Nicaragua, Guatemala, and Belize, among many others. Cf. IACHR. Indigenous Peoples, Communities of African Descent, and Extractive Industries: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15, 31 December 2015, paras. 28-32.

<sup>550</sup> See, inter alia, IACHR. Public Hearing. Situation of Indigenous Peoples in the Peruvian Amazon, Lands, and Environment, 170 Period of Sessions, 5 December 2018.

<sup>551</sup> See, inter alia, CIDH. Public Hearing. Situation of the Cultural Rights of Indigenous Women in Guatemala, 167 Period of Sessions, 26 February 2018; General Assembly. Resolution No. 73/165 "Declaration on the Rights of Peasants and other People Working in Rural Areas." UN Doc. A/RES/73/165, 17 December 2018.

<sup>552</sup> For example, the report of the International Advisory Group of Experts (GAIGE) regarding the murder of the human rights defender and indigenous leader Berta Cáceres is illustrative of this situation when it indicates that "partners, executives, managers, and employees of Desarrollos

349. On the other hand, the IACHR and its REDESCA also consider it highly relevant to mention the recent approval of the “Declaration on the Rights of Peasants and Other People Working in Rural Areas” by the UN General Assembly as a parameter to keep in mind situations where business activities may particularly affect these persons. In this regard, the Declaration recognizes the special relationship and interaction between peasants and the earth, the water, and nature, to which they are linked and on which they depend for their subsistence.<sup>553</sup> They also refer, for example, to guarantees of good faith participation and cooperation with decisions that may affect them, the completion of environmental and social impact studies and modalities of fair and equitable distribution of the benefits of the activity that affects the lands or resources that they traditionally use. Likewise, it sees the importance of establishing guarantees so that companies respect and strengthen the rights of peasants and other people who work in rural areas, including individual and collective land rights, the right to seeds and their traditional uses, as well as the right to equitable access to water and to water resource management systems, among others.<sup>554</sup>
350. Bearing in mind the foregoing, for example, the Ombudsman (*Defensoría del Pueblo*) of Peru has reported that the growing promotion of extractive activities in communal lands has caused these communities concern in the face of possible infringements on the exercise of their rights. Thus, it mentions events that may have caused environmental degradation and have affected the quality of water resources due to business activities, affecting an important number of native communities, for example, in the departments of Amazonas and Loreto; it also refers to tensions between palm oil harvesting companies and members of the native community of Santa Clara de Uchunya, whose members demand for the title to their land in the department of Ucayali. The presence of forest concessions in the department of Madre de Dios or of hydrocarbons in the department of Cusco, which are next to indigenous reserves, also represent a latent risk to indigenous peoples, in several cases, in situations of voluntary isolation or initial contact. The Ombudsman also has evaluated concerns and questions from peasant communities regarding modifications to the Environmental Impact Study for mining projects, as in the case of the “Las Bambas” project, due to the alleged lack of information and violations of these communities’ rights, identifying irregularities and giving specific recommendations to

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Energéticos Sociedad Anónima (DESA), private security companies working for DESA, and public officials and state security agencies implemented different strategies to violate the right to free, prior, and informed consultations of the Lena indigenous people. The objective of those strategies was to control, neutralize, and eliminate any opposition. These actions included: the manipulation of communities to rupture their social cohesion, smear campaigns, infiltrations, surveillance, threats, contract killing, sabotage of COPINH’s communication equipment, cooptation of justice officials and security forces, and strengthening of structures parallel to state security forces.” Cf. International Advisory Group of Experts (GAIPE). [Dam Violence: The Plan that Killed Berta Cáceres](#) (November 2017), page 2.

<sup>553</sup> General Assembly. Resolution No. 73/165 “Declaration on the Rights of Peasants and other People Working in Rural Areas.” UN Doc. A/RES/73/165, 17 December 2018.

<sup>554</sup> General Assembly. Resolution No. 73/165 “Declaration on the Rights of Peasants and other People Working in Rural Areas.” UN Doc. A/RES/73/165, 17 December 2018.

several dependencies of the Peruvian State.<sup>555</sup> As part of the preparation of this report, the IACHR and its REDESCA also received information on complaints of pollution and infringements on the right to water due to the activities of an open-pit mining company in community lands (*ejidos*) in the locality of Mazapán, Zacatecas in Mexico, which affected the spring water supply that the *ejido* residents used for their consumption and for food production. They indicate the well from which they received their water supply was dry and was not productive due to the mining activity in the area since 2006. They indicate that before they had access to water for their consumption but that now they have to share it; they also mentioned situations of infringement upon the rights to health, housing, food, and the environment as a result of these activities.<sup>556</sup>

351. Finally, the IACHR and its REDESCA also emphasize that in the field of business and human rights the rights of indigenous and Afro-descendant persons can be affected as individuals, particularly, due to the situation of structural discrimination or widespread poverty, deeply rooted both culturally and institutionally in societies. For example, the Council to Prevent and Eliminate Discrimination of Mexico City reported that only a very small part of the indigenous and Afro-descendent population has access to formal work and the amount that reports irregular situations that may happen in the workspace is smaller still. In this sense, the State's work to promote the inclusion of indigenous and Afro-descendant people in the private sector is still incipient. Regarding this subject, for example, the Inter-American Development Bank (IADB) and the Ethos Institute performed a study of the 500 largest companies in Brazil, which revealed that Afro-descendent individuals have a 35.7% participation in their workforce, which abruptly decreases for management positions (6.3%) or executive suites (4.7%). The situation is more unfavorable when evaluating the position of Afro-descendant women, who make up 10.3% of employees, 1.6% of management, and 0.4% of executive suites, although in Brazil, the Afro-descendant population makes up the majority of the country's total population.<sup>557</sup>
352. The REDESCA recalls that the information available shows that discrimination against these groups has been a clear determinant for the precariousness of social mobility channels and the existence of barriers to equal access to education and quality education.<sup>558</sup> In general, it observes that these populations make up part of the most impoverished groups in society, they present low rates of participation in political processes and

<sup>555</sup> In this regard, see Defensoría del Pueblo (Peru). [Análisis sobre las modificaciones efectuadas al proyecto minero Las Bambas](#) [Analysis on the modifications made to the draft mining Project Las Bambas] (only available in Spanish). Report No. 008-2016-DP/AMASPPI.MA, December 2016.

<sup>556</sup> In this regard see: Red Solidaria Década contra la Impunidad and Coordinadora Nacional Plan de Ayala. The situation of human rights and the Peñasquito mining company en Mazapil, Zacatecas, Mexico. June 2019.

<sup>557</sup> Ethos Institute and Inter-American Development Bank. [Social, racial and gender profile of the 500 largest Brazilian companies](#) (2016), pages 20-21.

<sup>558</sup> IACHR. Report on Poverty and Human Rights in the Americas. OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017, paras. 372, 373, 374, 382 and 385.



decision-making, they face unequal access to the labor market, and they have many difficulties in accessing a quality education and completing it.<sup>559</sup> Thus, the IACHR and its REDESCA emphasize that States must give special attention to respecting the self-determination of these peoples, as well as to ensure that these populations have access to quality comprehensive education that respects their culture and that facilitates access to decent work on equal terms. That is, the States also must ensure that they have the possibility of accessing decent jobs in the main economic and occupational sectors without any discrimination whatsoever, which includes programs for promoting their rights within companies, whether private or public, as policies meant to eradicate discrimination and segregation in this area.

## **D. *Children and adolescents***

353. Regarding the rights of children and adolescents in the region, the IACHR and its REDESCA emphasize that a first fact that stands out is the consideration of the topic, although different in scope and content, within the three national action plans on business and human rights that were approved in the continent (United States, Colombia, and Chile), with the topic of child labor being one of the greatest concerns in the three plans. Nonetheless, it is unknown whether children were protagonists and had active participation in these public policy initiatives, in light of their right to be heard, which is one of the pillars and foundational principles of every decision and act of the State relating to their rights. Without prejudice to the foregoing, the Commission and its REDESCA positively value the inclusion of the subject, without ceasing to call for adequate mechanisms to be implemented to facilitate these participatory processes in the ongoing initiatives on this subject.<sup>560</sup>
354. The impact of the lack of compliance with the States' international human rights obligations on this group of the population in contexts of business activities may be long lasting and even irreversible. The IACHR and its REDESCA emphasize that childhood is a unique period of rapid physical and psychological development, during which children's physical, mental, and emotional health may be permanently altered for better or for worse. Likewise, the Commission and its REDESCA take into account that an effective measure for the elimination of child labor, including its worst forms, is to provide job opportunities for young people in safe conditions,

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<sup>559</sup> Committee for the Elimination of Racial Discrimination (CERD). General Comment No. 34, UN Doc. CERD/C/GC/34, 3 October 2011, para. 6.

<sup>560</sup> In this context see, for example: UNICEF, Save the Children, Global Compact. [Children's Rights and Business Principles](#) (2012).

instead of entirely excluding them from formative employment opportunities, as well as paying attention to the working conditions of fathers, mothers, and caregivers.<sup>561</sup>

355. Regarding child labor, the Commission and its REDESCA highlight that, according to the ILO, 218 million children between the ages of 5 and 17 years old are involved in economic production worldwide. Of them, 152 million are victims of child labor; and 73 million are at risk of dangerous child labor. 5.3% of child labor is concentrated in the Americas, which is 10.7 million people (1 out of every 19), and children are also more at risk of going to work, although it is worth noting that this may be due to the fact that the work children perform is not always visible. The greatest number of children working is concentrated in the agricultural sector, at 71%, followed by the services section with 17% and the industrial sector with 12%.<sup>562</sup> In addition to the physical health effects and the risks to life and personal integrity, the IACHR and its REDESCA highlight the patterns of anxiety, mood disorders, low self-esteem, depression, somatic disorders, and social and cognitive problems as negative mental health repercussions in children as a consequence of the work they are forced to perform and the lack or insufficient protection by the States.<sup>563</sup>
356. Although less visible, it is also worth highlighting studies conducted in Canada and the United States on the subject of child labor. For example, the first study identified that 1,200 companies operating in Canada import goods at risk of having been produced by child labor, at a value of 34 billion Canadian dollars, thus a parliamentary committee in that country recommended including express discussions about child labor in the free trade agreements that the country negotiates, developing strategies so that businesses headquartered in the country continuously monitor their supply chain to ensure it is free of child labor, and implementing strategies so that its import regime and public spending work toward eliminating this problem.<sup>564</sup> For its part, the investigation by a sub-committee of the United States Senate also identified problems involving the trafficking of unaccompanied migrant children for the purpose of labor exploitation.<sup>565</sup>
357. On the other hand, within the responses sent for the preparation of this report, for example, the Colombian State reported on the design and implementation of the National Strategy for Business and Children, in order to guide and support businesses on how to exercise their shared responsibility through business policies, management systems, and sustainability programs, in a way that ensures due diligence with effective actions to prevent, protect, and remedy any effect that economic activity

<sup>561</sup> UNICEF, Save the Children, Global Compact, [Children's Rights and Business Principles](#) (2012).

<sup>562</sup> ILO, [Global Estimates of Child Labour: Results and Trends, 2012-2016](#) (2017).

<sup>563</sup> ILO, [Toward the Urgent Elimination of Dangerous Child Labour](#) (2018).

<sup>564</sup> The Standing Committee on Foreign Affairs and International Development (House of Commons), [A Call to Action: Ending the Use of All Forms of Child Labour in Supply Chains](#) (October, 2018)

<sup>565</sup> Permanent Subcommittee on Investigations (United States Senate), [Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement](#) (2016)

may generate toward children and adolescents, whose rights should prevail in decisions of any kind. The State of Ecuador also reported that the normative framework aimed at eradicating child labor is of special interest. The State affirmed that through Ecuador's National Strategy to Eradicate Child Labor, it achieved a reduction in its child labor index from 12.5% in 2007 to 5.9% in 2015.

358. In addition to the contexts of child labor and businesses, the IACHR also expressed concern about the possible negative effects on human rights in the context of the implementation of extraction projects that may lead to conditions of exacerbated vulnerability in indigenous girls and adolescents. Specifically, it has observed that the arrival of workers and day laborers to these remote areas, and the lack of State protection of the rights of these indigenous children may generate situations of trafficking or sexual exploitation.<sup>566</sup>
359. On the other hand, as regards the implementation of the right to health for this population group, the IACHR and its REDESCA observe concerning statistics on obesity and overweight among children in the region. For example, school children aged 6 to 11 years old would reach rates of up to 34.4% and adolescents between 12 and 19 years old would reach as much as 35%. In general terms, between 20% and 25% of the total population of children and adolescents in Latin America would suffer from overweight and obesity.<sup>567</sup> Similarly, according to the Global Youth Tobacco Survey, the region of the Americas shows high rates of youth tobacco consumption with the following results: Argentina (24.1%), Chile (20.3%), Mexico (19.8%), Saint Vincent and the Grenadines (19.4%), Bolivia (18.7%), and Nicaragua (17.6%); also worth emphasis is that Trinidad and Tobago would reach up to 17.2% of electronic cigarette consumption by young people. At the same time, throughout the English-speaking Caribbean there are high percentages of boys and girls who have tried a cigarette for the first time before they reach the age of 10, exceeding rates of 20%; the Commission and its REDESCA are particularly concerned that in the countries of Saint Kitts and Nevis and Saint Vincent and the Grenadines the rates have reached 32.9% and 34.5%, respectively; Paraguay also shows high rates in this area, with 26.4%.<sup>568</sup> Regarding alcoholic beverages, *Coalición Latinoamericana Saludable* (Healthy Latin American Coalition) reported that alcohol consumption begins early; and close to 20% of adolescent Latin American consumers drink until intoxication on a regular basis.
360. The aforementioned rates of obesity and tobacco and alcohol consumption among the children of Latin America show a high rate of consumption of products that have the capacity to risk their right to health. According to information provided for the preparation of this report, the lack of

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<sup>566</sup> IACHR. *Indigenous Women and Their Human Rights in the Americas*. OEA/Ser.L/V/II. Doc. 44/17, 17 April 2017, paras. 99-103.

<sup>567</sup> Pan-American Health Organization (PAHO). [Plan of Action for the Prevention of Obesity in Children and Adolescents](#) (2015).

<sup>568</sup> Pan-American Health Organization (PAHO). [Youth and Tobacco in the Americas: Results of the Global Youth Tobacco Survey](#) (2010-2017).

compliance with the States' obligations in addressing this problem and the behavior of the involved businesses themselves can be identified some of the causes of these statistics. In some cases it is reported that businesses may have strategies to increase their sales, as well as to prevent sanctions and implementation of effective policies that limit the commercialization, advertising, and consumption of these products in accordance with human rights standards through, for example, judicial proceedings or threatening suit against the State, lobbying and pressure on decision makers, or financing studies questioned for their lack of objectivity, among others.

361. In all cases, the Commission recalls that States must establish and enforce legal frameworks and adopt measures that effectively prevent, address, and punish the negative commercial impact on the rights of children and adolescents, adopting whatever additional measures may be necessary. For their part, businesses have the responsibility to adjust their decision-making processes and operations taking into account their impact on children's rights, particularly those industries with a differentiated impact on them.

## **E. *Persons deprived of liberty***

362. The IACHR has been particularly dedicated to the development of standards and monitoring of the situation of persons deprived of liberty since its creation, given the special condition of vulnerability in which these individuals find themselves, which has frequently meant that the many situations are characterized by the systematic violation of their rights. Without prejudice to the importance of taking into account a broad conception of what is understood as deprivation of liberty,<sup>569</sup> for the purposes of this report the IACHR and its REDESCA will only refer to the role of the States with respect to the involvement of business actors with people held in prisons due to the commission of a criminal offense.
363. In this regard, the IACHR has emphatically held that the main element that defines deprivation of liberty is the dependence of the individuals on the decisions that the staff of the establishment where they are being held. This situation places the State in a position of guarantor of all those rights that

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<sup>569</sup> The IACHR emphasizes that deprivation of liberty does not only involve the prison population for crimes, but also any form of detention, imprisonment, institutionalization, or custody over a person, for example, in psychiatric hospitals; establishments for individuals with physical, mental, or sensory disabilities; centers for children and older adults; installations made for people in conditions of human mobility, including stateless people; places where LGBTI individuals are held against their will in order to try to change their sexual orientation or gender identity; places for rehabilitation for drug consumption or addictions; as well as any other institution, public or private, where a person is deprived of their liberty. See, inter alia, IACHR. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, March 2018; and IACHR. Violence against Lesbian, Gay, Bisexual, Trans, and Intersex Persons in the Americas. OAS/Ser.L/V/II.rev.2 Doc. 36, 12 November 2015, paras. 200-2012.

are not restricted by the very act of deprivation of liberty, given the relationship of subjection and subordination existing between the persons deprived of liberty to the State. Thus, by depriving a person of liberty, the State assumes a specific and material commitment to respect and guarantee their rights, including in schemes in which third parties such as businesses may intervene. For the IACHR, in order for the State to effectively guarantee the rights of persons deprived of liberty, it is necessary that they exercise effective control over detention centers.<sup>570</sup>

364. In this context, the IACHR highlights two situations in which public or private businesses may be involved with the enjoyment of human rights of persons deprived of liberty. The first is when there are processes of prison privatization, whether total or partial, for example, by the State transferring assets and management responsibilities and supervision of the detention centers to the private sector, or through concessions and contracts between States and businesses for the provision of certain internal services (construction, remodeling, food, health, cleaning, and even security). The second situation refers to situations where companies establish labor relations with the inmates within their chain of production.
365. When this type of schemes exist, the Inter-American Commission and its REDESCA stress the importance of state authorities being able to exercise strict and adequate control in the context of the contracts or agreements with private businesses in their diverse modalities, insofar as they involve the enjoyment of human rights by persons deprived of liberty, so that they not only have efficient mechanisms for ensuring that detention conditions comply with international standards, but they also fulfill the goal of the personal liberty limitation according to the specific case, and that abuses or breaches of this or other rights and fundamental freedoms are not committed.
366. Regarding the first situation, according to some studies to which REDESCA had access, persons deprived of liberty in privatized detention centers may face serious threats to their safety and fundamental rights.<sup>571</sup> For example, already since 2001, the United States Department of Justice reported that in privately managed detention centers there is a higher rate of aggression and rioting than in prisons administrated by the State.<sup>572</sup> This was confirmed in 2016 through a comparative study by the Federal Bureau of Prisons of the United States, which showed, for example, that there were 9 times more lockdowns due to security emergencies, 30% more attacks between prisoners, high volumes of contraband (drugs, weapons, cell phones), or important obstacles to supervising the provision of health or management standards, such as the improper placement of inmates in the

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<sup>570</sup> IACHR. Report on the Rights of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II. Doc. 64, 31 December 2011, paras. 49, 50, 72 and 76.

<sup>571</sup> American Civil Liberties Unions. [Banking on Bondage. Private Prisons and Mass Incarceration](#), November, 2011.

<sup>572</sup> Bureau of Justice Assistance, U.S. Department of Justice. [Emerging Issues on Privatized Prisons](#), February 2001.

enclosure in spaces used for disciplinary corrections,<sup>573</sup> which led the country's Department of Justice to instruct federal government personnel to gradually discontinue their dependence on private prisons.<sup>574</sup> Likewise, the REDESCA highlights the relationship between the privatization of the prison system and overcrowding,<sup>575</sup> as well as the racial disparities found between the prison population in detention centers administered by public and private entities.<sup>576</sup>

367. Regarding the countries of Latin America, the IACHR notes the existence of different privatization initiatives in this sector. Particularly, it has learned of different experiences in Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Panama, and Peru, generally promoted under public-private partnership schemes.<sup>577</sup> For example, in its country report on Colombia, the IACHR stated that the eventual privatization processes for the construction and administration of detention centers must be conducted, at all stages, with the greatest transparency, and in accordance with technical, legal, and economic criteria, in which the experience of other countries in the region is objectively taken into account.<sup>578</sup> The IACHR also expressed its concern about privatized detention centers in Mexico that would have led to the application of regimes that are incompatible with human rights, such as excessive restrictions on visitation by family members and defenders of persons deprived of liberty; very limited access to the outdoors and recreation activities; excessive physical inspections, even on the intimate parts of visitors' bodies, principally women. The Commission also drew attention to the high costs that these mechanisms implied for the public budget, insofar as they also aimed to support models that are contrary to international standards, instead of seeking the humanization of prisons and the establishment of measures aimed at ensuring social reintegration of persons deprived of liberty.<sup>579</sup> For the IACHR and its REDESCA the role the States have in this area is of the utmost importance when considering that the mechanisms for restricting liberty are themselves attributed to public functions, although the problems described and the risk of suffering human rights violations can also be found in prisons directly administered by the States, in cases where they decide to involve businesses the States must reinforce compliance with their international obligations, insofar as the actions that entail risks to the rights of persons deprived of liberty are

<sup>573</sup> Federal Bureau of Prisons. U.S. Department of Justice. [Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons](#) (August, 2016)

<sup>574</sup> U.S. Department of Justice. [Memorandum Reducing our Use of Private Prisons](#), August 18, 2016.

<sup>575</sup> ACLU. [Banking On Bondage: Private Prisons And Mass Incarceration](#), November, 2011.

<sup>576</sup> NPR. [Why For-Profit Prisons House More Inmates Of Color](#), March 13, 2014.

<sup>577</sup> See, e.g.: Correo. [Law approved so the private sector can build and administer prisons](#), 21 July 2016; El tiempo. [Private sector alliances, formula to face prison crisis](#), 25 May 2015; La Diaria. [Priceless Rights](#), 18 November 2015; El Espectador. [Three companies will build first private prison](#), 26 May 2014; BBC. [Brazil will have the first private prisons in Latin America](#), 19 June 2011; La Nación. [The first private prison arrives in Buenos Aires](#), 25 October 1999.

<sup>578</sup> IACHR. Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia. OEA/Ser.L/V/II. Doc. 49/13, 31 December 2013, paragraphs 1127 and 1128.

<sup>579</sup> IACHR. Human Rights Situation in Mexico. OEA/Ser.L/V/II. Doc. 44/15, 31 December 2015, paras. 341-345

undertaken by the State itself delegating them and within the parameters of regulation and supervision that it establishes.

368. On the other hand, regarding the second situation, when there are agreements or the involvement of financial bodies for productive projects with persons deprived of liberty, or businesses that in practice establish employment relationships with persons deprived of liberty within their productive and commercial processes with these people, the Commission and its REDESCA highlight the State's obligation to regulate, supervise, and carefully guard the rights of these people given the high risks of labor abuse and exploitation. In this context, for example, the State of Guatemala reported on the existence of programs that involve private businesses with those held in prison. However, the country's prison system only serves as a means of putting the two parties in contact; this was the case of inmates who pack beans and oats, or bottles of perfumes at the Women's Guidance Center (*Centro de Orientación Femenina*).
369. The IACHR and its REDESCA recognize that businesses intervention in these contexts has the concrete possibility of creating benefits for these people and their families, whether economic benefits, capacity building, or reintegrating them in society;<sup>580</sup> to this end, it will be necessary that the States pay particular attention to ensuring that the relationships established comply with the respect and guarantee of human rights, in particular, fair and equitable working conditions and the individual's labor rights, whether in terms of salary, working hours, social benefits, non-discrimination, or security and hygiene within the productive activities they may carry out, in light of the particular context in which they are found. Likewise, the States must ensure there are effective and accessible remedies so that these individuals can report potential abuse or violations; continuous supervision, including independent actors; and broad frameworks for transparency about permitted employment structures, practices, and labor relationships, as well as business accountability and authorities involved when appropriate.
370. According to publicly available information, in many cases, persons deprived of their liberty work beyond permitted daily or weekly working hours, they do not receive the agreed-upon salary, they do not have adequate rest or the corresponding benefits the companies should provide; there are even complaints of punishment, discrimination, and forced labor.<sup>581</sup> The existence of business economic benefits to the detriment of prisoners' rights can also be observed when prisoners have difficulties

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<sup>580</sup> See, inter alia, The New York Times. [Made on the Inside, Worn on the Outside](#), 22 January 2019; EFE. [Colombian company seeks rehabilitation of prisons by creating baby clothes](#), 17 January 2019; World Bank. [Working from prison, a solution for thousands of inmates in Latin America](#), 12 March 2014.

<sup>581</sup> See, inter alia, Página12. [The big business of US prisons](#), 21 May 2018; Diario La Américas. [The Cuban prison population sustains the business of the regime's military corporations](#), 28 September 2018; Global Research. [The prison industry in the United States: Big business or a new form of slavery?](#), March 10, 2008; El Mostrador. [Gendarmerie recognizes that prisoners work under illegal conditions in prisons](#), 10 May 2016.



accessing available communication services or technology due to the high rates the companies charge for them.<sup>582</sup>

371. The foregoing also happens to migrants detained in facilities managed by private businesses in the United States, as was recently reported referring to two businesses: Core Civic and Geo Group.<sup>583</sup> In this regard, the IACHR recalls that 9 years ago, it already expressed its deep concern about private contractors who run several immigrant detention centers in this country, according to which the contractors were generating significant profits at the detainees' expense, in many cases said companies save even more money by hiring these individuals, to perform basic maintenance tasks in the detention centers for 1\$US dollar per day.<sup>584</sup>
372. More generally, the IACHR and its REDESCA also highlight that when persons deprived of liberty for criminal offenses later regain their freedom, the States must not only refrain from limiting or denying equal access to decent work, but should adopt measures to combat discrimination and promote access to job opportunities in these contexts.<sup>585</sup> In this framework, businesses may serve as catalysts for their formal social and economic reinsertion, and keep this condition from representing permanent stigma for finding decent employment or, in the worst cases, from encouraging them to relapse in committing a criminal offense.<sup>586</sup>

## ***F. Persons in contexts of human mobility***

373. For the purposes of this section, the group of persons who may enter the category of contexts of human mobility (migrants, asylum-seekers, refugees, displaced persons, stateless persons, etc.) is understood broadly, with the understanding that human mobility is a phenomenon that can be voluntary or force, internationally or internally, as well as being the result of a combination of diverse causes, such as violence, armed conflicts, inequality, poverty, the lack of economic, social and cultural rights, political instability, corruption, insecurity, the effects of certain business activities,

<sup>582</sup> Prison Policy Initiative. [State of Phone Justice: Local jails, state prisons and private phone providers](#), February, 2019; Prison Policy Initiative. [The Wireless Prison: How Colorado's tablet computer program misses opportunities and monetizes the poor](#), July 6, 2017.

<sup>583</sup> The Guardian. [Private prison companies served with lawsuits over using detainee labor](#), November 25, 2018; The Guardian. [Why are for-profit US prisons subjecting detainees to forced labor?](#), May 17, 2018; Project South. [Private Prison Company Uses Forced Labor of Detained Immigrants in Georgia to Boots Profits](#), April 17, 2018; National Public Radio. [Big Money as Private Immigrant Jails Boom](#), November 21 2017.

<sup>584</sup> IACHR. Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II. Doc. 78/10, 30 December 2010, paras. 266, 267.

<sup>585</sup> CESCR. General Comment No. 18, UN Doc. E/C.12/GC/18, 6 February 2006.

<sup>586</sup> See, inter alia, La República. [Who employs former prisoners?](#), 21 May 2018; Milenio. [Few companies hire former prisoners: Adiem](#), 26 February 2018; El Observador. [The labor market turns its back on former prisoners and the State creates a Plan B](#), 3 December 2017; Ministério da Justiça e Segurança Pública. [Selo certifica empresas que apoiam trabalho e ressocialização de presos](#), 22 November 2017.



particularly in extractive industries, natural disasters, and the impact of climate change, among others.<sup>587</sup>

374. It should be remembered that migrants often face interrelated forms of discrimination, not only due to their national origin, their migration status, or more broadly due to being foreign or displaced, but also because of factors such as their age, gender, sexual orientation, or ethnic origin, among others. The IACHR and its REDESCA additionally recall that in contexts of international human mobility, migrants' situation of vulnerability is exacerbated when they have an irregular migration status. The clandestine situation in which they live on a daily basis means that they are more vulnerable to falling victim to crimes and human rights violations both by the authorities and companies or private actors in general, through the different stages of the migration process. Added to this is migrants' fear of turning to the authorities because of the consequences this could trigger, mainly being detained and subsequently deported.<sup>588</sup>
375. The IACHR and its REDESCA observe that one of the greatest challenges to respecting and guaranteeing these persons' human rights in the field of business and human rights takes place in the sphere of work. The high bars to accessing formal employment not only creates incentives to develop long-term dependency on assistance, but also places them at risk of entering situations of poverty or threatening their basic survival, may have pernicious effects on the effective exercise of other human rights, such as access to housing, health, and education, and may facilitate various forms of exploitation, including trafficking, forms of contemporary slavery and forced conscription.<sup>589</sup> In this regard, the United Nations Rapporteur on the rights of migrants has held: "Migrants, especially those with a precarious residence status, are vulnerable to abuse and labour exploitation. Certain categories of migrants, such as migrant women and children, temporary migrant workers and undocumented migrants are more intrinsically vulnerable to abuse, violence and exploitation"<sup>590</sup> and that "States seem to invest very few resources in trying to reduce the informal sector and sanction employers who profit from the exploitative conditions of work to boost their competitiveness."<sup>591</sup> Likewise, the International Labor Organization's Committee of Experts on the Application of Conventions and Recommendations have held that: "The migrant workers instruments cover

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<sup>587</sup> IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standard of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 46/15, 31 December 2015, paras. 1-15.

<sup>588</sup> IACHR. Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standard of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 46/15, 31 December 2015, para. 9.

<sup>589</sup> UNHCR, Local Integration and Autonomy, U.N.Doc. EC/55/5C/CRP, 15 June 2015, para. 6.

<sup>590</sup> Report of the Special Rapporteur on the human rights of migrants. UN Doc. A/HRC/35/25, 28 April 2017, para. 49.

<sup>591</sup> Report of the Special Rapporteur on the human rights of migrants. UN Doc. A/HRC/26/35, 3 April 2014, para. 17.

displaced persons and refugees where they are employed as workers outside their county of origin.”<sup>592</sup>

376. On several occasions, the Commission has referred to the conditions of structural vulnerability faced by migrants, and the abuses to which they are exposed, among which poor working conditions are included.<sup>593</sup> For example, in 2015, in its report on the visit to Dominican Republic, the Commission expressed concern that the work that Haitian migrants perform especially exposes them to diseases arising from conditions of labor exploitation, workplace accidents, conditions of overcrowding, and consequent deprivation of the rights associated with work. In particular, it identified that historically, the migration of Haitian workers contributed fundamentally to the profits of the sugar industry, which, taking advantage of language barriers, discrimination, and lack of access to basic services, has subjected these individuals to conditions of intense exploitation.<sup>594</sup>
377. The Commission and its REDESCA also observe with deep concern available information on reports of labor exploitation in countries that are receiving the Venezuelan population in the context of massive migration as a result of the social, political, and economic crisis that the country is experiencing. Thus, for example, publicly available information indicates as much as 51% of Venezuelans have suffered some form of labor exploitation in Peru, with work days of up to 12 hours, salaries below the legal minimum, and in the case of women, sexual harassment.<sup>595</sup> This situation also includes reports in Brazil,<sup>596</sup> Colombia,<sup>597</sup> and Ecuador.<sup>598</sup> The REDESCA also accessed publicly available information on complaints of businesses infringement and States’ deficient supervision regarding the guarantee of numerous

<sup>592</sup> International Labor Organization, [General Survey Concerning the Migrant Workers Instruments](#), ILC.105/III/1B, 2016, para. 371.

<sup>593</sup> See, inter alia, IACHR. Informe Anual. [Second Progress Report of the Rapporteurship on Migrant Workers and their Families in the Hemisphere](#), OEA/Ser./L/V/II.111 doc. 20 rev., 16 April 2001, para. 64.

<sup>594</sup> IACHR. Report on the Situation of Human Rights in the Dominican Republic, OEA/Ser.L/V/II. Doc. 45/15, 31 December 2015, paras. 92-107, 565-574; IACHR. 2018 Annual Report. Chapter V, Follow-up on Recommendations Issued by the IACHR in its Country or Thematic Reports (Dominican Republic), paras. 59 and 60.

<sup>595</sup> Publímetro. [Study shows 51% of Venezuelans living in Peru suffered labor exploitation](#), 19 October 2018, Latina. [Venezuelans report being victims of labor exploitation in Peru](#), 14 March 2018; El Telégrafo. [18 Venezuelans were rescued from alleged sexual and labor exploitation](#), 24 August 2018 (only available in Spanish).

<sup>596</sup> Public Ministry of Labor. [“MP sobre assistência a refugiados deve abordar empregabilidade”, diz procuradora](#), 19 April 2018; Reporter Brasil. [Medo, fome, noites ao relento e trabalho escravo: a travessia dos venezuelanos na fronteira norte do Brasil](#), 12 May 2018 (only available in Portuguese). See also: La República. [Venezuelan migrants in Brazil, victims of labor exploitation](#), 8 March 2018 (only available in Spanish); The New York Times. [Stop Enslavement of Venezuelan Refugees in Brazil](#), 9 May 2018.

<sup>597</sup> La FM. [Due to exploitation of Venezuelas 600 companies have been sanctioned: foreign ministry](#), 31 January 2018; El Colombiano. [The labor exploitation Venezuelas suffer in Medellin](#), 4 July 2018; Canal1. [Venezuelans’ labor exploitation in Colombia](#); WRadio. [Investigations begin to establish exploitation of Venezuelans in Boyacá](#), 26 February 2019 (available only in Spanish).

<sup>598</sup> PúblicaFM. [1200 cases of labor exploitation of Venezuelans reported](#), 13 July 2018; Ecuadorinmediato. [Venezuelans do not need work permit, but companies should register contract, explains Minister of Labor](#), 23 February 2018; El Diario. [Venezolanos, víctimas de la discriminación y explotación laboral](#), 18 June 2017 (available only in Spanish).

human rights of migrant workers in the United States<sup>599</sup> and Canada.<sup>600</sup> The Committee for the Protection of the Rights of All Migrant Workers and their Families has also raised numerous concerns regarding the exploitation of migrant workers in an irregular migratory status, by business actors in Mexico, Argentina, Honduras, and Guyana, and among such violations made reference to low salaries, the lack of formal contracts, the failure to pay wages or paying them in an irregular manner, the lack of access to social protection, the excessive work hours, the restrictions on freedom of movement, among others. It also observes that agriculture, textile, construction, fishing, forestry, mining, and manufacturing industries, among others, were among the industries involved.<sup>601</sup>

378. In this context, the IACHR and its REDESCA recall that the State has obligations to respect and guarantee all the economic, social, cultural, and environmental rights, including the right to work and to social security; that is, regardless of the migration status of the person when an employment relationship is formed, the protections conferred to workers by law, with the full range of rights and obligations included, must be applied to all workers without discrimination, be they documented or undocumented.<sup>602</sup> In view of the foregoing, the IACHR and its REDESCA express that companies and employer agents also have the responsibility to respect human rights, including those of their non-national workers. This is recognized in the Guiding Principles on Business and Human Rights when they refer to migrants as one of the groups who often do not enjoy the same level of legal protection of their human rights as the general population, which may facilitate the materialization of abuses and human rights violations in the context of business activities and prevent such cases from being administratively or judicially examined.<sup>603</sup>

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<sup>599</sup> EFE. [Expertos warn of exploitation of immigrants and day laborers](#), 21 November 2015; The Guardian. [Immigration crackdown enables worker exploitation, labor department staff say](#), March 17, 2017; The New York Times. [Here's the Reality About Illegal Immigrants in the United States](#), 13 December 2018.

<sup>600</sup> The New York Times. [Foreign Farmworkers in Canada Fear Deportation if They Complain](#), August 13, 2017; CBC. [Police in Ontario free 43 Mexicans brought to Canada by alleged human traffickers](#), February 11, 2019; Global News. [Calls for reform after Ontario migrant workers claim they worked in terrible conditions](#), March 16, 2019.

<sup>601</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Concluding Observations (Guyana). UN Doc. CMW/C/GUY/CO/1, 22 May 2018, paras. 32-33; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Concluding Observations (Mexico). UN Doc. CMW/C/MEX/CO/3, 27 September 2017, paras. 47-48; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Concluding Observations (Honduras). UN Doc. CMW/C/HND/CO/1, 3 October 2016, paras. 42-43; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Concluding Observations (Argentina). UN Doc. CMW/C/ARG/CO/1, 2 November 2011, para. 21.

<sup>602</sup> IACHR. Merits Report No. 50/16, Undocumented Workers v. United States of America, 30 November 2016, para. 76; I/A Court H.R. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 134.

<sup>603</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Comments on Principles 3, 12 and 26.

## G. *Lesbian, gay, bisexual, trans and intersex persons*

379. With regard to LGBTI people, the IACHR and its REDESCA note that within the field of business and human rights, discrimination and violence at work is also one sphere where they may suffer infringements due to their sexual orientation and gender identity.
380. The IACHR and its REDESCA recall that America is a continent where societies are dominated by entrenched ideas and cultural patterns of heteronormativity, cisnormativity, sexual hierarchy, sex and gender binaries, and misogyny. These ideas and cultural patterns, combined with almost generalized intolerance toward people with non-normative sexual orientations, identities, and gender expressions and diverse sexual characteristics stimulate violence and discrimination against LGBTI persons or those perceived as such.<sup>604</sup>
381. In the workplace, for example, the ILO has reported that in many cases LGBTI persons who have the possibility to work are the object of invasive questions about their private lives at work, they must conform to the demands of binary notions of femininity or masculinity in order to achieve acceptance in the workplace, and in many cases must hide, deny, or keep in secret their sexual orientation and gender identity, whether to access a job, not lose one, or avoid situations of harassment, ridicule, or retaliation.<sup>605</sup> The studies carried out on this topic are illustrative of this problem; for example, in Argentina the lesbian women consulted reported more cases of sexual harassment at work, bisexual women and trans men reported unequal treatment at work.<sup>606</sup> On the other hand, in Costa Rica, there was evidence of the persistence of prejudices and moral criteria that encourage discrimination against LGBTI persons in all phases of the workplace, without there being sufficient and adequate state mechanisms or an adequate normative framework to protect them from abuse and violations of their rights; likewise, there is a lack of procedures to channel complaints and tools to identify situations of infringement on their rights are scarce.<sup>607</sup>
382. Colombia also shows very high rates of intolerance. No less than 75% of cases recognize the use of hostile and humiliating language against LGBTI persons in their workplace. Dismissals for revealing their sexual orientation reach 51.40% for the gay population, and 53.8% in the case of lesbians. For trans people, the exclusion from opportunities for promotions reaches

<sup>604</sup> IACHR. Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas. OAS/Ser.L/V/II.rev.2 Doc. 36, 12 November 2015, para. 48.

<sup>605</sup> ILO. [Discrimination at work on the basis of sexual orientation and gender identity: Results of the ILO's PRIDE Project](#) (Fact sheet); ILO.

<sup>606</sup> ILO. [PRIDE at work: Study on discrimination at work on the basis of sexual orientation and gender identity in Argentina](#) (2015).

<sup>607</sup> ILO. [PRIDE at work: Study on discrimination at work on the basis of sexual orientation and gender identity in Costa Rica](#) (2016).

92%.<sup>608</sup>

383. Available information indicates trans people tend to face the most severe forms of employment discrimination. As such, the ILO has identified that among the main problems these individuals face in the workplace are: the inability to obtain identity documents that reflect their gender and name; refusing to respect their acquired names and to accept of their gender expression with respect to the way they dress; being discouraged from using bathrooms appropriate to their gender; and furthermore facing increased vulnerability to bullying and harassment by coworkers. The exclusion from formal work, to which many trans workers are frequently exposed, may mean that their only survival strategy is to engage in sex work, often reinforces their vulnerability and exposes them to dangerous conditions where they are more susceptible to suffering violence.<sup>609</sup>
384. Due to the foregoing, the REDESCA of the IACHR highlights initiatives where businesses and other private entities lead social inclusion efforts to LGBTI persons, especially regarding access to economic rights through employment. In the Province of Buenos Aires, in Argentina, for example, public companies, businesses subsidized by the provincial government, and private businesses with contracts for public services are required to hire transgender people as a proportion of no less than 1% of their total staff.<sup>610</sup> For its part, in Mexico, the Ministry of Labor and Social Welfare (STPS), through the “Gilberto Rincón Gallardo” Distinctive Inclusive Business, recognizes workplaces that labor best practices in equal opportunities, inclusion, and non-discrimination for people in situations of vulnerability.<sup>611</sup>
385. Within this framework, and without prejudice to the standards developed in this report, the Commission and its REDESCA find it pertinent to exhort the States to redouble their efforts to respect and effectively ensure the rights of LGBTI people, specifically ensuring that, through their diverse competencies, they ensure that the businesses fulfill their responsibility to respect their rights. In this sense it is also important to mention the business principles of conduct in the fight against discrimination against LGBTI persons promoted by the Office of the United Nations High Commissioner for Human Rights, since 2017. Such directives stress the permanent responsibility of companies to respect these individuals’ human rights, the responsibility to eliminate discrimination, to provide support to their LGBTI staff in the workplace, to pay attention to the impacts and

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<sup>608</sup> Escuela Nacional Sindical & Corporación Caribe Afirmativo. [Raros... y oficios. Diversidad sexual y mundo laboral: discriminación y exclusión](#) [Queer... and careers, Sexual diversity and workplace: discrimination and exclusión] (2013) (available only in Spanish).

<sup>609</sup> ILO. [Discrimination at work on the basis of sexual orientation and gender identity: Results of ILO’s PRIDE Project](#) (Fact sheet).

<sup>610</sup> MERCOSUR Institute of Public Policy on Human Rights. [LGTBI: compendio regional de buenas prácticas gubernamentales de garantía y protección de derechos](#) [LGBTI: regional compendium of governmental best practices on guarantee and protection of rights] (2017), pages 65-66 (only available in Spanish).

<sup>611</sup> IACHR. Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas: OEA/Ser.L/V/II.170 Doc. 184, 7 December 2018, para. 215.

effects that their commercial relationships or their products or services have on LGBTI individuals, as well as to contribute to the elimination of such abuses from their role within the community voicing public support for LGBTI people.<sup>612</sup>

386. Likewise, the IACHR and its Special Rapporteurship recognize that businesses play an important role in changing stereotypical conceptions regarding LGBTI persons and may, through inclusion, foster principles of acceptance and non-discrimination and create a change in the social perceptions against sexual diversity. In this sense, there are innovative practices by businesses working toward this objective. For example, business recognition of non-binary gender options for their clients and users;<sup>613</sup> the inclusion of specific protection clauses in sponsorship contracts for athletes when they decide to make their sexual orientation public,<sup>614</sup> and initiatives that stress the importance of inclusion, innovation, and diversity for business development.<sup>615</sup>
387. On the other hand, without prejudice to the States' key role in respecting and ensuring this population's rights, the IACHR also has referred to the role that communication businesses may play in the enjoyment of their rights or in reinforcing prejudices and stereotypes about this population. Thus, for example, referring to a study on Caribbean countries, the Commission indicated, "media outlets tend to completely ignore LGBTI persons and their specific issues in their coverage. When reported, matters related to LGBTI persons are frequently covered in a 'sensationalized and demeaning' way. [...] [T]his results in the general public having a distorted view of LGBTI individuals and reinforces an erroneous belief that not many people are willing to publicly defend their rights."<sup>616</sup> The IACHR and its REDESCA also take note of cases of Internet censorship of content that defends the rights of LGBTI persons,<sup>617</sup> and the existence of complaints about advertising cases or approaches in programs or radio or television spaces that reinforce stigma, discrimination, and violence against this population. In this context, the Commission and its Office of the Special Rapporteur stress that the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity found that States must "address negative and/or

<sup>612</sup> OHCHR. [Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People standards of conduct for business](#) (2017).

<sup>613</sup> CNN Travel, [Airlines will add new gender options for non-binary passengers](#), 18 February 2019; ABC News, [Here's a List of 58 Gender Options for Facebook Users](#), 13 February 2014

<sup>614</sup> The Advocate, [Adidas Encourages Star Athletes to Come Out](#), 15 February 2016

<sup>615</sup> El Espectador, [Pride Connection, the network of businesses that celebrates sexual diversity](#), 9 May 2019; The Economist, [Companies from Pride Connection will march for LGBT+ workplace inclusion](#), 21 June 2018; America Economía, [If diversity is an important part of business, it should have an exclusive area or management](#), 4 June 2019.

<sup>616</sup> IACHR. Report on Violence against LGBTI Persons in the Americas. OAS/Ser.L/V/II.rev.2 Doc. 36, 12 November 2015, para. 220.

<sup>617</sup> Human Rights Watch. [YouTube censors HRW video on LGBT censorship](#), March 22, 2017; Motherboard. [A Canadian company is blocking LGBTQ content for censorious regimes](#), April 25, 2018; Open Global Rights. [Identities in the crosshairs—censoring LGBTQ internet content around the world](#), November 27, 2018.

stereotypical portrayals of lesbian, gay, bisexual, trans, and gender non-conforming persons in the media, and encourage the media to play a positive role in addressing stigma, prejudice and discrimination.”<sup>618</sup>

388. The REDESCA also considers it opportune to mention that discrimination against LGBTI people not only has a serious impact on their rights, but that it also tends to directly affect the businesses and the economy of the country.<sup>619</sup> On the other hand, it also identifies information on the economic contributions created by LGBTI people, whether through consumption or business ownership.<sup>620</sup>
389. Finally, the IACHR and its REDESCA also express their concern about the existence of discrimination in the provision of essential services for the enjoyment of other rights in which business actors are involved, such as health, education, housing, and water, among others. In this sense, the IACHR and its REDESCA underscore the States’ strict obligations to supervise and eventually sanction these practices and behaviors, insofar as the dignity of these individuals is threatened and in many cases their very survival is at stake.

## H. *Persons with disabilities*

390. The Commission and its REDESCA recall that individuals who live with some form of disability are more likely to experience adverse socioeconomic situations, such as a lower level of education, poorer health conditions, and a high percentage of unemployment.<sup>621</sup> This is exacerbated when people find themselves in some additional situation of vulnerability characterized, for example, by factors such as sex, ethnic origin, or age, generating differentiated and intersectional forms of discrimination or violence. It is also observed that there is a greater prevalence of people with disabilities in low-income countries, and that in the region the number of these individuals reaches 66 million (12%).<sup>622</sup>
391. In a similar manner to the situations described above, the IACHR and its REDESCA note that the rights of persons with disabilities in relation to business behavior or activity is a topic that refers to many kinds of circumstances. On the one hand, much of the available information refers to situations of widespread discrimination over access to work and decent

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<sup>618</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. UN Doc. A/HRC/38/43, 11 May 2018, para. 97.c

<sup>619</sup> See, inter alia, Badgett, M.V. Lee. *The economic cost of stigma and the exclusion of LGBT people: a case study of India*. Washington, DC: World Bank Group (2014).

<sup>620</sup> NGLCC, [America's LGBT Economy](#), 2016, p. 10.

<sup>621</sup> IACHR. *Report on Poverty and Human Rights in the Americas*. OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017, para. 427

<sup>622</sup> World Health Organization and World Bank, *World Report on Disability*, available at: [https://www.who.int/disabilities/world\\_report/2011/summary\\_es.pdf](https://www.who.int/disabilities/world_report/2011/summary_es.pdf)



working conditions, including complaints on the impact on workers who acquire some disability due to occupational risks at work. On the other hand, there is still a visibly wide gap due to the absence of reasonable accommodations to standards, services, equipment, facilities, and products, particularly those necessary for the enjoyment of their rights and the respect of their personal autonomy, as they do not meet criteria of availability, accessibility, affordability, or quality in accordance with their differentiated needs, insofar as such accommodations are presented as unnecessary, in some cases costly, and generally less visible for the rest of the population.

392. For example, according to information facilitated by the Ombudsman (*Defensoría del Pueblo*) of Peru, in said country businesses with more than 50 workers are required to hire workers with disabilities as no less than 3% of their total staff. Although non-compliance is considered a very serious infraction, the rates of inactivity and unemployment for this group remain high due to the lack of practice application of the rule and effective supervision by the State.<sup>623</sup> For its part, the Council to Prevent and Eliminate Discrimination of Mexico City reports, in the context of the preparation of this report, that 45.9% of the complaints received relating to discrimination against persons with disabilities were for cases in which there were reports of companies of different sizes violating the right to work.
393. In this context, and without prejudice to the obligations of States in this area, the REDESCA of the IACHR highlights initiatives such as the ILO's global business and disability network that works to create a global workforce culture that respects and includes persons with disabilities as well as raising awareness about the positive relationship between this group of people and greater success in business. Among the priority areas are employability in developing countries, digital accessibility, the fight against stigma and stereotypes, and support for mental health at work.<sup>624</sup> Thus, for example, different experiences of inclusion of persons with disabilities in the workplace have been shared in Brazil, Canada, Chile, and Costa Rica through the cooperation of networks or business organizations.<sup>625</sup>
394. The REDESCA of the IACHR also received information about permanent barriers permitted, and in some cases facilitated, by the States themselves that prevent the adequacy of services managed by private companies for the adequate development and enjoyment of the rights of persons with disabilities. For example, in the education sector it received reports of persistent denial of enrollment due to students' disability status and/or conditioning enrollment on hiring a personal assistant or therapies; breach

<sup>623</sup> Similar provisions are found in several countries of the continent such as Argentina, Nicaragua, Chile, Ecuador, Brazil, and Panama, among others.

<sup>624</sup> For more information on this initiative, see: ILO. [Global Business and Disability Network](#)

<sup>625</sup> ILO. [Disability in the Workplace: Employers' Organizations and Business Networks](#) (January, 2016). See also the [Guide for businesses on the rights of people with disabilities](#) created by the ILO and Global Compact.



of reservations of openings for students with disabilities when there is such a requirement; inaccessible infrastructure; lack of accessible furniture and adaptive materials for students with disabilities; lack of measures to counteract aggression and bullying against students with disabilities; and weakness in government supervision of the management and pedagogical practice of private educational institutions.

395. Other types of barriers may include physical barriers to access to workplaces and means of transportation; barriers to information and communication (such as the lack of interpretation in sign language, written information, screen readers, Braille, and easy to read formats); and in general the lack of accessible devices to reduce and eliminate existing barriers taking into account the diversity of situations of disability. In particular, it is important that the State guarantees within the framework of its powers, that business actors who provide public services like education, health, and water, as well as companies with open access like stores or theaters, not limit their rights to these people, particularly as regards the element of accessibility. Any business installation designed to serve the general public must be accessible to this group of people not only to offer the service or product, but also so that the person with disabilities can receive it or make use of the property in conditions of equality.

## **I. *Older persons***

396. The demographic projections of Latin America and the Caribbean point to the growth of older people in the continent. The population 60 years old and over is made up of around 76 million people, and should reach 147 million in 2037 and 264 million in 2075.<sup>626</sup> In the United States and Canada alone, it is estimated that there will be 115 million older people in 2060.<sup>627</sup>
397. The Commission and its Special Rapporteurship stress that the States play an important role in the enjoyment of economic, social, cultural, and environmental rights of older people, in particular to ensure economic independence, community integration, the recognition of their experience and their contribution to and participation in countries' development in general. However, they see with concern that every day older people face different forms of abuse and discrimination in this area, for example, in access to decent work, in the design of pension systems, or in access to housing. They also find many obstacles to their access to health and care services, education, transportation, culture and recreation, or access to financing.<sup>628</sup>

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<sup>626</sup> CEPAL. Challenges to the autonomy and interdependent rights of older persons, (LC/CRE.4/3/Rev.1), Santiago, 2017. Page 11.

<sup>627</sup> IACHR. [IACHR Calls on States to Combat Discrimination against Older Persons](#), 4 October 2017.

<sup>628</sup> Regarding the repercussions on the human rights of older persons generally, see: Report of the Independent Expert on the enjoyment of all human rights by older persons. UN Doc. A/HRC/39/50, 10 July 2018.

398. The IACHR and its REDESCA recall that older people are especially vulnerable to poverty since their ability to generate income is usually lower with the advance of age. Likewise, older people live in conditions of financial uncertainty, as they are less likely to recover from a loss of income or expenses caused by medical services.<sup>629</sup> In turn, the intersection with other factors of discrimination often aggravate their situation of vulnerability and ignore the specific needs and respect for their own identities and experiences; for example, older women, indigenous older people, older people of African descent, elders with disabilities, in situations of human mobility, deprived of liberty, living in poverty, living on the street, or living with HIV, cancer, or other chronic or high-risk conditions.
399. In this regard, the Public Ministry of Defense (*Ministerio Público de la Defensa*) of Argentina has stated, for example, that among the reasons for greatest concern regarding this population is charities or prepaid medicine companies' refusal to give access to treatment and/or services of different types, highlighting among these the denial of coverage for therapy, medication, prostheses, hearing aids, and other services, devices, and treatments. It also referred to the numerous obstacles that older people find to the accessibility of different systems as a consequences of the technological barriers imposed by companies, and the mandatory use of these tools in the provision of basic services, generally corresponding to the private business sector.
400. For its part, the Human Rights Commission of the Federal District of Mexico reported, in the course of preparation for this report, that in Mexico City just over 88% of older adults considered themselves discriminated against because of their condition, three out of every four older adults felt they had few or null possibilities of improving their living conditions, and over 90% considered they had lower chances of finding work.
401. The delay in securing the rights of older persons affected by business actions can also be an obstacle to affected older persons for compliance with the duty to remedy. In this sense, the Center for Studies on Transitional Justice in Brazil referred, for example, to the disaster that happened in the town of Mariana in 2015 due to the breaking of a toxic waste dam, and to existing challenges for older persons. In particular, it reported that the long delay in the process of reparation is highly concerning, taking into account the advanced age of several affected persons and the limitations to reestablishing their way of life. Furthermore, when older persons are forced to live in urban centers, far from their original contexts, they may present permanent emotional effects, depression, and uncertainty, at higher rates than the national average.
402. On the other hand, the Commission and its REDESCA highlight that, without prejudice to the States obligation to guarantee the right to social security, particularly to retirement, the State also should promote public policies in

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<sup>629</sup> IACHR. Report on Poverty and Human Rights in the Americas. OEA/Ser.L/V/II.164 Doc. 147, 7 September 2017, para. 459.

the private sector to support the access to and permanence of decent work for older people. For example, in Costa Rica, where it is reported that there is a growing population of older adults, public institutions are trying to articulate actions to offer a range of consolidated services and foster the process of active and healthy aging in addition to generating actions around the topic of entrepreneurship and employability.<sup>630</sup>

403. For its part, in the case of pension systems and the involvement of private companies to guarantee and respect the right to social security, the REDESCA of the IACHR observes that in Latin America, fourteen countries totally or partially privatized their pension systems between 1981 and 2014; by 2018, five of these countries had reversed this process. According to a study sponsored by the ILO, the privatization of pension systems hadn't produced the expected results, harming the economic security of older people. For example, it highlights that the levels of coverage had stagnated or diminished, the levels of the pensions and income had deteriorated, and gender inequalities had become entrenched. It also showed that the risk associated with fluctuations in the financial markets had been passed on to individuals, which shows that the involved companies benefitted to the detriment of older persons. The administrative costs also had increased resulting in lower levels of benefits for people of retirement age.<sup>631</sup>
404. In addition to the existence of risks due to the dominant position and concentration of the few companies that would be in the sector, pension reforms have had a limiting effect on growth in the majority of developing countries. Better governance for their administration had not made a positive difference either and, on the contrary, they had weakened the management of the pensions. In several cases, it was reported that the State functions of regulation and supervision had been taken over by the same financial groups responsible for the management of the pension funds, creating conflicts of interest.<sup>632</sup>
405. The IACHR and its REDESCA recall that the old age pension as part of the right to social security has already been recognized within the inter-American system. In particular, the Inter-American Court has recently indicated that: "in the framework of the Convention's general obligations to respect and guarantee, as well as that of adopting provisions of domestic law, States also have the obligation to adopt measures to keep privatizations from generating effects to the detriment of the rights of their pensioners. This, due to its nature as sustenance and to the special importance that the old-age pension has in the life of a retired person, since it could constitute the only substitute salary they receive in their old age to

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<sup>630</sup> Ministry of Labor and Social Security (Costa Rica). [Programas de Atención a Personas Adultas Mayores \[Programs of Attention to Older Persons\]](#) (only available in Spanish).

<sup>631</sup> Ortiz Isabel and Others. [Reversing Pension Privatizations: Rebuilding Public Pension Systems in Eastern Europe and Latin America](#). ILO, 2018.

<sup>632</sup> Ortiz Isabel and Others. [Reversing Pension Privatizations: Rebuilding Public Pension System in Eastern Europe and Latin America](#). ILO, 2018.

meet their basic needs for subsistence.”<sup>633</sup> In this way, the IACHR and its REDESCA highlight that for older adults, the infringement on the right to social security may constitute a serious impairment to their quality of life and personal integrity, and even as a factor for entering conditions of poverty, insofar as it constitutes their main source of income, in addition to generating additional burdens of effort, anguish, and uncertainty for those who must be a specially protected sector of the population. Thus, the States have a special duty to ensure they prevent companies from interfering with or violating the effective enjoyment of this right.<sup>634</sup>

406. On the other hand, although older people have the right to remain in their own homes and grow old in their environment, sometimes they may stay in care centers or have the need to be assisted in their homes. In this sense, the States must ensure that the businesses that have relationships with these people providing certain services must respect all of their human rights, with special attention to their prior consent and autonomy. Within this context, the IACHR and its REDESCA stress that the right to housing represents an essential aspect of the autonomous life of these people, as it must mean a place to live in security, peace, and dignity; in this way, the influence of business actors tending to commodify the contents of the rights, for example through real estate investment projects or privatization and land grabbing, may contribute to a lack of access to adequate housing if they do not take into account a human rights focus, thus producing evictions, overly expensive housing, or harassment or threats so that they leave the place they reside. These situations produce serious effects on older persons, including depression and cultural uprooting when they are forced to leave their homes and community networks. This may have a differentiated impact when there are additional factors of discrimination such as belonging to an indigenous people, an Afro-descendant community, or a peasant population.
407. The Commission and its REDESCA underscore the need for the States to take affirmative and visible steps to guarantee and promote the rights of older people in these contexts. The development of strategies and policies headed by the States complementing actions implemented by businesses and civil society organizations, that make evident compliance with their human rights obligations and responsibilities case by case will be essential to eradicating discrimination, violence, and infringement on these persons' rights.<sup>635</sup>

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<sup>633</sup> I/A Court. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 6 March 2019. Series C No. 375, para. 197.

<sup>634</sup> See, in general, Committee on Economic, Social and Cultural Rights. General Comment No. 19. UN Doc. E/C.12/GC/194, February 2008.

<sup>635</sup> IACHR. [IACHR Calls on States to Combat Discrimination against Older Persons](#). 4 October 2017

CHAPTER 8

INITIATIVES AND POSITIVE  
PRACTICES IN THE  
DEVELOPMENT OF THE FIELD  
OF BUSINESS AND HUMAN  
RIGHTS



## **INITIATIVES AND POSITIVE PRACTICES IN THE DEVELOPMENT OF THE FIELD OF BUSINESS AND HUMAN RIGHTS**

408. As part of the work to prepare this report, the REDESCA has received and compiled information on practices or initiatives in the field of business and human rights at a national, regional, or global level that suggests incorporating measures aimed at greater respect and protection of human rights. In this context, the IACHR and its REDESCA positively value the public acknowledgements made by the businesses or industrial organizations themselves, like the adoption of protocols and codes of conduct related to the impact of their operations on human rights, in which they voluntarily emphasize their own responsibility to respect human rights. Without prejudice to these practices' validity and complementarity, the Commission and its REDESCA also recall and strongly emphasize that they may not substitute compliance with the States' obligation to ensure human rights, particularly regarding their duties to prevent, supervise, regulate, and investigate, nor the effects that may arise from them, as applicable in each specific case, regarding businesses as indicated in Chapter V of this report.
409. Far from being an exhaustive list or a detailed analysis of each one of these initiatives and practices, the IACHR and its Special Rapporteurship find it worthwhile to briefly mention some of them in order to incentivize States and businesses to deepen positive actions in this regard. Likewise, the REDESCA finds that this report offers a valuable tool for the mandate to continue compiling best practices in the field based on the standards it establishes.
410. Mentioning these practices does not imply a legal analysis of their eventual compatibility or effectiveness in light of applicable inter-American standards. However, the IACHR and its REDESCA emphasize their vocation to incorporate and strengthen a human rights approach to the multiple and varied challenges that arise in this subject in light of each specific context. Next some of these practices are mentioned, reflecting the wide array of actors from which they come.

### **A. *Initiatives and practices promoted by the States:***

411. The development and implementation of binding legislation and regulation on due diligence, transparency, or public disclosure for businesses is positively valued given its link to the States' obligation to regulate. Among other examples, the so-called "dirty list" of slave labor regulation in Brazil,<sup>636</sup> the Modern Slavery Act in the United Kingdom,<sup>637</sup> and the Law on Due Diligence in Business Oversight in France<sup>638</sup> are noteworthy.
412. The "Dirty List" regulations in and of themselves do not establish any duty to carry out due diligence or adopt measures to prevent human rights violations. It only regulates the proceedings that should be observed before including an employer on the list. However, because the public and private financial institutions voluntarily decided to include a "Dirty List" consultation in their decision-making regarding granting credit, they have had a positive impact on the formation of a "culture of due diligence" among Brazilian companies.
413. The United Kingdom's Modern Slavery Act requires large businesses operating in the United Kingdom to report annually on the measures they have taken to prevent modern slavery from taking place at any level of their supply chains. It does not require the disclosure of specific information, but suggests that the reports should cover six areas of information: (a) organizational structure and supply chain; (b) company policies; (c) due diligence processes; (d) risk assessments; (e) effectiveness of the measures implemented; and (f) training. However, the permissibility and lack of adequate accountability of the rule has led many businesses to only establish general guidelines related to modern slavery, without taking practical measures in this regard, which has been denounced as contrary to the objective of guaranteeing business compliance with human rights standards. A similar content standard is the California Transparency Act on supply chains, in the state of California in the United States, or the Modern Slavery Act in Australia.<sup>639</sup>
414. For its part, in France the Law on Due Diligence in Business Oversight establishes a binding legal duty for large businesses established in France to effectively develop and implement a monitoring and due diligence plan. The plan must include information on procedures and actions to identify, prevent, and mitigate the adverse impacts on human and environmental rights derived from its own activities or the activities of its subsidiaries, the activities of the companies it controls and other

<sup>636</sup> [Portaria Interministerial No- 4, de 11 de Maio de 2016, Dispõe sobre as regras relativas ao Cadastro de Empregadores que tenham submetido trabalhadores a condições análogas à de escravo](#) (Brasil)

<sup>637</sup> [Modern Slavery Act, 2015](#) (The United Kingdom).

<sup>638</sup> [LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre](#) (France). Recently, in Holland, a law was also enacted on companies' due diligence regarding human rights and fighting against child labor. Cf. Mvoplatfom. [The Netherlands takes an historic step by adopting child labour due diligence law](#), May 14, 2019.

<sup>639</sup> [California Transparency in Supply Chains Act of 2010, Civil Code Section 1714.43](#) (California, united States) and [Modern Slavery Act 2018](#) (Australia). In Canada, there have also been similar initiatives. See: "Bill C-423: An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff, 2018 (Canada).



companies with those that maintain an established commercial relationship, both in France and abroad. The legislation does not create a mere obligation to document the measures adopted to address the adverse impacts on human rights, but to effectively implement such measures. Although it also provides for access to the courts when this is not complied with, there is also the issue of a lack of clarity regarding the liability arising from the lack of adequate due diligence procedures and the liability of businesses in cases where due diligence was not enough to prevent human rights violations.

415. The Commission and its REDESCA also consider it appropriate to mention Law No. 30787 approved in Peru in 2018, which incorporates a rights-based approach in favor of the people affected or harmed by disasters. For the purposes of this report, it is important to note that it expressly states that any private entity that directly and in any manner intervenes in disaster risk management actions, particularly in response, rehabilitation and reconstruction, must align its actions with the plans created, in strict compliance with the respect and guarantee of the right-based approach in order to immediately redress the fundamental rights violated as a consequence of the disaster. It mentions as priority rights, for example, the right to life, food, health, education, housing, access to justice, citizen security, access to water and sanitation services, and transportation infrastructure. While it is necessary for these provisions to be developed with specificity in a robust regulatory body that also includes, for example, business accountability in the event of non-compliance, the Commission appreciates this type of legislative initiatives as they help clarify such responsibilities in specific contexts.
416. The IACHR and its REDESCA have also welcomed the creation of institutions within the States that allow them to extrajudicially address complaints related to human rights abuses committed abroad by domestic companies, stressing that these must meet certain requirements to be effective, like protecting the mechanism's independence and giving it powers that allow it to investigate specific cases and cause companies' behaviors to change through their competencies. This was the case, for example, when Canada decided to create an Ombudsperson for Responsible Business Conduct Abroad in 2018.<sup>640</sup> However, they also observe that in July 2019 all the civil society representatives of the government advisory body on the subject decided to submit their resignations due to their disagreement about how the figure of the Ombudsperson had been implemented up to that date.<sup>641</sup> They have also underscored the importance of this country's judicial decisions (in the Hudbay Minerals, Tahoe Resources, and Nevsun Resources cases) finding matters related to allegations of human rights

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<sup>640</sup> IACHR. [IACHR Welcomes Creation by Canada of an Ombudsperson to Oversee Canadian Companies Operating Abroad](#). 6 February 2018.

<sup>641</sup> CNCA. [Government of Canada turns back on communities harmed by Canadian mining overseas, loses trust of Canadian civil society](#), July 11, 2019.

abuses related to Canadian businesses foreign operations admissible,<sup>642</sup> or similar decisions in the United States.<sup>643</sup>

417. The qualification of the non-applicability of civil statutes of limitations for crimes against humanity, as is the case with Article 2561 of the Civil and Commercial Code of the Argentine Republic, which entered into effect in 2015, which permits civil suit against businesses, as collective entities, without time limits and claiming payment of damages and civil compensation for their participation in the commission of gross human rights violations.
418. The creation of specific institutional spaces to spread knowledge about the truth regarding businesses involvement in gross human rights violations in the past, such as the “Bicameral Commission for Truth, Justice, Reparations, and Strengthening Democratic Institutions” created in Argentina through Law 27217 in order to identify economic and financial complicity during the last military dictatorship the country faced; as well as the dissemination of information regarding the subject through initiatives such as the Program for Truth and Justice of the Ministry of Justice and Human Rights in Argentina with academic and civil society institutions to produce a report on business responsibility for crimes against humanity in the country.<sup>644</sup>
419. The progressive inclusion of human rights clauses in commercial agreements, investment treaties, or economic integration agreements. The majority of these provisions are centered on general principles, thus the IACHR and its REDESCA positively value that the States are incorporating specific clauses that allow them to encourage investment while respecting human rights, including labor rights and the environment. The inclusion of these clauses in the comprehensive text of investment treaties is positive, since it reaffirms the need for investment and development to happen in accordance with environmental protection, human rights, and public health. Furthermore, it protects the State’s power to adopt measures on the matter, without the measures being seen as contrary to private actors’ investment.<sup>645</sup>
420. The design and implementation of legislation that effectively protects vulnerable populations in the context of business activities, such as the Pay Equity Act adopted in Canada in 2018, aimed at ensuring an equitable

<sup>642</sup> IACHR. IACHR Welcomes Creation by Canada of an Ombudsperoson to Oversee Canadian Companies Operating Abroad. 6 February 2018.

<sup>643</sup> United States Court of Appeals for the Third Circuit. [Case No. 18-2042, Máxima Acuña-Atalaya et al v. Newmont Mining Corporation et al](#), 20 March 2019; Earthrights. [Budha Ismail Jam, et al v. IFC An Indian fishing community takes on the World Bank](#) (2019).

<sup>644</sup> Ministry of Justice and Human Rights of the Nation and others. [Responsabilidad empresarial en delitos de lesa humanidad: Represión a trabajadores durante el terrorismo de Estado](#). [*Corporate Responsibility for Crimes against Humanity: Repression of workers during State terrorism.*] Tomo I. Editorial Ministerio de Justicia y Derechos Humanos de la Nación (2015).

<sup>645</sup> See, for example, [Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria](#) (3 December 2016), Arts. 13.4 and 15.3.

payment regime between women and men both in the public and private sector.<sup>646</sup>

421. The creation of areas or mandates within National Human Rights Institutions dedicated specifically to the subject of business and human rights, as is the case with the Second Internal Examiner (*Segunda Visitaduría*) of the National Commission on Human Rights of Mexico.<sup>647</sup> The Ibero-American Federation of Ombudsman (FIO) is developing work on the issue, including particularly relevant studies and recommendations.<sup>648</sup> In general, the IACHR and its REDESCA stress the important role that these institutions play in this field, both at the level of their respective countries, and in the spaces in which they articulate regional efforts.

## **B. *Initiatives and practices promoted by other actors:***

422. The REDESCA has also received examples of initiatives intended to orient the actions of States and businesses to strengthen respect and guarantees of human rights in this field.
423. For example, there are the “Children’s Rights and Business Principles”<sup>649</sup> created in 2012 by UNICEF, Save the Children, and the Global Compact, aimed at strengthening respect for the rights of children and adolescents in business practices and operations. There have even been more specific guidelines for the protection of this population within the framework of the information, communication, Internet, and related technology industries.<sup>650</sup> However, the experience of the region has been incipient, and requires greater dissemination, capacity-building, and resources for its implementation. Similar initiatives are observed in guidance documents in the field of business and LGBTI populations and persons with disabilities headed by OHCHR<sup>651</sup> and the ILO<sup>652</sup>, respectively, or the practical guidelines issued by the Organization for Economic Cooperation

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<sup>646</sup> Government of Canada. [Government of Canada introduces historic proactive pay equity legislation](#), October 29, 2018.

<sup>647</sup> National Commission on Human Rights (Mexico). [Recommendation No. 37 regarding Respect and observance of human rights in corporate activities](#), 21 May 2019 (only available in Spanish).

<sup>648</sup> Federación Iberoamericana del Ombudsman (*Ibero-American Federation of Ombudsmen*). Recommendations for the incorporation of a business and human rights focus in defense management in mining contexts – institutional experiences of the ombudsmen of Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru and Portugal (2018) (available only in Spanish and Portuguese).

<sup>649</sup> UNICEF, Save the Children, Global Compact. [Children’s Rights and Business Principles](#) (2012).

<sup>650</sup> International Telecommunication Union and UNICEF. [Guidelines for Industry on Child Online Protection](#) (2014).

<sup>651</sup> OHCHR. [Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People standards of conduct for business](#) (2017)

<sup>652</sup> ILO and Global Compact. [Guide for Business on the Rights of Persons with Disabilities](#) (2018).

and Development (OECD) on due diligence for responsible business conduct.<sup>653</sup>

424. The REDESCA also was informed that the Ibero-American Data Protection Network issued the “Standards for Data Protection of the Ibero-American States” in 2017,<sup>654</sup> which are guidelines that contribute to the creation of regulatory initiatives for data protection in the region. Standard 5.1 stipulates that the principles shall be applicable to anyone in charge or responsible for dealing with data related to the supply of goods or services directed to the residents of the Ibero-American States, or related to the control of their behavior, even if they are not established in the territory of an Ibero-American State. The Commission also highlights the “Toronto Declaration”<sup>655</sup> on the protection of the rights to equality and non-discrimination in automated data systems, which proposes a framework of principles emanating from the application of the international framework for human rights protection in order to guide Businesses and States actions in related to machine learning systems.
425. Among the responses sent to the questionnaire created for this report, the role of businesses that have positively contributed in processes of reconstruction and emergency aid to victims, such as those of the earthquake in Mexico in 2017,<sup>656</sup> or businesses strategies to establish commercial relations directly with victims of the armed conflict in Colombia, facilitating greater security for their lands and the defense of their rights,<sup>657</sup> was also highlighted. For its part, the REDESCA also notes the existence of practical guides and guidelines for companies on diverse fields relating to human rights, such as water<sup>658</sup> or gender equality.<sup>659</sup> They also highlight the “Guías Colombia on Business Human Rights and International Humanitarian Law Due Diligence” as a multi-actor initiative fostered in order to contribute to improving respect for human rights start from managing the relationships between a business and its operating environment and interest groups.<sup>660</sup>
426. Finally, by way of illustration, it is worth mentioning some voluntary initiatives in which the businesses themselves recognize certain responsibilities and commitments in this area, since they can build bridges to demand compliance with respect for human rights. For example, several multinational companies and investors called for protecting civil liberties, and stressed the importance of human rights

<sup>653</sup> OECD. [OECD Due Diligence Guidance for Responsible Business Conduct](#) (2018).

<sup>654</sup> RIPD. [Data Protection Standards for Ibero-American States](#). 20 June 2017.

<sup>655</sup> [The Toronto Declaration: Protecting the right to equality and non-discrimination in machine learning systems](#). May 2018.

<sup>656</sup> Business and Human Rights Resource Centre. [Different companies take action following the earthquake in Mexico](#). Septiembre de 2017.

<sup>657</sup> Business and Human Rights Resource Centre. [Direct trade with communities as enabler of security for land and environmental defenders](#) (2018).

<sup>658</sup> Global Compact. [Orientation for Companies on the right to water and sanitation](#). January 2015.

<sup>659</sup> Global Compact. [Principles for Women’s Empowerment](#) (2010).

<sup>660</sup> For more information on this initiative, consult [Guías Colombia en Empresas, Derechos Humanos y Derecho Internacional Humanitario](#) en Fundación Ideas para la Paz.

defenders and the rule of law.<sup>661</sup> They have also spoken up in favor of women's sexual and reproductive rights.<sup>662</sup> Others have shown public support for fundamental rights and called on governments not to punish labor activists for political reasons.<sup>663</sup> They have criticized restrictive immigration policies.<sup>664</sup> They have referred to respecting and protecting human rights in the area of telecommunications and the Internet, particularly regarding digital rights.<sup>665</sup> And they have taken up a position to fight against xenophobia and racism,<sup>666</sup> climate change, and environmental damages.<sup>667</sup> It is also observed that in some cases the workers themselves have demanded not to continue with projects identified as harmful or risky for human rights<sup>668</sup> and studies have been carried out by businesses' initiatives, to identify the relationship between ensuring fundamental rights and freedoms and economic growth.<sup>669</sup>

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<sup>661</sup> Business Network on Civic Freedoms and Human Rights Defenders. [Statement Supporting Civic Freedoms, Human Rights Defenders, and Respect for the Rule of Law](#) (2018)

<sup>662</sup> Página 12. [Empresarios de EE.UU. a favor del aborto legal](#), [*Businesses in the U.S. in favor of legal abortion*] 12 June 2019.

<sup>663</sup> International fashion, footwear, and travel companies. [Letter to the Government of Cambodia](#) (19 March 2018)

<sup>664</sup> Business and Human Rights Resource Centre. [USA: CEOs speak out against Trump Administration policy of separating migrant & asylum seeking families](#) (2018).

<sup>665</sup> Investor Alliance for Human Rights. [Investor Statement on Corporate Accountability for Digital Rights](#) (2018).

<sup>666</sup> Bloomberg. [Siemens Urges Staff in Eastern Germany to Stand Up to Xenophobia](#), September 5, 2018; Bloomberg. [Germany's Business Leaders Are Wading Into the Debate About Nationalism](#), September 20, 2018.

<sup>667</sup> Harvard Business Review. [U.S. Business Leaders Want to Stay in the Paris Climate Accord](#), May 31, 2017; Money CNN. [Top CEOs tell the CEO president: You're wrong on Paris](#), June 2, 2017.

<sup>668</sup> CNBC. [Google employees: We no longer believe the company places values over profits](#), November 27, 2018.

<sup>669</sup> The B Team. [The Business case for Protecting Civic Rights](#) (October 15, 2018).



CHAPTER 9  
RECOMMENDATIONS





## RECOMMENDATIONS

427. In light of this report, the IACHR and its REDESCA, aware that business activities and structures constantly change and interact with the enjoyment of human rights in complex ways and to various degrees, recognize that the actions that address this relationship must be comprehensive, without prejudice to the specifics that arise depending on the economic sector or group affected. Common, firm, and coherent actions are required in different sectors and by different actors (whether local or international, state or non-state), as well as sufficient resources and technical capacity for their implementation. At the same time, the IACHR and its REDESCA are conscious of the existence of the increasingly emergency, multiple, and – in many cases – sector-specific issuance of standards, recommendations and strategies, both at the local and international level, regarding the field of business and human rights.
428. Without prejudice to this, and taking into account the nature and scope of this report, the Commission and its REDESCA first reiterate the recommendations issued in their thematic report on “Indigenous Peoples, Communities of African Descent, and Extractive Industries” as their main forerunner to its work in this field. Second, they formulate the following recommendations bearing in mind as guidelines (i) applying the inter-American criteria identified above in all actions undertaken in this field; (ii) overcoming discursive or operative inertia on the subject; (iii) seeking to comprehensively and systemically articulate existing and future initiatives; (iv) work to correct asymmetries and power imbalances identified in this field from a human rights perspective; (v) facing the main, common, or simultaneous causes of human rights violations relating to the field of business from their functions and powers; (vi) contributing to the improvement of systems for prevention, oversight, regulations, and accountability, including those with extraterritorial scope, on this subject; and (vii) deepening lines of action on the subject through various mechanisms of the IACHR.
429. In this framework, based on the information received and the analysis carried throughout this report, the Inter-American Commission on Human Rights and its Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights issue the following recommendations.

## A. *Recommendations to the States*

430. Review and adapt the domestic legal framework applicable in the context of business and human rights, particularly any civil, administrative, criminal, fiscal, environmental, and labor provisions that are important for the effective fulfillment of the States' obligations to respect and ensure human rights in this field so that businesses respect these laws and are held accountable for their actions. To this end, it is recommended to carry out studies that identify the most relevant norms in this area and possible normative gaps so that, from there, legal reform strategies are implemented bearing in mind the standards developed in this report as parameters, especially those laid out in Chapters II, III, IV, and V.
431. Incorporate the applicable general standards referred to in Chapters II, III, IV, and V in the processes of creating National Action Plans regarding business and human rights in States that use this route as a public policy tool in this field.<sup>670</sup> For specific contexts and populations, States should also bear in mind, as appropriate, the considerations developed in Chapters VI and VII.
432. Adopt legislation that imposes binding provisions to businesses on the duty of human rights due diligence, taking into account the variables of the company's size, the degree of risk of the industry on human rights, the vulnerability of the affected or at-risk populations, among others, so that businesses may identify and prevent human rights violations that their commercial activities and relations may produce and, where appropriate, mitigate the negative impacts and repair violations when they have occurred. This legislation should include minimal operational guidelines on how businesses should conduct human rights throughout their supply chain and business structure, including a transnational scope, as well as transparency, participation, and oversight mechanisms.
433. Identify the main challenges faced by state prevention, oversight, supervision, and monitoring mechanisms, related to the respect of human rights in the framework of business activities, including those with extraterritorial scope, and create plans and strategies that include a human rights focus to overcome them. In particular, they should establish and ensure the existence of personnel trained about the industrial sector, population and rights involved, sufficient resources to carry out their work, and clear and timely responses to the presentation of complaints or the identification of problems to prevent possible human rights violations and impose appropriate sanctions for non-compliance.
434. Conduct a study that identifies possible avenues for overcoming the substantive, procedural, or practical obstacles there may be to access to

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<sup>670</sup> The SRESCER emphasizes that the Joint Project on Responsible Business Conduct in Latin America and the Caribbean, financed by the European Union, is an extraordinary opportunity for the States that benefit from it to make use of the aforementioned standards.

justice, whether civil, administrative, or criminal in nature, for victims of human rights violations and abuses in contexts of business activities, including an extraterritorial scope, and adopt the necessary measures to remove such obstacles. To this end, the States should take into account the reports produced by the Office of the High Commissioner for Human Rights on access to mechanisms for reparations, as well as the elements related to access to justice and reparations derived from inter-American jurisprudence and standards on the subject. Although the States may promote and permit the use of non-judicial – and even non-state – mechanisms for promotion and claims following such events, the victims always must be able to access judicial actions whenever they wish, including after the use of non-judicial mechanisms. Judicial mechanisms must ensure the possibility to order the involved companies to remedy the damages and give reparation to the victims, as may be required to provide comprehensive and timely reparations.

435. Carry out coordinated action by the branches of government, by exercising their legislative, executive, supervisory, and judicial functions in order to fulfill the obligations of respect, guarantee and cooperation in the area of human rights in this field in accordance with Chapters II, III, IV, and V of this report. For these purposes, the legal and political coherence and support for the defense of human rights should be ensured at the highest levels; for example, from the Executive Branches' portfolios for the economy, public housing, commerce, investment, industry, energy, mining, security, agriculture, justice, environment, and labor; the Congresses or National Assemblies; the Offices of the Prosecutor or Attorneys General; the Judiciaries and Constitutional Courts.
436. Create, strengthen, or consolidate the role, jurisdiction, and scope of action (including economic resources and adequate personnel) of the National Human Rights Institutes or Ombudspersons in the field of business and human rights in order to facilitate the creation of specialized institutional documents (reports, guides, and recommendations), and create greater capacity for domestic advocacy regarding this area. In this regard, States should take advantage of the established structure of these institutions or create offices, areas or adjuncts to foster dissemination and capacity-building regarding international standards on the matter, contribute to developing state bodies' institutional capacities, and create a greater culture of human rights in the business sector. Likewise, given the nature of these bodies, they should be able to receive complaints and start investigations *ex officio* about in this field, be empowered to request for receive necessary documentation to undertake their investigations, refer situations that may constitute crimes or administrative offenses to the competent courts or bodies, rule on normative frameworks and public policies related to the field of business and human rights, and propose necessary legal and administrative reforms in light of the context of each country and the content of this report.

437. Adjust their domestic legislation or practices to respect and guarantee human rights in contexts of transnational business operations over which the States exercise effective control or a position of influence in light of the standards established in Chapter IV of this report. In particular, the States must direct their efforts so that the strict doctrine of *forum non conveniens* and the common figures of business law such as dissolution, division, acquisition, sale, or merger of businesses do not prevent or hinder the analysis of claims of human rights violations and abuses in contexts of transnational business activities or of the effective execution of final judicial decisions that have been issued with respect for due process.
438. Ensure businesses' compliance in respecting human rights in an effective and legally binding way. Although they may be useful and may influence certain business behaviors, voluntary initiatives, mechanisms or standards on social responsibility are no replacement for enforceable rules on corporations' legal liability in this field, and their existence or use cannot be used as an argument to allege that binding laws on business conduct are not needed, including their transnational scope.
439. Establish by law businesses' duties, according to their size and the involved rights and populations, to publicly report on the annual impact of their operations on human rights, as well as their due diligence programs in this area to prevent abuses or human rights violations.
440. Expressly include investigation, both through judicial and non-judicial mechanisms, on the role and responsibility of businesses and economic actors in the commission of and complicity with gross human rights violations in the context of rules, practices, agreements, and policies related to peace processes and transitional justice bearing in mind the considerations developed in Chapter VI(A) of this report. Judicial investigations, together with other initiatives, such as historic research and recuperation of the victims' memory, should address the existing gaps in the role of companies and their members in the repressive policies of the past in order to articulate a complete story of what happened, bridge the gaps of business impunity and create concrete guarantees of non-repetition.
441. Impose express obligations on business actors under their jurisdiction regarding the provision of essential services for the fulfillment of human rights, with particular regard to the rights to health, education, social security, personal liberty, personal security, potable water, and sanitation, so that the systems in which they are inserted are consistent with international human rights law and the standards related to such rights, including the considerations developed in Chapter VI(B) of this report. Without prejudice to the fact States must implement adequate mechanisms to ensure supervision, accountability and effective access to reparations in the field of business and human rights, including their extraterritorial application, they must pay differentiated and specific

attention to the involvement of corporate actors in the provision of the aforementioned services due to their special relevance as part of the public functions of the States; in particular, they must gather and analyze relevant data on the impact of such actors in guaranteeing the aforementioned rights in a regular, participatory and transparent way so as to guide the policies and regulations that are necessary; require such actors to comply with the applicable standards regarding the rights at stake, including actions to investigate and formulate penalties of various kinds; as facilitating access to reparations; and the cessation of threats or violations of these rights when applicable.

442. Present ambitious, firm, and specific plans to limit global warming to 1.5° C (2.7° F) above pre-industrial levels,<sup>671</sup> in accordance with the principle of equity and the shared and differentiated responsibilities of every States, in which regulation, supervision, and accountability of business entities are included according to their contribution to emissions. It is recommended to prepare comprehensive and urgent decarbonization plans that respect human rights, placing strict limits on fossil fuel companies and industries that tend to generate deforestation and environmental degradation, whether locally or transnationally. Bearing in mind the analysis developed in Chapter VI(C), it is also necessary of the States to design and implement normative frameworks and public policies focused on mitigation, adaptation, and resilience to climate change and to environmental degradation produced by companies prioritizing people in situations of greater vulnerability, a gender perspective, frameworks for transparency and effective participation, the principle of intergenerational solidarity,<sup>672</sup> the protection of environmental defenders, and with particular attention to those who are displaced due to climate factors and environmental pollution. Faced with the threats of climate change and environmental degradation on human rights, the States' duty to cooperate in the field of human rights is reinforced, and in need of greater vigilance, to ensure that companies, including financial and investment institutions, comply in respecting human rights.
443. Ensure that human rights norms are a frame of reference to guide business tax practices as the State's legal and policy responses to them, taking into account the considerations developed in Chapter VI(D) of this report. The IACHR and its REDESCA also recommend building a system of transparent international rules on taxation of multinational companies that closes legal loopholes that impede the realization of human rights due to national or cross-border tax abuse. Without prejudice to this, States must evaluate the specific and differentiated impact on human rights that corporate tax practices and tax policies applicable to companies produce, including their extraterritorial impact, and build public knowledge on paying taxes in the

<sup>671</sup> IPCC. [Global Warming of 1.5 °C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty](#) (2018).

<sup>672</sup> See, inter alia: UN. General Assembly. Intergenerational solidarity and the needs of future generations. UN Doc. 4/68/322, 15 August 2013.

place where the corporations' commercial operations really occur as a way of calculating and distributing the benefits and profits of companies with transnational operations and structures.

444. Improve and strengthen systems for transparency and anti-corruption mechanisms to avoid interference, threats, or undue corporate influence over the formulation, follow-up, and evaluation of laws and policies related to the realization of human rights, including tax laws and policies. The States must also show clear and concrete actions to reduce and prevent corruption where companies intervene by diverting public funds or handing over sums of money to obtain private benefits. In this framework, for example, the State must design mechanisms that permit public knowledge of the purpose of these companies' interventions in these processes and give appropriate protection to those who make complaints or carry out investigations regarding this type of corporate practices. Mapping out risks in sectors and areas that are sensitive to corruption and State capture, and recording transit of individuals between the private sector and key public posts on transparency portals may help reduce the associated risks and give early warnings to prevent this type of practices. In the latter case, for example, it is important to assess applying minimum waiting periods or moratoriums to transit from certain public posts to the business sector.
445. Ensure that new information and communication technologies are used under human rights standards, particularly regarding the right to privacy, reputation protection, and the right to rectification, freedom of expression, and access to information, bearing in mind the considerations set forth in Chapter VI(E). Likewise, the States must ensure that the restrictions permitted in this area are strictly respected according to the parameters of non-discrimination, legality, necessity, and proportionality, including victims' right to an effective remedy to protect their rights. In this regard, it will be necessary to promote spaces for participatory and transparent dialogue with various stakeholders, including human rights defenders, academia, and the companies involved, in order to overcome existing and future challenges so that these technologies materialize their potential to foster the effective enjoyment of human rights.
446. Ensure the maintenance of an adequate space for state regulation of companies during the negotiation, ratification, and implementation of international trade and investment agreements, bearing in mind the considerations developed in Chapter VI(F) of this report. In this sense, States must ensure compatibility between the obligations derived from the inter-American human rights instruments (particularly the American Declaration and Convention and the Protocol of San Salvador on Economic, Social and Cultural Rights) and the existing international commitments or those would result from the adoption of a commercial or investment treaty. Some avenues for this include effectively using clauses that ensure the State's regulatory and sanctioning capacity for acts linked to foreign investment and international trade when such acts may produce real or

potential impact on the effective enjoyment and exercise of human rights; clauses that allow better dialogue, cooperation and interpretation of such agreements in accordance with international human rights standards; flexibility clauses on intellectual property and patents; clauses that allow effective access to justice and to mechanisms for reparations for the victims, even in the home states of the companies involved; and clauses that impose human rights obligations on companies protected under the investment treaty or agreement, particularly emphasizing the impact on populations in situations of vulnerability like indigenous and Afro-descendant peoples or human rights defenders, as well as highlighting the fulfillment of carrying out free, prior, and informed consultations in these cases. In general, the States also must direct their efforts to identifying and duly managing possible risks to human rights from the initial phases of contract negotiation with investors or businesses in order to prevent, mitigate, and correct possible damage to human rights associated with the project or its activities.

447. Bearing in mind Chapter VI(F), ensure that public systems for contracting with companies, systems for public procurement, public or state-owned companies, bodies managing State credit and export funds, and multilateral financial institutions where the OAS Member States may participate, have appropriate due diligence mechanisms in the field of human rights and effectively account for acts that generate human rights violations and abuses, including situations of transnational operations.
448. Ensure the criterion of effective and public participation at a general level in decision-making processes related to the field of business and human rights. In particular, ensure respect for the right to free, prior, and informed consultation and consent and the right to self-determination in cases involving the rights of indigenous and tribal Afro-descendant peoples, giving special consideration to natural resource extraction activities or projects over their lands and territories, or the design and implementation of development plans, exploitation or economic activities of any kind that may imply potential effects over their rights. Regarding peasant populations, when applicable, appropriate protections relating to their effective participation in decision-making regarding contexts of business activity that may affect their rights as well as their particular situation of vulnerability and poverty must also be considered.
449. Conduct information, awareness, and knowledge-building campaigns on business entities' responsibility to respect human rights.
450. Strengthen international cooperation and mutual assistance actions and promote spaces for dialogue on governance and best practices within the region, in the field of business of human rights. In particular, take into account the States' obligations regarding matters of a transnational nature in this area.

451. Adopt special protection measures for groups in situations of vulnerability in accordance with the considerations developed in Chapter VII of this report within the various legislative, executive, and judicial functions of the State relating to the field of business and human rights, including, when applicable, the differential application in the actions or implementation processes of the recommendations described above.

## **B. *Recommendations to Business Entities***

452. Although the foregoing recommendations are directed to the States Parties of the OAS in response to their international obligations, the Commission and its REDESCA reiterate that the effective implementation of these obligations generate effects on business entities, which have the responsibility to always respect human rights; therefore, even in cases of the States' inadequate compliance with their obligations, companies must orient and guide their actions and processes by the international human rights standards applicable to the case. This means that they must abstain from infringing, contributing, facilitating, encouraging or aggravating human rights violations and deal with the negative human rights consequences in which they have participated, whether through their own activities, commercial relationships, or corporate structure.
453. According to United Nations Guiding Principle 14 on Business and Human Rights, "[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."<sup>673</sup> Bearing in mind these factors and circumstances, and as part of its functions to promote and stimulate human rights in the peoples of the continent, the IACHR and its REDESCA find it opportune to issue some guidelines to these actors,<sup>674</sup> in order to make the analysis carried out in this report more operational. In particular, they recommend:
1. Have appropriate due diligence policies and procedures in the area of human rights within their operations, corporate structures, and supply chains, which includes standards on transparency, good faith, and access to relevant information in these contexts, using as a minimum standard the Guiding Principles and the standards established by the Inter-American System on this subject. In

<sup>673</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31, 21 March 2011, Principle 14.

<sup>674</sup> In particular, companies that are domiciled or headquartered in any of the States Parties of the OAS, independent of the national or transnational scope of their operations or activities, or those that are domiciled in States that are not parties of the OAS, but have operations or activities within the States Parties of the OAS.



particular, they must create appropriate safeguards to respect the rights to prior and informed consultation and consent as to the self-determination of indigenous and tribal Afro-descendant peoples, as well as the right to a healthy environment.

2. Include clauses in its contractual relationships that demand respect for human rights, inserting consequences for breaching such requirements. In this regard, in addition to the general mention of human rights, it is appropriate to refer to behaviors that have a harmful impact on the enjoyment and exercise of human rights, such as corruption or tax evasion and avoidance. It is also necessary to expressly and specifically mention the rights of populations in situations of vulnerability that may be affected in such contexts, such as indigenous and tribal Afro-descendant peoples, peasants, women, or human rights defenders, among others.
3. Refrain from placing obstacles, carrying out delay tactics, or hiding information in their possession, including in the context of their transnational operations, when such actions may impede or hinder the exercise of human rights, in particular access to effective judicial protection. This attitude may aggravate the company's liability. This includes the duty not to hinder, harass, or threaten human rights defenders, including journalists, justice operators, defenders of the environment, and union members, because of the work that they do in this field.
4. Facilitate accountability and provide redress to the victims of human rights violations and abuses in which they are involved, including in the context of their transnational operations, in accordance with their degree of liability and taking into account the standards mentioned in this report, even when the State has not demanded the reparations at issue, an omission that in any case may generate that State's international responsibility. For reparations to be adequate they must be integral, meaning comprehensive of all the effects generated; participatory, meaning they include the effective and informed participation of the directly affected individuals; and compatible with human rights, for example they should not promote fracturing

community ties, they must respect cultural identity and apply a gender perspective.

5. Refrain from pressuring or exerting undue influence over the States to obtain benefits that generate negative impacts or risks to the realization of human rights.

454. Likewise, for the IACHR and its REDESCA, these last recommendations are also applicable to multilateral finance or investment organizations or export or investment credit agencies. Particularly, they recommend these institutions make robust human rights requirements for borrowers, and implementing due diligence actions that comply with international human rights standards. For example, creating exclusion lists of corporations with extensive histories of threats to human rights, early warning tests, visits by independent experts with human rights knowledge, accessible complaint and participation mechanisms, designing plans or protocols to mitigate risks related to the enjoyment of human rights, including environmental risks, periodic reviews of the applicable project regarding the enjoyment of the human rights involved, and support for the work of human rights defenders in these contexts. Moreover, based on international human rights norms and the standards developed on the subject, it is necessary that, as part of their general processes for risk evaluation, policy creation, and decision-making, they directly incorporate specific analysis, qualification, and safeguards regarding threats and impacts related to the all the human rights at stake and involved populations through the area of influence of the project or financed activity. The IACHR and its REDESCA find it positive that these institutions seriously value including pertinent information issued from local, regional, and universal human rights systems in order to make timely decisions regarding actions that may influence the infringement of such rights. For example, they may use information originating from precautionary or provisional measures issued in the framework of threats in the context of development or investment projects, consider concerns and information released by human rights bodies in on-site visits, or align their policies with specific standards on the rights of indigenous peoples, human rights defenders, or environmental defenders, among others.

### **C. *Recommendations to Actors in the OAS***

455. Complementing all of the foregoing, and bearing in mind the importance of the different regional spaces as a platform for the protection of human rights in this field, the IACHR and its REDESCA consider it opportune to recommend that they:

1. Incorporate the applicable standards regarding the state duties of respect, guarantee, cooperation, and extraterritoriality in the field

of human rights analyzed in Chapters III and IV of this report in the periodic evaluations that the Working Group on the Protocol of San Salvador carries out for the protection of economic, social, cultural, and environmental rights regarding the reports submitted by the States Parties to the Protocol.

2. Create, with broad regional participation, model legal frameworks that serve as a guide for identifying necessary legislative and political reforms in this field within each country. The OAS, as the maximum regional space for political and legal discussion, offers an extraordinary opportunity for these effects.
  3. Hold sessions and dialogues on the subject under the auspices of the Permanent Council, and the Commission on Juridical and Political Affairs of the OAS in coordination, as appropriate, with the IACHR and its REDESCA.
  4. Continue issuing resolutions relating to the field of business and human rights in the framework of the OAS General Assembly that aim to strengthen the realization of human rights according to the analysis undertaken in this report.
456. The IACHR, through its REDESCA, will continue monitoring and developing standards on this subject through its various mechanisms in order to better monitor progress on fulfilling these recommendations; as well as continuing to identify specific challenges in the region within this area; reflect the international advances that are presented; and issue pronouncements and effective decisions in the framework of its competence. To this end, it calls upon States, civil society organizations, victims of human rights violations in these contexts, and diverse stakeholders on the issue to inform and adequately use the tools of the inter-American human rights system to strengthen the respect and guarantee of human rights under international parameters, particularly inter-American ones, developed for this purpose.
457. Likewise, the IACHR through its REDESCA will widely disseminate this report and will develop an agenda for promoting the standards it develops. To ensure the success to these actions, the IACHR and its REDESCA make a special appeal to the Member States and Observers, as well as to civil society, academia, the business sector, and other national and international economic actors to widely promote knowledge of this report, as use of the interpretive tools it offers and application of its recommendations, sharing with the REDESCA their initiatives in regard to better monitoring its impact and application.
458. Finally, the IACHR and its REDESCA call upon all cooperation agents, including the States Parties of the OAS, to provide resources and financing that may allow for the continued development of the breadth of issues raised in this report in a focused manner, in accordance with the region's

priorities and needs, including the collection and identification of best practices and guidelines or manuals in light of the recommendations and areas or groups of attention referred to in this report.

