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REGIONAL REPORT: LEGISLATIVE AGENDA ON CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES AND ENVIRONMENTAL DAMAGE IN LATIN AMERICA

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CONTENTS

SYNOPSIS: KEY AREAS OF LEGAL REFORM

This section summarises the key areas of legal reform proposed in this report to establish an effective regime of corporate responsibility for human rights abuses and environmental damage in the domestic legal systems of Latin American countries.

A. PREVENTION

1. Imposition of an explicit legal duty on companies to respect human rights and the environment, and to prevent human rights abuses and environmental damage, which:

- Extends to the entire value chain and business relationships (modifying and/or adapting the content and implications of the duty according to the nature of the relationship);
- Refers to all internationally, regionally, and nationally recognised human rights, and includes the duty to comply with domestic laws and regulations on human rights and environmental protection;
- Covers cumulative and legacy adverse impacts;
- Includes the environment as a good in its own right;
- Incorporates obligations on climate change;
- Covers both public and private companies and financial institutions;
- Covers small and medium-sized enterprises (modifying and/or adapting the form and means of compliance according to the size and capacity of the company and the nature and severity of the potential damage);
- Extends extraterritorially in relation to companies with direct or indirect operations or business relationships abroad.

2. Inclusion of a minimum, non-restrictive and non-exhaustive definition of due diligence in laws that seek to establish an explicit duty of corporate due diligence.

3. Imposition of an explicit duty on public entities to respect and guarantee human rights and environmental protection within the context of business activity, including, inter alia:

- Obligation of public entities to adopt and implement public policies, regulations, protocols, operational guidelines and other measures in their respective areas of operation consistent with their duty to respect and protect human rights and the environment in the context of business activity;
- Obligation of the state to enforce the corporate duty to respect human rights and the environment through competent and independent bodies with sufficient powers of oversight, supervision and sanction, not only when damage occurs, but also in the event of a lack of due care or due diligence;
- Effective administrative and judicial procedures to respond to situations of imminent threat;
- Application of the pro persona principle in the exercise of discretionary powers of public entities in relation to the approval and supervision of business activities and projects;
- Possibility to challenge or appeal administrative decisions related to business activities that put at risk or abuse human rights or the environment and to initiate administrative or other proceedings against public officials who fail to perform their duties;
- Obligation of the state, as guarantor of rights, to take affirmative measures to ensure material equality between companies and individuals or communities affected by their activities.

B. LEGAL RESPONSIBILITY FOR ABUSES

1. Strengthening the civil, administrative, and criminal responsibility of companies for failures to exercise due care or due diligence and for human rights abuses or environmental damage.

2. Imposition of a duty on public entities to investigate and sanction failures to exercise due care or due diligence and human rights abuses or environmental damage by companies.

C. ACCESS TO JUSTICE

1. Elimination or reduction of substantive, procedural and/or practical obstacles that prevail in cases of human rights abuses and environmental damage by companies and prevent or hinder access to justice in practice.

2. **Ensuring material equality of the parties in both access to and effective use of justice procedures. To this end, relevant measures include:**

- Fair apportionment of the burden of proof;
- Collective actions, whether acciones difusas or public interest actions;
- Broad legal standing;
- Independent technical advice;
- Legal aid;
- Extraterritorial legal actions;
- Lengthy limitation periods for legal action that take into account the needs and difficulties of the affected persons;
- Application of the law most favourable to the protection of human rights in extraterritorial civil actions;
- Complaints procedures before administrative oversight bodies.

3. **Ensuring full and comprehensive reparation for the injured party through, inter alia, judicial power to order a wide range of reparation measures.**

D. CROSS-CUTTING ISSUES

1. **Expressly enshrining and strengthening the rights to participation, consultation, and free, prior, and informed consent (FPIC),** the realisation, quality, integrity, and legitimacy of which are guaranteed by public authorities, both in the scope of their actions and in the context of corporate due diligence.

2. **Effective implementation of the principle of transparency and the right of access to information,** including information that is held both publicly and privately, access to which is necessary for the effective exercise and protection of human rights and the environment, including, inter alia, a corporate duty to disclose specific measures to identify, prevent, and mitigate risks and prevent abuses.

3. **Incorporation of an intersectional and differentiated perspective, including an ethnic and gender approach,** both in the exercise of the state's regulatory and oversight responsibilities and in the fulfilment of companies' duties of compliance and due diligence.

4. **Guarantee the right to defend human rights and the environment in the context of business activities,** through specific measures that oblige companies to respect these actions, ensure the exhaustive and diligent investigation of abuses and sanction actions that criminalise, stigmatise, discredit or otherwise undermine the work of human rights defenders.

INTERPRETATIVE PRINCIPLES

Formulation and implementation of public policies, regulatory frameworks, specific laws and/or policy or regulatory adjustments on business and human rights that take into account and integrate key human rights criteria and principles from the Inter-American system. These include the **principles of pro persona, comprehensive reparation and victim-centredness, material equality, comprehensive prevention and the precautionary principle.**

PERMANENT MONITORING BODIES

As part of the legal reform programme, create by law a **permanent multisectoral** commission, panel, or other **body to monitor and evaluate** implementation of new laws or legislative or regulatory adjustments. These forums should include special safeguards and measures to ensure the material equality of all participants and to prevent real-world power asymmetries from being replicated.

I. INTRODUCTION

The human rights of the populations of Latin American countries are impacted daily by the illegal, irresponsible, and unscrupulous activities of numerous national and transnational companies operating in the region. These impacts include land dispossession and other serious abuses of the collective rights of indigenous peoples, Afro-descendants, and rural communities,[1] large-scale socio-environmental impacts,[2] slave labour,[3] child labour,[4] discrimination in access to essential public services and goods, gender discrimination and violence,[5] harassment, criminalisation and violence against human rights defenders and environmental defenders,[6] among many others. These systematic abuses foster, exacerbate, and perpetuate social conflicts that give rise to new abuses. In 2022 alone, the Inter-American Commission on Human Rights (IACHR) recorded 126 murders of human rights defenders in the region. Many of them were indigenous and Afro-descendant leaders and defenders of the environment and territories.[7] This situation calls into question the will and/or capacity of Latin American states to comply with their international and regional obligations to respect, protect, and promote human rights in their territories. Despite the fact that the international and regional human rights framework is strongly rooted in the constitutional framework in most Latin American countries, human rights are not being fully respected and protected in the context of business activity.

At the global level, the normative framework on business and human rights is defined mainly by the Guiding Principles on Business and Human Rights (Guiding Principles), adopted by the UN Human Rights Council in 2011[8] and the Guidelines for Multinational Enterprises adopted by the Organisation for Economic Co-operation and Development (OECD).[9] To implement these Guiding Principles, states undertook to adopt National Action Plans on Business and Human Rights (NAPs).[10] Contrary to calls and demands of civil society organisations, social movements and communities affected by business

1. IACHR, *Indigenous Peoples, Afro-Descendent 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, ExtractiveIndustries2016.pdf (oas.org). See also Conectas et al, *Human Rights Due Diligence to Identify, Prevent and Account for Human Rights Impacts by Business Enterprises*, 168th Period of Sessions, p. 5, Corporate Due Diligence Report - Structure of Topics - 168th Period IACHR.docx (dejusticia.org)
2. IACHR, *Indigenous Peoples, Afro-Descendent 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, paragraphs 17-18, ExtractiveIndustries2016.pdf (oas.org)
3. ILO, *Trabajo forzoso en América Latina y el Caribe* (Forced Labour in Latin America and the Caribbean), https://www.ilo.org/americas/temas/trabajo-forzoso/lang--es/index.htm
4. ILO, *Trabajo infantil en América Latina y el Caribe* (Child Labour in Latin America, and the Caribbean), https://www.ilo.org/americas/temas/trabajo-infantil/lang--es/index.htm
5. ILO, *Igualdad de género en América Latina y el Caribe* (Gender Equality in Latin America and the Caribbean), https://www.ilo.org/americas/temas/igualdad-de-g%C3%A9nero/lang--es/index.htm. In the context of Peru, see J. Dador Tozzini, "Empresa y derechos humanos: El cuidado desde la perspectiva de género" (Business and Human Rights: Care from a Gender Perspective) in Perú Equidad, *Conducta Empresarial Responsable y Derechos Humanos. Normas vinculantes y Debida Diligencia* (Responsible Business Conduct and Human Rights. Binding Norms and Due Diligence), December 2022, p. 107, Conducta Empresarial Responsable y Derechos Humanos; IACHR, *Indigenous Peoples, Afro-Descendent 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, paragraphs 318-321, ExtractiveIndustries2016.pdf (oas.org); Conectas et al, *Human Rights Due Diligence to Identify, Prevent and Account for Human Rights Impacts by Business Enterprises*, 168th Period of Sessions, p. 5, Corporate Due Diligence Report - Structure of Topics - 168th Period IACHR.docx (dejusticia.org).
6. IACHR. *Indigenous Peoples, Afro-Descendent 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, paragraph 21, 316-317, ExtractiveIndustries2016.pdf (oas.org). See also Conectas et al, *Human Rights Due Diligence to Identify, Prevent and Account for Human Rights Impacts by Business Enterprises*, 168th Period of Sessions, p. 5, Corporate Due Diligence Report - Structure of Topics - 168th Period IACHR.docx (dejusticia.org).
7. IACHR, "2022 Was a Violent Year for the Defense of Human Rights in the Americas", 21 February 2023, IACHR: 2022 violent year for the defence of human rights in the Americas (oas.org). Between January 2015 and December 2022, the Business and Human Rights Resource Centre identified nearly 2000 attacks against human rights defenders in Latin America and the Caribbean, representing 42% of the total number of documented attacks worldwide. Business & Human Rights Resource Centre, "Guardians at Risk - Confronting Corporate Abuse in Latin America and the Caribbean", September 2023, Guardians at Risk: Confronting Corporate Abuse in Latin America and the Caribbean - Business & Human Rights Resource Centre (business-humanrights.org)
8. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/121/93/PDF/G1112193.pdf?OpenElement.
9. Updated in 2011 (to align with the Guiding Principles) and again in 2023.
10. National Action Plans on Business and Human Rights | OHCHR

activities, these plans relied primarily on voluntary compliance.[11] However, neither the voluntary recommendations and guidelines for responsible business conduct produced by governments, nor the codes of conduct and self-regulation developed by companies themselves proved to be effective in preventing or reducing cases of human rights abuses and environmental damage by companies.[12] This reality triggered a paradigm shift in the approach to implementation of the Guiding Principles and revived the long-standing calls by civil society for binding measures.

At the initiative of Ecuador, with the support of other states from the Global South, in 2014 the Human Rights Council issued Resolution 26/9 calling for the creation of an Intergovernmental Working Group to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[13] A few years later, laws on corporate due diligence began to be proposed and enacted in Europe. The French law on the corporate duty of vigilance was the first to be passed in 2017, followed by due diligence laws in the Netherlands, Norway, Switzerland, and Germany. There are also legislative proposals or commitments to develop laws in Austria, Belgium, Denmark, the Netherlands (with a broader scope than the law already in place) and Finland, among others.[14] In February 2022, the European Commission presented a draft Directive on corporate due diligence, which is now in the final stages of negotiation.[15] Once adopted, this Directive will have to be transposed into the domestic legislation of all EU countries.

The need for binding measures to enforce the corporate duty to respect human rights and the environment is now unquestionable. Europe is breaking new ground in this area and setting the course for the rest of the world to follow. However, it is important to note that the laws already in place in Europe, and the bills currently under discussion, contain many loopholes and shortcomings that may compromise their effectiveness. These include the limited number of companies or industry sectors covered, a narrow human rights focus, limitations on the scope of obligations (e.g. they do not cover the entire value chain), a lack of effective enforcement measures or legal consequences in terms of civil liability, and a lack of measures to reduce procedural asymmetry.[16]

Despite the commitments made by most Latin American states on business and human rights, none have made significant progress in regulating, monitoring, and sanctioning corporate abuses. The NAPs adopted since 2015 in the region have generally been insufficient, in both in terms of their content and drafting process.[17] With the exception of Peru,[18] Latin American NAPs have not been drafted in a sufficiently participatory manner, with full information and participation opportunities for civil society actors and communities affected by companies' activities.[19] Furthermore, they have not fully

11. International Corporate Accountability Roundtable (ICAR), European Coalition for Corporate Justice (ECCJ) and DeJusticia, *Assessments of existing National Action Plans (NAPs) on Business and Human Rights*, August 2017 Update, NAP-Assessment-Aug-2017-FINAL.pdf (icar.ngo)

12. The European Commission recognised in 2020 that voluntary measures are insufficient. European Commission, *Study on Due Diligence Requirements through the Supply Chain - Final Report*, January 2020, DS0120017ENN.en_.pdf (business-humanrights.org)

13. Resolution adopted by the Human Rights Council, 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, 14 July 2014, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/55/PDF/G1408255.pdf?OpenElement

14. National & regional movements for mandatory human rights & environmental due diligence in Europe, National & regional movements for mandatory human rights & environmental due diligence in Europe - Business & Human Rights Resource Centre (business-humanrights.org). Outside Europe, other countries such as Canada and the United States are considering, or have already enacted, due diligence laws. See, for example, the U.S. Uyghur Forced Labor Prevention Act, Uyghur Forced Labor Prevention Act | U.S. Customs and Border Protection (cbp.gov) and Canada's Corporate Responsibility to Protect Human Rights Bill, Private Member's Bill C-262 (44-1) - First Reading - Corporate Responsibility to Protect Human Rights Act - Parliament of Canada.

15. European Commission, Corporate Sustainability Due Diligence, Corporate sustainability due diligence (europa.eu)

16. S. Deva, "Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?", *Leiden Journal of International Law*, 2023, 36(2), 389-414, Mandatory human rights due diligence laws in Europe: A mirage for rightsholders? | Leiden Journal of International Law | Cambridge Core. For a critique of the European Commission's proposed Directive, see European Coalition for Corporate Justice (ECCJ), "Effective environmental and climate protection in the CSDDD: challenges and priorities", 29 August 2023, Briefing on Environment and Climate in CSDDD (corporatejustice.org)

17. Chile and Colombia were the first to develop a NAP, in 2015 and 2017 respectively. Peru approved its first NAP in June 2021. Argentina, Brazil, Mexico, Honduras and Ecuador are in the process of drafting a NAP for their territories, National Action Plans on Business and Human Rights (globalnaps.org); see also *Current context and future prospects for a due diligence law in Chile*, p. 1 (forthcoming).

18. The Peruvian NAP process was led by the Ministry of Justice and Human Rights and involved the active participation of a wide range of representatives from government, the business sector, trade unions, civil society organisations and affected communities. It is considered a rare example of an inclusive and participatory process in the region.

19. *Dialogo Regional: Lecciones Aprendidas, Desafíos, Innovación en América Latina y el Caribe - Reflexiones desde los actores. Estamos haciendo progreso?* (Regional Dialogue: Lessons Learned, Challenges, Innovation in Latin America, and the Caribbean

incorporated the Guiding Principles.[20] As a result, they have not resulted in substantial changes in the territories and have been rejected by some sections of civil society, which in a number of countries is no longer involved in their elaboration, as is the case in Chile.

Faced with this situation, civil society organisations have begun to raise the need for binding measures, mirroring the process in European countries. Civil society organisations or coalitions in Peru,[21] Brazil and Chile,[22] among other countries in the region, are pushing for processes to draft laws on corporate responsibility to respect human rights and the environment. In Peru, they have already drafted a proposal for a law on corporate due diligence,[23] while Brazil already has a draft national framework law on human rights and business, currently under consideration by the Chamber of Deputies of the National Congress.[24] The government programme of the current president of Chile includes the drafting of a law on corporate due diligence.[25] This promise began to materialise on 28 June 2023 when the Chilean Undersecretary for Human Rights formally announced the drafting of the bill.[26] The bill is now in its initial stages, which have included pre-legislative dialogue with civil society, workers and academia.

The fact that Latin American countries are embarking on legislative processes after the European processes puts them in an advantageous position. While they are not "reinventing the wheel", they can assess the shortcomings and limitations of laws that have already entered into force and avoid reproducing their deficiencies. Moreover, drawing on its progressive human rights tradition, its constitutional frameworks that guarantee human rights and, in many cases, lead the way globally, the Latin American region could go further than European laws and become a true model for the regulation of corporate responsibility.

This report aims to outline the key areas of legal reform needed to establish an effective regime of corporate responsibility for human rights abuses and environmental damage in the domestic legal systems of Latin American countries. Although it draws heavily on the experiences of Chile, Peru, and Brazil, it is of relevance to the entire region. It is the product of extensive research into a wide range of Latin American analyses and reports on the subject, and proposals and positions of civil society organisations in the region, as well as individual and group consultations with experts. The report does

- Reflections from the actors: Are we making progress?) 27 November 2019, Geneva, United Nations Forum on Business and Human Rights, 8th Session, PRESENTACION__REGIONAL_LAC_FORO_DDHH_Y_EMPRESAS__GENEVA_2019.doc (live.com); Statement of the Colombian National CSO Roundtable on Business and Human Rights of 10 December 2020, *Rechazamos nueva versión del Plan de Acción sobre empresas y Derechos Humanos*, We reject the new version of the Action Plan on Business and Human Rights, Rechazamos nueva versión del Plan de Acción sobre empresas y Derechos Humanos - CAJAR (colectivodeabogados.org)

20. J. Aylwin, F. Guerra and M. Didier, *Plan de Acción Nacional de Derechos Humanos y Empresas: Análisis crítico desde la sociedad civil* (National Action Plan on Human Rights and Business: A Critical Analysis from Civil Society), Observatorio Ciudadano, March 2019, https://observatorio.cl/plan-de-accion-nacional-de-derechos-humanos-y-empresas-analisis-critico-desde-la-sociedad-civil/
21. *Observatorio de Conflictos Mineros de América Latina* (OCMAL), "Retos del Plan Nacional de Acción en el nuevo gobierno de Pedro Castillo" (Challenges of the National Action Plan in the new government of Pedro Castillo), 17 November 2021, RETOS DEL PLAN NACIONAL DE ACCIÓN EN EL NUEVO GOBIERNO DE PEDRO CASTILLO | Observatorio De Conflictos Mineros De América Latina (Ocmal.Org)
22. *Plataforma Chilena de Sociedad Civil sobre Derechos Humanos y Empresas*, "Comunicado: PAN 2 propuesto para el período 2022-2025" (Press statement: NAP 2 proposed for the period 2022-2025), 6 June 2022, *Observatorio Ciudadano*, Comunicado: PAN 2 propuesto para el período 2022-2025; *Coordinación Plataforma de Sociedad Civil Chilena sobre Derechos Humanos y Empresas*, "Carta de 8 de agosto de 2022 a Sra Haydee Oberreuter Umazabal, Subsecretaria de Derechos Humanos del Ministerio de Justicia y Derechos Humanos" (Letter of 8 August 2022 to Ms. Haydee Oberreuter Umazabal, Undersecretary for Human Rights of the Ministry of Justice and Human Rights).
23. *Centro de Políticas Públicas y Derechos Humanos* (*Perú Equidad*), *Proyecto de Ley que Regula la Actividad Empresarial y la Debida Diligencia en Materia de Derechos Humanos y Ambiente* (Draft Law Regulating Business Activity and Due Diligence on Human Rights and the Environment), May 2022, PROYECTO-LEY-DEBIDA-DILIGENCIA.pdf (dhperu.org). The Peruvian NAP includes an agreement to assess the relevance of a norm on corporate due diligence, making Peru the first country in Latin America to make such a commitment in its own NAP.
24. Draft law No. 572/2022, *Projeto de Lei cria a lei marco nacional sobre Direitos Humanos e Empresas e estabelece diretrizes para a promoção de políticas públicas no tema* (Bill creating a national framework law on Human Rights and Business and establishing guidelines for the development of public policies on this issue), Projeto de Lei Marco Nacional sobre Direitos Humanos e Empresas.docx (aureacarolina.com.br); Brazilian Chamber of Deputies, *Projeto cria marco nacional sobre direitos humanos e empresas* (Bill creates national framework on human rights and business), Projeto cria marco nacional sobre direitos humanos e empresas - Notícias - Portal da Câmara dos Deputados (camara.leg.br)
25. *Programa de Gobierno: Apruebo Dignidad* (Government Programme: Endorsing Dignity), p. 180, Plan+de+gobierno+AD+2022-2026+(2).pdf (cepal.org)
26. *Ministro Corder anuncia proyecto de ley sobre debida diligencia empresarial* (Minister Corder announces corporate due diligence bill), 28 June 2023, Ministro Corder anuncia proyecto de ley sobre debida diligencia empresarial - YouTube

not seek to present exhaustive or definitive proposals. On the contrary, it endeavours to provide initial, open, and perfectible building blocks that prompt reflection and dialogue and contribute to the collective process of preparing effective corporate responsibility laws and regimes for Latin America. Rather than a specific law, we speak of a law or laws, or policy or regulatory adjustments, bearing in mind that technical and political needs, strategies and opportunities will vary from country to country.

II. LATIN AMERICAN CONTEXT

Peru, Brazil, and Chile, as well as most Latin American states, share certain characteristics or needs that must be addressed by new business and human rights laws or legislative reforms. These include the predominantly "territorial" nature of abuses and the huge gap between the written law and its practical implementation. These two factors mean that reflection on necessary laws or legislative measures must be based both on a thorough understanding of existing regulatory frameworks and normative gaps[27] and on the reasons for the lack of compliance with existing laws and regulations on business activities.[28] This exercise is crucial to determine what kind of legal intervention is needed and to ensure that, once in force, new laws or regulatory adjustments do not suffer the same fate as existing regulatory frameworks.

1. Predominantly "territorial" nature of abuses

Latin American countries in general, and Peru, Chile, and Brazil in particular, are major exporters of commodities and their economies depend largely on the revenue in dollars generated by these exports. Moreover, they all pursue extractive economic models,[29] which today are being intensified by the energy transition.[30] This means that, in the context of global supply chains, these are the countries where the companies at the top of the value chain (i.e. the producers and suppliers) are located. They are also typically recipients of foreign investment, which means that subsidiaries, affiliates or joint ventures owned or controlled by foreign-domiciled transnational corporations are also based in these countries.[31] This leads to regulatory regression or the so-called "race to the bottom".[32] Latin American countries have historically been forced or encouraged to dismantle their domestic regulatory frameworks to attract foreign investment and promote exports.[33] Bilateral investment treaties signed between Latin American countries and capital-exporting states capital-exporting states, particularly since the 1990s, have cemented this trend. Since their function is to protect the interests of foreign capital, they grant extraordinary legal rights and privileges to investment companies without imposing any obligations. One of the most damaging effects of these practices has been the restriction of states' ability to move forward with public policy and regulation in areas of public interest, including in the areas of environmental protection and human rights in the context of business activities.[34]

This situation means that, unlike in the Global North, most human rights and environmental abuses occur "at home", i.e. within their territory. Therefore, in contrast to legislative efforts in Europe and

27. See similar recommendation in Office of the Special Rapporteur for Economic, Social, Cultural and Environmental Rights (REDESCA), *Business and Human Rights: Inter-American Standards*, OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19, 1 November 2019, paragraph 430, HumanRightsInteAmericanStandards.pdf (oas.org) (REDESCA, *Business and Human Rights: Inter-American Standards*).

28. See similar recommendation in REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 430.

29. IACHR, *Indigenous Peoples, Afro-Descendent 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, paragraph 11, ExtractiveIndustries2016.pdf (oas.org); *Current context and future prospects for a due diligence law in Chile*, p. 1 (forthcoming).

30. For example, exploitation of lithium for use in electric vehicles and exploitation of renewable energy sources (solar, wind, hydro). See *Current context and future prospects for a due diligence law in Chile*, pp. 6-7, 9-10 (forthcoming).

31. IACHR. *Indigenous Peoples, Afro-Descendent 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, paragraph 14, ExtractiveIndustries2016.pdf (oas.org).

32. Competition between countries receiving foreign investment to attract such investment through the weakening or elimination of regulatory measures, including on the protection of human rights and the environment.

33. D.I. Márquez and L. S. de Erice Aranda, "*La diligencia debida empresarial como mecanismo para reforzar el respeto de los derechos humanos laborales en América Latina*" (Due diligence as a mechanism to strengthen respect for labour human rights in Latin America), *Homa Publica - Revista Internacional de Derechos Humanos y Empresas*, Vol. 6, No. 1, Jan-Jun 2022, p. 2, Vista de La diligencia debida empresarial como mecanismo para reforzar el respeto de los derechos humanos laborales en América Latina (ufjf.br); 7942.pdf (homacdhe.com)

34. The signing of free trade and investment treaties in the 1990s to protect foreign investment was like a wave that spread throughout the region. See L. Ghiotto & P. Laterra (eds), *25 años de tratados de libre comercio e inversión en América Latina - Análisis y Perspectivas Criticas* (25 Years of Free Trade and Investment Agreements in Latin America - Critical Analysis and Perspectives), Rosa Luxemburg Foundation, *El Colectivo*, 2020, CONICET_Digital_Nro.41a59a9f-f7ea-4f48-bf8f-45fe0985e531_L.pdf

other countries of the Global North that have focused almost exclusively on the enactment of new due diligence laws with extraterritorial scope, efforts in Latin American countries should continue to concentrate largely on improving and effectively implementing existing legal frameworks that regulate and control business activities and operations occurring within the territories.[35]

This does not mean that new laws or other measures with extraterritorial reach are not needed. Many Chilean, Brazilian and Peruvian companies buy products or services from abroad, and there is a growing number of transnational companies domiciled in these countries. In relation to these companies and their transnational activities (including the South-South investments that have increased exponentially in recent years) it is important that public policies, legislation, oversight and access to justice measures also have an extraterritorial reach. However, this aspect of regulation should not obfuscate the pressing need to continue working on strengthening national regulatory frameworks and their practical application. Ultimately, these have the greatest impact on the day-to-day activities and actions of companies (both domestic and foreign) in the national or "territorial" sphere.

2. Gap between the law and its implementation

There is a wide gap in the region between the written law and its practical implementation. Constitutional principles and provisions, laws and regulations, which in many cases are strong and adequate,[36] and even court rulings or orders, are often ignored by companies and the public officials in charge of enforcing them.[37] In this context, the question arises as to whether new laws are needed, or whether efforts should focus on effective enforcement of existing laws. If new laws or adjustments to policies or regulations are essential to close existing legal gaps in the area of business and human rights, how can it be ensured that these new laws or policy changes do not suffer the same fate as existing laws, i.e. what mechanisms are needed to implement them in practice?[38] It would be naïve to think that a single law or series of legislative interventions could eliminate all the causes and factors affecting the proper implementation and enforcement of laws in Latin America, especially in an area of such complexity and resistance as business regulation. Nevertheless, concrete measures may help to address some of these causes and achieve greater effectiveness.

In the area of business activities, the frequent lack of compliance with laws protecting human rights and the environment is due to a set of factors that include, among the most relevant, **corporate capture of the state**, **weakness of public institutions** in enforcing the law,[39] major **asymmetry of power** between companies and people affected by their activities, and **corruption**.[40] These factors are invariably intertwined. Corruption between private and public sector actors, for example, results

35. *Current context and future prospects for a due diligence law in Chile*, p. 13, (forthcoming), noting the need to adapt regulations to make them compatible with human rights in the context of business activity.
36. However, it should also be noted that many of these norms protecting human rights and the environment have been dismantled or undermined by the neoliberal reforms of the 1990s, or more recently by conservative governments with close ties to the business sector. See, for example, *Justiça nos Trilhos*, *Direitos Humanos e Empresas: a Vale S.A. e as estratégias de dominação, violações e conflitos envolvendo territórios, água, raça e gênero* (Human Rights and Business: Vale S.A. and the strategies of domination, violations and conflicts involving territories, water, race and gender), February 2020, Justiça nos Trilhos (justicanostrilhos.org)
37. See, for example, the case of non-compliance with the judgement of the Chilean Supreme Court of Justice against *Complejo Industrial Ventanas*. FIMA, "*Corte Suprema analiza recurso de queja por incumplimiento de la sentencia en el caso de las intoxicaciones masivas ocurridas en Quintero y Puchuncaví en 2018*" (Supreme Court considers complaint for failure to comply with the ruling in the case of the mass poisonings in Quintero and Puchuncaví in 2018), 24 March 2023, Corte Suprema analiza recurso de queja por incumplimiento de la sentencia en el caso de las intoxicaciones masivas ocurridas en Quintero y Puchuncaví en 2018 - Fima; For a more general analysis of this issue, see IACHR, *Indigenous Peoples, Afro-Descendent 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, paragraphs 103 and 139, ExtractiveIndustries2016.pdf (oas.org)
38. During a consultation in preparation for this report on 28 June 2023, Peruvian lawyer and expert on business and human rights, Federico Chunga Fiestas, noted that non-compliance with the law is a key problem. In his opinion, NAPs can serve as an initial and preparatory measure to contribute to the effective implementation of a future law on business and human rights, fostering a change in the culture of compliance with such a law.
39. See, for example, IACHR. *Indigenous Peoples, Afro-Descendent 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, paragraph 20, ExtractiveIndustries2016.pdf (oas.org)
40. With some exceptions, most Latin American countries are categorised as having medium to high levels of corruption in Transparency International's 2022 Corruption Perceptions Index, Report_CPI2022_English.pdf (transparencycdn.org); REDESCA, *Business and Human Rights: Inter-American Standards*, paragraphs 4, 131, 263-4

in or reinforces corporate capture and the weakening of public institutions. In addition, there is a **discursive** and "soul-buying" **phenomenon**, which sees companies, business enterprises and their political, media and academic allies maintaining a discourse that stigmatises as "anti-business", "anti-development" or "ideological" the position of indigenous peoples, trade unions and other human rights and environmental defenders against destructive business activities. The influence of these "developmentalist" arguments and positions on public policy is significant and is exacerbated in times of economic crisis.

Capture of state institutions occurs at all levels of government and in various parts of the public sector. Corporate capture of legislative bodies results in no legislation, weak legislation, or legislation favourable to business interests. Corporate capture of public administration bodies culminates in weak regulations that in many cases distort the objectives of the law, and lack of or insufficient oversight of business activities. Corporate capture of monitoring and justice bodies leads to impunity or practices that benefit business, such the adoption of simplified licensing procedures, the approval of unfair decisions or agreements, the promulgation of rulings that justify abuses in the name of economic development and growth, or the lack of follow-up and enforcement of convictions.[41] This is compounded by the **lack of resources and training of state oversight bodies**, which puts them in a situation of subordination and dependence on the private sector.

The **asymmetry of power** between companies and rights-holders is both the product and the constant cause of major social challenges that historically affect the region, such as the high **concentration of political and economic power**,[42] high levels of **informality and lack of protection** in the labour market,[43] high levels of **violence against social activists**,[44] profound **social inequality** and a colonial legacy marked by **racism** and **classism** that continue to reproduce patterns of social exclusion, marginalisation and exploitation.[45] This translates, for example, into the historical exclusion of indigenous peoples, Afro-descendants and rural communities from decision-making processes on issues that concern them, and the subordination of their rights to corporate and other interests.[46] This is compounded by societies dominated by **patriarchal behaviours** that are replicated and even exacerbated in many areas of business activity and have an adverse impact on the effective exercise of women's rights.[47] In order to be effective, legal reform programmes need to take this background into account.

3. Effective normative interventions that respond to local realities and needs

In many cases the most appropriate intervention, or a necessary intervention together with the introduction of new laws (e.g. on corporate due diligence), will be related to specific regulatory frameworks such as codes on mining, forestry or hydrocarbons, or labour or environmental protection laws, aimed at improving or adjusting their substantive provisions and/or strengthening enforcement and implementation mechanisms.[48] In any case, any new law seeking to impose a corporate duty

41. 17942.pdf (homacdhe.com) p. 8
42. UNDP, *Regional Human Development Report – Trapped: High Inequality and Low Growth in Latin America and the Caribbean*, 22 June 2021, p. 148
43. ILO, *Economía informal en América Latina y el Caribe* (Informal economy in Latin America and the Caribbean), Economía informal en América Latina y el Caribe (América Latina y el Caribe) (ilo.org)
44. UNDP, *Regional Human Development Report – Trapped: High Inequality and Low Growth in Latin America and the Caribbean*, 22 June 2021, p. 201; REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 317
45. UNDP, *Regional Human Development Report – Trapped: High Inequality and Low Growth in Latin America and the Caribbean*, 22 June 2021, p. 22; Economic Commission for Latin America and the Caribbean (ECLAC), "*Pese a avances recientes, América Latina sigue siendo la región más desigual del mundo*" (Despite recent advances, Latin America remains the most unequal region in the world), 8 June 2017, CEPAL: Pese a avances recientes, América Latina sigue siendo la región más desigual del mundo | Comisión Económica para América Latina y el Caribe; Conference proceedings, *Foro Debida Diligencia en Derechos Humanos y Reparación frente a los Impactos de las Actividades Empresariales* (Forum on Due Diligence in Human Rights and Remedies for the Impacts of Business Activities), 12-13 March 2020, p. 10, Relatoria-Foro-Foro-DDHH-Marzo-2020-VF-1.pdf (poderlatam.org)
46. IACHR, *Indigenous Peoples, Afro-Descendent 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, paragraph 139, ExtractiveIndustries2016.pdf (oas.org); REDESCA, *Business and Human Rights: Inter-American Standards*, paragraphs 347, 352
47. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 331
48. See, for example, REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 430 (Recommendations

of respect or due diligence should consider the impact it will have and how it will fit in with and be integrated into existing protection regimes.

The systemic challenges in implementing the law call for the introduction of features and approaches in new laws or regulatory adjustments that contribute to making effective implementation more achievable. For example, it is essential that new laws or regulatory adjustments expressly address state obligations and government capacity to enforce the law, in addition to corporate obligations of respect and due diligence. These are central elements of the proposed Peruvian law and the Brazilian framework law referred to above (see further below).[49] The establishment of permanent multi-stakeholder forums to monitor effective law enforcement is another relevant measure to strengthen and ensure independent oversight by the state.

Effective compliance also requires tools to empower civil society and rights-holders. For example, the effective participation in due diligence processes of individuals or communities whose human rights may be affected by business activities, and their active role in monitoring business conduct, are critical measures to ensure effective compliance with the legal duty to respect human rights. In the labour sphere, for example, there is no better enforcer of the law and guarantor of rights than the workers themselves and their trade unions.

New laws or policy or regulatory adjustments should also include measures to limit corporate power and mitigate procedural inequality of arms.[50] This can be achieved both through the introduction of interpretative principles of law that favour the individual or groups as rights holders (e.g. the pro persona principle), as well as through specific legal devices such as the reversal of the burden of proof or mandatory disclosure of information held by companies.[51] The establishment of a corporate duty of respect extending to the entire value chain may help to alleviate pervasive exploitation and abuse that are rampant in informal labour situations upstream in production chains.

In the face of widespread institutional, political, and social violence, laws or regulatory adjustments should also seek to protect human rights and environmental defenders and recognise and promote their work as essential actors in the prevention of abuse and corporate accountability. They should also aim to raise and promote the voice of traditionally excluded segments of the population in decision-making processes to respond to situations of exclusion and inequality of resources and opportunities. Due diligence regulations should offer those who are affected or potentially affected by corporate activities a central role, rather than viewing them simply as passive recipients or beneficiaries of processes controlled purely and exclusively by companies. The mandatory integration of a gender perspective both in the work of state bodies and corporate due diligence processes is an important way to address structural and historical discrimination against women and to avoid or adequately respond to differentiated and disproportionate impacts on women and girls.

In addition to designing laws or regulatory interventions on the corporate duty of respect and due diligence that sufficiently consider and seek to rectify situations of power asymmetry, it is essential to maintain a focus on other areas of public policy and regulation that have a direct, or less direct, impact on the effectiveness of laws that seek to regulate business activities. These include those related to the fight against corruption and undue corporate interference in public policy and regulation in areas directly related to or impacting on business activities.[52] It is also key to dismantle conservative and regressive narratives that pit environmental protection and human rights against economic development, job creation, and poverty alleviation.

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to states). The baseline study for the development of the Chilean NAP identified the need to adapt existing sectoral regulation and oversight systems, but the NAPs that followed did not use the opportunity to capitalise on this. See Chilean Baseline Report: https://derechoshumanos.udp.cl/publicacion/estudio-linea-base-sobre-empresas-y-derechos-humanos-en-chile/

49. See *Centro de Políticas Públicas y Derechos Humanos* (*Perú Equidad*), *Proyecto de Ley que Regula la Actividad Empresarial y la Debida Diligencia en Materia de Derechos Humanos y Ambiente* (Draft Law Regulating Business Activity and Due Diligence on Human Rights and the Environment), May 2022, p. 8, PROYECTO-LEY-DEBIDA-DILIGENCIA.pdf (dhperu.org), (highlighting the need for a regulation that ensures that the state takes assertive and proactive measures to promote human rights in business activity).

50. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 413

51. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraphs 134, 140

52. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraphs 15, 53, 267.

Finally, it is essential for states to reconsider their position on investment treaties and pursue structural reforms to regain their capacity to regulate foreign investment. In this regard, they must be able to impose performance requirements on investing companies, including in relation to human rights and the environment, and to implement public policies and regulations in these areas without fear of being sued for millions of dollars in international arbitration. In various ways, Ecuador, Venezuela, Bolivia, and Brazil have begun to take steps in this direction.[53]

53. L. Ghiotto & P. Laterra (eds), *25 años de tratados de libre comercio e inversión en América Latina - Análisis y Perspectivas Criticas* (25 Years of Free Trade and Investment Agreements in Latin America - Critical Analysis and Perspectives), Rosa Luxemburg Foundation, *El Colectivo*, 2020, pp. 129, 134, 139-141, CONICET_Digital_Nro.41a59a9f-f7ea-4f48-bf8f-45fe0985e531_L.pdf

III. KEY AREAS TO BE ADDRESSED BY LAWS OR LEGISLATIVE/REGULATORY ADJUSTMENTS ON CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES AND ENVIRONMENTAL DAMAGE

Each country will have to follow its own path of analysis to determine the new law(s) or legislative or regulatory reforms and/or adjustments that are necessary to introduce into the domestic legal system the corporate duty to respect human rights and the environment, and an institutional framework that will make the fulfilment of this duty effective in practice. For example, the establishment of a new regime of corporate tort liability for human rights and environmental abuses can be pursued through the adoption of a new comprehensive law regulating the corporate duty to respect that contains provisions on liability for abuses, or by amending specific articles on liability in civil codes and other regulatory frameworks. This responsibility may also be reinforced in criminal law.

This assessment will also be subject to the political situation specific to each country, which may influence decisions on the type, form, and timing of legislative or regulatory intervention. An adverse political context may justify modest or incremental interventions, provided these do not preclude or undermine the possibility of broader and more ambitious interventions in the future.

This section defines key areas to be addressed by new laws or policy/regulatory adjustments and is structured around four main axes or objectives:

A. **Prevention**
B. **Legal responsibility for abuse**
C. **Access to justice**
D. **Cross-cutting issues**

It is not intended to be exhaustive or to determine the most appropriate legal or regulatory instrument(s) or set of instruments or interventions to make progress in these key areas. It should be emphasised that any new normative measure should complement and, where appropriate, reinforce existing norms and should in no way replace or undermine existing effective and adequate legislation on corporate responsibility in specific areas (e.g. labour, environmental protection, consumer protection, etc.).

In relation to each area, examples are provided of specific provisions or approaches in the draft National Framework Law on Business and Human Rights in Brazil (Brazil's Framework Law or Framework Law), the draft law proposed by the *Plataforma de Sociedad Civil sobre Empresas y Derechos Humanos* in Peru (*Peru's Draft Law*), the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) which is now in force[54] and occasionally in other norms that address the issue. These examples or references are included for illustrative purposes and as inspiration for similar interventions or proposals in other countries.

An essential step for Latin American states is to ratify, or fully and effectively implement the Escazú Agreement. This instrument is relevant and critical to all the cross-cutting issues or objectives set out in this report.

54. ECLAC, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (LC/PUB.2018/8/Rev.1), Santiago, 2022, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (cepal.org)

A. PREVENTION

1. Corporate duty to respect and prevent

The new law(s) or policy or regulatory adjustments should seek to impose a corporate legal duty to respect human rights and the environment,[55] and to prevent human rights abuses and environmental damage, which:

- extends to the entire value chain and business relationships[56] (modifying and/or adapting the content and implications of the duty according to the nature of the relationship);[57]
- refers to all internationally, regionally and nationally recognised human rights, and includes the duty to comply with domestic laws and regulations on human rights and environmental protection;
- covers cumulative and legacy adverse impacts;
- includes the environment as a good in its own right;[58]
- incorporates obligations on climate change;[59]
- covers both public and private companies and financial institutions;
- covers small and medium-sized enterprises (modifying and/or adapting the form and means of compliance according to the size and capacity of the enterprise and the nature and severity of the potential damage);
- extends extraterritorially in relation to companies with direct or indirect operations or business relationships abroad.

EXAMPLES/REFERENCES

Brazil's Framework Law establishes a common obligation on the state and business to respect human rights and to avoid complicity with third parties in human rights abuses (Art. 4). Article 6 restates the substantive obligation of companies to respect, which implies "avoiding causing or contributing to human rights abuses". As for the scope of this duty, the Framework Law clarifies that it extends to companies and their subsidiaries, affiliates, subcontractors, suppliers, and any other entity in their global value chain (Art. 2, single paragraph) as well as to financial institutions (Art. 2) and state-owned or controlled enterprises (Art. 9.IV).

Peru's Draft Law establishes a general obligation for companies to "respect human rights and the environment" (Art. 10.1). It extends this duty to "all companies, whether domestic or with foreign capital participation, private, state-owned or involving state participation" and clarifies that it covers their own activities or those carried out through branches, subsidiaries, suppliers, subcontractors, or licensees (Art. 2.1). Moreover, it specifies that companies subject to its provisions must ensure that "subsidiaries, supply chains, licensees and subcontractors" respect human rights (Art. 10.2). The draft law extends this duty to the activities of Peruvian companies operating abroad "either directly or through subsidiaries or branches" (Art. 19).

55. FIDH et al, *A Matter of Justice: How European Legislation Can Make a Difference Experiences and views from around the world on how to establish meaningful EU rules on corporate accountability*, December 2020, p. 16, loi_vigi763angweb.pdf (fidh.org)
56. According to the OECD *Due Diligence Guidance for Responsible Business Conduct*, business relationships covered by a company's duty to exercise due diligence include "suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisors, and any other non-state or state entities linked to its business operations, products or services". OECD-due-diligence-guidance-for-responsible-business-conduct.pdf (oecd.org)
57. The closer the relationship, or the greater the power of control or influence, the greater should be the expectation of prevention, as well as the legal consequences for abuses. However, the corporate duty to respect or prevent must comprise reasonable measures to prevent foreseeable abuses along the entire value chain.
58. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 46.
59. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 46. UN Treaty Bodies, Joint Statement, Five UN human rights treaty bodies issue a joint statement on human rights and climate change. This is also in line with Resolution 3/2021 of the Inter-American Commission on Human Rights and REDESCA on the Climate Emergency, Resolucion_3-21_ENG.pdf (oas.org)

The **right to a healthy environment** is recognised under the Protocol of San Salvador (Art. 11) and in the Advisory Opinion of the Inter-American Court of Human Rights OC-23/17.[60] The Advisory Opinion clarifies that the environment must be protected as a legal asset, regardless of its connection to human rights risks or adverse impacts.[61]

2. Minimum, non-restrictive and non-exhaustive definition of due diligence

Where laws or legislative reforms seek to establish an explicit duty of due diligence, it is important to:

- Define minimum due diligence steps or measures in line with international due diligence standards and the essential operational guidelines on how to carry out these processes (e.g. on transparency, disclosure, consultation, and participation).
- Present these minimum steps and guidelines in an open, non-restrictive manner, that does not exclude any reasonable measures that may be necessary to avoid abuses in a specific situation or case.

A detailed and exhaustive definition of due diligence steps may give rise to the erroneous perception that corporate duty is satisfied by the fulfilment of those steps, regardless of the outcome, or even if other reasonable measures which were not used could have prevented the harm. This may encourage in practice a robotic and formalistic application of the duty to exercise due diligence.

The following aspects should be considered in legislation or regulations on due diligence:

- The use of the term "due diligence" should not confuse the function and purpose of this concept in the field of human rights and the environment. In this context, the primary function and objective of corporate due diligence is to prevent harm to third parties, regardless of whether this entails a risk or damage to corporate interests.
- The duty to respect and prevent should not be confused or assimilated with due diligence, which is only a tool, mechanism or mode of behaviour that helps to comply with the former.[62]
- Due diligence legislation should not undermine, but rather be consistent with the domestic laws of states, which in many cases require respect for and protection of human rights and the environment through obligations to achieve specific results and impose strict legal liability for the commission of certain damage.[63]
- Due diligence measures can be proportionate to the severity and likelihood of adverse impacts and to the size, resources and leverage of companies. However, the duty to respect and prevent applies to all companies, regardless of their size, structure or nature.
- Due diligence should be understood as an open, transparent and participatory process in which rights holders affected or likely to be affected by business activity have a high degree of participation and involvement (see Cross-cutting Issues).

60. Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017 requested by the Republic of Colombia, *The Environment and Human Rights* (Advisory Opinion OC-23/17). It is also recognised in many national constitutions, such as those of Mexico (art. 4), Chile (art. 19.8) and Argentina (art. 41). The constitution of Ecuador even enshrines the right of nature itself to its existence, maintenance, and regeneration, and grants every person or community the power to assert the rights of nature (art. 71).
61. Advisory Opinion OC-23/17, paragraph 62. In July 2022, the United Nations General Assembly recognised the human right to a clean, healthy, and sustainable environment. See Resolution 76/300 of 28 July 2022.
62. See, e.g., Global Witness, *A Chance at a Sustainable Future - Strengthening the EU's New Law*, April 2022, pp. 11-12, Can the EU hold companies to account? Global Witness (recommending that European legislation on corporate due diligence impose a corporate duty to prevent as well as a duty to exercise due diligence).
63. In Brazil, for example, Law No. 6.938 on National Environmental Policy establishes strict liability for environmental damage. If a company (or individual) pollutes the environment, it is liable for environmental damage without it being necessary to prove fault or intent. In the context of corporate due diligence, this means that it is not necessary to prove a lack of due diligence, or a failure or omission in its implementation, in order to hold the company civilly liable for environmental damage.

EXAMPLES/REFERENCES

Brazil's Framework Law includes a generic reference to the obligation of companies to "adopt control, prevention and redress mechanisms" capable of identifying and preventing abuses (Art. 5.2). Article 7 establishes a corporate duty to "conduct due diligence processes to identify, prevent, monitor and remedy" abuses and clarifies its approach and certain minimum procedural guidelines. It specifies, however, that the implementation of corporate control and prevention measures is without prejudice to the civil, administrative, or criminal liability of the company in case of abuse (Art. 5.2).

Peru's Draft Law establishes the "duty of due diligence" of companies, which implies "identifying, preventing and remedying the risks or damages that business activities may cause to the human rights of all parties concerned and the environment, in accordance with the rules established in this law, as well as the corresponding national and international regulations" (Art. 11). Unlike Brazil's Framework Law, it sets out the minimum steps and general guidelines for due diligence in considerable detail (Art. 12, 13, 15, 16).

3. Imposition of an explicit duty on public entities to respect and guarantee human rights and environmental protection in the context of business activity

New law(s), or policy or regulatory adjustments should seek to give effect to the state's obligation to respect and guarantee human rights and the environment in the context of business activity. The state must act as a "guardian" or guarantor of rights and not simply as an arbitrator between private parties. From a prevention perspective, the following aspects are critical:

- The obligation of public entities to adopt and implement public policies, regulations, protocols, operational guidelines and other measures in their respective areas of operation consistent with their duty to respect and protect human rights and the environment in the context of business activity (e.g. in the case of mining or industry development authorities, or in the context of public procurement, subsidies to private activity, public-private ventures, etc.).
- The state's obligation to enforce the corporate duty to respect human rights through competent and independent bodies with sufficient powers of oversight, supervision, and sanction (see Legal Responsibility for Abuses).
- In accordance with the **principle of comprehensive prevention** (see Interpretative Principles), states must ensure:

  (i) impact assessments of business activities or projects are conducted prior to their commencement and at key points throughout their duration, with genuine and informed participation of potentially affected persons or communities;[64]

  (ii) the power to investigate and sanction not only the occurrence of damage, but also failures to exercise due care or due diligence, regardless of the existence of damage. To this end, the absence or insufficiency of care measures should be considered a wrongdoing in itself, giving rise to sanctions and remedial orders[65] with the explicit aim of avoiding materialisation of damage (see Legal Responsibility for Abuse);

  (iii) effective administrative and judicial procedures to respond to situations of imminent threat.

- The application of the **pro persona principle** (see Interpretative Principles) in the exercise of discretionary powers of public entities in relation to the approval and supervision of business

64. In many cases, consultations carried out as part of impact assessments turn into administrative formalities to approve entry into territories rather than genuine procedures to assess whether entry is possible without affecting human rights.

65. The imposition of fines as the only sanction without the concomitant obligation to remedy failures and comply with the law leads to an ineffective enforcement system focused on the imposition and payment of fines and not on the effective prevention of damage. See, for example, the "popular complaint" case for environmental damages in Mexico, presented during the session "*Mas allá de los Tribunales: Desafíos y Oportunidades de otros Mecanismos Estatales*" (Beyond the Courts: Challenges and Opportunities for other State Mechanisms) of the VIII Regional Forum on Business and Human Rights in Latin America and the Caribbean, PROGRAMA | My Site 2 (empresasyderechoshumanos.org).

activities and projects and the obligation to respect human rights and not to reduce or undermine their protection in the exercise of these prerogatives.[66]

- The possibility to challenge or appeal administrative decisions, acts, or omissions related to business activities that put at risk or abuse human rights or the environment, and to request or initiate administrative or other proceedings against public officials or entities who fail to perform their duties.

Given the **asymmetry of power** that exists between companies and individuals or groups affected or potentially affected by their activities, the state, as guarantor of rights, cannot adopt a neutral stance. It must adopt a proactive role in protecting and defending human rights and take affirmative measures to address the imbalance **between parties** and **material equality**.[67] From a prevention perspective, this requires, inter alia, ensuring an **intersectional and differentiated approach**, including an **ethnic and gender perspective**, implementing mechanisms for **effective participation** and safeguarding the right to **consultation and FPIC**, **transparency**, effective mechanisms for **access to information, independent technical advice** and **effective protection of human rights defenders and environmental defenders** (see Cross-cutting Issues).

EXAMPLES/REFERENCES

Brazil's Framework Law is directed at both companies and "state agents or institutions, including the justice system" (Art. 2). Article 8 establishes a generic obligation on all levels of government (national, state, and municipal) to implement prevention, protection, monitoring, and reparation measures to prevent human rights abuses by companies. The Framework Law establishes the state's obligation to review existing laws to ensure that they do not restrict but rather facilitate respect for human rights by businesses (Art. 9.X), to deny subsidies or tax exemptions to companies that abuse human rights (Art. 9.XV), to prevent self-regulation from being a substitute for state responsibility to monitor business activities (Art. 9.XVIII), to adopt special protection measures for vulnerable groups (Art. 9.XVII) and to establish early warning systems (Art. 9.X). Article 15 requires the creation of administrative complaint mechanisms to encourage authorities to investigate and intervene not only in specific cases of abuse, but also when there is a risk of abuse, in order to prevent it. It provides for social and environmental impact assessments of business activities that guarantee respect for human rights (Art. 20.VII and IX), are carried out prior to the authorisation of the business activities in question and involve effective social participation in their preparation (Art. 9.XIX). The Framework Law also gives certain public bodies, such as the Public Prosecutor's Office, the Public Defender's Office and the National Human Rights Council, specific roles and responsibilities for intervention to ensure the protection of rights in various contexts.

Peru's Draft Law expressly establishes the state's duty to protect human rights in the context of business activities (Art. 4). It establishes a general obligation on all sectors and levels of government to regulate business activities, to comply with and enforce regulations that have the purpose or effect of making companies respect human rights and the environment, to ensure that regulations do not undermine the corporate duty to respect human rights and the environment, and to ensure the enforcement of court rulings related to the exercise of human rights or damage to the environment in the context of business activity. It also requires the implementation of training programmes on human rights and business for public officials and civil servants (Art. 6) and the improvement of services for the protection of human rights and the environment at the sub-national level, especially channels for complaints, care for victims and reparation for human rights abuses or environmental damage by companies (Art. 31.1).

66. See for example the cases cited in 17942.pdf (homacdhe.com), p. 8.

67. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 44.

The **Escazú Agreement** requires the possibility of ordering "precautionary and interim measures, inter alia, to prevent, halt, mitigate or rehabilitate damage to the environment" (Art. 8.3). The same article establishes the state's obligation to guarantee access to judicial and administrative mechanisms to challenge and appeal administrative decisions, actions or omissions related to access to environmental information, public participation or that adversely affect or could adversely affect the environment.

B. LEGAL RESPONSIBILITY FOR ABUSE

1. Strengthening corporate responsibility for failures to exercise due care or due diligence and for abuses

The legal responsibility to respect and prevent must be supported by civil, criminal and administrative legal consequences in case of human rights abuses and/or environmental damage. However, legal consequences must also be foreseen for failure to exercise due care or due diligence, even in the absence of damage and for the very purpose of preventing damage.

Many human rights abuses and cases of environmental damage constitute crimes under international law and under the domestic law of numerous countries. Examples include child or slave labour, certain cases of environmental pollution, corruption and labour abuses, and threats or acts of violence against human rights defenders and environmental defenders. The involvement of companies in these offences should carry criminal consequences (and/or their administrative equivalent)[68] that are sufficiently dissuasive and proportionate to the gravity of the offence.

Companies must also be held civilly liable for human rights abuses or environmental damage. In Latin America, constitutional actions (such as the motion for constitutional relief through *amparo* proceedings or motion for constitutional protection) are crucial for human rights protection, but do not always lead to full reparation. New laws or adjustments to existing laws should seek to establish the civil liability of companies for human rights abuses or environmental damage they have caused, contributed to, or could have avoided in their value chains had they implemented all reasonable due diligence measures according to the specific circumstances in each case.[69]

Legislation that seeks to establish a civil liability regime in such cases must ensure that:

- The existence and implementation of internal compliance or due diligence programmes alone cannot be used as an automatic or sufficient legal defence against civil claims for damages;
- New provisions on corporate responsibility for human rights abuses or environmental damage reinforce or supplement existing legal liability frameworks and in no way undermine or supplant them;
- Civil liability entails a duty to make full and comprehensive reparation for damage that is not limited to monetary compensation (see Access to justice and Principle of comprehensive reparation);
- Civil liability is independent and without prejudice to criminal and/or administrative liability (and vice versa).

68. Brazil's Law No. 9.605 on environmental crime regulates corporate criminal liability for environmental damage. This is the only law in Brazil that provides for a criminal sanction for companies. Other corporate offences, as in most Latin American countries, carry administrative sanctions (without prejudice to the criminal liability that may be incurred by directors or other individuals employed by the company).

69. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 197. See additional work in this area in H. Cantú Rivera et al, *Experiencias latinoamericanas sobre reparación en materia de derechos humanos y empresas* (Latin American Experiences on Business and Human Rights Remedies), 2022, https://www.kas.de/documents/271408/16552318/Experiencias+Latinoamericanas+sobre+reparaci%C3%B3n+en+materia+de+empresas+y+derechos+humanos+-+Humberto+Cant%C3%BA.pdf/70f15d4d-730a-8274-9f13-a4350f2370c4?t=1645812527356

EXAMPLES/REFERENCES

Brazil's Framework Law establishes that companies domiciled or economically active in Brazil are responsible for human rights abuses caused "directly or indirectly by their activities" (Art. 5). It specifies that liability is joint and several and extends to the entire production chain, even if there is no formal contractual relationship (Art. 5.1).

Peru's Draft Law establishes liability of companies for human rights or environmental impacts that they have caused or to which they have contributed when they "knew or should have known" of this contribution. It extends this liability to activities of third parties that cause impacts directly linked to their operations, products, or services (Art. 18). It also provides that companies must prove that they took all necessary measures not to cause or contribute to a human rights or environmental abuse, or to prevent such abuse (Art. 20.1), but clarifies that due diligence does not exempt a company from liability for human rights abuses that arise because of its actions or omissions (Art. 14.4 and 20.1). It further states that liability for breach of the duty of due diligence provided for in the law is "without prejudice to the consequences provided for in other laws" (Art. 11).

2. Imposition of an explicit duty on public entities to investigate and sanction failures to exercise due care or due diligence and human rights abuses or environmental damage by companies

New law(s), or regulatory or policy adjustments, should provide public oversight and monitoring bodies with sufficient powers and resources to investigate and, if necessary, sanction companies for failures to exercise due care or due diligence and for human rights abuses or environmental damage. These legal, regulatory, or administrative provisions should ensure that:

- Oversight bodies have the power to receive and investigate complaints about specific cases, initiate ex officio investigations, impose corrective and reparation measures and sanction companies that have caused or contributed to abuses, or failed in their duty to prevent abuses.[70]
- Oversight bodies have the power to follow up on corrective and/or reparation measures imposed and to ensure their enforcement through administrative and/or judicial proceedings in the event of non-compliance.
- Administrative procedures are not imposed as a precondition for access to justice and do not preclude the initiation of judicial proceedings, even if they have resulted in decisions against companies and the imposition of sanctions.
- Administrative sanctions available to oversight bodies are effective and sufficiently dissuasive and include a wide range of penalties, from financial penalties (fines or deprivation of profits), reputational penalties (publication of adverse rulings or inclusion on lists of offenders), to penalties that directly affect the ability to operate and generate profits, such as suspension or prohibition of activities, disqualification from contracting with the state, cancellation of licences and concessions, closure of premises or dissolution of the legal entity.
- Administrative liability should be independent and without prejudice to the possible civil or criminal liability of companies.
- Procedures are in place to report, investigate, and sanction public officials who do not duly comply with their duty of oversight, investigation and sanction.

70. FIDH et al, *A Matter of Justice: How European Legislation Can Make a Difference Experiences and views from around the world on how to establish meaningful EU rules on corporate accountability*, December 2020, p. 16, loi_vigi763angweb.pdf (fidh.org)

EXAMPLES/REFERENCES

Brazil's Framework Law establishes the obligation of all levels of government (national, state, and municipal) to enforce the legal responsibility of companies for human rights abuses through public policies, norms, and regulations (Art. 9). Article 15 expressly provides for the establishment of administrative complaint mechanisms for abuses (or risk of abuses) and proportionate penalties taking into consideration a range of factors, such as the seriousness of the abuse or risk created, the advantages gained and the economic power of the company in breach, and the seriousness or extent of the damage caused or risk generated (Art. 16). The Framework Law establishes a wide range of possible sanctions, including suspension of activities, prohibition from receiving state subsidies or from contracting with the state, fines and dissolution of the legal entity (Art. 18).

Peru's Draft Law provides for the creation of a "Register of Companies Responsible for Abuses of Human Rights and the Environment". The Register must be publicly accessible. Registered companies may only be removed from the Register if they prove that they have repaired the damages caused (Art. 26) and are "prevented from contracting with the state as long as the registration remains in force". This impediment is permanent if a company is registered a second time (Art. 27).

C. ACCESS TO JUSTICE

To ensure the **central role of the victim** in the construction of corporate legal accountability regimes, it is necessary to establish norms, mechanisms and legal devices that make their right of access to justice effective and real. This requires new laws, regulatory adjustments, and even practical measures to **remove or lessen obstacles** to access to justice that prevail in cases of corporate abuse of human rights and the environment and to ensure **material equality** in both access to and effective use of justice procedures.[71] It also requires provisions on reparations that ensure **full and comprehensive reparation** for the affected party.

An essential aspect of access to justice is the existence of a normative framework that creates obligations the breach of which gives rise to legal actions for accountability. Sections A and B above deal with this issue. However, to ensure effective access to justice, in addition to the legal foundations for corporate responsibility, it is also necessary to remove substantive, procedural and/or practical obstacles that prevent victims of corporate abuse from accessing effective justice and remedy. The following are key (but not exhaustive) areas to be addressed by new laws or policy or regulatory adjustments:

- Fair apportionment of the burden of proof. This can be provided for through an obligation to reverse the burden of proof or the establishment of a presumption of liability against the defendant company;
- Collective actions, whether *acciones difusas* or public interest actions;
- Broad legal standing (allowing for judicial and administrative actions to prevent abuse or seek redress without the need for the plaintiff to prove direct personal involvement);
- Independent technical advice;
- Legal aid, including for the preparation of expert opinions and other evidentiary measures, if the complainant or plaintiff does not have sufficient resources;
- Extraterritorial legal actions to enable persons affected by the activities of a company domiciled outside a state's territory to have access to justice in the place of domicile of that company;
- Lengthy limitation periods for legal action that take into account the needs and difficulties of the affected persons;
- Private international law provisions mandating or giving the plaintiff the option to apply the law most favourable to the protection of human rights in extraterritorial civil actions;
- Possibility of filing complaints with administrative oversight bodies, without prejudice to the right to bring legal action (see Liability for Abuse);
- Ensure judicial power to order a wide range of reparation measures beyond monetary compensation and the power to enforce them, as required for comprehensive and timely reparation.

71. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 430.

EXAMPLES/REFERENCES

Brazil's Framework Law establishes the obligation of all levels of government (national, state, and municipal) to "ensure full access to justice, under equal conditions, to persons or communities affected by corporate human rights abuses" (Art. 9.I). In recognition of the asymmetry of power between the parties, the Framework Law provides as express rights of persons or groups affected by business activities a series of procedural measures to provide equal access, such as the reversal of the burden of proof (Art. 11.I), provision of technical support and legal aid to vulnerable groups (Art. 11.II and IV), participation of human rights and justice bodies in processes of negotiation of reparation agreements with companies (19.II, V, VI) and monitoring of the implementation of agreed reparation measures (Art. 19.VIII). The Framework Law also requires the state to facilitate access to Brazilian justice for human rights abuses by Brazilian companies in other countries (Art. 9.XX). With respect to companies, the Framework Law also establishes a corporate duty to "combat obstacles to the production of evidence by persons affected" by their activities and to "contribute to investigations" (Art. 6.XVII). It establishes a corporate obligation to ensure independent technical advice to populations affected by its activities (Art. 9.III).

Brazil's Framework Law also establishes the common obligation of the state and companies to provide comprehensive reparation for human rights abuses by companies (Art. 4.III). It establishes the state's obligation to focus comprehensive reparation on the principle of the centrality of the victim's suffering, which "requires the leading role of the affected persons or communities in the development of mechanisms for prevention, comprehensive reparation and guarantees of non-repetition" (Art. 9.II). The principles of comprehensive reparation, the centrality of the victim's suffering, and the guarantee of non-repetition as part of comprehensive reparation are stated as express rights of persons and communities affected by corporate activity (Art. 11.X, XII, XIV). Based on these principles, the Framework Law also establishes a long list of conditions and restrictions to safeguard human rights in the context of negotiations and signing of reparation agreements between the state and companies (Art. 19). These include the obligation to guide these processes by the principle of comprehensive reparation and not to undermine constitutional protections or the principle of corporate responsibility (Art. 19.II and IV). Also, in application of the principle of comprehensive reparation, Article 16 of the Framework Law provides that the valuation of damages caused by human rights abuses cannot be subject to any type of legal or contractual limit.

Peru's Draft Law places the burden of proving diligent behaviour on the company which must demonstrate that it took all necessary measures not to cause or contribute to human rights or environmental abuses or to prevent such abuse (Art. 20.1). It also gives victims of human rights abuses caused by Peruvian companies outside their territory the option to initiate legal action against them in Peru (Art. 19). In terms of reparation, it emphasises the right of victims to comprehensive reparation (Art. 22.1). Based on this principle, it lists reparation measures that it should be possible to request, including restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, the possibility of judicial orders, environmental reparation and ecological restoration, coverage of the costs of relocation and/or rehabilitation of the victims, reinstatement of their social, labour and/or community prerogatives, comprehensive emergency assistance, monitoring of their comprehensive long-term health and measures to prevent further damage as requirements or guarantees of non-repetition (Art. 24).

As a means to guarantee the right of access to justice in environmental matters, the **Escazú Agreement** provides for, inter alia, "effective, timely, public, transparent and impartial procedures that are not prohibitively expensive", "broad active legal standing in defence of the environment", "measures to facilitate the production of evidence of environmental damage... such as the reversal of the burden of proof and the dynamic burden of proof", mechanisms for timely enforcement of judicial and administrative decisions, and a wide range of reparation measures. In addition, it establishes that states must adopt "measures to minimise or eliminate barriers to the exercise of the right of access to justice" and address "the needs of persons or groups in vulnerable situations by establishing support mechanisms, including... free technical and legal assistance." (Art. 8).

D. CROSS-CUTTING ISSUES

1. Rights to participation, consultation, and free, prior and informed consent (FPIC)

The new law(s) or policy or regulatory adjustments should enshrine or reinforce the rights to participation, consultation and FPIC in two concrete ways: 1. As human rights to be respected and protected by companies and authorities, as part of their general duty to respect and protect human rights; 2. By integrating them into the way public institutions and companies operate. Thus, new laws or policy or regulatory adjustments in this area should ensure:

- The express duty of the authorities to ensure the participation of individuals and communities in decision-making processes regarding business activities that have or may have an adverse impact on their human rights and, in line with the Escazú Agreement, the environment and public health, as well as in corporate due diligence processes. The state, as guarantor of rights, must also ensure the quality, legitimacy, integrity, and material equality of all parties in these processes.
- The duty of authorities to ensure access to independent technical advice to guarantee informed participation in the context of impact assessments, consultations, negotiations, conflict resolution, etc.
- Corporate due diligence should not be understood and developed as an internal risk management tool but rather should be "opened up" to those who are understood to be its beneficiaries. It should be conceived as a participatory tool or mode of abuse prevention that ensures that individuals and groups whose human rights may be affected by business activity have access to all relevant information and a high degree of control and involvement in activities, decision-making and monitoring related to risk identification and mitigation and the prevention and reparation of damage.
- Participation should extend to decision-making on reparation, whether it is discussed in the context of corporate due diligence alone, or in the context of administrative or legal action.
- The right to consultation and FPIC as established under international human rights law, as mandatory and ongoing procedural elements in both the decision-making and management of public bodies and in the specific context of corporate due diligence.
- Conduct of public participation, consultation and FPIC processes should not absolve the state of its duty to guarantee compliance with human rights and environmental protection. This clarification is important as a safeguard of rights against flawed, abusive, or purely superficial processes. It prevents authorities from being able to point to the fact that such processes have been carried out as evidence of respect for human rights, regardless of their legitimacy, integrity, or quality.

EXAMPLES/REFERENCES

Brazil's Framework Law establishes the state's obligation to guarantee the participation of people and communities affected or potentially affected by business activities in several areas. This includes monitoring, prevention and reparation activities for human rights abuses in the context of large-scale projects and infrastructure projects (Art. 9.IX), in the production of social, labour and environmental impact assessments (Art. 9.XIX), in the implementation of preventive measures for human rights abuses (Art. 11.VIII), during the negotiation and signing of reparation agreements between the state and companies (Art. 19) and in the context of reparation processes (Art. 8). More broadly, Article 20 of the Framework Law requires the state to ensure public participation in the elaboration and implementation of public policies aimed at implementing the law, including for example the monitoring of reparation processes, proposals to strengthen oversight mechanisms, access to information and monitoring of supply chains, and in environmental and human rights impact assessments. Regarding indigenous peoples, *quilombolas,* and traditional communities specifically, the Framework Law requires the state to guarantee them the right to prior, free and informed consultation in good faith when their rights are affected by business activities (Art. 9.VI and 11.VI) and in the context of negotiations and reparation agreements carried out by the state and companies (Art. 19.III).

With respect to companies, the Framework Law includes an express obligation for companies to respect the consultation rights of indigenous peoples, *quilombolas,* and traditional communities and the prior consultation and effective participation of workers or their representatives in processes that may impact their labour rights (Art. 6). It also establishes the obligation of companies to ensure the participation of workers and communities in the elaboration, management and supervision of prevention plans in the context of risky business activities (Art. 6.XIV). In terms of reparation, it

requires companies to establish mechanisms that make community participation in decision-making on the reparation process feasible, including transportation and food during public consultations (Art. 6.XVI). Finally, it establishes the right of trade unions to exercise external control over corporate activity (Art. 11.V).

Peru's Draft Law establishes a corporate obligation to effectively consult with workers or their representatives and other persons or communities impacted or potentially impacted by its activities on a "business plan on human rights and environmental protection" (Art. 12.2). Risk identification, prevention and mitigation processes must also include effective consultation with potentially affected groups, and "integrate the views of victims or potential victims of impacts" (Art. 14.2 and 14.3).

Article 7 of the **Escazú Agreement** establishes the state's obligation to guarantee mechanisms for public participation in decision-making processes with respect to policies, plans, rules and regulations, projects, and activities that have or may have a significant impact on the environment and health. To ensure effective participation, additional measures are required such as the dissemination of clear, timely and comprehensible information, the use of suitable communication channels and the use of non-technical language. It also requires specific efforts to engage vulnerable groups and persons directly affected by the decisions in question, in an active, timely and effective manner, and adds that states should value local knowledge, dialogue and the interaction of different views and knowledge.

2. Transparency and the right of access to information

In addition to being a right in itself, access to information is crucial for the realisation of many other human rights. In the context of business activity, the right of access to information should extend to all information held publicly or privately, access to and knowledge of which is necessary for the effective exercise and protection of human rights and the environment.

The new law(s) or policy or regulatory adjustments should establish the obligation of state institutions and companies to act **transparently** and to disclose information in accordance with the **principle of maximum disclosure**. State institutions should ensure the impartial and objective production of information regarding actual or potential human rights and environmental impacts of business activities and its "timely, accessible and complete" publication.[72] They must also guarantee the timely, accessible and complete publication of information in their possession, or in the possession of companies, concerning plans, projects and other business activities that have or may have an adverse impact on human rights and the environment.

The corporate duty of disclosure should include the regular and up-to-date publication of at least the following information:

- Characteristics, nature, registered office, and operations of the company and its direct and indirect owners (corporate structure), internal governance and decision-making systems and companies comprising the value chain.[73]
- Investment plans and projects broken down by country and geographical area, including investment contracts.
- Details of specific projects, including information on funding (amounts and sources), concessions and licences.
- Risk identification, prevention and mitigation procedures and abuse prevention procedures and measures, with details of risks and adverse impacts identified and specific preventive and remedial measures taken and to be taken (both retrospective and forward-looking disclosure).

72. REDESCA, *Business and Human Rights: Inter-American Standards*, pp. 35-36.

73. FIDH et al, *A Matter of Justice: How European Legislation Can Make a Difference Experiences and views from around the world on how to establish meaningful EU rules on corporate accountability*, December 2020, p. 16, loi_vigi763angweb.pdf (fidh.org)

In addition to the general disclosure obligation, there is an additional duty to disseminate project-specific information, in a proactive, timely and effective manner, to persons or groups whose rights are or may be affected by such projects.

EXAMPLES/REFERENCES

Brazil's Framework Law establishes an obligation of the state and companies to guarantee full access to all documents and information that may be useful for the defence of the rights of affected persons (Art. 4). It requires the state to 'create mechanisms to improve the effectiveness of legal instruments on access to information that are useful for the prevention, investigation, or reparation of human rights abuses" (Art. 9.VII). With respect to companies specifically, the Framework Law requires them to publish information regarding corporate management structure, internal roles, and responsibilities in decision-making within value chains, and policies for the promotion and defence of human rights. It also establishes a corporate obligation to disseminate information about the company's activities to communities affected by them, through appropriate and accessible communication channels, including in their own languages if necessary (Art. 6.XIII).

Article 12 establishes a general obligation for companies to publish biannual human rights reports. These reports must contain a brief description of their activities and strategy for respecting human rights, including details of internal responsibilities and timelines. It also requires information to be provided on prevention actions implemented, abuses detected, reparations granted, or reparation plans underway and changes in internal protocols to avoid the same abuses in the future (retrospective information), as well as the current analysis of human rights risks linked to their activities and production chain and the preventive, mitigation, and monitoring measures they plan to take, their prioritisation and urgency (forward-looking information). It provides that this information must be "sufficient to assess the concrete adequacy of the company's actions for the prevention, assessment and reparation of human rights abuses". Finally, it requires that this information be publicly accessible on the website and actively provided to affected or at-risk communities through appropriate communication channels and formats.

Peru's Draft Law establishes that rights-holders are entitled to clear, complete, and relevant information so they may participate effectively in decision-making processes related to business activities that may have an impact on human rights and to mechanisms to safeguard this right (Art. 23). It obliges companies to publish an annual report detailing the risks of human rights impacts identified, mechanisms used to prevent and mitigate them, "as well as the prevention, mitigation and reparation measures for each risk that have been implemented" (Art. 13.1). These reports must be communicated to workers and all persons or communities impacted or potentially impacted by their activities, "documenting compliance with their obligations to exercise reasonable care to avoid foreseeable harm" (Art. 13.2). The Draft Law also specifies that the results of monitoring and supervisory actions must be communicated to persons affected or potentially affected by the company's activities (Art. 15).

The **Escazú Agreement** establishes clear rules on access to environmental information held by the state in accordance with the principle of maximum disclosure (Art. 5). It also establishes the state's duty to support and proactively facilitate access to information for persons or groups in vulnerable situations to promote access and participation under equal conditions, and the duty to promote access to privately held information relating to business operations and their possible effects on human health and the environment, through appropriate legal or administrative frameworks (Art. 6.12). It details the type of information to be published in the context of consultation processes relating to projects or activities that have or are likely to have a significant impact on the environment or health. This information includes the physical and technical characteristics of the proposed project or activity, a description of the environmental impacts, including cumulative environmental impacts, and the measures foreseen with respect to those impacts, a description of alternative locations and actions taken to monitor the implementation and results of the preventive measures proposed in the impact assessment (Art. 7.17).

3. Intersectional and gender perspective

Public institutions in the exercise of their regulatory and oversight responsibilities, and companies in the fulfilment of their duties of respect and due diligence must incorporate an **intersectional and differential perspective**, including an **ethnic and gender approach**. When systematically and carefully applied, this perspective makes it possible to identify and respond appropriately to the potential differentiated, aggravated, or disproportionate adverse impacts that certain individuals or groups may suffer, due to their personal characteristics and circumstances, such as situations of vulnerability.[74] To this end, new law(s) or policy or regulatory adjustments should:

- Require the incorporation of an intersectional perspective, including a gender and ethnic approach, as a cross-cutting issue in the development of public policies and regulation, as well as in the fulfilment of the duty of respect and due diligence imposed on companies.
- Require corporate due care and due diligence measures to be designed and implemented in a manner that identifies and responds appropriately to specific, differentiated, aggravated, or disproportionate (in terms of severity or frequency) risks and adverse impacts on certain individuals or groups, due to their personal characteristics and circumstances.[75]

While a broad reference to all human rights is in principle sufficient to ensure respect for and protection of the human rights of certain individuals or communities, the particular risks faced by certain groups in the context of business activities may justify their express mention in the law. For example, Articles 6 and 9 of Brazil's Framework Law specifically deals with the right to non-discrimination in employment and the special protection of riverine, coastal, and rural communities. The law also contains many specific provisions for the protection of persons and communities affected by major industrial disasters (Art. 6.XV, 13, 14, etc.).

EXAMPLES/REFERENCES

Brazil's Framework Law states that social and environmental impact assessments of business activities that take into account gender, sexual orientation, race, and class inequalities should be conducted or encouraged (Art. 20.VII and IX).

Peru's Draft Law requires states to guarantee the right to non-discriminatory and gender-sensitive access to justice (Art. 24.1). It seeks to protect certain vulnerable groups, for example, by emphasising the state's obligation to supervise safety measures and measures to prevent disasters or serious work accidents (Art. 11.VII) or to improve programmes and public policies to combat child or slave labour (Art. 9.XVI).

The **Escazu Agreement** obliges states to establish conditions that are favourable to public participation in environmental decision-making processes and that are adapted to the social, economic, cultural, geographical and gender characteristics of the public (Art. 7.10).

74. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraphs 314-315

75. Action Aid et al, "An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment", September 2020, p. 3, principal-elements-of-an-eu-mhredd-legislation.pdf (corporatejustice.org); UN Special Procedures, Gender dimensions of the Guiding Principles on Business and Human Rights, 2019, BookletGenderDimensionsGuidingPrinciples.pdf (ohchr.org)

4. Right to defend human rights and the environment

The state is responsible for providing special protections for human rights and environmental defenders working on business activities. These must be adjusted to the type and frequency of harassment and aggressions defenders tend to suffer in this area and to their specific characteristics and needs. The new law or laws, or policy or regulatory adjustments should:

- Formulate an express obligation for companies to respect the "right to defend" human rights and the environment. This obligation implies exercising due care and due diligence to identify and adequately respond to the specific risks that their activities or business relationships generate for defenders.[76]
- Sanction companies involved in criminalisation, abusive use of the law, stigmatisation, or smear campaigns against defenders, without prejudice to civil, criminal and/or administrative liability for their possible participation in the commission of crimes against defenders or failure to take reasonable care to prevent them.
- Require diligent investigation by the authorities of attacks or other acts of violence and intimidation, including the possible connection of such acts to the work of defending human rights and/or the environment.

EXAMPLES/REFERENCES

Brazil's Framework Law provides for "non-criminalisation" and "non-prosecution" of individuals or communities affected by business activities, as well as of social movements, networks, or organisations as an overarching guiding principle for the application of the law as a whole (Art. 3.IX). More specifically, it includes the state's duty to protect defenders who are at risk for making complaints against companies (Art. 9.XII) and the duty of companies to respect and recognise collective processes, organisations, movements, and other forms of representation of workers, communities and individuals working to defend human rights affected or potentially affected by business activities (Art. 6).

Peru's Draft Law establishes that the protection of human rights defenders acting in the context of business activities is a priority for the state and provides for a regulation to determine specific protection measures (Art. 30).

The **Escazú Agreement** includes a specific chapter on the protection of human rights defenders and organisations working on environmental issues. It requires states to guarantee a safe and enabling environment for their work "by recognising and protecting them", and "adequate and effective measures to recognise, protect and promote all the rights of human rights defenders… including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement" as well as their ability to exercise their access rights (Art. 4.6, Art 9.2). It also requires appropriate, effective and timely measures to prevent, investigate and punish attacks, threats, or intimidation against such persons (Art. 9.3).

76. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 315.

IV. INTERPRETATIVE PRINCIPLES

The formulation and implementation of public policies, regulatory frameworks, laws and/or policy or regulatory amendments on business and human rights should consider and integrate key Inter-American human rights criteria and principles.[77] Among them, the **principles of pro persona**, **comprehensive reparation** and **victim-centredness**, **material equality**, **comprehensive prevention** and the **precautionary principle** are of particular relevance. Given their interrelatedness and mutual dependence, these principles must be interpreted and applied in the same manner, i.e. jointly and integrally, as a coherent whole.[78]

1. Pro persona principle

Laws and amendments that seek to establish a system of respect and corporate accountability in the domestic legal order of states should be guided by the pro persona principle and reflect it in their provisions. The formulation of norms, as well as their implementation, interpretation and evaluation, should put human beings at the centre, seeking outcomes that maximise the protection of their human rights. This principle should also be applied in the choice of applicable standard or interpretation of conflicting standards, so as to apply the standard or interpretation that best protects the human rights of the individual or groups concerned, or that least limits or restricts them.[79] It also assumes that any new rule or legislative amendment does not amount to retrogression and is not applied or interpreted in practice in a way that eliminates or undermines existing protections. It requires that domestic laws be interpreted in harmony with the state's human rights and environmental obligations, as well as the declarations by international and/or regional bodies entrusted with monitoring and promoting compliance.

EXAMPLES/REFERENCES

In direct application of the pro persona principle, **Brazil's Framework Law** establishes that in case of conflict between human rights provisions or multiple interpretations of the same human rights norm, the norm or interpretation most favourable to the affected person shall prevail (Art. 3.VI and 3.VII). It also applies this principle in the context of negotiations and judicial or extrajudicial reparation agreements between the state and companies that abuse human rights. These processes must be guided by the search for solutions that guarantee human rights (Art. 19).

In application of this principle, the **Peru's Draft Law** specifies that its provisions must be interpreted in accordance with international human rights standards and that in the choice of the norm applicable to a given case, the one that is most favourable to the individual must be chosen (Art. 3).

The **Escazú Agreement** establishes the pro persona principle as a general principle to guide the implementation of all its provisions (Art. 3). In line with this principle, it also establishes that states "shall seek to adopt the most favourable interpretation for the full enjoyment of and respect for the access rights" in the implementation of the Agreement (Art. 4.8).

77. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 413; Conference proceedings, *Foro Debida Diligencia en Derechos Humanos y Reparación frente a los Impactos de las Actividades Empresariales* (Forum on Due Diligence in Human Rights and Remedies for the Impacts of Business Activities), 12-13 March 2020, p. 11, Relatoria-Foro-DDHH-Marzo-2020-VF-1.pdf (poderlatam.org)

78. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 41.

79. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 42.

2. Principle of comprehensive reparation and victim-centredness[80]

The new law or laws, or the policy or regulatory amendments relating to access to justice and reparation must be guided by the principles of full and comprehensive reparation of the harm and the central role of the victim. Comprehensive reparation implies, on the one hand, identifying the totality of the damages suffered by the direct and indirect victims, from financial and physical damages to moral and emotional ones, both in their individual and collective dimension (multidimensional vision of damages). On the other hand, it implies granting all the necessary reparation measures to ensure the full restoration of the legal situation at issue and to guarantee non-repetition.[81] In many cases, this will require a combination of reparation measures, from monetary compensation to restitution, rehabilitation, and establishment of the truth, among others. The principle of victim-centredness requires that justice and reparation processes consider the way in which the victim was affected and respond appropriately to this personal experience, as well as to the victim's specific characteristics, situation, and needs.[82]

EXAMPLES/REFERENCES

Brazil's Framework Law establishes the principles of comprehensive reparation and the central importance of the suffering of the victim as general principles or guidelines that govern the application of the entire law (Art. 3.IV). These principles are also manifested in the general guideline on ensuring prior, free and informed consultation, in good faith, of victims of abuses (Art. 3.V). The Framework Law applies these principles extensively in many of its operative clauses. For example, in relation to the corporate duty of comprehensive reparation, the procedures for the establishment of mechanisms for prevention and comprehensive reparation, the negotiation of comprehensive reparation agreements with companies and the unrestricted valuation of damages, among others (section on the Right of Access to Justice and Reparation).

Peru's Draft Law requires the state to guarantee victims comprehensive reparation (Art. 21.1) and lists a host of specific reparation measures that justice remedies must provide to victims, from compensation to ecological restoration and long-term health care (Art. 24.1). Several provisions directly apply the principle of victim-centredness, including those on accessible, fair, and expeditious reparation procedures that provide comprehensive and timely redress, and on the obligation to inform victims of their rights to obtain just reparation (Art. 22).

3. Principle of material equality

Based on the recognition of the de facto inequality and disparity of arms between companies and individuals or communities whose rights are affected by their activities, the state must take proactive measures to address this imbalance and move towards material equality. Given that inequality manifests itself in all areas and stages of the relationship between companies and individuals or communities, new law(s), or policy or regulatory amendments should seek to establish procedures, safeguards, and on equality of status mechanisms in all these areas, from access to information on corporate activities, consultation and negotiation procedures, to corporate accountability and access to justice and reparation. Effective implementation of this principle also requires proactive and responsive state institutions that "take action" on behalf of individuals or communities whose human rights have been threatened or abused.

80. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 313; Conference proceedings, *Foro Debida Diligencia en Derechos Humanos y Reparación frente a los Impactos de las Actividades Empresariales* (Forum on Due Diligence in Human Rights and Remedies for the Impacts of Business Activities), 12-13 March 2020, p. 10, Relatoria-Foro-DDHH-Marzo-2020-VF-1.pdf (poderlatam.org)

81. J. Calderón Gamboa, "*La reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano*" (Comprehensive reparation in the jurisprudence of the Inter-American Court of Human Rights: standards applicable to the new Mexican paradigm), *Instituto de Investigaciones Jurídicas* (2013), UNAM, https://repositorio.unam.mx/contenidos/5014616

82. See for example, *Report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/72/162, 18 July 2017, paragraphs 7, 20, 26-31, 81, 86.a, N1721868.pdf (un.org)

EXAMPLES/REFERENCES

Brazil's Framework Law contains a significant number of measures on equality of status and protection of the "weaker party" in conflicts with companies, starting with the inclusion of express obligations, functions and prerogatives of the state for the effective safeguarding of rights in contexts of vulnerability (e.g. art 9.XII and 9.XVII) and reference to the role of certain state bodies in various processes (Public Ministry, Public Defender's Office, National Human Rights Council, etc.). It establishes the obligation of all levels of government to ensure access to justice "on equal terms" (Art 9.I). Concrete measures on equality of status include access to information (Art. 4, 6 and 12) and measures to achieve parity of arms in judicial proceedings, such as the reversal of the burden of proof and free technical and legal advice (Art. 11.I, II and IV). Also critical are provisions requiring the participation of communities in decision-making processes concerning or impacting their human rights and specific measures to ensure that this participation is effective and meaningful (e.g. Art 6.XIII and 6.XVI).

The **Escazú Agreement** establishes the principle of equality and non-discrimination as a general principle to guide the implementation of all its provisions (Art. 3). Indeed, the Agreement as a whole can be seen as an initiative by the parties on equality of status in that it seeks to guarantee "access rights" to those who traditionally do not have them or cannot exercise them. The Agreement requires parties to ensure that "guidance and assistance is provided to… groups in vulnerable situations, in order to facilitate the exercise of their access rights" (Art. 4.5). It requires, for example, the facilitation of access to environmental information for persons or groups in vulnerable situations, including assistance in formulating requests for information (Art. 5.3 and 5.4), the waiving of costs for persons unable to pay (Art. 5.17) and the disclosure of information "in the various languages used in the country", in "alternative formats that are comprehensible", "using suitable channels of communication" (Art. 6.6). It also requires special efforts to engage vulnerable groups and eliminate barriers to participation (Art. 7). To give effect to the right of access to justice, it requires states to establish support mechanisms for persons or groups in vulnerable situations according to their specific needs, including free legal and technical assistance (Art. 8.5).

4. Principle of comprehensive prevention

The state's duty of comprehensive prevention requires a broad approach that examines and addresses all phases and aspects of business activity that generate risks to human rights and the environment. It requires preventing or requiring the prevention of all risk factors that the state knows or should have known about, formulating public policies that take into account and respond to these risk situations, strengthening the relevant public institutions so that they can provide an effective response to the risk situation they are intended to address, and adopting or requiring the adoption of particular preventive measures with respect to specific cases or individuals (e.g. situations of imminent threat or vulnerability).[83]

EXAMPLES/REFERENCES

Brazil's Framework Law adopts this principle in several of its operative clauses related to the treatment of "risk". For example, the obligation to implement prevention policies in high-risk areas, such as the extractive and infrastructure sectors (Art. 15.II) or regarding vulnerable groups (Art. 9.XVII), and provisions regarding access to information and participation of at-risk communities in the adoption of prevention measures (e.g. art 11.VIII and 6.XIV). This principle is also reflected in the obligation to implement warning mechanisms (Art. 9.X), administrative procedures for receiving complaints about risks (Art. 15), the power of the state to sanction companies for generating risks or failing to effectively mitigate existing risks (Art. 18) and the choice of penalty in proportion to the severity of the risk generated or the number of people put at risk (Art. 16.III and VI). The Framework Law's guarantees of protection and an environment favourable to the work of human rights defenders also respond to the principle of comprehensive prevention, given the fundamental role they play in preventing abuses.

83. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraphs 94-95; I/A Court H.R. (2016) *Case of the Hacienda Brasil Verde Workers v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgement of 20 October 2016, Series C, No. 318, paragraph 320.

Peru's Draft Law also creates mechanisms to respond to situations of risk. It provides that the competent administrative authority or the Public Prosecutor's Office may propose the signing of a "Conduct Adjustment Commitment" in situations of "threats of harm" (in addition to specific harm) in order to avoid such harm. Also based on the principle of prevention, the Draft Law requires the investigation of public officials in charge of supervising business activities that do not adopt measures to guarantee effective access to preventive measures to avoid imminent or irreversible damage (Art. 29).

The **Escazú Agreement** establishes the precautionary principle as a general principle to guide the implementation of all its provisions (Art. 3). This principle is given effect in many of its provisions. For example, states are required to implement an early warning system (Art. 6.5) and to have the possibility of ordering precautionary and interim measures to prevent or halt environmental damage (Art. 8.3.d). It also requires authorities to disclose all relevant information in their possession about an imminent threat to public health or the environment, so that the public can take preventive measures (Art. 6.5).

5. Precautionary Principle

The state must also enshrine and implement the precautionary principle in new laws, or regulatory and/or normative adjustments, in environmental matters. The precautionary principle is enshrined in many international instruments on the environment, and, in essence, it prescribes that in the face of a threat of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing effective measures to prevent environmental degradation.[84] This principle is closely related to the pro persona and precautionary principles. In its Advisory Opinion OC-23/17 of 2017, the Inter-American Court of Human Rights expressly recognised this principle and held, in express application of the pro persona principle, that states must act in accordance with the precautionary principle and take effective preventive measures to protect the rights to life and personal integrity in cases where there are plausible indicators that an activity may lead to serious and irreversible damage to the environment, even in the absence of scientific certainty that such damage will occur. [85]

Brazil's Framework Law provides as an express right of persons or groups affected or potentially affected by business activities the impossibility of invoking the lack of absolute scientific certainty as an argument to postpone the adoption of measures to avoid human rights abuses (Art. 11.XIII).

The **Escazú Agreement** establishes the obligation of states parties to be guided by the precautionary principle in the implementation of the Agreement (Art. 3.f).

84. See, for example, Rio Declaration on Environment and Development 1992 (Article 15), Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (Preamble), Convention on Biological Diversity 1992 (Preamble), among many others.

85. Advisory Opinion OC-23/17, paragraph 180. REDESCA, *Business and Human Rights: Inter-American Standards*, paragraph 246.

V. PERMANENT MONITORING BODIES

As part of the legal reform programme, it is essential to create, by law, permanent multisectoral and pluricultural commission, panel, or other body whose purpose is to:

- Monitor, supervise and evaluate the implementation of new laws or policy and regulatory amendments, including the state's obligation to enforce the law;
- Ensure transparency in decision-making and monitoring and oversight activities;
- Urge, where necessary, further legislative, regulatory, public policy or other interventions or adjustments to improve the implementation and enforcement of the corporate duty to respect.

Sub-commissions can also be established to monitor certain areas of work more closely and in more detail (e.g. mining, public procurement, informal labour, etc.).

These forums must have special safeguards and measures to ensure the material equality of all participants. In the absence of such safeguards, real-world power asymmetries would be replicated in these multi-stakeholder spaces, under a semblance of equality. These bodies should also be guided by clear and pre-established human rights principles, such as the pro persona principle, and act in accordance with domestic and international human rights and environmental law norms and jurisprudence. Finally, companies wishing to participate must be able to demonstrate credible evidence of sustained commitment and progress towards effective respect for human rights and the environment.

EXAMPLES/REFERENCES

Peru's Draft Law provides for the creation of a "Multi-stakeholder Panel for the National Policy and Action Plan on Business and Human Rights" and "for the implementation, follow-up, monitoring, evaluation and updating of the National Policy and Plan on Business and Human Rights" (Art. 8.1). It requires state entities to be accountable to this panel in relation to their interventions (Art. 9).

Directorial Resolution Nº 004-2022-JUS-DGDH of the Peruvian Ministry of Justice and Human Rights establishes Guidelines for the functioning of the multi-stakeholder coordination spaces for the implementation, follow-up, monitoring, evaluation and updating of the National Action Plan on Business and Human Rights (NAP) 2021-2025.

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The Worldwide Movement for Human Rights acts at national, regional and international levels in support of its member and partner organizations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organizations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organizations and actors of change.

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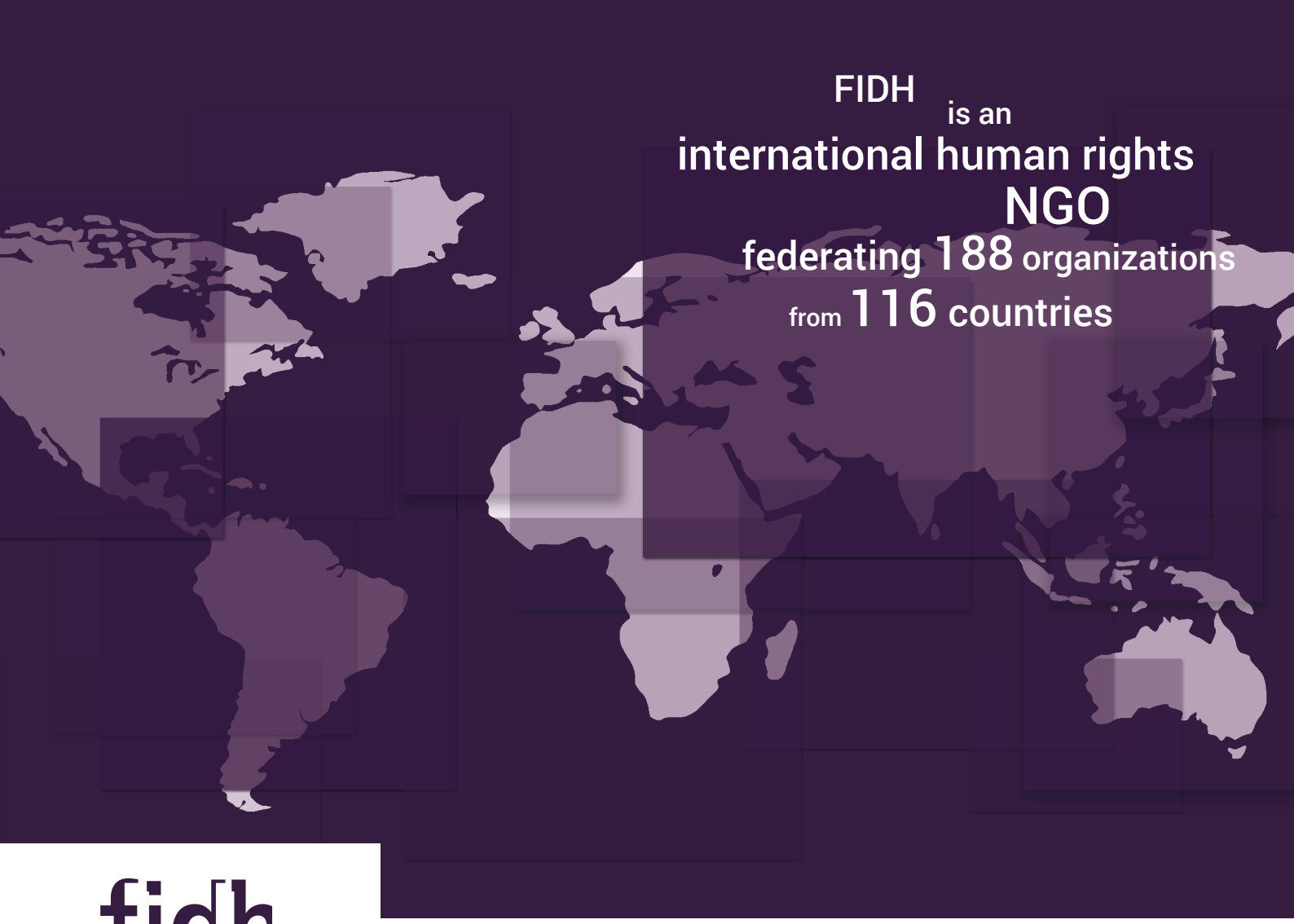

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ABOUT FIDH

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