Remedy for business-related human rights abuses: lessons from emblematic cases in the region

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1. Introduction

> *"Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes." (UNGP, Principle 23)*

The United Nations' Guiding Principles on Business and Human Rights ("UNGP"), unanimously endorsed by the UN Human Rights Council, clarified the roles and responsibilities of States and business enterprises in the protection of human rights in the context of corporate-related activities. Reaffirming the existing body of international human rights law, the UNGP recognize that States have a primary duty to protect against human rights violations committed in their territory and/or their jurisdiction by third parties, including business enterprises (Principle 1). In turn, businesses must respect human rights, which means that they must refrain from infringing the human rights of others and address the negative impacts on human rights in which they have some involvement (Principle 11).

The UNGP stipulate that unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless (Commentary, UNGP Principle 25). The Principles also provide that remedies must be effective, both in a procedural and a substantive manner. The UN Working Group on Business and Human Rights, in interpreting what an effective remedy means under the UNGP, stated that rights holders should also actively participate in the set-up, assessment and operation of remedy mechanisms.[1] This is particularly important in cases of human rights violations committed by business enterprises, given the need to level the playing

[1] UN General Assembly, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/72/162 (18 July 2017), p. 8.

field between enterprises and the affected people.[2] The participation should occur before the implementation of the remedial mechanism, so the parties can co-create and jointly design it.[3]

The Commission has recognized the importance of ensuring that individuals and communities who suffer business-related human rights abuses have access to effective remedy. On December 31, 2015, the IACHR published a report entitled "Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities." The report evaluated the patterns of human rights violations within the context of extractive industries in the Americas, particularly those adversely affecting indigenous peoples and Afro-descendant communities. The report stresses the "serious situation of impunity" in the hemisphere with regard to human rights violations committed in the context of extractive or development projects, especially in the case of transnational corporations, due to the presence of significant legal and factual obstacles. The Commission reaffirms that the States must guarantee access to mechanisms of justice and reparation, taking account of the well-established Inter-American standards on the issue, which means taking positive measures to reduce existing barriers and allowing those mechanisms to be effective.

Likewise, in its Advisory Opinion 23/17, related to environment and human rights, the Inter-American Court of Human Rights highlighted states' obligations to implement adequate and independent monitoring and accountability mechanisms, which include both preventive measures and those necessary to investigate, punish and repair possible abuses, through appropriate policies, regulatory activities and access to justice.

According to the Court, the greater the risk, the more intense the supervision and monitoring should be by the State. These obligations refer both to the conduct of state entities and private actors, including business enterprises.

Building on the above work, this proposed hearing seeks to discuss lessons learned and identify measures that may improve affected communities' access to remedies for harms caused by business enterprises. Our findings are supported by case studies of business-related human rights abuses in the region.

2. Relevance for the Inter-American Human Rights System

[2] NABUCO, J., & ALEIXO, L. "Rights Holders' Participation and Access to Remedies: Lessons Learned from the Doce River Dam Disaster". Business and Human Rights Journal, p. 2. doi:10.1017/bhj.2018.22 (last access: 1 March 2019).

[3] UN Special Rapporteur on the human rights to safe drinking water and sanitation, 'Brazil Mine Disaster: UN Human Rights Expert Calls for Urgent Access to Safe Drinking Water', 8 December 2015, http://bit.ly/2IKsCgo, p. 8.

2.1. Remedy: The "forgotten pillar"

The UNGP are based on three pillars: protect, corporate responsibility to respect and joint obligation between the two actors to remedy human rights violations in the context of business activities.

The Guiding Principles did not create new obligations or add rights to international human rights law (IHRL). Based on existing norms, they only clarify the roles and responsibilities of States and companies in the protection of human rights. Although the UNGP have contributed to the dissemination of tools to prevent and mitigate human rights impacts in the business world, in practice, their implementation is slow.

It is widely recognized that the "third pillar", ie effective remedy mechanisms, constitutes the "Achilles heel" of the implementation of the UNGP. The finding is based on actual experience: numerous cases of serious violations of rights caused by business enterprises do not generate accountability of those involved, nor do they result in fair and comprehensive reparations to victims.

There are a number of shortcomings that account for the unsatisfactory implementation of the third pillar of the UNGP. A study by the United Nations High Commissioner for Refugees examined gaps and good practice in six key areas: public law, private law, law enforcement agencies, transnational cooperation, financial barriers to legal action, and criminal sanctions. There is, in all these axes, significant space for improvement in domestic and international regimes.

However, at the heart of the injustices generated and aggravated by the processes of repairing disasters and major projects is a pattern of imposing "top-down" measures, as noted by the UN Working Group on Business and Human Rights after an official visit to Brazil in December 2015.[4] After experiencing losses of all kinds due to events of which they did not give cause, the affected communities are object of a series of reparation plans and mitigating measures, which are designed and implemented in defiance of their preferences, their aspirations and, more important, their right to the centrality in the processes of reparation.

2.2. Remedy of business-related abuses: From private law to a human rights approach

It is essential to look at the situation of people affected by disasters – such as Rio Doce and Brumadinho districts in Brazil – from a human rights perspective, in order to change this

[4] Conectas Human Rights. "Human Rights and Business in Brazil: Report of the UN Working Group", 2017. Available at <http://bit.ly/2pGUXYr>. Last access: 22.02.2019.

framework of tax and ineffective measures towards full, complete and effective redress of the damages suffered by those affected.

The human rights approach is transformative for several reasons. First, it removes prima facie solutions that lend themselves to solving conflicts of a purely private nature, such as trade or family disputes. It is often perceived that there is an attempt, especially by legal professionals with a practice in corporate law to transpose to a complex case dispute resolution mechanisms that, based on completely different circumstances, showed some degree of success in resolving conflicts.[5] These mechanisms, designed under a logic of private law, are suitable for situations where what is at stake are purely pecuniary issues, consumer relations and the liability of a person who causes harm to a subject with a certain economic capacity.

When it comes to massive human rights violations, especially the rights of vulnerable populations, groups, and communities, human rights principles should guide remedial action, not solutions that imply an equivalence of capacities to bargain, negotiate and define the terms of the remedial measures. It is not a matter of denying the autonomy of the will or the area of individual and decisive freedom of the victims, but of conceiving reparation mechanisms based on basic pillars of material justice and human dignity, in order to rebalance the asymmetry of power between the parties.[6]

2.3. Developing elements of the right to remedy

A reparation process, whether based solely on out-of-court mechanisms or in combination with the traditional judicial process, adopts a human rights approach if it observes the principles of (i) transparency, (ii) meaningful participation, (iii) full compensation, (iv) accountability, and (v) non discrimination.

2.3.1. Transparency

The availability of information, as well as its reliability, integrity and means of delivery, is essential to enable informed decision-making of affected communities. It is well known that transparency is a prerequisite for accountability. Without disclosure, the actions of bondholders remain obscure and inaccessible, thus undermining accountability measures. In all cases there have been weaknesses in access to information and transparency about the projects and decision-making regarding the type of investments, environmental assessments and the impacts generated.

[5] This is the case, for example, of the mediation mechanisms instituted for the compensation of family members of victims of air accidents, such as the case of TAM JJ 3054 and Air France 447.
[6] Office of the United Nations High Commissioner for Human Rights. "UN Guiding Principles on Business and Human Rights" (in English). Available at <http://bit.ly/2Ix1Nfv>. Last access: 22.02.2019.

Several of the cases to be highlighted at the hearing address the challenges of remedying violations of the rights of access to information and participation, which often occur at the early stages of a private sector project, when the investment is a mere proposal. For example, In the third case in Peru, discussed below, there are deficiencies of transparency and access to information in the process of categorization of the Kugapakori, Nahua, Nanti and others Territorial Reserve (RTKNN), since the Transparency Law has been interpreted inadequately , indicating information as reserved or confidential regarding the identification of peoples, the health and cultural situation, as well as education and environmental impacts, when it is public information, precisely because it is about safeguarding the life and health of the indigenous peoples in isolation and initial contact of the RTKNN.

2.3.2. Meaningful Participation

The principle of effective participation refers to the right to a remedy in which rightholders are not treated as mere recipients of reparations due by business enterprises. To this end, it is necessary for people affected by corporate-based human rights violations to integrate the whole process of developing and implementing reparation mechanisms. This allows the asymmetry of power between companies and people affected to be reduced by allowing the latter to determine the type of reparation that is most adequate to repair the damages suffered by them.

In order for such participation to be free and informed, affected communities should also have full access to relevant information on harm sustained, available remedy mechanisms, as well as all existing legal, medical and psychological resources[7]

2.3.3. Full Compensation

The principle of full compensation refers to the need for people affected by corporate-based human rights violations to receive adequate compensation for all damages suffered. The assessment of the adequacy of remedial measures should be the responsibility of the persons concerned, even if, in principle, it should prioritize remedial measures capable of restoring the persons concerned to their pre-violation state. In addition, no damage may remain unrepaired.[8] Remediation measures should be adequate and proportionate to the damages caused. Limitations on the access of affected communities to justice, reparation and information are incompatible with the right to effective remedy and jeopardize full reparation of the damages suffered.

[7] Conectas Direitos Humanos. "Transparência, participação, responsabilização e reparação: uma proposta de reforma de governança para a remediação do do Rio Doce", 2018, p. 9. http://bit.ly/2IM9bQt
[8] Id., p. 22.

2.3.4. Accountability

The principle of accountability refers to the right to relevant information on human rights violations suffered peoples and communities affected by business enterprises and available reparation possibilities, as well as to the liability of competent authorities that do not comply with their institutional attributions, a fundamental element of good governance. These are fundamental elements to the right to effective remediation and a prerequisite for the exercise of other rights, such as the right to participation.[9] Failure to comply with accountability rules in the design of reparation mechanisms compromises confidence in their effectiveness by those who have violated rights by companies, affecting the legitimacy and predictability of these instruments.

2.3.5. Non-Discrimination

The principle of non-discrimination is a corollary of the international system for the protection of human rights, with broad conceptual and jurisprudential development at both global[10] and Inter-American[11] systems. At the global level, the UN Committee on Economic, Social and Cultural Rights has stated the obligation of states to prohibit discrimination by non-state actors in the exercise of economic, social and cultural rights:[12]

> *Among the groups that are often disproportionately affected by the adverse impact of business activities are women, children, indigenous peoples, particularly in relation to the development, utilization or exploitation of lands and natural resources, peasants, fisherfolk and other people working in rural areas, and ethnic or religious minorities where these minorities are politically disempowered. Persons with disabilities are also often disproportionately affected by the negative impacts of business activities, in particular because they face particular barriers in accessing accountability and remedy mechanisms. As noted by the Committee on previous occasions, asylum seekers and undocumented migrants are at particular risk of facing discrimination in the enjoyment of Covenant rights due to their precarious situation, and under article 7 of the Covenant, migrant workers are particularly vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments.*

[9] Id., pp. 20-21.
[10] United Nations Committee on Economic, Social and Cultural Rights. General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. http://bit.ly/2JlKuNf
[11] Inter-American Commission on Human Rights. "Indigenous Peoples, Communities of African Descent, Extractive Industries", 2016. http://bit.ly/2JjY6Zv
[12] See note 10, para. 7.

Based on the provisions of Article 1.1 of the American Convention on Human Rights, this Commission has already had the opportunity to consider the importance of applying the principle of non-discrimination in relation to the right to collective property, emphasizing the importance of attention to specific groups in the context of the human rights impact of large-scale business activities.[13]

3. Case Studies

3.1. Samarco/Doce River disaster (Brazil)

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

After the disaster, corporate and government actors have also been failing to provide the affected communities with effective remedies, violating the communities' rights to an effective remedy, to housing, to health, to water, to access information, to develop ways and projects of life, as well as indigenous and human rights defenders rights.

In what remedy is concerned, State authorities and the enterprises involved (Samarco, Vale and BHP Billiton) engaged in three agreements without meaningful participation of affected communities. There is still judicial discussion on the endorsement of the negotiation, concerning minor details, but the expectation is that the agreement is judicially endorsed very soon, as the parts have already agreed on the general aspects.

The approval of the last agreement by the Judiciary system will in practice enable Samarco to return its operations. In fact, the agreements are more to allow for the company to operate without further opposition, than to fully remedy the affected communities.

Agreements have been taking place also on specific issues between the Renova Foundation[14] and affected communities without the intermediation of any other actor, be private lawyers or State organs. The problem is that these agreements are based on the concept that the parts stand in equal position to negotiate, with no consideration whatsoever for the inequalities that

[13] See note 11, para. 240.
[14] Renova Foundation was created by the first agreement and it is in charge of managing the reparation to affected communities.

separate a Foundation, with a close relation to the causers of the violation, from affected communities, that are poor and had limited access to formal education.

3.2. Brumadinho/Córrego do Feijão mine (Brazil)

On January 25 2019, the Feijão dam, in the municipality of Brumadinho, located 60 kilometers from the capital city of the state of Minas Gerais (Belo Horizonte), collapsed, releasing an estimated 12.7 million cubic meters of mining waste into the environment. The disaster left, so far, 186 deaths and more than 122 people missing, many of whom were Vale employees. The dam was owned and operated by Vale. The collapse of a new tailings dam three years after the Mariana dam burst is a clear indicator that Brazilian public authorities and Vale failed to take proper action to prevent new catastrophic failures and to adopt measures of non-repetition.[15]

3.3. Sonora River (Mexico)

On 8th August 2014, 40 million liters of heavy metals were spilled from a mine owned by Buenavista del Cobre (BdC a subsidiary of Grupo México) into the Sonora and Bacánuchi rivers, in northern Mexico. The disaster affected over 22 thousand people living in the rivers' watershed whose only water supply was contaminated depriving them of safe drinking water, who have suffered serious health problems due to the exposure to toxic heavy metals, and who have lost livestock and crops. Following the disaster, the company began to implement measures to clean up the river and provide remedies for the victims, but it never consulted with the affected communities, who claim that the measures taken by the company were insufficient and that there has still not been proper remediation.

BdC agreed with the Mexican Government that remediation would be delivered through a trust. Initially, BdC promised to pay 2 billion mexican pesos (USD 103 million) into the trust. In the end, it contributed only slightly more than half of this amount. They failed to effectively remedy and provide access to justice for victims. Two years after it was created, the trust was closed. Analysis of the trust shows that the resources were not all spent directly on those affected by the spill. The allocation of the money was arbitrary and discretionary, and companies and local governments benefited from these resources to the detriment of the people affected and at the expense of the impunity of those responsible for this ecological disaster. The possibility of suing the company as directly responsible for the human rights abuses caused by the spill has been denied, since the competent judges and courts have refused to consider the company as an authority for the purposes of appeals for legal protection, therefore deviating from principle 26 of the UN Guiding Principles.

[15] Conectas Direitos Humanos. "Vale tragedy in Brumadinho (MG) is denounced at the UN". February 5, 2019. http://bit.ly/2H4VRZw

3.4. Gas Exploitation in Bajo Urubamba (Peru)

The Camisea project, located in the lower Urubamba area, began in 2004. It involves the extraction, transportation (by pipelines), export and distribution of natural gas from the Camisea field. In its first phase, it includes the development of gas fields in Block 88, and the construction of the fractioning plant (under the responsibility of Pluspetrol Peru Corporation). The second phase involves the transportation of dry gas to the Humay area for consumption in Lima and transportation of the condensates that reach Lobería beach in Paracas (this is Transportadora de Gas del Perú (TGP)'s responsibility). Likewise, the lower Urubamba also houses the South Peruvian Gas Pipeline and Block 58, the latter under the responsibility of the National Petroleum Corporation of China (CNPC), which has confirmed gas reserves for a volume of 3.9 trillion cubic feet. With the need to obtain more gas, it is worrisome that 15 years after the start of the exploitation of hydrocarbons in Camisea, there are no studies on soil and water quality in the area. In the same way, even with the royalties generated by the exploitation of gas, the malnutrition rate in children under 11 years has increased in the Camisea area, and deaths of newborns (under 28 days) recorded for the period 2004 - 2013 equals 21% of total deaths.

At the beginning of February 2018, it is a framework of liquid natural gas in the Kemariato stream, a tributary of the Urubamba River, in the area of influence of this project, it is a product of a pipeline that is managed by the company Transportadora de gas del Perú - TGP and operated by the Gas Operating Company of the Amazon (Coga). As a result, the environment was affected, but, above all, the life and integrity of the surrounding native communities were affected.

With respect to life and integrity, the spill affected 22 communities and 7 native settlements. The Convention Health Network helped 27 affected people who experienced dizziness, nausea and vomiting due to exposure to gases. And regarding the environment, the Community Environmental Monitoring Program - PMAC Alto Urubamba[16], community warning and control system program for TGP gas pipeline operations verified that the bodies of water in the Kemariato stream were contaminated, as it caused the death of animals such as snakes and fish, as well as oil slicks[17].

[16] It responds to the interest of the Matsigenka communities of the Upper Urubamba for exercising environmental vigilance, corresponding to the jurisdiction of the Machiguenga Council of the Urubamba River - COMARU (representative regional organization of said communities).

[17] Programa de Monitoreo Ambiental Comunitario Del Alto Urubamba (2018). Primer reporte de la verificación del incidente en el kp 8+980 y el derrame de líquido de gas natural en la quebrada kemariato del sistema de transporte por ductos de TGP, ocurrido el 3 de febrero del 2018. COMARU Pronunciamiento: Nuevo derrame de gas natural líquido en el Bajo Urubamba. Exigimos una evaluación exhaustiva de la ingeniería de tuberías TGP.

After the spill of liquid gas, the representative organizations of the Lower Urubamba requested the "attention of the State institutions, in order to clarify the causes, apply sanctions and verify the impact generated in the flora, fauna and health, to the TGP company that compensates the population that could have been affected[18]".

As a result of this, the State set up a dialogue table where the TGP company committed to dialogue with the affected communities, so that on March 13 an agreement was reached between this company and the representative indigenous organizations for the company to carry out 28 sustainable projects that improve the quality of life of the 22 native communities and 6 rural settlements of the Megantoni district. However, to date, no progress has been reported regarding these projects and the information has not been socialized. In that sense, the agreement resulting from the spill of liquid gas has not been fulfilled and recently in early March the dialogue was suspended due to the lack of willingness to dialogue of the company.

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

3.5. Osorno Hydroelectric Project and the conflict with Mapuche communities due to the flooding of the Ngen Mapu Kintuante ceremonial complex (Chile)

The Osorno Hydroelectric Project, owned by Hidroeléctrica Pilmaiquen, since 2015 controlled by the Norwegian state company Stafkraf, is located on the Pilmaiquén river, in the border of the regions of Los Lagos and los Ríos in southern Chile. This project considers the construction of a dam and a reservoir approximately 18 kilometers long, flooding 302.38 hectares, including the Ngen Mapu Kintuante, part of an important religious ceremonial complex of the Mapuche-Williche people, and regularly attended by communities of an extensive territory.

After an irregular process of environmental evaluation and after pressures from the company then holder of the Project to avoid the implementation of an indigenous consultation process, this project was authorized in 2009, two months after ILO Convention 169 entered into forcé in Chile. The environmental permit recognized the existence of the ceremonial complex and

[18] Defensoría del Pueblo (2018). Reporte de Conflictos Sociales N° 168.

conditioned the initiation of the project so that the proponent would carry out a participatory process with three indigenous communities that were arbitrarily identified by the company. This implied the delegation by the State of Chile of its obligation to implement a consultation process to the Company. In this context, the company carried out a series of interventions, including individual negotiations, in practice purchasing leaders and authorities decisions, deteriorating trust and the social fabric in the area. Between 2013 and 2014 there was a period of high criminalization by the State, since leaders and traditional authorities were persecuted and detained, some of them subject to precautionary measures such as imprisonment or house arrest. In the absence of some leaders, the company held meetings with the communities identified in the environmental permit as requested by the environmental authority. Although to date, the company has not managed to comply with the condition established in the environmental license, the evaluating Environmental Authority has continued to validate the irregular circumstance that the company is the one that carries out the participation process with the communities. In turn, the company has continued to intervene Mapuche-Williche communities, delivering agricultural inputs to families in the vicinity of the ceremonial center, dividing the communities and destroying their social fabric.

3.6. La Coipa mine and conflicts with Colla communities from Quebrada de Paipote, Atacama (Chile)

La Coipa mine, owned by the Canadian company Kinross Gold Corporation, consists of an open-pit mining project located in the Atacama Region in the north of Chile, within the territory of communities of Colla Indigenous Peoples. The average extraction of the project is 50,000 tons per day, producing 180,000 ounces of gold per year. In 2013, La Coipa mining operation was temporarily paralyzed due the depletion of its economically exploitable mining resources. In 2016, after the completion of exploration campaigns in a new deposit, another operational project was authorized, which allowed for the operations' continuity. The prospective programs as well as the operational project were environmentally assessed under the modality of summary assessment, which meant that the implementation of a consultation process with the Colla communities who use the territory did not take place. These communities have suffered the confinement of the summer pastureland in their routes of nomadic pastoralism, traditional activity which depends on the preservation of meadows and Andean highland wetlands.

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

the project is located upstream of the meadows and Andean highland wetlands used by the communities in their herding.

3.7. El Morro/ Nueva Unión mining project on Diaguita peoples' territory (Chile)

The El Morro project, originally proposed by Goldcorp Inc., a Canadian company, is a mining project aimed at the exploitation of an open-pit gold and silver mine, which contains reserves of 8,9 million ounces of gold and 6.5 billion pounds of copper. El Morro's worksites are located in Huasco and Copiapo Provinces, cover an area of approximately 2,460 hectares, out of which 1,420 hectares correspond to legally registered territory of the Diaguita Agricultural Community of Huasco Alto (CADHA), an indigenous community.

In 2008, its Chilean subsidiary (Sociedad Contractual Minera El Morro) submitted an environmental impact assessment (EIA) to the Regional Environmental Committee of the Atacama region. The project was approved by this authority in 2011, without consultation to the CADHA as mandated in Convention 169 of the ILO ratified by Chile in 2009.

Judicial actions filed in 2011 by CADHA against the El Morro project for violation of constitutional guarantees, in particular due to lack of consultation, were accepted by the Supreme Court in decisions made in 2012 and 2014, which ordered the annulment of the EIA, and the implementation of a consultation process with CADHA. Due to this judicial decision, the company decided to temporarily withdraw the project from the Environmental Impact Assessment System and to suspend its execution. Nevertheless, in 2015, Goldcorp, with Teck Resources, a company also based in Canada, announced their intention to amend the original project to give rise to the Corredor project that combines the El Morro mining project with another adjacent project called Relincho. The combined project was later named New Union, or NuevaUnión, in reference to this merger. As in the case of Pascua Lama, the NuevaUnión project has not publicly stated whether this modification substantially affects the impacts of the project and/or allows compliance with the requirements imposed by the Diaguita people and citizens. In addition, the indigenous consultation is still pending. In both projects the companies involved have not implemented due diligence processes. Although consultation is an obligation of the state and not of companies, they did not ensure that their investments in these projects were impacting indigenous legal or ancestral lands , as it is the case. The intervention of the companies involved in this project resulted in the division of the Diaguita people. Moreover, they did not have a complaints mechanism as proposed by the UN Guiding Principles on Business and Human Rights.

3.8. Proposed Metal Mining in the Massif du Nord (Haiti)

There are no active industrial metal mines in Haiti yet, but the government has identified the mineral sector as key to the country's economic growth.[19] The government has issued more than fifty gold mining permits, including three for mineral exploitation, authorizing companies to construct what most likely would be open pit mines. These permits collectively encompass land occupied by dozens of communities and thousands of families. These communities have long sought but been denied basic information concerning mineral exploration and the proposed construction of mines. In fact, many residents report that they did not know that their communities sit within mineral concessions until mining company vehicles arrived for the first time.

To this day, communities lack information about the legal and regulatory framework for mining in the country, including knowledge of their rights; planning and permitting of mining; potential environmental and social impacts of mining in their areas, such as on water resources and soil; mitigation measures; community development commitments; and payment and distribution of mining revenues, among other issues. Companies have ignored community requests for specific information about the type and scope of mining planned for their communities and its potential environmental and social impacts, and have not engaged in meaningful processes to obtain community consent to explore or mine in the area. The national government is advancing a proposed new mining law to replace the current Mining Decree, but the draft law is available only in French (rather than in Creole, the language spoken by all Haitians), and has not been distributed for public consideration. Among other major flaws, the draft law contains a provision that requires all reports, documents, and data related to work done under a mining permit to remain confidential for ten years.

The lack of access to information about Haiti's mining sector is a longstanding problem. In 2015 GJC and *Kolektif Jistis Min*, a collective of Haitian social movement organizations that support communities affected by metal mining, testified at a hearing before the Inter-American Commission on Human Rights on the situation of the right to access to information in Haiti. The Commission found the testimony about the "existing obstacles to the exercise of the right of access to public information"—specifically in the context of mining—"troubling."[20]

In addition to lacking access to information, residents in rural Haiti have reported crop damage caused by companies drilling on their land and 10-meter deep holes left for months uncovered, posing a hazard to children and animals. Companies also failed to abide by the Haitian Mining Decree, which requires the holder of a mining title to reach an agreement with a land owner or occupier prior to operating on his or her land. Residents reported instances of companies

[19] Except where otherwise cited, the material in this section is drawn from Global Justice Clinic and Haiti Justice Initiative, *Byen Konte, Mal Kalkile: The Human Rights and Environmental Risks of Gold Mining in Haiti* (2015), http://bit.ly/2Jp1ySz

[20] Organization of American States (OAS), Report on the 154th Session of the IACHR (19 Jun. 2015), http://www.oas.org/en/iachr/media_center/PReleases/2015/037A.asp (last visited 03 May 2019).

entering their land without seeking their permission, seeking their permission only after beginning work, and making false promises to persuade residents to agree to provide access to their land.

The case of the emerging mining sector in Haiti sheds light on the challenge of remedying early-stage information and participation-related violations associated with private sector investments. These challenges are particularly acute when companies are operating in countries with weak or absent regulatory states. Neither mining companies operating in Haiti nor the government has established a complaint mechanism to address and remedy rights violations. Although the rights violations that have occurred in the exploration phase are not as grave as those which might occur during mineral production, Haitian residents complain of violations of their rights to information, participation, and property.

The absence of a grievance mechanism is made worse by the fact that Haitian people do not have access to an independent and competent tribunal to enforce their rights. The Mining Decree forecloses options for judicial recourse, requiring mandatory arbitration for land-related disputes. Even absent such arbitration provisions, there is minimal evidence that Haitian courts provide effective remedy to those who have been harmed. Further, evidence makes clear that the government of Haiti largely abandoned residents in the negotiation process by failing to provide accessible information about mineral mining and the rights of community members under the Mining Decree and by failing to provide access to an arbitral body as envisioned in the law.

The communities affected by mining activity in northern Haiti are, as Haitians say, *moun andeyò*—literally "people outside." They are outside of Port-au-Prince, outside of Haiti's secondary cities, and outside of conversations about the development of the mining sector. This level of social, economic, and political exclusion makes residents in areas affected by mining in Haiti extremely vulnerable to ongoing and repeat rights violations. Worse yet, if a company proceeds to build a mine, the lack of environmental management and general governance failure coupled with the frequent extreme weather events and earthquakes make Haitian communities susceptible to socio-environmental disasters of immense scale, such as the collapse of the Fundão tailings dam. If, despite the lack of transparency, absence of the regulatory state, and exclusion of the population in decisions affecting their lives, companies continue to operate, government and corporate actors must: first, provide information to the Haitian people about proposed activities and their anticipated impacts, including making public a Kreyòl translation of the proposed mining law that would overhaul the sector; and second, establish a remedy mechanism for mining-related harms that adopts a human rights approach, respecting principles of transparency, meaningful participation, and non-discrimination.

3.9. The right to remedy for violations of human rights due to abuse of digital surveillance tools (Mexico; Global)

The digital surveillance industry, also known as the commercial "spyware" market, is a multi-billion-dollar trade.[21] Spyware is software that enables the covert collection of data and other information stored on or captured through an infected digital device, such as a cell phone or computer. Ostensibly authorized for use only by law enforcement and military agencies and only to combat crime and terrorism, spyware has been deployed for impermissible purposes, such as to track the conduct of human rights defenders,[22] dissidents, and journalists. Given the clandestine operation and extreme invasiveness of digital software, its use to harass, intimidate, and ultimately silence members of civil society is an entirely foreseeable human rights risk. And this risk is far from hypothetical.

Companies engaged in the development, distribution and maintenance of spyware have sold their products to governments that have used them to surveil and intimidate journalists and human rights defenders. An investigation by technologists at Citizen Lab, an interdisciplinary research institute at the Munk School of Global and Public Affairs at the University of Toronto, revealed that sophisticated digital surveillance technology sold by an Israeli firm, NSO Group, was used to spy on human rights defenders, journalists, lawyers, legislators and advocates of public health measures in Mexico. Based on research conducted between 2016 and 2018, Citizen Lab, produced a seven-part series documenting the misuse of NSO Group's "Pegasus" spyware against more than twenty members of civil society in Mexico.[23] Among those targeted with spyware were colleagues of a slain journalist investigating corruption, lawyers looking

[21] Adam Goldman, *Takeaways from the Times's Investigation Into Hackers for Hire*, N.Y. Times (21 Mar. 2019), https://www.nytimes.com/2019/03/21/us/politics/nso-darkmatter-government-spies.html (describing what Moody's estimates is a $12 billion market for spyware).

[22] The term "human rights defender" refers to anyone who acts to address human rights violations on behalf of individuals or groups. *See* Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 Annex, ¶ 4, adopted 9 Dec. 1998 (8 Mar. 1999) (referring to "individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals").

[23] John Scott-Railton et al, Citizen Lab, *Bitter Sweet: Supporters of Mexico's Soda Tax Targeted with NSO Exploit Links* (11 Feb. 2017), www.citizenlab.ca/2017/02/bittersweet-nso-mexico-spyware/; John Scott-Railton et al, Citizen Lab, *Reckless VI: Mexican Journalists Investigating Cartels Targeted with NSO Spyware Following Assassination of Colleague* (27 Nov. 2018), http://bit.ly/2Jo5Fhz; *see also* Miles Kenyon, Citizen Lab, *How Government-Exclusive Spyware is Used to Surveil Civil Society in Mexico* (22 June 2018), https://citizenlab.ca/2018/06/government-spyware-surveillance-mexico/.

into the disappearance of 43 students in 2014, and a well-known human rights center, Centro Prodh.[24]

The effect of such targeting—whether or not infection of a digital device occurs—is to interfere with a recognized zone of privacy and to generate a reasonable fear on the part of the targeted person that she is now or will be subject to surveillance. This fear has a chilling effect on human rights defenders' communicative activities, including the ability to hold and express opinions without interference.

The targeting of journalists and human rights defenders with malicious software, because of their opinions or work, is never permissible under human rights law. It infringes on the right to privacy and chills the exercise of freedom of opinion and expression, regardless of whether the data or communications of the targeted individual are in fact intercepted.[25] Article 13 of the American Convention on Human Rights guarantees the rights to freedom of thought and expression, and prohibits states from restricting the free circulation of ideas and opinions—rights reinforced in the Declaration of Principles on Freedom of Expression.[26] Article 11 of the American Convention protects individuals against arbitrary or intrusive interference with private life.[27]

There have been some attempts to hold the government and NSO accountable for the abusive deployment of Pegasus spyware in Mexico. In August 2018, the Mexican digital rights group, Red en Defensa de los Derechos Digitales (R3D) filed suit against NSO Group in Israel.[28] R3D, along with other Mexican civil society organizations, had previously filed a complaint with the Mexican Attorney General's office, and have demanded that the government undertake an

[24] *See* Azam Ahmed and Nicole Pelroth, *Using Texts as Lures, Government Spyware Targets Mexican Journalists and Their Families*, N.Y. Times (19 Jul. 2017), https://nyti.ms/2JuzRYm

[25] *See generally* Rep. of the Office of the UN High Comm'r for Human Rights, *The Right to Privacy in the Digital Age*, UN Doc A/HRC/27/37 (30 June 2014).

[26] American Convention on Human Rights, Art. 13, 1144 U.N.T.S. 143 (1969); Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, Principle 5 (2011) ("Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression."). *See also* International Covenant on Civil and Political Rights, Art. 19, 999 U.N.T.S. 171 (1966); Human Rights Committee, General Comment 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, ¶¶ 5, 9, 10 (12 Sept. 2011) (clarifying non-derogable nature of right to freedom of opinion).

[27] American Convention on Human Rights, arts. 11, 13.

[28] R3D, *NSO Group es Demandada ante Tribunales de Israel y Chipre por Negligencia y Complicidad en el caso #Gobiernoespía* (31 Aug. 2018), http://bit.ly/2JqKc7N

independent investigation into the deployment of spyware against private citizens.[29] To date, however, there have been no remedies.

The difficulty of remedying breaches of the right to privacy and repairing the chilling effect caused by abusive surveillance underscores the importance of preventive measures. As part of their duty to protect, governments that license the sale of digital surveillance tools must require robust due diligence processes to screen against the sale of spyware products to states that lack the requisite legal framework and judicial oversight to ensure such surveillance tools are not used unlawfully, and to monitor for misuse. Private companies bear direct responsibilities, as well, for preventing human rights violations related to their operations and remedying those which their activities cause or to which they contribute.[30] Pursuant to that responsibility, commercial spyware companies must ensure that a state purchasing their products can satisfy the principles of legality, proportionality and necessity in deploying digital surveillance tools, to respect the rights to privacy, opinion and expression. In doing so, companies should review the proposed buyer's legal framework, history of abuse, and mechanisms for judicial control of surveillance operations, and must refuse to sell to countries with a history of abuse—especially past targeting of human rights defenders. Moreover, the review of the legal framework must ensure that the client country provides mechanisms for redress, including remedy and judicial review, in cases of wrongful attempted or completed targeted surveillance.

Moreover, there must be a system in place to allow individuals who become aware that they have been targeted for digital surveillance to challenge their targeting before an independent and impartial judicial authority, and to seek reparation for the pecuniary and non-pecuniary harms that result from the invasion of privacy and chilling of opinion and expression. The remedies guaranteed under Article 25 of the American Convention on Human Rights may take many forms, including not only reparation and satisfaction, but—of particular importance in the context of digital surveillance—guarantees of non-recurrence. Recognizing that an attempted digital infection of a human rights defender is evidence of a completed violation—the unlawful targeting of that individual on the basis of opinion—should give rise to remedial measures both at the individual and the institutional level. Attempted infection puts states and commercial spyware companies on notice that they need to strengthen their due diligence systems and regulatory framework to prevent the wrongful deployment of surveillance software. Human rights defenders who are victims of attempted infection should have some recourse or means to alert authorities or appropriate bodies to the attack and trigger remedial measures.

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[29] *Human Rights Groups say Mexico not Investigating Spyware Claims*, Reuters (18 Feb. 2018), https://reut.rs/2JoZdqL

[30] *See* Human Rights Council, *Guiding Principles on Business and Human Rights*, UN Doc. HR/PUB/11/04, Principles 11-22 (2011).

Guidance is needed from the Inter-American Commission on Human Rights concerning steps states should take to ensure non-repetition of the kinds of surveillance abuses that have occurred to date, and to make plain that states must provide access to remedies for individuals wrongfully targeted with commercial spyware.

4. The Treaty Process at the UN

In order to complement the protection afforded by the Guiding Principles, a treaty on transnational corporations and other business enterprises with respect to human rights is being discussed at the United Nations since 2015.

The Treaty is intended to establish binding obligations to transnational corporations and it has been pushed by the international civil society considering the many examples of human rights violations caused by transnational corporations that leave affected communities without meaningful and fair reparation. The discussion of the Treaty is advancing and there is already a Zero Draft of the future instrument. In every session of the Open-Ended Intergovernmental Working Group, the presence of civil society and affected communities was crucial to enabling the process to go on.

It is important that Inter-American Commission pays attention to that process and prompt States to support the process, so as to enable advances in the institutional framework concerning business and human rights.

5. Conclusion and recommendations

We ask the Special Rapporteur on ESCE Rights to incorporate the information documented during this hearing to its report on Business and Human Rights. In particular, we recommend that the report refer to specific cases in which weak regulatory frameworks and/or policy failures have resulted in non-compliance of States and business enterprises with their duty to reparate corporate-based human rights violations.

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

1. Ensure companies' compliance with international norms and standards to ensure effective remedy for corporate-based human rights violations, especially in large-scale projects that generate massive socio-environmental impacts.

2. Clearly articulate the duty of States, under the Convention, to adopt a framework of laws, regulations and policies with mandatory standards to implement the right to effective remedy to be carried out by companies.

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

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

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

6. Ensure mechanisms are in place to guarantee effective and intercultural participation, as well as transparency and access to information, in the design, preparation, implementation and development of policies and mechanisms to remediate corporate-based human rights violations.

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

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

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

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

11. Refrain from adopting legislations that limit the scope of reparation processes exempting companies from addressing human rights violations disregarding the principles of principles of transparency, meaningful participation, full compensation, accountability, and non discrimination.

12. Refrain from adopting legislations that undermine rights holders' and affected groups' access to justice and their right to an effective remedy; or that establish ceilings of financial compensation; or that allocate the burden of the proof of irregularities in the due diligence process to non-corporate claimants.