National NGO Roundtable on Business and Human Rights

CONTRIBUTION OF ENVIRONMENTAL, SOCIAL, DEVELOPMENT AND HUMAN RIGHTS NON-GOVERNMENTAL ORGANIZATIONS OF COLOMBIA TO THE INTERGOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES IN REGARD TO HUMAN RIGHTS

February 2020

The undersigned organizations wish to transmit our contribution as part of the Colombian civil society to be considered at the VI session of the Intergovernmental Working Group on the latest draft of the Binding Treaty on business & human rights to be held in Geneva in 2020.

The **National NGO Roundtable on Business and Human Rights** is a space of confluence of platforms and diverse environmental, social, development and human rights NGOs in Colombia, for dialogue, dissertation, mutual learning and the search for common purposes, around the business conduct in the country.

Colombian context in relation to Business and Human Rights

In Colombia, the issue of the relationship between business and human rights has been occupying an important place in the public agenda, not precisely because of the commitment of companies and the Government to ensure human rights; but, on the contrary, due to the cases of abuses and violations of fundamental rights and freedoms in which national and transnational companies have been involved, which have affected individuals, communities, nature and territories, contributing to the increasing complexity of the social, political and armed conflict that the country is still experiencing.

The Colombian State welcomes the United Nations Guiding Principles on Business and Human Rights (UNGPs) (Human Rights Council. Resolution 17/4, 2011), a non-binding instrument that, at the global level, establishes the obligations and responsibilities of States and companies with respect to the protection and respect for human rights and the reparation of damages caused by companies in their activities and business relations and services; however, these Principles are not effectively implemented in various territories where business projects are carried out, since the mere declaration of their implementation does not have any impact on the socio-

environmental problems and contexts, nor on the guarantee of the rights of local populations, especially peasant, indigenous and Afro-descendent peoples.

We consider it essential, therefore, to give greater scope to the object of the present draft Treaty, establishing, as one of its purposes, the consolidation of the duty of States to "**investigate, judge and sanction**" human rights violations, proposing both national courts as a scenario for legal action and the creation of an International Tribunal to settle disputes or the referral of cases to the International Criminal Court (in cases of its competence). This should be **expressly included and not subsumed** in the body of this instrument under the abstract criterion of "access to justice". In the same vein, following the logic of the *Maastricht* principles, it should be expressly stated that multinationals and companies that carry out activities outside their home territory have obligations that subscribe to the extraterritoriality of their activities.

The Treaty should include a section of Principles, among which the differential approaches (ethnic, gender, minorities, migratory status, etc.) should be integrated and, expressly the intersectional approach, with emphasis on the impacts on women and girls, as criteria for interpretation and implementation. In this way, it is possible to account for differential impacts, inequalities at the working place and access to information related to gender, class, race/ethnicity, disability, etc. These approaches should focus on historical subjects that have been invisible until now, such as the peasantry (Declaration of Peasant Rights, 2018), the rights of nature and the collective dimension of human rights, which have a very important jurisprudential and constitutional development in Latin America.

The Principles section mentioned should include a **clause on the primacy of human rights** over any trade agreement or treaty. It should also enshrine the **duty of the State to protect** individuals and communities from business activities that may cause harm; the recognition of **the responsibility of all companies** to respect internationally recognized human rights, emphasizing the unrestricted requirement not to produce negative impacts, by action or omission, on local populations and the environment; and, finally, it must include the obligation of the State Parties and companies to **guarantee not only the remedy** for possible human rights violations, but also **integral and transformative reparation**, in order to not generate scenarios of revictimization. Implicit in this principle is the **obligation of prevention** as the first *ratio* and, if necessary, to refrain from activities that could create negative impacts. Additionally, an intersectional approach must be integrated as a principle of interpretation and implementation in prevention and reparation actions, which contemplates the social, environmental, gender, age, cultural diversity and disability dimensions, among other differential factors.

The draft Treaty uses the concept of "**remedy**"[1]. Therefore, the concept of **integral and transformative reparation** must be integrated, because to remedy implies to ignore that there are irreversible impacts. Therefore, any action of remedy and reparation must be preceded by actions of **prevention and mitigation**. Furthermore, the concept of victim included in article 1 must be complemented with the recognition of the category of "**collective victims**" and, it must be emphasized that the interested parties (or intervening actors) include the victims (and their families and communities), the States and the companies, as well as civil society. This criterion should be articulated with the express recognition and the **guarantee of protection** of those affected, as human rights defenders and the work they carry out.

The following expressions should be replaced:

[1] The concept used in the framework of the different United Nations human rights instruments is: "effective remedy".

1) Article 4, subparagraph 4, should read: "Victims have the right to receive special and differentiated treatment in order to avoid any form of revictimization…"
2) Article 4, subparagraph 10, should read: "States Parties are bound by the international duty to investigate, prosecute and punish all human rights violations and abuses effectively, promptly, thoroughly and impartially…"
3) Article 4, subparagraph 12, should be modified in two ways: a) the numbers from "a" to "e" in this subparagraph should be written equally with verbs or nouns at the beginning; and b) the number "e" should be clarified, since we consider that - in no case - the victims (individual or collective) should assume the procedural costs, since this constitutes a scenario of revictimization.
4) Article 4 subparagraph 16 should read "...the courts may decree..."

In article 6, subparagraph 7, the expression criminal, civil or administrative liability must be replaced by **criminal, civil *and* administrative liability**, because the initial wording makes them exclusive, which is contrary to the rights of victims and to the coherence with the interpretation of this instrument under discussion. In order to give greater coherence to what is stated here, in the section of definitions a clear distinction must be made between **environmental crimes and damage**, so as not to reduce the scope of implementation to criminal, civil or administrative justice, but rather the text must allow for an interpretation of concomitance and not exclusion. These spheres must be interpreted in an interrelated manner, since human rights are universal, inalienable, indivisible and interrelated.

In addition, literal "g" should include **dispossession and land-grabbing; forced abandonment and confinement of populations;** and it should consider not only scenarios of armed conflict and generalized violence, but also those conducts carried out in the apparent legality framework. Finally, two more paragraphs should be included: The first one should give an account of the criminal, civil and administrative liability that the economic activity of the company and its contractual relations imply, so its guarantee duties should be extended to the supply chain, commercial relations, the products it manufactures and the services it provides, including any transaction and/or virtual activity. The second should introduce the inversion of "polluter pays" principle by a double minimum standard: “not polluters and not abusers of human rights will be benefited.” This would provide a protection of rights in two scenarios: a) compliance with the decision of communities that declare a resounding NO to a business project; and b) when States prove veiled benefits for companies, with compensation rates based on the possibility of paying for polluting.

Article 5, on prevention mechanisms and actions, includes in subparagraph 3.a, some prevention measures, to which **previous studies**, diagnoses and prior assessment of social and environmental impacts should be added, as a requirement for the development of business activities, undertaken both by the company and by the relevant bodies and instances of the States. Similarly, a **socio-environmental and participatory approach** should be made obligatory in the allocation of licenses or permits for exploration, exploitation and production.

Finally, numeral 5th of article 5th, subparagraph 6, includes the possibility for States to provide incentives for compliance with the *legally binding instrument*. However, these should be understood as a complementary standard, since the minimum standard must be full and effective compliance with this instrument. Any incentive should be considered as an additional element to facilitate implementation over time, but not as a guarantee of compliance.

Although the present draft includes, in its article 6th, subparagraph 3th, the guarantee of access to justice for the victim as opposed to the responsibility of legal and individual persons, it is

unavoidable to make express mention of a clause to lift the corporate veil, emphasizing the mechanism and the necessary presumptions in favor of the victims (individual and collective). In addition, a standard of **guarantee of non-re-victimization** and greater control should be included for those companies that develop activities in areas considered to be in armed conflict, with environmental or conservation risks, together with the recognition of the presence in those territories of peasant, indigenous and afro-descendant communities.

The Escazú Agreement (Costa Rica) of 2018 is another regional standard that can be integrated into this instrument. In this regard, the agreement mentioned includes in its article 6th, some components that should be expressly included, based on the State's obligation to protect people who defend the environment, territory and human rights, in the following terms: (a) An information system on environmental impacts linked to corporate activities should be considered, from which States and civil society can carry out monitoring, follow-up and control activities; (b) Access to information on projects with environmental impacts should not be reduced to the victims, since they are of interest to society as a whole; and (c) In order to guarantee real and comprehensive access to information, the way in which it is systematized and presented should be culturally accessible.

In addition, another of the instruments relating to access to information for citizens and the prevention of impacts must focus on promoting corporate transparency. To this end, both targeted incentives and regulatory measures can be articulated, either through the creation of periodic evaluations, the consolidation of an accountability system and the promotion of intra-institutional transparency practices and action against third parties by companies.

The obligations of States about human rights are framed in the duties to **respect, protect and guarantee**. Therefore, the criterion of extraterritoriality regarding human rights violations must be understood from a triad of shared responsibility**: the offending company plus the State where the events occurred, and the State where the company's parent company is located**. A scenario such as the one proposed would encourage States to regulate their legal framework in order to protect their territory and population and also to avoid the proliferation of so-called *tax and judicial havens*, from which activities contrary to human rights done by companies are usually covered up. This element should be integrated into article 4th on the rights of victims.

With regard to the same article, the following modifications and additions should be made: (a) In the second paragraph, the expression "**and other associated rights**" should be included; (b) In the third paragraph, change the expression "benefit" to "**has the right to**"; (c) Finally, the effects generated by corruption, both private and State/Government should be considered as damages to repair.

On the other hand, in the **preventive** dimension that this instrument seeks to regulate, we should consider articulating the **precautionary principle** and the **principle of precaution**, which would make it possible to account for the distinction between *an impact resulting from human action and the possibility of avoiding it*, that is, an *ex-ante* and *ex post* reflection of human activities. **Precaution** implies weighing up uncertainty and arbitrariness in decision-making that seeks to avoid environmental damage or hazards, so that future damage is understood as **certain**[2]. On the other hand, including the **precautionary** principle forces to consider **uncertain** damages, because their effects are unknown[3], making both the damage

[2] This implies that there is enough accumulated scientific information. Therefore, any preventive action will imply mitigating or stopping a possible damage, which does not translate into a change of activity or the cessation of the productive activity that could be a source of damage.

[3] This obliges States not to allow activities whose harmful effects are unknown, but which can reasonably be assumed to be harmful, i.e. fracking.

and the action that mitigates it unpredictable. In the second case, we would be giving scope to two presumptions necessary for the regulation of the activities carried out by companies: the presumption ***pro ambiens*** or in favour of the environment and the presumption ***pro culture*** or in favour of cultural diversity. Thus, mitigation and prevention imply doing, contemplating all possible damages and, not doing, when unpredictability dominates.

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