



## BUSINESS AND HUMAN RIGHTS IN THE NATIONAL DEVELOPMENT PLAN

COLOMBIAN PLATFORM FOR HUMAN RIGHTS, DEMOCRACY AND DEVELOPMENT - PCHDD

CIVIL SOCIETY ROUNDTABLE ON BUSINESS AND HUMAN RIGHTS – MESA EDH

### **TITLE OF THE GOVERNMENT PROGRAMME:**

II. COLOMBIA SOCIEDAD PARA LA VIDA<sup>1</sup>

### **TOPIC AND NUMBER OF THE GOVERNMENT PROGRAMME:**

3. FROM INEQUALITY TOWARDS A SOCIETY THAT GUARANTEES RIGHTS: LETS MAKE THE '91 CONSTITUTION A REALITY OUT OF BUSINESS.

### **AXIS OF TRANSFORMATION FOR THE FORMULATION OF THE NDP.**

REPRODUCTIVE ECONOMY FOR LIFE AND FIGHT AGAINST CLIMATE CHANGE

### THE PROBLEM, CHALLENGE AND/ OR NECESSITY

In Colombia, we still do not have legal and mandatory mechanisms that establish corporate respect for human rights and the environment. Further, there has not been any progress in the investigation, sanctioning and reparation for suffered harms for individual and collective victims, including regarding the environmental impact caused by business operations, which omits its duty of compliance with comprehensive Human Rights.

Since 2016 and particularly since 2019, Colombia has been the country host of most assassinations of social and environmental leaders in the world. In the time from January to September 2021 139 assassinations were documented, according to the programme Somos Defensores. A large share of the social leaders murdered in Latin America had been active in the protection of the Amazon region, the preservation of biocultural diversity and the fight against climate change. For years they have denounced environmental crimes and human rights violations caused by the enforcement of a development model that heavily affects their territories due to large-scale extractive projects of different natures: agro-industrial, mining, energy, or infrastructure projects, among others.

In this sense, even though Colombia has adopted the UNGPS<sup>2</sup> and has declared that with its National Action Plan (NAP) it has built a public policy on the matter, that policy is yet to deliver results and lacks the required

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<sup>1</sup> Colombia Society for life

<sup>2</sup> With resolution No 17/4, the United Nations Human Rights Council adopted the Guiding Principles on Business and Human Rights, which are voluntary norms that are based on three fundamental pillars:



and decisive elements and requirements to determine the responsibility of the businesses in the area of human rights violations and to generate effective reparation for the people, communities or territories whose fundamental human rights have been negatively affected due to business activities. The country is witnessing a scenario of continuous violation of human rights by business actors (private, mixed or public), who do neither recognise nor confront the socio-environmental, health, labour, economic and cultural conflicts that are generated by their operations, products and services. In this sense, it is important to recognise that the economic actors (legal, illegal, formal, and informal) have been decisive in the historical conflict that has been experienced in different territories in the country, as a result of the configuration of the extractivist development model. The National Action Plan on Business and Human Rights, currently in force, is, just as the previous one, insufficiently equipped to constitute a State public policy, due to its temporal limitation, linked to the development models proposed by the governments in power, which restrict its applicability, projection, and effectiveness. The country has had two action plans and a notorious shortcoming of both plans so far is that they have not been drawn up based on a diagnosis of the problem of serious damage and violations of human rights caused by companies (public, mixed or private), to which they should respond; that is, the State's obligations to protect, respect and guarantee human rights and fundamental freedoms in the contexts related to business activities fail to recognise the responsibility - past, present and future - of companies in respecting the rights of the population; its formulation has also lacked the real, effective and democratic participation of the communities affected by business activities; it has not carried out the obligatory processes of consultation and free, prior and informed consent with ethnic peoples and has not included differential approaches to gender, ethnicity, territory, persons with disabilities, migratory status or the rights of children and adolescents.

So far, the public policy on business and human rights lacks adequate follow-up mechanisms to measure its scope, the resources invested in its implementation, and, much less, to reduce human rights violations due to business activities.

Currently, the Ombudsman's Office is working on the construction of a legislative proposal for due diligence in the area of business and human rights to ensure that the State and companies effectively manage the real and potential risks to human rights posed by corporate activities. However, there is concern about the inadequacy of due diligence to ensure the accountability of companies for human rights violations, since it is not based on the real harm caused to people, communities, or the environment and since it does not guarantee real access to justice and reparation since responsibility is defined by a list of precautions/measures that companies must take.

It is understood that according to Human Rights Due Diligence, businesses: a) must embrace the negative consequences for human rights that have been fully or partially caused by their own actions or by entities to

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1. States have the duty to protect all people in their jurisdiction against human rights violations committed by businesses.
  2. Businesses have the duty to respect Human Rights. In this sense, they must prevent the violations of Human Rights in the places where they carry out their activities, products or services, regardless of the corporate size or sector. This duty holds independently from whether or not the states fulfil their respective obligations.
  3. In the case of corporate abuses, the victims must have access to effective remedy through reparation mechanisms, either of judicial or extrajudicial character.

However, eleven years after the adoption of the Guiding Principles, the results do not live up to expectations.



which their operations, products, services or trade relations are directly or indirectly linked; b) the complexity of the task will vary according to the corporate size, the risk of severe adverse impacts for human rights and the environment and the operational context; c) It must be a continuous effort, given that the risks to human rights may vary over time, with evolving business activities and in the operational context of the businesses.

It must be stressed that in those countries that have already adopted due diligence legislation, their effectiveness is still lagging, given that they fail to cover the entire value chain and lack effective mechanisms to ensure access to remedy for persons or communities whose human or environmental rights have been negatively affected by corporate activities. Further, due diligence entails the risk to turn into a procedure and given its preventive character, its inherent flaws point to the lack of transparency and the dependence on the very companies that turn into judges and interested parties of their own practices.

#### THE PROPOSALS:

From the Colombian Platform for Human Rights, Democracy and Development, together with the Civil Society Roundtable on Business and Human Rights, we convene a working space aimed at analysing the current scenario in Colombia with regards to Business and Human Rights. We suggest the following:

1. *Support and active participation of the Colombian state in the dialogue- and negotiation spaces for the Binding Treaty on Business and Human Rights, promoted by the UN open-ended intergovernmental working group (IGWG).*
2. *Progress in the development of a comprehensive policy in the area of Human Rights, including a chapter dedicated to Business and Human Rights that stipulates the bases and lines of action for establishing binding mechanisms and corporate liability, spelling out responsibilities and building on the engagement of individuals, communities and environments whose rights have been negatively affected by corporate actions.*
3. *Advance in the reformulation and expansion of public policies that go beyond the Business and Human Rights National Action Plan, making it a participatory process that integrates differential human rights approaches (ethnic, generational, gender, territorial and intersectional), of binding character and providing a regulatory framework for corporate responsibility in Colombia. Advance a process of institutional restructuring for the implementation and monitoring of the public policy on business and human rights.*
4. *Reconstruction of the institutional scaffolding in the area of Business and Human Rights.*
5. *Promote mechanisms for environmental democracy that guarantee the effective and binding participation of the affected communities in the decision-making spaces for extractive and mining and energy projects by coherence and alignment of the inter-American and Universal Human Rights framework with the Escazú Agreement.*
6. *Establish mechanisms that allow for the detection and restriction of undue corporate behaviour in decision-making spaces that negatively affect the Human Rights of people and communities (through lobbying, corruption and undue interference in so-called 'corporate state capture').*

#### REGIONAL AND NATIONAL JUSTIFICATION OF THE PROPOSAL



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1. ***Providing support for the binding treaty in the international dialogue arena.*** The current government should support the Binding Treaty process as a tool that will allow communities, and even states, a fairer fight in the face of the climate, food, environmental, ecological, economic and social emergency, which requires the enforceability of binding mechanisms on corporate accountability. The voluntary mechanisms that have sought to regulate the relationship between business and human rights have not been effective for decades. Therefore, one of the most relevant points in the discussion is the role that the State should assume in enforcing duties and obligations on companies, as well as providing effective judicial mechanisms for victims. This must be in contrast to the restricted role that companies should have in determining the type of regulation that applies to them and their recurrent approach of using only extrajudicial mechanisms.
2. ***Advance in the development of a comprehensive public policy on Business and Human Rights:*** The government must advance in the construction of a comprehensive public policy on human rights, known as the National Human Rights Action Plan. Since 1993, the Colombian state committed itself, based on the Vienna Declaration and Programme of Action, to the elaboration of a national action plan in which the measures required for the state to improve the promotion and protection of human rights would be determined. Almost thirty years later, we do not have such a plan. On the other hand, the General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace picks up on this commitment of the Colombian state and establishes in paragraph 5.2.3 that progress must be made in the '*design, elaboration and implementation of a National Human Rights Plan with the effective participation of organisations of human rights defenders and social organisations and movements which, taking into account the different existing policy efforts, will allow them to be adjusted to the needs of a peace-building scenario*'. This Plan should therefore develop a specific chapter on the issue of business and human rights that will, in turn, underpin the development of public policies that will enable corporate legal accountability frameworks that go beyond the drafting of the National Business and Human Rights Plan.
3. ***Advance in the development of binding public policies for corporate liability.*** The NAPs have shown that they are neither sufficient nor do they guarantee human rights in contexts of business activity. Against this background, we ask the new government to consider the construction of a baseline of legal accountability that takes into account particular situations regarding business and human rights in the different territories of the country (including its marine areas), taking into account the particularities of the contexts, and especially those where business activity has generated serious violations of the human rights of individuals, communities or the environment. Public policies should include participatory mechanisms for the victims of corporate action, monitoring, evaluation and measurement of their impacts, and individual and collective reparation measures with relevant indicators and deadlines for this purpose.
4. ***Reconstruction of the institutional scaffolding in the area of Business and Human Rights.*** The institutional coordination for the development of comprehensive public policies on corporate legal responsibility should be promoted, which implies assessing and adjusting the institutional framework necessary for its implementation at the national and local territorial levels.
5. ***Promote mechanisms of environmental democracy.*** In general, the government should promote effective mechanisms for the real participation of communities in the decision-making on extractive projects or private investment in the territories. Progress must be made in strengthening



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mechanisms such as popular consultations, never limiting the right to express an opinion or to participate in making relevant decisions about the future of the territories. Currently, Colombian legislation does not include binding participation mechanisms for decision-making on mining and extractive investments. The Constitutional Court in its ruling SU 095 of 2018 urged the Congress of the Republic to advance a legislative proposal that allows for effective participation mechanisms in decision-making on mining and energy projects, and this participation should be interpreted from a binding approach. Civil Society organisations have advanced a legislative proposal that builds on two mechanisms: **Open environmental lobbying** and the **public environmental control hearing**, which aim to interfere in projects both at the planning and the implementation stage. Open lobbying is a figure that already exists in national legislation and is taken up in this proposal, integrating elements such as the provision of information to communities by state institutions on the projects to be implemented (including the free, prior and informed consent of ethnic peoples), in order to guarantee the right to information; it also establishes instances of deliberation and decision-making which, as has been stated, would be binding. On the other hand, among the measures to counteract climate change, ruling STC 4360 of 2018 calls for the creation and implementation of national roundtables to guarantee citizen participation.

6. ***Establish mechanisms to identify and restrict the improper actions of companies in making decisions that affect the human rights of individuals, communities, and the environment.*** Corporate capture is the dynamic and process by which the business or financial sector seeks to determine and/or control political decision-making spaces and initiatives in order to consolidate and protect their interests and investments. There are a number of cases where the capture of the state by large business associations is evident; one of them is the law on the taxation of sugary drinks or the law on labelling, where an attempt was made in the legislative arena to put on hold the proposals in this regard, through lobbying by companies. The Colombian business sector exerts constant pressure to lower the standards for environmental licences, prior consultation and popular consultations, especially in relation to the democratic participation of citizens. With the excuse of speeding up "the procedures", they have openly supported Express Environmental Licenses, Online Prior Consultation and the non-ratification of the Escazú Agreement. Besides, they engage in lobbying to delay or impede the adoption of legislative projects that would negatively impact their interests. In light of the above and in relation to the decision-making architecture around food sovereignty and food security, corporate participation in decision-making in this area should not be allowed. We suggest implementing a governance mechanism in which decision-makers, state and right-holders participate on equal terms.

#### OBSERVATIONS/ PROGRESS RELATED TO THE PROPOSAL: PREVIOUS STUDIES, RESEARCH AND DEMANDS

- Draft Binding Treaty Document on Business and Human Rights.  
[https://www.ciedhcolombia.org/files/ugd/739426\\_5b512e3dfce54146bf19a520306677bf.pdf](https://www.ciedhcolombia.org/files/ugd/739426_5b512e3dfce54146bf19a520306677bf.pdf)
- National Action Plan on Business and Human Rights.  
[https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/PNA\\_Colombia\\_9dic.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/PNA_Colombia_9dic.pdf)
- Legislative proposal for environmental democracy <https://www.camara.gov.co/mecanismos-de-participacion-en-contextos-extractivos>



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- Statements of the Civil Society Roundtable on Business and Human Rights.  
[https://www.ciedhcolombia.org/files/ugd/739426\\_a1efd785b9704d1a8678e4c6931e0b1a.pdf](https://www.ciedhcolombia.org/files/ugd/739426_a1efd785b9704d1a8678e4c6931e0b1a.pdf)  
[https://www.ciedhcolombia.org/files/ugd/739426\\_eab028660a644f75bd78af53a4e2decf.pdf](https://www.ciedhcolombia.org/files/ugd/739426_eab028660a644f75bd78af53a4e2decf.pdf)  
[https://www.ciedhcolombia.org/files/ugd/739426\\_1768f56bac9f401fb50d9fd66bc418b3.pdf](https://www.ciedhcolombia.org/files/ugd/739426_1768f56bac9f401fb50d9fd66bc418b3.pdf)
- FIAN International position paper on corporate due diligence and the respective state duties in the context of corporate accountability. [https://www.fian.org/files/files/Final\\_DD\\_paper\\_SPA\(1\)\(1\).pdf](https://www.fian.org/files/files/Final_DD_paper_SPA(1)(1).pdf)

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