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OFFICE OF THE FEDERAL OMBUDSMAN FOR HUMAN
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**TECHNICAL NOTE No. 7/2018 THE PROTECTION AND REPARATION
OF HUMAN RIGHTS IN BUSINESS ACTIVITIES**

I - Contextualization

National development, in accordance with Article 3, item II, of the 1988 Constitution, is a fundamental goal of the country. In order to achieve this goal, there is no doubt on how important long-term investments are, capable of generating and distributing wealth, which, however, must contribute to the achievement of the other goals listed in the same article, including that of eradicating poverty and marginalization and reducing social and regional inequalities (CF, Article 3, I and III). This combination of development with social repercussions is consistent with the provision, also Constitutional, that free enterprise, citizenship, human dignity and social values of work integrate the pillars of the Democratic State of Brazilian Law, (CF, Article 1, I, II and IV).

Nevertheless, Brazilian and world history reveals that business activities, although indispensable for economic growth, very often generate numerous and equally large negative impacts (sometimes irreversible) of a socio-environmental nature and not infrequently violations of human rights. In other words, instead of free enterprise and development driving the State's social welfare, they end up antagonizing this perspective.

In this process, populations in situations of greatest vulnerability are the most intensely affected. Hence, residents of poor outskirts or communities, as well as Indigenous peoples and other traditional peoples and communities – such as forest and riverside communities, small farmers, fishermen, and the so-called *vazanteiros*, *geraizeiros*, *veredeiros*, among many others – are more intensely affected by business ventures that are commonly the very denial of their worldview. The rights threatened or violated are many: right to life, physical integrity, security, housing, decent work, health, water, adequate food, culture, memory, information and real and full development. The disproportionate and serious violation of rights of these populations, associated with the fact that development has been consolidated with the worsening of social inequality, has shown the tension between business activities and human rights.



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To deal with the complexity of this alleged antagonism between business enterprises and human rights, national and international civil society has increasingly demanded the improvement of legal instruments and frameworks for the protection and promotion of human rights by business enterprises.

It is a fact that the norms and policies for the protection and promotion of human rights were originally built for the State to take its role, considered the only potential violator of these rights. However, today non-State actors are also considered potential agents of human rights violations, when in situations of exercising a *power in fact* (as if they were functions of government) or present themselves in relation to individuals in a situation of superiority of social power.¹

Among these non-State actors, the role of business enterprises and, above all, of transnational corporations, which often have superior economic and political power in comparison to that of State institutions themselves.²

Under the terms of the Brazilian Constitution, business activities must be governed according to the general principles of economic activity provided for in articles 170, among which the following stand out: the valorization of human labor, free enterprise, the social function of property, the defense of the environment and the reduction of regional and social inequalities. These principles must guide the production of infraconstitutional norms and national case law, shaping the relationship between business enterprises and society as for norms, regarding respect for human rights.

At the international level, the United Nations Human Rights Council leads two parallel initiatives to strengthen normative frameworks on human rights and business. The first gave rise to the creation of the Working Group on Business

¹The term "non-State actors " comprises many kinds of entities and persons that do not hold identities among themselves: individuals, multinational corporations, small businesses, religious institutions (churches), organized epistemic communities, trade unions, universities, non – governmental organizations, multilateral international organizations (e.g. UN, ILO, WHO, UNICEF, WTO, OAS, World Bank, International Monetary Fund), terrorist groups, armed resistance groups, insurgents or rebels.

²According to the non-governmental organization Global Justice Now, there are more than 40 thousand transnational corporations in the world. And, among the 100 richest institutions in the world (between governments and business enterprises),

69 are transnational corporations and only 31 are governments. See http://www.globaljustice.org.uk/sites/default/files/files/resources/controlling_corporations_briefing.pdf



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and Human Rights³, whose mandate refers to the dissemination and implementation of the Guiding Principles on Business and Human Rights, elaborated by Professor John Ruggie, at the request of the Secretary-General of the United Nations and approved by the Human Rights Council in 2011. The second concerns the proposal and discussion of an international treaty on the subject, currently at the discussion stage of the first draft.⁴

In the context of the activities encouraged by the UN Human Rights and Business Working Group, one of the central themes is the recommendation for States to adopt a National Action Plan, defined as an evolving political strategy developed by a State for protection against adverse human rights impacts by business, in accordance with the Guiding Principles on Business and Human Rights.⁵

Several Brazilian civil society entities follow and interact with the issue of human rights protection in the face of business activities and demanded that the Office of the Federal Ombudsman for Human Rights – PFDC create an internal working group to monitor the State's activity in the matter.⁶ Taking into account the need to assess the demand for Brazil to institute a National Action Plan, as well as the country's position in the discussion process of the aforementioned international treaty, and after reflections by the Internal Working Group and dialogues with government bodies and civil society itself, the PFDC issues this technical note to express its view on these processes. The theme demands decision-making by the Brazilian State and society, in view of the two international processes referred to and the history of human rights violations by business enterprises in Brazil, the following should be noted among many cases:

³See

<https://www.ohchr.org/en/issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

⁴ See <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>

⁵ See https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf. For an overview of the National Action Plans already approved, see HOMA Institute, “general perspectives on National Action Plans on Business and Human Rights” - Research coordinated by Manoela Carneiro Roland. Available at: <http://homacdhe.com/wp-content/uploads/2016/01/Perspectivas-Gerais-sobre-os-Planos-Nacionais-de-Ac%C3%A7%C3%A3o-sobre-Empresas-e-Direitos-Humanos.pdf>.

⁶ Human Rights and Business Working Group, created by Ordinance No. 14/2016, of the Office of the Federal Ombudsman for Human Rights. To clarify its considerations, the Human Rights and Business Working Group of the PFDC promoted, on November 8, 2017, a public hearing in Vitória – ES, which was attended by about 130 people, among representatives of affected, non-governmental organizations, government and State-owned companies.



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the rupture of the Fundão dam, operated by Samarco, in Mariana/MG; the construction of the Belo Monte hydroelectric power plant, in the Xingu River, Pará State; various damages caused in different parts of the country and the planet by mining activities by Vale S/A; the operation of ThyssenKrupp Companhia Siderúrgica do Atlântico – TKCSA, in Rio de Janeiro, without an environmental license; the expansion of agribusiness borders in the *cerrado* (Brazilian savannah) with the expulsion of traditional peoples from their land and serious damage to the water supply for urban and rural populations; environmental damage and land issues related to the expansion of the port of Suape, in Pernambuco; tailings leakage from Hydro Alunorte, in Barcarena, in Pará.

II - Business Activities and Human Rights

The tension between business and human rights is not a new issue. It is practically a truism to say that human rights violations committed by States are, as a rule, associated with economic or financial interests. Whether in international or internal conflicts, as in authoritarian or relatively democratic regimes, violations take place in contexts of protecting, facilitating or privileging the interests of social groups and their respective economic pretensions. Also as usual, the onslaught against human rights is made with the argument of the need to accelerate economic development, although the reason for that is often associated with others of a political or social nature, such as the need to repress subversive groups, criminals, etc.

It is also necessary to recognize that business enterprises develop their economic activities with the aim of remunerating partners and shareholders, that is, making a profit. This is an essential element of the political-economic system present in the Brazilian Constitution (as well as in the constitutions of all capitalist countries) under the principle of Free initiative. This purpose, there is no doubt, is lawful and encouraged by the State.

However, the purpose of profiting imposes enormous pressure on company administrations to minimize costs and expenses and, consequently, maximize profits. It is clear that this logic compresses investments or expenditures in guaranteeing and protecting human rights, especially when the normative framework for supervising existing rules are weak. In that context, an aspect that sounds central to the PFDC in relation to the theme of the protection of human rights in the face of



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business activities is the need to build a clear legal framework on the obligations of business enterprises, associated with an effective system of reparations and efficient control. Without a comprehensive mechanism that balances the correlation of forces and impacts the decision-making processes of corporations, the defense of human rights will always be at risk in the face of the economic and financial demands of business enterprises. The protection of human rights cannot be interpreted as an option or mere voluntary social responsibility. It should be at the heart of any business decision-making process. At the present stage of civilization, it is unacceptable that economic activity can sacrifice human dignity for the sake of financial results. In other words, respect for human rights must be a premise in any decision-making process.

The need for States to attract investment from business enterprises by reducing costs of operation and implementation of enterprises causes the phenomenon of the so-called “race to the bottom”. That is, States compete with each other as the “cheapest” places for business, which imposes sacrifices both in the tax plan (fiscal war) – and consequently, in the State's ability to promote social and economic rights – such as when dealing with the obligations to do or not to do of business enterprises, notably in the environmental fields, prohibition to use labor similar to slavery, need to observe sanitary standards, facilitation in the occupation of land and the consequent indiscriminate use of eviction, forced displacement of populations. In other words, respect for human rights in general is compromised as a way of privileging business investment.

There is no reason for a corporation to adopt different levels of protection and respect for human rights due to the location of its business enterprise. The cultural multiplicity and different stages of social development of societies cannot serve as a pretext for unequal standards of dignity, especially with regard to human rights defined in international law. Disqualifying and discriminating certain populations with regard to the intensity of respect for their fundamental rights refers to practices of slavery and colonialism.

For this reason, PFDC advocates the reinforcement of the normative system, national and international, so that transnational corporations are obliged to adopt the same standard of protection of human rights in all countries and communities in which they operate, directly or indirectly. With this, it will privilege



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the principle of maximum protection (*pro homine*) and equality. That is to say that at all stages of the operation and in all the countries in which they operate, corporations should follow the highest model of respect for human rights, especially those enshrined in international law and able to be implemented in different degrees of intensity.⁷

Another aspect related to the impacts of business activities on human rights is that it varies according to the sectors or fields of economic activity. In fact, some areas or activities have a higher risk of producing human rights violations due to the natural tension they cause, such as in the following cases: (a) size of the enterprise *vis a vis* the socio-environmental impact (e.g., the deployment of large industries, farms or clusters notoriously cause removal of people and environment alterations), (b) nature of the activity *vis a vis* socio-environmental impact (e.g., mining, oil and gas, agriculture, livestock, pulp and paper, and hydroelectric businesses affect the environment, housing, and traditional economic activities of the surrounding area, etc.) and (c) nature of the activity *vis a vis* the destination and availability of their products and services (e.g., the military, security services and pharmaceutical Industries; private health and education services; the goods produced or services provided by business enterprises coincide with, or reach, the legal goods protected by the concept of human rights).

States, internally or among themselves, should adopt stronger regulatory standards and control mechanisms in the face of such activities, precisely because of the greater risk they pose to human rights. However, what is often noticed is precisely the opposite: the easing of obligations to attract these investments, especially since they are business initiatives that allocate large resources and increase export discussions, which favors the developmental discourse at the expense of precaution and social and environmental protection. In addition, it is not uncommon for these investments to be linked to the interests of some politically influential groups, which is decisive in the State's disinterest in imposing prevention of socio-environmental risks as a condition for approving the implementation of the enterprise or its constant monitoring.

⁷Some human rights are defined only following principles, and it is up to each State to define the degree of intensity. For example, the minimum working age for teenagers. For the PFDC, if the company is obliged to follow the law of a certain country that prohibits the work of minors under 16 years of age, such a standard should be adopted in other places in which it operates.



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If we add these circumstances to the fact that globalization has promoted a significant oligopolization at the international level of the market in which large transnational corporations operate, it is possible to perceive the limited capacity that States have, in isolation, to face these pressures. This scenario therefore recommends that international standards be adopted to minimally level the standards of respect for and protection of human rights, as well as the ability of business enterprises to be held accountable for negative impacts and violations.

In other words, States – including Brazil – must adopt, at the domestic level, public policies to effectively strengthen the protection of human rights in the face of business activities and, at the same time, create an international system that reduces, distances or limits the power of business enterprises to push States towards the path of flexibility or relativization of human rights, under the false argument of prioritizing economic development.

Thus, seeing economic development as something separate from the promotion of human rights and the reduction of social inequality has turned out to be a fallacy, since it appropriates collective natural and social resources in favor of small groups⁸. As a matter of fact, development itself must also be understood as a human right, belonging to the collective. The concept of development brings to attention the human dimension, as highlighted by the UN Declaration on the Right to Development (1986), in its Article 2: The human person is the central subject of development and should be the active participant and beneficiary of the right to development. That means understanding that there is only real development when there is improvement in the lives of all the people and communities directly or indirectly affected by the process.

In fact, States have recently undertaken, by adopting the United Nations 2030 Agenda on Sustainable Development Goals, to combat inequalities within and among countries and ensure that all human beings can enjoy prosperous and fulfilling lives and that economic, social and technological progress occurs in harmony with nature (Goal 10). In fact, there is recognition of the liability of violation to

⁸The non-governmental organization Oxfam, in its report *Reward Work, Not Wealth*, released in January 2018, pointed out that the income share of the richest 1% continue to own more wealth than the whole of the rest of humanity. Available at https://www.oxfam.org.br/sites/default/files/publicacoes/2018_recompensem_o_trabalho_nao_a_riqueza_resume_word.pdf.



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human rights as a result of the investment model adopted by the most developed countries in the southern regions of the planet and a call for a change in this paradigm. The 2030 Agenda is in line with the Brazilian Constitution and both realize that economic growth without the promotion of human rights is not development.

III - Policy development – the United Nations Guiding Principles and National Action Plans

In the last decade, the theme of business and human rights has gained projection in the international community. After some previous initiatives, in 2011 the United Nations Human Rights Council approved the list of Guiding Principles on Business and Human Rights, prepared by Professor John Ruggie, at the request of the UN Secretary General. They can be understood as the first step on the path of affirming a peremptory norm.

However, the guiding principles do not have peremptory force by themselves and integrate the so-called soft law of international law. Thus, the principles do not create duties for States, although they focus as an interpretative and referential axis on the application of other imperative norms related to human rights and business.

In this sense, UN treaty bodies adopt them as a parameter in the application of human rights conventions. We should mention General Comment 16 of the Committee on the Rights of the Child, linked to the Convention on the Rights of the Child⁹ General Comment 24 of the Committee on Economic, Social and Cultural Rights,¹⁰ that specify the criteria for the application of these treaties from the perspective of respect for Human Rights by business enterprises.

In the case of the American continent, The Guiding Principles are in line with the Charter of the Organization of American States, which provides, in Article 36, that “[a] transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements

⁹Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fc%2fgc%2f16&Lang=en

¹⁰Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fc.12%2fgc%2f24&Lang=en



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to which said countries are parties, and should conform to the development policies of the recipient countries, and, in Article 45, point” e“, that "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (...). The operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community;”

The Inter-American Court of Human Rights, in this line, recognizes them as part of the set of norms for the protection of human rights, with which, in fact, it has built its case law in relation to the responsibilities of business enterprises when addressing human rights. The case *Pueblos Kaliña Y Lonoko vs. Suriname*¹¹; Advisory Opinion 22/2016 (Property of Rights of Legal Persons),¹² and Advisory Opinion 23/2017 (Environment and Human Rights).¹³

¹¹The sentence reads: "223. In this regard, the court takes note that the mining activities that generated the effects on the environment and therefore on the rights of indigenous peoples were carried out by private actors, first by the company Suralco and later by the joint venture called BHP Billiton-Suralco.

224. Al respecto, la Corte toma nota de los “Principios Rectores sobre las empresas y los derechos humanos”, mediante los cuales se ha establecido que las empresas deben actuar de conformidad con el respeto y la protección de los derechos humanos, así como prevenir, mitigar y hacerse responsables por las consecuencias negativas de sus actividades sobre los derechos humanos. En este sentido, tal como lo reiteran dichos principios, los Estados tienen la responsabilidad de proteger los derechos humanos de las personas contra las violaciones cometidas en su territorio y/o su jurisdicción por terceros, incluidas las empresas. Para tal efecto los Estados deben adoptar las medidas apropiadas para prevenir, investigar, castigar y reparar, mediante políticas adecuadas, los abusos que aquellas puedan cometer, actividades de reglamentación y sometimiento a la justicia.

225. En este sentido, el Representante Especial del Secretario General de Naciones Unidas para la cuestión de los derechos humanos y las empresas transnacionales y otras empresas, ha señalado que estas deberán respetar los derechos humanos de personas pertenecientes a grupos o poblaciones específicas, entre ellos los pueblos indígenas y tribales, y deberán prestarle especial atención cuando vulneren dichos derechos.

226. En virtud de lo señalado, la Corte estima que, siendo que el Estado no garantizó la realización de un estudio de impacto ambiental y social de manera independiente y previa al inicio de la extracción de bauxita ni supervisó el estudio que fue realizado con posterioridad, incumplió con dicha salvaguardia, máxime tratándose de un área natural protegida y de territorios tradicionales para diversos pueblos.”

¹²See paragraphs 30 and 31, which refer to the obligation of legal persons, including business enterprises, to observe human rights in States signatories to the convention, as well as the duty of States to adopt the measures to make this happen.

¹³The Opinion points out various duties of States in relation to the protection of the environment, several of which are related to regulatory and supervisory duties in relation to business enterprises.



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The guiding principles are structured around three pillars: protect, respect and remedy. The document emphasizes that the function of protecting belongs to the States, as well as the mission of guaranteeing judicial and non-judicial remedial mechanisms. Furthermore, business enterprises must act to respect human rights. The principles were created taking into account that all business enterprises, regardless of their size, sector, location, owners and structure, carry out activities that can generate impacts on human rights. There is no emphasis on transnational corporations. The main points of the guiding principles are:

- ✓ States have a primary duty to prevent, investigate, punish and redress human rights abuses committed in their territories by business enterprises and should ensure that all business enterprises located in their territories respect human rights.
- ✓ States should make business enterprises respect human rights, ensure that economic activity does not restrict, but promotes respect for human rights, advise business enterprises on how to respect human rights, and encourage or require businesses to report on how they deal with the impact of their activities on human rights.
- ✓ States have higher responsibility for State-owned or government-sponsored enterprises, including with public credit, insurance or investments.
- ✓ The State must observe whether the business enterprises it hires promote respect for human rights.
- ✓ States should have adequate standards to ensure compliance with human rights obligations in the agreements they enter into with other States or with business enterprises, including through investment treaties and contracts.
- ✓ Business enterprises should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
- ✓ The responsibility of business enterprises to respect human rights refers to internationally recognized human rights.
- ✓ Business enterprises should avoid causing negative impacts on human rights through their own activities,



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face the consequences when they occur, seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.

- ✓ Business enterprises should have appropriate policies and procedures in place due to their size and circumstances, in particular: commitment to assume their responsibility; audit (due diligence) to identify, prevent, mitigate and account for how they address their impacts on human rights; and processes to enable remediation.
- ✓ Business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action, and monitor the effectiveness of their own response.
- ✓ Business enterprises should be prepared to communicate the measures taken to address the impacts of their activities, especially when those affected demonstrate concerns.
- ✓ Business enterprises whose operations or operational contexts entail serious risks of impact shall officially inform the measures they take in this regard.
- ✓ Business enterprises should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities.
- ✓ Business enterprises must respect internationally recognized human rights, wherever they operate.
- ✓ States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse. They should also facilitate access to non-State complaints.
- ✓ Business enterprises, as well as industrial corporations and multi-party associations, should establish or participate in effective reporting mechanisms.
- ✓ State or non-State non-judicial mechanisms are effective when: legitimate, accessible, predictable, equitable, transparent and rights-compatible, as well as learning-compatible. These mechanisms should be based on engagement and dialogue.



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The edition and content of the guiding principles, although positive in an evolutionary perspective, have been the object of several criticisms by civil society and academia, especially because they have fallen far short of what is considered possible and indispensable to effectively protect human rights in the face of business activities.¹⁴ In fact, and even because they have been edited into a non-binding instrument, one notes that there is no mentioning of a prohibition of human rights violations, but rather the adoption of a euphemistic semantics of “avoiding” violations and developing “policies” for prevention and reparation. It is also noted the absence of direct obligations to companies to adopt effective preventive measures, built with the participation of the population affected by the enterprise. The document seems to admit a certain tolerance with the violation of human rights by companies. In addition, States continue to be assigned exclusive protection functions, and it is necessary, in certain cases, to move towards the recognition of corporate co-responsibility for deficient protection, especially in the case of transnational corporations.

While interpreting the Guiding Principles as a welcome step in building more effective standards, the PFDC also recognizes the insufficiency of this framework to deal with the issue of human rights violations by companies, especially since (a) it overlooks the need to address the phenomenon of the “race to the bottom”, that is, pointing to the direct responsibility of business enterprises for inducing governments to reduce social costs and protective requirements to the environment and other human rights as a condition for investment allocation, (b) it does not address the need for States to universal or quasi-universal jurisdiction¹⁵ to assess cases of human rights violations by transnational corporations, (c) it emphasizes the adoption of voluntary policies by companies, without reinforcing the concept that all human rights violations must be fully repaired, through restitution, compensation, reintegration and guarantees of non-recidivism, (d) it develops the theme with privilege to the vision and language of business enterprises, to the detriment of that of victims and those affected, and (e) it lacks clear

¹⁴See, for example, <http://homacdhe.com/wp-content/uploads/2018/08/Caderno-de-Pesquisa-Homa-Planos-Nacionais-de-Ação.pdf>.

¹⁵We call quasi-universal jurisdiction the provision that companies can be sued in the judiciary of any of the countries in which they operate directly or indirectly, or in which they have establishments or assets.



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obligation on the business enterprises' part to develop their enterprises, including extractive ones, only after prior, free and informed consultation with the affected populations.

Following the adoption of the Guiding Principles, the UN Human Rights Council established a Working Group to disseminate their implementation. The main tool for this would be the implementation of National Action Plans by the States. To date, 21 countries have published plans, among them: Chile, Colombia, Germany, Spain, the United Kingdom, The Netherlands, Denmark, Finland and the United States.¹⁶

In Brazil, the Ministry of Human Rights carries out basic studies for the preparation of the plan and established the Business and Human Rights Committee, with the purpose of seeking ways to implement the guiding principles; propose common parameters applicable to the performance of private companies, mixed economy companies or State-owned companies, with regard to respect for Human Rights; analyze the issues raised by civil society, research centers, control bodies, the Prosecution Service, the Public Defender's Office and the Federal Ombudsman for Human Rights, and propose referrals; request information, as well as monitor the actions of companies, in the context of the implementation of the guiding principles relevant to human rights; encourage private companies to communicate and report on their strategic actions for full respect for human rights and indicate the impacts of their actions; carry out diagnostics and prepare studies on the subject; make proposals for normative acts or specific actions on the subject; articulate intersectoral, interinstitutional and interfederative actions to strengthen respect for human rights by companies; and present reports on their activities and progress.¹⁷

The PFDC appreciates the proposal and the effort of the UN Human Rights Council to implement national action plans, as well as the Ministry of Human Rights to create a Business and Human Rights Committee.

However, it understands that, in the case of Brazil, prior to mobilizing efforts to prepare a National Action Plan, it should be considered whether the measure is appropriate in view of the historical situation. It is necessary to bear in mind the risk that the

¹⁶ Complete list available at <https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx>

¹⁷ See Ordinance No. 289, of August 10, 2018, of the Minister of Human Rights and Ordinance No. 24, of 2017, of the National Citizenship Secretariat.



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deficits in the Democratic representativeness of Brazilian institutions lead to the lack of legitimacy of the plan, especially if there is an imbalance of forces between the multiple actors that must take part in a process of this nature. In addition, the definition of human rights policies must adopt, as a starting point, the demands of victims and potential victims and, therefore, they must have guarantees that the process will provide them with a position compatible with this premise. In other words, construction must be collective, in a process of broad dialogue with civil society. This can be exemplified by what was adopted for the elaboration of the Third National Human Rights Plan.

It should also be taken into consideration that the plan has been recommended as a measure to implement the Guiding Principles and, therefore, the above-mentioned criticisms of the content and language adopted in these principles should be considered and overcome.

The eventual plan should adopt, as a starting point, the “state of the art” of protection of human rights in the face of business activities in Brazil, as foreseen in normative frameworks or recognized in the case law, notably because in several cases Brazil is at a higher level of protection than that recommended in the Guiding Principles. After all, it will not be legally valid, in light of the principle of the prohibition of retrogression, that a National Action Plan strives for a situation of protection, respect and reparation that falls short of that existing in the Brazilian legal system.

In addition, it should be noted that National Action Plans are, as a rule, published as a set of non-binding standards, which has limited impact in reality. In fact, a public policy on human rights vis-à-vis companies depends, in several aspects, on the law in the strict sense or on international treaties and conventions, especially since its core necessarily runs through the definition of obligations for private agents and rules on the exercise of jurisdiction, issues attached to the principle of legality.

The PFDC notes that, in several fields, Brazil, through laws or case law, has defined important and binding norms for business activity in the face of human rights. In the environmental plan, to highlight Article 225 of the Federal Constitution, which incorporated into constitutional law the requirement of environmental impact studies prior to the installation of work or activity potentially



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able to cause degradation to the environment and the provision of comprehensive repair of damage by those who practice conducts harmful to the natural environment or exploit mineral resources. With similar significance, the ratification by Brazil of Convention No. 169, of the International Labor Organization (ILO), which provides, among other fundamental rights, on prior, free and informed consultation with traditional peoples and communities, whose application has been recognized in several judicial precedents¹⁸. Also worth mentioning are the norms of criminal liability of the legal entity in cases of environmental crimes, those that protect citizens in consumer relations, those related to accountability for acts of misconduct and corruption in public office, labor standards and the specialization of Labor Justice, which functions as a guarantee of fast and sensitive jurisdiction to the peculiarities of the labor relationship. In addition, Article 170 of the Federal Constitution, which binds the economic order to the principles of the social function of property, the defense of the environment, the reduction of social and regional inequalities and the pursuit of full employment, and Article 243, which determines the expropriation of land in which the exploitation of slave labor occurs.

Add to this the edition of Law 12846, of 2013, providing sanctions to companies for acts committed against national or foreign public patrimony, against principles of the public administration or against the international commitments made by Brazil, which should also be read from the protection of human rights.

The “state of the art”, therefore, is not incipient and, in several themes, exceeds the levels that could be offered by a non-binding National Action Plan. Of course, the scenario of human rights violations by business enterprises is still obscene in the country, but certainly it will not be the call for voluntary procedures that will have the ability to substantially change this picture.

In addition, one may not overlook the fact that given the current national and International moment of weakening of human rights institutions, the reopening of discussion on already consolidated levels brings concrete risks of regression.

Thus, the PFDC considers that, although the approval of a National Action Plan may – if the above essential conditions are met – represent a relevant initiative,

¹⁸See, for example, judgment of the Federal Regional Court of the 3rd Region, 00278431320164010000, Rel. Assistant Justice Souza Prudente.



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the "state of the art" of the matter in Brazil, the national and international political contingencies and the limited potential of the Ruggie principles require caution when carrying out the process.

In the case of Brazil, it may be more advisable – if and when there are favorable democratic conditions – to invest in the elaboration of a comprehensive public policy on human rights and business, including to extend the positive case law for all cases of human rights violations (e.g., criminal liability of legal entities, not restricted to current hypotheses; mandatory prior consultation with all populations potentially affected by enterprises; expansion of reparation duties; universal or quasi-universal jurisdiction; responsibility for activities throughout the production chain; provision of clear gender equity parameters, common to State and private companies, including in the mining sector, where serious examples of inequality are observed; strengthening the gender focus in environmental impact studies of business enterprises). This public policy would be built in discussion with the multiple stakeholders – and especially with people affected by business activities – and would include legislative advances that establish a binding set of regulations compatible with the promotion of sustainable development, in accordance with the 2030 Agenda of the United Nations, as well as with the milestones indicated by the different UN treaty bodies and the Inter-American Court of Human Rights.

IV - International Treaty

As mentioned above, the UN Human Rights Council has established a working group to promote the drafting of an eventual international treaty on business and human rights.¹⁹ In July p.p., the State of Ecuador – coordinator of the aforementioned working group – released the first draft of the International Convention. According to the document released,²⁰ the purpose of the convention is (a) to strengthen respect for, promotion, protection and fulfillment of human rights in the context of business activities of any transnational nature, that is, those related to any activities of

¹⁹Resolution A / HRC/RES/26 / 9.

²⁰"Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".



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profit nature that take place or involve actions, persons or impacts in two or more national jurisdictions, (b) to ensure effective access to justice and remedy for victims of human rights violations in the context of business activities, (c) to prevent the occurrence of such violations, and (d) to advance international cooperation with a view to fulfilling States' obligations under international human rights law.

Among several aspects of the proposal, the following items stand out:²¹

- ✓ Jurisdiction for acts or omissions that result in violations of human rights protected by the Convention shall be the State in which the acts or omissions take place, or the State in which the legal or natural person alleged to have committed the acts or omissions is domiciled.
- ✓ The following is considered a domicile: location of the registered office, the central administration, the place it has a substantial business interest, or the place it has a subsidiary, agency, instrumental bodies, branches, representative offices or the like.
- ✓ The statute of limitations shall not apply where violations constitute crimes under international law. For other violations, the statute of limitations may not be unduly restrictive and must allow an adequate period of time for investigation and prosecution, especially when the facts took place abroad.
- ✓ Substantive questions of applicable law may be decided on the basis of the law of the State exercising jurisdiction or by the law of another State party in which the person engaged in transnational business activities is domiciled.
- ✓ In order to assess the possible impact on human rights, States Parties shall ensure that their domestic law provides for all persons with transnational business activities in their territory, under their jurisdiction or control to be required to carry out audits (due diligence). Failure to comply with the duty to conduct audits shall entail appropriate liability and compensation. States shall ensure that they monitor compliance with these obligations.

²¹These items are described in Portuguese from a free interpretation of the original in English and do not represent a translation of the original draft.



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- ✓ States Parties shall ensure in domestic law that legal and natural persons may be held criminally, civilly or administratively liable. The liability of legal persons shall be independent of that of natural persons. Criminal liability should apply to principals, cronies and accomplices.
- ✓ Any future investment or trade agreement that States Parties negotiate, whether among themselves or with third parties, should not contain any provision that conflicts with the implementation of the Convention and should ensure respect for Human Rights.

As evidenced in the preceding paragraphs of this note, the PFDC believes that, despite the eventual adoption of a National Action Plan, the adequate treatment of the topic of human rights and business depends on the definition of cogent international standards, which can avoid or minimize the deleterious effects of the “race to the bottom”, the adoption of multiple standards of respect for human rights by companies and the weaknesses of the systems of reparation and promotion of Justice. Without a minimum pattern on how States treat the subject, the affirmation of human rights in the face of business activities, at a universal level, will continue to be a vague promise, hostage to the arguments of prioritizing national development at any cost.

In this sense, the PFDC welcomes the offer of the first draft of an international treaty by Ecuador and suggests that the Ministry of Foreign Affairs of Brazil and the Ministry of Human Rights lead a process of discussion and public consultation with civil society and the various interested Brazilian actors, in order to democratically define the suggestions for improving the text that will be defended by the Brazilian State.

In parallel, the PFDC itself will continue in dialogue with civil society and the representations of those affected by human rights violations in the country, forwarding and articulating the follow-up of complaints, promoting dialogues with the State and other interested actors in favor of a national policy on the subject, consistent with the premises indicated in this note. In particular, in the agenda of the PFDC mandate, the monitoring of the evolution of the discussions on the institution in Brazil of a National Action Plan, the work on the elaboration of the



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International Convention on Human Rights and activities of transnational corporations – strengthening the perspective of gender equity and the protection of the rights of populations in vulnerable situations – as well as supporting the mandate of the United Nations Working Group on Business and Human Rights.

Brasilia, August 27, 2018.

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