

## **Brazil's obligations under the UN Guiding Principles on Business and Human Rights in relation to allegations of trafficking in persons and contemporary forms of slavery at *Fazenda Brazil Verde***

1. This amicus curiae brief is respectfully submitted to the Honourable Inter-American Court of Human Rights (the 'Court') in the Case No. 12.066, "*Fazenda Brasil Verde*" Workers against Brazil by the Essex Business and Human Rights Project ('EBHR'), University of Essex. The aim of this amicus curiae brief is to provide analysis of Brazil's obligations in relation to human rights harm caused by business actors.
2. Who we are: EBHR (<http://www.essex.ac.uk/ebhr/>) is located in the School of Law, University of Essex (UK). It aims to foster research regarding the linkage between business and human rights and to bring the results of that research to bear on practical problems. Its members have been commissioned by governments, IGOs and world leading NGOs to analyze human rights issues raised by international businesses in 10 countries. Members of EBHR have submitted *amicus curiae* briefs to various courts around the globe in cases involving human rights abuses by business enterprises. The principal contributions to this application will be made by EBHR members Dr. Anil Yilmaz and Prof. Sheldon Leader. Prof. Leader is a graduate of Yale and Oxford Universities, a member of the Bar of England and Wales, Professor of Law at the University of Essex, and Director of the EBHR. He has advised NGOs, governments, and businesses on specific issues involving business and human rights. Dr. Yilmaz has obtained her law degrees from the Universities of Marmara (Turkey) and Essex (UK), including a PhD in international investment law. She is a member of the Istanbul Bar Association, Lecturer in Law at the University of Essex and a member of the EBHR. She has advised NGOs and governments on questions of business involvement in human rights abuses alongside as a member of the EBHR.

### **Brazil's obligations for human rights harm caused by business actors**

3. This submission is focused on the specific links between business practices, the human rights standards guaranteed under the American Convention, and the contribution to the interpretation of the Convention available from the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>1</sup>.

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<sup>1</sup> Special Representative of the Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie)

4. In the present case, the activities that have arguably resulted in violation of the rights and freedoms guaranteed by the Convention were carried out by private businesses that owned and ran the farms in question. But, ultimately, international responsibility for those activities is attributable to the State. In this regard, the Court has held on numerous occasions that the obligations of state parties under the Convention would extend to “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) ..., not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”<sup>2</sup>

### **Relevance of the UNGPs in the present case**

5. The UNGPs were endorsed by the UN Human Rights Council unanimously in 2011,<sup>3</sup> and Brazil has committed itself to implementing the principles at the national level.<sup>4</sup> States’ implementation of the UNGPs relies on several sources. These include: (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms; and (b) the need for rights and obligations to be matched to appropriate and effective remedies when breached.<sup>5</sup>
6. While the UNGPs do not by themselves create new law, they do provide important guidelines for the interpretation of existing law: guidelines which are designed for the specific context of business operations. In the *Case of the Kaliña and Lokono Peoples v. Suriname* the Court took note of the UNGPs, which assist in giving detail to the States’ duty to protect against adverse human rights impact caused by businesses.<sup>6</sup>
7. Brazil’s obligations in relation to trafficking in persons and the use of slave labour by businesses can be initially captured by the first pillar of the UNGPs on State Duty to Protect. Guiding Principle 1 states that States are not per se responsible for human rights abuse by private actors. However, States may breach their obligations under international human rights law in two ways: [A] where such abuse can be attributed to them, or [B] where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse.

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<sup>2</sup> *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 172; ver também , Corte IDH. *Caso Pueblos Kaliña y Lokono Vs. Surinam*. Mérito, Reparações e Custas. Sentença de 25 de novembro de 2015. Série C No. 309, paras. 223-224.

<sup>3</sup> Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶1 (July 6, 2011)

<sup>4</sup> National Action Plans, Business and Human Rights Resource Centre, available at <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>

<sup>5</sup> UNGPs General Principles

<sup>6</sup> Para. 224

### **Application to the facts relevant to our case:**

8. Under [A] are situations of negative obligation, calling on states to refrain from actively enabling or facilitating the abuses in the present case. The UNGPs can assist the Court in further assessments of the facts as reported by the Commission, by pointing to the special features of state/business relationships ,
9. Such further examination might reveal, as examples, state support for the “Fazenda Brasil Verde” business activities through provision of subsidies or tax exemptions to the owners of these farms, by export credit assistance, investment insurance or investment guarantees governed by UNGP 4, or by way of direct or indirect procurement from these farms governed by UNGP 6. Assuming requisite levels of knowledge and substantial causal impact, these types of support would not only activate the strictures of the UNGPs but could in turn lead to responsibility of the State as an active participant in the commission of a gross human rights violation against the farm labourers.
10. In addition, when State assistance or support of the types indicated reaches a substantial level, if further investigation reveals this, UNGP 4 places an expectation on states to take additional steps. This would call for heightened due diligence by the state agencies providing this level of support.
11. Under [B] are situations of positive obligation that fall within the scope of UNGP 3, which places a duty on the states to “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps”. This obligation has five distinct features. It covers:
  - a. *Obligation to prevent illegal practices associated with trafficking in persons and slave labour. These arose via:*
    - i) Obligation to enforce existing law e.g. prohibitions on trafficking of persons; prohibitions on illegal enticements to employment with promises to pay that are not honoured [responsabilidade pelo aliciamento ilegal com promessa de pagamento; prohibitions on requirements that prospective employees to sign both, fixed and open-date blank contracts on the same day; liability for use of slave labour, registration and documentation of workers in violation of labour laws, level of wages below the legislated minimum and failure to respect the requirement that wages be paid; prohibition on

employment of minors; failure to satisfy required provision of decent accommodation, food and water to workers residing in the farms.<sup>7</sup>

- ii) In addition the UNGPs encourage interpretations of international and domestic laws so as to prevent actions by employers that are not illegal *per se*, but that contribute or give rise to violations of law under (i) above. Examples drawn from the facts presented by the Commission in this case include<sup>8</sup>: requiring illiterate workers to sign documents without ensuring comprehension [; location of labour practices in isolated farms, where workers are particularly vulnerable; charging in-farm services at prices higher than outside the farm; failing to prevent worker rotation and employment for short periods. The overall duty on the state to protect against abuses by business implies a duty on the state to put in place measures that will create an environment conducive to preventing or reducing adverse impacts that are directly linked to their operations. [cf. UNGP 13 (b)]

#### 12. a. Failure to adequately investigate:

The Court's jurisprudence<sup>9</sup> and the UNGPs 26 and 27 make it clear that adequate investigations have to demonstrate impartiality and efficacy.

*Impartiality*: The Commission Report provides *prima facie* evidence of failures of impartiality. For example it refers to a process of investigation and dispute settlement in which the alleged victims were not included.<sup>10</sup>

*Efficacy*: The Report also shows a lack of efficacy in the investigations carried at such a level that raise serious concerns according to the standards set by the above mentioned jurisprudence. The facts as reported by the Commission indicate that there has not been a complete lack of investigation and measures aimed at prevention: thus, measures described in paragraph 120 of the Commission's report were taken, including the creation of a task force (Grupo Especial de Fiscalização Móvel) and a 'Lista Suja' to combat slave labour and these efforts helped free thousands of individuals working under slavery conditions. However, the facts provided about other abandoned or failed efforts by the authorities to investigate, among others, the facts of the instant case over a period exceeding 10 years, as in the Commission Report (see paragraphs 76-115) could point to a *prima facie* indication of a

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<sup>7</sup> Commission Report on the Merits ('Commission Report'), Paras. 85, 87, 99, 100, 106, 107, 109

<sup>8</sup> Commission Report on the Merits ('Commission Report'), Paras. 85, 87, 99, 100, 106, 107, 109

<sup>9</sup> I/A Court H.R., *Case of Espinoza Gonzáles v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014. Series C No. 289, para.238.

<sup>10</sup> Commission Report, paras. 111 and 112

failure to adequately investigate all of the relevant abuses and, where applicable, prosecute and punish those responsible.

- b. Failure to adequately punish: No serious attempts have been made to punish the third parties responsible for the violations, allowing the farm owners to act with impunity, and carry on with their practices of trafficking and subjecting individuals to contemporary forms of slavery. UNGP 25 places an obligation on states to take appropriate steps to provide effective remedies to victims of human rights abuses by businesses through “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as prevention of harm through, for example, injunctions or guarantees of non-repetition.” On the facts as reported by the Commission, none of the measures taken have included an effective punishment of the offenders.
- c. Failure to provide adequate redress: Further to those measures established in UNGP 25, UNGP 26 places special emphasis on the need to take positive steps to ensure access to remedy for certain vulnerable groups who might be “excluded from the same level of legal protection of their human rights that applies to the wider population”. The UNGP 26 expects states to give particular attention to the rights and specific needs of “individuals from groups or populations at heightened risk of vulnerability or marginalization [who] often face additional cultural, social, physical and financial impediments to accessing, using and benefitting from these mechanisms.” Although the general measures that are listed in paragraph 120 of the Commission’s report appear to have given particular attention to the victims that were in a vulnerable position, these have failed to provide *adequate* redress and assistance– to victims of trafficking and contemporary forms of slavery. For instance, even though a civil claim was brought against the farm owners after one of the verifications, the conciliation process that resulted from it did not, in any way, involve the affected workers, nor did it offer adequate remedies to them.
- d. In this sense, as requested by the Commission,<sup>11</sup> and relying on principles developed by instruments, such as the UNGPs and the UK’s Modern Slavery Act, linking business activity and human rights, the Court could order Brazil to “... monitor the application and punishment of persons responsible for slave labor at all levels,” and that “... create coordination mechanisms between the criminal jurisdiction and the jurisdiction of labour to overcome existing gaps in research, processing and punishment of persons responsible

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<sup>11</sup> CIDH. *Caso 12.066, Trabajadores da Fazenda Brasil Verde (Brasil)*. Nota de remissão de 4 de março de 2015. Disponível em: <<http://www.oas.org/es/cidh/decisiones/corte/2015/12066NdeRes.pdf>>. P. 4 (paras. 6 e 7)

for crimes of servitude and forced labor”. One important part in such a monitoring and coordination strategy would be the building of sound networks of communication by the farms concerned indicating the steps they take to identify abuses and the concrete measures they are taking to eradicate such practices. At the international level this is called for by Principle 3 (d) of the UNGPs and more detailed guidance is provided by the UNGPs Reporting Framework.<sup>12</sup> It would also be possible and appropriate for the Court to refer to examples of best practice from national laws. One such example is to be found in the UK’s Modern Slavery Act, 2015, s. 54, which requires businesses to exercise due diligence to ensure that slavery and human trafficking is not taking place in its supply chains or other parts of its business, and report on its policies and findings on such practices.<sup>13</sup>

## Conclusion

13. The abusive labour practices amounting to trafficking in persons and modern forms of slavery that were carried on in the Fazenda Brazil Verde for over a decade attest to the State’s failure to satisfy its human rights obligations, both negative and positive. When businesses adversely impact human rights, according to the UNGPs, states will be held liable if they contribute to the violation or if they fail to take the necessary steps to end the violations, hold the offenders liable and provide adequate remedies to the victims. The Court should call on Brazil to put in place effective legislation and administrative structures to ensure businesses do not harm human rights, including transparency rules similar to the Modern Slavery Act described above and rigorous enforcement of existing labour laws. The Court should also call on Brazil to introduce effective penalties/punishment

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<sup>12</sup> The UNGP Reporting Framework is available at <http://www.ungpreporting.org/reporting-framework/>

<sup>13</sup> Section 54 (4): A slavery and human trafficking statement for a financial year is—

a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—

(i) in any of its supply chains, and

(ii) in any part of its own business, or

(b) a statement that the organisation has taken no such steps.

Section 54(5)

An organisation’s slavery and human trafficking statement may include information about—

(a) the organisation’s structure, its business and its supply chains;

(b) its policies in relation to slavery and human trafficking;

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate

against offender businesses which are capable of acting as deterrent. Finally, the Court should call on Brazil to involve the victims in any proceedings involving potential liability and ensure they receive adequate remedies for the harm suffered.

Date: 07/03/2016

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