

# Diplomatic Spaces, Indigenous Voices, and Equity in a Shifting Paradigm of Global Governance:

A Critical Analysis on Regional Diplomacy to Promote and Protect the  
Rights of Indigenous Peoples at the Nexus of Business and Human Rights



International Human Rights Internships Program - Working Paper Series



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## Abstract

Inspired by my attendance of and reporting on the ninth Session of the EMRIP in July 2016 to the Canadian Permanent Mission to the UN in Geneva, this policy paper addresses changes in rethinking the global paradigm with the following questions: (1) Why should human rights diplomacy on indigenous rights at the intersection of business and human rights focus on regional diplomacy? (2) How could communication between UN Forum's three Regional Fora in Latin America and the Caribbean (2013), Africa (2014), and Asia (2016), and communication between the international and regional levels be restructured to include indigenous voices and, hence, be more equitable? It first argues that a focus on regional diplomacy would center dialogue on the mobilization, rights, plurality of legal orders, and experiences of indigenous peoples instead of those of businesses, which better supports the purpose for creating these spaces. Second, it focuses on the *Guiding Principles* and presents a structural view of relevant international and diplomatic channels to demonstrate how the three Regional Fora would shift dialogue on the rights of indigenous peoples in these spaces from legitimacy to responsibility and accountability; from implementation to impact; and from principles to equitable access. This paper concludes with recommendations on how to make diplomatic spaces at the nexus between business and human rights more equitable for indigenous peoples.

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## (1) Introduction

Ninety-seven percent of land in Papua New Guinea is customary land, communally owned by large tribal groupings with constitutional protection from unjust deprivation of traditional land.<sup>1</sup> As I learned of this salient fact at the side event “Civil Society Response to the Universal Periodic Review of Papua New Guinea” in Geneva in May 2016, I was appalled that over 5 million hectares of this land has been stolen by an abusive Special Purpose Agriculture Business Lease land scheme since 2003, with no recourse for the landowners.<sup>2</sup> The leases provide a temporary acquisition of customary land for a fixed period of time for foreign owned companies to establish an agriculture business. Guised as an initiative to enhance landowner participation in economic activities, the leases do not provide rent or compensation to the landowners, suspend all customary rights to the land, apart from those specifically reserved, result in gross environmental damage, and are fraudulently obtained through misrepresentation and lack of free, prior, and informed consent. Why was I learning about this unjust circumstance at a side event hosted by NGOs? Why were representatives of the tribal groupings themselves unable to engage in international fora about the abuse of their rights in the interaction of business and human rights?

The tribal groupings in Papua New Guinea are not alone in experiencing abuses of their rights as indigenous peoples. Minority Rights Group International reports that in Venezuela, indigenous peoples face perpetual pressure from State-owned companies to appropriate their land for extractive projects that cause environmental destruction.<sup>3</sup> Indigenous activists who protest such projects are killed.<sup>4</sup> In Bangladesh, despite the 1997 *Chittagong Hill Tracts (CHT) Peace Accord* identifying the area as tribal and recognizing the region’s Jumma indigenous communities, 5,216 acres of land in the CHT were appropriated in 2015 by public authorities

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<sup>1</sup>Act Now! For a Better Papua New Guinea, “SABL: A Form of Customary Land Theft”, 2016, online: <<http://actnowpng.org/sites/default/files/publications/SABL%20Factsheet.pdf>>; *Constitution of the Independent State of Papua New Guinea*, 1975 at s 53.

<sup>2</sup> Act Now! For a Better Papua New Guinea, *ibid.*

<sup>3</sup> Minority Rights Group International, *State of the World’s Minorities and Indigenous Peoples 2016: Events of 2015*, (London, UK: Minority Rights Group International, 2016) at 114.

<sup>4</sup> *Ibid.*

and private companies for, *inter alia*, tourist developments.<sup>5</sup> Indigenous peoples and communities worldwide have experienced gross human rights violations at the forefront of transnational business operations, thereby bestowing power and influence in global governance upon non-State actors. Most recently, a group of Indigenous women from Papua New Guinea who were victims of sexual violence committed by mine security personnel in the midst of a joint operation of the Porgera Mine by the Papua New Guinea Government, Barrick Gold (a Canadian mining company), and Zijin Mining Group (a Chinese producer), wrote an open letter to the fifth annual UN Forum on Business and Human Rights in November 2016, pleading for fair compensation.<sup>6</sup> Counter to the mobilization of indigenous peoples who seek to join this dialogue, the establishment in 2011 of the *United Nations Guiding Principles on Business and Human Rights (Guiding Principles)*<sup>7</sup> and UN Forum on Business and Human Rights (UN Forum),<sup>8</sup> have left them without equitable voices.

The need for global spaces to create dialogue among these different actors on protecting and promoting human rights in the business context requires a rethinking of the global paradigm that structures human rights diplomacy at this nexus. The promotion and protection of indigenous rights at the intersection of business and human rights was discussed at the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) for the first time during its ninth Session in July 2016.<sup>9</sup> Chief Littlechild, an EMRIP representative of the Western European and Others Group, explained that there is a need for the EMRIP to be involved in the further development of the legal framework that provides guidelines for business and human rights.

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<sup>5</sup> *Ibid* at 127.

<sup>6</sup> Elizabeth McSheffrey, “Indigenous sexual assault survivors plead for UN action against Canadian mining giant”, *National Observer* (17 November 2016) online: <http://www.nationalobserver.com/2016/11/17/news/indigenous-sexual-assault-survivors-plead-un-action-against-canadian-mining-giant>.

<sup>7</sup> UN, Office of the High Commissioner for Human Rights, *Universal Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, OHCHR, 2011, HR/PUB/11/04.

<sup>8</sup> UN, Office of the High Commissioner for Human Rights, “United Nations Forum on Business and Human Rights”, online: United Nations Human Rights Office of the High Commissioner <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>.

<sup>9</sup> See Expert Mechanism on the Rights of Indigenous Peoples, “Expert Mechanism on the Rights of Indigenous Peoples”, online: <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>. [EMRIP].

The *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) highlights the importance of “free, prior and informed consent” (FPIC) of indigenous peoples in several activities that concern their livelihood and rights.<sup>10</sup> Chief Littlechild pointed to this principle, emphasizing that it is a call for all relevant actors to work together to address ongoing human rights violations against indigenous peoples that have spiritual elements. Thus, ‘working together’ requires a restructuring of the global paradigm.

Inspired by my attendance of and reporting on the ninth Session of the EMRIP in July 2016 to the Canadian Permanent Mission to the UN in Geneva, this policy paper will address changes in rethinking the global paradigm with the following questions: (1) Why should human rights diplomacy on indigenous rights at the intersection of business and human rights focus on regional diplomacy? (2) How could communication between UN Forum’s three Regional Fora in Latin America and the Caribbean (2013), Africa (2014), and Asia (2016),<sup>11</sup> and communication between the international and regional levels be restructured to include indigenous voices and, hence, be more equitable? In addressing the first question, I will develop a working understanding of indigenous peoples, analyze theoretical discourse on how the mobilization of businesses and indigenous peoples require a rethinking of the global paradigm for governance, discuss indigenous rights as human rights in the business context, explore legal pluralism as necessitating regional diplomacy, and articulate the importance of regional diplomacy to employ human rights instruments effectively for the promotion and protection of indigenous rights. I will argue that a focus on regional diplomacy would center dialogue on the mobilization, rights, plurality of legal orders, and experiences of indigenous peoples instead of those of businesses, which better supports the purpose for creating these spaces. In response to the second question, I will focus on the *Guiding Principles* and present a structural view of relevant international and diplomatic channels to demonstrate how the three Regional Fora would shift dialogue on the rights of indigenous peoples in these spaces from legitimacy to responsibility and accountability; from implementation to impact; and from principles to

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<sup>10</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGA, 61st Sess, Supp No 49, UN Doc A/Res/61/295 (2007), art 29 [UNDRIP].

<sup>11</sup> *Supra* note 8.

equitable access. I will conclude with recommendations on how to make diplomatic spaces at the nexus between business and human rights more equitable for indigenous peoples.

## **(2) Developing a working understanding of indigenous peoples**

A critical analysis of indigenous rights in the context of business and human rights necessitates an understanding of the owners of those rights. As Saul explains, legal definitions “determine who is entitled to rights” and, conversely, identify obligations on governments to promote and protect them.<sup>12</sup> Whereas many different countries and regions will refer to its indigenous peoples with different terminology, such as ‘Aboriginal Peoples’ in Canada, ‘Native Americans’ in the United States, ‘Tribal Peoples’ in the Philippines, and ‘Hunter-Gatherers’ in the Amazon, the term ‘indigenous’ has been used in international law and global fora to attribute rights to those who have been identified as distinct from the dominant societies in which they live. Recognizing this group as a distinct ‘peoples’ emerged in the post-World War II context, in the midst of decolonization, which influenced the international community’s commitment to the legal concept of ‘self determination’, albeit for “whole population[s] of states”.<sup>13</sup> The popularization of indigenous ‘peoples’ unfolded in the 1960s, notably through the International Labour Organization’s (ILO) Conventions (see below).

According to the UN Permanent Forum on Indigenous Issues (UNPFII), an official definition of indigenous peoples has not been adopted by any UN body, as establishing a definition would be counterintuitive to self-identification as being an integral component of protecting the human rights of said peoples.<sup>14</sup> At the national level, there are different definitions of indigenous peoples, and many States do not recognize their own indigenous populations. “Political sensitivities” exist about such recognition, notably in Asian and African

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<sup>12</sup> Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence*, (London: Hart Publishing, 2016) at 23.

<sup>13</sup> *Ibid* at 23-24.

<sup>14</sup> United Nations Permanent Forum on Indigenous Issues, “Who are indigenous peoples?”, online [http://www.un.org/esa/socdev/unpfi/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfi/documents/5session_factsheet1.pdf); International Work Group for Indigenous Affairs, “Interpreting the UN Guiding Principles for Indigenous Peoples: IWGIA Report 16” (2014) at 12 [IWGIA].

States, because respective governments explain that “indigenous peoples do not exist in their countries because all of their inhabitants can be said to be native or autochthonous there.”<sup>15</sup> Globalization movements, however, have pointed to the resulting marginalization and inequality that ensues among the indigenous populations in these States, leading to a form of solidarity among indigenous ‘peoples’ to employ the term ‘indigenous’ to plead the protection of their rights.<sup>16</sup> Self-identification, thus, is pivotal to understanding indigenous rights, because otherwise, State governments could choose to not recognize these peoples as distinct, and “deny their legal existence and rights”.<sup>17</sup> The focus, thus, is on identifying indigenous peoples rather than defining them.

A universal legal definition of ‘indigenous peoples’, however, is integral to recognize who is entitled to indigenous rights, who has obligations to protect those rights, and what those obligations entail. As Saul further explains, law provides who has access to international fora to “voice their concerns”.<sup>18</sup> Hence, indigenous groups employ the term ‘indigenous peoples’ to “engage strategically with laws”, while protecting their own identity and terminology in their local contexts.<sup>19</sup> The *Study on the Problem of Discrimination against Indigenous Populations* by Special Rapporteur José Martínez Cobo of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has described indigenous characteristics that provide a general understanding of common experiences of indigenous peoples around the world and have been influential for the drafting of subsequent international instruments.<sup>20</sup> For example, the

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<sup>15</sup> *Supra* note 12 at 25.

<sup>16</sup> For a comprehensive review of this phenomenon, see Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, (Berkeley: University of California Press, 2003).

<sup>17</sup> *Supra* note 12 at 26.

<sup>18</sup> *Ibid* at 23.

<sup>19</sup> *Ibid* at 24.

<sup>20</sup>UN Commission on Human Rights, *Study of the Problem of Discrimination against Indigenous Populations, Final Report of the Special Rapporteur, Mr José Martínez Cobo*, CHR, 1983, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (which describes indigenous characteristics as “...having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider[ing] themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them...form[ing] at present non-dominant sectors of society and...determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems” at paras 379-382).

UNDRIP does not provide a definition of who indigenous peoples are, though it does elaborate on fundamental rights for indigenous peoples that are applicable in the nexus between business and human rights.<sup>21</sup> Article 33 of the UNDRIP refers to the rights of indigenous peoples to “determine their own identity or membership in accordance with their customs and traditions.”<sup>22</sup> Instead of developing a working definition of ‘indigenous peoples’, hence, this paper provides a working understanding of them to recognize both the historic and present marginalization of peoples, communities, and nations who have historic, traditional, and cultural geographic ties. The United Nations Division for Social Policy and Development explains that indigenous peoples are “distinct peoples” who “have sought recognition of their identities, way of life and their right to traditional lands, territories and national resources for years, yet throughout history, their rights have always been violated.”<sup>23</sup> A contemporary focus of the effects such marginalization and vulnerability that is unique for different indigenous peoples, communities, and nations is appropriate when conceiving of a shifting global paradigm of governance, which I will explore next.

### **(3) Rethinking the Global Paradigm**

#### **(a) Analyzing theoretical discourse on how the mobilization of businesses and indigenous peoples require a rethinking of the global paradigm**

The plurality of actors influencing the socio-economic rights (later understood as human rights) of individuals, and distinct peoples has multiplied over the last fifty years. The realms of business and human rights advocated by international bodies such as the United Nations began to intersect after the end of the Cold War, characterized by a mobilization and expansion of businesses worldwide in the form of multi-national and trans-national corporations. Activities emanating from globalization, such as outsourcing, pooling resources, trades, and investment,

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<sup>21</sup> See note 10.

<sup>22</sup> *Ibid* at art 33; See also International Labour Organization, *Indigenous and Tribal Peoples Convention, C 169*, 27 June 1989, C169 (entered into force 5 September 1991) at art 1(2) [*ILO Convention No. 169*].

<sup>23</sup> UN, Division for Social Policy and Development, “Indigenous Peoples at the UN”, online: Division for Social Policy and Development: Indigenous Peoples <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.

have been made more feasible on a global scale with an increase in the deregulation of business activities, development of market economies across geopolitical borders, and lowering national barriers for foreign investments.<sup>24</sup> Business transactions contribute significantly to the economic development of States, at an unprecedented level today, thereby introducing businesses as new actors implicated in the health of local economies. This responsibility is traditionally understood as belonging to the State.<sup>25</sup> Whereas businesses are driven by market forces to make decisions, States act in accordance to their obligations to their citizens. Business and human rights, thus, intersect at the point in which businesses affect the well-being of peoples, taking the responsibility attributed to States to ensure their well-being with minimal accountability measures. Unfortunately, in the extractive sectors, such as mining, the Natural Resource Governance Institute reports that 80% of States “fail to achieve good governance”.<sup>26</sup> The global paradigm of States as leading actors in economic development and promotion and protection of human rights within their borders, therefore, is shaken by the diversification and growing importance of non-State actors in governance. In addition to this tension between public and private actors, trans-national actors such as the United Nations are increasingly experiencing a convergence of goals between States and businesses. Fortin and Jolly explain that the goals of businesses are of growing importance, because UN goals have achieved a “widespread consensus among governments”, and businesses now have more influence in materializing governments’ goals.<sup>27</sup> Thus, the reciprocal influence between governments and businesses are made more visible in the international community.

The interaction between States and businesses becomes problematic when businesses fulfill States’ economic obligations without protecting human rights. A cost-benefit analysis often leads businesses to not protect locals against human rights violations, as this protection entails

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<sup>24</sup> Harvard Law School Human Rights Program, *Business and Human Rights: An Interdisciplinary Discussion Held at Harvard Law School in December 1997*, (New York, NY: President and Fellows of Harvard College, 1999) at 9.

<sup>25</sup> *Ibid.*

<sup>26</sup> Natural Resource Governance Institute, “Resource Governance Index”, online: <http://www.resourcegovernance.org/resource-governance-index>.

<sup>27</sup> Carlos Fortin and Richard Jolly, “The United Nations and Business: Towards New Modes of Global Governance?” (2016) 46:3 *IDS Bulletin* at 45.

adherence to State regulation and monitoring costs that are ‘traded-off’ for more material gain.<sup>28</sup> States, in turn, will provide minimal regulation to encourage foreign direct investment, fuelling a ‘race to the bottom’, a competition of the least costly venture.<sup>29</sup> The interdisciplinary nature of this synergy is made more apparent when considering that international instruments and treaties are binding insofar as they are domesticated. International covenants and treaties ratified by States declare rights to be promoted and protected establish customary law, but the way in which States implement the principles of these instruments varies dramatically, as well as the level of their effectiveness.<sup>30</sup> Thus, States that deny their indigenous peoples’ rights or even fail to distinguish indigenous peoples within their borders provide little if any regulation for businesses to consider when embarking on development or extractive projects. As Blackwell notes, businesses engage with “different cultures having different values and norms” in a contemporary context that internationally recognizes fundamental human rights that protect human dignity, and unless these differences are accounted for, “we [Western businesses] undermine our own norms”.<sup>31</sup>

Corporate social responsibility emerges out of international human rights dialogue as a viable, albeit limited, principle that encourages businesses to self-regulate in ensuring the protection of human rights throughout their activities. Debate remains as to whether businesses should be agents of human rights,<sup>32</sup> though there is an increased international attention on business activities worldwide via the World Bank, International Monetary Fund, and ILO, *inter alia*. Fulmer, Snodgrass Godoy and Neff articulate that corporate social responsibility is an “umbrella term” that refers to “voluntary self-regulation” in accordance with governments, NGOs, and actors within the market economy.<sup>33</sup> Despite its “quasi-legal form”,<sup>34</sup> self-regulation perpetuates the reality that businesses are more powerful than the indigenous peoples

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<sup>28</sup> *Supra* note 24 at 9, 17.

<sup>29</sup> Amanda M Fulmer, Angelina Snodgrass Godoy & Philip Neff, “Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine” (2008) 50:4 *Latin American Politics and Society* at 98.

<sup>30</sup> *Supra* note 24 at 17.

<sup>31</sup> *Ibid* at 36.

<sup>32</sup> *Ibid* at 26.

<sup>33</sup> *Supra* note 29 at 111.

<sup>34</sup> *Ibid*.

their decisions impact, such that their own regulation remains unquestioned.<sup>35</sup> Essentially, corporate social responsibility is disconnected to the political and policy changes needed to protect the rights of indigenous peoples implicated negatively at the intersection of business and human rights.<sup>36</sup> The IWGIA further notes that if there is no “state-sponsored framework” to measure and evaluate the impact of business activities, businesses’ “ad-hoc methods” expressed as corporate social responsibility are moot.<sup>37</sup> This initiative, therefore, appears as a ‘band-aid’ solution to underlying tectonics shifting the State-centered global paradigm that leaves businesses unaccountable for human rights violations. The international community’s increasing approach to focus on the “responsibility to protect human rights”, moreover, re-evaluates the purpose of corporate social responsibility and moves the monitoring of business policies to the purview of international law.<sup>38</sup>

In response to the global mobilization of businesses, indigenous peoples engage in activism to protest the violation of their rights as human rights. For instance, in the Latin American context, Fulmer, Snodgrass Godoy and Neff remark that the mobilization of indigenous Guatemalans to protest “‘development’ initiatives”, and consequent killings of activists, is “nothing new”.<sup>39</sup> Large-scale mining operations that use chemicals to erode land conflict with the values of indigenous peoples, such as the “cosmovision” of Mayans, who believe that their relationship with the earth is “depend[ent]” and “inseparable”.<sup>40</sup> The unsustainability of mining practices is not only environmentally destructive, but also damaging to indigenous peoples’ distinct view of the world. Protest, distrust, alienation, and vulnerabilities ensue. The (in)ability of local communities to participate in the decision-making of what is acceptable for economic development, coupled with the diversification of actors who work towards this end, questions the global governance structure: who should be held accountable? Moreover, the lack of

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<sup>35</sup> *Ibid* at 112.

<sup>36</sup> *Ibid*.

<sup>37</sup> IWGIA, *supra* note 14 at 25.

<sup>38</sup> Cathal M. Doyle, European Network on Indigenous Peoples, “Indigenous Peoples’ Issues & Participation at the UN Forum on Business and Human Rights: Progress to Date and Potential for the Future” (2014) at 19.

<sup>39</sup> *Supra* note 29 at 92.

<sup>40</sup> *Ibid* at 94.

protection of indigenous rights in the business context makes international pleading amenable to concerns of the promotion and protection of human rights, leaving indigenous peoples as their own diplomats external to international fora. This unfortunate reality calls for discussion on indigenous rights as human rights.

### **(b) Discussing indigenous rights as human rights in the business context**

Dialogue on human rights is a right in and of itself, as opposed to a duty. The equal access to “processes of opinion and will-formation”, according to Jürgen Habermas, constitute basic rights.<sup>41</sup> Human rights ethics strives to balance the uneven distribution of “economic, political and rhetorical power” between discussion participants,<sup>42</sup> such as the actors in attendance of the UN Forum. Understanding human rights as being “duty-based” recognizes that ‘others’ also have rights and ‘we’ as individuals have duties to respect those rights.<sup>43</sup> A shift in focus has occurred, hence, from the rights holder to the respecter of the rights. This model is conducive to the increased diversification of non-State actors who interact and impact the stability of human rights. Solidarity to work toward others, thus, is feasible with this view of human rights: to emphasize “duties *toward* others” in the process of “hold[ing] rights *against* others”.<sup>44</sup>

The rights of indigenous peoples emerge from a brutal history of colonial oppression and exploitation of spirit. State power emerging from conquest and subsequent monopoly of violence within its self-defined borders is one element of this history, perpetuating a distrustful relationship between settler and indigenous peoples that continues today. The State’s relationship with its peoples is limited by its borders, whereas many indigenous peoples emphasize their relationships with all natural beings beyond human-made constructs. Hence, an international dialogue on indigenous rights appears to be more appropriate.

Decolonization influenced the contemporary development of human rights for marginalized peoples, self-identifying as ‘indigenous’. Niezen explains that the term ‘indigenous’

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<sup>41</sup> Clark Butler, ed, *Human Rights Ethics: A Rational Approach*, (West Lafayette, IN: Purdue University Press, 2008) at 6.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid* at 26.

<sup>44</sup> *Ibid* at 21-22.

provided a “new global identity” and new group of rights holders being denied “restoration, affirmation, justice, and dignity” by the State.<sup>45</sup> Indigenous peoples were not included in many international human rights law instruments, most notably the *Universal Declaration of Human Rights*.<sup>46</sup> Moreover, Saul notes that there is no specialized treaty on indigenous rights, though such treaties exist for other vulnerable groups.<sup>47</sup> Nevertheless, human rights instruments have been strategically used to address concerns of indigenous peoples. The establishment of conventions by the ILO was integral to introduce indigenous rights in global dialogue. Saul identifies seven conventions addressing the labour rights of indigenous peoples adopted by States between 1936 and 1989.<sup>48</sup> Only the last, *ILO Convention No 169*, provides a contemporary standard and mechanisms for reporting the implementation.<sup>49</sup> States are not required, however, to consult with their indigenous peoples for their reporting and implementation,<sup>50</sup> leaving the very group whose rights are most implicated at the intersection of business and human rights without a voice. Additionally, indigenous peoples cannot complain directly to the ILO.

Despite these obstacles, the human rights approach has been employed at the nexus between business and human rights, notably through the rise in jurisprudence concerning indigenous lands and natural resource use. The UN Human Rights Committee has decided on numerous claims over the exploitation of traditional lands, citing Article 27 of the *International Covenant on Civil and Political Rights* that protects minority cultural rights.<sup>51</sup> Moreover, the UN Centre for Transnational Corporations produced a series of reports on business impacts on indigenous peoples’ rights between 1990 and 1994.<sup>52</sup> Subsequently, the UN Sub-commission on Human Rights established the UN Norms on Transnational Corporations (1999-2003),

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<sup>45</sup> Ronald Niezen, *A World Beyond Difference: Cultural Identity in the Age of Globalization*, (Malden, MA: Blackwell Pub, 2005) at 96.

<sup>46</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

<sup>47</sup> *Supra* note 12 at 1.

<sup>48</sup> *Ibid* at 4-5.

<sup>49</sup> *ILO Convention 169*, *supra* note 22 at arts 4, 5, 7, 15.

<sup>50</sup> *Supra* note 12 at 5.

<sup>51</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 27 (entered into force 23 March 1976) [ICCPR]. For a review of relevant jurisprudence, see *supra* note 12 at 66.

<sup>52</sup> *Supra* note 38 at 1.

which “explicitly recognized the needs for corporations to respect indigenous peoples’ rights and interests”.<sup>53</sup> The requirement of ‘free, prior and informed consent’ was planted into the minds of the drafters of international standards from this point forward, stemming from the mobilization of indigenous peoples to channel their complaints through legal recourse.<sup>54</sup>

Since the early 2000s, several developments to provide international standards to recognize indigenous rights in the midst of businesses thriving and human rights being violated have flourished. The most recent development occurred in 2011 with the creation and unanimous adoption of the *Guiding Principles*. They were developed by the Special Representative of the Secretary General on Human Rights and Transnational Corporation and other Business Enterprises, following resolutions passed by the UN Commission on Human Rights and Human Rights Council in 2005<sup>55</sup> and 2008,<sup>56</sup> respectively. As Doyle comments, the *Guiding Principles* “continue the tradition of affirming the requirement to uphold indigenous peoples’ rights in the context of corporate activities by affirming that businesses must respect all human rights, including those affirmed in specific UN standards addressing indigenous peoples.”<sup>57</sup> Understanding indigenous rights as human rights, thus, developed partly over the course of the mobilization of indigenous peoples to plead the exploitation of their lands and vulnerability, which became more legal in nature as UN international standards were defined. The shift in conceptualizing indigenous rights as human rights brings to the forefront of the intersection of business and human rights the purpose for the international community to monitor not only the activities of governments, but also businesses. In other words, those who are impacted in this nexus are spotlighted via this human rights approach.

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Human rights and transnational corporations and other business enterprises SRSG mandate*, RES/2005/69/, CHR, 61st Sess, UN Doc E/CN.4/RES/2005/69.

<sup>56</sup> *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, RES/8/7/, HRC, 8th Sess, UN DOC A/HRC/RES/8/7.

<sup>57</sup> *Supra* note 38 at 1.

### (c) Exploring legal pluralism as necessitating regional diplomacy

The human rights focus of indigenous peoples as a vulnerable group affected by the actions of businesses raises questions as to how indigenous peoples conceptualize ownership, land, and natural resources with distinct legal traditions. Indigenous peoples carry their own traditions and laws, comparable to the system of common law or civilian tradition. They are understood as ‘customary’ or ‘traditional’ laws within States. Hence, a legal pluralism exists within States, wherein different legal ‘systems’ coexist “without undermining state sovereignty.”<sup>58</sup> Many States, however, do not recognize indigenous law. Anker explains that “legal monism”, “legal positivism”, and “legal centralism”, together, “make up a consensus about the nature of law” in Western thought, such that law is found within a single legal system that has a monopoly within Westphalian borders, is prescriptive in nature, and States are its enforcers.<sup>59</sup> A singular focus on law promotes “unity, coherence, autonomy, stability, objectivity and reification”.<sup>60</sup> An understanding of indigenous peoples as distinct, however, questions unity within States. A universal approach to law via Western conceptions perpetuates colonial legacies which are surfacing at the nexus of business and human rights. Claims brought forward by indigenous peoples to recognize their right to their lands and natural resources, hence, are framed within the “epistemic language of settler law” that labels the rights of indigenous peoples as a “*fact*”, instead of as “obligation to another *law*.”<sup>61</sup> Legal pluralism, thus, acknowledges multiple legal orders and the fluidity of language (and law) as a human product, that is, hence, capable of change, interpretation, and is ever evolving.<sup>62</sup>

Identifying indigenous peoples as distinct and non-dominant within their social contexts favourably leads to acknowledging different legal orders for each indigenous community, and questions the effectiveness of judicial remedies for grievances, compared with non-judicial ones. The exploitation and loss of land and natural resources is difficult to remedy with monetary

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<sup>58</sup> *Supra* note 12 at 31.

<sup>59</sup> Kirsten Anker, *Declarations of Interdependence: A Legal Pluralism Approach to Indigenous Rights*, Cultural Diversity and Law, (Burlington, VT: Ashgate Publishing Company, 2014) at 3.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* at 4.

<sup>62</sup> *Ibid* at 4-5.

compensation for indigenous peoples, as it presumes that indigenous communities grieve and value material objects in a similar way as do dominant groups within their shared spaces. The IWGIA reports that the “material and spiritual well-being” of indigenous peoples is “closely connected” to traditional lands.<sup>63</sup> Dorough points to the urgency of understanding the “distinct cultural context” that indigenous peoples live in, “where spiritual, cultural and social values have extraordinary significance” that is incomparable to the economic interests of States and businesses.<sup>64</sup> She further articulates that indigenous peoples perceive reparations as having a “collective significance” and that compensation, or material reparation, does not heal their pain nor the “damage done to their collective dignity, cultural integrity and that of their lands, territories and resources.”<sup>65</sup> Taking a common law approach that favours monetary damages, thus, is counterintuitive to ensuring the respect of indigenous peoples and their rights, and may be deemed “inappropriate.”<sup>66</sup> Instead, non-material and non-judicial remedies should be explored. Moreover, indigenous peoples’ customary law should be applied to determine effective remedies.<sup>67</sup> Employing legal pluralism to understand indigenous rights, hence, cognizes indigenous rights as human rights, because the remedies that can be effective to indigenous peoples ultimately protect their human dignity, as they experience it, and enable their ability to “continue [their] collective existence.”<sup>68</sup> Article 8 of the UNDRIP formalizes the collective human dignity that indigenous ‘peoples’ experience, by providing that both “Indigenous *peoples* and individuals have the right not to be subjected to forced assimilation or destruction of their culture” [emphasis added].<sup>69</sup> These experiences are unique to each

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<sup>63</sup> IWGIA, *supra* note 12 at 13.

<sup>64</sup> Dalee Sambo Dorough, “Indigenous Peoples and the Rights to Remedy: The Need for a Distinct Cultural Context” in Cathal M. Doyle, ed, *Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy. Case Studies from Africa, Asia and Latin America* (Chiang Mai, Madrid, Copenhagen: AIPP, Almaciga, IWGIA, 2015) 13 at 17.

<sup>65</sup> *Ibid* at 17-18.

<sup>66</sup> *Ibid*.

<sup>67</sup> Cathal M. Doyle, “Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy. An Introduction” in Cathal M. Doyle, ed, *Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy. Case Studies from Africa, Asia and Latin America* (Chiang Mai, Madrid, Copenhagen: AIPP, Almaciga, IWGIA, 2015) 1 at 3.

<sup>68</sup> *Supra* note 64 at 18.

<sup>69</sup> *Supra* note 10 at art 8.

indigenous community, and thus, cannot be generalized or understood as being universal. A legal pluralism, thus, exists among indigenous peoples themselves. Businesses and States must, therefore, appreciate this pluralism in order to respect indigenous rights and provide effective remedies for grievances caused by the exploitation and destruction of traditional territories and spiritual beings. A regional focus on the promotion and protection of the rights of indigenous peoples is more amenable to accepting and supporting the legal plurality both between indigenous and non-indigenous actors and among indigenous peoples than a universal, monistic legal view, as will be explored below.

**(d) Articulating the importance of regional diplomacy to employ human rights instruments effectively for the promotion and protection of indigenous rights**

Regional diplomacy is a responsive approach to the grievances indigenous peoples face at the convergence of State and business responsibilities to uphold human dignity. As Doyle observes, remedial mechanisms can transcend geopolitical borders and implicate different levels of authorities, notably local and regional ones.<sup>70</sup> For indigenous peoples, oftentimes, the borders of traditional lands do not align with Westphalian ones,<sup>71</sup> necessitating regional cooperation.

Dialogue on how regional human rights instruments can assist in recognizing and implementing both appropriate preventive and remedial mechanisms is, hence, important to adequately respond to the legal plurality that exists between indigenous and non-indigenous nations, beyond territorial boundaries. For example, the Organization of American States (OAS), as an influential regional body, has held several meetings annually since 2009 on the rights of indigenous peoples in the Inter-American System.<sup>72</sup> The Department of International Law of the OAS in particular, launched a Program of Action on Indigenous Peoples in the Americas in 2009 to “promot[e] and strengthen[] the participation of indigenous peoples in domestic and international decision-making processes”,<sup>73</sup> by providing, *inter alia*, training in the

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<sup>70</sup> *Supra* note 67 at 3.

<sup>71</sup> *Ibid.*

<sup>72</sup> See Organization of American States, Department of International Law, “Events organized by the OAS”, online: [http://www.oas.org/en/sla/dil/indigenous\\_peoples\\_prior\\_activities.asp](http://www.oas.org/en/sla/dil/indigenous_peoples_prior_activities.asp).

<sup>73</sup> Organization of American States, Department of International Law, “Promoting the Rights of the Indigenous Peoples of the Americas”, online: [http://www.oas.org/en/sla/dil/indigenous\\_peoples.asp](http://www.oas.org/en/sla/dil/indigenous_peoples.asp).

form of courses, seminars, and workshops for indigenous representatives, NGOs, and government officials to sensitize them to indigenous issue and raise awareness as to how the Inter-American System is structured and how indigenous peoples can participate in its activities.<sup>74</sup> Additionally, a significant achievement from this regional effort has been to include indigenous representatives at negotiation meetings on the Draft American Declaration on the Rights of Indigenous Peoples since 1999. This summer, at the launch event of the *2016 State of the World's Minorities and Indigenous Peoples* focusing on culture and heritage, I learned of the adoption of the draft American Declaration on the Rights of Indigenous Peoples on June 15, 2016 by the General Assembly of the Organization of American States. This instrument is pivotal to promote and protect the rights of indigenous peoples in the region, and generate dialogue as to how to include indigenous voices in enforcing and implementing these rights. Article VI of the Declaration explicitly recognizes that “Indigenous peoples have collective rights that are indispensable for their existence”, along with their right to fully enjoy all human rights.<sup>75</sup> This is the first formal understanding of collective rights in the region, an acknowledgment of the distinct legal order of indigenous peoples. Article IX confirms indigenous peoples’ juridical personality to exercise all rights, thereby empowering indigenous peoples to bring forward actions that infringe their rights.<sup>76</sup> In the context of business and human rights specifically, Article XIX provides a “right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”<sup>77</sup> Furthermore, the Declaration acknowledges the shift in the global paradigm that has expanded governance to diverse actors in Article XXIX, that declares that indigenous peoples, “have the right to effective measures to mitigate adverse ecological, economic, social, cultural, or spiritual impacts for the implementation of development projects that affect their rights”, including the right to compensation for damages caused by executing “state, *international financial institutions or*

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<sup>74</sup> Organization of American States, Department of International Law, “Program of Action on Indigenous Peoples in the Americas”, online: [http://www.oas.org/en/sla/dil/indigenous\\_peoples\\_program\\_of\\_action.asp](http://www.oas.org/en/sla/dil/indigenous_peoples_program_of_action.asp).

<sup>75</sup> OAS, Inter-American Commission on Human Rights, *Draft of the American Declaration on the Rights of Indigenous Peoples*, OR OEA/Ser.PAG/doc.5537/16 (2016).

<sup>76</sup> *Ibid* at art IX.

<sup>77</sup> *Ibid* at art XIX.

*private business plans*” [Emphasis added].<sup>78</sup> This inaugural and integral regional instrument, thus, is a product of regional diplomacy and dialogue on indigenous rights. Given that most international treaties do not mention indigenous peoples nor their rights, as articulated above, this Declaration can facilitate how to implement the *Guiding Principles* in the Americas.

In addition to regional diplomatic instruments, regional judicial mechanisms invoke and apply human rights in disputes affecting the rights of indigenous peoples. Saul points to how regional courts and other instruments have employed human rights standards to include “specific circumstances, cultural characteristics and distinctive experiences of indigenous peoples.”<sup>79</sup> In turn, this jurisprudence materializes international human rights standards.<sup>80</sup> During the Universal Period Review of Suriname in May 2016, the Deutsch delegate recommended that Suriname implement the Inter-American Court of Human Rights’ judgment concerning the Saramaka People. The case he was referring to was *Saramaka People v Suriname* (*Saramaka*),<sup>81</sup> that concerned the State’s logging and mining of the traditional lands of the Maroon tribal people. As Suriname’s domestic law failed to recognize a “right to communal property”, and the status of the Maroon tribal people as indigenous, the Court interpreted Article 21 of the *American Convention on Human Rights*<sup>82</sup> to find communal tribal and indigenous property rights.<sup>83</sup> Consequently, Suriname was obliged to establish procedural safeguards of indigenous lands and the resources that stem from them.<sup>84</sup> Similarly, the African Commission on Human and Peoples’ Rights have progressively interpreted property rights in the indigenous context. In the case *Endorois Welfare Council v. Kenya* (*Endorois*),<sup>85</sup> the African Commission read

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<sup>78</sup> *Ibid* at art XXIX.

<sup>79</sup> *Supra* note 12 at 131.

<sup>80</sup> *Ibid* at 133, citing Gaetano Pentassuglia, “Towards a Jurisprudential Articulation of Indigenous Land Rights” (2011) 22 *European Journal of International Law* 165 at 177-82.

<sup>81</sup> *Saramaka Peoples v Suriname (Preliminary Objections, Merits, Reparations and Costs)* (2007) IACtHR (Ser C) No 172 [*Saramaka*].

<sup>82</sup> OAS, General Assembly, *American Convention on Human Rights, “Pact of San Jose, Costa Rica”*, 22 November 1969 at art 21 (entered into force 18 July 1978). [ACHR].

<sup>83</sup> *Supra* note 81 at para 93; *Supra* note 12 at 156-57.

<sup>84</sup> *Saramaka, ibid* at para 129; *Saul, ibid*, at 158.

<sup>85</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010), ACHPR Communication No 276/2003, 2009 AHRLR 75 [*Endorois*].

Article 21 of the *African Charter on Human and Peoples' Rights*<sup>86</sup> to include indigenous peoples' the right to natural resources in traditional lands.<sup>87</sup> The cause of action was that the Endorois indigenous community in Kenya was forcibly ousted from their traditional lands by the Kenyan government to establish a game reserve, and subsequently sell these lands for a gold mining concession that resulted in the removal of the Endorois from preserving their lands.<sup>88</sup> Moreover, the Commission analogized the facts giving rise to this action with those from *Saramaka*, deeming that the State should consult with indigenous peoples to preserve “their traditions, share any benefits, and conduct environmental and social assessments.”<sup>89</sup> Essentially, this judgment aligned with Article 29 of the UNDRIP requiring “free prior and informed consent”.<sup>90</sup> These two cases demonstrate, thus, how regional judicial mechanisms can give effect to international human rights standards that seem ambiguous without any context.

The increasing integration of business activities with State governance in promoting and protecting both human rights and the rights of indigenous peoples has spiraled into a mobilization of indigenous peoples to protest the violation of their rights, revealing a plurality of legal orders that can amenable be addressed with regional instruments. This mobilization, in both the international social and regional juridical contexts amplifies the purpose for creating diplomatic spaces at the nexus for business and human rights: to protect the most vulnerable. In the next section, I will focus on regional diplomacy to articulate this purpose further.

## **(4) Shifting the Dialogue**

### **(a) Revisiting the Guiding Principles**

A focus on regional diplomacy at the nexus between business and human rights for the benefit of indigenous peoples leads to discussion as to how international instruments, namely the *Guiding Principles*, can be adopted, implemented, monitored, and evaluated at the regional

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<sup>86</sup> OAU, *African Charter of Human and Peoples' Rights* (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3/ rev. 5, 21 I.L.M. 58 (1982) at art 21 (entered into force 21 October 1986).

<sup>87</sup> *Endorois*, *supra* note 85 at para 267; Saul, *supra* note 12 at 161.

<sup>88</sup> *Saul*, *ibid* at 160.

<sup>89</sup> *Endorois*, *supra* note 85 at paras 266-268; Saul, *supra* note 12 at 161-62.

<sup>90</sup> *Supra* note 10 at art 29.

level. The Guiding Principles are founded on three pillars: (1) “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms”; (2) “The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights”; and (3) “The need for rights and obligations to be matched to appropriate and effective remedies when breached.”<sup>91</sup> By attributing public responsibilities to non-State actors, in tandem with States’ obligations to their citizens, the *Guiding Principles*, hence, acknowledge the shift in the global paradigm to re-level power dynamics in global governance. To this end, the description for the *Guiding Principles* specifies that one of the purposes for this instrument is to contribute to a “socially sustainable globalization.”<sup>92</sup> Despite the collective effort of international actors (noted above) that contributed to the production of the *Guiding Principles*, this instrument has grown to become an influential form of diplomatic guidance that implicates high-level diplomacy that is far from “the ground”. To read the *Guiding Principles* in accordance with the *UNDRIP*, for instance, remains oxymoronic an illustrious endeavor without impact if indigenous peoples are not directly consulted or considered.<sup>93</sup> Niezen articulates eloquently that such significant governing bodies that have engaged in assessing their power, “have often grown beyond the reach of those whose fates they claim to protect.”<sup>94</sup> An inquiry into identifying these actors is, hence, necessary to understand their internal interaction, or lack thereof, that affects how they impact indigenous peoples.

### **(b) A Structural View of Relevant International and Diplomatic Channels**

The following table summarizes the recently established diplomatic channels at both the international and regional levels that concentrate on the rights of indigenous peoples and indigenous issues.<sup>95</sup> Remarkably, the majority of these instruments operate at the international level to other UN Bodies such as the Human Rights Council, with very few sharing of resources

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<sup>91</sup> *Supra* note 7, at 1.

<sup>92</sup> *Ibid.*

<sup>93</sup> For a thorough analysis as to how the Guiding Principles can be read in accordance with the rights of indigenous peoples, see *supra* note 14.

<sup>94</sup> *Supra* note 45 at 83.

<sup>95</sup> This listing is not exhaustive.

or knowledge among themselves. Exceptionally, the EMRIP completed a “Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries” that identifies coordination between the Special Rapporteur on the rights of indigenous peoples, UNPFII, and the EMRIP in analyzing the impact of extractive industries on indigenous peoples.<sup>96</sup> The Report, however, does not point to regional solutions. Additionally, most of these instruments operate at the international level with no regional or local counterparts to share and respond to their findings. The UN Forum, however, uniquely has corresponding Regional Fora, which could be more effectively operative in this regard, as will be explored below.

<b>International and Regional Diplomatic Channels Concerning the Rights of Indigenous Peoples and Indigenous Issues</b>			
<b>Instrument</b>	<b>Year Established</b>	<b>Description</b>	<b>Level of Diplomacy Implicated</b>
UNPFII	2000	The UNPFII is an advisory body to the UN Economic and Social Council to address indigenous issues related to “economic and social development, culture, the environment, education, health and human rights.” <sup>97</sup> It meets annually for a two-week session at the UN Headquarters in New York.	International
UN Special Rapporteur on the rights of indigenous peoples	2001	The UN Special Rapporteur is part of the UN’s thematic Special Procedures, mandated to promote good practices for agreements between indigenous peoples and	International

<sup>96</sup> EMRIP, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, HRC, 2012, A/HRC/21/55 at 3-4.

<sup>97</sup> UN, Division for Social Policy and Development, “Permanent Forum”, online: <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html>.

		states and to implement international standards implicating the rights of indigenous peoples. This position also entails reporting on the human rights situations of indigenous peoples in specific countries and conducting thematic studies related to the promotion and protection of the rights of indigenous peoples. <sup>98</sup>	
The EMRIP	2007	Established by the Human Rights Council through its Resolution 6/36, the Expert Mechanism is an advisory instrument for the Council. <sup>99</sup> It produces thematic studies and proposals concerning the rights of indigenous peoples for the Council to adopt. <sup>100</sup> The Expert Mechanism meetings annually for a one week session at the UN Headquarters in Geneva. In 2011, this instrument produced a study on indigenous peoples and the right to participate in decision-making, including a focus on participation in regional and international forums and processes. <sup>101</sup>	International
The <i>UNDRIP</i>	2007	The Declaration stemmed from the draft declaration of the Working	International

<sup>98</sup> OHCHR, “Special Rapporteur on the rights of indigenous peoples”, online: <http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>.

<sup>99</sup> *Expert mechanism on the rights of indigenous peoples*, RES/6/36/, HRC, 6th Sess, UN Doc A/HRC/RES/6/36.

<sup>100</sup> *Supra* note 9.

<sup>101</sup> EMRIP, *Final study on indigenous peoples and the right to participate in decision-making*, HRC, 2011, UN Doc A/HRC/EMRIP/2011/2 at 15.

		Group on Indigenous Populations (1982-2007). As Doyle describes, it signaled the start of a new “era of respect for indigenous self-determination”. <sup>102</sup>	
World Conference on Indigenous Peoples	2014	The World Conference was a high level plenary meeting established by the UN General Assembly to disseminate and share best practices and knowledge on actualizing the rights of indigenous peoples, especially through the <i>UNDRIP</i> and consultations with indigenous peoples. <sup>103</sup>	International
<i>Guiding Principles</i>	2011	The <i>Guiding Principles</i> were established by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises and presented to the Human Rights Council. It is a non-binding international instrument that provides guidance to State and business actors as to how they should implement the UN’s “Protect, Respect and Remedy” Framework. <sup>104</sup> The Council, in turn, endorsed the <i>Guiding Principles</i> in its	International/Regional

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<sup>102</sup> *Supra* note 67 at 1.

<sup>103</sup> World Conference on Indigenous Peoples, “Background”, online: <http://www.un.org/en/ga/69/meetings/indigenous/background.shtml>.

<sup>104</sup> *Supra* note 7 at iv, 1.

		Resolution 17/4. <sup>105</sup> The <i>Guiding Principles</i> explicitly mention indigenous peoples. <sup>106</sup>	
UN Forum on Business and Human Rights	2011	The UN Forum is the largest global assembly of diverse actors, including government, business, community, civil society, legal, UN body, and NHRI representatives, as well as academics and the media. <sup>107</sup> It convenes annually over three days to discuss topics relevant to the Guiding Principles and contemporary “business-related human rights issues.” <sup>108</sup> A Working Group on Business and Human Rights was created in tandem with the UN Forum. For the first time, the 2016 fifth annual UN Forum had a formal category of indigenous representative speakers. <sup>109</sup> Since its establishment, regional counterparts have been created via the Regional Forum on Business and Human Rights for Latin America and the Caribbean (2013), African Regional Forum on Business and Human Rights (2014), and Asia	International with Regional Counterparts

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<sup>105</sup> *Human Rights and transnational corporations and other business enterprises*, RES/17/4, HRC, 17th Sess, UN Doc A/HRC/RES/17/4; *Ibid* at iv.

<sup>106</sup> *Supra* note 7 at 5, 14, 29.

<sup>107</sup> UN, Office of the High Commissioner for Human Rights, “2016 United Nations Forum on Business and Human Rights”, online: <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2016ForumBHR.aspx>.

<sup>108</sup> *Ibid*.

<sup>109</sup> UN, Office of the High Commissioner for Human Rights, “Forum Speakers”, online: <http://www.ohchr.org/Documents/Issues/Business/ForumSession5/SpeakersList.pdf>.

		Regional Forum on Business and Human Rights (2016).	
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The spaces created at the regional level are more intimate for participating actors to divulge into genuine discussion as to how they can work together towards resolving indigenous disputes over land and natural resources extracted by businesses. States who are strategically ‘like-minded’ at the international level, can create a space regionally to confidently address issues among themselves without being concerned over the influence and soft power of ‘non-like-minded’ States.<sup>110</sup> The dialogue, hence, is centered on fewer actors and non-traditional State superpowers, so to speak. The following section briefly highlights key conversations had at the three Regional Fora of the UN Forum, that have each met once, about the *Guiding Principles* that exemplify how at the regional level, diplomatic actors can shift the dialogue on business and human rights to focus on the rights of indigenous peoples.<sup>111</sup>

**i. Latin America and the Caribbean: from legitimacy to responsibility and accountability**

The first Regional Forum for Latin America and the Caribbean convened in 2013 and significantly held a multi-stakeholder panel discussion on the thematic report by the Working Group on the issue of human rights and transnational and other business enterprises that focused on how the *Guiding Principles* can clarify the roles and responsibilities of States, business enterprises, and indigenous peoples to address harmful impacts of business activities on the rights of indigenous peoples.<sup>112</sup> It is worthy to note that the panel included an indigenous lawyer

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<sup>110</sup> For more discussion on the dynamics of States criticizing other states’ human rights abuses, see David Petrasek, “New Powers, New Approaches? Human Rights Diplomacy in the 21ST Century”, (2013) *Sur International Journal on Human Rights* 6 at 8.

<sup>111</sup> It is important to note that given the fact that I had not personally attended these Regional Fora and that there is limited scholarship on the outcomes emerging from them, my analysis of the dialogues that took place in these diplomatic spaces are cursory, selective, and meant to invite readers to further explore their significance.

<sup>112</sup> UN, Office of the High Commissioner for Human Rights, “2013 Regional Forum on Business and Human Rights for Latin America and the Caribbean”, online: [www.ohchr.org/EN/Issues/Business/Forum/Pages/2013LACRegionalForumBusinessandHumanRights.aspx](http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013LACRegionalForumBusinessandHumanRights.aspx); Working Group on the issue of human rights and transnational corporations and other business enterprises,

from the Maya Q'eqchi' Guatemala Community. Committing to the *Guiding Principles* may not always be genuine. Fortin and Jolly refer to a “Bluewash” issue in companies making commitments for the sole purpose of public legitimacy without executing that commitment.<sup>113</sup> In asking what lessons can be learned from stakeholder engagement and consultation processes, keeping in mind FPIC, the regional panel critically considered the *Guiding Principles* that legitimate best practices to extrapolate their function to attribute responsibilities to different actors in the new global paradigm and note their accountability in lessons learned.<sup>114</sup> As Spar comments, we are experiencing a “transfer of responsibility” by “asking corporations to play a role that governments have been unable to fulfill”.<sup>115</sup>

## ii. Africa: from implementation to impact

The African Regional Forum met in 2014 and mainly focused dialogue on the impact of business activities on the rights of African peoples.<sup>116</sup> During her closing remarks, H.E. Dr. Aisha Abdullahi, Commissioner for Political Affairs of the African Union Commission stated that, this Regional Forum invites different actors “to openly discuss how African governments, business and [civil society organizations] can move to address the *impact* of business activities on the rights of the people in Africa” [emphasis added].<sup>117</sup> On a similar note, a presentation delivered by the UN Office of the High Commissioner for Human Rights spotlighted the

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*Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UNGA, 2013, UN Doc A/68/279 [Working Group Report].

<sup>113</sup> *Supra* note 27 at 52; An idle commitment can be made to Principles 15(a) and 16 of the *Guiding Principles*, for instance, which refer to the importance of having policies and processes demonstrating businesses’ “commitment to meet their responsibility to respect human rights”, if they remain on paper. *Supra* note 7 at 15-16.

<sup>114</sup> OHCHR, “Panel on Implementation of the UN Guiding Principles on Business and Human Rights in the Context of Indigenous Peoples”, online [http://www.ohchr.org/Documents/Issues/Business/TORsSideEventUNGPsin\\_IPcontext.pdf](http://www.ohchr.org/Documents/Issues/Business/TORsSideEventUNGPsin_IPcontext.pdf).

<sup>115</sup> *Supra* note 24 at 18.

<sup>116</sup> UN, Office of the High Commissioner for Human Rights, “African Regional Forum on Business and Human Rights, 16-18 September 2014, Addis Ababa (Ethiopia)”, online: [www.ohchr.org/EN/Issues/Business/Forum/Pages/AfricaRegionalForum.aspx](http://www.ohchr.org/EN/Issues/Business/Forum/Pages/AfricaRegionalForum.aspx); It is important to note that there was no mention of indigenous peoples nor the rights of indigenous peoples at this Regional Forum, due in part to the political sensitivities of identifying indigenous peoples in this region, as discussed above.

<sup>117</sup> H.E. Dr. Aisha Abdullahi, Commissioner for Political Affairs of the African Union Commission, “Closing Remarks” delivered at the African Regional Forum on Business and Human Rights, 18 September 2014.

*Guiding Principles* as emphasizing the avoidance and need to address negative impacts of businesses on human rights.<sup>118</sup> Here, there is a clear shift from dialogue on implementing the *Guiding Principles* to using them to assess impacts on human rights, and by extension, those impacted.

### **iii. Asia: from principles to equitable access**

Most recently, the Asian Regional Forum convened in 2016 and focused on, inter alia, indigenous peoples' rights and effective access to remedies for victims negatively impacted by business activities.<sup>119</sup> This dialogue is significant, because similar to the African region, indigenous peoples in Asia are largely not formally recognized. There are no regional instruments that employ human rights standards to promote and protect the rights of indigenous peoples, though the ASEAN Intergovernmental Commission on Human Rights works to promote and protect human rights.<sup>120</sup> This Forum, hence, empowered indigenous peoples in this region by creating dialogue about the implications of FPIC and that businesses should allocate adequate resources to facilitate consultations with indigenous peoples.<sup>121</sup> This dialogue on principles exemplifies how diplomacy can be a first step in materializing the *Guiding Principles* to promote equitable access for indigenous peoples on governance matters.

These examples from the Regional Fora demonstrate the ability of regional diplomacy to take the *Guiding Principles*, as an international initiative, and shift dialogue about them to focus on the rights of indigenous peoples. In the next section, I will provide recommendations on how diplomatic spaces at both the international and regional levels can be made more equitable for indigenous peoples.

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<sup>118</sup>OHCHR, "Introduction to the Guiding Principles on Business and Human Rights" delivered at the African Regional Forum on Business and Human Rights, 16 September 2014.

<sup>119</sup> UN, Office of the High Commissioner for Human Rights, "2016 Asia Regional Forum on Business and Human Rights", online: <http://www.ohchr.org/EN/Issues/Business/Pages/2016AsiaRegionalForum.aspx>; A report was produced for this Regional Forum. See Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on the Asia Forum on Business and Human Rights*, HRC, 2016, UN Doc A/HRC/32/45/Add.2 [Working Group Asia Report].

<sup>120</sup> ASEAN Intergovernmental Commission on Human Rights, "About", online: <http://aichr.org/about/>.

<sup>121</sup> Working Group Asia Report, *supra* note 119 at 12.

## **(5) Recommendations on how to make diplomatic spaces more equitable for indigenous peoples**

The following recommendations focus on responsibility, accountability, impact, and equitable access as desirable ends.

*Recommendation 1: The Regional Fora should actively endorse and support the implementation of the UNDRIP at the regional level, in tandem with the Guiding Principles.*

Although the *UNDRIP* establishes an international standard to recognize and protect the rights of indigenous peoples, it has yet to be fully implemented by States. As an integral human rights instrument that acknowledges the vulnerability of indigenous peoples, it should be widely promoted and recognized on multiple diplomatic levels and domesticated by member States. In agreement with Doyle’s remark that the *UNDRIP* is meant to “remedy past wrongs and protect against future rights violations by requiring free prior and informed consent”,<sup>122</sup> implementation of the *UNDRIP* entails both a standardized approach at the international level to recognize core values from the *UNDRIP*, and a more nuanced sensibility to local needs. Articles 3 (right to self-determination for economic development), 4 (right to autonomy for internal affairs), 23 (right to free, prior and informed consent), and 23 (right to development)<sup>123</sup> in particular should be implemented with knowledge of local and specific circumstances each unique indigenous community or peoples faces. This recommendation coincides with the one made by the Working Group on the issue of human rights and transnational corporations and other business enterprises in 2013 to States: “...pursue a range of measures to fully implement the [UNDRIP] for home states of transnational corporations operating in territories used or inhabited by indigenous peoples, even if no indigenous populations reside within their borders”.<sup>124</sup> Businesses can contribute to such recognition by harmonizing their policies, notably, corporate social responsibility, with the *UNDRIP*, keeping in mind the interests of the

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<sup>122</sup> Cathal M. Doyle, “Conclusion: Lessons Emerging from Indigenous Peoples’ Experiences” in Cathal M. Doyle, ed, *Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy. Case Studies from Africa, Asia and Latin America* (Chiang Mai, Madrid, Copenhagen: AIPP, Almaciga, IWGIA, 2015) 259 at 260.

<sup>123</sup> *Supra* note 14 at 13; *Supra* note 10 at arts 3, 4, 10, 23.

<sup>124</sup> See Recommendation 55(a), *supra* note 112 at 39.

local indigenous peoples affected by their activities via consultations to materialize responsibility, “adherence, alignment and accountability” stipulated in the *Guiding Principles*.<sup>125</sup> Hence, businesses retain legitimacy of their activities by focusing on their responsibility and accountability to indigenous peoples within the legal framework provided by the *UNDRIP* and *Guiding Principles*.

*Recommendation 2: The EMRIP’s role should be enhanced to become the central guiding body to assist the Working Group in protecting and promoting indigenous rights at the nexus between business and human rights.*

The EMRIP currently meets independently on an annual basis and submits reports and studies to the Human Rights Council. The Working Group on the issue of human rights and transnational corporations and other business enterprises should conduct joint studies with the EMRIP to produce best practices for monitoring and evaluation at both the international and regional levels. The specialized knowledge of the EMRIP’s members is invaluable for all actors in the new global paradigm to understand their relative positions and responsibilities. The EMRIP should centralize the guidance both State and non-State actors receive as to how they should “realize their duties and responsibilities in relation to indigenous peoples’ rights”.<sup>126</sup> Further to Doyle’s recommendation, in addition to providing best practices, the EMRIP should support the Working Group in monitoring and evaluating “compliance with these obligations.”<sup>127</sup> Centralizing knowledge and increasing access to best practices, thus, will aid the diverse global actors in understanding both their responsibilities and the measures to be used to hold them accountable.

*Recommendation 3: Monitoring, evaluation, and remedial mechanisms to implement the Guiding Principles should be established at the regional level*

Monitoring and evaluation mechanisms would shift dialogue from the universal implementation of the *Guiding Principles* to the (potential) impact this guiding instrument has on indigenous peoples. At the regional level, the *Guiding Principles* should be read together with

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<sup>125</sup> *Supra* note 67 at 23-24.

<sup>126</sup> *Ibid* at 3.

<sup>127</sup> *Ibid*.

regional instruments, notably the *American Declaration on the Rights of Indigenous Peoples* and *African Charter*, to (1) produce specific regional mechanisms that will consult indigenous peoples on business activities and monitor States and their relations with businesses within existing regional legal frameworks; (2) evaluate the implementation of the *Guiding Principles* based on the impact experienced by local indigenous peoples; and (3) provide effective remedial mechanisms to address local grievances. The participation of indigenous leaders is integral for the effectiveness of these mechanisms, to acknowledge the legal pluralism that exists between indigenous legal traditions and spirituality and more dominant forms of legal order. Additionally, Dorrough's recommendation that businesses could provide "operational-level grievance mechanisms" to address complaints would complement such regional mechanisms.<sup>128</sup>

*Recommendation 4: The three Regional Fora should be scheduled to convene separately every year, prior to the annual UN Forum, and produce outcome documents.*

The fact that each Regional Forum has met once without any outcome documents produced, whereas the UN Forum has met five times and has published outcome documents does not encourage a continuous liaison between regional and international diplomatic actors, focusing on having a dialogue on implementing the Guiding Principles at the two levels rather than one that impacts persons "on the ground", so to speak. This recommendation advocates for annual reporting and evaluation in consultation with indigenous peoples of the impact of business practices and activities on indigenous peoples and of States' protection (or lack thereof) of the rights of indigenous peoples at the regional level. Annual discussion at the regional level enhances access to justice, as indigenous peoples or their representatives can address emerging and imminent concerns in due time with more feasible travel. In turn, regional reporting can be a more effective mechanism to achieve accountability, as actors can be reprimanded for their actions in a more comfortable space by their peers as discussed above. Moreover, the outcome,

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<sup>128</sup> *Ibid* at 23. For more information, see Cathal M. Doyle, "Operational-Level Grievance Mechanisms and Indigenous Peoples' Access to Remedy" in Cathal M. Doyle, ed, *Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy. Case Studies from Africa, Asia and Latin America* (Chiang Mai, Madrid, Copenhagen: AIPP, Almaciga, IWGIA, 2015); See also, *supra* note 7 at 31-32.

monitoring, and evaluation reports produced at the regional level can be shared at the UN Forum to better facilitate guided dialogue on successes, failures, and best practices.

*Recommendation 5: The EMRIP's members should integrate their role as regional representatives with a role to liaise between the international and regional UN fora, with the rights of indigenous peoples becoming a permanent agenda item for all the fora.*

This recommendation entails that members of the EMRIP should attend the UN Forum and respective regional fora, and lead discussions on the rights of indigenous peoples. Establishing a permanent agenda item is an equitable approach to spotlight indigenous peoples as the most vulnerable at the intersection of business and human rights, and reinforce the purpose of the international and regional Fora to address vulnerabilities. Indigenous peoples or representatives of indigenous peoples should be invited to access and participate in the discussions emerging from this agenda item. Furthermore, members of the EMRIP can relay outcomes from the regional fora, including any reporting that emerges from them, to the UN Forum in order to facilitate specific dialogues on ameliorating the impact of both States' and businesses' practices and activities on indigenous peoples.

## **(6) Conclusion**

In the midst of a shift in the global paradigm for governance at the nexus of business and human rights, a collaborative and intersectional approach to promote and protect the rights of indigenous peoples is crucial for their survival. Human rights diplomacy on indigenous rights at this intersection should focus on regional diplomacy to center dialogue on the mobilization, rights, plurality of legal orders, and experiences of indigenous peoples. The three Regional Fora of the UN Forum are pivotal diplomatic channels to restructure diplomatic dialogue to focus on indigenous peoples, shifting from legitimacy to responsibility and accountability; from implementation to impact; and from principles to equitable access. With a more equitable perspective adopted by both international and regional human rights instruments, articulated by the recommendations above, I hope that the group of Indigenous women from Papua New Guinea mentioned at the beginning of my paper will no longer be complainants external to the global paradigm of governance, but rather key decision-makers within it.

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