

**GOVERNING THE GLOBAL COMMONS: HOW UNSR ANAYA’S  
STUDY ON EXTRACTIVE INDUSTRIES CAN INFORM A NEW  
GLOBAL HUMAN RIGHTS REGULATORY REGIME FOR  
TRANSNATIONAL CONSERVATION NGOS OPERATING ON OR  
NEAR INDIGENOUS TERRITORIES**

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**I. INTRODUCTION**

Those who live in high biodiversity areas and in fragile ecosystems<sup>1</sup> often face resource development pressures from the natural resource extraction industry (e.g., oil, gas, and mining), infrastructure and energy development, and agribusiness. They also face similar pressures from transnational conservation

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<sup>1</sup> For a review of the concept of ecosystem fragility, see Christer Nilsson & Gunnell Grelsson, *The Fragility of Ecosystems: A Review*, 32 J. APPLIED ECOLOGY 677, 677-92 (1995).

non-governmental organizations (CoNGOs) wanting to conserve or safeguard biodiversity. Such is the case for many of the world's Indigenous peoples. Indigenous peoples are on the frontlines of ecological change and face mounting pressures from competing wants and uses of their lands and natural resources stemming from this "resource rush."<sup>2</sup> They are also disproportionately affected by human rights violations resulting from improper natural resource and infrastructure development or conservation practices and policies that fail to account for the rights of Indigenous peoples in their operations. This has led to, among other things, food and water insecurity, dislocation and dispossession, restricted access to their territories, loss of livelihoods and culture, impoverishment, chronic social conflict, and exacerbated effects of climate change. More still, Indigenous peoples often lack the necessary financial resources, political saliency, and the technical or other capacity to effectively respond to these complex challenges to their collective and individual human rights, especially the right to determine and develop priorities and strategies for the development, use, or conservation of their lands, territories, and other resources.

The "worldwide drive to extract and develop minerals and fossil fuels" has led to "ever more widespread effects on Indigenous peoples' lives," Professor James Anaya, former United Nations Special Rapporteur on the Rights of Indigenous Peoples (UNSR) noted in his seminal thematic report on Indigenous peoples and extractive industries.<sup>3</sup> Indigenous peoples account for five percent of the world's population, but they own, occupy, or have claim to a quarter of the planet that represents eighty percent of the world's remaining biodiversity.<sup>4</sup> As a result, Indigenous territories have become hotspots for activities related to natural resource exploitation and biodiversity conservation. As the global demand for

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<sup>2</sup> See, e.g., Andrew C. Revkin, *Can Peru Control the Murderous Resource Rush on Its Forest Frontiers?*, N.Y. TIMES (Oct. 10, 2014), <http://dotearth.blogs.nytimes.com/2014/10/10/can-peru-control-the-murderous-resource-rush-on-its-forest-frontiers/>; Martin Lukas, *Indigenous Rights Are the Best Defence Against Canada's Resource Rush*, GUARDIAN (Apr. 26, 2013), <http://www.theguardian.com/environment/true-north/2013/apr/26/indigenous-rights-defence-canadas-resource-rush>; Aqukkasuk, *The Arctic Resource Rush, Enviros and Inuit Poverty*, ALASKAN INDIGENOUS (Aug. 3, 2013 9:35 PM), <https://alaskaIndigenous.wordpress.com/2013/08/03/arctic-resource-rush-enviros-and-inuit-poverty/>. For a view of how the resource rush can induce economic development in Africa, see Ngozi Okonjo-Iweala, *Fulfilling the Promise of Sub-Saharan Africa*, MCKINSEY Q., June 2010, at 1, 3-4, available at [http://www.mckinsey.com/insights/economic\\_studies/fulfilling\\_the\\_promise\\_of\\_sub-saharan\\_africa](http://www.mckinsey.com/insights/economic_studies/fulfilling_the_promise_of_sub-saharan_africa).

<sup>3</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples*, ¶¶ 1-2, U.N. Doc. A/HRC/24/41 (July 1, 2013) (by S. James Anaya) [hereinafter *Extractive Industries & Indigenous Peoples*].

<sup>4</sup> CLAUDIA SOBREVILA, WORLD BANK, *THE ROLE OF INDIGENOUS PEOPLES IN BIODIVERSITY CONSERVATION: THE NATURAL BUT OFTEN FORGOTTEN PARTNERS* 5 (2008). See also Gina Cosentino, *World Indigenous Day: Harnessing the Power of the Five Percent*, NATURE CONSERVANCY (AUG. 8, 2013), <http://blog.nature.org/conservancy/2013/08/08/world-Indigenous-day-harnessing-the-power-of-the-five-percent/>.

more food, water, energy, and other commodities continues to rise, the rights of Indigenous peoples to their lands, territories, and natural resources are often ignored or downplayed by courts, governments, industry—and at times, environmental organizations who seek to safeguard nature—when they clash with economic development, aid policy, trade objectives, or conservation goals. “Green” forms of energy, such as hydropower, solar, wind, and biofuels, also involve the exploitation of Indigenous peoples’ territories that can lead to adverse environmental and social impacts. However, conservation actors, which include governments, intergovernmental agencies, transnational conservation non-governmental organizations and their funders (e.g., foundations, multilateral financing institutions, and philanthropic donors) are increasingly targeting Indigenous territories to safeguard essential ecosystem services (i.e. the “services” nature provides, such as food, climate stability, and water) and manage human impacts on nature given their biologically significant value. Conservation strategies include, but are not limited to, creating protected areas, influencing public policy and corporate practices, restoring wildlife and habitat, climate change mitigation and adaptation, and managing resource-use such as fisheries, agricultural lands, and forests through a range of strategies to maintain the health of the environment, economy, and human well-being to meet present-day and future needs. However, these and other conservation practices, which have been at times rights-blind and often measure the “value of nature” in market-based terms, have sometimes led to a clash in values and approach to conservation, leading to adverse impacts on the lives and well-being of Indigenous peoples as well as their rights to land, territories, and natural resources.

States bear the primary duty to protect human rights, as affirmed by the *Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework* (the “*Guiding Principles*”) adopted by the United Nations in 2011 as the global standard on corporate social responsibility.<sup>5</sup> Corporations and other non-state actors such as non-governmental organizations (NGOs) also have an independent responsibility to respect and comply with internationally recognized human rights and standards and to exercise due diligence to ensure their activities do not contribute or violate Indigenous peoples’ rights even if domestic laws fall short of the global standard. This includes, at minimum, the International Bill of Human Rights, International Labour Organization’s (ILO) Fundamental Principles of Rights at Work, as well as relevant international human rights instruments pertaining to Indigenous peoples such as the United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration), Indigenous and Tribal Peoples Convention (ILO 169),

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<sup>5</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Businesses 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) [hereinafter *U.N. Guiding Principles*].

the Convention on Biological Diversity (CBD), and others.<sup>6</sup> Lastly, both States and companies have a shared responsibility to provide effective remedies and mechanisms of redress for human rights infringements.<sup>7</sup>

Despite the growing acceptance and recognition of corporate social responsibility, a lack of clarity over what corporate responsibility means vis-à-vis Indigenous rights impedes effective implementation of the *Guiding Principles* and the U.N. Declaration. In part this is due to a general lack of understanding of, respect for, or recognition of Indigenous rights by some businesses, civil society organizations, or States, which fuels further conflict and intensifies human rights violations of Indigenous peoples.<sup>8</sup> Adding to this, Professor Anaya asserts that the prevailing model of extraction on Indigenous territories, one that is led and controlled by extractive businesses, primarily benefits others, such as the businesses themselves and governments, thereby exacerbating social and environmental harms.<sup>9</sup> In addition, this model of extraction has shown to contribute to the violation of Indigenous peoples' human rights, impacts their livelihoods and traditional modes of subsistence, "erodes the basis of their self-determination and, in some cases, endangers their very existence as distinct peoples."<sup>10</sup> Since the activities of extractive industries was identified by the Rapporteur "as one of the most significant sources of abuse of the rights of Indigenous peoples worldwide" during his first mandate,<sup>11</sup> his top priority in his final term as Rapporteur was to clarify and develop standards, guidance, and good practices to assist implementation and operationalization of the standards affirmed in the U.N. Declaration on the Rights of Indigenous Peoples, other international human rights instruments, and the *U.N. Guiding Principles on Business and Human Rights*. Indeed, as Professor Anaya notes, the "growing degree of awareness and assumption of responsibility on the part of States and corporate actors," created an "historical opportunity" to develop an international human rights regulatory regime with respect to corporate social responsibility to Indigenous peoples.<sup>12</sup> What is particularly innovative about his work in this context is the applicability of this responsibility and accountability framework to the similarly situated field of environmental conservation.

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<sup>6</sup> *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, ¶¶ 55-56, 59, 81-85, U.N. Doc. A/HRC/21/47 (Jul. 6, 2012) (by S. James Anaya) [hereinafter *2012 Report*]; *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶ 52. *See also U.N. Guiding Principles*, *supra* note 5, princ. 12.

<sup>7</sup> *See U.N. Guiding Principles*, *supra* note 5, prins. 27-31.

<sup>8</sup> *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, ¶ 81, U.N. Doc. A/HRC/15/37 (July 19, 2010) (by S. James Anaya) [hereinafter *2010 Report*].

<sup>9</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶ 4.

<sup>10</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries Operating Within or Near Indigenous Territories*, ¶ 80, U.N. Doc. A/HRC/18/35 (July 11, 2011) (by S. James Anaya) [hereinafter *Extractive Industries & Indigenous Territories*].

<sup>11</sup> *Id.* ¶ 82.

<sup>12</sup> *Extractive Industries & Indigenous Territories*, *supra* note 10, ¶ 84.

Professor Anaya's recommendations in the extractive industries study argue for a new model of extractive and resource development and provide essential guidance for businesses to interpret and operationalize international standards, principles, and good practices in international human rights law pertaining to Indigenous peoples. This commentary argues that Professor Anaya's study on extractive industries represents a new global benchmark of corporate social responsibility with respect to Indigenous peoples that had hitherto been missing. The framework he presented is transformative because he operationalizes and delineates the relevant human rights standards, principles, and good corporate practices related to Indigenous peoples. Conservation has received relatively little focused attention by the U.N., especially the responsibilities of transnational conservation NGOs. As non-state actors, they are key players and, at times, leading players in designing, implementing, evaluating, monitoring, and advocating for conservation programs and national and global environmental policies, including policies and programs related to food and water security; climate; disaster risk reduction; financing mechanisms; resource development including mitigation and biodiversity offsets; and wildlife, marine and land management; among others. While the *U.N. Guiding Principles and Businesses and Human Rights* are applicable to non-state actors beyond businesses, Professor Anaya's study on extractive industries provides essential guidance for their applicability vis-à-vis conservation NGOs whose work can affect the use, enjoyment, and rights relating to Indigenous peoples' lands, territories, and natural resources. As concerns related to the impacts of conservation activities on Indigenous rights continue to be raised by Indigenous peoples and human rights organizations alike, and increasingly by some CoNGOs themselves, this next global human rights regulatory frontier must be addressed by the intergovernmental system to advance systemic sector reform and standardization of compliance. I argue Professor Anaya's study can catalyze necessary change in this and other sectors, energize implementation, and generate greater awareness of, understanding of, and respect for Indigenous peoples' rights as a core feature of the corporate and NGO social responsibility paradigm.

Part II of this commentary provides a brief overview of the evolution of the international human rights regulatory regime related to non-state actors such as business and transnational conservation NGOs. Part III provides a cursory discussion on conservation non-governmental organizations and on why, in the context of conservation on Indigenous territories (or "Indigenous conservation"), there is a need for a new conservation ethic and practice galvanized around a responsibility and accountability framework to respect human rights. This regime shift includes the need for explicit international standards, dissemination of good practices, and accountability and grievance mechanisms to influence and guide NGO practices on the ground. Even though international norms and principles guiding businesses operating on or near Indigenous territories would apply to other types of private actors, such as NGOs, it is argued that further study and attention by the relevant U.N. Indigenous rights mechanisms is needed to galvanize a global discussion and develop—with the participation of Indigenous

peoples—specific authoritative, standardized guidance, principles, and institutions. Also needed is a coordinated system of international processes related to monitoring, investigation, grievance, and promotion of good practices relating to the responsibilities of conservation NGOs to respect human rights in conservation at all levels, local to global. As it stands, Professor Anaya’s guiding principles, framework, and model for extractive industries, especially as related to the responsibility of non-state actors to Indigenous peoples, provides the basis for advancing a clear and authoritative global Indigenous-rights-based approach to conservation and extractive industries. Part IV highlights key principles and safeguards that have been shown to be exceptionally challenging for extractive industries and conservation NGOs to operationalize and implement. However, Professor Anaya provides compelling, clear reasoning and guidance that can and should facilitate operationalization for adoption into corporate and NGO practices and policies, as well as provide authoritative interpretative guidance for U.N. processes such as the U.N. Working Group on Business and Human Rights. Lastly, I offer concluding remarks on next steps, as well as the impact of Professor Anaya’s work as UNSR in this space.

While the work of all three U.N. Indigenous rights mechanisms—the U.N. Permanent Forum on Indigenous Peoples (UNPFII), the U.N. Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and the U.N. Special Rapporteur—are mutually reinforcing and provide a rich body of authoritative perspectives and work on extractive industries, I will restrict my focus to the final 2013 UNSR thematic report on extractive industries and the three annual update reports to the Human Rights Council on this study from 2010-2012, collectively referred to as Professor Anaya’s study on extractive industries.<sup>13</sup>

## **II. INDIGENOUS PEOPLES AND THE DEVELOPMENT OF A GLOBAL VOLUNTARY-COMPLIANCE HUMAN RIGHTS REGIME FOR EXTRACTIVE INDUSTRIES**

Over the last forty years, a proliferation of reported cases of human rights violations by extractive and energy-related industries and infrastructure development (i.e., hydroelectric dams, road construction, and bridges) demonstrated a pressing need for the creation of global standards to clarify the responsibilities of extractive industries and other non-state actors. This has been a key focus of work at the U.N. and for Indigenous peoples over this time. Since the 1990s—known as the “golden age”<sup>14</sup> of corporate globalization—the debate concerning the responsibilities of businesses in relation to human rights has garnered considerable attention by the U.N., the media, and especially Indigenous peoples. Over the last fifteen years in particular, significant progress has been

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<sup>13</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3; *2012 Report*, *supra* note 6; *Extractive Industries & Indigenous Territories*, *supra* note 10.

<sup>14</sup> JOHN G. RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* xv (2013).

made to develop a global architecture around a system of regulatory and self-regulating compliance human rights mechanisms and policies related to business activities and their social and environmental responsibility. Developments include the U.N.'s endorsement of the 2011 Guiding Principles on Business and Human Rights, which set out the relevant human rights principles and good practices for implementing the "Protect, Respect and Remedy Framework" (2008);<sup>15</sup> the creation of the U.N. Working Group on Business and Human Rights (2011);<sup>16</sup> the U.N. Forum on Business and Human Rights (2011);<sup>17</sup> the U.N. Global Compact

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<sup>15</sup> *U.N. Guiding Principles*, *supra* note 5, at xx.

<sup>16</sup> The Working Group on the issue of human rights and transnational corporations and other business enterprises was endorsed by the Human Rights Council on June 2011 at its 17th session. *See* Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th sess., June 16, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011). The Human Rights Council decided to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts of balanced geographical representation for a period of three years. In June 2014, at its twenty-sixth session, the Human Rights Council decided to extend the Working Group's mandate for a period of three years. Human Rights Council Res. 26/22, Human Rights and Transnational Corporations and Other Business Enterprises, 26th Sess., June 10-27, 2014, U.N. Doc. A/HRC/26/L.1, ¶ 11 (June 23, 2014). It reports annually to the Human Rights Council and its mandate is, among other things, to promote the effective and comprehensive dissemination and implementation of the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*; to identify, exchange, and promote good practices and lessons learned on the implementation of the *Guiding Principles* and make recommendations; to provide support to promote capacity-building in the use of the *Guiding Principles*, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights; and to conduct country visits. *See* Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Apr. 9, 2015).

<sup>17</sup> The U.N. Forum on Business and Human Rights meets annually in Geneva, Switzerland. *See* H.R.C. Res. 17/4, *supra* note 16. The Forum:

is under the guidance of the Working Group on human rights and transnational corporations and other business enterprises to "discuss trends and challenges in the implementation of the Guiding Principles [on Business and Human Rights] and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices.

*United Nations Forum on Business and Human Rights*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/>

(2000),<sup>18</sup> the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (updated in 2011),<sup>19</sup> the Voluntary Principles on Security of Human Rights (2000);<sup>20</sup> the Food and Agricultural Organization (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (2012);<sup>21</sup> the Equator Principles;<sup>22</sup> and the Extractive Industries Transparency Initiative (EITI, 2002-2003);<sup>23</sup> among others. Countries like Canada, which is headquarters to over fifty percent of the world's mining companies as of 2013, have advanced corporate social responsibility (CSR) initiatives, such as Canada's

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UNForumonBusinessandHumanRights.aspx (last visited Apr. 9, 2015) (quoting H.R.C. Res. 17/4, *supra* note 16).

<sup>18</sup> The U.N. Global Compact is endorsed by chief executives and was launched in July 2000. It is a leadership platform based on voluntary implementation to develop, implement, and disclose responsible and sustainable corporate policies and practices, and to align business operations and strategies with ten universally accepted principles in human rights, labor, environment, and anti-corruption. See *Blueprint for Corporate Sustainability Leadership within the Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/resources/229> (last visited Apr. 14, 2015).

<sup>19</sup> ORGANIZATION FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), available at <http://dx.doi.org/10.1787/9789264115415-en>.

<sup>20</sup> The Voluntary Principles on Security and Human Rights were launched in 2000. *Voluntary Principles on Security and Human Rights*, BUS. & HUMAN RIGHTS RESOURCE CENTRE, <http://business-humanrights.org/en/conflict-peace/special-initiatives/voluntary-principles-on-security-and-human-rights> (last visited Apr. 10, 2015). They "are a set of non-binding principles created to assist extractive companies to balance security concerns with human rights." *Id.* They were formed as part of a multi-stakeholder initiative that included representatives from extractive industries, States and NGOs. *Id.*

<sup>21</sup> FOOD & Agric. ORG., VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY IV (2012), available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (promoting secure tenure rights and equitable access natural resources).

<sup>22</sup> The Equator Principles are a "financial industry benchmark for determining, assessing, and managing environmental and social risk in projects." EQUATOR PRINCIPLES (2003), available at [http://equator-principles.com/resources/equator\\_principles\\_III.pdf](http://equator-principles.com/resources/equator_principles_III.pdf).

<sup>23</sup> The Extractive Industries Transparency Initiative (EITI) is a global standard to promote open, transparent, and accountable management of natural resources in resource-rich countries and reduce corruption related to extractive activities. See EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, FACT SHEET (2015), available at [https://eiti.org/files/document/EITI\\_Factsheet\\_EN.pdf](https://eiti.org/files/document/EITI_Factsheet_EN.pdf). But see generally Maryam Jordan, *The Extractive Industries Transparency Initiative: A Critique and Proposed Reforms*, GLOBAL ANTICORRUPTION BLOG (Sep. 14, 2014), <http://globalanticorruptionblog.com/2014/09/05/the-extractive-industries-transparency-initiative-a-critique-and-proposed-reforms/>; MARY ELLA KEBLUSEK, IS EITI REALLY HELPING IMPROVE GLOBAL GOOD GOVERNANCE?: EXAMINING THE RESOURCE CURSE, CORRUPTION, AND NIGERIA'S EITI IMPLEMENTATION EXPERIENCE (2010), available at <http://midprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>.



strategy to strengthen its extractive sector abroad.<sup>24</sup> Similarly, there is also an emerging CSR movement as well as government-sponsored initiatives in “BRICS”<sup>25</sup> countries and in emerging economies like the Philippines, Vietnam, and Indonesia.

In addition, regulatory frameworks governing corporate responsibility to Indigenous peoples have been more fully developed than in other human rights sectors. Multilateral global and regional financial institutions, such as the International Finance Corporation (IFC), the World Bank, the Multilateral Investment Guarantee Agency (MIGA), the European Bank for Reconstruction and Development, the Asian Development Bank, and the Inter-American Development Bank have developed specific policies and performance requirements (called performance standards) “to encourage public or private companies to ensure a minimum level of respect for international Indigenous rights standards in their activities, in such key areas as consulting or territorial rights.”<sup>26</sup> Similarly, as Professor Anaya notes, there are examples of CSR initiatives in sectors such as mining and forestry, as well as multi-sectoral

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<sup>24</sup> DEP’T OF FOREIGN AFFAIRS, TRADE & DEV., *DOING BUSINESS THE CANADIAN WAY: A STRATEGY TO ADVANCE CORPORATE SOCIAL RESPONSIBILITY IN CANADA’S EXTRACTIVE SECTOR ABROAD* (2014), available at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced\\_CS\\_Strategy\\_ENG.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf).

<sup>25</sup> BRICS is an acronym that refers to the emerging advanced economic development of newly industrialized countries of Brazil, Russia, India, China, and South Africa. They share a common characteristic of a fast-growing economy and increasing influence on the regional and global stage. See United Nations, *CSR and Developing Countries: What Scope for Government Action?*, SUSTAINABLE DEV. INNOVATION BRIEFS Feb. 2007, at 1, 2.

<sup>26</sup> *2010 Report*, *supra* note 8, ¶ 41. See also OP 4.10—Indigenous Peoples, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (last visited Apr. 10, 2015); MULTILATERAL INVESTMENT GUARANTEE AGENCY, *PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY* 38-43 (2013), available at [http://www.miga.org/documents/performance\\_standards\\_env\\_and\\_social\\_sustainability.pdf](http://www.miga.org/documents/performance_standards_env_and_social_sustainability.pdf) (Performance Standard 7); INT’L FIN. CORP., *PERFORMANCE STANDARD 7: INDIGENOUS PEOPLES* (2012), available at [http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES); INT’L FIN. CORP., *GUIDANCE NOTE 7: INDIGENOUS PEOPLES* (2012), available at [http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bf a336b93d75f/Updated\\_GN7-2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bf a336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES); *Indigenous Peoples*, ASIAN DEV. BANK, <http://www.adb.org/site/safeguards/Indigenous-peoples> (last visited Apr. 10, 2015); INTER-AMERICAN DEV. BANK, *OPERATIONAL POLICY ON INDIGENOUS PEOPLES AND STRATEGY FOR INDIGENOUS DEVELOPMENT* (2006), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2032081>; EUROPEAN BANK FOR RECONSTRUCTION & DEV., *ENVIRONMENTAL AND SOCIAL POLICY 50-57* (2008), available at <http://www.ebrd.com/downloads/research/policies/2008policy.pdf>.

initiatives that recognize responsibility and include standards for respecting and promoting Indigenous rights.<sup>27</sup>

These policy and practice initiatives signify a broader political, legal, and cultural shift towards a “growing awareness”<sup>28</sup> and an increasing “social expectation”<sup>29</sup> for corporations to take a proactive approach to balance sustainable development, respect for human rights, and good social and environmental practices with economic prosperity at all costs. Nevertheless, despite these significant institutional and normative responses by the U.N., multilateral agencies, and international industry associations, compliance with these responsibilities and measurable changes in practice have yet to be fully realized.

Over this same period, the U.N. has also established a number of mechanisms that uphold and support the human rights of Indigenous peoples, such as the adoption of the U.N. Declaration in 2007,<sup>30</sup> the establishment of the UNPFII,<sup>31</sup> the EMRIP,<sup>32</sup> and the UNSR mandate.<sup>33</sup> These significant

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<sup>27</sup> See *2010 Report*, *supra* note 8, ¶ 42. See also, e.g., FOREST STEWARDSHIP COUNCIL, FSC PRINCIPLES AND CRITERIA FOR FOREST MANAGEMENT (2002). Principle 3 of Forest Rules Management requires the forest owner or manager respect Indigenous peoples’ rights “to identify and uphold Indigenous peoples’ rights of ownership and use of land and resources.” *The 10 Principles*, FOREST STEWARDSHIP COUNCIL, <https://ic.fsc.org/the-ten-principles.103.htm> (last visited Apr. 14, 2015). See also Forest Stewardship Council, POLICY FOR THE ASSOCIATION OF ORGANIZATIONS WITH FSC (2011). In addition, the multi-sectoral Global Reporting Initiative (GRI) also includes Indigenous rights in its guidelines for the voluntary submission of sustainability reports, especially in relation to the mining and metals sector. GLOBAL REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES: REPORTING PRINCIPLES AND STANDARDS DISCLOSURES (2013), available at <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>. The International Council on Mining and Metals (ICMM), a global umbrella organization for mining and metals companies, circulated a 2015 revised draft for comment on their Indigenous peoples and good practice mining guide. INT’L COUNCIL ON MINING & METALS, GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING (2d ed. 2015). Compare with INT’L COUNCIL ON MINING & METALS, GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING (2010), available at <http://www.icmm.com/document/1221>.

<sup>28</sup> *Extractive Industries & Indigenous Territories*, *supra* note 10, ¶ 84.

<sup>29</sup> *2010 Report*, *supra* note 8, ¶ 34.

<sup>30</sup> See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GOAR, 61st Sess., U.N. Doc. A/RES/61/295 (Sep. 13, 2007). The U.N. Declaration represents the highest standard in international law representing the minimum standards for the well-being and dignity of the world’s Indigenous peoples. It is unique for having been jointly drafted and consented to by States and Indigenous representatives. In addition, for a comprehensive analysis of the development of international law and human rights system dealing with Indigenous peoples, see S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004).

<sup>31</sup> The Permanent Forum was established by the United Nations Economic and Social Council, E.S.C. Res. 2000/22, U.N. Doc. E/RES/2000/22 (July 28, 2000).

<sup>32</sup> The Expert Mechanism on the Rights of Indigenous Peoples was created by Human Rights Council Res. 6/36, A/HRC/6/36 (Dec. 14, 2007). The Mechanism made-up of five experts, including Indigenous persons, is an advisory body to the Human Rights

international developments demonstrate the relevance and importance of Indigenous peoples to the realization of the goals and aims of the U.N. itself, as well as the vulnerability to their substantive and procedural rights in the context of extractive industries, large-scale development on their territories, and other activities, such as large-scale conservation initiatives impacting their rights to their lands, territories, and natural resources.

Indigenous peoples themselves have been central to advancing the global discussion on corporate responsibility to respect the rights of Indigenous peoples. At the first International Conference on Indigenous Peoples and Mining in London, in 1996, the Indigenous Peoples' Declaration on Mining highlighted the conflicts occurring between Indigenous peoples and corporations, and other human rights violations such as resource development without consent, land dispossession, and environmental degradation. Thirteen years after that first global meeting, without much amelioration in the relationship between extractive companies and Indigenous peoples, Indigenous peoples met in Manila in March 2009 for the International Conference on Extractive Industries and Indigenous Peoples. The outcome of that meeting, the Manila Declaration, reaffirmed Indigenous peoples as rights holders, called for a review of all on-going mining projects that have been approved without free, prior, and informed consent, and restitution, compensation, and restoration of degraded lands, among other things.<sup>34</sup> It also requested then-Special Representative of the U.N. Secretary General, Professor John Ruggie, and U.N. Working Group on Business and Human Rights and Transnational Corporations and Other Businesses to “actively engage with impacted Indigenous communit[ies] through workshops addressing Indigenous peoples' rights and the extractive industry, and together with other U.N. procedures, bodies and agencies, promote the enactment of legislation in home states of transnational corporations that provides for extraterritorial jurisdiction in

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Council. It provides expertise on issues related to the rights of Indigenous peoples primarily through thematic studies and it may propose topics for study to the HRC.

<sup>33</sup> Human Rights Council Res. 15/14, A/HRC/RES/15/14 (Oct. 6, 2010). In 2001, the then-Commission on Human Rights, now the Human Rights Council, appointed a Special Rapporteur on the rights of Indigenous peoples as part of the system of thematic Special Procedures.

<sup>34</sup> Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples (Mar. 23-35, 2009), *available at* [http://www.ciel.org/Publications/Declaration\\_Manila\\_Mar09.pdf](http://www.ciel.org/Publications/Declaration_Manila_Mar09.pdf). For a history of Indigenous peoples activities around the issues surrounding extractive industries, an analysis of a range of local and global responses by Indigenous peoples to these issues, and a discussion of the aims and goals of the Manila Conference, see PITFALLS & PIPELINES: INDIGENOUS PEOPLES AND EXTRACTIVE INDUSTRIES (Andy Whitmore ed., 2012) (especially forward and chapter 1). *See also*, INT'L WORK GRP. ON INDIGENOUS AFFAIRS, INDIGENOUS PEOPLES, TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (2012), *available at* [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0566\\_BRIEFING\\_2.pdf](http://www.iwgia.org/iwgia_files_publications_files/0566_BRIEFING_2.pdf).

relation to their activities.”<sup>35</sup> Given slow progress on improving corporate responsibility to respect Indigenous rights in extractive and related enterprises, Indigenous peoples turned to the U.N. Working Group on Business and Human Rights to refocus its attention on extractive industries and Indigenous peoples, and to develop specific recommendations in line with their human rights. It was also taken up as a focus of study by the three U.N. Indigenous rights mechanisms: the U.N. Special Rapporteur on the Rights of Indigenous Peoples, the U.N. Expert Mechanism on the Rights of Indigenous Peoples, and the U.N. Permanent Forum on Indigenous Rights.

The U.N. Permanent Forum on Indigenous Issues appointed three of its members as Special Rapporteurs in 2007 to conduct a study on Indigenous Peoples and corporations; this study was submitted at the tenth session of the UNPFII in May 2011.<sup>36</sup> The study recommended, inter alia, cataloguing good corporate practices on Indigenous territories; assessing the impacts of the practices of corporations and international lending institutions that fund programs and projects on Indigenous territories; ensuring Indigenous participation in the creation of regulatory frameworks in line with the principle of free, prior, and informed consent; ensuring fair and tangible benefits to Indigenous peoples; ranking corporations according to their adherence to corporate social responsibility frameworks and Indigenous rights; publishing a hotlist of companies that violate Indigenous rights; creating a periodic project impact assessment mechanism; and creating a tripartite conflict resolution organization composed of Indigenous peoples, States, and corporations.<sup>37</sup> It also requested the UNSR to include in his annual reports an evaluation of both positive and negative corporate practices of businesses operating on Indigenous lands and territories, a suggestion which was incorporated in the UNSR’s 2013 report on extractive industries.

Similarly, the Expert Mechanism on the Rights of Indigenous Peoples, in coordination with the work of the U.N. Special Rapporteur and UNPFII, examined Indigenous peoples’ right to participate in decision-making in the context of extractive industries. EMRIP also provided comments and advice to the U.N. Working Group on Human Rights and Businesses in respect to this right and

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<sup>35</sup> Permanent Forum on Indigenous Issues, May 18-29, 2009, *Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples’ Rights and Corporate Social Responsibility*, U.N. Doc. E/C.19/2009/CRP. 8 (May 4, 2009).

<sup>36</sup> Permanent Forum on Indigenous Issues, May 16-27, 2009, *Study on Indigenous Peoples and Corporations to Examine Existing Mechanisms and Policies Related to Corporations and Indigenous Peoples and to Identify Good Practices*, U.N. Doc. E/C.19/2011/12 (Mar. 10, 2011) [hereinafter *Study on Indigenous Peoples and Corporations*]. In addition, the UNPFII secretariat prepared an analysis report on “economic and social development, the environment and free, prior, and informed consent” in 2011 at the 10<sup>th</sup> session. Permanent Forum on Indigenous Issues, May 16-27, 2011, *Analysis Prepared by the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Economic and Social Development, the Environment and Free, Prior and Informed Consent*, ¶ 1, U.N. Doc. E/C.19/2011/13 (Mar. 15, 2011).

<sup>37</sup> *Study on Indigenous Peoples and Corporations*, *supra* note 36, ¶¶ 57-66.

provided an initial review of the Guiding Principles on Business and Human Rights and the Protect, Respect, and Remedy framework, which, taken together, contributed to the global understanding and interpretation of international human rights law as it relates to Indigenous peoples and extractive industries.<sup>38</sup>

This evolving corporate and consumer consciousness regarding corporate social responsibility is rooted in the gains of the international human rights system over the last forty years to create a comprehensive framework based on existing international environmental, human rights, labor, humanitarian and other standards, norms, and practices that would enhance transparency, accountability, and outline the responsibilities of business in relation to human rights.<sup>39</sup> In 2003, the U.N. Sub-Commission on the Promotion and Protection of Human Rights approved the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms).<sup>40</sup> The Draft Norms set out human rights standards and obligations for companies ranging from civil, political, economic, social, and cultural rights, as well as obligations regarding sustainable development, environmental practices, and the rights of workers. They also sought to impose binding or non-voluntary obligations on companies akin to those belonging to States. However, while the Draft Norms acknowledges States as having the “primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human

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<sup>38</sup> See Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Comment on the Human Rights Council’s Guiding Principles on Business and Human Rights as Related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries, U.N. Doc. A/HRC/EMRIP/2012/CRP.1 (July 4, 2012); Human Rights Council, Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-making, with a Focus on Extractive Industries, U.N. Doc. A/HRC/21/55 (Aug. 16, 2012); Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Compilation of Recommendations, Conclusions and Advice from Studies Completed by the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/EMRIP/2013/CRP.1 (July 4, 2013); Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-making U.N. Doc. A/HRC/18/42 (Aug. 17, 2011).

<sup>39</sup> For a review of the emergence of new human rights norms related to transnational corporations, see Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 2, 279-98; David Weissbrodt, *UN Perspectives on “Business and Humanitarian and Human Rights Obligations,”* in PROCEEDINGS OF THE 101ST ANNUAL MEETING 135, 135-39 (2006); Nina Seppala, *Business and the International Human Rights Regime: A Comparison of UN Initiatives*, 87 J. BUS. ETHICS 401 (2009); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901 (2003).

<sup>40</sup> Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (Aug. 26, 2003).

rights . . . as organs of society,”<sup>41</sup> transnational corporations would also have the responsibility of promoting and securing the human rights<sup>42</sup> within their “respective spheres of activity and influence.”<sup>43</sup> What these spheres of influence meant in practice remains unclear. However, the strong accountability framework, which included independent mechanisms for monitoring, reporting, and financial transparency “made it the most comprehensive document on business and human rights”<sup>44</sup> that has been proposed to date.

Had the U.N. endorsed the Norms, it would have also strengthened enforcement, monitoring, and governance mechanisms over corporate behavior. As it stands, the current *Guiding Principles* are voluntary, or “non-binding,” which can mean they are less effective due to self-policing of compliance, despite being endorsed by the Human Rights Council. They are the focus of the work of the U.N. Working Group on Business and Human Rights or U.N. Forum on Business and Human Rights, which both also lack formal monitoring or accountability mechanisms in their work related to promotion and implementation of the *Guiding Principles*. In the end, the Draft Norms petered out in 2004 without having had a vote on them by the then-U.N. Commission on Human Rights (U.N. Commission) due to a lack of consensus and agreement on the Draft Norms by various stakeholders. The U.N. Commission instead affirmed that, as a draft, the norms had no legal standing, and it recommended further stakeholder engagement and review of options to strengthen and implement standards for corporate responsibility.<sup>45</sup> As a result, soon thereafter in 2005, the U.N. Secretary-General appointed Professor John Ruggie as Special Representative with the goal of moving beyond the gridlock over clarifying the roles and responsibilities of governments, corporations, and civil society to respect human rights in business activities. In 2008, after extensive research and multi-stakeholder consultations, the Human Rights Council endorsed the Special Representative’s Protect, Respect and Remedy framework and, subsequently in 2011, his *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*.<sup>46</sup> The *Framework* and *Guiding Principles* clarified and differentiated the human rights responsibilities and duties of States and companies while providing a framework to develop and refine good practices and accountability mechanisms over time. With the endorsement of the Human Rights Council in 2011, the *Guiding*

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<sup>41</sup> *Id.*, pmb1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, ¶ 1.

<sup>44</sup> Mantilla, *supra* note 39, at 286.

<sup>45</sup> See Office of the High Comm’r for Human Rights Dec. 2004/116, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/2004/L.11/Add.7, ¶ (c) (2004).

<sup>46</sup> See, e.g., Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS, 385 (2009); JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013) (discussing the history of the *U.N. Guiding Principles* from the perspective of the drafter).

*Principles* became the authoritative global standard for preventing human rights violations in activities of businesses. The authoritative weight of the *Guiding Principles* is seen their by their adoption and endorsement “by inter-governmental bodies, industry associations, international organizations, and multi-stakeholder initiatives and incorporate[ion] in some instances into legislation and national action plans.”<sup>47</sup>

However, while the *Guiding Principles* are an important development in the global CSR and international human rights regulatory architecture, they did not address Indigenous rights in specific. The *Guiding Principles* acknowledge that “[d]epending on circumstances, business enterprises may need to consider additional standards.”<sup>48</sup> As such, Professor Anaya’s efforts to develop a framework for corporations around the *Guiding Principles* as they relate to Indigenous peoples’ rights was essential to advancing both corporate learning and assessing corporate practices vis-à-vis the key principles, standards, and good practices outlined in his thematic study on extractive industries. He aimed to create a “useful tool” for Indigenous peoples, governments, and corporate actors. Indeed, his framework provided the needed clarity and definition of key principles such as consultation; free, prior, and informed consent; due diligence; and shared benefits as it relates to corporate responsibility to respect the human rights of Indigenous peoples.<sup>49</sup> Given the “urgent need to reach a minimum understanding of what corporate responsibility is with regard to the rights of Indigenous peoples,”<sup>50</sup> as Professor Anaya notes, his guidance is also relevant for other non-state actors, such as large-scale international conservation NGOs, whose operations and activities can have similar impacts on Indigenous peoples’ rights, livelihoods, and well-being.

### **III. EMERGENT FRONTIERS IN GOVERNING THE GLOBAL INDIGENOUS “COMMONS”: THE NEED FOR A GLOBAL REGULATORY FRAMEWORK CLARIFYING THE HUMAN RIGHTS RESPONSIBILITIES OF CONSERVATION NGOS**

At a 2013 international conference on Indigenous conservation, Professor Anaya in his keynote address remarked on “the advances and ongoing challenges worldwide for implementation of the internationally recognized rights of Indigenous peoples, especially in the context of land and natural resource

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<sup>47</sup> WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., SCALING UP ACTION FOR HUMAN RIGHTS: OPERATIONALIZING THE UN GUIDING PRINCIPLES ON BUSINESSES AND HUMAN RIGHTS 5 (2014), available at <http://www.aim-progress.com/files/85/wbcds--scaling-up-action-on-human-rights--issue-brief.pdf>.

<sup>48</sup> *U.N. Guiding Principles*, *supra* note 5, princ. 12, cmt.

<sup>49</sup> *Extractive Industries & Indigenous Territories*, *supra* note 10, ¶ 78.

<sup>50</sup> *2010 Report*, *supra* note 8, ¶ 32.

conservation programs.”<sup>51</sup> Similarly, at the sixth World Parks Congress in Sydney in 2014, current Special Rapporteur Vicky Tauli-Corpuz, who has long been involved in global climate, environmental, and conservation policy and practice discussions, called for greater global attention to the impacts of conservation on the human rights and well-being of Indigenous peoples with the aim to improve conservation practices and accountability.<sup>52</sup> She also aims to provide a “state of the field” report on conservation and Indigenous peoples at the next World Conservation Congress in Hawaii in 2016.<sup>53</sup>

Professor Anaya’s study on extractive industries is especially instructive for the conservation sector and, in particular, for international conservation NGOs.<sup>54</sup> As increasing attention is placed on the growing role and influence of

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<sup>51</sup> James Anaya, Keynote Address at the World Indigenous Network Conference: Conservation Efforts Should Advance Rights of Indigenous Peoples, (May 29, 2013), available at <http://unsr.jamesanaya.org/videos/interview-at-the-world-Indigenous-network-conference-2013>.

<sup>52</sup> More recently, Special Rapporteur Tauli-Corpuz testified to the Inter-American Court on Human Rights in February 2015. She stated that Governments must “fully recognize and respect Indigenous Peoples’ rights when implementing conservation and biodiversity initiatives” as “conservation projects have too often involved governments seizing and nationalizing Indigenous territories and subjecting the people who managed them to impoverishment, cultural deterioration, and other severe human rights violations.” Press Release, Vicky Tauli-Corpuz, U.N. Special Rapporteur on the Rights of Indigenous Peoples, UN Special Rapporteur: Conservation Policies Must Fully Respect Indigenous Peoples’ rights, available at <http://unsr.vtaulicorpuz.org/site/index.php/en/press-releases/58-unsrip-conservation-policies> (last visited Apr. 11, 2015). At the time of publishing, Ms. Tauli-Corpuz is also a current board member of Conservation International. See *Board of Directors*, CONSERVATION INT’L, <http://www.conservation.org/about/Pages/board-of-directors.aspx> (last visited Apr. 11, 2015).

<sup>53</sup> Victoria Tauli-Corpuz, U.N. Special Rapporteur on the Rights of Indigenous Peoples, Statement at the 14th U.N. Permanent Forum on Indigenous Issues (Apr. 21, 2015).

<sup>54</sup> The International Institute for Environment and Development (IIED) and Natural Justice has undertaken significant work addressing accountability, transparency, and responsibility among conservation actors. See, e.g., HARRY JONAS, DILYS ROE & JAE E. MAKAGON, HUMAN RIGHTS STANDARDS FOR CONSERVATION: AN ANALYSIS OF RESPONSIBILITIES, RIGHTS AND REDRESS FOR JUST CONSERVATION, IIED Research Report (Nov. 2014), <http://pubs.iied.org/14644IIED>; JAE E. MAKAGON, HARRY JONAS & DILYS ROE, HUMAN RIGHTS STANDARDS FOR CONSERVATION, PART I: TO WHICH CONSERVATION ACTORS DO INTERNATIONAL STANDARDS APPLY?, IIED Discussion Paper (July 2014), <http://pubs.iied.org/14631IIED>; HARRY JONAS, DILYS ROE & ATHENE DILKE, HUMAN RIGHTS STANDARDS FOR CONSERVATION, PART II: WHICH INTERNATIONAL STANDARDS APPLY TO CONSERVATION INITIATIVES, IIED Discussion Paper (Nov. 2014), <http://pubs.iied.org/14645IIED.html>; and JAE E. MAKAGON, HUMAN RIGHTS STANDARDS FOR CONSERVATION, PART III: WHICH REDRESS MECHANISMS ARE AVAILABLE TO PEOPLES AND COMMUNITIES AFFECTED BY CONSERVATION INITIATIVES?, IIED Discussion Paper (Nov. 2014), <http://pubs.iied.org/14646IIED>. See also Jael E. Makagon, Harry Jonas & Dilys Roe, *Upholding Human Rights in Conservation: Who is Responsible?*, IIED BRIEFING (Sep. 2014), <http://pubs.iied.org/17254IIED>, and Dilys Roe et al., *Conservation*



international NGOs, especially in environmental, conservation, and development sectors, many are viewing NGOs as having more in common with “private corporations than to any existing political institution.”<sup>55</sup> Robert Blood further argues:

the corporate model has given NGOs important advantages with which they have “out-competed” traditional political institutions to win greater public influence, awareness and trust. In the increasingly important arena of supranational politics and treaty organisations, NGOs have exploited the flexibility of their corporate structure to become the *sole players apart from governments*. Thus NGOs are, in effect, the *political analogues* of that other highly successful late 20th institution, *corporations*, sharing not only their strengths, but also their weaknesses.<sup>56</sup>

As a such, conservation NGOs play an important, if not central role in identifying, designing, implementing, evaluating, monitoring, and financing conservation initiatives, as well as advising governments, international organizations (such as U.N. agencies and multilateral financial organizations), corporations, and funders (including foundations and philanthropic donors).<sup>57</sup> As more States retrench their role and financial involvement in key policy areas, often due to fiscal austerity measures, limited technical capacity, or competing public policy choices, the influence of NGOs will increase as they fill in the governance gap. This is especially the case for conservation NGOs given the technical specialization, investment in science, access to diverse sources of financing, relationships on the ground (including local implementing partners), and other expertise they can bring without having to expand the public sector.

This increased influence can have important human rights implications, especially regarding livelihoods, access to territories, cultural survival, tenure rights, traditional medicines, and water and food systems, should environmental NGOs fail to fully respect the rights of Indigenous peoples in their operations.<sup>58</sup> Indeed, as CoNGOs fill an environmental (and human development) governance gap, the democratic accountability gap widens. That is, CoNGOs occupy a quasi-governance role where they are neither State nor exclusively in the private sphere, yet they do not have the direct democratic accountability to citizens that are

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*and Human Rights: The Need for International Standards*, IIED BRIEFING (May 2010), <http://pubs.iied.org/pdfs/17066IIED.pdf>.

<sup>55</sup> Robert Blood, *Should NGOs Be Viewed as “Political Corporations”?*, 9 J. COMM. MGMT. 120 (2004).

<sup>56</sup> *Id.* at 120 (emphasis added).

<sup>57</sup> See WORLD BANK, *NGOS AND THE BANK: INCORPORATING FY95 PROGRESS REPORT ON COOPERATION BETWEEN THE WORLD BANK AND NGOS* (1996).

<sup>58</sup> *NGOS AND SOCIAL RESPONSIBILITY* xiv (Güler Aras & David Crowthe eds., 2010).

affected by their efforts. In this respect, CoNGOs have largely existed in an unaccountable or unregulated bubble. While conservation can significantly improve the lives and well-being of people by safeguarding nature, the inverse is also true if their efforts do not fully respect human rights. Therefore, since CoNGOs are increasingly involved in governing the global commons, a large part of it on Indigenous territories, addressing the accountability and Indigenous governance gap over their territories is essential to the fulfillment and realization of the human rights of Indigenous peoples. Greater regulatory clarity would lead to conservation being more accountable, transparent, and sustainable; to reduction in conflict; and to enhancing the diplomatic role that sound environmental management can have on human development goals, peace, and sustainable development. In short, the regulatory vacuum in which conservation NGOs have largely operated increases legal, financial investment, reputational, and organizational risks while limiting the opportunities, benefits, and constituency for conservation that human-rights-based conservation can engender.

### **A. Indigenous Peoples and Conservation and the “FRESCH” Approach**

Since conservation activities often take place on or near Indigenous territories and waterways, CoNGOs are increasingly engaging Indigenous peoples and their communities as “partners” in conservation. Likewise, Indigenous peoples are increasingly integrating conservation programming into their long-term governance plans and seeking technical and financial assistance from CoNGOs given the realities of having to address complex grand challenges such as climate change, degradation, contamination, and competing uses and wants over their territories (e.g., energy development, illegal logging, illegal occupation to clear forests for ranching, et cetera). As these have cumulative impacts on their livelihoods, food and water security, and overall ecosystem health, they often require partnerships with civil society and other actors. They also often involve expensive and complex legal or bureaucratic processes, policy development, and political arrangements, particularly when tenure and communal property rights are at stake.

Nevertheless, there has been a spate of global and regional networks and initiatives to scale up and share good practices in local Indigenous conservation, climate mitigation and adaption, and sustainable development innovations. Examples include the World Indigenous Network of Indigenous and Local Community Land and Sea Managers (WIN)<sup>59</sup> and First Stewards<sup>60</sup>—both of

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<sup>59</sup> World Indigenous Network of Indigenous and Local Community Land and Sea Managers was conceived by Indigenous peoples in Australia and the Government of Australia in 2013 as a global network to exchange good practices, traditional knowledge and local solutions for the conservation of ecosystems and biodiversity, the sustainable use of protected natural areas, and food security of Indigenous peoples of Africa, Asia, Latin America, North American, and Pacific regions. Since its first meeting in Darwin, Australia in May 2013, WIN became an official part of the United Nations “after the government of

which were created by Indigenous peoples—and the UNDP’s Equator Initiative.<sup>61</sup> In addition, despite anemic government, NGO, and U.N. funding to support Indigenous peoples’ attendance at international meetings, Indigenous peoples have also been steadily ramping up participation and mobilization in global environmental policy decision-making as well as international standard-setting processes related to climate change, food and water security, biodiversity conservation, and protected areas, to name a few.

Notwithstanding increasing participation in global and regional environmental decision-making fora, and in conservation in general, Indigenous peoples have had a tenuous history with conservation. Conservation can be defined as the protection, preservation, management, or restoration of critical habitats (e.g., lands, waters, plants, and animals), and natural resources, especially those threatened by human activities, so they can be available for continued use and enjoyment in the future. Conservation efforts also include taking steps to protect the planet from the harmful effects of human activity (through mechanisms like protected areas, climate mitigation, and adaptation), natural hazards (such as the mitigating the effects of hurricanes on coastal communities), contaminants, and degradation (i.e., climate change, resource extraction, and infrastructure development).

Five main types of conservation actors usually undertake this work: national governments (and their agencies such as national wildlife, fisheries, or park services); intergovernmental organizations (such as U.N. agencies or global financial institutions); private actors such as conservation NGOs (at the local, national, regional, and international levels); philanthropic foundations; and individual donors. Two other categories of actors, Indigenous peoples (as well as

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Australia handed over its management to the Equator Initiative of the United Nations Development Programme (UNDP).” *About*, WORLD INDIGENOUS NETWORK, <http://www.winism.net/about/> (last visited Apr. 11, 2015).

<sup>60</sup> First Stewards was created to “unite Indigenous voices to collaboratively advance adaptive climate change strategies to sustain and secure our cultures and strengthen America’s resiliency and ability to adapt to climate change by holding symposia, and cultivating sustainable projects and educational opportunities within Indigenous communities.” *Mission & Vision*, FIRST STEWARDS, <http://www.firststewards.org/vision--mission.html> (last visited Apr. 11, 2015).

<sup>61</sup> Equator Initiative (EI), a program of the U.N. Development Programme, “brings together the United Nations, governments, civil society, businesses, and grassroots organizations to recognize and advance local sustainable development solutions for people, nature and resilient communities.” *What We Do*, EQUATOR INITIATIVE, <http://www.equatorinitiative.org/index.php?lang=en> (last visited Apr. 11, 2015). It seeks to acknowledge successful initiatives, create platforms to share knowledge and good practices, inform policy that supports Indigenous and local community initiatives, and invests in capacity-development for scalable impact. *Id.* The Equator Initiative awards a prize every two years, recognizing twenty-five notable local sustainable development projects, many of which are awarded to Indigenous peoples’ organizations. *Id.*; *Equator Prize 2014*, EQUATOR INITIATIVE, [http://www.equatorinitiative.org/index.php?option=com\\_content&view=article&id=767&Itemid=890&lang=en](http://www.equatorinitiative.org/index.php?option=com_content&view=article&id=767&Itemid=890&lang=en) (last visited Apr. 11, 2015).

non-Indigenous local communities) and corporate actors, are also becoming increasingly involved in conservation activities. For the most part, the “standard scenario” of conservation is led by NGOs or States (or both) who promote, (and often proceed with) conservation programming within Indigenous territories, at times including land purchase or easements, or exercising management decisions in conjunction with governments, which exclude or limit the access of Indigenous peoples from their traditional territories (such as certain forms of protected areas).<sup>62</sup> Under this scenario, Indigenous peoples face similar concerns regarding the lack of or limited inclusion, consultation (and consent), benefits, conflict-resolution mechanisms, and respect for tenure or Indigenous rights recognition that often occurs in large-scale conservation as it does in natural resource extraction activities within Indigenous territories. The nature and scale of the projects of both types of enterprises are similar in terms of process, scope, and potential impacts to Indigenous rights.<sup>63</sup>

The long history of inappropriate conservation practices causing serious human rights violations, such as some types of protected areas,<sup>64</sup> have resulted in dispossession, displacement, forced relocation, or restricted access and use of traditional lands, territories, and natural resources. Indeed, the modern conservation movement, starting with the creation of the National Parks system in the United States in the late 1800s is rooted in forced expulsion of Indigenous peoples off of their lands.<sup>65</sup> During this era, traditional knowledge was dismissed as “folklore,” and their title, treaties, and other constructive arrangements were not recognized. Indigenous peoples were forcibly evacuated and expelled from their lands, their livelihoods destroyed, and their rights to their territories completely ignored or, in some cases, believed to not have ever existed, as the dominant Westphalian view of sovereignty and nation-statehood and the legacy of colonialism delegitimized and discounted Indigenous peoples’ view of sovereignty and self-determination over their own territories. This was known as the Yellowstone (or fortress) model, coined after the first U.S. National Park created in California in 1872. Under this imposed and exclusionary model of conservation, people and culture were seen as a barrier to protecting nature, despite Indigenous peoples having lived sustainably on their lands from time immemorial. Examples of fortress conservation are still seen today, with egregious examples including land dispossession, loss of livelihoods, and

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<sup>62</sup> See GUIDELINES FOR APPLYING PROTECTED AREA MANAGEMENT CATEGORIES 2013 (Nigel Dudley ed., 2013); GUIDELINES FOR APPLYING PROTECTED AREA MANAGEMENT CATEGORIES TO MARINE PROTECTED AREAS (2012); *IUCN Protected Area Categories System*, INT’L UNION FOR CONSERVATION OF NATURE, [http://www.iucn.org/about/work/programmes/gpap\\_home/gpap\\_quality/gpap\\_pacategories/](http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/) (last updated Jan. 15, 2014).

<sup>63</sup> See *Extractive Industries & Indigenous Peoples*, *supra* note 3, pts. III, IV.

<sup>64</sup> See *Mission & Vision*, *supra* note 60.

<sup>65</sup> MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARK* (1999). See also ROBERT H. KELLER & MICHAEL F. TUREK, *AMERICAN INDIANS AND NATIONAL PARKS* (1999); KARL JACOBY, *CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION* (2014).

exclusion from decision-making in the creation of national parks, wildlife reserves and refuges, protected areas, World Heritage Sites, and other conservation practices.<sup>66</sup>

The fortress model is completely at odds with a human-rights-based approach to conservation. Moreover, it is also widely seen as unsustainable and conflict-ridden, and thus an inefficient and ineffective approach to conservation. The failure to recognize Indigenous rights and their role in the management, use, and conservation of biodiversity has led to deepening poverty, loss of culture, expropriation, marginalization, loss of livelihoods, conflict, and food and water insecurity, among other harmful impacts.<sup>67</sup> Despite this history, over the last ten years, at the level of global conservation policy, there is a growing recognition of the role of Indigenous peoples in conservation and the importance of respecting Indigenous rights. For instance, the 2014 International Union of Conservation of Nature (IUCN) World Parks Congress, the decennial global meeting which sets the global agenda on land and sea protected area management, included a strategy for respecting the rights of Indigenous peoples including forms of tenure, inclusion in decision-making and management of their lands, and respect for traditional knowledge and culture in protected areas.<sup>68</sup> Similarly, the IUCN World

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<sup>66</sup> For example, the Endorois of Lake Bogoria in the Rift Valley of Kenya, the Sengwer evictions from the Embobut forest in Kenya, or the Kaliña and Lokono Peoples of Suriname. See Centre for Minority Rights Dev. (Kenya) & Minority Rights Grp. Int'l (on behalf of Endorois Welfare Council) v. Kenya, 276/2003, Afr. Comm'n on Human & Peoples' Rights (2010), available at [http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46_276_03_eng.pdf); Kaliña & Lokono Peoples v. Suriname, Petition 198-07, Inter-Am. Comm'n H.R., Report No. 76/07. See also Victoria Tauli-Corpuz, Expert Testimony of the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, Before the Inter-American Court of Human Rights (IACHR) on the Case of Kaliña and Lokono Peoples vs. the Government of Surinam (Feb. 3, 2015), available at <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/56-testimony-case-surinam>.

<sup>67</sup> See, e.g., Daniel Brockington & James Igoe, *Eviction for Conservation: A Global Overview*, 4 CONSERVATION & SOC'Y 424 (2006); DAN BROCKINGTON ET AL., NATURE UNBOUND: CONSERVATION, CAPITALISM AND THE FUTURE OF PROTECTED AREAS (2008); DAN BROCKINGTON, FORTRESS CONSERVATION: THE PRESERVATION OF THE MKOMAZI GAME RESERVE, TANZANIA (2002); ROSALEEN DUFFY, NATURE CRIME: HOW WE'RE GETTING CONSERVATION WRONG (2010); MARK DOWIE, CONSERVATION REFUGEES: THE HUNDRED-YEAR CONFLICT BETWEEN GLOBAL CONSERVATION AND NATIVE PEOPLES (2009); MARCUS COLCHESTER, SALVAGING NATURE: INDIGENOUS PEOPLES, PROTECTED AREAS AND BIODIVERSITY CONSERVATION (2003). For an opposing view, see Kathy McKinnon, *Are We Really Getting Conservation So Badly Wrong?*, PLOS BIOLOGY, Jan. 2011, (reviewing DUFFY, *supra*).

<sup>68</sup> See SUMMARY OF THE 2014 INTERNATIONAL UNION FOR CONSERVATION OF NATURE (IUCN) WORLD PARKS CONGRESS (WPC) 2014, INT'L INST. FOR SUSTAINABLE DEV. (2014), available at <http://www.iisd.ca/download/pdf/sd/crsvol89num16e.pdf>. The "Promise of Sydney" is the outcome document of the decennial IUCN World Parks Congress and lays out the strategy, commitments, and approaches to safeguarding the planet's natural assets over the next ten years. See *The Promise of Sydney: Innovative*

Conservation Congress (a quadrennial global meeting to discuss pressing environmental and development challenges, which includes government, the public sector, non-governmental organizations, business, U.N. agencies, and social organizations) has increasingly recognized the role and interests of Indigenous peoples in conservation, called for the implementation of the U.N. Declaration on the Rights of Indigenous Peoples, and to respect Indigenous rights in conservation more generally, among other resolutions which recognize Indigenous peoples' concerns and rights related to conservation.<sup>69</sup> While this recognition of a new conservation ethic—by the world's largest conservation organization consisting of governments and conservation NGOs as members and a network of over 11,000 conservation scientists and other experts—is certainly a step in the right direction, there is still a marked gap between policy and the ground conservation practice more broadly.

In response to this gap, Indigenous peoples are increasingly employing domestic and international legal strategies, as well as social movement strategies such as coalitions with human rights organizations,<sup>70</sup> social media campaigns,<sup>71</sup>

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*Approaches for Change*, IUCN WORLD PARKS CONG., [http://www.worldparkscongress.org/about/promise\\_of\\_sydney\\_innovative\\_approaches.html](http://www.worldparkscongress.org/about/promise_of_sydney_innovative_approaches.html), (last visited Apr. 12, 2015). For the recommendations and strategies from Stream 7: Respecting Indigenous and traditional knowledge, see IUCN WORLD PARKS CONG., A STRATEGY OF INNOVATIVE APPROACHES AND RECOMMENDATIONS FOR RESPECTING INDIGENOUS AND TRADITIONAL KNOWLEDGE AND CULTURE IN THE NEXT DECADE (2014) [hereinafter STREAM 7], available at <http://worldparkscongress.org/downloads/approaches/Stream7.pdf>. For comparison with the previous World Parks Congress in Durban, South Africa, 2003, see IUCN WORLD PARKS CONG., THE DURBAN ACTION PLAN 248-51 (revised ed. 2004) [hereinafter DURBAN ACTION PLAN], available at <http://cmsdata.iucn.org/downloads/durbanactionen.pdf>.

<sup>69</sup> See IUCN, RESOLUTIONS AND RECOMMENDATIONS (2012), available at [http://cmsdata.iucn.org.iucn.vm.iway.ch/downloads/resolutions\\_and\\_recommendations\\_2012.pdf](http://cmsdata.iucn.org.iucn.vm.iway.ch/downloads/resolutions_and_recommendations_2012.pdf). See also IUCN Res. 4.052, Implementing the UN Declaration on the Rights of Indigenous Peoples (2008).

<sup>70</sup> See, e.g., Anna Ikarashi, *Conservation Conflicting with Local Ways of Life in Mexican Reserve*, MONGABAY.COM (Dec. 23, 2014), <http://news.mongabay.com/2014/1223-tcs-ikarashi-conservation-conflict-mexico.html>; Elliot Fratkin & Tiffany Sher-Mei Wu, *Maasai and Barabaig Herders Struggle for Land Rights in Kenya and Tanzania*, CULTURAL SURVIVAL Q., Fall 1997, at 55, available at <http://www.culturalsurvival.org/ourpublications/csq/article/maasai-and-barabaig-herders-struggle-land-rights-kenya-and-tanzania>; Curtis Kline, *Sengwer of Kenya Forcibly Evicted from Ancestral Forest*, INTERCONTINENTAL CRY (Feb. 1, 2014) <https://intercontinentalcry.org/SENGWER-KENYA-FORCIBLY-EVICTED-21865/>; *Parks Need Peoples*, SURVIVAL INT'L, <http://www.survivalinternational.org/Parks> (last visited Apr. 12, 2015); Rebecca Adamson, *Are Western Conservation Efforts Causing Famine in Africa?*, ALTERNET (Sep. 19, 2011), [http://www.alternet.org/Story/152366/Are\\_Western\\_Conservation\\_Efforts\\_Causing\\_Famine\\_In\\_Africa](http://www.alternet.org/Story/152366/Are_Western_Conservation_Efforts_Causing_Famine_In_Africa); *Celebrate World Environment Day by Respecting Indigenous Stewardship*, FIRST PEOPLES WORLDWIDE (June 5, 2013, 4:28 PM), <http://firstpeoples.org/wp/celebrate-world-environment-day-by-respecting-Indigenous-stewardship/>.

<sup>71</sup> See, e.g., Mark Dowie, *Clash of Cultures: The Conflict Between Conservation and Indigenous People in Wild Landscapes*, GUARDIAN (June 2, 2009), <http://www.theguardian.com/environment/2009/jun/03/yosemite-conservation-Indigenous->

and other tactics to draw attention to improper conservation practices and policies by States and conservation NGOs, in addition to seeking remedies and redress for harms incurred. Regional and global human rights mechanisms such as the African Commission on Human and Peoples Rights,<sup>72</sup> the Inter-American Commission on Human Rights,<sup>73</sup> the U.N. Permanent Forum on Indigenous Issues,<sup>74</sup> the U.N. Special Rapporteur on the Rights of Indigenous Peoples,<sup>75</sup> the Committee of the Elimination of Racial Discrimination (CERD), the Committee for the Elimination of Racial Discrimination Against Women (CEDAW),<sup>76</sup> the

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people; *Tanzania Breaks Promise - Thousands of Maasai Evicted to Make Way for Lion Hunt*, *ECOLOGIST* (Feb. 27, 2015), [http://www.theecologist.org/News/News\\_Analysis/2771261/Tanzania\\_Breaks\\_Promise\\_Thousands\\_Of\\_Maasai\\_Evicted\\_To\\_Make\\_Way\\_For\\_Lion\\_Hunt.html](http://www.theecologist.org/News/News_Analysis/2771261/Tanzania_Breaks_Promise_Thousands_Of_Maasai_Evicted_To_Make_Way_For_Lion_Hunt.html); Mark Dowie, *Conservation: Indigenous People's Enemy No. 1?*, *MOTHER JONES* (Nov. 25, 2009), <http://www.motherjones.com/Environment/2009/11/Conservation-Indigenous-Peoples-Enemy-No-1>.

<sup>72</sup> See, e.g., AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS, REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES (2005), available at [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/African\\_Commission\\_book.pdf](http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf); Centre for Minority Rights Dev. (Kenya) & Minority Rights Grp. Int'l (on behalf of Endorois Welfare Council) v. Kenya, 276/2003, Afr. Comm'n on Human & Peoples' Rights (2010); Resolution 197, Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site (Nov. 5, 2011). See also ALBERT KWOKWO BARUME, LAND RIGHTS OF INDIGENOUS PEOPLES IN AFRICA (2010).

<sup>73</sup> INTER-AM. COMM'N ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2010).

<sup>74</sup> See, e.g., Rep. of the Thirteenth Session, May 12-23, 2014, E/2014/43-E/C.19/2014/11 (June 6, 2014); Rep. of the Sixth Session, May 14-25, 2007, E/2007/43-E/C.19/2007/12; Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods, Sixth Sess., May 14-25, 2007, E/C.19/2007/CRP.6 (May 7, 2007); Rep. of the Secretariat on Indigenous Traditional Knowledge, Sixth Sess., May 14-25, 2007, E/C.19/2007/10 (Mar. 20, 2007); Rep. on the Seventh Session, Apr. 21-May 2, 2008, E/2008/43-E/C.19/2008/13.

<sup>75</sup> See, e.g., Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Cases Examined by the Special Rapporteur (June 2009 – July 2010)*, U.N. Doc. A/HRC/15/37/Add.1 (Sep. 15, 2010) (by S. James Anaya); Kenya / Embobut Forest: UN Rights Expert Calls for the Protection of Indigenous People Facing Eviction, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Jan. 13, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163&>.

<sup>76</sup> See, e.g., COALITION ON RACIAL DISCRIMINATION WATCH, SHADOW REPORT SUBMISSION TO THE COMMITTEE ELIMINATING RACIAL DISCRIMINATION: THAILAND (2011), available at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/THA/INT\\_CERD\\_NGO\\_THA\\_13686\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/THA/INT_CERD_NGO_THA_13686_E.pdf); NATIONAL INDIGENOUS WOMEN'S FEDERATION (NIWF) ET AL., THE RIGHTS OF INDIGENOUS WOMEN IN NEPAL (2011), available at [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/FPP\\_NIWF\\_Nepal49.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/FPP_NIWF_Nepal49.pdf).

Universal Periodic Review (UPR),<sup>77</sup> and others are key international forums where Indigenous peoples voice their concerns over improper conservation affecting their rights to their lands, territories, and natural resources. This was in large part bolstered by the 2007 adoption of the U.N. Declaration on the Rights of Indigenous Peoples that added significant legal, political, and moral weight to their claims.

Indeed, as we move towards the creation of a global regulatory framework and system for conservation, Indigenous peoples are increasingly calling for what I term as a “FRESCH” approach to conservation and development—For Rights, Economies, Sustainability (and Security), Communities (and Culture), and Human Well-being. This is to say, an Indigenous-led, human-rights based, inclusive, culturally-appropriate, multidisciplinary conservation and development approach; which fully accounts for the rights of Indigenous peoples; which provides social, communal, and economic tangible benefits; which strengthens and invests in capacity development, sustainable livelihoods, and governance in line with Indigenous peoples’ aspirations and priorities, and individual and collective rights; and which is accountable and transparent.

### **B. Conservation-Human Rights Nexus: Conservation NGOs and the Rise of Self-Regulating Coalitions**

Non-governmental organizations are non-profit “private” organizations that operate independently from government, but in practice they work in a complex web of relationships with governments, corporations, funders, communities, civil society—at all levels from local to international, and often for the “public good.” NGOs are a diverse group of not-for-profit mission-based entities that typically operate in the international arena with goals such as humanitarian, economic development, and environmental, among others.<sup>78</sup> At the

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<sup>77</sup> See, e.g., CULTURAL SURVIVAL & NAT’L COALITION AGAINST RACIAL DISCRIMINATION, OBSERVATIONS ON THE HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLE IN NEPAL IN LIGHT OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2015), available at [https://indigenousissuesinasia.files.wordpress.com/2015/03/nepalupr15\\_joint\\_submission.pdf](https://indigenousissuesinasia.files.wordpress.com/2015/03/nepalupr15_joint_submission.pdf); UNREPRESENTED NATIONS & PEOPLES ORG., SUBMISSION TO THE UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2011), available at <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TZ/UNPO-UnrepresentedNationsPeoplesOrganization-eng.pdf>.

<sup>78</sup> The World Bank’s definition of NGOs is widely used: “private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development.” WORLD BANK, NON-GOVERNMENTAL ORGANIZATIONS AND CIVIL SOCIETY ENGAGEMENT IN WORLD BANK SUPPORTED PROJECTS: LESSONS FROM OED EVALUATIONS 1 (2002), available at [http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/851D373F39609C0B85256C230057A3E3/\\$file/LP18.pdf](http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/851D373F39609C0B85256C230057A3E3/$file/LP18.pdf).



level of international decision-making, the U.N. provided for a consultative role for organizations that were neither governments nor member-States when the U.N. was created in 1945.<sup>79</sup> The “vital role” of NGOs in sustainable development was recognized in 1992 in Chapter 27 of Agenda 21,<sup>80</sup> which set a new consultative relationship between the U.N. and NGOs towards “strengthening the role of non-governmental organizations as social partners” and to “review formal procedures and mechanisms for [their] involvement at all levels from policy-making and decision-making to implementation.”<sup>81</sup> Interestingly, while conservation NGOs have secured a firm place in conservation and sustainable development in intergovernmental decision-making processes, the same cannot be said of Indigenous peoples’ representatives, despite Agenda 21 also recognizing the need to strengthen the role of Indigenous peoples and their communities in national and international decision-making and conservation programming, taking into account technical and financial capacity needs, culture and traditional knowledge, and

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<sup>79</sup> U.N. Charter art. 71. International NGO (INGO) was first defined by the U.N. Economic and Social Council (ECOSOC) as “any international organisation that is not founded by an international treaty.” ECOSOC Res. 288 B (X) of Feb. 27, 1950.

<sup>80</sup> Agenda 21, *The UN Blueprint for the 21<sup>st</sup> Century*, is a non-binding policy statement and voluntarily implemented action plan of the U.N. on sustainable development from the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, along with the Biodiversity Convention, the Rio Declaration, the UN Framework Convention on Climate Change, and the Statement of Forest Principles. See United Nations Conference on Environment and Development, June 3-14, 1992, *Resolutions Adopted by the Conference*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (1993), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/836/55/PDF/N9283655.pdf?OpenElement>. Since 1992, it has been amended over time at subsequent U.N. conferences on sustainable development in at Rio+5 in 1997, Rio+10 in 2002, and Rio+20 in 2012. In 2012, 180 nations who participated in the UN Conference on Sustainable Development (2012 Earth Summit) reaffirmed their commitment to Agenda 21 in the outcome document of that conference: *The Future We Want*, G.A. Res. 66/288, U.N. Doc. A/RES/66/288, Annex (Sept. 11, 2012), available at [http://www.icriforum.org/sites/default/files/UNGA\\_the\\_future\\_we\\_want.pdf](http://www.icriforum.org/sites/default/files/UNGA_the_future_we_want.pdf). Indigenous peoples from around the world gathered in Rio de Janeiro, Brazil at the Indigenous Peoples International Conference on Sustainable Development and Self Determination, (June 17-19, 2012) during the 2012 Earth Summit. They issued the Indigenous Peoples International Declaration on Self-Determination and Sustainable Development, which called for, among other things, the recognition of culture as the fourth pillar of sustainable development in addition to social, environmental, and economic; a full recognition of their individual and collective rights in sustainable development initiatives by corporations and States; and stating that sustainable development policies, programs, and projects that effect or concern Indigenous peoples must respect the U.N. Declaration on the Rights of Indigenous Peoples policies. *Rio+20: Indigenous Peoples International Declaration on Self-Determination and Sustainable Development*, INT’L WORK GRO. FOR INDIGENOUS AFFAIRS (JUNE 21, 2012), [http://www.iwgia.org/news/search-news?news\\_id=542](http://www.iwgia.org/news/search-news?news_id=542).

<sup>81</sup> U.N. Conference on Environment and Development, June 3-14, 1992, Agenda 21, ch. 27.6 (1992), available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

human rights, among others.<sup>82</sup> Indeed, as Professor Anaya notes, there are still significant structural and systemic barriers to participation, including, but not limited to, a lack of available funds to secure travel and exclusion in high level decision-making fora such as climate meetings of the U.N. Framework Convention on Climate Change (UNFCCC), where Indigenous peoples' organizations may have opportunities to participate but are often streamed in parallel processes outside formal discussions. They are also often viewed as representing separate or tangential concerns and may therefore have very limited influence over final outcomes or shaping the agenda at the start.<sup>83</sup>

Nevertheless, the U.N. has increasingly acknowledged the relationship between safeguarding the environment, sustainable development, and human rights, including Indigenous peoples' rights vis-à-vis global development and conservation.<sup>84</sup> This is reflected in the 1972 Declaration of the U.N. Conference

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<sup>82</sup> *Id.* ch. 26 (especially articles 26.3(b)-(c) and 26.5(a), (b), (c)).

<sup>83</sup> See S. James Anaya, Statement of the Special Rapporteur on the Right to Participation, to the Expert Mechanism on the Rights of Indigenous Peoples (July 12, 2010), available at <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-on-the-right-to-participation-to-the-emrip-2010>; GONZALO OVIEDO & ANNELIE FINCKE, EUROPEAN PARLIAMENT, INDIGENOUS PEOPLES AND CLIMATE CHANGE 16-18 (2009). See also International Indigenous Peoples' Forum On Climate Change (IIPFCC), Executive Summary of Indigenous Peoples' Proposals to the UNFCCC COP 20 and COP21, Lima, Peru (November 30, 2014). The IIPFCC proposal was not reflected into the final text leading up to the U.N. Nations Climate Change Conference (COP 21) in December 2015. See INTERNATIONAL INDIGENOUS PEOPLES' FORUM ON CLIMATE CHANGE (IIPFCC), EXECUTIVE SUMMARY OF INDIGENOUS PEOPLES' PROPOSALS TO THE UNFCCC COP 20 AND COP 21 (2014), available at <http://www.iwgia.org/images/stories/int-processes-eng/UNFCCC/ExecutiveSummaryIPpositionFINAL.pdf>. Compare with AD HOC WORKING GROUP ON THE DURBAN PLATFORM FOR ENHANCED ACTION, WORK OF THE CONTACT GROUP ON ITEM 3: NEGOTIATING TEXT (advance unedited version, 2015), available at [https://unfccc.int/files/bodies/awg/application/pdf/negotiating\\_text\\_12022015@2200.pdf](https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf). See also, Alejandro Argumedo, *Why Are Indigenous People Sidelined at UN Climate Talks?*, RESPONDING TO CLIMATE CHANGE (July 29, 2014), <http://www.rtcc.org/2014/07/29/why-are-Indigenous-people-sidelined-at-un-climate-talks/#sthash.vw1wIDgS.dpuf>.

<sup>84</sup> See Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Preliminary Report*, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012) (by John H. Knox); Human Rights Council Res. 25/21, Human Rights and the Environment, U.N. Doc. A/HRC/25/L.31 (Mar. 24, 2014). More recently, in an open letter to all governments involved in the climate change negotiations in Peru (COP 20), twenty-four U.N. Special Procedures of the Human Rights Council, including the current U.N. Special Rapporteur on the Rights of Indigenous Peoples, Vicky Tauli-Corpuz, and John Knox, the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, affirmed the relationship between climate action and the enjoyment of human rights as recognized and protected in international law. See Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change, *A New Climate Change Agreement Must Include Human Rights Protections for All* (Oct. 17, 2014), available at [http://www.ohchr.org/Documents/HRBodies/SP/SP\\_To\\_UNFCCC.pdf](http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf).

on the Human Environment (Stockholm Declaration),<sup>85</sup> U.N. General Assembly Report on Human Rights and Climate Change (2009),<sup>86</sup> the Millennium Declaration and the Millennium Development Goals,<sup>87</sup> the forthcoming U.N. post-2015 Sustainable Development Goals,<sup>88</sup> the outcomes of the 1992 U.N. Conference on Environment and Development (Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles),<sup>89</sup> the U.N. Framework Convention on Climate Change, the Convention on Biological Diversity,<sup>90</sup> the World Summit on Sustainable Development Rio+20 Declaration (2012),<sup>91</sup> the Copenhagen Declaration on Social Development (1995),<sup>92</sup> the U.N. Food and Agricultural Policy on Indigenous and Tribal Peoples (2010),<sup>93</sup> the U.N. Indigenous Peoples,<sup>94</sup> International Labour Organization's No. 169,<sup>95</sup> the U.N.

<sup>85</sup> G.A. Res. 2994 (XXVII), U.N. Doc. A/RES/27/2994 (Dec. 15, 1972), available at <http://www.refworld.org/docid/3b00f1c840.htm>.

<sup>86</sup> Human Rights Council, Rep. of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, A/HRC/10/61 (Jan. 15, 2009).

<sup>87</sup> See *United Nations Millennium Development Goals*, UNITED NATIONS, <http://www.un.org/millenniumgoals/> (last visited Apr. 12, 2015).

<sup>88</sup> For post-2015 Sustainable Development Goals, see U.N. Secretary-General, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet*, U.N. Doc. A/69/700 (Dec. 4, 2014), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/69/700&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/69/700&Lang=E); *Open Working Group Proposal for Sustainable Development Goals*, SUSTAINABLE DEV. KNOWLEDGE PLATFORM, <https://sustainabledevelopment.un.org/sdgsproposal> (last visited Apr. 12, 2015).

<sup>89</sup> The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, known as the Forest Principles, was produced at the 1992 U.N. Conference on Environment and Development (UNCED). United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Doc. A/CONF.151/26 (Vol. III) (Aug. 14, 1992).

<sup>90</sup> June 5, 1992, 1760 U.N.T.S. 30619. See also *id.* arts. 8(j), 10(c) (discussing traditional knowledge, innovations and practices, and sustainable use of components of biological diversity, respectively, both recognizing the role of Indigenous peoples' customary rights, cultural practices, traditional knowledge and participation in effective biodiversity conservation.)

<sup>91</sup> See G. A. Res. 66/288, U.N. Doc. A/RES/66/288 (Sep. 1, 2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/476/10/PDF/N1147610.pdf?OpenElement>.

<sup>92</sup> World Summit for Social Development, Copenhagen, Den., Mar. 6-12, 1995, *Copenhagen Declaration on Social Development*, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995), available at <http://www.un.org/documents/ga/conf166/aconf166-9.htm>.

<sup>93</sup> See, e.g., FOOD & AGRIC. ORG., FAO POLICY ON INDIGENOUS AND TRIBAL PEOPLES (2010), available at [http://www.fao.org/fileadmin/user\\_upload/newsroom/docs/FAO\\_policy.pdf](http://www.fao.org/fileadmin/user_upload/newsroom/docs/FAO_policy.pdf).

<sup>94</sup> The United Nations Indigenous Peoples Partnership (UNIPP) was launched in May 2011 by four U.N. agencies—International Labour Organization (ILO), Office of the

Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD),<sup>96</sup> U.N. Development Programme (UNDP) Social and Environmental Standards,<sup>97</sup> the U.N. Declaration on the Rights of Indigenous Peoples, as well as numerous resolutions of World Parks Congress,<sup>98</sup> and World Conservation Congress of the IUCN.<sup>99</sup> These and other U.N. instruments, policies, and resolutions reflect the need to enhance participation of Indigenous peoples in all conservation initiatives, programs, and policy developments that affect them. Furthermore, they recognize that Indigenous peoples possess a unique body of knowledge relevant for the conservation and sustainable use of natural resources as well as possess human rights related to their lands, territories, and natural resources.

Yet, in the conservation NGO sector, there remains at times some antipathy or implicit dismissiveness by some conservation practitioners who view human rights as tangential to their conservation mission. However, while internal or publicly stated organizational priorities and commitments often identify Indigenous peoples and respect for human rights as important to mission success,

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High Commission on Human Rights (OHCHR), U.N. International Emergency Children's Fund (UNICEF), and U.N. Development Programme (UNDP)—as the first global inter-agency initiative that focuses on providing country-level programs for the advancement of Indigenous rights. See *United Nations Indigenous Peoples' Partnership*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/IPeoples/Pages/UNIPPPartnership.aspx> (last visited Apr. 13, 2015).

<sup>95</sup> International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), June 27, 1989, 28 I.L.M. 1382.

<sup>96</sup> See UN-REDD PROGRAMME, OPERATIONAL GUIDANCE: ENGAGEMENT OF INDIGENOUS PEOPLES AND OTHER FOREST DEPENDENT COMMUNITIES (2009), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=455&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=455&Itemid=53)

<sup>97</sup> UNDP's Social and Environmental Standards (SES) were in effect on January 1, 2015. U.N. DEV. PROGRAMME, SOCIAL AND ENVIRONMENTAL STANDARDS (2014), available at <http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDPs-Social-and-Environmental-Standards-ENGLISH.pdf>. These SES standards are a significant achievement as they are among the first to include a comprehensive due diligence process, including screening, assessment, and management of social and environmental risks and impacts, along with a Social and Environmental Compliance Unit (SECU) and a Stakeholder Response Mechanism (SRM). They also include a firm commitment to respect international human rights law as seen in their overarching principles in support of human rights, women and gender empowerment, and environmental sustainability, as well as project-level standards regarding Indigenous rights and other social and environmental standards. See *id.*

<sup>98</sup> For example, the Fifth World Parks Congress Durban Action Plan and the Sixth World Parks Congress Promise of Sydney (A strategy of innovative approaches and recommendations for respecting Indigenous and traditional knowledge and culture in the next decade). See DURBAN ACTION PLAN, *supra* note 68, at 248 (dealing with the rights on Indigenous peoples in relation to natural resources and biodiversity); STREAM 7, *supra* note 67.

<sup>99</sup> See IUCN, RESOLUTIONS AND RECOMMENDATIONS, *supra* note 69.

a closer assessment of their practices across the organization reveal a need for critical improvement. In some large conservation organizations, despite the presence of staff who are supportive of or have experience with human-rights-based approaches to conservation, barriers to mainstreaming human rights persist. Especially in large transnational CoNGOs, those who work in human-rights-based conservation are often few in number (for the most part they are centralized at headquarters versus field offices) and have fewer financial resources or the requisite level of authority (or the active support of executive management) to influence systemic change in organizational culture, priorities, or practice.

At the same time, especially over the last decade, international conservation NGOs are becoming more attuned to their ethical and legal responsibilities and the role they can play in supporting and promoting conservation efforts that respect human rights and contribute to good governance and sustainable livelihoods. This is seen in the proliferation of studies and guides outlining the benefits of conservation to communities or addressing human-rights-based approaches to conservation that assist practitioners.<sup>100</sup> However, the impact of these guides or studies on organizational cultural shift or conservation practice remains unknown or at best speculative. Certainly, since conservation is at times at odds with Indigenous peoples rights and aspirations demonstrates a need for concerted efforts aimed at systemic reform, organizational learning, human rights training, and shift in conservation mindset and ethic.

Nevertheless, a notable shift has been taking place among some transnational conservation organizations, as seen in the creation of the Conservation Initiative on Human Rights (CIHR). The CIHR is a consortium of eight international conservation NGOs agreeing to improve the practice of conservation by promoting the integration of human rights in conservation policy and practice. Endorsed by the CEOs of the participating members in 2009, the CIHR framework is rooted in four principles: respect for human rights, promotion of human rights within conservation programs, protection of those who are vulnerable to human rights infringements, and promotion of good governance.<sup>101</sup>

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<sup>100</sup> See, e.g., IUCN, *CONSERVATION WITH JUSTICE: A RIGHTS-BASED APPROACH* (Thomas Greiber ed., 2009); SOBREVILA, *supra* note 4; CTR. FOR INT'L FORESTRY RESEARCH, *RIGHTS-BASED APPROACHES: EXPLORING ISSUES AND OPPORTUNITIES FOR CONSERVATION* (Jessica Campese et al, eds., 2009); DAVID THOMAS, BIRDLIFE INT'L, *AN INTRODUCTION TO CONSERVATION AND HUMAN RIGHTS FOR BIRDLIFE PARTNERS* (2011), Karin Svadlenak-Gomez, *Integrating Human Rights in Conservation Programming*, HUMAN RIGHTS & CONSERVATION, Sep. 2007, at 1; JENNY SPRINGER ET AL., *CONSERVATION AND HUMAN RIGHTS: KEY ISSUES AND CONTEXTS* (2011).

<sup>101</sup> CIHR FACTSHEET, INT'L UNION FOR CONSERVATION OF NATURE (2010), available at [http://cmsdata.iucn.org/downloads/cihr\\_factsheet\\_august\\_2010.pdf](http://cmsdata.iucn.org/downloads/cihr_factsheet_august_2010.pdf). The CIHR was endorsed in 2010 by Conservation International (CI), World Wildlife Fund (WWF), International Union for the Conservation of Nature (IUCN), Wetlands International, Wildlife Conservation Society (WCS), The Nature Conservancy (TNC), Birdlife International, and Fauna and Flora International. See *id.*; *Conservation Initiative on Human Rights*, INT'L UNION FOR CONSERVATION OF NATURE, [http://www.iucn.org/about/work/programmes/social\\_policy/sp\\_themes\\_hrande/scpl\\_cihr/](http://www.iucn.org/about/work/programmes/social_policy/sp_themes_hrande/scpl_cihr/) (last visited Apr. 13, 2015).

Among its commitments, member organizations agreed to create and implement internal policies and guidelines, invest in internal capacity to facilitate implementation, develop an accountability mechanism and metrics, and participate and create shared learning opportunities among member organizations.

While the goals and aims of the CIHR are laudable and efforts to ensure its success should be supported by the conservation community, there remain significant gaps (or viewed another way, opportunities) to strengthen implementation and compliance or even general awareness of its existence within participating conservation organizations. In this respect, the CIHR participating organizations could be key leaders within the conservation movement to lead by example and thus advocate for change within their own organizations and within the conservation sector in general—especially vis-à-vis States, corporate, and local implementing partners. Moreover, they could also support the creation of an international regulatory system that would provide greater transparency, oversight, and accountability of their work to ensure their responsibilities to respect human rights, including the human rights of Indigenous peoples.

However, while the CIHR could certainly function as a coalition of global conservation leaders who, given their influence with governments, funders, and corporate partners, could significantly contribute to the well-being and realization of human rights of Indigenous peoples by promoting a new ethic and practice of conservation that fully respects human rights, there are limitations to its effectiveness. For one, the CIHR is a loose coalition and thus no formal organizational structure or accountability mechanism exists to monitor or enforce the voluntary set of commitments made by participating members.

In addition, the level of compliance by member organizations to their commitments varies. For instance, the *Guiding Principles* assert that non-state actors have an independent responsibility for due diligence that includes creating certain policies as well as a policy statement confirming commitment to their human rights responsibilities that is adopted and endorsed by the most senior levels of organizational leadership, which is publicly available and contains due diligence and remediation processes, among other requirements.<sup>102</sup> However,

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<sup>102</sup> *U.N. Guiding Principles*, *supra* note 5, princ. 15. Principle 15 reads as follows:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The commentary explains that “[b]usiness enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in

there is significant variation across CIHR member organizations of the content, quality, and scope of policies and codes of conduct, due diligence and monitoring, and compliance and grievance processes.<sup>103</sup> Some explicitly mention their human rights commitments and provide principles and operational guidance related to this; others do not. Some address topics like gender, research ethics, poverty, vulnerable communities, and grievance mechanisms; others do not. Some contain general principles with limited operational guidance. Only a few of CIHR members have created detailed internal policies or operational guidance relating to Indigenous peoples in specific, beyond the general commitment to human rights stated in the CIHR framework.<sup>104</sup> Indeed, Indigenous-peoples'-specific policies are essential to fulfill the independent responsibility of conservation NGOs in respecting the rights of Indigenous peoples as the operational guidance would provide clarity and consistency in the application of human rights standards and principles to conservation with Indigenous peoples and on or near their territories.

Yet, even though CIHR was endorsed at the CEO level, there is still uneven implementation and internal awareness of the CIHR framework within some of the member organizations. Aside from uneven financial commitment from each participating organization in dedicating financial resources to the

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place.” Principles 16 to 24 elaborate further on these responsibilities.

<sup>103</sup> Dilys Roe et al. note that despite the adoption of statements of principles, guidance, and codes of conduct by “many agencies that fund or implement conservation,” key challenges persist. Challenges include the “aspirational” or general nature of human rights commitments; “the variation in specific commitments across conservation organisations [that] can lead to confusion, weaken the position of the conservation community as a contributor to equitable and sustainable development, and make good practice hard to identify;” and the need for accessible conflict resolution and grievance mechanisms. See Roe et al., *supra* note 54.

<sup>104</sup> For example, World Wildlife Fund, Birdlife International, Wetlands International, IUCN, Wildlife Conservation Society, and Fauna and Flora have various types of social policies, codes of conduct, or human rights statements that are publicly accessible online, although not all have specific human rights policies outside the CIHR. CI has a range of social policies and were early adopters of such policies, but at the time of publication these were not available online. There is significant variation among the scope and type of policies across the organizations. To date, The Nature Conservancy does not have an executive endorsed organizational policy or set of guidelines with respect to Indigenous peoples other than the Conservation Initiative on Human Rights (which is available on their website). As former Global Director of Indigenous and Communal Conservation at The Nature Conservancy, I commissioned the Lands, Resources and Human Rights Workshop at the University of Arizona James E. Rogers College of Law, led by Professor Anaya, to assist in drafting a set of guidelines and principles related to developing a human rights-centered approach to Indigenous conservation at the Conservancy. These drafts were vetted by an internal team I led consisting of a representative cross-section across the organization. At the time of publication, they have yet to be formally adopted, and as such, are not yet publicly available.

Secretariat,<sup>105</sup> some members are not active or regular participants in the work of the CIHR.

Moreover, some CIHR member organizations have specific departments or programs dedicated to the study and dissemination of good practices vis-à-vis human rights. However, most do not, especially dealing with Indigenous conservation specifically. Of those that do, there are barriers to effectiveness. For example, limited human resources capacity (including sufficient numbers of qualified staff organization-wide with the necessary technical international human rights and Indigenous rights expertise, and operationalizing standards and compliance procedures), financial resources, capacity to mainstream, and the large diffuse organizational structure of NGOs are among key barriers to effective implementation, awareness, and mainstreaming of human-rights-based approaches, the CIHR framework, and ultimately fulfilling organizational responsibilities to respect the human rights of Indigenous peoples that is consistent with the *Guiding Principles* and the UNSR Anaya's extractive study. In addition, within some CoNGOs, a perceived conflict of interest could exist with those leading programs on Indigenous-led conservation who are also often tasked to evaluate programs, partnerships with corporations and philanthropic donors, land deals, and perform risk assessments. Indeed, compliance, accountability, and monitoring performance would be enhanced by creating a separate unit as an institutional safeguard outside of core conservation programming that would perform vital due diligence, monitoring, evaluation, oversight over CSR commitments, knowledge management, organizational learning, and ombudsperson duties. Indeed, challenges such as competing organizational priorities, a complex bureaucratic, decentralized, and transnational structure, and a prevailing understanding among many conservation practitioners who believe that promoting human rights ought to remain outside the work of environmental conservation organizations are very real barriers.

In short, the CIHR is an essential step in the right direction, but more needs to be done to support those tasked to implement CIHR in their organizations to make it an organizational priority not only in name, but also in practice. This also includes the need to create stronger accountability mechanisms within CIHR as an entity to ensure members are compliant with their CIHR commitments and remain active participants in the consortium. In addition, more needs to be done to standardize rights-based practices across member organizations, include specific measures to safeguard the rights of Indigenous peoples in conservation, and create inclusive processes to facilitate participation of Indigenous peoples in all phases of conservation decision-making. While some CIHR member organizations have taken steps in this direction, the role of U.N. institutions, especially Indigenous peoples mechanisms, could also provide more direction, require reporting from CoNGOs, and offer guidance. This could spur organizational reform, improve standardization and implementation of internal

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<sup>105</sup> The secretariat consists of a participating member who takes the lead in coordinating work plans and monthly calls. Financial contributions of participating members are essential to defray human resource costs and other expenses.



organizational guidelines, facilitate the dissemination and promotion of good practices, and improve accountability and transparency in conservation more broadly.

Lastly, despite the commitments and expertise of those tasked to lead CIHR efforts internally, a key operational challenge remains. For instance, the variation in national legislation and formal recognition of Indigenous peoples, land title, and understanding about Indigenous peoples and their human rights vary within conservation NGOs from country to country. This often leads to variation in compliance when country level and headquarters have differing perspectives on Indigenous rights in conservation, which poses organizational risks. Adding to this is the matrix-style decision-making structure where those tasked to advance human-rights-based approaches in headquarters has little authority over local chapters. The inverse is also true when local chapters want stronger adherence to human rights and Indigenous rights in organizational practice throughout the organization, including headquarters where key environmental policies, practices, and priorities are formulated. In this case, institutional reform is necessary to empower social practice and policy conservation leaders and create a network of such leaders across the organization to facilitate implementation and organization.

Other factors impeding successful implementation of human-rights-based approaches include many conservation practitioners conflating “local communities” with Indigenous peoples’ communities. The former term is used as a less politically contentious label when States, and other conservation partners do not recognize the existence of Indigenous peoples. This is not mere semantics. The recognition of Indigenous peoples as peoples is vital as it can impact due diligence processes and the perceived responsibilities of conservation NGOs to respect the human rights of Indigenous peoples under international law. Moreover, as Professor Anaya notes, as a requirement of organizational due diligence, NGOs are required to recognize Indigenous peoples even when States do not; Indigenous recognition does not depend on unilateral decisions by the state.<sup>106</sup> This is most common in regions where “Indigenous people or peoples” is viewed as politically contentious or the concept itself is contested as being valid and applicable (e.g., in some parts of Africa or Asia). This could pose serious ramifications for the human rights of Indigenous peoples, and, in those cases, exacerbate organizational risk and local conflict.

The variation in compliance, operationalization, and implementation of good practices and relevant international human rights standards of Indigenous peoples’ rights, as well as the variation in human rights literacy within and across conservation NGOs, variation in organizational will for systemic reform, and a lack of internal accountability mechanisms, highlights the need for a clear, standardized, and robust global regulatory framework. This global regulatory regime should also include mechanisms for accountability, grievance, monitoring, and the promotion of good practices, a compliance reporting mechanism,

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<sup>106</sup> 2010 Report, *supra* note 8, ¶ 49.

investigation of cases, and stakeholder response and communication mechanism. As conservation NGOs occupy a quasi-governance role in ecosystem management and environmental policy-making at all levels, it is important to evaluate whether the current system of self-regulating voluntary compliance should be supplanted in favor of one that is binding or, at the very least, one with a stronger accountability and oversight mechanism. Since the nature of the relationship between conservation organizations and Indigenous peoples is often rooted in trust, is positioned as being both in the public interest and positioned as being in the interests of Indigenous peoples, it is essential to explore what an accountable system would look like in practice. This could be studied by the current UNSR or EMRIP for example.

Reputational, legal, and organizational risk will continue unabated in conservation organizations, and the benefits of conservation will remain partially realized unless there is clear direction and organizational mandate from executive-level leadership that prioritizes *and* requires a human rights approach to Indigenous conservation to be mainstreamed as a common practice in CoNGOs. This also includes dedicating sufficient financial and human capacity, including hiring more Indigenous peoples and human rights experts *across* the organization who are empowered to shape conservation practices (including those with an understanding of conservation science, measures, evaluation, and monitoring, and international environmental policy). CoNGOs should also implement a robust knowledge management and regular training program (for all staff including executive leadership) to facilitate institutional learning and organizational cultural change. Indeed, a full institutional commitment to create and implement an Indigenous rights and human-rights-based approach to conservation, with requisite monitoring, accountability and ombudsperson mechanisms, a long-term strategic plan for implementing rights-based conservation, and ongoing human rights training is essential to create enduring organizational and sectorial change. While conservation can be a pathway to human and environmental security and can help realize human rights, there is still a way to go to mainstream rights-based practice and policy. Professor Anaya's guidelines for extractive industries provide essential guidance in this regard.

#### **IV. KEY LESSONS FROM THE UNSR EXTRACTIVE STUDY ON HUMAN RIGHTS RESPONSIBILITIES, PRACTICE, AND PRINCIPLES RELATING TO INDIGENOUS PEOPLES IN DUE DILIGENCE PROCESSES**

Despite an increased awareness in Indigenous rights, there continues to be, as Professor Anaya notes, a "lack of a minimum shared understanding about the basic implications of accepted international standards or about the institutional arrangements and methodologies required to give them full effect in the context of

extractive or development operations that may affect Indigenous peoples.”<sup>107</sup> This section will focus on key principles and safeguards which have been shown to be exceptionally challenging for extractive industries and conservation NGOs alike to operationalize and implement: participation, due diligence, benefit-sharing, respecting the right of self-determination by supporting Indigenous-led and Indigenous-controlled initiatives, recognition of Indigenous peoples, and tenure. Professor Anaya’s analysis and operational guidance will prove to be essential as the global community continues to develop and refine practices related to corporate responsibility to Indigenous peoples, as well as the burgeoning work on elucidating a global framework for conservation NGOs working on or near Indigenous territories.

#### **A. Participation, FPIC, and Self-Determination and Indigenous-led Models**

Building on the study of the Expert Mechanism on the Rights of Indigenous Peoples on the right to participate in decision-making and extractive industries,<sup>108</sup> Professor Anaya deepens our understanding of the right of Indigenous peoples to participate in decision-making in projects and initiatives taking place on or near Indigenous territories and what this means for corporate responsibility. This includes the right of Indigenous peoples to oppose projects, to be free from reprisals, expulsion, and restricted access to their territories, and freedom from undue pressure to accept project proposals.<sup>109</sup> As such, Indigenous peoples, as peoples, have the collective right to set their own priorities and strategies for the development, use, or conservation of their lands, territories, and natural resources rooted in the right of self-determination.<sup>110</sup> This sets a high standard for corporations and conservation NGOs to develop a set of safeguards, procedures, processes, and protocols that allows for dialogue and inclusive and effective participation of Indigenous peoples in all phases of project development: exploration, program design, development, evaluation, monitoring, remedy, and grievance (including respecting their own dispute resolution systems). The 1989 Indigenous and Tribal Peoples Convention (ILO 169) recognizes “consultation and participation [as] the cornerstone of the Convention and that such mechanisms are not merely a formal requirement but are intended to enable Indigenous peoples

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<sup>107</sup> *Extractive Industries & Indigenous Territories*, *supra* note 10, ¶ 60.

<sup>108</sup> H.R.C. Res. 15/14, *supra* note 33.

<sup>109</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 19-25; *see also* Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶¶ 36-57, U.N. Doc. A/HRC/12/34 (Mar. 24, 2008) (by James Anaya) [hereinafter *Protection of All Human Rights*] (discussing the duty to consult).

<sup>110</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 9, 27-30.

to participate effectively in their own development.”<sup>111</sup> The participation of Indigenous peoples is therefore required at every stage.<sup>112</sup>

The responsibility to consult and obtain consent is rooted in democratic principles of popular sovereignty, transparency, and accountability as well as the right of Indigenous peoples to cultural integrity, equality, equity, property, and self-determination.<sup>113</sup> In addition, Indigenous consent is to be considered a presumptive requirement when the operations of extractive industries or conservation organizations occur within Indigenous territories whether title is officially recognized or is customary tenure, especially when there are cultural or spiritually significant impacts, natural resources use in traditional subsistence, or other uses that are important to their existence.<sup>114</sup> Therefore, the principles of consent and effective consultation are integral to the right of participation and self-determination, as they safeguard substantive rights recognized in the U.N. Declaration and in other sources of domestic and international law. These rights include rights to culture, spirituality, health, traditional livelihoods, non-discrimination, conservation, and development.<sup>115</sup>

However, Professor Anaya found “differing or vague understandings persist about the scope and content” of the principle of free, prior, and informed consent (FPIC) and corporate responsibility to protect and respect Indigenous rights in general.<sup>116</sup> FPIC is often viewed as a general “community” stakeholder consultation exercise. However, Professor Anaya’s guidance is clear. The principle of FPIC, which applies to Indigenous peoples as rights-holders including both the collective and individual dimension of their rights, must be respected. While it is good practice to respect local cultures and consult local stakeholders in extractive or conservation operations, the principle of free, prior and informed consent as affirmed in the U.N. Declaration on the Rights of Indigenous Peoples applies to Indigenous peoples in specific. Any other stakeholder consultation exercises with local communities should be *in addition to* processes specifically aimed at fulfilling the principle of FPIC as a requirement of due diligence responsibilities to Indigenous peoples.

Moreover, due diligence processes often view FPIC as a utilitarian objective of securing “a yes to a predetermined decision, or as a means to validate a deal that disadvantages affected Indigenous peoples.”<sup>117</sup> However, as Professor

<sup>111</sup> INT’L LABOUR ORG., MONITORING INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS THROUGH ILO CONVENTIONS: A COMPILATION OF ILO SUPERVISORY BODIES’ COMMENTS 2009-2010 46-47 (2010).

<sup>112</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 95, art. 2.

<sup>113</sup> *Protection of All Human Rights*, *supra* note 109, ¶ 41. Anaya adds that “[t]he duty of States to effectively consult with Indigenous peoples is also grounded in the core human rights treaties of the United Nations.” *Id.* ¶ 40.

<sup>114</sup> 2012 Report, *supra* note 6, ¶¶ 65, 85.

<sup>115</sup> *Id.* ¶¶ 50-51; *see also Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶ 28.

<sup>116</sup> *Extractive Industries & Indigenous Territories*, *supra* note 10, ¶ 60.

<sup>117</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶ 30.

Anaya argues, it should be viewed as relationship building and an opportunity to develop ongoing dialogic processes to garner social trust, maintain informed consent, meaningful inclusion, and minimize harms while maximizing potential benefits accrued to Indigenous peoples. Again, the advice is clear: free, prior and informed consent is not a mere exercise to obtain social license to operate, it is the conduit to productive relationships, social trust, and the realization of the human rights of Indigenous peoples. In short, it is an opportunity to change corporate (or conservation) practices and projects from the ground up that offers a greater chance of lasting success.

In addition, as a good practice, communication processes should be developed to facilitate mutual sharing of information, voicing concerns, and providing project status updates. Good-faith negotiating also includes a discussion of the following: when organizations should share information (at the earliest time possible to allow for revision and input from Indigenous peoples); informed consent (based on all requisite information, financial, technical, and all forms of impacts to Indigenous peoples); mitigation of power imbalances (corporations and conservation organizations to invest in capacity-development and access to funds to secure independent counsel, negotiators, and technical assistance); who to consult (Indigenous participation through their own representative institutions); and benefit sharing and access to remedies (where harms have been accrued).<sup>118</sup> Fair dealing, good-faith negotiation, and adequate consultation are thus essential elements of a new business and engagement model rooted in “just terms that are protective of Indigenous rights,”<sup>119</sup> inclusive and informed decision-making, and respect for self-determination. He further adds:

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<sup>118</sup> See *id.* ¶¶ 58-71 (outlining fair and adequate consultation and negotiation procedures). For partnership and benefit-sharing, see *id.* ¶¶ 75-77; *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 74-76; *2010 Report*, *supra* note 8, ¶¶ 76-80 (outlining adequate grievance procedures); *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶ 78. On capacity-building and mitigation of power imbalances, see *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 63-66; *Protection of All Human Rights*, *supra* note 110, ¶ 71. See also, Convention on Biological Diversity, Traditional knowledge and Biological Diversity, ¶ 93, U.N. Doc. UNEP/CBD/TKBD/1/2 (Oct. 18, 1997) (“[A]ny special needs regarding participation should be attended to. These may include the need for capacity building (e.g., negotiation skills, understanding of the environmental management issues under review and of the reasons behind the outside interest in their knowledge, legal support) and mechanisms for compensating the real costs of participation (foregone labour or social investments as well as out of pocket expenses).”). Capacity-building is essential for democratic participation as a lack of financial, technical, legal, and other support are key factors impeding full and effective participation of Indigenous peoples. See, *Protection of All Human Rights*, *supra* note 109, ¶¶ 50-53 (discussing the elements of confidence-building conducive to consensus). See also *2010 Report*, *supra* note 8, ¶¶ 69-70. For guidance on engaging Indigenous peoples through their own representative institutions and the ambiguity that may arise from which representatives should be consulted, see *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 70-71.

<sup>119</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶ 30.

If consent is obtained, it should be upon *equitable and fair agreed-upon terms*, including terms for compensation, *mitigation measures and benefit-sharing* in proportion to the impact on the affected Indigenous party's rights. In addition, terms for a long-term sustainable relationship should be established with the corporation or other enterprise that is the operator of the extractive project. This *implies new business models* involving genuine partnerships, in keeping with Indigenous peoples' right to set their own priorities for development.<sup>120</sup>

Therefore, Indigenous-led efforts, be they for extractive, mega-development, or conservation projects of the Indigenous-led approaches, are a good business practice that Professor Anaya argues is a "preferred model."<sup>121</sup> Indigenous-led enterprises and initiatives offer the greatest opportunity for the fulfillment of human rights of Indigenous peoples, such as self-determination and economic development and conservation in line with their own priorities and cultural values. The right of Indigenous peoples to be self-determining as peoples is viewed as the linchpin of sustainable, stable, peaceful, effective, and enduring relationships. It is the axis around which social license is obtained or taken away by the community. His analysis of the threshold of consent is pivotal since consent is often viewed as tenuous, controversial, and the most difficult for field practitioners and industry leaders to operationalize, comprehend, and respect.

At the same time, Professor Anaya also provides specific guidance on when consent can be limited or when it is not required, in effect settling whether or not Indigenous peoples possess a "veto." The high threshold to justify limiting Indigenous consent to situations when "it can be *conclusively* established that the activities will not substantially affect Indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories<sup>122</sup> means this would be exceedingly rare in practice. Nevertheless, consent may be reasonably limited if it can be demonstrably justified to meet the just and most compelling requirements of a democratic society, affirmed by article 46 of the U.N. Declaration. Even then this limitation test is high.

First, as noted earlier, Professor Anaya argues, "consent performs a safeguard role for Indigenous peoples' fundamental rights."<sup>123</sup> This sets a high standard to mitigate against rights infringement in the first place since non-consent can lead to further human rights violations throughout the lifecycle of the project. Second, consent can be limited if there is "a valid public purpose"<sup>124</sup> that is well beyond revenue-creation interests of the State or private profit interests of companies. However, this too is subject to proportionality limits:

<sup>120</sup> 2012 Report, *supra* note 6, ¶ 68 (emphasis added).

<sup>121</sup> See *Extractive Industries & Indigenous Peoples*, *supra* note 3, ch. II.

<sup>122</sup> *Id.* ¶ 31 (emphasis added).

<sup>123</sup> *Id.* ¶ 33.

<sup>124</sup> *Id.* ¶¶ 35-36.

Even if a valid public purpose can be established for the limitation of property or other rights related to Indigenous territories, the limitation must be necessary and proportional to that purpose. . . . In determining necessity and proportionality, due account must be taken of the significance to the survival of Indigenous peoples of the range of rights potentially affected by the project.<sup>125</sup>

That is, unless restriction is warranted in dire, rare, and special circumstances, limiting Indigenous peoples' rights to access their lands in times of natural disaster, in emergencies, or even in pursuit of a public interest such as conservation would require accommodative solutions to limit intrusion on the human right as much as possible. Yet even national and global disaster risk reduction and emergency preparedness would require a human-rights-based approach in the development of such policies that includes Indigenous peoples' participation. The same would also be true for conservation that is to take place on their territories. As such, to depict the principle of consent as a veto distorts the right of Indigenous peoples, who as "peoples" have the right to set their own priorities and strategies for development or conservation over their territories, and therefore violates the principles of equality and nondiscrimination which is fundamental to international law.

In cases where projects proceed absent consent, Professor Anaya provides clear guidance regarding State obligations to safeguard human rights and due process in such circumstances<sup>126</sup> and a corporation's "independent responsibility to respect human rights" and not proceed with operations "regardless of any authorization by the State to do so."<sup>127</sup> This would apply likewise to conservation NGOs.

### **B. Due Diligence, Safeguards, and Impact Assessments**

In addition to the standard of consent and consultation, Professor Anaya notes that this is not the only safeguard against actions that can impact Indigenous peoples' rights over their lands, territories, natural resources, and other human rights. This is often the key focus of both conservation and corporate actors alike. As he asserts, "additional safeguards include but are not limited to the undertaking of prior impact assessments that provide adequate attention to the full range of Indigenous peoples' rights, the establishment of mitigation measures to avoid or

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<sup>125</sup> *Id.* ¶ 36.

<sup>126</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 37-39.

<sup>127</sup> *Id.* ¶ 40.

minimize impacts on the exercise of those rights, benefit-sharing, and compensation for impacts in accordance with relevant international standards.”<sup>128</sup>

Therefore, according to the second pillar of the *Guiding Principles*, corporations must act with due diligence to avoid infringing or contributing to the infringement of human rights. In practical terms, this is a key component of any organization’s risk management and risk mitigation system; however, given the weak understanding of Indigenous rights or lack of compliance monitoring in many organizations, due diligence often falls significantly short of good practices to respect the rights of Indigenous peoples in extractive industries. As there are “deficient regulatory frameworks” worldwide, the rights of Indigenous peoples are not sufficiently protected in extractive industries.<sup>129</sup> As such, extractive companies and conservation NGOs must exercise due diligence to identify, mitigate, and prevent potential adverse harms, as well as provide remedy and redress for incurred harms.<sup>130</sup>

Moreover, corporate NGO responsibility should go beyond harm avoidance (or negative responsibility) as reflected in principles 11, 12, and 13 of the Respect, Protect and Remedy framework.<sup>131</sup> Under principle 11 of the

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<sup>128</sup> 2012 Report, *supra* note 6, ¶ 52. See also *id.* at 14 n.3 (citing *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 138-40 (Nov. 28, 2007) for the proposition that safeguards include participation, impact assessments, and benefit-sharing). Impact studies, compensation measures, and benefit-sharing safeguards are also discussed in the 2010 Report, *supra* note 8, ¶¶ 71-80, and the 2012 Report, *supra* note 6, ¶ 52.

<sup>129</sup> 2012 Report, *supra* note 6, ¶ 58.

<sup>130</sup> U.N. *Guiding Principles*, *supra* note 5, princ. 17. See also Anaya’s discussion on due diligence in *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 40, 53-57, 62, 64; 2012 Report, *supra* note 6, ¶¶ 61, 71, 83; and 2010 Report, *supra* note 8, ¶¶ 46-80.

<sup>131</sup> Those principles read as follows:

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.  
 . . . .
12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.  
 . . . .
13. The responsibility to respect human rights requires that business enterprises:
  - (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;



*Guiding Principles*, the “responsibility to respect human rights as a global standard of expected conduct for all business enterprises wherever they operate” also includes taking sufficient measures to prevent, mitigate, and remediate harms, but they may also include “other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights.”<sup>132</sup> As a result, Professor Anaya notes, as part of due diligence, it is now expected of companies “to be *proactive* by identifying the rights of Indigenous peoples in the areas in which they operate and by determining how those peoples would be affected by their activities.”<sup>133</sup> Social and environmental impact assessments, including mitigating against harms to health, subsistence activities, and sacred sites must be included in human rights impact assessments, for harms incurred to take measures to provide adequate compensation or steps to minimize or offset the limitation of the right.<sup>134</sup> This also includes the responsibility to fully share information about potential impacts and benefits, including financial benefits, and to include Indigenous peoples in the impact assessment processes, and it can be shared confidentially should the information be proprietary.<sup>135</sup> In addition, in line with free, prior and informed consent, Professor Anaya asserts that consultations and agreement with Indigenous peoples over an extractive or conservation project should take place prior to a state authorizing a company or conservation NGO to start activities.<sup>136</sup> As a matter of good practice and good faith, due diligence is also required in the exploration phase of any projected activity on Indigenous territories. Failure to consult even in the exploration phase, as Professor Anaya notes, can breed irreparable distrust and engender conflict.<sup>137</sup>

### **C. Indigenous Recognition and Tenure**

Moreover, among the most pressing challenges both companies and conservation NGOs face when operating on Indigenous territories is recognizing Indigenous peoples as Indigenous peoples even when the State does not.<sup>138</sup> Often, in an effort to not alienate State partners, many corporate and conservation partners refer to Indigenous partners as “local communities.” As previously stated, the lack of recognition of Indigenous peoples by States, corporations, or

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- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

*U.N. Guiding Principles*, *supra* note 5.

<sup>132</sup> *Id.*, princ. 11, cmt.

<sup>133</sup> *2010 Report*, *supra* note 8, ¶ 45 (emphasis added).

<sup>134</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶¶ 38, 73.

<sup>135</sup> *Id.* ¶¶ 65-66.

<sup>136</sup> *Id.* ¶ 67.

<sup>137</sup> *Id.* ¶ 68.

<sup>138</sup> *2010 Report*, *supra* note 8, ¶¶ 49-52.

conservation organizations can have serious ramifications on Indigenous peoples' rights and well-being. Failure to recognize Indigenous peoples is often tied to a failure to recognize Indigenous rights and title to their land, territories, and natural resources, and effective decision-making over matters related to these, as a matter of survival.<sup>139</sup> Professor Anaya is clear with respect to the responsibilities of non-state actors to respect Indigenous rights to tenure. This includes respecting Indigenous peoples' territories over "lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices."<sup>140</sup> In addition, he asserts that a "generally accepted principle of international human rights law holds that the existence of distinct ethnic, linguistic, or religious groups, including Indigenous peoples, can be established by objective criteria and cannot depend on a *unilateral* decision by a State."<sup>141</sup> Similarly, in cases of customary land tenure, he argues that "companies cannot, in the exercise of due diligence, assume that the absence of official recognition of Indigenous communal ownership rights implies that such rights do not exist."<sup>142</sup>

As such, business and NGO entities "cannot use limited recognition, or absence of explicit recognition, of Indigenous peoples in the countries in which they operate as an excuse not to apply the minimum international standards applicable to Indigenous rights, including in cases where States are opposed to the application of such standards."<sup>143</sup> Due diligence therefore requires companies and environmental NGOs alike to identify in advance which Indigenous peoples could be affected by their activities and how they could be affected.<sup>144</sup> This includes obtaining prior documentation prepared by experts on Indigenous land use and occupation (e.g., economic subsistence activities, cultural and spiritual uses, and the use of natural resources for their economic and social development as peoples).<sup>145</sup> In addition, conservation or extractive projects must also respect and treat Indigenous customary land tenure on the same legal footing as officially legally titled land.<sup>146</sup> Thus, due diligence exercised by business or NGOs in relation to land and resource title requires "intercultural understanding that goes far beyond mere legal considerations" to include the "special relationship existing between Indigenous peoples and their traditional territories, which form the basis of their distinct identity and culture."<sup>147</sup> As a result, Professor Anaya explains, "Companies must understand that . . . Indigenous peoples have maintained, and

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<sup>139</sup> *2012 Report*, *supra* note 6, ¶ 65.

<sup>140</sup> *Extractive Industries & Indigenous Peoples*, *supra* note 3, ¶ 27.

<sup>141</sup> *2010 Report*, *supra* note 8, ¶ 49 (emphasis added).

<sup>142</sup> *Id.* ¶ 57.

<sup>143</sup> *Id.* ¶ 50.

<sup>144</sup> *Id.*

<sup>145</sup> *2010 Report*, *supra* note 8, ¶¶ 54-55.

<sup>146</sup> *Id.* ¶ 56.

<sup>147</sup> *Id.* ¶ 59.

continue to maintain, ties to their traditional territories by participating in their control and management. These ties are, moreover, collective, and therefore go far beyond the individual rights of the members of these groups.”<sup>148</sup>

Professor Anaya’s study on extractive industries builds on a general human rights framework of the *Guiding Principles*, but specifically examines, operationalizes, and clarifies the relevant international standards, principles, and good practices from an Indigenous rights perspective in line with international human rights law and norms. He also addresses the persistent misconceptions and misinterpretations about the content and status of Indigenous rights in international law. This is an essential body of work upon which to build a new global human rights regulatory regime for conservation NGOs and other non-state actors operating on or near Indigenous territories.

## V. CONCLUSION: CONSERVATION NGO RESPONSIBILITY IN A POST-UNSR EXTRACTIVE STUDY ERA

As Indigenous peoples have been effective stewards of the global commons, there is now a deluge of activity related to both the exploitation and conservation of their lands, territories, and natural resources. This has often led to serious repercussions on the lives, livelihoods, and human rights of Indigenous peoples, and often leads to chronic conflict, political instability, deepening poverty, and human suffering. A recent study found widespread acceptance by companies of their responsibility to respect human rights, and at the same time deep confusion about what this means in practice.<sup>149</sup> Factors impeding progress on implementation of corporate responsibility, according to the study, include a lack of understanding of their company’s responsibilities (thirty-two percent), a lack of training and education for employees (twenty-six percent), a lack of resources to address human rights issues (twenty-seven percent), and a belief that respecting human rights is related mostly to social license or stakeholder engagement (forty-eight percent) versus a broader responsibility to infuse better practices throughout corporate practices.<sup>150</sup> Moreover, corporate human rights responsibilities were viewed more as a moral or ethical issue (forty-one percent) and brand and reputational management issue (forty-three percent), yet only twenty-one percent believe that human rights policy is being driven by a clear, long-term strategic business case in their company.<sup>151</sup> Given the increasing

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<sup>148</sup> *Id.*

<sup>149</sup> See ECONOMIST, *THE ROAD FROM PRINCIPLES TO PRACTICE: TODAY’S CHALLENGES FOR BUSINESS IN RESPECTING HUMAN RIGHTS* (2015). This study surveyed 853 senior executives from a range of industries, conducted nine in-depth interviews with corporate leaders, and interviewed independent experts. *Id.* at 2. See also John G. Robinson, *Common and Conflicting Interests in the Engagements Between Conservation Organizations and Corporations*, 26 *CONSERVATION BIOLOGY* 967 (2012).

<sup>150</sup> ECONOMIST, *supra* note 149, at 5.

<sup>151</sup> *Id.*

awareness of human rights responsibilities of corporations and conservation NGOs, there remains, as Professor Anaya found:

significant ambiguity about the extent or manner in which the *Guiding Principles* relate to the standards of human rights that specifically concern Indigenous peoples [and] a pervasive lack of understanding, much less conviction, that the human rights that . . . companies are to respect, include the specific rights of Indigenous peoples, in particular those that are affirmed in the United Nations Declaration on the Rights of Indigenous Peoples.<sup>152</sup>

It is for this reason that Professor Anaya's study on extractive industry is both timely and essential both in the context of providing guidance to States and businesses to respect the human rights of Indigenous peoples in business activities, but also to non-profits who work on Indigenous territories and natural resources in the public interest. Moreover, with increasing conflict and confrontation between Indigenous peoples and those who seek to develop (or safeguard) their natural resources, growing public awareness and media attention of such conflicts, and increasing political and legal mobilization of Indigenous peoples to assert their human rights; the costs and risks to industry, governments, and non-governmental organizations alike who work on or near Indigenous territories are real and increasing.<sup>153</sup> Indeed, corporations and NGOs are beginning to get the message. For instance, corporate sustainability experts predict social and environmental responsibility will be a core feature of most jobs in 2015 and beyond, given shifting consumer preferences and awareness towards sustainable and responsible businesses.<sup>154</sup> In addition, as reported by the 2014 Indigenous Peoples' Rights Risk report, "Ernst and Young elevated the *social license to operate* to the third place on its list of the greatest business risks to the mining industry, citing 'the frequency and number of projects being delayed or stopped due to community and environmental activists continues to rise.'"<sup>155</sup>

As a result, Indigenous peoples have become a core constituency to businesses, NGOs, and states in the current era of a "responsibility revolution,"<sup>156</sup>

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<sup>152</sup> James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, Statement at the Forum on Business and Human Rights (Dec. 5, 2012) *available at* <http://unsr.jamesanaya.org/statements/forum-on-business-and-human-rights-2012-statement-by-professor-james-anaya>.

<sup>153</sup> See *2010 Report*, *supra* note 8, ¶ 29. Risks could include operational, investor confidence, reputational, legal, and economic. See *generally, e.g.*, REBECCA ADAMSON & NICK PELOSI, *FIRST PEOPLES WORLDWIDE, INDIGENOUS RIGHTS RISK REPORT* (2014).

<sup>154</sup> Ellen Weinrub, *2015 Prediction: Sustainability Will Be Written into Every Job Description*, *GUARDIAN* (Jan. 7, 2015), <http://www.theguardian.com/sustainable-business/2015/jan/07/2015-prediction-sustainability-jobs-careers-employers>.

<sup>155</sup> ADAMSON & PELOSI, *supra* note 154, at 8 (emphasis added).

<sup>156</sup> See JEFFREY HOLLENDER & BILL BREEN, *THE RESPONSIBILITY REVOLUTION: HOW THE NEXT GENERATION OF BUSINESSES WILL WIN* ch. 1 (2010).

where transparency, accountability, social and environmental justice, good governance, and respect for and promotion of human rights are essential for organizational performance, return on investment, competitive advantage, longevity, investor confidence, corporate viability, and brand strength.

Therefore, in the current era of “Corporate Responsibility 2.0,”<sup>157</sup> where CSR (or NGO social responsibility) can no longer be a mere marketing gimmick with a thinly veiled appearance of doing business differently, a clear, authoritative, and practical regulatory framework is essential to assess corporate performance and change. In this respect, Professor Anaya’s work on extractive industries can engender transformative change in corporate behavior and the lives and well-being of Indigenous peoples by clarifying corporate responsibility in this context. His preferred business model for resource extraction industries, one which is Indigenous-led, can lead to transformational outcomes in economic and social development, equality, and governance, while resetting the relationship between the State, big business, and Indigenous peoples. The same can be said for Indigenous-led conservation efforts. While gains have been made in both sectors, the lack of enforcement, monitoring, and binding norms and standards can limit systemic change. Indeed, the lack of a cohesive framework and set of standards and guiding principles adopted at the global level further impedes practice reform for the conservation sector writ large, and conservation NGOs in particular.

The UNSR extractive study fills a gap that has been hitherto missing in the international human rights regulatory and compliance regime pertaining to non-state actors and, at the same time, it significantly advances understanding of the *Guiding Principles*. Corporate social policies and codes of conduct must take into account Professor Anaya’s analysis and operationalization of the key principles underlying corporate responsibility to respect the rights of Indigenous peoples. His report will therefore have far-reaching implications to other sectors whose work may impact the human rights of Indigenous peoples.

The question remains, what is next now that the *Guiding Principles* are the global standard of corporate responsibility, and now that the Human Rights Council has endorsed the UNSR thematic report on extractive industries as an authoritative interpretive text of corporate responsibility to respect Indigenous rights? Professor Anaya has come the closest since the creation of the Draft Norms to hold the possibility that, in the case of international human rights law concerning Indigenous peoples, business enterprises have a legal obligation to respect human rights, which include at minimum respecting the human rights instruments and relevant human rights standards and instruments such as the U.N. Declaration on the Rights of Indigenous Peoples.

In fact, Professor Anaya challenges the dismissive notion that, though declarations are not formally legally binding on States, the legitimacy of the U.N. Declaration as a human-rights instrument nevertheless rests on its recognition and

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<sup>157</sup> See *id.* at 16-18.

acceptance by a large number of States and Indigenous peoples.<sup>158</sup> The Declaration reflects both what States and Indigenous peoples believe to be obligatory and widely accepted, and, as such, can crystallize new norms and practices, forming an emerging customary law, which is binding.<sup>159</sup> As Professor Anaya argues, “the Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination, and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies.”<sup>160</sup> As a result, he argues, “the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that is not legally binding. [The] implementation of the Declaration should be regarded as a political, moral *and, yes, legal imperative.*”<sup>161</sup>

This is significant, as Professor Anaya makes it harder on both moral and substantive legal grounds to dismiss so-called soft law norms and standards by elevating the respect for human rights as a non-discretionary good practice, independent of whatever regulatory norms States impose on corporations. In this respect, Professor Anaya moves the debate beyond the applicability of human rights of Indigenous peoples as being a creation of soft law that is aspirational, non-enforceable, and voluntary, to elevating core provisions and principles as binding norms around customary practice, and therefore is obligatory to respect. As a result, Professor Anaya, as UNSR, significantly advanced global understanding, practices, and awareness of the rights of Indigenous peoples related to just governing of the global commons—both in terms of its protection or its development. Indeed, Anaya’s extractive industry study dispels myths and misconceptions on what respecting Indigenous rights means in practice, including what the standards, norms, and good practices are related to corporate and NGO responsibility to respect Indigenous rights in their operations.

In addition, as conservation NGOs can impact the fundamental human rights of Indigenous peoples to their lands, territories and natural resources, is it therefore time to revisit a binding mechanism? Or are new measures and mechanisms needed within existing intergovernmental institutions to address this current regulatory gap? What global institutional reforms are needed to enhance accountability, remedy, redress, transparency, and promote dialogue between Indigenous peoples and extractive industries and conservation NGOs specifically

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<sup>158</sup> U.N. Secretary-General, *Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 60, U.N. Doc. A/65/264 (Aug. 9, 2010).

<sup>159</sup> *Id.* ¶ 62.

<sup>160</sup> James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, to the EMRIP (July 15, 2010), *available at* <http://unsr.jamesanaya.org/statements/statement-on-the-united-nations-declaration-on-the-rights-of-Indigenous-peoples-to-the-emrip>.

<sup>161</sup> U.N. Secretary-General, *Rights of Indigenous Peoples*, ¶ 70, U.N. Doc. A/66/288 (Aug. 10, 2011); U.N. Secretary-General, *Situation of Human Rights and Fundamental Freedoms of Indigenous People*, *supra* note 158, ¶ 63 (emphasis added).

within the Indigenous peoples human rights system? For one, coordination is needed among the various U.N. and regional processes and mechanisms (such as the UNSR, EMRIP, and UNPFII) to initiate a comprehensive study, recommend and develop a regulatory framework and institutional mechanisms to address the accountability gap in global conservation, and increase standardization of conservation practice among CoNGOs. Moreover, processes such as the Universal Periodic Review mechanism or Committee on the Elimination of Racial Discrimination can also be strengthened to specifically address State obligations to protect Indigenous rights vis-à-vis the activities of conservation NGOs and other actors. Institutions such as the U.N. Forum on Business and Human Rights, the Working Group on the issue of human rights and transnational corporations and other business enterprises, and the U.N. Global Compact may be instructive for developing institutions or processes related to the promotion of good practices (among all conservation actors, including States), enhancing accountability, monitoring the activities of CoNGOs, and provide for grievance, remedy and redress—learning from these organizations’ strengths and weaknesses. Certainly, the role of the UNSR will be essential in standard-setting processes, institutional development, and dissemination of and compliance to good practices, investigation, and monitoring.

A lack of a clear global regulatory framework outlining the responsibilities of conservation organizations to Indigenous peoples; a lack of understanding of the complex ways conservation organizations work with civil society, international, and national levels, and the corporate sector; weak Indigenous and human rights literacy in many conservation organizations; weak accountability mechanisms; and a mischaracterization of key principles and standards, have led to a patchwork adherence to good practices in conservation programming, planning, policies, and partnerships. The need for a global standardized due diligence and human-rights-based approach to conservation will go far in maximizing the benefits of conservation on the well-being and fulfillment of human rights of Indigenous peoples, environmental security, and meaningful development outcomes.

One thing is clear, a global regulatory regime that outlines the responsibilities of non-state actors who work on or near Indigenous territories must go beyond the voluntary compliance and self-policing that exists today to a standardized framework that facilitates the active promotion and implementation of good practices and understanding of Indigenous rights in business activities that impact their lands, territories, and natural resources. Voluntary compliance mechanisms such as the Conservation Initiative on Human Rights is an important start, but its efficacy for ushering systemic change is limited without a global regulatory architecture to guide and promote good practices, facilitate dialogue between conservation actors, provide for accountability mechanisms, monitor compliance, investigate urgent cases, and bolster Indigenous participation in governing the global commons. International conservation organizations can play a leadership role within the conservation sector by creating (and adhering to) codes of conduct and guidelines in line with both the *Guiding Principles* and the

interpretative framework in the UNSR extractive industry study. Further, it can support this next step for the creation of industry-wide standards and global regulatory regime that would help reduce risk and fulfill their human rights responsibilities while realizing the benefits of conservation such as equity, social justice, sustainability, cultural resilience, improved livelihoods, and economic and political stability.

As I reflect on his body of work over his two terms as UNSR, Professor Anaya has been incisive and steadfast yet principled and convincing in his recommendations and critiques of cases and countries he has examined. His analysis and technical advice—including to civil society organizations that sought his help—is grounded in applied philosophy where human emancipation, equality, fairness, non-discrimination, inclusiveness, and empowerment are given tangible expression for implementation at national and international levels, including a tangible impact on the lives of people. In this respect, Professor Anaya certainly demonstrated a “principled pragmatism” that was rooted in building consensus, promoting dialogue and good practices to bring about meaningful change in the circumstances and lives of Indigenous peoples worldwide.<sup>162</sup> His commitment was exceptional in that regard.

Professor Anaya’s brand of human rights diplomacy stands out for his robust evidenced-based yet principled reasoning, his commitment to human rights and fair play, his ability to foster dialogue, and his ability to transcend and avoid politicization. His normative, social, and legal contributions lie not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses, integrating them within a single, logically coherent, and comprehensive template, and identifying where the current regime falls short with respect to protecting Indigenous peoples’ rights and how it could be improved. In all respects, this study represents an important jurisprudential framework that should be considered as a new global benchmark for how businesses and other non-state actors should model their practices to not only avoid harm to Indigenous peoples, but to proactively contribute to the positive realization of their human rights.




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<sup>162</sup> *Extractive Industries & Indigenous Territories*, *supra* note 10, ¶ 80. See also Comm’n on Human Rights, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶ 70-81, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (discussing principled pragmatism).