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Engaging the U.N. Guiding Principles on Business and Human Rights: the inter-american commission on human rights & the extractive sector

Relacionando os Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos a Comissão Interamericana de Direitos Humanos e o setor extrativista

Cindy S. Woods

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ABSTRACT

Following the adoption of the U.N. Guiding Principles on Business and Human Rights (Guiding Principles) in 2011, states have increasingly engaged with the need to protect against and remedy corporate human rights abuses. This can be seen in the proliferation of National Action Plans (NAPs) on business and human rights (BHR). Many countries through the Americas have begun drafting BHR NAPs, and engaging in other activities to promote corporate accountability and social responsibility. As the normalization of BHR standards continues in the region, it is important for the Inter-American Commission on Human Rights (IACHR) to take a lead role in setting regional standards for the state responsibility to protect against and remedy corporate human rights abuse. This paper illustrates, through a discussion of the IACHR's mandate and functions, along with an analysis of the Commission's work in the extractive sector that the IACHR is both capable of and obliged to engage with the Guiding Principles.

Keywords:

1. Business and Human Rights
2. Inter-american Commission on Human Rights
3. Extractives
4. UN Guiding Principles
5. ESCR Unit

1. INTRODUCTION

In recent years, the business and human rights movement has climbed to the top of the international human rights agenda. Starting in the 1970s, as multinational corporations increased in fiscal and political power throughout the neoliberal boom of the era, and as corporate complicity in large scale human rights abuses came to light, civil society and governments alike

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began to push for increased corporate accountability.¹ After multiple failed endeavors within the United Nations system at drafting a binding code of conduct for transnational corporations, in 2011, the Human Rights Council adopted the Guiding Principles on Business and Human Rights (Guiding Principles).² These principles lay out, in three pillars, the state duty to protect individuals against human rights abuses; the corporate responsibility to respect human rights; and the need for greater access to judicial and non-judicial remedies for victims of corporate human rights abuse.³ Following the endorsement of the Guiding Principles, the subsequently created Working Group on the issue of human rights and transnational corporations and other business enterprises called upon states to begin operationalizing the Guiding Principles through the creation of National Action Plans (NAPs)—“evolving policy strateg[ies]” aimed at creating cohesive and coherent implementation.⁴ Over thirty countries have committed to creating a NAP, including many within the inter-American system, signaling the region’s readiness to engage with the Guiding Principles.⁵

1 The Bhopal gas tragedy of 1984 is probably the most cited case of corporate complicity in human rights abuse, though calls for an international code of conduct for TNCs began in the mid-seventies. See, Address Delivered by Salvador Allende Gossens, President of Chile, at the inaugural ceremony on 13 April 1973, United Nations Conference on Trade and Development, *Proceedings of the United Nations Conference on Trade and Development*, Apr. 13-May 21, 1972, 62, U.N. Doc. TD/180 (Vol. 1), Annex VIII (1973).

2 U.N. Special Representative of the Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rts. and Transnat’l Corp. and other Bus. Enter., John Ruggie, Annex, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*]. For more on past attempts at drafting a binding code of conduct, see Cindy S. Woods, “It Isn’t A State Problem”: The Minas Conga Mine Controversy and the Need for Binding International Obligations on Corporate Actors, 46 *Geo. J. Int. L.* 629, 635-39 (2015).

3 *Guiding Principles*, supra note 2.

4 U.N. Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights ii* (2014) [hereinafter *Working Group Guidance*].

5 Compare *State National Action Plans*, U.N. Human Rights Office of the High Commissioners for Human Rights, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Apr. 8, 2015) with *National Action Plans*, Business & Human Rights Resource Center, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited Apr. 8, 2015). Countries within the region committed to forming a NAP include, Argentina, Brazil, Chile, Colombia, Guatemala, Mexico, and the United States. *Id.*

The Guiding Principles were favorably received throughout the international community, not only by states, but also regional bodies; the General Assembly of the Organization of American States (OAS) endorsed the principles in June 2014.⁶ As the supreme organ of the OAS, the General Assembly requested the Inter-American Commission on Human Rights (IACHR) to “continue supporting states in the promotion and application of the state and business commitments in the area of human rights and business.”⁷ However, the IACHR has been slow on the uptake. Some merit this lethargy to unfamiliarity on the Commission’s part with the new business and human rights lexicon, while others question if the mandate of the IACHR is adequate to allow the Commission to implement the Guiding Principles. This paper aims to put both of these mistaken assumptions to rest by illustrating that not only is the promotion of the Guiding Principles squarely within the Inter-American Commission’s mandate, but also that the Commission is well-versed in issues of business and human rights, through an analysis of the inter-American human rights system’s prior decisions, hearings and reports. In demonstrating the latter point, the paper will focus on the extractive industry; arguably one of the sectors most fraught with corporate human rights abuses in the Americas. Finally, the paper will go one step further, and illustrate the importance of the IACHR’s engagement with the Guiding Principles.

The paper will progress as follows: Part II introduces the Guiding Principles in greater detail, before turning to a discussion regarding the implementation of the principles in domestic spheres. Part III focuses on the inter-American system, introducing the Inter-American Commission, overviewing its functions and clarifying its mandate. Part IV illustrates how the Commission has been engaging with the topic of business and human rights through its work regarding the extractive sector, focusing on three main issues: indigenous peoples’ rights, criminalization of human rights defenders, and private security. Part V argues that the Commission should and must engage with the principles because it has been request to by the OAS General Assembly, has the ability to set normative standards in the field, and should seek to close gaps in accountability. Part VI

6 Organization of American States, Resolution Promotion and Protection of Human Rights in Business, OAS AG/RES. 2840 (XLIV-O/14) (June 4, 2014) [hereinafter *OAS Resolution*].

7 *Id.* at 3.

concludes by suggesting that the Commission can and should begin effectively and explicitly engaging the Guiding Principles within the inter-American system.

2. THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The U.N. Guiding Principles on Business and Human Rights were unanimously endorsed by the Human Rights Council in 2011. The principles are the culmination of Professor John Ruggie's six-year mandate to identify and clarify standards of corporate responsibility and accountability for multinational corporations and explicate the duties of States in regulating and adjudicating the role of multinational corporations with regards to human rights.⁸

A. The Three Pillars

The Guiding Principles are based on a three-pillared "Protect, Respect, and Remedy" Framework, which establishes the (1) state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) the need for greater access to remedy, both judicial and non-judicial, for victims of business-related abuse.⁹ The following is a brief discussion of each pillar, highlighting the pertinent principles for subsequent analysis.

State Duty to Protect

States are obligated to protect individuals within their jurisdiction against human rights abuses caused by corporate actors.¹⁰ This obligation requires that states take appropriate steps to "prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."¹¹ In part, states

should enforce *de jure* and *de facto* laws which require businesses to respect human rights, periodically reassessing the adequacy of these laws, and provide effective guidance to corporate actors regarding how to respect human rights within their operations.¹² States should take additional steps to protect individuals against human rights abuses caused by parastatal corporations or other business enterprises substantially supported by the state.¹³ In conflict-affected areas, where the control over territory, resources or a Government itself is contested and the risk of human rights abuses is heightened, states have additional human rights duties to ensure that corporations are not involved in causing or exacerbating human rights abuses.¹⁴ These auxiliary duties include "engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships" and "providing adequate assistance to business enterprises to assess and address the heightened risk of abuses, paying special attention to both gender-based and sexual violence."¹⁵

Corporate Responsibility to Respect

While there is no legal obligation for corporations' to uphold human rights norms, business enterprises have a responsibility to respect internationally recognized human rights.¹⁶ This responsibility exists independently from states' ability or willingness to uphold their human rights duties, and above and beyond compliance with national laws and regulations that seek to protect human rights.¹⁷ The corporate responsibility to respect is twofold: (1) corporations should avoid infringing on the human rights of others through their activities but address such impacts when they occur and, (2) they should 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 directly contributed

8 Comm'n on Human Rights Res. 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc.E/CN.4/RES/2005/69 (Apr. 20, 2005).

9 Special Rep. of the Sec'y Gen. on the issue of human rights and transnat'l corps. and other bus. enters., John Ruggie, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

10 *Id.* princ. 1.

11 *Id.*

12 *Id.* princ. 3.

13 *Id.* princ. 4.

14 *Id.* princ. 7.

15 *Id.*

16 *Id.* princ. 11. These rights are understood, at a minimum, to encompass the rights expressed in the International Bill of Human Rights and the fundamental rights protected in the International Labor Organization's (ILO) Declaration on Fundamental Principles and Rights at Work. *Id.* princ. 12.

17 *Id.* princ. 11 cmt.

to the harm.¹⁸ Addressing human rights impacts means, “taking adequate measures for their prevention, mitigation and where appropriate, remediation.”¹⁹ In order for corporations to identify, mitigate and account for how they address adverse human rights impacts, they should carry out human rights due diligence, which should include “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”²⁰ Some ways to gauge human rights risks include seeking meaningful consultation with potentially affected groups and other stakeholders, and drawing on internal and independent external human rights expertise.²¹

Access to Remedy

States must ensure, through judicial, administrative, legislative or other appropriate means that victims of business-related human rights abuse have access to effective remedy.²² Failure to investigate, punish and redress corporate human rights abuses renders the state duty to protect meaningless.²³ States should therefore ensure the effectiveness of their domestic judicial mechanisms in the context of addressing corporate human rights abuses; this includes reducing legal, practical and other barriers that could lead to a failure by victims to access remedy.²⁴ State-based and non-state-based grievance mechanisms can also be used as an alternative source of remedy for corporate human rights abuses.²⁵ However, in order to be effective, these non-judicial grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.²⁶

B. Moving Forward: Implementing the Guiding Principles

Following its endorsement of the Guiding Principles, the Human Rights Council established a Working

Group on the issue of human rights and transnational corporations and other business enterprises (Working Group), requesting it, in part, to “promote the effective and comprehensive dissemination and implementation of the Guiding Principles.”²⁷ In this regard, the Working Group has encouraged all states to develop and enact National Action Plans (NAPs), fluid policy strategies aimed at preventing corporate human rights abuses through the promotion of the Guiding Principles.²⁸ The Working Group and a number of civil society organizations have developed guidance on the development of NAPs.²⁹ According to the Working Group, one essential criterion for the creation of an effective NAP is the meaningful involvement of interested stakeholders in an inclusive and transparent process.³⁰

As of April 2015, more than thirty countries have committed to or have drafted NAPs, including at least six countries within the inter-American system.³¹ In line with prevailing guidance, many of these countries have reached out to civil society organizations and other interested stakeholders for inputs, evaluations and guidance, including the U.S. process of public consultations in collaboration with universities and civil society organizations and the Mexican government’s engagement with domestic and international civil society organizations.³² Accompanying this rising interest in and collaboration on the development of NAPs in the Western Hemisphere have come calls for the increased participation of the Inter-American Commission on Human Rights in regional NAPs processes.³³ For example, in

27 Human Rights Council Res. 17/4, Human rights and transnational corporations and other business enterprises, 17th Sess., U.N. Doc. A/HRC/Res/17/4 (July 6, 2011).

28 *Working Group Guidance*, *supra* note 4 at ii.

29 See, e.g., *Id.*; The Danish Institute for Human Rts. & The Int’l Corp. Accountability Roundtable, National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation and Review of State Commitments to Business and Human Rights 16-17 (2014).

30 *Working Group Guidance*, *supra* note 4 at ii.

31 See *supra* note 5.

32 See, Christopher Smart, *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct*, U.S. National Security Council (Nov. 20, 2014; 1:29 PM), <https://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business-> (last visited Apr. 10, 2015); ICAR & PODER *Partner to Support the Development of a National Action Plan on Business & Human Rights in Mexico*, International Corporate Accountability Roundtable, <http://accountabilityroundtable.org/analysis/icarpoderprojectmexiconap/> (last visited Apr. 10, 2015).

33 See, e.g., *Letter to the Inter-American Commission on Human Rights*

18 *Id.* princ. 13.

19 *Id.*

20 *Id.* princ. 17.

21 *Id.* princ. 18.

22 *Id.* princ. 25.

23 *Id.*

24 *Id.* princ. 26.

25 *Id.* princ. 27-31.

26 *Id.* princ. 31.

December the Chilean government announced that it had begun the NAP process and would “look to the [Inter-American] Commission for advisement throughout [the] process.”³⁴ With the growing number of countries within the inter-American system committed to drafting NAPs, it is time for the Inter-American Commission to take a leadership role in this emerging human rights movement in the region.

3. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American Commission on Human Rights (IACHR) was formed in 1959 by the Organization of American States as an autonomous organ tasked with the promotion and protection of human rights. Since its inception, the IACHR has monitored state activities and served as a focal point of human rights consensus within the region. As calls for increased Commission engagement with the Guiding Principles become stronger, some question whether the IACHR has the mandate or capacity to widen its scope to broader issues of business and human rights. However, an overview of the Commission’s mandate and structure reveals this possibility to be well within the realm of the IACHR’s authority.

A. The IACHR’s Mandate and Functions

The principal function of the Commission is to “promote the observance and protection of human rights” in the Western Hemisphere.³⁵ The American Convention on Human Rights in 1969 defines in more specific terms the functions and powers of the Com-

mission, which include:

- (a) to develop an awareness of human rights among the peoples of America;
- (b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- (c) to prepare such studies or reports as it considers advisable in the performance of its duties;
- (d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- (e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- (f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- (g) to submit an annual report to the General Assembly of the Organization of American States.³⁶

These functions and powers are further refined by the Statute of the IACHR, which provides more context to the Commission’s mandate, especially regarding individual petitions.³⁷ While the IACHR mandate is quite broad, the work of the Commission generally falls within three main categories: the (1) individual petition system; (2) monitoring of Member States human rights situations; and (3) special attention to priority thematic areas.

Individual Petition System

The Commission has the authority to act on petitions containing denunciations or complaints alleging violation of the American Convention on Human Rights or the American Declaration of the Rights and Duties of Man brought by any individual, group of persons, or nongovernmental entity legally recognized

on *Integrating Business and Human Rights*, International Corporate Accountability Roundtable (Dec. 18, 2014), <http://accountability-roundtable.org/wp-content/uploads/2014/12/ICAR-Letter-to-Inter-American-Commission.pdf> (last visited Apr. 10, 2015).

34 *Id.*; see also, *Subsecretario Edgardo Riveros participó en Foro Anual sobre Derechos Humanos y Empresas en Naciones Unidas*, Ministerio de Relaciones Exteriores de Chile (Dec. 2, 2014), <http://www.min-rel.gov.cl/subsecretario-edgardo-riveros-participo-en-foro-anual-sobre-derechos-humanos-y-empresas-en-naciones-unidas/min-rel/2014-12-03/100147.html> (last visited Apr. 10, 2015).

35 Organization of American States, *Charter of the Organization of American States* (Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993), Apr. 30, 1948, 1609 U.N.T.S. 48.

36 Organization of American States, *American Convention on Human Rights*, “Pact of San Jose”, Costa Rica, Nov. 22, 1969, OAS Treaty Series No. 36; 1144 U.N.T.S. 123 [hereinafter *Pact of San Jose*].

37 Organization of American States, *Statute of the Inter-American Commission on Human Rights*, Oct. 1, 1979, O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88.

in a member state.³⁸ While the Commission's finding in any case brought before it is not considered binding, it does have the authority to forward cases of violations of the American Convention to the Inter-American Court on Human Rights, whose findings are binding on those member state that have accepted its jurisdiction.³⁹ Through the petition system, the Commission can also call on states to adopt precautionary measure to avoid serious and irreparable harm to life and personal integrity.⁴⁰

Member State Monitoring

The IACHR also monitors member states through the presentation of its Annual Report to the General Assembly and the publication of special reports on the human rights situation in member states or specific human rights problems within the region.⁴¹ Additionally, the Commission carries out in loco visits to monitor human rights situations at the request or permission of member states to investigate specific situations or take broader stock of the general situation of human rights in the state.⁴²

Priority Thematic Areas

In relation to priority thematic areas, the Commission maintains nine rapporteurships on broad topics of human rights.⁴³ These rapporteurships are aimed at strengthening, promoting and systematizing the IACHR's work surrounding these groups, communities

and peoples particularly at risk of human rights abuses.⁴⁴ In 2012, as part of the IACHR Strengthening Process, the Commission created the Unit on Economic, Social, and Cultural Rights (ESCR Unit).⁴⁵ This new thematic area has the mandate to "cooperate with the analysis and evaluation of the situation of these rights in the Americas, provide advice to the IACHR in the proceedings of individual petitions, cases and request of precautionary measures and provisional measures which address these rights, undertake working visits to the OAS Member States and prepare studies and publications."⁴⁶ Some within the organization sees the ESCR Unit as the actor most poised to engage at a high level with the business and human rights movement, especially the Guiding Principles.⁴⁷ However, thus far, little has been done within the Commission to promote this new international human rights standard.

B. Squaring the IACHR's functions with the Guiding Principles

In 2014, the General Assembly of the OAS endorsed the Guiding Principles, vowing to continue promoting their application and urging member states to disseminate the Guiding Principles and the best practices surrounding their implementation.⁴⁸ It also requested that the Inter-American Commission "continue supporting states in the promotion and application of state and business commitments in the area of human rights and business."⁴⁹ However, the Commission has been slow to take up this charge. Some question whether this relative inaction is the result of the functional inadequacy of the Commission's mandate to engage with the Guiding Principles; however, this view can be easily dismissed by

38 *American Convention on Human Rights*, *supra* note 42 at art. 44; *Statute of the Inter-American Commission on Human Rights*, *supra* note 44 at art. 19-20.

39 *Petition and Case System Informational Brochure*, Inter-American Commission on Human Rights, <https://www.oas.org/en/iachr/docs/pdf/HowTo.pdf> (last visited Apr. 13, 2015).

40 Organization of American States, *Rules of Procedure of the Inter-American Commission on Human Rights*, Annual Report of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 (1992).

41 Statute of the Inter-American Commission on Human Rights, *supra* note 44 at art. 18.

42 *Id.*

43 Themes of the rapporteurships include the freedom of expression; human rights defenders; and the rights of indigenous peoples; women; migrants; children; persons deprived of liberty; afro-descendants and against racial discrimination; lesbian, gay, trans, bisexual, and intersex persons. Thematic Rapporteurships and Units, Organization of American States, <http://www.oas.org/en/iachr/mandate/rapporteurships.asp> (last visited Apr. 13, 2015).

44 *Id.*

45 Unit on Economic, Social and Cultural Rights, Organization of American States, <http://www.oas.org/en/iachr/desc/> (last visited Apr. 13, 2015). For more information on the Strengthening Process, see Process for Strengthening the IACHR: Methodology, Organization of American States, <http://www.oas.org/en/iachr/mandate/strengthening.asp> (last visited Apr. 13, 2015).

46 Unit on Economic, Social and Cultural Rights, *supra* note 53.

47 See, e.g., Paulo Vannuchi, Comm'r Unit on Economic, Social and Cultural Rights, Presentation at the Special Meeting of the Permanent Council of the Organization of American States on Promotion and Protection of Human Rights in Business (Jan. 28, 2015); Interview with Paloma Munoz Quick, Consultant, Economic Social and Cultural Rights Unit, Inter-American Commission on Human Rights (Feb. 20, 2015).

48 OAS Resolution, *supra* note 6.

49 *Id.*

the fact that (1) the Guiding Principles are a restatement of existing international human rights law and (2) the Commission maintains the express prerogative to advance human rights in the region.

The Guiding Principles Create No New International Obligations

The Guiding Principles do not create new international law obligations, but rather elaborate the “the implications of existing standards and practices for States and businesses.”⁵⁰ This viewpoint, that the Guiding Principles are a mere restatement of current international law, is not the rhetoric of Professor Ruggie, but the consensus reached by numerous stakeholder consultations throughout the drafting process.⁵¹ As such, the IACHR is not being asked to delve into a new set of human rights standards; only to promote the improvement of sections of human rights law where the current regime falls short—a task well within its ambit of responsibilities.⁵² This point was cogently made at the Special Meeting on Promotion and Protection of Human Rights in Business held by the OAS Permanent Council in January 2015. According to Jorge Daniel Taillant, executive director of the Argentine-based Center for Human Rights and Environment, the business and human rights agenda is “not one more subject for the OAS” to deal with, but merely a “sophistication of [its] understanding on human rights.”⁵³ To support this claim, he cites the preamble to the Universal Declaration of Human Rights, which proclaims “every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms [provided for by the Declaration] and by progressive measures, national and international, to secure their universal and effective recognition and observance. . . .”⁵⁴ The American Convention, in accordance with the Declaration’s viewpoint, holds that “the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural

rights, as well as his civil and political rights” and binds state parties and the IACHR to promote the human rights enshrined within the document to this end.⁵⁵

The Guiding Principles, as a “single, logically coherent and comprehensive template” which elaborates existing standards and demonstrates “where the current regime falls short and how it should be improved” are a tool for states and regional instruments alike to effectively *continue* with their task of promoting the full implementation and realization of human rights, not the source of new obligations.⁵⁶

The IACHR Has A Mandate To Promote Human Rights

Advising state actors on the promotion of human rights is part of the mandate of the Inter-American Commission, enshrined in its duty “to promote respect for and defense of human rights.”⁵⁷ As discussed in the previous section, this includes making recommendations to member state governments regarding progressive measures for the implementation and observance of human rights standards; accepting individual petitions regarding state violations of human rights; preparing studies and reports in relation to promoting respect and knowledge of human rights; and providing states with advisory services regarding human rights in the state when requested.⁵⁸ As settled above, because the implementation of the Guiding Principles is geared towards closing gaps in the promotion of existing international human rights obligations within the corporate realm, it falls squarely within the Commission’s mandate to engage with the movement.⁵⁹ This view is bolstered by the fact that multiple member states have gestured toward the Commission regarding guidance on business and human rights topics. In April 2014, the Republic of Panama formally requested an advisory opinion from the Inter-American Commission regarding the scope and protection of the rights and obligations of “legally-recognized non-governmental entities,” including corporations and private companies.⁶⁰ In a less

50 *Guiding Principles*, *supra* note 2, ¶ 14.

51 *Id.* at ¶ 10-12.

52 *Id.* at ¶ 14.

53 Jorge Daniel Taillant, Remarks at the Special Meeting on Promotion and Protection of Human Rights in Business, OAS Permanent Council (Jan. 29, 2015).

54 UN General Assembly, *Universal Declaration of Human Rights*, G.A. Res. 217A, Dec. 10, 1948, U.N. Doc. A/810.

55 *American Convention on Human Rights*, *supra* note 42.

56 *Guiding Principles*, *supra* note 2, ¶ 14.

57 *American Convention on Human Rights*, *supra* note 42 at art. 41.

58 *See supra* note 43 & accompanying text.

59 *See supra* note 64 & accompanying text.

60 Request for an Advisory Opinion by the Government of the Republic of Panama (Apr. 28, 2014), http://www.corteidh.or.cr/solicitudoc/solicitud_14_11_14_ing.pdf (last visited Apr. 18, 2015).

formal capacity, the government of Chile announced in December 2014 that it would look to the Inter-American Commission for guidance during the creation of its National Action Plan on Business and Human Rights.⁶¹ With a clearly laid out mandate and accompanying state belief that the Commission is competent to advise on issues of business and human rights there appears to be no hindrances regarding the IACHR's engagement with the Guiding Principles.

4. THE EXTRACTIVE SECTOR: DEMONSTRATING THE IACHR'S FAMILIARITY WITH BUSINESS AND HUMAN RIGHTS CONCEPTS

While the ease with which the first rationale of Commission inaction—inadequate mandate—can be dismissed could lead one to believe the argument to be a red herring, the second line of reasoning—Commission discomfort with the new business and human rights lexicon—bears more weight. This section argues that while the Commission has been diffident regarding referencing and implementing the Guiding Principles, this wariness is unnecessary given the extent to which the Commission has already engaged with topics and principles encompassed by the Guiding Principles. The following analysis will focus on the human rights impacts of the extractive industry, an emblematic business and human rights problem in the inter-American system, to illustrate the extent to which the IACHR has spoken to and engaged with issues espoused in the Guiding Principles.

The problem of human rights abuse related to the extractives industry is one faced by the majority of countries in the region. The IACHR has long recognized this nexus through the granting of numerous public hearings, publication of reports and taking of petitions related to the topic—both before and after the OAS endorsement of the Guiding Principles.⁶² Specifically, the Commission has spoken considerably on the human rights requirements of states in the extractive context regarding three overlapping subjects: (1) indige-

nous peoples' rights; (2) threats against of human rights defenders; and (3) use of private security and military forces.

A. Indigenous Peoples' Rights

The relationship between human rights abuse and the extractive sector frequently involves issues of indigenous peoples rights. Given the large population of indigenous peoples in the hemisphere, the IACHR has been very involved in the protection of these minority groups, creating the rapporteurship on the rights of indigenous peoples in 1990.⁶³ The Commission has spoken broadly to the connection between indigenous rights and natural resources on many occasions, and more specifically on the obligation of state actors in protecting against human rights violations by extractive companies. The bulk of the inter-American human rights system's work regarding this topic has been in reference to the indigenous right to free, prior and informed consultation and/or consent (FPIC).

The FPIC standard has been established through a number of key cases decided upon by the Inter-American Court on Human Rights.⁶⁴ While the Court's jurisprudence, as legally binding, lays the foundation for this right, the Commission's work leading up to recommending these emblematic cases to the Court was integral to the development of the standard in the region.⁶⁵ In early cases involving indigenous land rights, the Court established that the right to property espoused in Article 21 of the American Convention protects the indigenous right to natural resources found within their territory and related to their culture and traditional uses.⁶⁶ However, this property right is not absolute, and

61 *Letter to the Inter-American Commission on Human Rights on Integrating Business and Human Rights*, International Corporate Accountability Roundtable (Dec. 18, 2014), <http://accountabilityroundtable.org/wp-content/uploads/2014/12/ICAR-Letter-to-Inter-American-Commission.pdf> (last visited Apr. 10, 2015).

62 *See, infra* subsections A-C.

63 *Rapporteurship on the Rights of Indigenous Peoples*, Organization of American States, <http://www.oas.org/en/iachr/indigenous/default.asp> (last visited Apr. 23, 2015).

64 *See, e.g.*, *Saramaka People v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Nov. 28, 2007) [*hereinafter* *Saramaka Case*]; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, (June 27, 2012) [*hereinafter* *Sarayaku Case*].

65 The Commission continues to push the IACHR to engage with issues of indigenous rights and natural resources. In February 2014, the Commission filed another case dealing with the indigenous right to FPIC. *See, IACHR Takes Case Involving Kaliña and Lokono Peoples v. Suriname to the Inter-American Court* (Feb. 4, 2014), available at http://www.oas.org/en/iachr/media_center/PReleases/2014/009.asp (last visited Apr. 23).

66 *See, Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. ¶ 118 (Mar.

a state may restrict the use and right to property where the restrictions are “(a) previously established in law; (b) necessary; (c) proportional; and (d) with the aim of achieving a legitimate objective in a democratic society” as long as it does not deny a population’s survival as a tribal people.⁶⁷

In 2007, the Court first spoke to the right of free, prior and informed consultation and consent in *Saramaka People v. Suriname*. In *Saramaka*, descendants of self-liberated African slaves challenged the Suriname government’s granting of logging and mining concessions to extractive companies claiming rights to traditional territory for their cultural, religious and economic activities.⁶⁸ The Court clarified the states obligations regarding the granting of natural resource concessions on indigenous land by holding that in order to guarantee that the property right restrictions of the Saramaka people imposed by the concessions within their territory did not amount to a denial of their survival as a tribal people, the state must, *inter alia*, “ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan [] within Saramaka territory.”⁶⁹ In order to ensure effective participation, the state “has a duty to actively consult” with the community according to their customs and traditions.⁷⁰ This duty “requires the State to both accept and disseminate information, and entails constant communication between the parties.”⁷¹ Additionally, consultations must be “in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.”⁷² These consultations should take place at the early stages of a development or investment plan and the state must ensure that the consulted group is aware of possible environmental and health risks in order to make a knowing and voluntary decision.⁷³ Most importantly, the Court held that in re-

gards to “large-scale development or investment projects that would have a major impact” within indigenous territory, the state has a duty not only to consult with affected indigenous communities, but to obtain their “free, prior and informed consent.”⁷⁴

The safeguards established in the *Saramaka* case, especially the standards around adequate consultation, were further refined and embedded within the inter-American system in the 2012 *Kichwa Indigenous People of Sarayaku v. Ecuador* case. In *Sarayaku*, the indigenous Kichwa peoples of the Ecuadorian Amazon Basin brought a complaint against the government of Ecuador for, *inter alia*, granting a concession for oil exploration and exploitation on their communally titled land without their consultation and consent.⁷⁵ The Court, in finding that the state obligation to consult with indigenous peoples and communities about to be affected by state action on their territory has been “clearly recognized” as a general principle of international law, went on to explicate more specifically the obligations of the state regarding advanced, informed, culturally appropriate consultations and issues of good faith.⁷⁶ Additionally, according to the IACtHR, the state has a duty to “organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of [the indigenous right to participate in decisions on matters that concern their interests and survival].”⁷⁷ Because it is the state’s obligation to guarantee these consultation rights, it must also “ensure that the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of public authorities that would affect their rights and interests.”⁷⁸ This duty therefore entails that a state must “carry out the tasks of inspection and supervision” regarding implementation of indigenous consultation.⁷⁹ Similarly, the duty to consult cannot be designated to a third party, i.e. an extractive company; it is a duty of the state.⁸⁰

The Inter-American Commission has also reaffirmed the indigenous right to consultation through the issuance of number precautionary measures. For

29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. ¶ 137 (June 17, 2005).

67 *Saramaka Case*, *supra* note 72 ¶¶ 127-28.

68 While the Saramaka people were not indigenous to the country, the Court found them to maintain certain tribal characteristics that made them akin to indigenous peoples and thus deserving of the same rights and protections. *Id.* ¶¶ 79-86.

69 *Id.* ¶ 129.

70 *Id.* ¶ 133.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* ¶ 134.

75 *Sarayaku Case*, *supra* note 72.

76 *Id.* ¶¶ 165-66, 180-203, 208-11.

77 *Id.* ¶ 166.

78 *Id.* ¶ 167.

79 *Id.*

80 *Id.* ¶ 203.

example, in 2011 the Commission requested the state of Brazil to suspend a large-scale dam project in the Xingu river basin because the government had not consulted with the indigenous peoples living in the area affected by the mega-project.⁸¹ Similarly, in 2010, the IACHR issued a precautionary measure to protect the members of eighteen Maya indigenous communities in Guatemala from the harming environmental effects of mining in the region occurring without the indigenous population's FPIC.⁸² The Commission requested the state to suspend the unauthorized mining project and any other activities related to the concession granted to the extractive company.⁸³

The IACHR also continues to raise awareness regarding indigenous rights in relation to natural resource extraction through the publication of reports and holding of public hearings. In the past two years, the Commission has held a number of hearings on the rights of indigenous people in relation to the extractive industry; in the last period of sessions alone, the IACHR conducted five hearings on the subject.⁸⁴ Similarly, the Commission has recently issued a report on the rights of indigenous peoples in voluntary isolation and initial contact which identified the extraction of natural resources as a main threat to the full enjoyment of the human rights of these populations.⁸⁵ Incursion into the property of indigenous peoples in voluntary isolation or initial contact can result in negative consequences more dire in scale than the effects of similar incursions on contacted indigenous groups, given not only the sustenance ties these groups have to the land, but also the fragility of

their worldview and immune systems.⁸⁶ In this context, the Commission considers the principle of no contact, as an expression of the right of indigenous peoples in voluntary isolation to self-determination, essential for the protection of these special indigenous rights; it is “fundamental that every effort be made to reinforce respect for the principles of no contact” unless initiated by the peoples in isolation.⁸⁷ However, because of this respect for indigenous self-determination, it is not possible for the government to conduct free, prior and informed consultations with these special indigenous groups without making contact with these peoples and violating the principle of no contact.⁸⁸ Therefore, the Commission has established standards for when FPIC may be undertaken in regard to each of these groups: In relation to peoples in voluntary isolation, the main factors to analyze when considering whether consultation would be plausible are “(i) the manifest rejection of the presence of persons who are not members of their people in territories, and (ii) their decisions to remain in isolation with respect to other peoples and persons.”⁸⁹ For indigenous peoples in initial contact, a state may be able to consult the group through consultation with other indigenous groups or majoritarian society members with which the group has contact with special consideration to their “particular situation of vulnerability and interdependence with their territories and natural resources, their worldview, and how they may interpret a consultation process.”⁹⁰ In these cases, the state is still obligated to undertake the consultation in accordance with the standards already established by the Inter-American Commission and Court.⁹¹

B. Human Rights Defenders

The Inter-American Commission has long expressed an interest in and focus on the situation of human rights defenders in the Americas. The Executive Secretariat of the IACHR created a Unit for Human Rights Defenders in 2001 and the IACHR issued its first thematic report on the issue in 2006.⁹² In 2011, due to the

81 Indigenous Communities of the Xingu River Basin, Pará, Brazil, Inter-Am. Comm'n H.R., PM 382/10 (Apr. 1, 2011).

82 Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala, Inter-Am. Comm'n H.R., PM 260/07 (May 20, 2010).

83 *Id.*

84 In the 154 Period of Sessions, the IACHR conducted the following hearings: *Human Rights Situation of Leaders and Defenders of the Shuar People in Ecuador, Hearing Before the Inter-Am. Comm'n H.R.* (Mar. 17, 2015); *Extractive Industries and Human Rights of the Mapuche People in Chile, Hearing Before the Inter-Am. Comm'n H.R.* (Mar. 17, 2015); *Corporations, Human Rights, and Prior Consultation in the Americas, Hearing Before the Inter-Am. Comm'n H.R.* (Mar. 17, 2015); *Human Rights and Extractive Industries in Latin America, Hearing Before the Inter-Am. Comm'n H.R.* (Mar. 19, 2015); *The Right to Property and the Right to a Healthy Environment of Indigenous Peoples in Bocas del Toro, Panama, Hearing Before the Inter-Am. Comm'n H.R.* (Mar. 20, 2015)

85 Inter-American Commission on Human Rights, *Indigenous peoples in Voluntary Isolation and Initial Contact in the Americas*, OEA/Ser.L/V/II, Doc. 47/13 (Dec. 30, 2013) ¶¶ 101-14.

86 *Id.* ¶¶ 19-20.

87 *Id.* ¶¶ 21-22.

88 *Id.* ¶ 25.

89 *Id.*

90 *Id.* ¶ 26.

91 *Id.*

92 *Rapporteurship on Human Rights Defenders*, Organization of American States, <http://oas.org/en/iachr/defenders/reports/the>

increasing number of petitions the Commission received regarding abuses towards human rights defenders and growing interest in the subject from civil society, the IACHR created the Rapporteurship on Human Rights Defenders.⁹³ That same year, the Second Report on the Situation of Human Rights Defenders in the Americas was released, making much mention of the role the extractive sector played in the increasing abuse towards these activists.⁹⁴ Along with noting many troubling trends regarding extractive industries and human rights abuses, the Commission laid out certain state responsibilities in relation to this conflict.⁹⁵

The Commission held that “attacks, aggression and harassment targeted at defenders of the environment have become more pronounced” in the region due in large part to the tensions between extractive industries and sectors that resist the implementation of such projects.⁹⁶ The IACHR made a connection between failing to uphold environmental regulations, increased social protest against extractive projects, and subsequent violence against human rights defenders. The Commission noted that the majority of extractive projects are run by foreign businesses and that host states “often do not properly monitor their activities and environmental effects,” especially where regulation is weak or does not exist.⁹⁷ The lack of state enforcement often “pits the industries against the communities neighboring the projects.”⁹⁸ This tension has led to the harassment, abuse and murder of environmental defenders “region-wide in the case of the extractive industry,” exposing the problem of State non-compliance with its obligations.⁹⁹ The state is not only obligated “to adopt measures to protect the human rights of all persons,” it also has “a duty to enforce the national and international environmental protection standards that they have enacted or accepted.”¹⁰⁰ Effective enforcement of environmental protection measures in relation to extractive projects “is essential to avoid the State’s international responsibility for violating human rights of the communities affected

by activities detrimental to the environment.”¹⁰¹

In addition, in relation to the IACHR’s concern regarding the growing abuse faced by environmental defenders who oppose extractive industry projects, the IACHR pronounced that “States are obligated to take reasonable measures to prevent the threats, assaults and harassment of human rights defenders; conduct serious investigations of the facts brought to their attention; and, where appropriate, punish those responsible and adequately redress the victim.”¹⁰² Subsequent to making this clear statement regarding state obligations in relation to extractive industry violence towards environmental defenders, the Commission has confirmed this international standard by issuing a number of precautionary measures to protect defenders in this exact position. For example, in April 2007, the IACHR granted precautionary measures in favor of members of the Grupo de Formación Integral para el Desarrollo Sostenible (GRUIFIDES), a community organization dedicated to the defense of the environment and legal assistance to peasant communities around Cajamarca, Peru.¹⁰³ The beneficiaries of the precautionary measure had been subject to intimidation and threats by supporters of mining in the region, where assassinations had already occurred in confrontations between mine activists and mining supporters.¹⁰⁴ The state was requested not only to protect the life and physical integrity of the beneficiaries, but also to judicially investigate the facts giving rise to the precautionary measures.¹⁰⁵ Similarly, in 2012, the IACHR granted precautionary measures in favor of a human rights defender in Guatemala, Telma Yolanda Oqueli Veliz, involved in opposing a mining project in the region.¹⁰⁶ After receiving threats in relation to her anti-mine work, Ms. Oqueli Veliz was shot in the back.¹⁰⁷ In this case, the IACHR also requested the state to adopt the necessary measures to guarantee the life and physical integrity of the beneficiary and to investigate the facts leading up to the issuing of the precautionary measure.¹⁰⁸

matic.asp (last visited Apr. 18, 2015).

93 *Id.*

94 Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights Defenders in the Americas (2011) [*hereinafter* Second Report].

95 *See, infra* notes 78-80.

96 Second Report, *supra* note 103 at ¶ 312.

97 *Id.* at ¶ 313.

98 *Id.* at ¶ 316.

99 *Id.* at ¶ 317.

100 *Id.* at ¶ 314.

101 *Id.* at ¶ 315.

102 *Id.* at ¶ 320.

103 Marco Arana, Mirta Vásquez, et al., Inter-Am. Comm’n H.R., PM (Apr. 23, 2007), *available at* <http://www.cidh.org/medidas/2006.eng.htm> (last visited Apr. 19, 2015).

104 *Id.*

105 *Id.*

106 Telma Yolanda Oqueli Veliz and family, Guatemala, Inter-Am. Comm’n H.R., PM 207/12 (Aug. 22, 2012).

107 *Id.*

108 *Id.*

Lastly, the Commission has also held a number of public hearings that touch on the relationship between human rights defenders and the extractive sector. Most recently, these hearings include broad examinations of social protest in the Americas and specifically in Guatemala¹⁰⁹; examinations of the situation of human rights defenders in the Americas in general, and Brazil, Ecuador and Guatemala, in specific¹¹⁰; investigations into the improper use of law to criminalize human rights defenders¹¹¹; and extractive industry specific hearings regarding their impacts on general human rights.¹¹² These hearings, granted by the IACHR mostly at the request of civil society organizations, illustrate the Commission's interest in developing awareness within the inter-American community regarding the persecution of human rights defenders in relation to the extractive sector.

C. Private Military and Security Forces

The use of private military and security forces (PMSCs) in the extractive sector in the inter-American region, especially in Latin America, has also put the IACHR on alert. Reports indicate that the emerging trend of extractive corporations using PMSCs to protect their operations has led to harmful human rights abuses among local populations.¹¹³ Particularly, the use of

private security forces is often times linked directly to abuse towards human rights defenders. The IACHR has received numerous reports detailing instances where extractive sector businesses have hired security forces to attack, abuse and harass leaders of environmental and social movements lobbying against their operations.¹¹⁴ In advising states on their role in situations such as these, the Commission underscores that state failure to intervene in, prevent or investigate this type of directed violence by PMSCs could comprise the states international responsibility to prevent human rights abuses inflicted upon its citizens.¹¹⁵ In addition, the Commission holds that in countries that allow private security firms to operate according to the rules that govern business activity, these forces must be "properly regulated."¹¹⁶ According to the IACHR, the domestic legal system "must regulate the functions that private security services can perform, the types of weapons and materials they are authorized to use, the proper mechanism to oversee their activities, introduction of licensing, and a system whereby these private security firms are required to report their contracts on a regular basis"¹¹⁷ In addition, the public authorities should "demand compliance with selection and training requirements that individuals hired by [] private security firms must meet, specifying which public institutions are authorized to issue certifications attesting to the firms' employees."¹¹⁸

D. Discussion

An overview of the Commission's work in the area of human rights and the extractive sector illustrates its experience with concepts covered by the Guiding Principles. First, within the Commission's engagement with the indigenous right to free, prior and informed consultation and/or consent, it has espoused various duties that the state must abide by in protecting its indigenous population from possible human rights abuse caused by extractive operations. The Commission has made clear that the state, not any individual extractive company,

109 Social Protest and Human Rights in the Americas, Hearing Before the Inter-Am. Comm'n H.R. (Mar. 16, 2015); Human Rights and Social Protest in Guatemala, Hearing Before the Inter-Am. Comm'n H.R. (Oct. 28, 2013).

110 Situation of Human Rights Defenders in Guatemala, Hearing Before the Inter-Am. Comm'n H.R. (Oct. 28, 2014); Situation of Human Rights Defenders in the Americas, Hearing Before the Inter-Am. Comm'n H.R. (Mar. 24, 2014); Situation of the Right to Freedom of Association and Environmental Defenders in Ecuador, Hearing Before the Inter-Am. Comm'n H.R. (Mar. 28, 2014); Situation of Human Rights Defenders in Brazil, Hearing Before the Inter-Am. Comm'n H.R. (Oct. 29, 2013); Situation of Human Rights Defenders in Guatemala, Hearing Before the Inter-Am. Comm'n H.R. (Oct. 28, 2013).

111 Improper Use of Criminal Law to Criminalize Human Rights Defender, Hearing Before the Inter-Am. Comm'n H.R. (Oct. 31, 2014).

112 Human Rights and Extractive Industries in Latin America, Hearing Before the Inter-Am. Comm'n H.R. (Mar. 19, 2015); Impact of Canadian Mining Activities on Human Rights in Latin America, Hearing Before the Inter-Am. Comm'n H.R. (Oct. 28, 2014); Development and Extractive Industries in Colombia, Hearing Before the Inter-Am. Comm'n H.R. (Oct. 31, 2013); Human Rights Situation of People Affected by Mining in the Americas and the Responsibilities of the Host and Home States of the Mining Companies, Hearing Before the Inter-Am. Comm'n H.R. (Nov. 1, 2013).

113 Antonie Perret, *Private Security Trends and Challenges in Latin America* [Student's Paper Series] Western Hemisphere Security Analysis

Center (Aug. 1, 2011), available at <http://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=1036&context=whemsac>.

114 Second Report, *supra* note 103 at ¶ 318.

115 Inter-American Commission on Human Rights, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II (Dec. 31, 2009) ¶¶ 39-46 [hereinafter Report on Citizen Security].

116 *Id.* ¶ 73.

117 *Id.*

118 *Id.*

has the international obligation to consult with, and in some cases, gain the consent of, indigenous groups when extractive operations are being planned within their traditional territory. This obligation, and the requirements that accompany it, fall within the first pillar of the Guiding Principles—the state duty to protect human rights. Also resounding within the first pillar is the Commission’s guidance on the state obligation to protect against the abuse of human rights defenders and regulate and protect against abuse of PMSCs.

Similarly, within the Commission’s nascent, but expanding, views on the use of PMSCs in the extractive sector, the second pillar of the Guiding Principles—the corporate responsibility to respect human rights—is also implicated. While the IACHR has mainly focused on how the states should regulate these companies, it has indicated through the types of regulation desired, its expectation for PMSCs. Also, its condemnation for the lack of state investigation and prosecution of extractive companies, which hire these forces, connotes the Commission’s condemnation for these actions, signaling that extractive corporations should respect human rights, or be prosecuted for not doing so.

Lastly, the Commission speaks to the third pillar of the Guiding Principles—access to judicial and non-judicial remedy for corporate human rights abuse—in its discourse on both PMSCs and the criminalization of human rights defenders. The IACHR has stated explicitly that the state must investigate and, where appropriate, punish those responsible for threats, assaults and harassment of human rights defenders; likewise, it must investigate directed violence by PMSCs or risk compromising its own international responsibility.

5. ARGUMENTS FOR ENGAGEMENT

While the discussion above illustrates the IACHR’s familiarity with business and human rights concepts, some may argue that it also demonstrates the Commission’s ability to protect against human rights abuses implicated by business within its existing legal framework. Thus the question must be asked: why a need to engage with the Guiding Principles at all? The answer is threefold: the Inter-American Commission (1) has been requested to engage with the principles; (2) has the ability to set normative standards in the field; and (3)

should seek to close increasing accountability gaps

A. The IACHR has been requested to engage with the Guiding Principles

The General Assembly of the OAS has explicitly requested that the Inter-American Commission engage with the Guiding Principles. The Charter of the OAS lays out the formal mandate of the commission, stating that its “principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the [OAS] in these matters.”¹¹⁹ Keeping in mind this function, the General Assembly called on the Commission to continue supporting “the promotion and application of state and business commitments in the area of human rights and business” when it formally endorsed the Guiding Principles in June 2014.¹²⁰ Part of the General Assembly’s own vow to support and promote the disseminate and implementation of the Guiding Principles across the Western Hemisphere was based on its assumption that its consultative human rights arm would uphold its mandated role as promoter of human rights across the Americas. The Commission’s decision whether or not to engage with the Guiding Principles is not its own to make—the General Assembly has entreated this uptake, and the Commission lacks the authority to disregard such a request.

B. The IACHR has the ability to set normative standards in the field

The Inter-American Commission maintains great influence over not only member states, but also the international community, regarding its interpretation and promotion of human rights understandings. As such, the Commission has the ability to transform the Guiding Principles clarification of state obligations and business responsibilities into region-wide normative concepts. The General Assembly recognized as much in its 2014 adoption of the Guiding Principles, citing its inspiration by “the emerging practices and progress seen in the Hemisphere with regard

119 Organization of American States, Charter of the Organization of American States (Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993), Apr. 30, 1948, 1609 U.N.T.S. 48.
120 OAS Resolution, *supra* note 6.

to social responsibility and its anchoring in human rights” as one consideration in its decision to embrace and implement the new human rights framework.¹²¹ The Commission’s ability to create and support normative shifts in business and human rights thinking emanate from all its designated functions, including both its individual petition system and advisory functions.

An example of the IACHR’s power to influence can be seen in the Commission’s work with the concept of free, prior and informed consent. As discussed in Section IV, the Commission’s engagement with the indigenous right to consultation and consent was the impetus for the Inter-American Court’s elucidation and interpretation of this right through the hearing of multiple cases on this issue.¹²² While the concept of FPIC emerged in the international arena almost simultaneously with its evolution in the inter-American court system, the Commission’s continued engagement with this topic through hearings and reports brought it from the fringe and into focus.¹²³ Following the inter-American systems clarification of FPIC, multiple governments in the region have become more engaged on the topic, including the Ecuadorian government guaranteeing FPIC in its 2008 Constitution and the 2011 promulgation of the Indigenous Peoples Consultation Law in Peru.¹²⁴ Today, the right to free, prior and informed consent is a clear concern for companies doing business in Latin America.¹²⁵ While the region continues to define the contours of the right through legislation, litigation and advocacy, it is important to note the paradigm shift in the conversations being had—it is no longer about whether the right exists, but how the right is upheld. Similarly, other regions have continually looked to the jurisprudence and precedent set in the inter-American system for reference in their own interpretation of the right to free, prior and informed consent.

The opportunity to normalize additional human rights in the business context is ripe for the Inter-Ame-

rican Commission. The steady increase of extractive industry investment in the region, coupled with the relative strength of the inter-American human rights system, has created a prime opportunity for the Commission to weigh in on multiple aspects of the business and human rights problem. The Commission can continue to expand its conceptualization of State duties and corporate expectations regarding FPIC, human rights defenders, and private security forces through the taking of individual petitions, the issuance of thematic reports or other types of state guidance, including advising on the state NAP processes. It can also grow its work in the field by expanding the scope of business and human rights issues it addresses via these means. The Inter-American Commission’s already existing concern over these discreet human rights concerns in the extractive sector coupled with its ability to create normative shifts in the illustrate the human rights gains to be had by the Commission’s engagement with the principles.

C. The IACHR should seek to close increasing accountability gaps

Not only is the Inter-American Commission an important avenue for victims of corporate human rights abuse to access remedy, it is increasingly become one of the few places where such remedy is possible. Recent developments in U.S. jurisprudence have severely limited one of the main paths for victims of corporate human rights to justice, U.S. federal courts under the Alien Tort Statute (ATS). The ATS allows, in short, for non-U.S. citizens to file a case in U.S. federal court for torts committed in violation of international law.¹²⁶ While historically, ATS litigation has been used by foreign plaintiffs to bring suit against foreign corporations for human rights abuses committed abroad, in 2011, the U.S. Supreme Court held in *Kiobel v. Royal Dutch Petroleum* that federal courts do not have jurisdiction over such cases unless such claims “touch and concern” the United States with “sufficient force.”¹²⁷ While the exact contours of the “touch and concern” requirement are still being mapped out through lower court decisions, multiple suits against corporate actors for human rights abuses committed within the Americas have been thrown out of U.S. courts.¹²⁸

121 *Id.*

122 *See, supra* Section IV, part A.

123 The Inter-American Court on Human Rights ruled on the *Saramaka* case in 2007, the same year the U.N. General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples, which espouses FPIC as a human right.

124 Constitución Política de la República de Chile [C.P.] art. 57; Law No. 29785, Sept. 7, 2011, Diario Oficial [D.O.] (Perú).

125 *See, e.g.,* Steven Fox & Trevor Sutton, *Ground Rules: Cultivating Investments through Free, Prior, and Informed Consent*, Veracity (2015); Amy K. Lehr & Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, Foley Hoag, LLP (2010).

126 28 U.S.C. § 1350.

127 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1658 (2013).

128 *See, e.g.,* Elizabeth Holland, *ATS Case Developments Post-Kiobel*:

The narrowing of this avenue of redress has had an alarming effect. For example, under the *Kiobel* interpretation of the ATS, the Court of Appeals for the Eleventh Circuit dismissed a lawsuit against the U.S.-based banana company Chiquita Brands International alleging torture, extrajudicial killings, war crimes and crimes against humanity for its involvement in funding the Self-Defense Forces of Colombia (AUC), a right-wing paramilitary group.¹²⁹ The case was a consolidation of numerous similar cases brought in varying U.S. districts over a period of four years and compiled the claims of over 4,000 victims of grave human rights abuse caused by the AUC and allegedly supported by Chiquita.¹³⁰ The circuit court, finding that it no longer had jurisdiction to hear the case under *Kiobel*, left thousands of victims without remedy. While this is not to assume that the other courts of the region are not equipped to hear such cases; many times this is thought to be the case, with foreign plaintiffs' citing corruption or weak rule of law as arguments why redress is not available in their home state.

As forums within which victims of corporate human rights abuse can seek accountability constrict, it is increasingly important for the inter-American human rights system to carry more weight. In situations where corporations cannot be brought into State courts for jurisdictional or other reasons, the Inter-American Commission should look to the Guiding Principles to examine the State's breach of duty in regards to protecting against corporate human rights abuse or providing access to remedy for victims of human rights violations and to clarify its expectations for corporate behavior. This increase of engagement with the Guiding Principles is the required by the Commission in order to faithfully uphold its mandate to promote human rights in the region.

Interpreting the "Touch and Concern" Standard, Corporate Social Responsibility and the Law (Sept. 13, 2013) <http://www.csrandthelaw.com/2013/09/13/case-developments-post-kiobel-interpreting-the-touch-and-concern-standard/> (last visited Sept. 27, 2015); *Post-Kiobel, the Lower Courts are only Pretending to Apply the Presumption against Extraterritoriality in Alien Tort Statute Cases*, The View From LL2, <http://viewfromll2.com/2014/07/22/post-kiobel-the-lower-courts-are-only-pretending-to-apply-the-presumption-against-extraterritoriality-in-alien-tort-statute-cases/> (last visited Sept. 27, 2015).

129 Cardona, et al. v. Chiquita Brands International, et al. No. 12-14898 (11th Cir. 2014).

130 For more information relating to the history of the Chiquita case, see Chiquita lawsuits (re Colombia), Business & Human Rights Resource Centre, <http://business-humanrights.org/en/chiquita-lawsuits-re-colombia> (last visited Sept. 27, 2015)

6. FINAL CONCLUSIONS

Not only is it well within the Inter-American Commission's mandate and capacity to start engaging with the Guiding Principles on Business and Human Rights, there are multiple reasons why the Commission should and must engage. The Commission's mandate require it generally to promote the observance and protection of human rights by empowering the Commission to make recommendations to governments and prepare studies as it sees fit, request information from governments, and provide them with advisory serves as requested. The Guiding Principles, as a restatement of existing international human rights law, falls within the ambit of rights that the Commission should be promoting. It should therefore feel unfettered in utilizing its functions and powers to the full extent to encourage state implementation of the Guiding Principles.

Additionally, the Commission has already spoken to several duties and expectations of the state in regards to human rights and the extractive sector. As illustrated above, much of the guidance the IACHR has provided fits squarely within the framework of the Guiding Principles. The Commission need not learn a new branch of international human rights law, nor overhaul it's current, general thinking on human rights issues within the region. Implementing the Guiding Principles requires only that the Commission, in addition to its current conceptualization of human rights and international law, layer into its analysis the Guiding Principle framework. This incorporation is not intended to displace any existing international human rights law fields with which the Commission interacts; it simple bolsters the authority of the Commission's statements and findings while also engaging with and promoting the business and human rights framework. The Commission has the mandate and the knowledge to accomplish this end.

Lastly, multiple reasons exist why the Commission should and must engage with the Guiding Principles. Foremost, the IACHR been directly requested by the OAS General Assembly to amp up its engagement with the principles. Second, it should utilize its influence and ability to normalize standards in the region to further its mission of advancing human rights promotion and protection in the Hemisphere. Moreover, as avenues for redress of corporate human rights abuse shut down or continue to be out of reach of victims in both home and host countries, the Inter-American Commission

has a duty to take on more cases relating to business and human rights to provide access to remedy to those in the Americas that otherwise would not find justice for corporate human rights abuse.

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