Human Rights, Sustainability, and Businesses: A study of the protection of environment-related human rights in Latin America.

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Abstract

For decades, businesses have taken advantage of governance gaps and a lack of international liability regarding human rights violations. In 2011, the United Nations Human Rights Council addressed these problems by adopting the Guiding Principles in Business and Human Rights. The Guiding Principles aims to reduce corporate wrongdoings vis-à-vis human rights, clarify state role, and provide judicial and non-judicial remedies for businesses' human rights offenses. Colombia, Chile, and Peru have translated the Guiding Principles into National Action Plans. The Sustainable Development Goals adopted in 2015 by the United Nations General Assembly also played a critical role during the development and implementation of these policies. After a doctrinal and empirical analysis, the thesis concludes that National Action Plans are a framework suitable to bridge the differences between sustainable development and human rights rationales and that they can constitute cogent policies capable to protect environment-related human rights, rebalance the burden of achieving environment-related human rights among states and corporations, and hold firms accountable for environmental and human rights damage. However, the disregard towards what the Inter-American Court of Human Rights calls substantive environment-related human rights hampers their effectiveness. The research also concludes that National Action Plans' capacity to respect, protect, and guarantee environment-related human rights exponentially increases when said policies account for input legitimacy (agency and public participation); output legitimacy (government technical capabilities); and throughput legitimacy (sound methodologies to create, implement, and evaluate policies).

Pendant des décennies, les entreprises ont profité des écarts en matière de gouvernance et de l'absence de responsabilité internationale pour les violations des droits humains. En 2011, le Conseil des droits de l'homme des Nations Unies adopte les Principes directeurs relatifs aux entreprises et aux droits de l'homme pour aborder ces problèmes. Ces Principes directeurs visent à réduire les méfaits des entreprises vis-à-vis des droits humains, à clarifier le rôle de l'État et à fournir des recours judiciaires et non judiciaires pour répondre aux infractions commises par les entreprises à l'égard des droits humains. La Colombie, le Chili et le Pérou ont traduit les Principes directeurs en plans d'action nationaux, en partie grâce au rôle essentiel des Objectifs de Développement Durable adoptés par l'Assemblée générale des Nations Unies en 2015. Après une analyse doctrinale et empirique, cette thèse arrive à conclure que les plans d'action nationaux sont un cadre approprié pour combler les différences entre le développement durable et la logique des

droits humains et qu'ils peuvent constituer des politiques efficaces capables de protéger et de rééquilibrer le fardeau de la réalisation des droits de l'homme liés à l'environnement entre les États et les entreprises, ainsi que de tenir les entreprises responsables des dommages environnementaux et des violations aux droits humains. Cependant, le mépris de ce que la Cour interaméricaine des droits de l'homme appelle les droits humains substantiels liés à l'environnement entrave leur efficacité. Les résultats de la recherche permettent de conclure que la capacité des plans d'action nationaux à respecter, protéger et garantir les droits de l'homme liés à l'environnement augmente de façon exponentielle lorsque ces politiques tiennent compte de la légitimité des contributions (agence et participation du public) ; la légitimité de la production (capacités techniques du gouvernement) ; et la légitimité du débit (méthodologies solides pour créer, mettre en œuvre et évaluer les politiques).

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Introduction

The private sector have taken advantage of governance gaps and a lack of international liability regarding human rights abuses. Depending on whom you ask, corporate responsibility vis-a-vis human rights is a moral, ethical, or legal problem. Yet, all authors agree that liberal policies, globalization, and weak governance structures to halt corporate abuses enable such scenarios. The last successful effort to shorten those gaps is the 2011 adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council. [1] Guided by the UNGPs, 26 states have already developed a National Action Plan on Businesses and Human Rights (NAPs). Of the 31 countries currently working on their NAPs, seven are in Latin American.[2] Nevertheless, the UNGPs' and NAPs' efficacy to protect the human rights of those most vulnerable is still contested, especially on environment-related human rights. My thesis examines the remaining gaps for NAPs to protect environment-related human rights. Building on the analysis of the Colombian, Chilean, and Peruvian NAPs in the context of corporate abuses in Latin America, I argue that NAPs have accommodated development and human rights discourses into somewhat cohesive policies. However, when considering the protection of environment-related human rights they are unsuccessful for two reasons. The first obstacle is the lack of technical understanding about the distortions generated by development rhetoric. The second is the absence of disclosed methodologies to integrate the inputs of corporations, government bureaus, individuals, and academics into the NAP while maintaining human rights as the policy bedrock. These two obstacles are dissected as output and throughput legitimacy problems, respectively.

The Cerro Matoso case in Colombia exemplifies the gaps in the current legal frameworks to protect human rights from corporate abuses. The case shows how corporations can jeopardize the human rights of thousands of individuals by generating immeasurable and long-lasting environmental damage. In 1963, via concession 866, Richmond Petroleum Company was granted exploration and exploitation rights over 500 hectares to extract nickel and other minerals. After three decades and two new concessions adjacent to concession 866, Richmond Petroleum Company transferred its concession rights to Cerro Matoso S.A., which ended up exploiting the

[1] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 UNHRCOR, 17th Sess (2011).

[2] Office of the High Commissioner for Human Rights [OHCHR], "State national action plans on Business and Human Rights", (2021), online: <www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>. The eight Latin American countries are Argentina, Brazil, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, and Peru

fourth largest ferronickel open pit in the world. The Constitutional Court of Colombia ruled in 2017 that the latest consultation of the eight Zenú indigenous communities—3,463 inhabitants—did not adhere to international standards regarding free, prior, and inform consultation and that mining activities damaged their health and the right to a healthy environment. The Zenú communities live between 750 meters and 10.1 km from the mining perimeter. Blood and urine tests performed on inhabitants of these nearby communities revealed nickel levels well above average. While the Colombian Constitutional Court acknowledge in its ruling that per the Institut National de Santé Publique du Québec concentrations above 0,59 mcg/lt unacceptable, the tests performed revealed nickel blood levels of 10,53 mcg/lt on average.[3]

Human rights and sustainable development must be a cornerstone of development and extractive projects. Medium and big-scale enterprises must be required to revise their existing *modus operandi* to accommodate social, ethical, and legal requirements about human rights and environmental protections. Contextualizing the UNGPs and development rhetoric through NAPs could boost ongoing efforts to decrease environmental and human impacts by corporate activities. Wherever a corporation operates, it becomes part of that community; therefore, its obligations towards community members extend beyond legal requirements. For example, Due diligence practices could enhance community trust toward the companies and create a favorable environment for revenue while respecting human rights. Governments must acknowledge NAPs as comprehensive and coherent policies beneficial for companies and individuals. In doing so, cases like Cerro Matoso could be reduced, or even if accidents occur, communities and individuals will have access to redress avenues.

My thesis will focus on what the Inter-American Court of Human Rights (IA Court) calls substantive environment-related human rights, as these rights are disproportionally affected by environmental damage.[4] Substantive environment-related human rights encompass the right to life, personal integrity, private life, health, food, water, the right not to be forcibly displaced, property rights, and participation in cultural life. The concept of "substantive environment-related human

[3] Corte Constitucional de Colombia, 20 September 2018, *Sentencia 733/17*, (2018), Section 4.5.1 (Colombia) [*Cerro Matoso S.A.*].

[4] *Advisory Opinion OC-23/17* Inter-Am Ct HR (Ser A) No 23 at para 66.

rights" is used interchangeably with "environment-related human rights." Procedural environment-related human rights are never referred to as environment-related human rights.[5]

Protecting human rights, specifically those related to the environment, is closely associated with sustainable development. The UN General Assembly agreed on the 2030 Agenda for Sustainable Development in September 2015.[6] Countries around the world embraced a common understanding of sustainability and transformed multiple legal duties into targets, goals, and indicators through this political agenda. Although human rights are a cornerstone of the Sustainable Development Goals (SDGs), significant tensions remain between human rights and development rhetoric. Human rights scholars and activists must look beyond their differences with development theorists. They should use the SDGs' political acceptance and highly authoritative characteristics to advance human rights, specifically environment-related human rights.[7] The UNGPs and the SDGs are both soft law initiatives and are based on international human rights law. The UNGPs not only acknowledge the role of the private sector in the modern world, but also align with the polycentric, diverse, flexible, and cooperative spirit of the current international milieu. Human rights law, the UNGPs, and the SDGs must engage in a three-way dialogue to achieve environment-related human rights.

Corporations are crucial players in the economic and social development of a country. Private companies permeate every aspect of society, from private schools to our daily mobility, from our garments to utilities, such as water and electricity. This omnipresence causes serious harm when is left unchecked. Business wrongdoings plague Latin America with serious consequences on everyday life. From water source contamination in Colombia's Cerro Matoso or in Ecuador's Rio

[5] Procedural environment-related human rights encompass, but are not limited to, the right to freedom of expression and association, the right to access to information, and the right to public participation.

[6] *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, UNGAOR, 70th Sess (2015).

[7] Alexander Agnello & Nandini Ramanujam, "Recalibration of the Sustainable Development Agenda: Insights from the Conflict in Yemen" (2020) 16:1 MJSDL 84; Alberto Quintavalla & Klaus Heine, "Priorities and human rights" (2019) 23:4 Int J Hum Rts 679; Siobhán McInerney-Lankford & Hans-Otto Sano, "Human Rights and the Post-2015 Sustainable Development Goals: Reflections on Challenges and Opportunities" in Frank Fariello, Laurence Boisson de Chazournes & Kevin E Davis, eds, *The World Bank Legal Review, Volume 7 Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice Systems* (Washington, D.C.: World Bank Group, 2016) 167.

Agrio, to human rights defenders' stigmatization in Colombia, and the awarding of mining concessions in Honduras without prior consultation with indigenous groups.[8]

In the words of the former UN General Secretary Ban Ki-moon, "[s]ustainable development is the pathway to the future we want for all. It offers a framework to generate economic growth, achieve social justice, exercise environmental stewardship, and strengthen governance."[9] Unfortunately, the ideals he describes are still far away, the road is long and thorny, and the quest for development without recognizing our inherent human dignity will only slow down the pace towards sustainability. Latin America's rich biodiversity and the livelihoods of millions of persons with a personal, economic, or spiritual connections to such biodiversity are at stake. Sadly, vulnerable populations—including indigenous communities and those impoverished—will suffer exponentially more than those well-off.[10] NAPs can bridge the rhetoric gaps between sustainable development and human rights. Enacting NAPs with clear actions regarding substantive environment-related human rights has the potential to bring the continent closer to the ideals offered by Ban Ki-moon.

Colombia and Chile pioneered the adoption of NAPs to counter companies' human rights abuses in the region.[11] In June 2021, Peru joined them as the third Latin American country with a NAP. These NAPs highlight the global trend to translate the UNGPs into domestic policies whereby development rhetoric is instrumental to compliance with human rights. NAPs have taken the form of executive decrees around the world, and Latin America is no exception. The Colombian, Chilean, and Peruvian policies address problems like vertical and horizontal political coherence, lack of awareness regarding the UNGPs, and public participation throughout the policy

[8] Kathia Martin-Chenut & Carmen Perruso, "El caso Chevron-Texaco y el aporte de los proyectos de convención sobre crímenes ecológicos y ecocidio a la responsabilidad penal de las empresas transnacionales" [The Chevron-Texaco case and the contributions of the draft convention on ecological crimes and ecocide to the criminal responsibility of transnational companies] in Humberto Fernando Cantú Rivera, ed, *Derechos humanos y empresas: Reflexiones desde América Latina [Human rights and Business: Reflections from Latin America]* (IIDH, 2017) 355 at 355, 358-65; Amanda Romero Medina & Mauricio Lazala, "Hacer negocios en un país en conflicto armado: Análisis de la relación reciente entre empresas y derechos humanos en Colombia" [Doing Business in a Country in Armed Conflict: Analysis of the Recent Relationship between Business and Human Rights in Colombia] in Cantú Rivera, ed, 193 at 195-99, 203-04, 209-11; OAS, Inter-Am Comm HR, OEA/Ser.L/V/II. *Human Rights Situation in Honduras*, Doc. 146 (2019) at para 200.

[9] Ban Ki-Moon, "Remarks at a G20 working dinner on 'Sustainable Development for All'", (9 May 2013), online: <www.un.org/sg/en/content/sg/statement/2013-09-05/secretary-generals-remarks-g20-working-dinner-sustainable>.

[10] Sébastien Duyck & Sébastien Jodoin, "Integrating human rights in global climate governance: an introduction" in Sébastien Duyck, Sébastien Jodoin & Alyssa Johl, eds, *Routledge handbook of human rights and climate governance* (New York: Routledge, 2018) 3 at 3.

[11] In simple terms, NAPs are public policies regarding business and human rights.

construction.[12] Likewise, all NAPs distribute multiple tasks to different executive ministries. Aside from those similarities, there are critical distinctions between each NAP. While in Colombia and Peru NAPs were adopted at the highest level of the Executive Branch—the presidency—Chile adopted its NAP through the Secretary of Foreign Affairs. During the VI Regional Forum on Business and Human Rights for Latin America and the Caribbean held in October 2021, Chile reported that the Human Rights Deputy Secretary of State is now in charge of monitoring and updating the NAP. Other differences include the prioritization of different economic sectors, for instance, the first Colombian NAP prioritized energy mining, agroindustry, and road infrastructure sectors. Colombia also focused on the implementation of the 2016 Peace Agreement between the Government of Colombia and the FARC and devised new governance structures to enforce and monitor this policy. The Chilean NAP gives more weigh to the SDGs interconnections. The Peruvian NAP was the first to include a detailed baseline study of the current business and human rights context and is the only one with disaggregated approaches to senior citizens.

Nevertheless, regional NAPs still lack policy coherence, a foundational principle of the UNGPs. As an example, Colombia and Chile only partially refer to NAPs in their SDGs Voluntary National Reports.[13] More importantly, they have not devised new mechanisms or reformed existing ones to protect environment-related human rights, as most environment-related actions in their policies are inconsequential towards these rights.

Because these NAPs are the first regional instruments of such nature, there is room for improvement to strengthen each policy. Out of the three pillars which comprise the UNGPs 1) state duty to protect, 2) businesses responsibility to respect, and 3) access to remedies, none of the three NAPs has a strong stance on the UNGPs remedy pillar, nor do they include significant actions for National Human Rights Institutions, or detailed commitments to enact due diligence laws. The lack of attention on the second and third pillars denotes substantial biases in the way countries address the business and human rights conundrums, as will be discussed later. Although the Chilean NAP set up clearer expectations for companies than the Colombian and Peruvian ones, no plan elaborates

[12] Colombia *Plan de Accion de Empresas y Derechos Humanos*, 2015 [Colombian NAP 2015]; Colombia *Plan Nacional de Acción de Empresas y Derechos Humanos 2020/2022*, 2020 [Colombian NAP 2020]; Chile *Plan de Acción Nacional de Derechos Humanos y Empresas*, 2017 [Chilean NAP]; Peru *Plan Nacional de Acción sobre Empresas y Derechos Humanos 2021-2025*, 2021 [Peruvian NAP].

[13] *Chilean NAP*, *supra* note 12 at 22–25; Colombia, *Presentación Nacional Voluntaria de Colombia Los ODS como instrumento para Consolidar la Paz* (2016); Colombia, *Reporte Nacional Voluntario Colombia* (2018).

on the benefits for company compliance, an important incentive for good corporate behavior. The analysis of the four policies highlights marginal improvements in the NAPs development. For instance, the revised 2020-2022 Colombian NAP is more specific and better structured around the three UNGPs pillars than its predecessor and is interlocked with broader national development policies. While the revised Colombian NAP improved on its vertical and horizontal coherence, it sacrificed the distinctive developments regarding transitional justice and the peace process. The Peruvian NAP proposes the most ambitious follow up and evaluation system of the three countries by encompassing the 97 NAP actions, the UN Universal Periodic Review and UN treaty bodies recommendations, and the SDGs indicators.[14]

Latin America's nefarious history on resource overexploitation and long-standing international support for human rights partially explains the rationale for addressing the governance gaps on business and human rights with such impetus. Regarding its resource exploitation, more than two centuries of Spanish, French, Dutch, Portuguese, or British colonialism still echoed in today's legal and social institutions. Though most Latin American countries gained formal independence around two centuries ago, effective sovereignty is still absent in the region. Neoliberalism and largely unchecked corporate activities have served as a form of neocolonialism. The combination of neoliberalism and the corruption of local elites facilitated an environment where corporations profited at the expense of vulnerable populations,[15] perpetuating the cruel history of exclusion and exploitation during colonial times.

Perhaps this common history sparked the public outcry for human rights. Not only had many Latin American countries signed the American Declaration of the Rights and Duties of Man before the Universal Declaration of Human Rights, but Latin America was a crucial player during the negotiations surrounding it. The continent also has a highly regarded regional human rights system. The American Convention on Human Rights created the Inter-American Human Rights System, comprising of two international bodies. The Inter-American Commission on Human Rights

[14] *Peruvian NAP*, *supra* note 12 at 129–32.

[15] Corte Nacional de Justicia, 12 November 2013, *Lago Agrio v Chevron Corporation*, (2013) [Lago Agrio]; *Opario Lemonth Morris y Otros (Buzos Miskitos) (2018)*, Inter-Am Comm HR, *Informe No 64/18* [*Opario IACHR*].

(IACHR), whose primary function is to "promote respect for and defense of human rights"[16] and the IA Court, whose objective is to interpret and apply the American Convention.[17]

Latin America has played a critical role regarding environment protection and sustainable development. For instance, Brazil hosted the first Earth Summit and during the Rio+20 conference, Colombia and Guatemala advocated for the inclusion of global performance indicators as a governance tool in sustainable development and environmental treaties.[18] Jodoin et al. claim that current trends indicate that Latin America is at the forefront of including human rights issues in the debates surrounding climate change. Of the emerging world economies, only Brazil and Mexico introduced human rights in their intended national contributions under the Paris Agreement, he points out.[19] Brazil, Venezuela, Nicaragua, Argentina, Guatemala, Ecuador, and Bolivia have either criticized, withdrawn, or stated that any treaty with an investment dispute mechanism will not be signed because of the structural imbalances in favor of investors and the lack of transparency.[20] These factors explain the unique regional view on human rights, businesses, and environmental protections. Therefore, the thesis pivots around the idea that Latin American regionalism provides context-appropriate solutions for the issues addressed herein, solutions that might be ill-advised elsewhere.

Overall, I conclude that NAPs can bridge the difference between development and human rights narratives and create a coherent and cohesive policy. NAPs have the potential to protect environment-related human rights while distributing the burden of achieving environment-related human rights between states and corporations. To reach that point, however, governments must have an acute understanding of the benefits and drawbacks of development and human rights theories and well-defined methodologies to assess and incorporate the inputs of several stakeholders into the NAP. Human rights law, the UNGPs, and the SDGs need to sustain a three-way dialogue between them to achieve environment-related human rights. Whereas my thesis

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[16] *American Convention on Human Rights*, 1978 at article 41 (18 July 1978) [ACHR].

[17] Inter-Am Ct HR, "What is the Inter-American Court of Human Rights", (03 October 2021) online: *What is the Inter-American Court of Human Rights* <www.corteidh.or.cr/que_es_la_corte.cfm?lang=en>.

[18] Tomáš Hák, Svatava Janoušková & Bedřich Moldan, "Sustainable Development Goals: A need for relevant indicators" (2016) 60 Ecol Indic 565 at 566.

[19] Sébastien Jodoin, Rosine Faucher & Katherine Lofts, "Look before you jump: Assessing the potential influence of the human rights bandwagon on domestic climate policy" in Duyck, Jodoin & Johl, eds, *supra* note 8, 167 at 175-76.

[20] Alexander Gillespie, *The long road to sustainability: the past, present, and future of international environmental law and policy*, first edition. ed (Oxford: Oxford University Press, 2018) at 213.

highlights initiatives to link these three distinctive regimes, academics have hitherto overlooked this conversation.[21] I contribute to such debates by assessing how human rights discourse can harness the high-level support of the SDGs and of the UNGPs. Then, I identify the links between human rights law, the UNGPs, and the SDGs environmental pillar.[22] Afterward, I underscore the importance of respecting agency, having enough technical capabilities to understand the underlying human rights problems, and establishing and disclosing a sound methodology for using the different inputs into a coherent policy.

Methodology, Assumptions, Limitations, and Structure

I implement a doctrinal analysis of human rights law, development theories, and the UNGPs, as well as an empirical assessment of the Colombian, Chilean, and Peruvian NAPs. Although the I employ additional examples of business wrongdoing in Latin America, those cases serve as discursive elements, not as thorough case studies. Many of the arguments I made draw on indigenous people settings because of their vulnerability, their intrinsic connection with the environment, and the abundance on jurisprudence. The emphasis on indigenous examples should not prevent the reader to engage with the thesis in a broader setting. As Colombia, Chile, and Peru jumped onto the bandwagon of using NAPs as a regulatory tool to increase national control over companies within their jurisdiction, their empirical assessment reveals a disregard for substantive environment-related human rights.

Scholarly works have typically cataloged environmental protection as a collective action problem. I utilize Ostrom's arguments that relying solely on traditional collective action thinking is insufficient for environmental problems; on the contrary, she posits an updated and communitarian model for collective action problems which encompass behavioral theory and enhance trust levels among participants.[23] The sense of community—where companies, government institutions, human rights advocates, communities, and other stakeholders actively participate in a policy process—not only complements the principle of social expectations outlined

[21] OHCHR, "Universal Human Rights Index", (16 March 2021), online: <uhri.ohchr.org/en/>; Danish Institute for Human Rights, "The Human Rights Guide to the Sustainable Development Goals", (15 August 2021) online: <sdg.humanrights.dk/>; Paraguay, "SIMORE plus", online: *SIMORE Plus* <www.mre.gov.py/simoreplus/> [SIMORE Paraguay].

[22] UNGA, *supra* note 6. SDGs 13 climate action, 14 life below water, and 15 life on land

[23] Elinor Ostrom, "Polycentric systems for coping with collective action and global environmental change" (2010) 20:4 Glob Environ Change 550 at 551, 52, 57.

by the UNGPs, but also is at the core of the arguments that explain why companies must respect human rights.[24] Similarly, I use Steffek's idea of input, output, and throughput legitimacy. Input legitimacy refers to public participation throughout the policy process. Output legitimacy entails the government capacity to solve complex problems whilst meeting the expectations of its citizenry. Throughput legitimacy refers to the processes employed to transform stakeholders' inputs into a NAP while maintaining human rights as the bedrock.[25] The legitimacy triad and the updated vision of collective action problems are critical to understand and correct current NAP shortcomings.

I embrace a more comprehensive understanding of "the law", which comprises executive decrees, such as the NAPs, and self-regulation mechanisms like business human rights due diligence. Regulating companies through executive decrees is the current trend of business and human rights. Even though judicial and legislative control over companies' wrongdoings vis-à-vis human rights exists in Latin America, it is not as widespread and developed as NAPs, which have been the primary source of innovation in the area within the region. Moreover, I urge countries to continue developing domestic policies until a more concrete and bottom-up regional understanding of "business, sustainability, and human rights" emerges. By acknowledging the principle of the interconnectedness of law, my research gives prevalence to the social nuances and local priorities to develop NAPs.[26]

Fuller and Moore proved that multiple social variables are interweaved with moral, ethical, or legal regulations. Even the imperceivable subtleties within a society can be determine the success or downfall of a policy, NAPs included. Hence, I posit as equally important the voices of local actors (input legitimacy) and the technocracy governance (output legitimacy). The thesis is embedded with a pragmatic spirit rather than an idealistic one insofar as it assumes that is better to work around an already accepted standard—such as the UNGPs—than to attempt to develop a new set of international norms. While stakeholders beyond states (e.g., corporations, non-governmental organizations, and international cooperation agencies) play a critical role in the current human

[24] UNHRC, *supra* note 1.

[25] Jens Steffek, "The output legitimacy of international organizations and the global public interest" (2015) 7:2 Int Theory 263 at 263–69.

[26] Lon L Fuller, "Human Interaction and the Law" (1969) 14:1 Am.J.Jurisprud 1 at 1, 27; Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 L.& Soc'y Rev. 719 at 721, 742.

rights and development regimes, I adopt a state-centric framing to the problem that aligns with the Latin American standards on business and human rights and the IA Court jurisprudence.[27] Given the state of international politics, it is impossible to address environment-related human rights without talking about sustainable development. Although I recognize the value of employing multiple instruments and drawing inspiration from several international frameworks, I argue that states must comply with human rights law first, then use development rationale to enhance human rights, not vice versa.

Since the scope of my research is limited to Latin America, this precludes my thesis to provide a generalizable global picture of UNGP. All empirical assessments were based on documentation (e.g., reports, public policies, press releases), rather than fieldwork and interviews with stakeholders, this too can be considered a limitation. However, the rich nature of the UNGPs and its broad acceptance has produced a rich and diverse literature and evaluations that suffice for this study.

The structure of the thesis is as follows. Chapter 1 starts by analyzing human rights and sustainable development discourses and how each discipline frames and undertakes similar problems, including the most recent tendencies. Then, I refer to how the NAPs are in a unique position to take full advantage of both frameworks in Latin American, specifically by focusing on Colombia, Chile, and Peru. Chapter 2 covers the links between substantive environment-related human rights, the UNGPs, and the environmental SDGs (SDGs 13 climate action, 14 life below water, and 15 life on land). In this chapter I focus on how all these frameworks ultimately aim at improving human rights and how NAPs can harness their mutually reinforcing nature. By way of critiquing the NAPs development process, I urge to consider input, output, and throughput legitimacy as criteria for improving NAPs' relation to environment-related human rights per the Latin American standards.

I conclude that NAPs are suitable policies where human rights can benefit from the mutually reinforcing—yet hierarchically dependent—nature of sustainable development thinking. NAPs are promising mechanisms to rebalance the burdens of achieving environment-related human rights among corporations and states. Given Latin America's active engagement and specific obligations

[27] OAS, Inter-Am Comm HR, Ser.L/V/II, *Business and Human Rights: Inter-American Standards*, CIDH/REDESCA/INF.1/19 (2019); *Buzos (Lemonth Morris y Otros) (Honduras)* (2021), Inter-Am Ct HR (Ser C) No 432 at paras 46–49 [*Lemonth IA Court*].

regarding the environment and human rights nexus, regional NAPs are far more advisable to address the governance gaps and the lack of accountability regarding corporate human rights abuses than international treaties or judicial actions. The analysis of the Latin American NAPs reveal that the lack of actions toward substantive environment-related human rights has neglected the UNGPs from their full potential. The failure of NAPs to improve these rights does not mean that states should discontinue them; rather, it points out one way to improve them. Finally, I claim that to respect, protect, and guarantee environment-related human rights countries must consider input, output, throughput legitimacy when developing their NAP.

Chapter 1

The first section of this chapter establishes a dialogue between the discourse of human rights and the discourse of sustainable development within the context of the UNGPs. Herein I address how these frameworks face similar problems, the inherent complexities of tying them together, and the most relevant trends. Overall, this section proves that human rights law must be the foundation for any successful NAP, although international human rights law and development law are mutually reinforcing; otherwise, the policy may lack substantive grounding. A cohesive and coherent NAP can reap the benefits of both narratives by tying them together to improve people's lives. In Section II I consider the regional context in which the UNGPs have been implemented, including the regional viewpoint on the triad of human rights, sustainability, and business. I focus on the Colombian, Chilean, and Peruvian NAPs, although I also examine cases from other countries. In sum, I aim to develop a richer understanding of human rights and development narratives, introduce crucial Latin American specificities, and lay down the foundations for using NAPs as a regulatory tool capable of achieving environment-related human rights.

I. Points of divergence and convergence between the Human Rights and Development law.

This section covers the current human rights and development law regimes and how they permeate the UNGPs. The UNGPs were developed as a response to the "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human

rights" (draft norms).[28] The draft norms were a hard law initiative geared towards the imposition of international obligations to transnational corporations. However, states were reluctant to the idea of a treaty for bridging the gaps between businesses and human rights. Instead, they appointed John Ruggie as the UN Special Rapporteur for Business and Human Rights. His five-year mandate concluded in 2011 when the UN Human Rights Council endorsed the UNGPs. During his mandate, Ruggie's approach was consequential for countries to consolidate soft law over hard law to address business and human rights problems, a vision imported from international development law. Unfortunately, the scholarly debate on development and human rights has mostly focused on their differences, not on their mutually reinforcing nature.

Understanding the underlying foundations and limits in human rights and development law is crucial to include businesses in the current debates. Indeed, some countries have held corporations accountable based on international standards, yet this is still a contested idea.[29] Although the prevailing human rights discourse portrays transnational companies as human rights wrongdoers,[30] states are reluctant to grant business the subject status in international human rights law. Meanwhile, development narratives—such as the SDGs—tend to frame corporations as development and human rights enablers. Both arguments represent different sides of the same coin and are equally valuable to improve people's lives. The draft norms demonstrated that if companies are depicted negatively, progress at the international level will halt; yet, portraying companies only as enablers for development can obscure their human rights abuses. Instead, stakeholders must acknowledge the benefits and drawbacks of each field. Comprehending the differences is one part of the puzzle (output legitimacy). The other two parts (input and throughput legitimacy) include public participation and disclosed methodologies to evaluate all the inputs during policymaking.

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[28] Humberto Fernando Cantú Rivera, "Los desafíos de la globalización: reflexiones sobre la responsabilidad empresarial en materia de derechos humanos" [The challenges of globalization: reflections about corporate social responsibility in human rights] in Cantú Rivera, ed, *supra* note 6, 37 at 41; Radu Mares, "Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Brill | Nijhoff, 2011) 1 at 9–10.

[29] John H Knox, "The Ruggie Rules: Applying Human Rights Law to Corporations" in Mares, *supra* note 28, 51 at 53.

[30] María Laura Böhm, "Introducción general" [General Introduction] in María Laura Böhm, ed, *Empresas transnacionales, recursos naturales y conflicto en América Latina. Para una visibilización de la violencia invisible [Transnational business, natural resources, and conflict in Latin America. For a visibility of invisible violence]*, 1st ed (Buenos Aires, 2020) 9 at 9-21.

a. Divergence.

A thorough study of the UNGPs reveals the intricate and interwoven nature of development and human rights law. Nonetheless, there are significant differences in the ways each discipline undertakes similar issues. The first difference lies in the diachronic and synchronic comparisons. The diachronic comparisons made under a development perspective conflict with the human rights spirit, which favors synchronic comparisons. Diachronic comparisons look at historical trends and inevitably see how things have improve. While diachronic comparisons weigh progress over time, synchronic comparisons enable us to identify what is currently avoidable given our current knowledge and resources. For example, a diachronic comparison of labor conditions would emphasize how far we have come from abolishing slavery. Meanwhile, a synchronic comparison would show that what we have done is not enough in today's world. To cite another example, diachronic comparisons regarding climate change will focus on the trends and developments to transition away from fossil fuels. Synchronic comparisons will evidence that we have not done enough to control anthropogenic climate change. In short, while development discourse is progressive, human rights discourse calls for immediate action.[31]

The divergence on how human rights and development evaluate progress over time has sparked serious critics within the literature. Winkler & Williams harshly critiqued the SDGs and cataloged them as lofty goals.[32] Frey argued that the SDGs market-driven approach conflicts with the state's duty to protect human rights by holding private actors accountable. Her work reveals how oversimplified the SDG 8 (decent work and economic growth) approach is. In her view, decent work should be growth neutral, not synonymous with economic growth.[33] Perhaps the business model embedded in some SDGs views countries as enterprise enablers, not as duty-holders. Policymakers must understand the limits, biases, and distortions embedded into the SDGs because it can prevent partial solutions to intricate problems (See chapter 2 Section I.c for further discussion).

[31] Thomas Pogge & Mitu Sengupta, "Assessing the sustainable development goals from a human rights perspective" (2016) 32:2 J Int Comp Soc Policy 83 at 86, 88.

[32] Inga T Winkler & Carmel Williams, "The Sustainable Development Goals and human rights: a critical early review" (2017) 21:8 Int J Hum Rts 1023 at 1026.

[33] Diane F Frey, "Economic growth, full employment and decent work: the means and ends in SDG 8" (2017) 21:8 Int J Hum Rts 1164 at 1165, 1174, 1177-79.

The second difference is their enforcement mechanisms. While development law does not impose sanctions for falling short on the SDGs, human rights law does have enforcement mechanisms. These enforcement mechanisms vary in scale and coercibility. The UN treaty bodies only produce reports with recommendations, whereas the regional human rights systems have stringent procedures. The Inter-American and European Human Rights Courts judge human rights violations and produce binding judicial rulings.[34] Since there are no explicit obligations regarding sustainable development, there are no sanctions for developing unsustainably. The absence of such an obligation, due to no consensus on a hard law instrument on development, has not prevented states from engaging in sustainable development law. On the one hand, sustainability discourse emphasizes soft law, perhaps due to the lack of international obligations towards sustainable development or consensus. On the other hand, human rights advocates—especially in Latin America—overemphasize the importance of hard law mechanisms. Ultimately, the flexibility inherent to development law complements human rights law advocacy.

Despite no explicit legal obligation to develop sustainably, Barnes contends that sustainable development principles influence modern international governance and enjoy high-level support among most countries. She asserts that several international dispute settlement bodies—the International Court of Justice included—have referred to the importance of sustainable development.[35] Sustainable development's highly authoritative and political acceptability characteristics allowed it to become so prevalent in today's human rights rhetoric. Sustainable development rationale has influenced multiple governance frameworks, including business practices like corporate social responsibility.[36]

Human rights norms do not always take the form of a treaty. The Universal Declaration of Human Rights, the UN Declaration on the Rights of Indigenous Peoples, and the UNGPs exemplify how human rights come in varying packages. Human rights obligations also differ in scope and nature. Civil and political rights have traditionally been considered negative obligations, in which a state is bound to refrain from a behavior. By contrast, economic, social, and cultural rights are

[34] *ACHR*, *supra* note 16 at articles 62, 67, and 68; *European Convention on Human Rights*, 1953 at articles 32 and 46 (3 September 1953).

[35] Mihaela-Maria Barnes, "State-Owned Entities as Key Actors in the Promotion and Implementation of the 2030 Agenda for Sustainable Development: Examples of Good Practices" (2019) 8:2 Laws 1 at 2.

[36] Gerlinde Berger-Walliser & Paul Shrivastava, "Beyond compliance: Sustainable development, business, and proactive law" (2014) 46 Geo J Intl L 417 at 425, 32; Inter-Am Comm HR, *supra* note 27 at paras 45, 104–120.

considered positive duties in which a state must take a proactive role in protecting such rights, for instance, education and health services.[37] Yet, the sharp distinction between positive and negative rights is outdated. Civil and political rights also entail positive obligations, while economic, social, and cultural rights impose negative obligations. It is naive to claim that a state can stop using excessive force to contain legitimate demonstrations without training police officers. Likewise, it must create criminal codes that punish such acts and establish criminal judging circuits where laws are applied. This example demonstrate that even with respect to civil and political rights—where states must not obstruct the enjoyment of these rights—countries need to adopt positive measures to uphold these rights either from government officials or third parties.

Another layer of complexity in human rights law is the dichotomy between conduct and result obligations. Practitioners and academics usually classify economic, social, and cultural rights as progressive; nonetheless, this interpretation is, at best, incomplete. In the case *"indigenous communities of the Lhaka Honhat (our land) association v. Argentina"*, the IA Court acknowledge progressive nature of economic, social, and cultural rights, but also referred to immediate duties regarding these rights.[38] The IA Court has also underscored that the state duty to investigate human rights violations is essentially a conduct duty.[39] Per the Inter-American Human Rights System, such obligation stems from the right to a fair trial, an inherent civil and political right.[40]

The third difference is the constant evolution of human rights. Unlike development initiatives, which are usually fixed over a set timeframe, human rights through advisory opinions, domestic and international jurisprudence, and the UN treaty bodies' general comments is constantly evolving.[41] The constant evolution of human rights law makes its enforcement even more difficult. Undoubtedly, we cannot construe human rights in the same way they were 70 years ago. *Pro homine* and evolutionary interpretations constantly move forward the notions and ideas set in the language of international human rights treaties.[42] These unceasing interpretations are problematic

[37] *General comment No. 24: On State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, Committee on Economic, Social and Cultural Rights, *E/C.12/GC/24.* (2017) at paras 4, 16.

[38] *Indigenous communities of the Lhaka Honhat (our land) association (Argentina)* (2020), Inter-Am Ct HR (Ser C) No 400 at paras. 229 and 272 [*Lhaka Honat*].

[39] *Kawas-Fernández (Honduras) (2009)*, Inter-Am Ct HR (Ser C) No 196 at para 101; *Garifuna community of Triunfo de la Cruz and its members (Honduras)* (2015), Inter-Am Ct HR (Ser C) 305 at paras. 229–32 [*Triunfo*].

[40] *ACHR*, *supra* note 16. Article 8

[41] See how the SDGs are fixed standards from 2015 to 2030, or how the millennium development goals were stoic standards for 15 years, from 2000 to 2015.

[42] Inter-Am Ct HR, *supra* note 4 at paras 42–45.

because they have created a sophisticated discipline to guide state action, which forces government officials to be updated with the most recent developments. Bureaus do not have the privilege to analyze all the nuances or implications of recent case law when technical resources are limited. Fortunately, the connections between collective rights, positive, and conduct obligations with the SDGs allow countries to have a 15-year implementation roadmap for some human rights, including environment-related human rights. Solely focusing on the International Bill of Human Rights or the regional human rights treaties is not enough to put human rights at the NAPs' center. Likewise, focusing solely on sustainable development could result in a box-ticking approach, where initiatives lack substance. Aside from the lack of enforcement mechanisms, the SDGs can increase human rights enforceability by clarifying how public policies impact people's lives and providing a stable 15-year road map to facilitate the enforcement of human rights.

The fourth difference is the use of indicators in human rights and development law.[43] Indicators are widespread in development rhetoric, but human rights mechanisms such as the IACHR and the UN treaty bodies have assimilated the foreign idea of indicators as governance tools. Under program 21 of its strategic plan 2017-2021, the IACHR emphasizes indicators as tools to improve its monitoring.[44] Human rights rhetoric accommodates indicators in three distinct yet interconnected levels—structural, process, and outcome indicators.[45] Although some human rights institutions are using and recommending indicators to assess improvement in critical areas, the SDGs allow increased maneuverability.

Even though the SDGs have an internationally agreed indicator set, they allow countries to further contextualize their indicators, whereas the human rights law margin of flexibility is much narrower, especially in Latin America. Human rights analysis and theories are highly anthropocentric, whereas development is not always anthropocentric. The human rights-based approach is a clear example of such bias.[46] The notions of rights-holders and duty-bearers—two inseparable concepts in human rights law—are at the core of the human rights-based approach.

[43] Indicators are a governance tool used to measure changes in a quantitative way. Nowadays, it's common for public policies to assess their implementation through a multilayered set of indicators.

[44] OAS, Inter-Am Comm HR, *Strategic plan 2017-2021*, 2017, at 43, 64 online: Inter-Am Comm HR <www.oas.org/en/iachr/mandate/StrategicPlan2017/docs/StrategicPlan2017-2021.pdf>

[45] OHCHR, *Human rights indicators: A guide to measurement and implementation. HR/PUB/12/5* (New York and Geneva: United Nations Human Rights, 2012) at 34–38.

[46] Peter Uvin, "From the right to development to the rights-based approach: how 'human rights' entered development" (2007) 17:4–5 Dev. Pract. 597 at 602-04.

Participation and agency are crucial throughout policymaking to correctly translate human rights into indicators. Because only human beings are entitled to human rights, indicators that do not encapsulate those entitlements will imprecisely portray any human rights improvement. Meanwhile, some SDGs are based on the environment. Therefore, their goals and indicators focus on the environment per se.[47]

Two problems related to indicators are worth examining—namely the limits on the margin of appreciation to translate international concepts into ground realities and the inevitable distortions generated by indicators. The margin of appreciation doctrine is stronger in Europe than in Latin American. In *"Ireland v. England"*, the European Court of Human Rights defines the margin of appreciation as the prerogative for national authorities, who are better placed than an international judge, to decide the necessary measures to overcome a conflict between human rights and public interest.[48] Subsidiarity, proportionality, and the better position rationale are the main motives for such a concession.[49] Although both international systems work on similar principles, the IA Court has not developed the doctrine within its jurisprudence thus far. Meanwhile, Shany and Kratochvíl have even critiqued the European Court of Human Rights for its overuse.[50] Even Shany admits that the political milieu which allowed the European Court of Human Rights to develop this doctrine could not be replicated elsewhere. Perhaps this explains the hesitant approaches of other human rights institutions to broaden states' maneuverability margins when human rights clash with public interests.[51] Latin American countries have less space to maneuver when such conflict arises. Therefore, Latin American countries might be more inclined to engage with other international frameworks, such as international development law, where they will not be judged for exercising such leeway.

A bigger problem with the margin of appreciation doctrine is that it overlooks public participation. The doctrine focuses on the technical capacity of government agencies to decide what will benefit their constituents. It is improbable and undesirable to expect the IA Court to use the

[47] UNGA, *supra* note 6 at paras 2, 17, goals 12.4, 14.1, 15.3.
[48] *Ireland v The United Kingdom*, (1978) ECHR at para. 207.
[49] Jan Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights" (2011) 29:3 NQHR 324 at 326–28, 30; Yuval Shany, "All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee" (2018) 9:2 JIDS 180 at 183.
[50] Shany, *supra* note 49 at 185; Kratochvíl, *supra* note 49 at 326, 35.
[51] Shany, *supra* note 49 at 198.

margin of appreciation when determining the best actions regarding environment-related human rights. The doctrine over-relies on technocratic governance and reduces the capacity to participate in public decision-making (input legitimacy). Consequently, the approach is ill-suited to address the polycentric and multilayered problem of closing the governance gap between business and human rights.

Indicators are now widespread throughout human rights mechanisms. The UN treaty bodies and the UN Human Rights Council require states to provide quantitative and qualitative data regarding their respective convention, or in the case of the Universal Periodic Review on the Universal Declaration of Human Rights.[52] When the IACHR drafts a country report, it assesses qualitative and quantitative information from the state and other stakeholders. The working group of the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador) has even adopted a set of indicators to evaluate state improvement on the protocol rights.[53] Similarly, the Office of the High Commissioner for Human Rights has devoted substantial resources to examine the use of indicators within the human rights regime.[54]

Yet indicators have a cost. Indicators can distort the social phenomena they intend to evaluate, thus losing effectiveness. Moreover, an over-reliance on indicators could produce a box-ticking approach to compliance, leading to superficial changes only.[55] Herein I use Santos' work to elucidate the value of indicators in contemporary governance. He visualizes laws as maps. Like maps, laws distort reality in three areas—namely scale, projection, and symbolization. Scale involves the conscious decision to represent more or fewer details. Projection entails translating a multi-dimensional object or discussion onto a flat surface (e.g., a policy document). Every orientation instrument projects reality with a level of distortion. This projection is not only distorted by technical aspects. The map's intended use and the cartographer's ideology also influence projection; biases, political priorities, and tendencies therefore influence the framing of NAPs.

[52] *Compilation of guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties.* United Nations Secretary-General, *HRI/GEN/2/Rev.4* (2009) at 9, 27, 49, 83, 89.

[53] OAS, Working Group of the Protocol of San Salvador, OEA/Ser.D/XXVI.11, *Progress indicators for measuring rights under the protocol of San Salvador*, 2nd edition (Washington: OAS, 2015).

[54] OHCHR, *supra* note 45.

[55] Galit A Sarfaty, "Measuring Corporate Accountability through Global Indicators" in Benedict Kingsbury, Kevin E Davis & Sally Engle Merry, eds, *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law*, (Cambridge: Cambridge University Press, 2015) 103 at 117.

Finally, symbolization refers to the representation of selected features with specific symbols.[56] The tangible value of a law lies in the conscious decisions to portray reality in a specific way. Maps, laws, and indicators cannot coincide point to point with real life.[57] Policymakers ought to walk a fine line where the indicators' mapping process does not downplay reality in a harmful manner. In the "business and human rights" context, this only can be achieved in a process that encompasses input, output, and throughput legitimacy. In simpler terms, the distortion process should be participatory, carried out by technically capable institutions with an adequate understanding of the complexities in the development and human rights narratives, and be methodologically sound.

Despite its drawbacks, authors like Sarfaty acknowledge indicators as governance tools capable of improving corporate behavior.[58] All NAPs rely on indicators to assess their implementation.[59] The revised NAP include references to a matrix with indicators, goals, and deadlines. The Chilean NAP cleverly used the SDGs indicators prioritized in the National Sustainable Development Agenda.[60] The latest NAP improved the power of indicators by including a thorough baseline study on the Peruvian context.[61] The use of indicators in a human rights policy can only be the culmination of years of consultations with multiple stakeholders. The use of indicators as an integral part of the current NAPs exemplifies the progress made within the region and that public consultation is one of the three steps for combining the UNGPs, development law, and human rights law.

To recapitulate the differences between development and human rights law, the development viewpoint point emphasizes how much progress we have made (diachronic comparisons). By contrast, human rights assess what has not reached the current standard and what would now be possible given available resources (synchronic comparisons). Human rights rhetoric relies heavily on the notion of duty-holders, as they are coercible obligations and the development narrative frame states as enablers for development, as there is no legal obligation to develop sustainably. Whereas indicators were not endemic to human rights thinking, they are now a key component of human

[56] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd ed, Law in Context (Cambridge: Cambridge University Press, 2020) at 501–05.

[57] *Ibid* at 500, 01, 05, 09, 19. A map with copious details—representation—will obscure orientation. A map that can provide an accurate orientation will likely downplay representation.

[58] Sarfaty, *supra* note 55 at 108.

[59] *Colombian NAP 2020*, *supra* note 12 at 20, 62; *Chilean NAP*, *supra* note 12 at 90; *Peruvian NAP*, *supra* note 12 at 64.

[60] *Chilean NAP*, *supra* note 12 at 56, 90.

[61] *Peruvian NAP*, *supra* note 12 at 30–43.

rights narratives. However, the indiscriminate usage of indicators can lead to a box-ticking approach or an undesired distortion of reality. Lastly, development discourse is progressive whereas human rights discourse calls for immediate action. Within the spectrum of human rights obligations, the call for immediate action—either by conduct or result obligations—does not entail instantaneous results (See Chapter 2 Section I.c for further discussion).[62]

b. Convergence.

Human rights and development law converge in more points than where they diverge. Perhaps their most important similarity is that both "attempt to achieve a more equal, peaceful, and sustainable world."[63] Nevertheless, scholarly debates have neglected their mutually reinforcing nature. Authors like Agnello, Ramanujam, Quintavalla, Heine, McInerney-Lankford, and Sano have researched how the SDGs can be instrumental for the human rights discourse. Others, like Sarfaty and Prada, have researched the power of indicators as a governance tool, a prevalent idea in today's human rights policies.[64] Quintavalla & Heine and Agnello & Ramanujam have specifically researched human rights prioritization and hierarchization to improve people's lives. While critiques have mostly come from human rights scholars on development theories, authors such as Posner and Agnello & Ramanujam have critiqued human rights.[65] The latter authors concluded that the holistic nature of human rights—which implies fulfilling human rights in a non-selective manner—is detrimental to sustainable development and unviable in contexts of economic scarcity or where technical capabilities are limited.[66] Thus, they claim that countries must prioritize securing rights that are instrumental for others. These studies shed light on how thoughtful development models can facilitate the achievement of human rights; likewise, they pinpoint the importance of a multi-layered and interconnected understanding of the "business and human rights" regime. All Latin American NAPs have recognized the interlaced nature of human rights and sustainable development by accommodating development rhetoric and human rights narratives.

[62] *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, Committee on Economic, Social and Cultural Rights, *E/1991/23.* (1990) at paras. 2, 10.

[63] Winkler & Williams, *supra* note 32 at 1027.

[64] Sarfaty, *supra* note 55; María Angélica Uribe Prada, "The Quest for Measuring Development: The Role of the Indicator Bank" in Kingsbury, Davis & Merry, 133 at 139-41.

[65] Eric Posner, *The Twilight of Human Rights Law* (Cary, United States: Oxford University Press, 2014) at 62, 140; Agnello & Ramanujam, *supra* note 7 at 87.

[66] Agnello & Ramanujam, *supra* note 7 at 87, 102.

However, NAPs need to improve their throughput legitimacy and prioritize substantive environment-related human rights over procedural environment-related human rights.

The second similarity between contemporary human rights law and development law is the focus on soft law instruments. The UNGPs and the SDGs underscore the use of soft law instruments as a trend in the current international landscape. Berger-Walliser and Shrivastava also identify that trend when addressing the new international governance structures and concepts, like climate change and sustainable development.[67] Soft law best align with the polycentric, diverse, flexible, and cooperative spirit prevalent in the current international milieu. Despite having a market-driven approach, which is generally insufficient, the SDGs are highly authoritative, politically accepted, and less questioned than human rights norms. This new soft law governance model to develop sustainably sparked a wide range of global, regional, and local initiatives.[68]

However, Latin American human rights activists and Ecuador have strongly contested the use of soft law norms.[69] Latin America is a region where human rights norms typically take the form of international conventions. The business and human rights field is not an exception, as Ecuador currently chairs the UN Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.[70] Human rights treaties are still prevalent in the Latin American psyche. A case in point is the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú treaty). Adopted on March 4th, 2018, by the OAS, the Escazú treaty is a ground-breaking international agreement that aims to guarantee

[67] Berger-Walliser & Shrivastava, *supra* note 36 at 434, 42, 43.

[68] Panamá Ministerio de Comercio e Industrias, "Gobierno panameño presenta Plan Nacional de Responsabilidad Social Público Privado y Derechos Humanos 2020-2030" [Panamanian Government presents National Plan for Public Private Social Responsibility and Human Rights 2020-2030], (15 April 2019), online: *Gobierno panameño presenta Plan Nacional de Responsabilidad Social Público Privado y Derechos Humanos 2020-2030* <www.mici.gob.pa/noticias/gobierno-panameno-presenta-plan-nacional-de-responsabilidad-social-publico-privado-y-derechos-humanos-2020-2030>; UN Department of Economic and Social Affairs, *SDG Good Practices. A compilation of success stories and lessons learned in the SDG implementation* 1ts ed (New York, 2020) at 58-78.

[69] Ecuador's position might be a combination of factors, among which the two more relevant are the case of Lake Agrio and its political stance against neoliberalism.

[70] OHCHR, "Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights", (2021), online: *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* <www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>.

> "access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development."[71]

The Escazú treaty and the UN Open-ended intergovernmental working group demonstrate the resistance of Latin American countries to adopt only soft law instrument for the triad addressed herein. Understanding the nuances between development and human rights is crucial to explain the role currently played by businesses. It would be impossible to engage with companies in a traditional human rights way; the last attempt to do so abruptly concluded when states abandoned the draft norms. Perchance the same will happen to the current effort chaired by Ecuador.

The difficult to achieve international consensus explains the abundance of soft law to address emerging issues. Today's world is much more diverse and convoluted than when human rights surged after the Second World War. When states adopted the Universal Declaration of Human Rights, the number of sovereign nations was one-quarter the number today. Even during the 1960s' when states negotiated the International Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights, there were one-third fewer sovereign countries.[72] Even leaving aside the participation of multiple stakeholders in international forums, achieving consensus among 193 countries is much more difficult than in the past and consistently leads to the lowest common denominators.

The lack of consensus on more stringent norms at the broadest global level allows for regional developments in the "business and human rights" regime. National and regional developments based on the UNGPs' can improve human rights much more than arid discussions in New York or Geneva. Especially if Latin America's developments are guided by competent interpretations such as the IACHR "Business and Human Rights: Inter-American Standards" 2019 report. Soft laws are not inherently bad, even if they exist because of a lack of consensus. Guiding principles and voluntary guidelines can spark a plethora of positive initiatives. For instance, since the adoption of

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[71] *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.*, 2021 (22 April 2021) at article 1.

[72] UN Secretary-General, "UN State Membership", (10 November 2021) online: *UN State Membership* <www.un.org/en/about-us/growth-in-un-membership>.

the UNGPs, eight other Latin American countries have demonstrated their willingness to develop their NAP. In addition to hundreds of corporate initiatives geared around the UNGPs, civil society has also embraced the UNGPs by developing certification processes and independently increasing scrutiny over corporations.[73] Nonetheless, these forms of self-regulation must be critically examined and often complemented with domestic laws to yield better results. In Latin America—a region where environmental protections are ever-present in collective thinking—the UNGPs, the IACHR "Business and Human Rights: Inter-American Standards" 2019 report, the IA Court advisory opinion OC-23/17, and the SDGs can work in tandem to improve environment-related human rights.

Their mutually reinforcing nature is the third important similarity between human rights and sustainable development. Quintavalla & Hein developed a theory where human rights hierarchization is necessary to advance human rights. Human rights prioritization and hierarchization are prominent in Latin America, a region where economic and technical resources are scarce. The reasoning behind improving some human rights before others (e.g., improving potable water access to improve personal integrity) is built on the principle of instrumentality.[74] In scenarios where human and economic resources are limited, this principle is vital to any government. Quintavalla & Hein were inspired by development raison d'être. They argue that human rights instrumentality is consistent with all the human rights principles (e.g., indivisibility and interdependence). Their research reveals that human rights can harness the flexibility and creativeness of development thinking without jeopardizing the nature of human rights.[75] However, the idea of instrumentality is not native to the human rights regime. Indeed, the Committee on Economic, Social and Cultural, in its general comment 24 "State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities", calls for NAPs to "place equal emphasis on all categories of human rights, including economic, social and cultural rights",[76] thus reinforcing the tensions between human rights and development approaches.

[73] Inter-Am Comm HR, *supra* note 27 at 411–426; Fiona Haines, Kate Macdonald & Samantha Balaton-Chrimes, "Contextualising the Business Responsibility to Respect: How Much Is Lost in Translation?" in Mares, *supra* note 28 107 at 116–18.
[74] Quintavalla & Heine, *supra* note 7 at 688, 93.
[75] *Ibid* at 681, 88.
[76] Committee on Economic, Social and Cultural Rights, *supra* note 37 at 59.

The indivisibility and interdependence principles imply that improving some human rights impacts positively the fulfillment of other rights. At a minimum, these two principles implicate that fulfilling certain rights triggers a domino effect. For instance, in Lhaka Honhat, the IA Court holds that "some aspects related to the observance of [the right to food, water, cultural identity, and the right to a healthy environment] may overlap with the realization of others."[77] Though the NAPs addressed herein do not specifically reference the principle of instrumentality, they use it. The question then becomes which human rights we must focus on to have a meaningful impact on people's lives? In the context of environment-related human rights, there is enough evidence to suggest that the NAPs approach of focusing on procedural rather than substantive environment-related human rights was the wrong focus, as will be discussed later in the thesis. Despite the thesis support for the use of the instrumentality principle, by no means does it advocates abandoning core human rights principles for a promising theory; on the contrary, it invites us to re-imagine human rights in different contexts and in today's polycentric world.

The mutually reinforcing nature of human rights law and the SDGs manifest itself through prioritization. Countries often need to prioritize populations or topics to make progress on pressing issues. Due to their importance for the national economy and their human rights and environmental impacts, both Colombian NAPs prioritize the energy mining, agroindustry, and road infrastructure sectors.[78] Other examples of the instrumentality principle include the recently approved Peruvian NAP. The NAP has 97 specific actions divided into three main objectives. More importantly, the "mesa multi-actor" (multi-stakeholder roundtable) procures a mutual understanding of the problems and solutions regarding business activities in the human rights context as well as promotes prioritizing specific actions over others.[79] Likewise, the Chilean, Peruvian, and Mexican human rights policies prioritize specific populations, topics, and regions.[80] These policies recognize the core principles of human rights (e.g., interdependence, universality, and complementarity) and that improving certain human rights over others does not undermines core human rights principles. These examples demonstrate how human rights policies acknowledge to

[77] *Lhaka Honat*, *supra* note 38 at para 243.
[78] *Colombian NAP 2015*, *supra* note 12 at 7; *Colombian NAP 2020*, *supra* note 12 at 11,43, 50.
[79] *Peruvian NAP*, *supra* note 12 at 1624–29. 132 stakeholders participated in the multi-stakeholder roundtable. 40 actors were government entities, 35 were civil society organizations, 22 were from the private sector, thirteen international organizations, eight indigenous people organizations, other seven were international cooperation agencies, four labor unions, and three universities. From March 2019 to May 2021, the roundtable met 15 times.
[80] Chile, *Primer Plan Nacional de Derechos Humanos*, 2018 [*Chilean HR Policy*]; Peru, *Plan Nacional de Derechos Humanos 2018-2021*, 2018; Mexico, *Programa Nacional de Derechos Humanos 2020-2024*, 2020.

varying degrees that solving every problem at once is an overwhelming and perhaps impossible task, thus supporting Quintavalla & Hein's argument about the principle of instrumentality.

The academic community has not unanimously accepted the idea of human rights instrumentality and prioritization. Prioritizing human rights implies a programmatic approach, which the SDGs understand as the translation of abstract human rights into concrete goals. Pogge & Sengupta harshly critiqued the SDGs by stressing the costs in translating human rights norms into goals—or wishes as they pejoratively refer to them—and by claiming that the SDGs discourse dilutes human rights norms.[81] By contrast, Santos' argument values the conscious decisions in which the SDGs distort reality. The use of goals, targets, and indicators does not purport to represent reality point to point; they aim to improve orientation. Governments and Private actors need the instrumentality principle, orientation, leeway, and flexibility to improve human rights. Moreover, I found that these ideas can perfectly coexist with the core components of human rights law.

Regardless of their differences, human rights law, UNGPs, and SDGs aim to improve people's lives, this is their fourth point of convergence. The central idea of placing human beings at the center is a core component of international human rights law and influenced development models. Three decades ago, development thinking rapidly embraced the idea of measuring development beyond economic growth and like human rights placed human beings at the center.[82] The UNGPs are no exception to place human beings at the core, they place humans at the center of its three pillars. The UNGPs' main goals are to reduce corporate wrongdoing vis-à-vis human rights, to clarify the state's role in this arena, and to provide judicial and non-judicial avenues for remedying corporate human rights violations.[83] The SDGs and the UNGPs share the focus on humans.

Focusing on human beings accentuates the fifth similarity; development theories and human rights reaffirm democracy and agency as core principles.[84] Sen refers to the rise of democracy as

[81] Pogge & Sengupta, *supra* note 31 at 94.

[82] Amartya Kumar Sen, *Development as freedom* (New York: Anchor Books, 2011); Amartya Kumar Sen, *Inequality reexamined.* (Oxford: Oxford University Press, 1995); Uvin, *supra* note 46 at 597.

[83] OHCHR, *Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework HR/PUB/11/04* (Geneva: 2011) at 3.

[84] Séverine Deneulin, "Democracy and Political Participation" in Lila Shahani & Séverine Deneulin, eds, *An Introduction to the Human Development and Capability Approach* (Sterling, Virginia: Earthscan, 2009) 185 at 185. Agency recognize people as active subjects of their own destiny.

the most significant event of the 20th century.[85] Indeed, democracy has been considered a precondition for sustainable development and human rights.[86] Nonetheless, multiple human rights, such as freedom of speech, economic equality, and freedom of association influence democratic processes. Democracy goes beyond the right to elect and be elected; it involves the right to actively participate in the public sphere.[87] Thus, participation plays a critical role throughout the policymaking process. All the Latin American NAPs had opportunities for participation throughout their elaboration. The three countries went one step further by incorporating diverse civil society sectors in their monitoring efforts. By reaffirming democracy and agency as core principles, participation becomes a cornerstone in development and human rights policies, NAPs included. Disregarding public participation would diminish individuals' agency and delegitimizes any attempt to bridge the governance gaps regarding business and human rights. However, participation alone is insufficient to elaborate a coherent NAP. Government officials need to understand the similarities and differences of the discourses surrounding the triad addressed herein. So far, I elaborated on the necessity of participation and technical capabilities—input and output legitimacy respectively—for enacting a coherent NAP. The last step is to have well-defined protocols and methodologies to assess multiple inputs while maintaining human rights as the backbone of the NAP. It is on the second and third step where NAPs seem to fail, as the research could not find evidence of the methodology used to shape the NAPs into their final form. The absence of well-defined methodologies supposes an undesired leeway for governments to accommodate narratives, indicators, and actions without proper accountability. While this is a pivotal argument in the thesis, I scrutinize it in chapter 2 Section II.a.

In sum, human rights and development are similar because they both aim to improve the world, they use soft law norms for addressing contemporary issues, with the exception on Latin America. Both regimes are mutually reinforcing, focus on human beings, and give prevalence to values such as agency and democracy.

[85] Amartya Kumar Sen, "Democracy as a universal value" (1999) 10:3 J Democr 3 at 3.
[86] Kathryn Sikkink, *Evidence for hope: Making human rights work in the 21st century,* (Princeton: Princeton University Press, 2017) at 193-96; Deneulin , *supra* note 84 at 191.
[87] Deneulin, *supra* note 84 at 186–88.

c. From converge to action, using development thinking to advance human rights.

The momentum behind the SDGs echoed all over the world. The Office of the High Commissioner for Human Rights and the Danish Institute for Human Rights have adopted separate e-tools to visualize the interconnections between the SDGs, the UN treaty bodies and the Universal Periodic Review recommendations.[88] Regionally, countries like Paraguay, Chile, and Honduras have also developed human rights monitoring systems embracing the SDGs.[89] Additionally, the Peruvian NAP monitoring system is expected to consolidate the UN treaty bodies and the UN Universal Periodic Review recommendations, the SDGs indicators, and the NAPs action into one comprehensive monitoring system. These initiatives are—in part—a response to broader trends in international governance. Beyond the academic debate about human rights and development, human rights organizations and governments saw an opportunity to expand human rights by riding the SDG wave.

One of the most problematic questions is to what extent development law improves human rights law, if at all? There is no definitive data quantifying the level of improvement, unfortunately. However, NAPs and scholarly works—such as Quintavalla & Heine and Agnello & Ramanujam—propose the inclusion of development-oriented monitoring tools and governance mechanisms into human rights policies. In Latin America this tendency is in fact an expectation from stakeholders that states must create development while respecting human rights. In the IACHR's words, the right to development "allows us to observe how States and business entities fulfill their obligations and whether the procedures they follow are coherent with the human rights framework."[90] The Commission's opinion implies the intrinsic connections between human rights, development, and businesses activities. A connection that is reflected in the Colombian, Chilean, and Peruvian NAPs, which explicitly refer to sustainable development.

Neither development thinking nor human rights rhetoric on their own could match the expectations of all social actors in a country. Social expectations demand a re-calibration of the way we address environmental problems and their consequences.[91] Perhaps the new paradigm

[88] Danish Institute for Human Rights, *supra* note 21; OHCHR, *supra* note 21.

[89] SIMORE Paraguay, *supra* note 21; Chile, Subsecretaría de Derechos Humanos, "Sistema de Monitoreo Plan Nacional de Derechos Humanos", online: *Sistema de Monitoreo Plan Nacional de Derechos Humanos* <planderechoshumanos.gob.cl/buscador>.

[90] Inter-Am Comm HR, *supra* note 27 at para 45.

[91] Ostrom, *supra* note 23 at 551, 52, 57.

should not be limited to states and could consider companies not only as abstract legal entities but as members of the community where they carry out their activity. Western legal frameworks gave corporations the most valuable recognition in the world, that of persons. In Spanish corporations are "personas jurídicas", in French they are "personne morale", and in Portuguese they are "pessoas jurídicas". Attach with the status of person there are not only rights, but also duties with its peers. Corporations, in whatever shape or form, are persons and part of local, national, and global communities. Ergo, community expectations complement legal obligations to behave in a certain way.

The NAPs discussed herein have enhanced trust among members of a community and created fora where all members can actively participate in solving problems. The notion of mutual trust resonates with Ostrom's argument about reshaping our understanding of collective action thinking for environmental affairs. As she claims, an updated model for collective action problems should enhance trust levels among participants. Trust also resonates with the UNGPs principle about the corporate responsibility to respect human rights. Abstract social expectations and concrete behavior expected of companies as community members shape that responsibility. Today's world calls for a more comprehensive approach to social phenomena. The comprehensive approach referred throughout my thesis acknowledges the mutually reinforcing nature of development law and international human rights law as well as the nuances when applying these regimes in business activities. Furthermore, I claim that Steffek's three legitimacies are the yardsticks to assess if such expectations are met and if the nuances were adequately discussed by policymakers.

If the academic debate surrounding development and human rights focused on the benefits each perspective brings to respect and enhance people's dignity, rather than the differences, possibly new hybrid national policies or regional instruments could emerge. One promising example is the recent creation of the Special Rapporteur on the Right to Development.[92] To adequately assess NAPs implementation, governments, academics, and practitioners need a thorough understanding of development and human rights rhetoric and look past their differences. It would be naive to study NAPs as a tool for achieving environment-related human rights without scrutinizing sustainable development.

[92] *Creation of the Special Rapporteur on the Right to Development,* A/HRC/RES/33/14, UNHRCOR, 33rd Sess. (2016).

Overall, in this section I underscored the importance and instrumentality of development rationale towards NAPs. However, the hostility to introduce development thinking into human rights policies is not unfounded. The way the SDGs frame problems can sometimes obscure or misrepresent the magnitude of a particular problem. To accurately represent the businesses' responsibility to respect environment-related human rights, human rights principles and values must be at the core of any NAP. Unfortunately, policymakers are overwhelmed by human rights' constant evolution and the vast theories, principles, and literature surrounding them. Therefore, meticulously understanding of sustainable development discourse serves as a roadmap that facilitates human rights achievement. I also highlighted the importance of agency and participation in a democratic policymaking process. Likewise, I laid the foundations to evaluate NAPs on three dimensions (input, output, and throughput legitimacy). These ideas would be prominent in the coming chapter as they are a core component of the Latin American NAPs.

II. The never-ending road for human rights: The United Nations Guiding Principles on Business and Human Rights in Latin America.

Building on the foundations lay down by the preceding section and based on Roland's theory of slow-moving and fast-moving institutions, in this section I detail the endemic perspective of Latin America regarding human rights, sustainability, and business triad. The section then sheds light on some of the intersections between the UNGPs and some regional instruments concerning environmental human rights obligations. I also address the shortcomings of litigation regarding businesses accountability in human rights matters and the role of international organizations in a NAP development process. The evidence gathered indicates that litigation, self-regulation, and top-down approaches are insufficient to shorten the current gaps about human rights international obligations in the business context. Developing domestic policies regarding this conundrum offers short-term benefits and paves the way for an improved regional *ius commune*. The distinctive regional developments evoke a sense of regionalism where Latin America is fertile soil for experimenting with NAPs. Finally, I argue that substantive environment-related human rights must come at the forefront of future policies.

a. A unique landscape for the business and human rights movement.

Extractivism and overexploitation of the human and natural resources found in Latin America has cursed the region since Europeans discovery it during the 15th century. Legal and social

institutions based on neglecting the aboriginal communities' rights abounded during Latin America's subsequent two centuries of colonialism. Roland explains that the common thread among developing countries is rooted in their institutions, not their laws or policies *per se*. To him, the interaction among slow and fast-moving institutions is what generates development. Roland defines slow-moving institutions as those who "generally change slowly, incrementally and continuously"[93] and fast-moving institutions as those who change rapidly, discontinuously, and in exponential steps, and their interaction enables change. Laws can only be implemented when culture—a slow-moving institution—accepts as legitimate a new policy or law—fast-moving institutions. Enforcement depends on the way people perceive new measures as valid.

Roland's theory sheds light on some of Latin America's tendencies regarding development and human rights. Think for a moment whether societies can create solid political institutions in a culture that does not value them? Or can societies support and view as legitimate an externally imposed policy that does not share societal concerns? For example, when a community does not consider jaywalking a problem, not even the harsher fines would deter jaywalkers. This logic also applies to environment-related human rights issues. States cannot transplant foreign approaches and expect them to perform exactly as in the country of origin. Because of that, translating the UNGPs into NAPs is a highly contextualized process.

Unlike in the Netherlands, the United Kingdom, and the United States, where lawyers have approached some climate change issues through litigation,[94] the conditions for climate-based litigation in Latin America are still scarce. Hence, it would be naïve to expect the region to embrace the same approach. Not only that, but people could perceive the imposition of global north models as a form of neocolonialism. What is important to note is that increasing the control of corporations is a societal concern in Latin America. Governments must pair that belief (slow-moving institution) with a policy or law (fast-moving institution) that satisfies its polity.

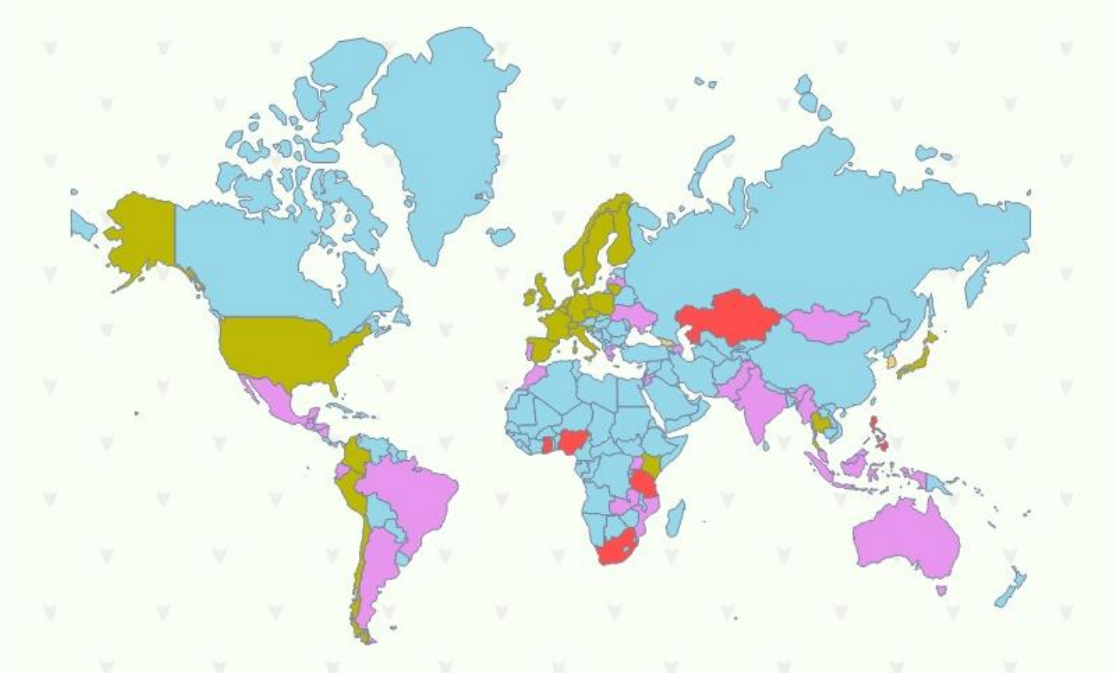
Since NAPs—a fast-moving institution—are supported by slow-moving institutions, they can have high enforcement rates and consequently improve human rights. One may see the vast number

[93] Gérard Roland, "Understanding institutional change: Fast-moving and slow-moving institutions" (2004) 38:4 Stud.Comp.Int'l Dev. 109 at 116.

[94] Diederik Baazil & Laura Millan Lombrana, "What a Dutch Court Ruling Means for Shell and Big Oil", (4 June 2021), online: <www.bloomberg.com/news/articles/2021-06-04/what-a-dutch-court-ruling-means-for-shell-and-big-oil-quicktake>; Sabin Center for Climate Change Law, "Climate Change Litigation Databases", online: <climatecasechart.com/climate-change-litigation/>.

of forums and organizations that participate throughout the NAP development process in Colombia, Chile, and Peru as in support for the process. Per the Chilean NAP, 360 persons participate throughout nine regional dialogues. During the second Colombian NAP, 850 persons took part during 15 regional forums. 132 stakeholders participated in the Peruvian multi-stakeholder roundtable.[95] If the UNGPs were not supported by countries and their societies (See illustration 1), it would be impossible that Colombia, Chile, and Peru had already approved their NAPs. Since a quarter of Latin American countries has ongoing efforts to enact NAPs, it illustrates the alignment of the UNGPs with slow-moving institutions within the hemisphere.[96] There has been a slow and steady shift from the colonial institutions to more democratic ones, although other factors (e.g., corruption, weak governance structures, and neoliberalism) have entered Latin Americans' collective thinking. An exceptional distancing from colonial narratives occurred during the aftermath of the second world war.

Illustration 1 NAPs around the world[97]



Color	Description
	Countries with NAPs
	Countries with business and Human rights chapter in their Human Rights National Action Plan
	Countries developing NAPs
	Countries where civil society or National Human Rights Institutions have started a NAP process.

[95] *Chilean NAP*, *supra* note 12 at 28–29; *Colombian NAP 2020*, *supra* note 12 at 46; *Peruvian NAP*, *supra* note 12 at 24–29.

[96] OHCHR, *supra* note 2.

[97] Own elaboration with information from <www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

After the second world war, Latin America exercised its voice and agency into shaping the new world order. Even though Latin America has been fertile soil for social experimentation, the global north has diminished its global role even after formal independence in the 19th century.[98] Perhaps, the extensive impacts on human lives during colonial times and the frequent disregard to the regional international legal developments were one of many factors motivating the region's contributions to shaping the modern international governance structures. For instance, Calvo's doctrine and Álvarez's proposal to internationally protect individual rights were pivotal arguments during the creation of the United Nations.[99] Although the quest to improve people's lives has been ever-present in human history,[100] it took a 180-degree shift in the 1940s'. This shift could not be possible without Latin America. The hemisphere was influential during the negotiation rounds for the Universal Declaration of Human Rights and at the San Francisco Conference, where it was the largest regional group.[101]

Even before the Universal Declaration of Human Rights, Latin America had a strong stance in favor of human rights. While Sikkink acknowledged that "Latin America's greatest contribution to human rights was the attempt to combine and balance the individual and the communal aspect of human rights",[102] contemporary initiatives suggest that the idea of including other actors (e.g., businesses and gangs) had prevailed in the regional psyche.[103] As mentioned, Latin America has a sturdy regional human rights system and equally strong support for the universal human rights mechanisms, as most countries have signed almost every international human rights convention. The American region has a broad acceptance of the Universal Human Rights System treaties. 20 out of the 25 countries that make up the OAS and have ratified the American Convention on Human Rights are parties from seven to nine universal human rights conventions. The other five have ratified between four and six treaties. Latin America has the second largest number of countries of

[98] Sikkink, *supra* note 86 at 59. "[i]n the 1830s more countries in Latin America than in Europe had male suffrage"
[99] *Ibid* at 61–62.
[100] Gillespie, *supra* note 20 at 7, 8, 14, 16, 19, 185.
[101] Sikkink, *supra* note 86 at 70, 79.
[102] *Ibid* at 75.
[103] Oscar Estrada, "Relatoría especial de naciones unidas reconoce que maras y pandillas son violadores de DD.HH." [UN Special Rapporteur recognizes that gangs violate human rights], (10 July 2018), online: *El Pulso HN* <elpulso.hn/2018/10/07/relatoria-especial-de-naciones-unidas-reconoce-que-maras-y-pandillas-son-violadores-de-dd-hh/>; Honduras Presidencia de la República, "Presidente Hernández abogará ante la ONU por un precio justo del café, acceso a Fondos Verdes y seguridad regional contra maras y pandillas" [President Hernández will advocate before the UN for a fair price of coffee, access to Green Funds and regional security against maras and gangs], (22 October 2019), online: *presidencia.gob.hn* <presidencia.gob.hn/index.php/gob/el-presidente/6354-presidente-hernandez-abogara-ante-la-onu-por-un-precio-justo-del-cafe-acceso-a-fondos-verdes-y-seguridad-regional-contra-maras-y-pandillas>.

every global region pursuing a NAP. Nowadays, the hemisphere is at the forefront of including environmental protections as an integral part of human rights.[104] The foreign transplantation of fast-moving institutions is insufficient to improve people's lives. On the contrary, only when exogenous inputs—such as the UNGPs—are compatible with endogenous slow-moving institutions NAPs can be successful.

Corruption and civil unrest thwart state sovereignty. Both Colombia and Peru fought long battles against terrorism. Most Latin American countries faced cruel dictatorships during the 20th century and in the early 2000s'. Moreover, no Latin American country is exempt from gross corruption accusations concerning elite politicians. All these conditions disproportionally affected territories in remote areas where state sovereignty is either jeopardized or absent. In the Colombian context, Because FARC controlled large swathes of land for decades, Colombia could not exercise its effective sovereignty control over these areas. In Guatemala, Honduras, and El Salvador, the lack of government presence allowed drug cartels to control entire remote communities.[105] Governments typically frame development initiatives in these areas as the sole opportunity to end the "lawlessness" in these areas. Historically speaking, development (e.g., mining, highway, and dam constructions) took place in these remote areas, where state control is precarious. To make thing worst, indigenous and afro-descendant communities usually live in these places, making them prone to grave human rights abuses. A contemporary approach to human rights must acknowledge the "ausencia del estado" phenomenon; otherwise, proposed solutions will be unviable. In these scenarios, other actors—whether legitimately or illegitimately—have assumed state roles. In cases of corporations holding either exploration or exploitation permits in these remote landscapes, the UNGPs, the IACHR "Business and Human Rights: Inter-American Standards" 2019 report, and the IA Court advisory opinion OC-23/17 offer valuable insights into this conundrum.

One of the biggest problems Latin America faces is the lack of coherence vis-à-vis indigenous communities' right to the free, prior, and informed consultation. Although the IA Court introduced the ILO 169 convention and the 2007 Declaration on the Rights of Indigenous Peoples into the

[104] Jodoin, Faucher & Lofts, *supra* note 19 at 176; Inter-Am Ct HR, *supra* note 4.

[105] Kevin Sieff, "The Guatemalan rainforest: Lush jungle, Mayan ruins and narco jets full of cocaine", (5 July 2020), online: *The Washington Post* <https://www.washingtonpost.com/world/2020/07/05/guatemala-cocaine-trafficking-laguna-del-tigre/>; Sofia Menchu & Gustavo Palencia, "Drug cartels test Central America for cocaine production", (1 November 2018), online: *Reuters* <www.reuters.com/article/us-centralamerica-drugs-idUSKCN1N64GA>.

Inter-American human rights standards, many countries fail to establish transparent consultation procedures.[106] The right to free, prior, and informed consultation encompasses a duty to carry out consultations during the development stage of a policy and during the early stages of every project that will impact indigenous communities livelihoods.[107] Governments could use NAPs to clarify within their bureaus who are responsible for conducting indigenous consultations. Consultations with indigenous people should not be regarded as another formal step in policymaking; consultations must carry meaning because it allows indigenous communities to exert their agency. As will be discussed below, the opportunity to influence during the early stages of the NAP and the establishment of indicators plays a critical role in determining public priorities and reflecting reality in an unbiased way.

Latin America is a suitable region for experimentation regarding human rights, business, and sustainable development because of three factors: 1) the endemic perspectives about development and environmental matters; 2) the prevalent idea that community members have human rights duties; 3) the longstanding tradition with human rights law. While my thesis specifically analyses whether NAPs can protect environment-related human rights, the continent provides optimal conditions to assess whether NAPs can increase corporate due diligence in areas where state control is almost non-existent. Thus, engaging companies in the moral and ethical raison d'être for respecting human rights. In lieu, if businesses only change their behavior in the wake of robust regulation and enforcement capabilities—as the IA Court suggests—this creates a pathway for policymakers and international cooperation organizations to redirect resources. Overall, Latin America is a region where all these topics intersect the government and civil society agenda, although sometimes they differ in the enforcement mechanisms.

The region's cautious approach regarding the UNGPs implementation should not be confused with inaction. The OAS General Assembly supported the UNGPs one year after their adoption.[108] Before the IACHR "Business and Human Rights: Inter-American Standards" report the Inter-

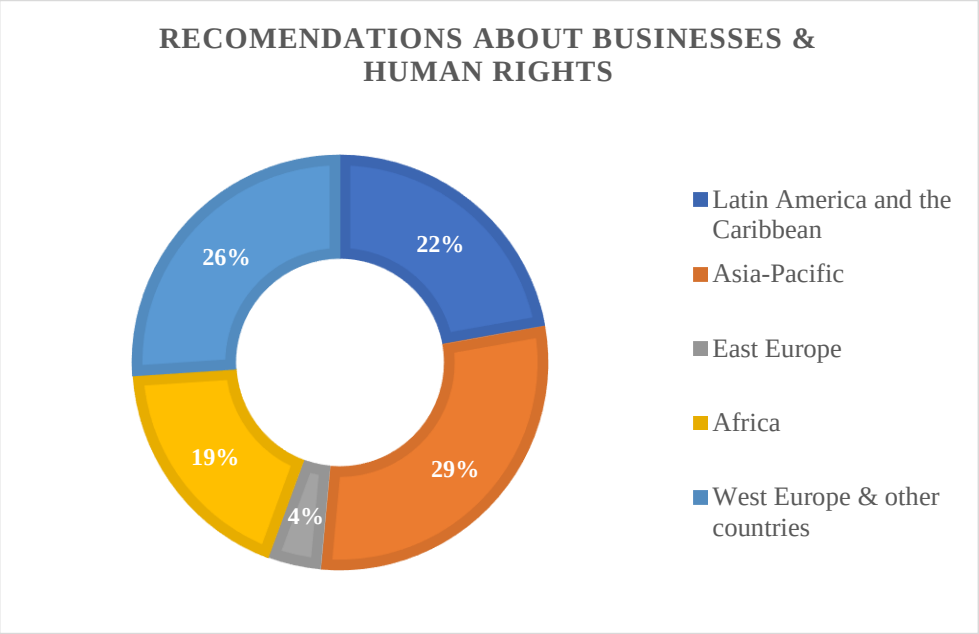
[106] Inter-Am Ct HR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 11: Pueblos indígenas y tribales* [Case Law Handbook of the Inter-American Court of Human Rights No. 11: Indigenous and Tribal Peoples] (San Jose, Costa Rica, 2021) at 110–22.

[107] OAS, Inter-Am Comm HR, OEA/Ser.L/V/II. *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities,* Doc. 47/15 (2015) at para 106.

[108] OAS, General Assembly, *Promotion of Corporate Social Responsibility in the Hemisphere.* AG/RES. 2753 (XLII-O/12). (2012).

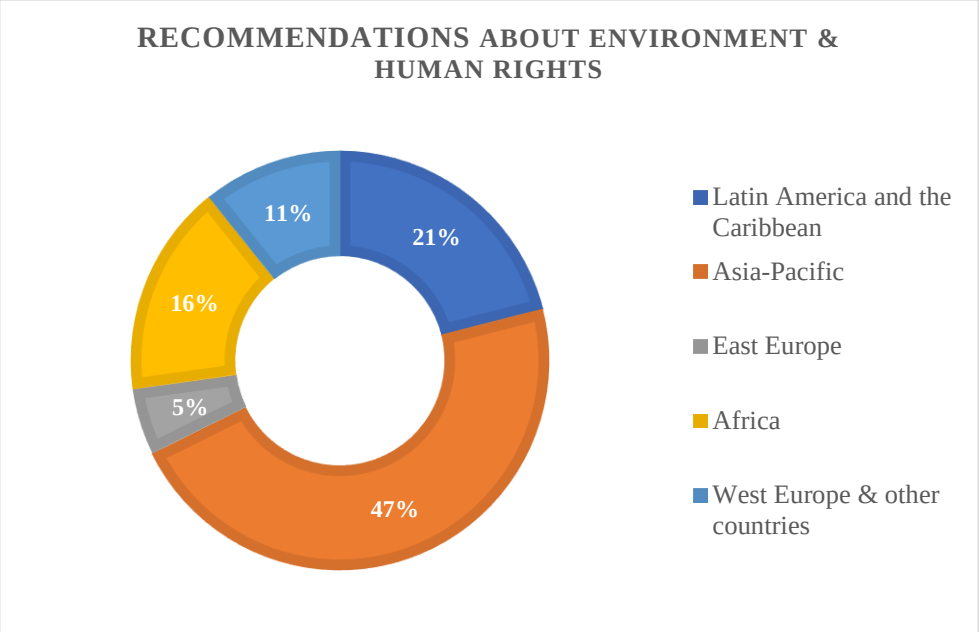
American Juridical Committee had already elaborated extensive documents concerning business and human rights.[109] Relatively shortly after the UNGPs adoption, Colombia and Chile develop their NAPs. Also, there has been a blossoming country-to-country dialogue within the Universal Periodic Review framework. Since the first Universal Periodic Review cycle, Latin American countries have made 66 out of 308 recommendations regarding businesses and human rights (see figure 1). Likewise, Latin American countries made 41 out of 194 recommendations regarding human rights and the environment (see figure 2).[110] Overall, these facts reveal the solid regional commitment regarding the trinomial addressed herein.

Figure 1 Percentage of recommendations by regional group per the Universal Human Rights Index



[109] Inter-Am Comm HR, *supra* note 27 at 16.
[110] OHCHR, *supra* note 21.

Figure 2 Percentage of recommendations by regional group per the Universal Human Rights Index[111]



b. The state and corporate role in the Inter-American standards.

In today's Latin America, businesses are expected to "[r]espect the human rights set out in international human rights treaties, in the context of their project activities and products."[112] Per the UNGP Principle 11, these expectations encompass the international human rights and those reflected in national constitutions and legislations.[113] These expectations reinforce the notion that, even though states are the primary ones responsible for human rights violations, third parties can contribute or trample human rights, a vision inspired by German drittwirkung theory.[114] One of the most prominent examples of such assertion is Ecuador's Lake Agrio contamination.

Texaco obtained authorization to explore and eventually exploit petroleum in Ecuador's Lake Agrio in the 1960s'.[115] Texaco then created a subsidiary called TexPet to carry out its activities in Ecuador. From 1972 to 1993, TexPet was the only company exploiting the petroleum in lake Agrio, which produced from 1.3 to 1.7 million barrels of crude oil during those years. After twenty years,

[111] Figures 1 and 2 were made with data from <uhri.ohchr.org/en/search-human-rights-recommendations>
[112] Nienke Busscher et al, "Civil society challenges the global food system: The International Monsanto Tribunal" (2020) 17:1 Globalizations 16 at 21.
[113] OHCHR, *supra* note 83 at 13.
[114] Andrés Felipe López Latorre, "In Defence of Direct Obligations for Businesses Under International Human Rights Law" (2020) 5:1 BHRJ 56 at 69–70.
[115] Lake Agrio is an Ecuadorian Canton east of Quito, Ecuador's capital. It is in the Ecuadorian Amazonia south of Colombia. It has a land area nearly twice as big as Toronto.

Texaco withdrew all assets from Ecuador and transferred well control to a public company called Petroecuador. Even though Texaco—nowadays Chevron-Texaco—was entirely aware of the environmental impacts of petroleum exploitation since 1972, its subsidiary did nothing to stop releasing polluted water into the ecosystem. Texaco had already developed a guide for wastewater treatment in the United States by the 1970s'; though, it was not implemented overseas due to its costs. After it departed from Ecuador, Chevron-Texaco used its leverage to sign with the Ecuadorian government a document exonerating them from any responsibility.[116]

After an exhausting court procedure in New York, the court dismissed plaintiffs' claims by arguing the *forum non conveniens* doctrine.[117] Shortly after, plaintiffs headed to Ecuadorian courts seeking justice, albeit Chevron-Texaco had no assets to seize in Ecuador. Finally in 2011, the Ecuadorian Supreme Court ruled in favor of Lake Agrio's communities awarding them USD 8,000,646,160.00.[118] However, the adjudication has not been enforced. In 2014, a United States court referred to the ruling as unenforceable everywhere. Similarly, neither Argentina nor Canada—where plaintiffs have tried to enforce the court's decision—has seized any assets from Chevron-Texaco.[119]

This case illustrate that third parties can harm human rights, that countries need to improve national controls over large companies, and that corporations have benefited from elusive corporate structures and outdated legal frameworks. Furthermore, it shows how ill-suited is to focus solely on procedural environment-related human rights and judicial remedies. Vulnerable populations are aware of the problems they face, and as the NAPs development process suggest they can participate in the debates. Nonetheless, they require concrete action and effective judicial and non-judicial avenues for redress. Neither self-regulation nor increasing home state control—as Caleca argues—is the solution to these many problems.[120]

[116] Martin-Chenut & Perruso, *supra* note 8 at 355–56.
[117] *Aguinda v Texaco*, 303 F 3d 470 (United States Court of Appeals, Second Circuit 2002).
[118] Lago Agrio, *supra* note 15 at 222.
[119] Martin-Chenut & Perruso, *supra* note 8. 357-362.
[120] Alexandra Rose Caleca, "The Effects of Globalization on Bangladesh's Ready-Made Garment Industry: The High Cost of Cheap Clothing" (2014) 40:1 Brook J Intl L 279 at 282, 310.

Cernic, Thorsen, Andreasen, and Lukas have proven that self-regulation by itself is insufficient.[121] Caleca acknowledges that most self-regulation measures materialize after a disaster. Moreover, addressing this issue by increasing home state control can be considered neocolonialism. My research reveals that solutions must come from within countries, not from foreign powers as opposed to Caleca suggest. Therefore, it is critical to act proactively, look beyond voluntary guidelines, and increase host state capabilities. Paired with participation, governments require technical capabilities to create comprehensive policies. In that regard, international standards can increase output legitimacy by guiding and supporting the discussion.

International standards like the ones developed by the IACHR in its "Business and Human Rights: Inter-American Standards" report can assist countries in developing better NAPs. The report encompasses the right to develop and the right to a healthy environment as foundational criteria. Likewise, it elaborates on the state's duty to regulate and adopt domestic laws about business activities in human rights and environment-related contexts. The report includes brief descriptions of state and non-state initiatives in the business and human rights area. Finally, it elaborates 31 recommendations to all stakeholders, 22 of which address states obligations.

The IACHR acknowledges that businesses play a critical role in sustainable development and that the right to development "allows us to observe how [s]tates and business entities fulfill their obligations and whether the procedures they follow are coherent with the human rights framework."[122] In the regional context corporate due diligence, access to environmental information, participation, accountability, and reparation are at the core of the right to a healthy environment. At the same time as collecting ample evidence of the grave climate change repercussions and the vulnerabilities already faced by some countries, the IACHR report points out that the right to a healthy environment is an autonomous right, which goes beyond protecting human beings. Both the IA Court and the Colombian Supreme Court of Justice have held that the right to a healthy environment also protects different environmental components, including but not

[121] Jernej Letnar Cernic, "Desarrollos internacionales recientes en el ámbito de los derechos humanos y las empresas" [Recent international developments in human rights and business] in Cantú Rivera, ed, *supra* note 6, 137 at 155; Sune Skadegaard Thorsen & Signe Andreasen, "Remodelling Responsible Supply Chain Management: The Corporate Responsibility to Respect Human Rights in Supply Chain Relationships" in Mares, *supra* note 28, 129 at 135; Karin Lukas, "Human Rights in the Supply Chain: Influence and Accountability" in Mares, *supra* note 28, 151 at 160.

[122] Inter-Am Comm HR, *supra* note 27 at para 45.

limited to rivers, forests, and seas.[123] Per the Inter-American standards, it is incompatible to undermine environmental protections for development purposes. Hence, development is at the service of people and the environment, not vice versa. The IACHR values in people's agency and active participation in any effort to tackle the emerging problems concerning "business and human rights".

Under article 2 of the American Convention on Human Rights, contracting parties have a bi-dimensional duty. On the one hand, they are obliged to eliminate any regulation incompatible with the convention. On the other hand, they ought to introduce new laws or regulations necessary to uphold the American Convention on Human Rights and in the Protocol of San Salvador's human rights.[124] The duty to adopt domestic measures is also integral in the International Covenant on Economic, Social and Cultural Rights.[125] That duty is recognized in the regional context as the *effet utile* of the American Convention on Human Rights. This entails enacting legislative, judicial, and administrative measures in the context of business activities vis-a-vis human rights. Half of the states that recognize the IA Court jurisdiction seem to agree that NAPs are the most effective tool for discharging such duty. Even the IA Court stated that states must enact policies conducive to the protection of human rights, establish due diligence procedures, and adopt mechanisms that allow firms to restore any violation of human rights.[126] While the IA Court has not ordered countries to adopt NAPs, it nudges states and corporations into applying the UNGPs. However, the region and the world still lack substantive legislative measures demanding companies to adopt due diligence processes, an obligation established by the IACHR in its report and highlighted by the IA Court in its decision on "*Buzos Lemonth Morris y Otros v. Honduras"*.[127]

In 2017, the IA Court, through its advisory opinion OC-23/17, thoroughly clarified state duties regarding human rights and environment binomial. First, the IA Court describes what human rights are related to the environment. Per the court, environment-related human rights consist of two groups. The first one encompasses substantive rights, and the second group contains procedural rights. The former are "rights whose enjoyment is particularly vulnerable to environmental

[123] *Ibid* at paras 234, 236, 240, 243, 252.
[124] *Ibid* at paras 104–07, 114.
[125] Committee on Economic, Social and Cultural Rights, *supra* note 37 at para 16,36, 38.
[126] *Lemonth IA Court*, *supra* note 27 at para 49.
[127] Inter-Am Comm HR, *supra* note 27 at paras 115, 117, 120.

degradation."[128] The latter are "rights whose exercise supports better environmental policymaking."[129] Though both categories are environment related, I focused on substantive rights because they are directly jeopardized by environmental degradation. Substantive rights include life, personal integrity, private life, health, food, water, the right not to be forcibly displaced, property rights, and participation in cultural life. Indigenous communities are especially vulnerable to violations of the last two rights.[130]

The IA Court then explains the Inter-American obligations. These environmental duties emanate from articles 2 (domestic legal effects) and 26 (progressive developments) of the American Convention on Human Rights; and article 11 (right to a healthy environment) of the Protocol of San Salvador. The obligations to protect, respect, and guarantee are within regional human rights law the three general state obligations. In the context of environmental protection and human rights, these general obligations are transformed into three specific duties—namely prevention, precaution, and cooperation.[131]

The language used by the IA Court in the advisory opinion OC-23/17 is consistent with the UNGPs language. Any *bona fide* commitment to implement the UNGPs would indeed directly impact the obligations lay down in the OC-23/17. For example, the IA Court divides the duty to prevent significant environmental into a five-stage sequenced process. The first step is to regulate, including third parties' activities vis-à-vis the environment. Therefore, NAPs should be coherent with the national legislation regarding corporate activities impacting the environment. After regulating, states must "supervise and monitor activities within their jurisdiction that may cause significant damage to the environment."[132] Note that the IA Court implies a form of control over companies operating overseas by tying monitoring to state jurisdiction. But, the IA Court wisely asserts that human rights protection should not be an excuse for infringing customary international law or the UN Charter, thus limiting interventionism and validating international cooperation.[133] The third duty in this sequence is to require and approve environmental impact assessments. Most OAS countries already have legal provisions requiring environmental impact assessments, yet

[128] Inter-Am Ct HR, *supra* note 4 at para 64.
[129] *Ibid*.
[130] *Ibid* at paras 64, 66.
[131] *Ibid* at paras 174, 180, 209–210, 242.
[132] *Ibid* at para 154.
[133] *Ibid* at para 90.

NAPs could continue to shorten the gaps between affected communities and private companies. Consider how a NAP could reduce Cerro Matoso's S.A. impacts on Zenú communities. The NAP can detail the responsibilities and establish a protocol for conducting consultation with indigenous communities. Or at least it could provide a platform to discuss and address the communitarian environmental problems. The fourth step is to have a contingency plan, and the fifth is to mitigate arising environmental damage. The fourth and fifth duties align with UNGPs third pillar, access to remedy. For these steps, consider how Chevron-Texaco and the United States should behave to provide adequate remedies to affected communities. Instead, the company denied its liability by all legal means available and challenge the adjudication itself. In short, NAPs with a clear relation to environmental affairs can discharge the legal duties outlined in the advisory opinion OC-23/17.

The IA Court jurisprudence regarding business and human rights is not as rich as on environmental matters. Cabezas speculated how the IA Court could respond in "*Buzos Lemonth Morris y Otros v. Honduras"*. The case refers to the alleged violations of the right to life, personal integrity, and labor exploitation of 46 Miskito indigenous and their families by lobster fisheries in Honduras.[134] Since the fishery industry exploits thousands of indigenous Miskito people in Honduras, the case had the chance to become a staple in the Inter-American Human Rights System because it could refer to the corporate role concerning human rights. Unfortunately, The IA Court's scope of analysis was limited by the agreement reached by the parties and because the American Convention on Human Rights does not impose obligations to companies. While Santarelli states that the IACHR's and the IA Court's repudiation of corporate human rights violations could influence firms towards human rights values, this has little effect on the current *status quo*.[135] Neither the IACHR nor the IA Court has moved—nor could they move—away from the duty-holder role of states in human rights law.[136] Although López Latorre provides compelling arguments to admit that businesses have international obligations regarding some human rights and some environmental protections, traditional positivistic approaches to international law neglect these ideas to flourish.[137] Even in the unlikely scenario where the IA Court establishes international

[134] Víctor Daniel Cabezas Albán, "El caso de los buzos miskitos: un laboratorio vivo para auditar la adaptabilidad del Sistema Interamericano de Derechos Humanos" [The case of the Miskito divers: a living laboratory to audit the adaptability of the Inter-American Human Rights System] (2020) 84 Derecho PUCP 47 at 49–54.

[135] Nicolas Santarelli, "La promoción y el desarrollo de la protección de los derechos humanos frente a abusos empresariales en el sistema interamericano" [The promotion and development of the protection of human rights against business abuses in the Inter-American System] in Cantú Rivera, ed, *supra* note 6, 87 at 109–10, 118

[136] Cabezas Albán, *supra* note 134 at 64.

[137] López Latorre, *supra* note 114 at 56–57, 63, 68, 78, 81–82.

obligations to businesses, and countries are obliged to abide by them via "control de conventionalidad", this top-down approach further reduces countries' margin of appreciation and neglects the voices of different stakeholders. Consequently, litigation could reduce the pace at which the countries introduce the UNGPs in their domestic regulations. Essentially, my research reveals that the Inter-American Human Rights System should play an advisory role, guiding states through the complex international regimes, while leaving enough leeway for NAPs.

Beyond technical advice from the Inter-American Human Rights System, what else does Latin America need for accomplishing environmental sustainability? For example, do they need stronger laws? Or do they need better moral and ethical arguments to hold companies accountable? What if we need are better enforcement capabilities? Or could more awareness suffice? All these propositions must be equally weighed during policymaking. Arbitrarily disregarding one over the other will neglect part of the richness in the discussions. Khan argues that environmental protections require robust legal frameworks in consonance with international standards, empowerment for marginalized populations, and reliable enforcement and accountability procedures for wrongdoers.[138] While I agree with the previous statement, Khan's argument neglects the role of businesses because it frames environmental protections solely as a state duty. By contrast, López Latorre asserts that corporations have international obligations regarding human rights, including environment-related human rights. Lopez Latorre believes that contemporary international law binds corporations to international norms, yet states are responsible for policing such obligations.[139] Solving the question which started this paragraph is not easy, and perhaps there is no definitive answer as different latitudes may face distinct challenges and have diverse perspectives. Likewise, political priorities and ideologies may favor one approach over the others. Based on the evidence analyzed, I argue that countries must 1) develop a vertical and horizontal coherent NAP; 2) increase enforcement capacities; 3) include a wide array of stakeholders; 4) prioritize substantive environment-related human rights for the most vulnerable to have a coherent NAP. Policymaker must identify the underlying human rights at risk to balance competing arguments. However, this balance can only be achieved when policymakers have the technical capabilities—output legitimacy—and when there is a clear and well-defined methodology to reach such a balance—throughput legitimacy.

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[138] Irene Khan, "Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development" in Fariello, Boisson de Chazournes & Davis, eds, *supra* note 7, 221 at 229, 36.

[139] López Latorre, *supra* note 114 at 63, 68, 78.

As mentioned *ut supra*, environment-related problems are collective action problems. As such, entirely focusing on increasing awareness about the UNGPs *per se* is insufficient. These actions should be at the bottom of the priorities for countries undertaking efforts to halt businesses abuses trampling on environment-related human rights. An updated understanding of collective action problems reveals that the State ought to create a community within a territory.[140] Khan's and Latorre's claims complements Ostrom's updated vision of collective action problems. Governments must state clear expectations and provide companies with enough incentives for respecting all sorts of human rights. In addition, states can use NAPs to fulfill their obligations outlined in the OC-23/17. International organizations and foreign cooperation must acknowledge their role as technical advisors during the NAP development process, thus, leaving enough leeway on countries to adapt NAPs to local realities. Unfortunately, all Latin American NAPs rely heavily—though not exclusively—on public campaigns, forums, and seminars regarding the UNGPs to halt corporate abuses. This approach is erroneous because it does not address the most pressing international obligations and because it does little to counter the current *status quo*. Once again, this demonstrates the disconnection between practitioners and scholars, to which my thesis partially responds.

c. Environment-related human rights and the regional NAPs.

Governments can address environment-related human rights through improving procedural environment-related human rights as a precondition to achieve better substantive protections. Or they could address them by first improving substantive environment-related human rights as a precondition to exercising agency and securing procedural environment-related human rights. Those who favor the latter option gave little value to increase awareness if persons face famines, droughts, and health problems. We could endlessly debate whether one of these axioms is true (see illustrations 2 and 3). Perhaps, other human rights scholars and advocates can provide a third option where the human rights principles of indivisibility and interdependence take prominence. Ergo, disregarding the principle of instrumentality, as both rights must be guaranteed concurrently. Though, the purpose of this research is not to answer such a puzzling question. Herein, I claim that the decisiveness to focus on procedural environment-related human rights via NAPs has constricted NAPs' potential towards substantive environment-related human rights has.

[140] Ostrom, *supra* note 23 at 551–52.

Illustration 2 First hypothesis (favored by states)

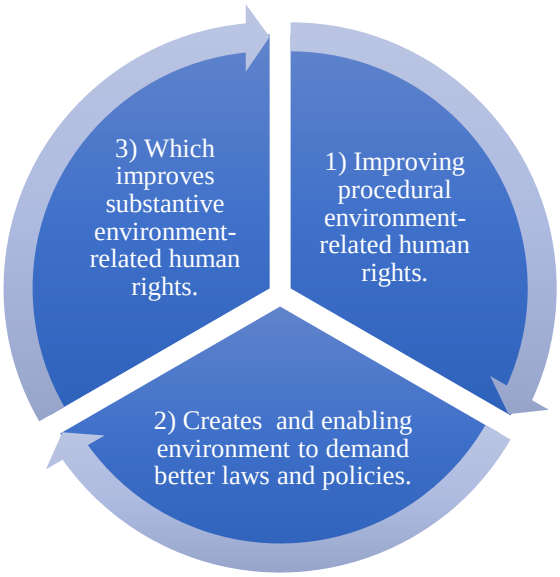
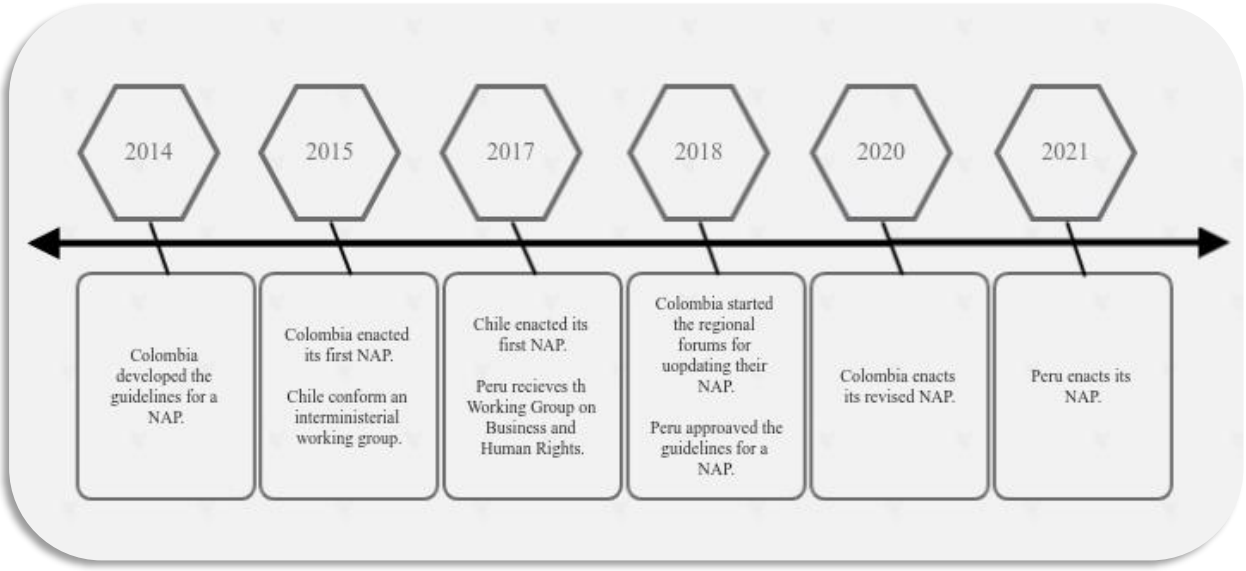


Illustration 3 Second hypothesis (favored by the thesis)

While NAPs generally follow the UNGPs three-pillar structure, each country has adopted a context-specific policy to address the main problems in their jurisdictions. The only exception was the first Colombian NAP, perhaps due to NAPs relative novelty. Colombia's, Chile's, and Peru's NAP elaboration processes were relatively similar. All three countries included participation from civil society, academia, and businesses. They also took around two years to enact their NAPs (see illustration 4). All the NAPs have noticeable disparities in the number and scope of actions allocated to each pillar. Generally, the first pillar (state duty to protect) has most of the actions. These actions have a larger scale than those included in the second and third pillars (businesses responsibility to respect and access to remedies, respectively). For instance, the Peruvian NAP allocates 66 actions in the first pillar, the second pillar has 21, and the third pillar only comprises nine actions. Likewise, the Chilean NAP third pillar only contains a fifth of what the first one does.[141] The number of actions distributed across the three pillars indicates governmental priorities.

[141] *Colombian NAP 2020*, *supra* note 12; *Chilean NAP*, *supra* note 12; *Peruvian NAP*, *supra* note 12 at 121–27.

Illustration 4 Latin America's NAP timeline



Colombia was the first non-European country to adopt a NAP.[142] Colombia introduced two new governance structures into the NAP implementation and evaluation. An intergovernmental working group comprised by 21 governmental institutions and an advisory committee integrated by civil society, academia, international cooperation organizations, and the ombudsperson. Together they have the mandate to advise and follow up the implementation of the 2015 and 2020 Colombian NAPs. So far, Chile and Peru have replicated this best practice. Another feature of the 2015 Colombian NAP was the incorporation of the transitional justice process into the policy. Since the discussion of this NAP coincided with the peace dialogues in Havana,]transitional justice and the peace process are transversal throughout the policy. Researchers like Romero Medina, Lazala, and Muñoz Quick have studied the role of businesses in the armed conflict and the connections between transitional justice and the UNGPs in Latin America.[143] Their work illustrate once again NAPs' flexibility to bridge multiple regimes (e.g., transitional justice, economic development, and human rights).

When compared to the first Colombian NAP, the Chilean policy improves on several aspects. The virtue of the Chilean NAP lies in interconnecting the SDGs to their monitoring scheme. As mentioned above, the SDGs have several goals and indicators. Integrating them into the NAP

[142] Romero Medina & Lazala, *supra* note 8 at 206–07.
[143] *Ibid* at 194, 211; Paloma Muñoz Quick, "Buscando la reconciliación: Planes de Accion para lograr la transición" [Seeking Reconciliation: Action Plans to Achieve Transition] in Cantú Rivera, *supra* note 8, 313 at 315, 16, 19.

monitoring structure talks about the mutually reinforcing nature of these initiatives and the incorporation of development rationale into domestic human rights policies. Additionally, when compared to the 2015 Colombian NAP, the Chilean policy set clearer expectations for corporations. The Chilean NAP third axis of the second pillar included references to non-financial human rights reporting mechanisms; thus, corporations are expected to disclose their human rights efforts.[144] Unfortunately, these mechanisms play a secondary role in the overall NAP. For instance, there is no description of the content for those reports, neither an online repository nor consequences for non-complying corporations. One key difference between the Chilean NAP and their homologous is that the final policy was enacted the Secretary of Foreign Affairs, not the presidency. At first, it seems counterintuitive that this government entity spearheads a NAP when Chile has—since 2015—a Deputy Secretary of Human Rights. For example, in the Peruvian case, the Deputy Secretary of Human Rights was entrusted to build the NAP, yet the presidency adopted the policy. The fact that the Chilean Secretary of Foreign Affairs has two implications. Either the Chilean NAP was not primarily a human rights policy or the Secretary of Foreign Affairs was better positioned to adapt the UNGPs into a NAP. In the end, each country can decide who spearheads a NAP development process. What is critical is that the designee has the technical capabilities and the political will to conclude such a process, that the process is legitimate, and that people are heard. Nevertheless, during the VI Regional Forum on Business and Human Rights for Latin America and the Caribbean held in October 2021, Chile reported that the Human Rights Deputy Secretary of State is now in charge of monitoring and updating the NAP. It's worth noting that in countries with explicit human rights mandates within the Executive Branch, these institutions seem to be the best suited to spearhead NAPs. Regardless of who is in charge, government institutions benefit from peer support by other ministries and independent entities (e.g., ombudsperson, prosecutor offices, judiciary, and congress commissions) to expand the policy impact.

Peru is the latest country to culminate its NAP. Peru differentiates from the others because of its deep baseline study, its ambitious follow up, evaluation, and update system as well as its disaggregation on senior citizens and ages groups. Unlike Colombia and Chile—which had a separated follow up matrix—Peru's NAP includes a detailed one. The matrix encompasses the activity, its raison d'être, the responsible organization, the indicator, the baseline, and the goals

[144] *Chilean NAP*, *supra* note 12 at 75; Joseba Fernández Gaztea & Alberto Muñoz Fernández, "Comply or Explain in the EU, or the New Human Rights Reporting Obligation: An Analysis of Directive 2014/95/EU" (2017) 9:1 CDT 285 at 292.

until 2025. The Peruvian baseline study empirically supports the need to go beyond self-regulation. Only 5% of the 252 companies consulted between 2016 and 2017 informed alignment with the UNGPs. The baseline also documents that 64.4% of the social conflicts have an environmental background; thus, the Peruvian NAP highlights the disparities in access to formal avenues for environmental damage compensation for communities.[145]

While all NAPs theoretically acknowledge the interconnections between human rights, businesses, and sustainability, the actions detailed in them barely scratch the surface of environment-related human rights. Colombia's NAPs use ambiguous language when referring to the only four actions related to the environment.[146] Additionally, all policies somehow trivialize substantive environment-related human rights. Instead, they favor actions like enhancing dialogue capacities, fostering participation in environmental affairs, and conflict prevention and management. NAPs are not 100% coherent, for example, Chile's and Peru's NAP have explicit actions to increase information access on environmental matters, but neither country has ratified the Escazú treaty. Peru's NAP has less vague actions concerning substantive environment-related human rights, followed by Chile. Peru has three specific actions to incorporate corporate social responsibility into environmental impact assessments, whereas Chile's only action vis-à-vis substantive environment-related human rights is the consolidation of gender analysis in environmental impact assessments. Regrettably, the mentions of substantive environment-related human rights range from scarce to non-existent. Future NAPs need to devote extensively more attention to substantive environment-related human rights and to the second and third UNGPs pillars.

So far, my thesis has covered the mutually reinforcing nature of development law and human rights law. By introducing multiple Latin American specificities, the study provided historical explanations on the rationale for increasing control over transnational corporations. Likewise, the research established the foundations for using NAPs as a regulatory tool capable of combining human rights and development law into a coherent framework. The region's history and contemporary developments evoke a sense of regionalism where NAPs can be a tool for improving substantive environment-related human rights. However, these rights have been blatantly disregarded by the current NAPs. In chapter I one also introduced key elements for the discussions,

[145] *Peruvian NAP*, *supra* note 12 at 30, 45.
[146] *Colombian NAP 2015*, *supra* note 12 at 11, 13, 20; *Colombian NAP 2020*, *supra* note 12 at 52, 53.

such as the preconditions needed to enact a coherent NAP. In the following chapter, I deepen such analysis by addressing the specific interactions between substantive environment-related human rights, the UNGPs, and the SDGs. Moreover, I elaborate on the preconditions a NAP needs to reap the benefits of both narratives—namely input, output, and throughput legitimacy.

Chapter 2

This chapter covers the links between the environmental SDGs (SDGs 13 climate action, 14 life below water, and 15 life on land), the UNGPs, and the substantive environment-related human rights, including Latin American specific instruments—such as the IA Court advisory opinion OC-23/17. In the first Section I mainly focus on the SDGs' and UNGP's instrumentality vis-à-vis environment-related human rights. Then, I argue that understanding human rights as a means of achieving sustainable development is erroneous. On the contrary, sustainable development is a path to achieve human rights; because of it, human rights should be the backbone of a NAP. Furthermore, NAPs must incorporate an all-inclusive vision where all these interconnected regimes intersect. I also employ the "*Buzos Lemonth Morris y Otros v. Honduras*" case to illustrate the limits of litigation and self-regulation; the case demonstrates how different voices frame the same problems differently and reach distinctive solutions, thus, emphasizing technical capabilities and agency.

In Section II, the chapter indicates how stakeholders' perspectives, technical capabilities, and political priorities shape Latin American NAPs. I then argue that using goals and indicators in a policymaking process is a double edge sword. On the one hand, orientation instruments—like goals and indicators—can establish clear objectives for legislative or administrative measures and simplify complex problems into easy-to-understand approaches. On the other hand, over-relying on orientation instruments obscures the human rights narratives behind a problem. Without public participation, indicators can distort reality to the point where it misrepresent a phenomenon. Indicators must be built with participation, technical capabilities, and accountability to be valuable in a NAP. Consequently, I call for policymakers to account for input, throughput, and output legitimacy to respect people's agency and ensure accountability while focusing on environment-related human rights during policymaking.[147] My overall goal in this chapter is to ground the

[147] Steffek, *supra* note 25 at 263–69. input legitimacy refers to the involvement of the citizenry in the political process. Output legitimacy results from effective problem solving. Throughput legitimacy entails the procedures through which the inputs create outputs.

differences and similarities of the development and human rights discourses analyzed, while offering an insightful critique of the NAPs development processes, especially focus is on the need for substantive environment-related human rights in upcoming administrative and legislative measures.

I. NAPs foundations, a hierarchical scheme of interconnections.

Scholars and IA Court have addressed how the principles of indivisibility and interdependence interweave human rights.[148] As argued in the previous chapter Section I.a, said principles imply that fulfilling certain human rights trigger a domino effect. As such, all human rights—including environment-related human rights—are part of a complex and multilayered structure with the UNGPs and with the SDGs. What is contested is whether the human rights discourse should allow for hierarchization. Regardless, the UNGPs Principle 24 commends companies to prioritize existing and potential adverse human rights impacts. Principle 24 also calls companies to focus on severe and irremediable damages.[149] It is feasible to argue that under adequate conditions, human rights instrumentality[150] is not only consistent with human rights principles, but also embeds the principled pragmatism enshrined in the UNGPs.

a. The hierarchy between human rights and development.

The three layers necessary to address environment-related human rights are herein referred to as environment-related human rights, the UNGPs, and the SDGs. The argument uses the pyramid structure as a metaphor for the framework. Because human rights have the sturdiest international legal framework, they must be at the pyramid's base, which supports the rest of the structure. Due to its scope, the thesis focuses on substantive environment-related human rights (see figure 3). Then, the UNGPs are in the middle of the pyramid structure. In this metaphor, the UNGPs are the bond between human rights and the SDGs. The SDGs serve as the capstone of the pyramid, but they cannot exist without a solid foundation. For example, flipping the pyramid would create an unstable and fragile structure. Thus, policymakers cannot use the SDGs as the base for a NAP.

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[148] Quintavalla & Heine, *supra* note 7 at 680–81; *Lhaka Honat*, *supra* note 38 at paras 243–54.

[149] UNHRC, *supra* note 1 at principle 24: Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

[150] Human rights instrumentality is a theory developed by Quintavalla & Heine, as mentioned in chapter 1 Section I.b. They claim that human rights hierarchization and prioritization are necessary to advance human rights in contexts where economic and technical resources are scarce.

Human rights constitute the first layer of the pyramid, but this thesis focuses on substantive environment-related human rights. As mentioned, these rights comprise the right to life, personal integrity, private life, health, food, water, the right not to be forcibly displaced, property rights, and participation in cultural life. These rights exist in the many treaties through the human rights *corpus iure*; however, this section primarily addresses the American Convention on Human Rights, the Protocol of San Salvador, and the subsequent interpretations by the IACHR and the IA Court. Despite been a human rights subfield, the UNGPs' three-pillar framework specificity allows a distinct consideration. The first UNGP pillar encompasses state obligations regarding businesses and human rights. The second pillar details the businesses' responsibility to respect human rights. The third pillar specifies both companies' and states' roles regarding the judicial and non-judicial grievance mechanisms.[151] The final and upper layer of the pyramid analogy consists of the SDGs. Due to the research scope, the thesis will only focus on the environmental SDGs. Henceforth, the section demonstrates how these three layers are internally (endogenously) and externally (exogenously) connected.[152]

It is no coincidence that the pyramid analogy portrays the UNGPs as the middle layer. The UNGPs, and NAPs for that matter, bond human rights norms with more flexible soft law governance mechanisms, such as the SDGs. Engaging with just one or two of these three frameworks would produce limited results. The UNGP Principle 8 (policy coherence) reveals the intertwined nature of the environment-related human rights, UNGPs, and the SDGs. The said Principle calls NAPs to be coherent with human rights norms; then, with other UNGPs principles and other national development policies. A NAP is not policy coherent when overlooks one or the other.[153] The pyramid structure illustrate how human rights provide the legal, moral, and ethical scaffolding for the UNGPs and the SDGs and the unstable nature of considering the SDGs as the foundation for NAPs. (see figure 3). While the UNGPs incorporate businesses into the discussions, at the very top, the SDGs provide goals to evaluate the mechanisms to fulfill these obligations on the ground. In sum, NAPs must incorporate an all-inclusive vision. Otherwise, focusing solely on

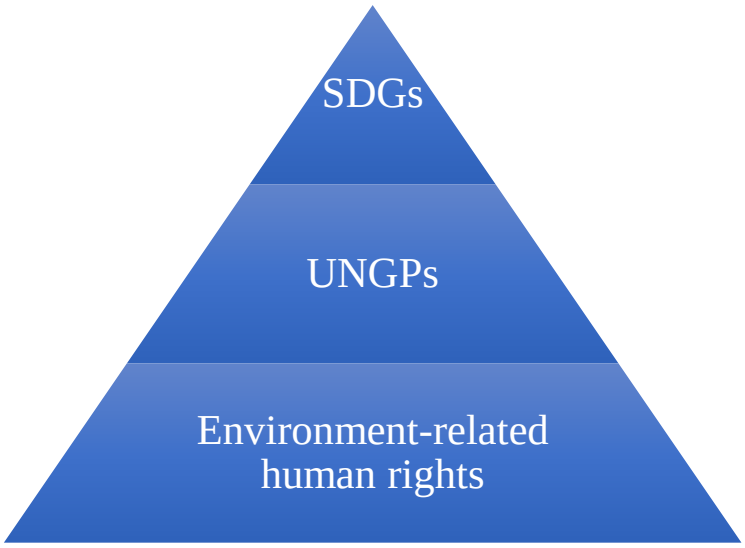
[151] UNHRC, *supra* note 1.

[152] Endogenous connections refer to interactions inside one layer of the pyramid analogy. For example, the interactions between the right to property and the right to water. Exogenous connections refer to the interactions between different layers of the pyramid, such as the right to food with SDG 2 (zero hunger) or between SDG 14 (life below water) and human rights due diligence mechanisms (UNGP second pillar).

[153] Because the UNGPs were agreed to fill an international governance gap, countries cannot apply them selectively to comply only with what suits their interests or what is aligned with their priorities. Because a NAP cannot occur in a vacuum, they cannot disregard other policies' effects or the interactions with international norms.

human rights without understanding the intricate relationship they have with other regimes is ill-suited to improve them.

Figure 3 Hierarchical order for the NAP building blocks



All the substantive environment-related human rights are interlaced with each other (endogenous connections) and with the UNGPs (exogenous connections). IA Court jurisprudence has consistently upheld the endogenous connections within these rights. For instance, in *"Kichwa indigenous people of Sarayaku v. Ecuador"* the court acknowledges that articles 13 (freedom of thought and expression), 21 (right to property), and 23 (right to participate in government) of the American Convention on Human Rights are deeply interconnected. The case refers to the states' granting of a permit to a private oil company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku without previously consulting them and without obtaining their consent.[154] Whereas indigenous communities have rich connections with their land and the environment, these relationships are not limited to indigenous communities such as Sarayaku, Lhaka Honat, or Zenú.[155] The IA Court in its advisory opinion OC-23/17 devotes a complete chapter to addressing the links between human rights and environmental protections.[156] Lake Agrio's case highlights how water contamination affects the right to water, health, and personal integrity of nearby inhabitants.[157] Domestic and international jurisprudence by themselves

[154] *Kichwa indigenous people of Sarayaku (Ecuador)* (2012) Inter-Am Ct HR (Ser C) No 245 at paras 2, 230 [*Sarayaku*].
[155] *Lhaka Honat*, *supra* note 38 at para 230; *Cerro Matoso S.A.*, *supra* note 3.
[156] Inter-Am Ct HR, *supra* note 4 at paras 46–70.
[157] Martin-Chenut & Perruso, *supra* note 8 at 356.

prove the rich and interdependent nature of human rights. If indivisibility and interdependence are understood in a negative sense—meaning that trampling a human right can harm other rights—there are no reasons for applying the same logic the other way around. In other words, the indivisibility and interdependence principles evoke positive human rights interactions. For example, the Sarayaku case protects property rights as well as freedom of thought and expression.[158] Therefore, Quintavalla & Heine's theory of human rights instrumentality is consistent with the indivisibility and interdependence principles. Nevertheless, understanding which human rights can spur the most positive domino effect requires comprehensive knowledge of the interconnectivity between human rights and public participation.

Public participation is pivotal for the agency of indigenous communities. They even have the right to free, prior, and informed consultation. On most occasions, the vision of development for indigenous communities diverges from the western understanding of development. Because of their unique perception of the world and their right to free, prior, and informed consultation, governments must incorporate indigenous voices into the NAPs. Indigenous participation is not only part of the right to free, prior, and informed consultation; it also outlines which actions governments must prioritize to protect human rights in remote areas. NAPs can become a platform to discuss national or provincial protocols to carry out consultations according to the ILO 169 convention and the Inter-American standards.[159]

Just like human rights have several endogenous connections, the UNGPs also are interwoven. Each of the three pillars cannot be understood or addressed in a vacuum as they considerably overlap. Principle 8 (policy coherence) calls for governments to ensure policy coherency in all their different bureaus. The Office of the High Commissioner for Human Rights further explains that the UNGP Principle 8 refers to vertical and horizontal policy coherency. The former entails having the necessary policies, laws, and processes to implement their international human rights obligations. The latter means supporting and equipping departments and agencies that shape business practices to act according to human rights obligations.[160] Principle 8 stresses the need to secure complete respect for human rights law and consistency with the other UNGPs.

[158] *Sarayaku*, *supra* note 154 at paras 231–30.
[159] Inter-Am Ct HR, *supra* note 106 at 110–22.
[160] OHCHR, *supra* note 83 at 10–11.

The UNGP Principle 3 (developing an adequate legal framework and competent enforcement mechanisms for such framework), 25, 26, and 27 (judicial and non-judicial remedies) exemplify the exogenous connections among the UNGPs and environment-related human rights. Principle 3 plays a critical role in protecting all environment-related human rights. Both Khan and the IA Court argue that environmental protections vis-à-vis human rights require robust legal frameworks in consonance with international standards as well as rigorous enforcement and accountability procedures for wrongdoers.[161] Therefore, self-regulation on its own is inadequate to halt corporate abuses. NAPs can establish public and private partnerships to develop quasi self-regulations though. These mechanisms can encourage due diligence procedures where countries, companies, and communities cooperate in setting evaluation and audit procedures. NAPs can increase compliance with human rights norms through incentives.[162] For instance, a NAP could introduce a business and human rights award for firms excelling in previously defined and verifiable criteria. Or it can provide fiscal incentives for companies adhering to a set of standards above the minimum law requirements. These, however, are still unexplored initiatives for regional NAPs.

The UNGP Principles 25 to 27 also exemplify the relations between the UNGPs and environment-related human rights. These principles are of utmost importance for ensuring complete redress in case of businesses wrongdoing. Principles 25 to 27 ought to be guided by articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention on Human Rights. Unfortunately, the Colombian, Chilean, and Peruvian NAPs have overlooked at these principles. The main factor for such shortcomings are the limitations of an executive decree towards judicial independence. Overall, the UNGPs provide countries and companies with an already interpreted, politically acceptable, and consistent roadmap to fulfill their human rights obligations in the context of business activities. Yet, the UNGPs still need to undergo a process of contextualization.[163]

As discussed above, the human rights narrative favors synchronic comparisons. Yet, the surge in development-oriented governance regimes—such as the SDGs—has influenced states to accommodate diachronic comparisons in their policies. Regarding climate change, diachronic

[161] Khan, *supra* note 138 at 226, 36; Inter-Am Ct HR, *supra* note 4 at 154.

[162] Jean-Pascal Gond, Nahee Kang & Jeremy Moon, "The government of self-regulation: on the comparative dynamics of corporate social responsibility" (2011) 40:4 Econ Soc 640 at 647–48.

[163] UNHRC, *supra* note 1 at 7 (special obligations regarding businesses in conflict areas), 23 (contextualization regarding specific field operations), and 31 (criteria for effective non-judicial grievances mechanism).

comparisons will evaluate the progress countries have made on CO^2 emission reduction or the percentage of renewable energy used in the national energy matrix. In the case of the right to adequate food, diachronic comparisons will invariably look at the progress made through the years to eradicate hunger. Synchronic comparisons are more interested in identifying what is currently avoidable and has not been avoided. On climate change, synchronic comparisons would ponder what is feasible given our current technology and understanding of anthropocentric driven climate change. Because humanity produces enough food to feed the entire global population and hunger still exists, synchronic comparisons allow us to identify that much more work is needed or even what types of measures are needed to secure the right to adequate food.[164] In both cases, synchronic comparisons emphasize what is still missing. The programmatic approach embedded into the NAPs does not align with synchronic comparisons. The main problems of depending on synchronic comparisons is that conclusions are usually negatively framed, and they do not ease evaluations over time. Because of these factors, diachronic comparisons take prominence in contemporary policymaking. Their positive conclusions and their ability to allow comparisons over time are highly a condition highly valued by elected governments. A prominent example of the trend to include diachronic comparisons over synchronic ones is employing indicators to measure policy success. Indicators are one of the SDGs' most prominent features but their overreliance is associated with some risks already outlined.

Because the SDGs have been widely accepted as a roadmap for sustainability, they constitute the third layer of the complex network address herein. They are also endogenously and exogenously interweaved. While Griggs et al. exposed the interactions among the SDGs,[165] others—like the Office of the High Commissioner for Human Rights and the Danish Institute for Human Rights—have analyzed the rich nature of human rights vis-à-vis the SDGs. Griggs et al. demonstrate oceans' importance for food security and marine resources relation with businesses activities, pollution, and overexploitation. Their research evidence that the most prominent interactions between SDG (14 life below water) and business activities relate to SDGs 1 (no poverty), 8 (decent work and economic growth), 12 (responsible consumption and production), and

[164] Special Rapporteur on the Right to Food, *Interim report of the Special Rapporteur on the right to food*, UNGAOR 70th Sess, A/70/287 at para 2; FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2020. Transforming food systems for affordable healthy diets*, (Rome, 2020) at 3.

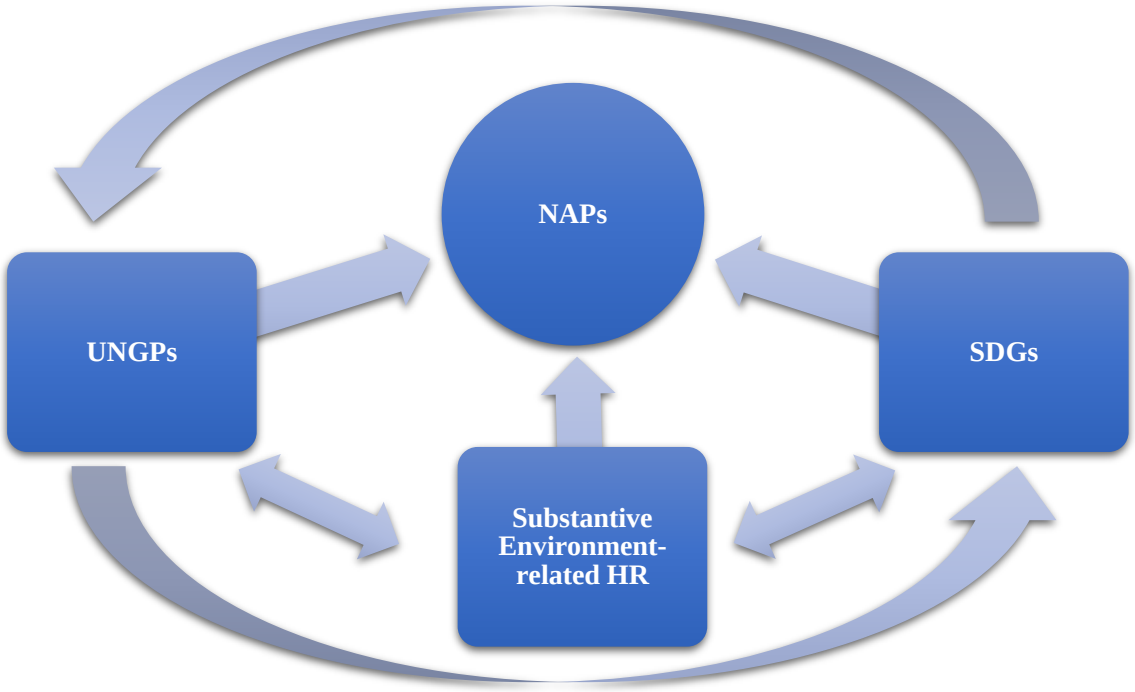
[165] Dave J Griggs et al, *A guide to SDG interactions: From science to implementation* (Paris: International Council for Science, 2017) at 170, 210–11.

17 (partnerships for the goals).[166] As discussed below, Lemonth's case encapsulates such interactions.

Disregarding one or more of the previous layers will render ineffective NAPs vis-à-vis environment-related human rights. A successful NAP should accommodate comprehensively and coherently all these different and overlapping regimes. Although my research has superficially tackled the intricacies of the interactions between the environment-related human rights, the UNGPs, and the SDGs, it illustrated how a siloed approach would not be coherent enough. While the SDGs do not have enough compliance pull to solve environmental problems caused by corporations, human rights law does not provide enough guidance. International human rights law guidance relies on authoritative interpretations of treaties' legal provisions and international case law.[167] Because these opinions are cluttered with legal jargon and technicalities, they are not easily understandable to everyone. The UNGPs can bridge both regimes' shortcomings. So far, I claimed that the UNGPs bond human rights and development law and that NAPs are policies where these regimes can positively affect ground realities. Accommodating all these regimes demands well-defined methodologies (throughput legitimacy), a process where stakeholders can exert their agency (input legitimacy), and a reasonable understanding of development and human rights law differences (output legitimacy).[168] Only then NAPs can accomplish the mutually reinforcing nature of these regimes. There is a vertical and horizontal relationship concerning the three layers. Each field influences the other, and jointly they model NAPs (see illustration 5).

[166] *Ibid* at 190–94.
[167] Inter-Am Ct HR, *supra* note 4; Inter-Am Comm HR, *supra* note 27.
[168] Steffek, *supra* note 25 at 269. Throughput legitimacy refers to the quality of the policymaking process or how the inputs from all the stakeholders are processed and weigh into the policy instrument.

Illustration 5 International inputs for a successful NAP



b. Connections in practice.

A general example can clarify these connections. SDG 15 (life on land) is linked to personal integrity, food, water, and participation in cultural life. Many rural communities such as Sarayaku in Ecuador, Lhaka Honat in Argentina, or the Garifuna community of Triunfo de la Cruz in Honduras depend on a healthy land ecosystem for their livelihoods.[169] In the long-term the drawbacks of using forest soil for agriculture overshadow its short-term benefits. Additionally, indigenous communities have spiritual ties with their land, flora, and fauna. Some consider certain animals as signs of prosperity, others utilize plants for traditional medicine or in ceremonies, and most of indigenous communities have sacred lands and rivers within their territories.[170] Technical knowledge of ecosystems is not enough to respect these unique and endangered perspectives. Governments must hear indigenous people prior to understand their intricate relationship with the land. In turn, allowing them to participate allows the state to enact contextualized measures with a deeper alignment with indigenous' slow-moving institutions and respect their right to be consulted.

[169] *Sarayaku*, *supra* note 154 at para 230; *Lhaka Honat*, *supra* note 38 at para 243; *Triunfo*, *supra* note 39 at paras 101–03.
[170] *Sarayaku*, *supra* note 154 at paras 146–55.

Disown the intrinsic liaisons between indigenous communities and their land impedes full implementation of SDG 15 and neglects these communities from their human rights to personal integrity, property, and the right to participation in cultural life. On the contrary, protecting these ecosystems is one of the many actions needed to protect and respect said rights. The UNGPs provide tailored guidance for states and businesses to fulfill their independent role. Regarding states' role, the UNGP Principle 4 discloses states' direct obligations through state-owned companies. Likewise, Principles 5 and 6 refer to the state's role as an economic actor. The UNGPs second pillar—specifically Principles 15 through 20—establishes the business responsibility to enact due diligence policies and their content to comply with their corporate human rights responsibilities.[171] In conclusion, articles 5 (right to humane treatment), 21 (right to property), and 26 (progressive development) of the American Convention on Human Rights as well as articles 11 (right to a healthy environment), 12 (right to food), and 14 (right to the benefits of culture) of the Protocol of San Salvador are directly connected with the mentioned UNGPs' principles, and with SDG 15.

A more concrete example is the decision on case of "*Buzos Lemonth Morris y Otros v. Honduras*". As mentioned in the chapter 1 Section II.b, the case refers to the alleged violations of the right to life, personal integrity, and labor exploitation of 46 Miskito indigenous and their families by the lobster fishery industry in Honduras.[172] From a development viewpoint, the case refers to SDGs 1 (no poverty), 3 (good health and well-being), 8 (decent work and economic growth), and 14 (life below water). Griggs et al. claim that although rapid growth policy interventions could reduce poverty and create jobs, they could jeopardize oceans' health, leading to over-exploitation.[173] The Lemonth's case also suggest that market-driven policies can impact workers and community life. Miskitos fish lobster under precarious working conditions and market-driven models would only exacerbate their precarious working conditions. Miskito divers catch lobster without proper equipment or training, and some divers even start as early as 14 years old. Miskito divers do not receive medical assistance or rehabilitation in case of work-related illnesses or injuries, and compensation for their arising medical conditions is almost inexistent. Acute decompression syndrome or Caisson's disease is a common syndrome among most male

[171] Tara J Melish & Errol Meidinger, "Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework" in Mares, *supra* note 28, 303 at 304, 12; Deneulin, *supra* note 84 at 187, 91, 202.
[172] *Lemonth IACHR*, *supra* note 15 at paras 1–2.
[173] Griggs et al, *supra* note 165 at 177–82.

Miskitos. By 2004, at least 4,200 Miskitos have suffered from it. Caisson's disease is a consequence of unsafe or prolonged dives. It can destroy bone structures, and cause permanent paralysis, even when properly treated. On top of that, divers receive their salary only after the packaging facility pays the lobster to the fisheries representatives. Meanwhile, divers are granted credit from the employer, which their employer deducts from their paycheck.[174]

Even though statistics show that well over 46 Miskito divers have been affected by acute decompression syndrome, the IA Court can only judge the specific facts raised to them. That highlights one more time that over-relying on jurisdictional forums such as the IA Court is insufficient to tackle these structural deficiencies. The traditional stance of considering states as duty-holders further prevents the court from extending the interpretation of human rights obligations into businesses.[175] In its judgement of "*Buzos Lemonth Morris y Otros v. Honduras*", the IA Court homologated the agreement between Honduras and the victims. The court only addressed general movement around business responsibility vis-à-vis human rights in 11 of the 161 paragraphs of the ruling. The IA Court avoids the question of businesses responsibilities by stating that its function is to establish whether the states are responsible for the violation of human rights recognized in the American Convention, not to determine the individual responsibility of individuals.[176] When confronted with the opportunity to establish business duties, the court reconfigured the questions to fit the traditional Westphalian vision on states as duty-holders. Hence, the IA Court suggests that states must adopt measures aimed at businesses to adopt policies to 1) protect human rights; 2) establish due diligence practices; 3) redress victims of any human rights violations related to their activities. Likewise, the court claimed that states must foster corporate practices focused on stakeholders, not on shareholders.[177] The court's opinion is only a miniscule step in the right direction. Nevertheless, as more countries enact NAPs, this could develop into a consistent national practice or even a regional customary norm, encouraging the IA Court to take a harsher stance on corporations. In Latin America, the limits on the IA court functions suggest that in "business and human rights" the best option is to continue pushing for national developments, as their widespread practice can latter constitute an international practice.

[174] *Lemonth IACHR*, *supra* note 15 at 34–50.
[175] *Lemonth IA Court*, *supra* note 27 at paras 46, 49.
[176] *Ibid* at para 46.
[177] *Lemonth IACHR*, *supra* note 15 at 49.

Lemonth's case exemplifies that framing is fundamental for any policy. One could argue that Honduras needs to increase its enforcement capabilities during the fishing season and provide effective legal avenues for redress. Others could claim that Honduras needs to provide better health services to prevent the worst cases of Caisson's disease. In the first scenario, the problem lies in the lack of enforcement, while in the second, it is a public health problem. Others could blame companies as the main responsible; hence, suggesting that they must provide training, equipment, and adequate payment, even if the state is unable or unwilling to policy its laws. In this third scenario, the problem is about the moral and ethical values in the lobster industry.

In situations like in "*Buzos Lemonth Morris y Otros v. Honduras*", human rights obligations must be at the core of the solution, but they need to be complemented by the UNGPs' and the SDGs' practicality. If policymakers based their choices solely on the SDGs, they could commit the mistake underscored by Frey by understanding decent work as economic growth dependent.[178] Another risk associated with uniquely focusing on the SDGs is the existing tensions between preserving marine life from overexploitation and lifting coastal communities out of poverty.[179] On the contrary, if governments focus on the holistic nature of human rights, they will not know where to start. Self-regulation mechanisms would also be insufficient for solving the complex situations of Miskito divers. For example, establishing an industry code or an eco-label could produce several not mutually exclusive and undesired side effects. Firstly, without adequate accountability, it could lead to greenwashing, "a practice used to describe false or misleading environmental claims."[180] Secondly, while it can prevent dangerous diving practices by nudging companies into buying lobster caught in safer conditions, it will undoubtedly push Miskito communities into further poverty. Given the case context—as in other abandoned and remote areas—one can infer that the fishery industry will divert the costs to the divers. Divers would have to undergo training and most likely buy equipment to be hired during lobster season. The final problem with self-regulation is that it commodifies dignity and transfers the blame to consumers who purchase lobster fished through unsafe practices, not the companies who caught them.[181]

[178] Frey, *supra* note 33 at 1174, 1177–79.
[179] Griggs et al, *supra* note 165 at 184–86.
[180] Hamish Van der Ven, *Beyond greenwash: Explaining credibility in transnational eco-labeling* (Oxford University Press, 2019) at 1.
[181] Michael F Maniates, "Individualization: Plant a tree, buy a bike, save the world?" (2001) 1:3 Glob Environ Polit 31 at 32–33.

In this case, articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 19 (rights of the child), 24 (right to equal protection), 25 (right to judicial protection), and 26 (progressive development) of the American Convention relate to SDGs 1 (no poverty), 3 (good health and well-being), 8 (decent work and economic growth), and 14 (life below water) as well as with UNGPs Principles 1 (protect human rights from third parties), 3 (enact a legal framework adequate for respecting human rights in business operations), 11-14 (the core responsibilities of companies vis-à-vis human rights), 25 (the state obligation for enacting formal avenues for redress), 30 (companies' roles in redress procedures), and 31 (criteria for effective non-judicial grievance mechanisms). Understanding the interweaved nature of these regimes leads to the second part of solving the problem, how to integrate all of them into a coherent policy. Human rights and development rationale suggest that accommodating these different values requires a well-informed, transparent, and deliberative policy process, more on this later.

Other examples of the connections between human rights law, the UNGPs, and the SDGs are the e-tools SDG data explorer developed by the Danish Institute for Human Rights and the Universal Human Index (UHRI) created Office of the High Commissioner for Human Rights. Both databases connect the recommendations from the Universal Human Rights System and the SDGs. However, the former also links the ILO conventions, the most relevant human rights declarations, and the regional human rights instruments (e.g., American Convention on Human Rights, Protocol of San Salvador, and the Escazú treaty). Whereas both the UHRI and SDG data explorer link the international recommendations that countries have received with the SDGs, the SDG data explorer gives greater insights by pairing the SDGs with specific provisions of human rights conventions.[182] Using the SDG data explorer reveals that all the Latin American human rights treaties are integrated into SDGs 13 (climate action), 14 (life below water), and 15 (life on land).[183] For a range of actors with limited time and resources having immediate access to these e-tools facilitates the understanding of the complexities regarding international human rights law and development law. Paraguay went one step further by developing its own contextualized and integrated system to follow up their specific human rights recommendations and the SDGs goals. The Peruvian NAP proposes an integrated and comprehensive monitoring system similar to the Paraguayan.[184] Both

[182] Danish Institute for Human Rights, *supra* note 21; OHCHR, *supra* note 21.

[183] The treaties include the Pacto de San José, the Protocol of San Salvador, the Convention of Belem do Para, the Escazú treaty and even the American Declaration of the Rights and Duties of Man.

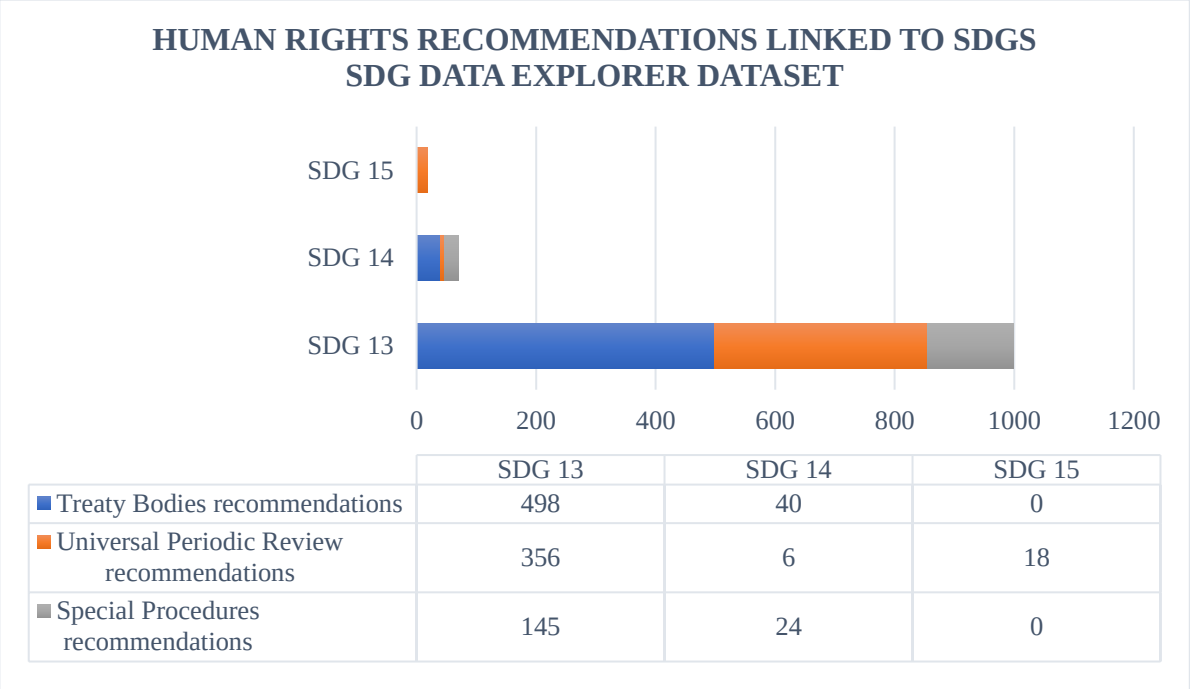
[184] *Peruvian NAP*, *supra* note 12 at 128–32.

the Paraguayan and the proposed Peruvian monitoring systems embrace diachronic comparisons. Government institutions always benefit from the pragmatism and quantitative nature of indicators to measure progress over time. Nevertheless, the risk of over-relying on indicators and statistics could—as Cantu suggests—dilute human rights message and misrepresent human rights violations as mere statistics.[185]

A quick overview of both SDG data explorer and UHRI databases reveals the copious quantity of recommendations made to states regarding climate change (SDG 13). To a much lesser extent, UN treaty bodies, UN special procedures, and the Universal Periodic Review have addressed SDGs 14 and 15 (see figures 4 and 5). Both e-tools data sets suggest that tackling climate change—even in the SDGs' terms—is closely related to human rights obligations. In addition to the SDG data explorer and UHRI databases, the IA Court advisory opinion OC-23/17 clarifies the specific obligations for state parties to the American Convention on Human Rights regarding the right to life and personal integrity in the context of environmental protection. In its opinion, the IA Court held—among other things—that states have: 1) to prevent significant environmental damages inside and outside of their territory; 2) to abide by the precautionary principle, even in the absence of scientific certainty; 3) to cooperate in *bona fide* against transborder environmental damages; 4) to guarantee access to information on issues that may affect the environment; 5) to allow public participation in decision making; 6) to guarantee access to justice about the environmental obligations outlined in the IA Court adjudication.[186] These six obligations are subdivisions of the prevention, precaution, and cooperation general human rights duties vis-à-vis environmental protections detailed in Section II.b of chapter 1. The IA Court opinion also supports Jodoin et al. argument that Latin America is at the forefront of including human rights issues in the context of climate change.[187]

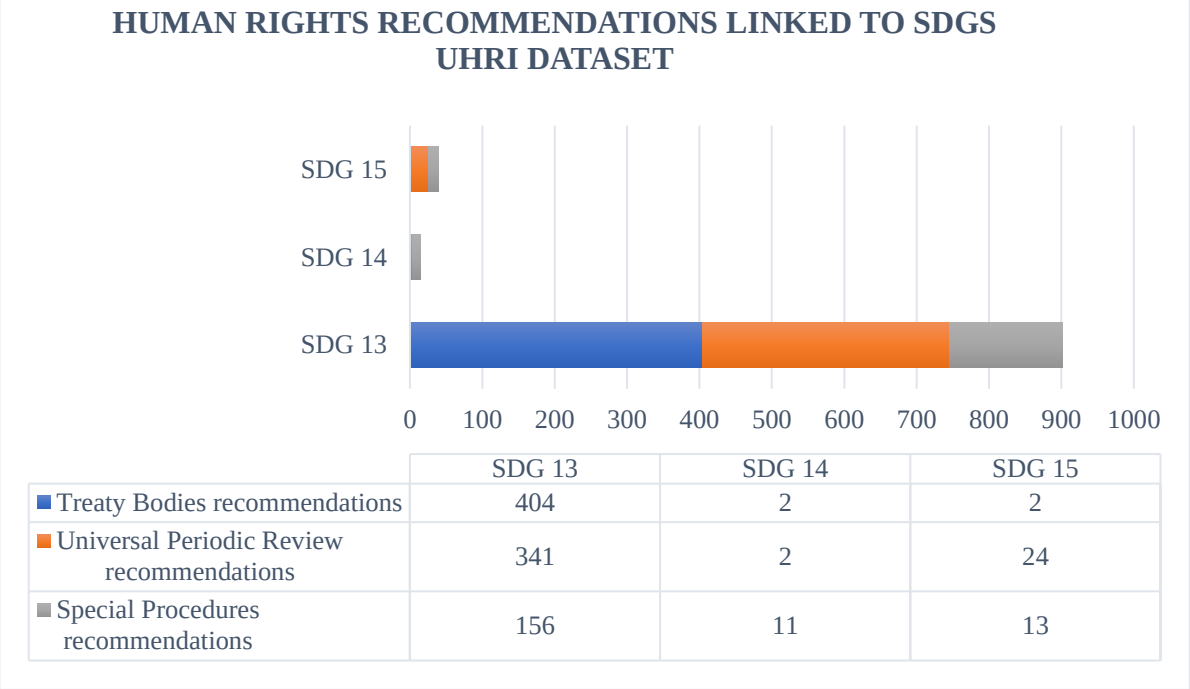
[185] Cantú Rivera, *supra* note 28 at 55–57.
[186] Inter-Am Ct HR, *supra* note 4 at resolution 2–8.
[187] Jodoin, Faucher & Lofts, *supra* note 19 at 175–76.

Figure 4 International Human Rights recommendations linked to the SDGs according to the SDG data explorer



	SDG 13	SDG 14	SDG 15
Treaty Bodies recommendations	498	40	0
Universal Periodic Review recommendations	356	6	18
Special Procedures recommendations	145	24	0

Figure 5 International Human Rights recommendations linked to the SDGs according to the UHRI[188]



	SDG 13	SDG 14	SDG 15
Treaty Bodies recommendations	404	2	2
Universal Periodic Review recommendations	341	2	24
Special Procedures recommendations	156	11	13

[188] Figures 3 and 4 were elaborated with data from the UHRI and the SDG database. Available at <uhri.ohchr.org/en/sdgs> and <sdgdata.humanrights.dk/> respectively.

While addressing the interlinked nature of human rights, the UNGPs, and the SDGs, In this section I also hinted at the dangers of disregarding human rights as the foundation of NAPs. While the empirical evidence suggests that human rights must be NAPs' bedrock, the Colombian, Chilean, and Peruvian NAPs methodology does not fully disclose the rationale behind focusing on procedural environment-related human. Neither they disclose how the SDGs are instrumental towards human rights. Even though the Chilean NAP delves deeper into the interconnections between the SDGs and human rights, its opening chapter erroneously states that human rights and business are vehicles for sustainable development when is the other way around. Business and sustainable development contribute to achieve human rights. Human rights are primarily based on dignity, not on economic or market-driven models. Even development thinking shifted its focus to people's rights during the 90s'.[189] The SDGs—as the latest development law product—are grounded in the international bill of rights. Misunderstanding human rights as a way to achieve development dilute their essence.

c. Harvesting development approaches for the achievement of human rights.

Although both regimes aim to improve human rights, giving precedence to the SDGs could lead to unbalanced or misguided policies, as illustrated by the pyramid analogy. Misguided or unbalanced policies refer to ideas or documents that misinterpret the core problem. Misinterpretation is a multi-causal problem that can arise 1) due to the absence or abundance of inputs from civil society; 2) due to the lack of technical or financial capabilities in the government; 3) due to unclear or biased methodologies to assess inputs. These three factors can jointly affect a NAP and are addressed further as input, throughput, and output legitimacy problems, respectively.

Whereas it seems counterintuitive to think that a policy with abundant participation can backfire the policy itself, the diversity in voices can conceal the real problem. The lack of technical or financial capabilities to deal with all the different voices and nuances during policymaking exacerbate the problems related to the abundance of inputs. The multiplicity of stakeholders during the NAPs policymaking processes implies different approaches to solve business' wrongdoings vis-à-vis environment-related human rights (see Lemonth's case). For instance, 132 stakeholders participated in the multi-stakeholder roundtable in Peru. 40 were government entities, 35 were civil society organizations, 22 were private organizations, thirteen were international organizations,

[189] Amartya Kamur Sen, "A decade of human development" (2000) 1:1 J Hum Dev 17 at 22.

eight were indigenous people organizations, seven were international cooperation agencies, four labor unions, and three universities.[190] In those scenarios, a skilled policymaker ought to understand the competing arguments surrounding the problem around environment-related human rights and businesses. Then, government officials would acknowledge the competing and overlapping solutions but maintain human rights at the core of the solutions. Although embedding 132 positions into a policy is difficult it's not a deterrent to keep human rights as the backbone of the policies and not as means to achieve sustainable development. If the basis for a good NAP is prioritizing which human rights obligations to fulfill first, the second step would be integrating the UNGPs and the SDGs into a coherent NAP.

When it comes to the SDGs' and UNGPs' instrumentality regarding human rights, Agnello & Ramanujam claim that even the SDGs' working framework should operate based on the agenda instrumentality towards broader objectives.[191] The instrumentality they refer to evokes that the SDGs are part of a more comprehensive scheme. That scheme is dignity. The 2030 agenda for sustainable development preamble clearly states that the SDGs "seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls."[192] Similarly, Uvin suggests that sustainable development merely redefines human rights. Nonetheless, he adds that the good governance agenda implemented by international development institutions—like the World Bank—has only rhetorically repackaged human rights, which according to him had little to no substantive change in ways of doing business.[193] Implementing the SDGs without careful considerations of human rights could result in a self-indulgent practice lacking substantive meaning. Initiatives such as the SDG data explorer and UHRI ease the understanding of the legal, moral, and ethical values underneath the SDGs, hence reducing the risk of misguided and unbalanced policies.

Development rhetoric—particularly the SDGs—are valuable because of the easiness in which they can convey a message. Memos, briefs, and summaries are the standard to communicate in politics. The language used by the SDGs enables the messages to reach their audience smoothly and in an easy-to-comprehend manner. The number of human rights treaties can sometimes obscure

[190] *Peruvian NAP*, *supra* note 12 at 24–29.
[191] Agnello & Ramanujam, *supra* note 7 at 111.
[192] UNGA , *supra* note 6.
[193] Uvin, *supra* note 46 at 597, 600.

the message, especially to readers who are not well versed in the topic.[194] For instance, the right to adequate food established in article 11 of the International Covenant on Economic, Social, and Cultural Rights and article 12 of the Protocol of San Salvador is saturated with complexities. Recent studies suggest that the right encompasses six dimensions—agency, stability, sustainability, access, availability, and utilization—each with specific meaning and implications.[195] A more practical way of framing and communicating these complex standards is through SDG 2 (zero hunger).

Extrapolating Santos' analogy of law as mapping to the SDGs evidence that SDG 2 distorts the right to adequate food six dimensions by focusing on food production. Laws, as maps do, distort reality in through scale, projection, and symbolization, as explained in Chapter 1 Section I.a.[196] When analyzing SDG 2 as a distortion of the legal standards set on human rights treaties, it's apparent that SDG 2 favors orientation rather than representation. Otherwise, there is no value in mimicking the language and complexities in article 11 of the International Covenant on Economic, Social, and Cultural Rights and article 12 of the Protocol of San Salvador. The inherent—often unappreciated—value of the distortions carried out by the SDGs lies in the conscious decisions to simplify social phenomena to reach pragmatic solutions.

Through scale, projection, and symbolization SDG 2 avoids variables like agency and utilization. Moreover, SDG 2 reduces access and availability multidimensionality into one variable, food production. The SDG 2 simplifies the right to adequate food complexities to ease our understanding of the problem at the expense of focusing on food production, which is insufficient to eradicate hunger. SDG 2 has become politically acceptable guidance for addressing the right to adequate food, and more countries are adopting domestic policies based on its premises. The straightforwardness in which SDG 2 conveys a similar message effectively is a valuable aspect for policymakers of which human rights must take advantage.[197] In short, just like SDG 2, all the SDGs embody a form of distortion to reality. Those distortion allows them to appeal to governments and non-expert audiences. However, the distortions can be detrimental when 1) stakeholders cannot participate in the definition of the parameters to which these distortions will occur; 2) when the

[194] Posner, *supra* note 65 at 78, 86–95.
[195] HLPE, *Food security and nutrition: Building a global narrative towards 2030*, (High Level Panel of Experts on Food Security and Nutrition, 2020) at 19–20.
[196] Santos, *supra* note 56 at 501–05.
[197] Catherine F Smith, *Writing public policy: A practical guide to communicating in the policy making process*, 5th edition ed (New York: Oxford University Press, 2019) at 29–30.

methodology for such distortion is unclear; 3) when the policymakers do not ground the policy choices in human rights.

Another relevant point in the SDGs' and UNGPs' instrumentality vis-à-vis human rights is establishing well-defined priorities among human rights. Prioritizing actions is a foreign idea to human rights discourse, but—as studied herein—it does not contradict human rights principles. In fact, it is conventional in the Latin American milieu. Quintavalla & Heine's argument implies that for most developing countries simultaneously accomplishing all human rights is unrealistic. They call states and other key actors to set well-defined priorities and act accordingly to ensure the widest realization of human rights.[198] Their rationale is both supported by the SDGs and by the UNGPs Principles 18 (how to conduct human rights due diligence), 20 (tracking process), and 24 (prioritize actions). Principle 24 specifically states that "[w]here it is necessary to prioritize actions… business enterprises should first seek to prevent and mitigate those that are most severe or where the delayed response would make them irremediable."[199] In its guide "Due Diligence Guidance for Responsible Business Conduct", the Organisation for Economic Co-operation and Development (OECD) extensively comments on what this prioritization exercise implies for companies.

The OECD assesses severity based on the scale, scope, and irremediable character of the damages. The scale refers to the gravity of the impact. For example, the extent to which a company impacts human health or violates fundamental workers' rights. The scope entails the magnitude of the damage; it can be assessed by the number of people affected in their health or the number of workers whose rights are obstructed. Lastly, the irremediable character refers to the possibility of restitution. In other words, whether people can recover from health damages or whether the workers' rights can be restored or compensated.[200] The OECD claims that if "a potential adverse impact can result in loss of life, it may be prioritised even if it is less likely."[201] Although Götzmann applied a different set of standards and methodology than the OECD to evaluate human rights impact assessment—which is part of the broader human rights due to diligence responsibility—both she and the OECD conclude that prioritization is vital in the "business and human rights" regime. Götzmann's study further concludes that the absence of publicly available human rights

[198] Quintavalla & Heine, *supra* note 7 at 683–84.
[199] UNHRC, *supra* note 1.
[200] OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018) at 42–44.
[201] *Ibid* at 45.

impact methodologies coupled with the lack of fora to discuss challenges and best practices hinders the improvement of self-regulation and human rights impact assessments.[202]

Per the OECD and Götzmann findings, in the Cerro Matoso case—even if spillover were unlikely—the mining company should prioritize the potential health and environmental impacts on adjacent Zenú communities as 3,463 inhabitants live around the mine. In Lemonth's case, the lobster fishery industry should consider divers health and labor security standards a top priority in their policies. Unfortunately, Latin American NAPs do not reflect those calls. NAPs have overlooked substantive environment-related human rights, which are the most susceptible rights of severe and irremediable damage by companies' activities. Instead, they have focused on increasing awareness and improving public participation in policymaking processes.

Despite their acute critique towards the SDGs, Winkler & Williams acknowledge that in today's world, the SDGs "offers one of our best, contemporary global opportunities to oppose social injustices that human rights advocates can use as a tool."[203] The dialogue between Agnello & Ramanujam's and Winkler & Williams' studies suggests that international human rights law shall guide the SDGs. Winkler & Williams argue, nonetheless, the challenge lies in engaging the human rights community with the SDGs narrative. Doing so can ensure human rights full implementation and would hold governments accountable for their legal and political commitments.[204]

In their study, McInerney-Lankford and Sano invite us to question whether legal obligations are mandatory to achieve human rights.[205] Without delving deeper into a classical discussion between *ius positivism* and *ius naturalism*, I argue that non-binding initiatives may provide enough incentives to improve human rights, but still require high accountability mechanisms and clear benefits for companies. Though Pogge & Sengupta are among the harsher critiques of the SDGs, they shed light on the intricacies of developing global mutual goals. One of their arguments emphasizes that establishing goals and policy cycles spurn the human rights of millions of people. Indeed, policies tend to lead to incremental or marginal improvements, but their claim disregards the fact that most human rights are implemented through public policies. Progressive and civil and

[202] *Nora* Götzmann, *Human Rights and Impact Assessment: Conceptual and Practical Considerations in the Private Sector Context*, Matters of Concern Human Rights Research Paper Series Research Paper 201/4/02 (Danish Institute for Human Rights, 2014) at 32–34.
[203] Winkler & Williams, *supra* note 32 at 1024.
[204] *Ibid* at 1027.
[205] McInerney-Lankford & Sano, *supra* note 7 at 183.

political human rights require plans, public policies, and allocated budgets for implementation.[206] Since 1990, the Committee on Economic, Social and Cultural Rights already stated that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the [c]ovenant's entry into force for the [s]tates concerned."[207] While imposing an obligation to move as expeditiously and efficiently as possible towards the covenant objective, the Committee on its general comment 3 *"The Nature of States Parties' Obligations"* acknowledges constraints related to resource scarcity. In short, the Committee calls countries to approve public measures conducive toward economic, social, and cultural rights; yet, it recognizes that said measures may be different from country to country and that the covenant does not demand immediate results.

Consider in Lemonth's case how could the Honduran government protect Miskito divers without investing programmatically and consciously in health infrastructure and healthcare workers; likewise, it would need to invest in enforcement mechanisms. Improving Miskito divers' situation requires public policies aimed at the protection of their human rights. Even though Pogge & Sengupta mat consider those policies as incremental, IA Court regarded the policies proposed by the Honduran State as sufficient to redress the damage done in the case.[208] It is worth noting that the policies proposed resulted from extensive dialogue (consultation) with the victims and the Miskito community.[209] The government did not unilaterally adopt non-repetition measures. On the contrary, Honduras heard the community demands (input legitimacy) and established mechanisms to fulfill them. When we translate the question if legal obligations are mandatory to achieve human rights into a domestic setting? specifically to a business and human rights context, it's clear that Pogge & Sengupta's claim against a programmatic approach toward human rights mechanisms loses credibility. Human rights do not solely rely on legal obligations—although they are of utmost importance—other frameworks can help revitalize human rights rhetoric and increase their effectiveness.[210] For instance, development discourse is the perfect complement for traditional human rights narratives in a policy context.[211]

[206] Pogge & Sengupta, *supra* note 31 at 87.
[207] Committee on Economic, Social and Cultural Rights, *supra* note 62 at para 2.
[208] *Lemonth IA Court*, *supra* note 27 at paras 134–42.
[209] *Ibid* at paras 2–11.
[210] McInerney-Lankford & Sano, *supra* note 7 at 183.
[211] Smith, *supra* note 197 at 29.

Another relevant piece of the puzzle lies in how the relevant stakeholders ought to use this information. As hinted by Haines et al., the UNGPs' framework articulates non-negotiable goals and endorses flexibility in their achievement.[212] The problem lies in having too much flexibility without democratic accountability. In their SDGs assessment, Quintavalla & Heine recognize that there is no certainty if political elites would democratize participation in human rights affairs.[213] Neither Quintavalla & Heine nor I suggest that democratizing participation in human rights affairs should arbitrarily impose the will of majorities over minorities. Quite the opposite, democratizing human rights affairs supposes a space where vulnerable populations can participate in the decision-making process.

Agency is the underlying idea behind Quintavalla & Heine's argument. Agency recognizes people as active subjects of their own destiny, but agency is preconditioned by access to substantive environment-related human rights (see illustration 3 in chapter I Section II.c). Though I urge states to turn their attention to substantive environment-related human rights, understanding which substantive environment-related human rights need to be prioritized demands public participation. When dealing with indigenous communities, prioritizing human rights demand their free, prior, and informed consent. Indigenous communities are the custodians of their unique lifestyles, and governments cannot underestimate their knowledge and agency in defining how to achieve their human rights. Further NAPs or other relevant measures related to the "business and human rights" agenda must include societal participation and fully disclose their methodology. Only then societies will influence the raison d'etre of the new policies and laws. Essentially, participation must be paired with output and throughput legitimacy, as discussed in this chapter Section II.a.

Indicators can grant another level of flexibility. As stated in chapter 1 Section I.b, indicators have gained terrain within human rights initiatives. One of their main benefits is their capacity to single out the complex problem into easy-to-understand metrics comparable over time (diachronic comparisons). Likewise, indicators are not a radical and novel idea. Instead—as Riegner claims—they are a step in the evolution of statistics as governance tools.[214] Indicators built without public consultation can overshadow human suffering and transform human rights abuses into mere

[212] Haines, Macdonald & Balaton-Chrimes, *supra* note 73 at 107–12.
[213] Quintavalla & Heine, *supra* note 7 at 683.
[214] Michael Riegner, "Implementing the 'Data Revolution' for the Post-2015 Sustainable Development Goals: Toward a Global Administrative Law of Information" in Fariello, Boisson de Chazournes & Davis, *supra* note 7, 17 at 19.

statistics.[215] For example, in Lemonth's case, the IACHR was informed that in 2013 twenty people died because of unsafe and dangerous diving practices, and 400 suffered injuries.[216] With that information, let's construct a hypothetical—yet highly likely—scenario where these numbers obscure human suffering. In case the deaths and injuries are reduced over time, governments or corporations may argue that there has been a reduction of, let's say, 60% in casualties and injuries produced by unsafe diving practices. Presenting information like so hides that eight people die and the other 160 are injured each year from lobster fishing in the Honduran Moskitia. This statistic also does not tell us anything about either reparation or rehabilitation.[217] That is why unilateral decided indicators and statistics, in general, alienate persons and conceal dignity. Most of the Peruvian NAPs indicators can be classified as structural or process indicators.[218] The Peruvian indicators tend to measure if a particular guide or booklet was elaborated, the number of public campaigns, or the number of persons participating in trainings about the UNGPs.[219] These indicators further obscure human rights narratives as they do not explain the overall impact of a set of actions in people's life. NAPs indicators also need to incorporate outcome indicators to be valuable. This last category measures the overall impact on people's lives. They could include aspects like the number of hectares recognized as indigenous land or the number of human rights defenders who have suffered an attack to their personal integrity. The SDGs provide an overall great starting point to the debate about outcome indicators because their indicators are not monoliths; all the contrary, they are the starting point on which democracies wish to represent human rights. To align with reality in the most exact way possible, human rights indicators must be the culmination of years of consultations with a wide range of stakeholders. Accountability and agency help to verify that statistics and indicators distortions do not misrepresent reality.

Finally, two other examples of the marriage between development thinking and human rights are the human rights-based approach and the right to development. The human rights-based approach and the right to development recognize that human beings must be agents of their development. Hence, positioning people's voice and throughput legitimacy as a foundation of the human rights-based approach and the right to development philosophies. The human rights-based

[215] Cantú Rivera, *supra* note 28 at 55–57.
[216] *Lemonth IACHR*, *supra* note 15 at para 47.
[217] See also SDG indicator 8.8.1 "Fatal and non-fatal occupational injuries per 100,000 workers, by sex and migrant status"
[218] OHCHR, *supra* note 45 at 34–38.
[219] *Peruvian NAP*, *supra* note 12 at 61–127.

approach demands—among many other things—transparency and mutual trust. As mentioned in chapter 1 Section I.c, the notion of mutual trust resonates with Ostrom's arguments about reshaping our understanding of collective action thinking for environmental affairs and with the corporate responsibility to respect human rights. Persons are not mere beneficiaries of policies; they are active participants throughout the policy process—implementation and evaluation included.[220] The right to development is the outcome of decades of multidisciplinary dialogues to reimagine the idea of development from economic growth to a more comprehensive understanding.[221] After 1986 the right to development emerged as a new soft law norm.[222] In Latin America, the IACHR envisions the right to development as part of the *corpus iuris* related to the "business and human rights" regime and has extensively reported and commented on it on its thematic reports.[223] On the other side of the Atlantic, the UN Human Rights Council created a special rapporteur on the right to development.[224] In a practical sense, the human rights-based approach and the right to development provide a platform to balance all the different regimes address in this section and the different positions of the wide range of actors throughout the policy process.

So far, in this chapter I have addressed three main points. Firstly, the layered and hierarchical order between environment-related human rights, the UNGPs, and the SDGs, which is perfectly illustrated by a pyramid analogy. At its base there are environment-related human rights, then the UNGPs in the middle, and on top the SDGs. Secondly, I have shown how the SDGs and the UNGPs can be instrumental for human rights and the risks of over-relying on these instruments without having human rights as the backbone of NAPs. Some of the benefits of using the SDGs include 1) their easy-to-understand language, 2) their widely accepted indicators, and 3) their diachronic comparisons. On the other end, the risks associated with the SDGs comprise 1) their distortion of reality, 2) the way they dilute human rights narratives, and 3) the way they can lead to partial or misguided solutions. Thirdly, I offered some e-tools to ease the understanding of the complex pyramid of interconnections. Likewise, I described the international and domestic initiatives to jointly follow up international human rights recommendations and the SDGs. Given these building blocks, this next section advocates pairing agency and public participation with technical

[220] Götzmann, *supra* note 202 at 19.
[221] Sen "*Development as freedom"*, *supra* note 82; Sen "*Inequality reexamined* ", *supra* note 82.
[222] *Declaration on the Right to Development*, Resolution 41/128, UNGAOR 41st Sess. (1986).
[223] Inter-Am Comm HR, *supra* note 27 at paras 45, 245.
[224] UNHRC, *supra* note 92.

capabilities and sound methodologies throughout the NAP policy cycle. All of which is evaluated on the current NAPs using input, throughput, and output legitimacy criteria.

II. From theory to practice, a NAPs development process critique.

While in the previous section I established the building blocks for the analysis of the Latin American NAPs, herein I dissect how NAPs can be elaborated from the ground up to achieve substantive environment-related human rights. NAPs must incorporate an all-inclusive vision where environment-related human rights, the UNGPs, and the SDGs regimes intersect. I also cover how different voices can frame the same problems differently and reach distinctive conclusions and explain how political priorities can overshadow agency. Thus, I emphasize the dichotomy between technical capabilities and agency. Though, the dichotomy is also influenced by the methodologies, or lack thereof, in favoring one approach over another. Finally, in this section I advocate that stakeholders must account for input, throughput, and output legitimacy to respect the agency and ensure accountability while focusing on environment-related human rights during the policymaking process.[225]

NAPs do not occur in a vacuum. A country's context and the government's political priorities tremendously influence the final document. For instance, the peace process greatly influenced the first Colombian NAP. The NAP explicitly states that it is an input for the post-conflict and peace agenda.[226] The 2020 Colombian NAP has no substantive references to the peace process and focuses more on the economic recovery from COVID-19 while respecting human rights. It's worth noting that in 2018 there was a change in the presidency in Colombia which may explain the abrupt switch in focus. Domestic actors and international institutions can positively influence a NAP outcome by balancing the changes in political power. On the contrary, when governments have a carte blanche to determine their actions and indicators, they may reflect reality in a biased way.[227] Despite the NAPs' references to the number of seminars, dialogues, and other forums held to adopt such policies, countries did not disclose how policymakers assessed and integrated those inputs into the final document.[228]

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[225] Steffek, *supra* note 25 at 263–69.
[226] *Colombian NAP 2015*, *supra* note 12 at 7.
[227] Melish & Meidinger, *supra* note 171 at 322–29.
[228] *Colombian NAP 2020*, *supra* note 12 at 46–48; *Peruvian NAP*, *supra* note 12 at 16–19; *Chilean HR policy*, *supra* note 80 at 26–29.

Romero & Lazala describe how the Colombian context affects the corporate mindset. In their opinion, the circumstances forced corporations to participate either as passive or active actors during the armed conflict. Firms like Chiquita, Coca Cola, and Nestle were unsuccessfully indicted for supporting Colombian armed groups. Many elite corporations adopted corporate social responsibility, codes of conduct, and high-level commitments as part of the rhetoric to clean their image.[229] With the introduction of good corporate governance, compliance, and corporate social responsibility, businesses lead the way in self-regulatory initiatives vis-à-vis human rights.[230] Colombian companies created the Mining Committee on Security and Human Rights, the Fundación Ideas para la Paz (Foundation Ideas for Peace), and the Colombian Guides on Human Rights and Humanitarian Law, all self-regulation initiatives.[231] NAPs have enough flexibility and specificity to be translated into different settings, like armed conflict, post-conflict, and economic recovery. Sadly, the current Colombian president discontinued the novelties brought by its predecessor in the first NAP. As Muñoz suggests, NAPs have the potential to coordinate efforts towards a common goal, improve policy coherence, and foster dialogue between dissimilar actors.[232] NAPs can also recognize the past while looking ahead. They can prevent future human rights abuses while at the same time improving redress for past ones.[233] Nevertheless, NAPs' full potential can only be unlocked when accountability and technical capabilities are present.

The appropriate use of the SDGs and the UNGPs depends on participation, technical capabilities, and accountability. One form of accountability is through independent monitoring. Assuming all the NAPs inputs were equally assessed and decisions were made based on all information available, establishing independent monitoring processes is the next logical step for accountability. Colombia's approach to monitoring involves an intergovernmental working group comprised by 21 government institutions and an advisory committee integrated by civil society, labor unions, the ombudsperson, government agencies, and international organizations.[234] Chile and Peru followed the same logic with two similar governance structures.[235] However, the Peruvian NAP monitoring system went one step further; it aims to consolidate the UN Universal Periodic

[229] Romero Medina & Lazala, *supra* note 8 at 195–96, 198.
[230] Denisse Cufré et al, "Autorregulación empresarial" [Self-regulation] in Böhm, supra note 30, 46 at 49–55.
[231] Romero Medina & Lazala, *supra* note 8 at 199–201.
[232] Muñoz Quick, *supra* note 143 at 319.
[233] *Ibid* at 319, 37.
[234] *Colombian NAP 2015*, *supra* note 12 at 10–12.
[235] *Chilean NAP*, *supra* note 12 at 90–91; *Peruvian NAP*, *supra* note 12 at 129–130.

Review, the UN treaty bodies' recommendations, the SDGs indicators, and the NAPs action into one comprehensive scheme. As mentioned *ut supra*, the indicators in the Peruvian NAP do not give a full picture of the human rights situation because they are embedded with a programmatic language. For example, number of trainings non-governmental organizations and human rights defenders; or due diligence guidelines for small and medium companies elaborated and implemented.[236] Although indicators like these are limited, the proposed Peruvian monitoring system can enable another dimension of interactions beyond the advisory committees. With it, third parties—such as academia, grassroot organizations, business organizations, and other civil society organizations outside of the advisory committee—can independently evaluate institutions' performance and goals accomplished, thus, increasing accountability.

Accountability and the human rights-based approach flourish in a democratic setting. Meckled-Garcia even claims that human rights do not exist without democracy. On a positivistic language, he argues that realizing human rights demands a contextualized interpretation. The discussion, however, can only be possible through democratic deliberation.[237] Authors like Deneulin and Sikkink support the idea that democratic values positively influence human rights.[238] One could extend such arguments beyond human rights treaties into the SDGs. Claiming that goals and indicators are meaningless unless they pass through a societal sieve is not irrational. Even with all the guide and support from international organizations, identifying NAPs' core elements as well as setting its indicators remains highly contextual. Whereas Meckled-Garcia's proposal is quite generalizing, he based it on the need for public participation and agency. A democratic setting is a fertile soil for considering citizens as active subjects of their own development. Democratizing the interpretation of human rights and establishing priorities should not be a disguise for majorities to oppress minorities. What Meckled-Garcia and I argue is that agency and accountability must be a core component of human rights prioritization. While accountability is vital, it operates *ex post facto*; therefore, government institutions require the technical capabilities to properly assess, evaluate, and translate these instruments into a coherent and cohesive policy (output legitimacy).

Understanding how indicators, goals, and laws distort reality is critical for their appropriate use. In its metaphor about laws as maps explained in Chapter 1 Section I.a, Santos pinpoints scale,

[236] *Peruvian NAP*, *supra* note 12 at 67, 79, 109.
[237] Saladin Meckled-Garcia, "What comes first, democracy or human rights?" (2014) 17:6 Crit Rev Int Soc Polit Philos 681 at 685.
[238] Deneulin, *supra* note 84 at 185; Sikkink, *supra* note 86 at 193–96.

projection, and symbolization as the three mechanisms through which maps distort reality.[239] Studying these characteristics would make policymakers more aware of their decisions. More importantly, disclosing such analysis would improve NAPs' legitimacy and future assessments.

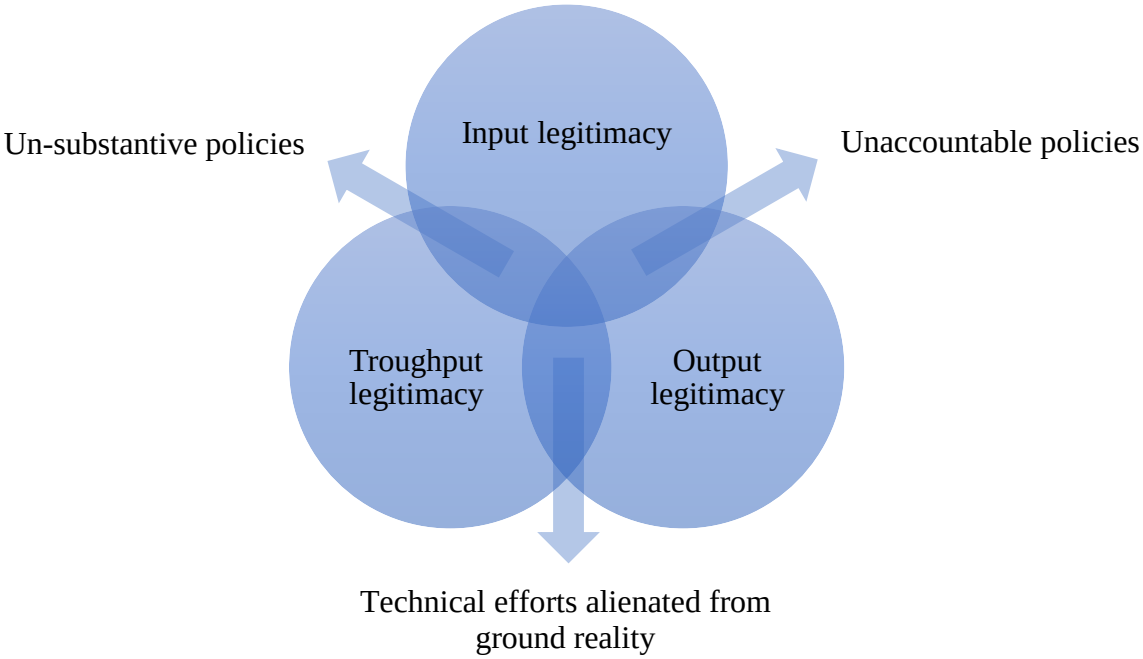
a. Input, output, and throughput legitimacy in the NAPs development process.

Steffek claims there are three dimensions of legitimacy in each decision-making process (see figure 6). The first one is input legitimacy, which refers to the involvement of the citizenry in the political process. The second is output legitimacy, which results from effective and efficient problem-solving; output legitimacy encompasses the institutions' technical capabilities to solve a given problem while meeting citizens' expectations. Throughput legitimacy is the third dimension and entails the procedures through which the inputs create outputs.[240]

When analyzed, the NAPs' policymaking process did encompass different information from the widest spectrum of society. Trusted and capable government institutions transformed those inputs into the final policy document. Only the Chilean NAP was not led by a human rights ministry within the executive, which raised concerns regarding output legitimacy. However, every country should be allowed to decide who would be commended to develop a NAP. The problem does not lie in who is in charge if they have 1) enough independence to develop a coherent policy; 2) the willingness to devote financial and technical resources towards a NAP; 3) the determination to include a wide arrange of stakeholders; 4) the decisiveness to develop and disclose a sound methodology. A process encompassing a multi-actor committee supported by the technical advice from international organizations—like the IACHR—could improve NAPs output legitimacy. Finally, the process through which those inputs produce a coherent policy must be transparent and equitable with all the parties. Unfortunately, governments did not disclose the process through which their institutions assessed such inputs. NAPs must meet the three criteria outlined by Steffek to be legitimate. Otherwise, they are either technical efforts alienated from ground reality, unaccountable policies, or un-substantive *bona fide* endeavors.

[239] Santos, *supra* note 56 at 501–05.
[240] Steffek, *supra* note 25 at 263–69.

Figure 6 Interactions between different types of legitimacies



At the intersection of input and throughput legitimacy, one could find un-substantive *bona fide* policies. Un-substantive policies happen when civil society participates in a NAP, but government institutions lack the technical capabilities to elaborate a good policy. Governments can use the aforementioned e-tools, create a multi-actor committee, and seek technical assistance from international organizations to compensate for the lack of technical capacities. Fortunately, none of the above options is mutually exclusive. A country can opt for the combination that best fits their needs or even take a different path as long as they aim to fulfill their international human rights obligations. A second scenario refers to technical efforts alienated from ground reality. It occurs when civil society does not participate in the policymaking process whether because the methodology did not include it or because people do not want to participate, thus, lacking input legitimacy. There are multiple reasons why civil society may withdraw from a NAP. For example, when people do not perceive either government institutions or their processes as legitimate, or when civil society perceives the development of a NAP as a policy design in alliance with businesses. The third scenario refers to unaccountable policies. It occurs when the government institution spearheading the NAP gathers inputs from multiple actors, but it lacks the methodology to integrate them into a coherent policy.

My analysis reveals that all three countries did commendable regarding input and output legitimacy. Nevertheless, NAPs lacked throughput legitimacy or, at least, the procedures to transform the inputs were unclear. This obscured the decision-making process on why to focus on procedural environment-related human rights and not on substantive environment-related human rights.

Although NAPs inclusion of civil society resonates with Melish & Meidinger's claim about the importance of participation regarding the UNGPs, the methodology used to translate the different inputs to the final policy is still unclear. Khan, Melish & Meidinger are right to say that public participation and accountability go together.[241] However, public participation is more effective when persons do not serious human rights violations. When people have secured a minimum living standard, they can afford to care for fulfilling other needs. For impoverished people, persons with disabilities, and rural communities, public participation is more a luxury than a human right. Even worse, indigenous communities, which have the right to free, prior, and informed consent, do not always get consulted when establishing development projects in their territories. Improving substantive environment-related human rights becomes a precondition to meaningful public participation for those left behind as suggested in chapter 1 section IIc. Evidence shows that NAPs have overstressed the importance of procedural environment-related human rights. Therefore, future NAPs should rebalance the focus to actions like access to justice, respecting property rights, stopping human rights defenders' criminalization, or preventing forced displacements instead of campaigns, workshops, and public awareness. This is my critique to self-indulgent policies that only address specific aspects that are not as bad or are easier to comply with instead of focusing on the underlying problems. In no way should be misinterpreted as an opposition to political and public participation. Consider where is the value of doing public campaigns regarding business, human rights, and the environment when people can already participate in public policy discussions? Wouldn't it be more valuable if NAPs devote their attention to reducing greenhouse emissions, improving redress mechanisms regarding environmental damage, or securing property rights of indigenous communities?

Of course, peoples' voice and agency must be an integral part of the NAPs development process and the evidence supports that people were heard. What is less clear are those people's capabilities

[241] Khan, *supra* note 138 at 236; Melish & Meidinger, *supra* note 171 at 328.

and how the political institutions transformed those inputs into a policy. In Deneulin's words, "[a] benevolent dictator who ensures that his people have the capability to be healthy, educated and live in a peaceful environment still fails to recognize them as subjects of their own development."[242] The thesis in no way suggests that any of the countries studied are dictatorships; these statements underline the importance of accountability and disclosure throughout the policymaking process. Mere participation can lead to impressive numbers, but the question—as with indicators—is to what extent quantitative data represent reality. For instance, How did participants' inputs during Peru's 22 regional dialogues shape the NAP? How did the 850 people that participated in the fifteen regional encounters during the development of the 2020 Colombian NAP influence such policy? As Uvin says, participation must respect dignity and individual autonomy.[243] Qualitative statistics and narratives are also needed to assess whether people have been heard with dignity.

Given the dire context in which many transnational corporations operate in Latin America, it is surprising that NAPs have almost avoided the UNGPs third pillar. Even in the absence of information on how the NAPs' inputs influenced the final policy, one could theorize two likely scenarios. On the one hand, almost no stakeholder raised concerns about those problems, which is improbable. On the other hand, those inputs were not equally weighted, leading to a self-indulgent policy. Whereas access to justice is a cornerstone for achieving environment-related human rights,[244] it is the major shortcoming of all three NAPs. Neither Colombia, nor Chile, nor Peru addressed substantially the lack of reliable enforcement and accountability mechanisms for wrongdoers. NAPs barely devote attention to actions on the third pillar (access to remedies). For Example, The Peruvian NAP only allocates nine of the 97 actions to its third pillar. Likewise, the Chilean NAP third pillar only contains a fifth of what the first one does.[245] Finally, nine of the fifteen actions aligned with the UNGPs' third pillar in the revised Colombian NAP relate to public campaigns and raising awareness on judicial and non-judicial grievances mechanisms. Three of the actions are specific to Colombian telecommunication companies, an industry unprioritized in the NAP. Only three actions have substantive meaning. One refers to the establishment of a policy related to conflict resolution through social dialogue. Another has to do with training for communitarian resolution centers, and the last one encompasses the creation of guidelines to align

[242] Deneulin, *supra* note 84 at 185.
[243] Uvin, *supra* note 46 at 603.
[244] Inter-Am Ct HR, *supra* note 4 at paras 233–40.
[245] *Chilean NAP*, *supra* note 12; *Peruvian NAP*, *supra* note 12 at 121–27.

existing or new non-judicial mechanisms with the UNGPs.[246] Just like substantive environment-related human rights have been absent in the regional NAPs, governments have equally avoided access to remedies.

Theoretical and empirical evidence revealed a layered scheme connecting human rights, the SDGs, and the UNGPs. Substantive environment-related human rights, the UNGPs, and the SDGs create an interlinked pyramid. Understanding such interconnections is only one of the steps for a satisfactory policy outcome. The other steps require establishing an equitable, transparent, and thoughtful involvement of the citizenry in the political process as well as creating and disclosing well-defined methodologies to assess the competing and overlapping stakeholder opinions and theories. Lemonth's case and the Colombian NAPs illustrate the power of framing and context in policymaking. Even with all the different narratives influencing a NAP, the thesis advocates for an approach that keeps human rights at its core. Otherwise, it could produce misguided policies with no substantive grounding. Maintaining human rights at the center of the policies allows us to complement them with development thinking (e.g., indicators, goals, and ease of language). I also showed that monitoring is a powerful tool for accountability and that both participation and accountability flourish in a democratic setting. Finally, by way of critiquing the NAPs development process, I expose the importance of agency (input legitimacy), of a clear and well-defined methodology (throughput legitimacy), and of the technical capabilities to understand the complexities and nuances dividing theory and practice (output legitimacy).

Conclusions

By studying the similarities and differences in human rights and development discourses I have shown that both regimes are mutually reinforcing. Whereas most of the legal scholarship surrounding these disciplines has critiqued how development discourse waters down human rights, I have expose that focusing on their differences has neglected their complementary nature. Further analysis revealed the hierarchical nature between human rights and development. Given their hierarchical nature, the differences in each regime can be bridged by the UNGPs internationally and by NAPs domestically. More specifically, I claim that the SDGs and the UNGPs are instrumental for environment-related human rights. Human rights must be NAPs' bedrock;

[246] *Colombian NAP 2020*, *supra* note 12 at 58,59.

otherwise, policies based solely on sustainable development ideals may lack substantive foundation.

Aside from the theoretical divergence and convergence, the analysis was complemented by empirical evidence for the three Latin American NAPs. As the UNGPs have ignited different bottom-down policies—such as NAPs and self-regulation schemes—NAPs potentially reduce the governance gaps remaining between business and human rights. Colombia, Chile, and Peru integrated human rights principles and development ideals into their NAPs to address these gaps. NAPs took advantage of diachronic comparisons endemic to development rationale, which manifest themselves in the use of indicators. NAPs have harnessed the programmatic and flexible spirit of development thinking to engage with multiple stakeholders throughout the policy life cycle. NAPs employed the principle of instrumentality to prioritize some human rights rather than focusing on all problems and used simplified language to communicate their goals and ideals.

My study revealed how Latin America's common history from colonial times to the present and its longstanding tradition towards human rights created an enabling environment for unique human rights interpretations. On the one hand, the IA Court advisory opinion OC-23/17 and the Escazú treaty encapsulate the regional understanding of the intersections on environmental protections and human rights. On the other hand, the IACHR "Business and Human Rights: Inter-American Standards" report outlines the Inter-American nuances on the "business and human rights" regime. Historical reasons, contemporary case studies, and the unique understanding of the triad studied herein make Latin America a fertile soil for experimentation regarding business and environment-related human rights. Overall, I imply a sense of regionalism that may not be applicable elsewhere.

Insights from the Cerro Matoso case, the Rio Agrio case, and the Lemonth case illustrate the limits of over-relying on judicial forums to make corporations accountable for their human rights abuses. Likewise, insights from Peru—where only 5% of the companies consulted between 2016 and 2017 informed alignment with the UNGPs—and Lemonth's case demonstrate the inability of self-regulation to nudge corporations to respect human rights. My research reveals that developments must come from a bottom-down approach within countries, at least in Latin America. However, A country's leeway during the NAP elaboration is not a carte blanche and requires to be balanced by domestic and international actors.

Input legitimacy, output legitimacy, and throughput legitimacy encapsulate the main problem during policy development. Therefore, states must carefully follow them during the policy life cycle. Input legitimacy refers to the way people participate during the NAP. This form of legitimacy evokes principles like agency and public participation. All three NAPs had had input legitimacy because they had ample participation. The other two elements are more contentious to evaluate. Output legitimacy refers to the technical capabilities of a governmental bureau to frame and solve complex problems. While every country has enough autonomy to decide which institution will spearhead the development of a NAP, whoever is in charge must have 1) enough independence to develop a coherent policy; 2) willingness to devote financial and technical resources towards a NAP; 3) determination to include a wide arrange of stakeholders; 4) decisiveness to develop and disclose a sound methodology. Countries must continue to increase their output legitimacy by international cooperation, creating a multi-actor committee, and using the e-tools mentioned. Finally, the Achilles heel of NAPs lies in throughput legitimacy. Unfortunately, neither NAP discloses the methodologies used to assess and integrate the different inputs into a comprehensive instrument. The lack of focus on substantive environment-related human rights and access to justice, coupled with the absence of a methodology to evaluate inputs led me to conclude that not all voices were equally assessed. Two prime examples of said conclusion are the disregard toward substantive environment-related human rights and the disinterest towards the UNGPs' third pillar.

In sum, while NAPs have successfully surpassed the academic debate between human rights and sustainable development by merging them in a domestic policy. They have failed to protect substantive environment-related human rights. Countries must take a decisive steer in how NAPs face environment-related human rights to improve people's lives. That steer must unequivocally encompass input legitimacy, output legitimacy, and throughput legitimacy.

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