

Report to the U.N. Committee on the Elimination of Racial Discrimination

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UNIVERSITY OF TORONTO
FACULTY OF LAW

INTERNATIONAL
HUMAN RIGHTS
PROGRAM



EARTHRIGHTS INTERNATIONAL

ERI is a non-governmental organization based in the United States, the Amazon region, and Southeast Asia that works with communities and local groups around the globe to address issues of corporate accountability and liability for human rights and environmental harms. ERI has worked with communities impacted by Canadian mining corporations. ERI represented individuals in Porgera, Papua New Guinea, including women and men who suffered human rights abuses in connection with the Porgera Joint Venture gold mine.

INTERNATIONAL HUMAN RIGHTS PROGRAM

UNIVERSITY OF TORONTO

The International Human Rights Program at the University of Toronto Faculty of Law enhances the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society.

MINING WATCH CANADA

In collaboration with national and international networks, and with local partners and allies, MiningWatch Canada seeks to strengthen mining-affected communities in order to: prioritize healthy communities and a healthy environment ahead of mining activities that are often promoted and protected at their expense; strengthen technical and strategic skills within communities and organizations faced with impacts of mining activities, to allow them to impose appropriate terms and conditions on mining or to prevent the development of projects that would adversely affect areas of ecological, economic and cultural significance; and advocate policies to reduce the risks of mineral development for mining-affected communities and to remedy harm.

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I. Summary

A coalition of civil society groups, consisting of EarthRights International (ERI), MiningWatch Canada (MWC), and the University of Toronto's International Human Rights Program (IHRP) ("the Coalition"), submit this report to the Committee on the Elimination of Racial Discrimination ("the Committee") for consideration during its 93rd session and review of Canada.

The *International Convention on the Elimination of All Forms of Racial Discrimination* ("Convention") requires Canada to regulate the activities of, and rectify discriminatory practices – direct and indirect – committed by Canadian corporations abroad, and to prevent these practices from occurring.¹ The Committee has previously expressed concern over reports that transnational corporations registered in Canada, particularly mining companies, are impairing the rights of indigenous peoples outside Canada and recommended that Canada take appropriate legislative and administrative measures to prevent these harms and hold corporations accountable for them.²

Yet, despite these recommendations, Canada has not taken appropriate action to fulfill its Convention obligations. Canada continues to rely on a corporate social responsibility strategy centered around voluntary self-regulation, and has not implemented appropriate legislative and administrative measures to regulate its corporations to ensure their activity abroad does not discriminate against indigenous peoples and ethnic minority communities. Moreover, reports show that Canada supports extractive industry companies – including companies accused of human rights abuses – through, among other things, economic diplomacy and loans from Export Development Canada (EDC).

In the face of this inaction, Canadian companies continue to be implicated in human rights violations³ in countries around the world, including discrimination. The allegations against the operations of Canadian corporations include racially discriminatory environmental damage, harms to health, and forced displacement in violation of articles 5(d)(v) and 5(e)(iii)(iv) of the Convention; failure to obtain the free, prior and informed consent of indigenous peoples in violation of article 5(c) of the Convention; and violence and criminal persecution of human rights defenders in violation of articles 5(b) and 5(d)(ix) of the Convention.

Once again the Coalition must call upon Canada to uphold its Convention obligations and regulate the extraterritorial activity of Canadian corporations, and ensure that victims of corporate related

¹ The Committee has repeatedly confirmed the Convention's extraterritorial reach. See U.N. Cmte. on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, ¶ 17, U.N. Doc. CERD/C/CAN/CO/18 (May 25, 2007), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f18&Lang=en [hereinafter, "CERD Concluding Observations: Canada 2007"]; U.N. Cmte. on the Elimination of Racial Discrimination, *Concluding Observations: United States of America*, ¶ 30, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2fCO%2f6&Lang=en [hereinafter, "CERD Concluding Observations: USA 2008"]; U.N. Cmte. on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, ¶ 14, U.N. Doc. CERD/C/CAN/CO/19-20 (Apr. 4, 2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f19-20&Lang=en [hereinafter, "CERD Concluding Observations: Canada 2012"].

² CERD Concluding Observations: Canada 2007; CERD Concluding Observations: Canada 2012.

³ References to human rights throughout this report are inclusive of environmental and indigenous rights.

human rights abuses have access to an effective remedy. To this end, the Coalition makes the following recommendations, which are further expanded upon in the Recommendations section:

1) Ombudsperson

Canada should create a human rights Ombudsperson office for the extractive industries.

2) Access to judicial remedies

Canada should facilitate access to Canadian courts for indigenous peoples and ethnic minority communities who have been harmed by the international operations of Canadian companies.

3) Parent company liability

Canada should enact legislation establishing automatic parent company liability for the actions of subsidiaries, with the purpose of avoiding human rights violations and ensuring accountability when violations occur. Canada should affirm, through legislation, corporations' duties to respect the indigenous and human rights of individuals and communities affected by their activities, including outside Canada.

4) Investigate and prosecute

Canada must investigate credible allegations of criminal behaviour connected with the operations of Canadian corporations outside Canada, including violent abuses, and prosecute cases where merited.

5) Government support

Canada must implement binding legislation to ensure that all public agencies have a legal obligation to ensure human rights, including indigenous peoples' rights, are respected prior to providing any kind of support, and support must be withdrawn from companies that do not respect these rights.

II. Canada's mining sector: a brief overview of its significance and impacts

Canada prides itself on its global recognition as an "important mining nation,"⁴ with an extractive industry sector whose operations "can result in a win-win outcome both for the Canadian economy and that of host countries."⁵ Canada is home to more than half of the world's mining corporations, with 1500 companies operating 8000 properties in over 100 countries.⁶ In 2017,

⁴ Natural Resources Canada, *Minerals and Metals Factbook – 2016*, p. 1, https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/pdf/mms-smm/Minerals%20and%20Metals_factbook_En.pdf [hereinafter "Minerals and Metals Factbook"].

⁵ Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* (modified on Sept. 16, 2016), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> [hereinafter, "Doing Business the Canadian Way"].

⁶ *Ibid.* See also U.N. Office of the High Commissioner for Human Rights, *Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights* (June 1, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E> [hereinafter, "UNWG on BHR Statement on Canada"].

57% of global mining companies were listed on the Toronto Stock Exchange (TSX) and TSX Venture Exchange,⁷ and this figure is up from 52% in 2015.⁸

The global operations of many of these Canadian corporations are associated with reports of systematic human rights violations against surrounding indigenous and ethnic minority communities. A study from 2009 found that since 1999, Canadian mining companies were implicated in the largest portion (34%) of 171 incidents alleging involvement of international mining companies in community conflict, human rights abuses, unlawful and unethical practices, or environmental degradation in a developing country.⁹ Of the Canadian-involved incidents, 60% involved community conflict, 40% environmental degradation, and 30% unethical behaviour.¹⁰ A recent report from the Justice and Corporate Accountability Project documented 44 deaths, 15 incidents of sexual violence, and 403 injuries (including brutal physical beatings and shootings), as well as 709 cases of criminalization (including legal complaints, arrests, detentions and charges) associated with 28 Canadian mining companies operating in 13 countries in Latin America over the last 14 years.¹¹ Moreover, according to the Business and Human Rights Resource Centre, Canada is among the top three countries with companies connected to reported cases of threats to human rights defenders.¹²

These allegations show that the Canadian extractive sector's operations abroad are not creating "win-win" situations, and that Canada must take appropriate action to prevent these abuses and hold corporations accountable for their involvement in these violations.

III. Canada's obligations under the Convention and other international instruments

A. Obligations under CERD

Under the Convention, discrimination can be both direct and indirect. Discrimination is "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."¹³ Indirect discrimination includes acts,

⁷ UNWG on BHR Statement on Canada.

⁸ Minerals and Metals Factbook, at p. 1.

⁹ Canadian Centre for the Study of Resource Conflict, *Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World*, pp. 6, 16 (Oct. 2009), http://miningwatch.ca/sites/default/files/CSR_Movements_and_Footprints.pdf.

¹⁰ *Ibid.* at p. 16.

¹¹ Justice and Corporate Accountability Project, *The "Canada Brand": Violence and Canadian Mining Companies in Latin America*, pp. 4, 12 (Nov. 2016), <https://ssrn.com/abstract=2886584> [hereinafter, "JCAP, The Canada Brand"].

¹² UNWG on BHR Statement on Canada.

¹³ International Convention on the Elimination of All Forms of Racial Discrimination art 1.1, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter, "ICERD"].

even unintentional acts, that lead to discrimination by imposing a disadvantage or having a disproportionate impact on a racial or ethnic group – discrimination in effect.¹⁴

Canada is required to “condemn . . . and . . . eliminat[e]”¹⁵ both “direct and indirect”¹⁶ forms of racial discrimination by any persons [which includes corporations],¹⁷ groups, or organizations using “all appropriate means.”¹⁸ To fulfill this obligation, the Convention imposes both positive and negative duties on States parties, and these duties apply extraterritorially.¹⁹

States parties are required to prohibit and bring to an end racial discrimination, including that arising from conduct of non-state or private actors.²⁰ To achieve this objective, States parties are required to enact legislation that makes violence or incitement to violence against any racial or ethnic group or incitement to racial discrimination a criminal offense,²¹ and to adopt additional legislative measures as required by the circumstances.²²

States parties are required to guarantee equality before the law with respect to “political rights,”²³ as well as “economic, social, and cultural rights,” without distinction as to race, colour, or national or ethnic origin.²⁴ This includes “the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.”²⁵ When discrimination occurs, States parties are required to assure access to effective remedies against discrimination, as well as the right to seek just and adequate reparations for damages suffered as a result of discrimination.²⁶

¹⁴ *Ibid.* art 1.3; U.N. Cmte. on the Elimination of Racial Discrimination, *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, ¶¶ 7-8, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) [hereinafter, “CERD GR 32”]; Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination*, p.113 (Oxford University Press, 2016) [hereinafter, Thornberry].

¹⁵ ICERD, at art. 2.1.

¹⁶ CERD GR 32.

¹⁷ Thornberry, at p. 185.

¹⁸ ICERD, at art 2.1.

¹⁹ See CERD Concluding Observations: Canada 2007, at ¶ 17; CERD Concluding Observations: USA 2008, at ¶ 30; CERD Concluding Observations: Canada 2012, at ¶ 14.

²⁰ ICERD, at art 2.1(d).

²¹ *Ibid.*, at art 4(a); U.N. Cmte. on the Elimination of Racial Discrimination, *General Recommendation no. 15, General Recommendation XV on article 4 of the Convention*, ¶ 5, U.N. Doc. CERD/C/GC/15 (Mar. 17, 1993), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7487&Lang=en.

²² ICERD, at art 2.1(d); Thornberry, at p. 188.

²³ *Ibid.*, at art 5(c).

²⁴ *Ibid.*, at art 5(e).

²⁵ *Ibid.*

²⁶ *Ibid.*, at art 6.

The Convention also requires States parties to refrain from sponsoring, defending, or supporting racial discrimination by any persons or organizations.²⁷ This includes financial or other generalized support, as well as encouragement or approval.²⁸

B. This Committee's concern over Canada's failure to properly regulate Canadian corporate activity abroad

This Committee has previously voiced concerns that Canada is failing to fulfill its treaty obligations by not properly regulating the extraterritorial conduct of its corporations. In its last two sets of Concluding Observations on Canada, this Committee expressed concerns over the allegations that Canadian corporations' operations outside Canada are violating the rights of indigenous peoples. In 2007, the Committee noted the "adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions."²⁹ Based on articles 2.1(d), 4(a), and 4(b) of the Convention, and General Recommendation No. 23, the Committee recommended that the Canadian government "take appropriate legislative or administrative measures" to prevent these violations and to hold Canadian corporations accountable.³⁰ The Committee reiterated these concerns in its 2012 Concluding Observations, again noting Canada's failure to adopt the requisite measures. The Committee urged the Canadian government to undertake legislative measures to prevent violations of the Convention, and ensure proper accountability.³¹

In addition to reviewing this issue in its Concluding Observations, the Committee has recently sought further information from the Canadian government in an Early-Warning and Urgent Procedure Letter to the Permanent Representative of Canada to the UN. The May 2016 letter highlighted concerns regarding reported allegations of land eviction and mass rapes in Lote Ocho, Guatemala, committed by Hudbay Minerals Inc., as well as land claims by the Lubikon Lake Nation (Muskotew Sakahikan Enowuk) in Canada.³² With respect to the women in Lote Ocho, the letter noted that the information it received "suggests that Canada has not yet adopted legislative or administrative measures to hold corporations registered in Canada accountable for human rights violations carried out abroad, including violations of the rights of indigenous peoples."³³ In its follow up letter, the Committee encouraged the Government to ensure that "all companies registered in the State party comply with the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, in particular with regard to the rights of indigenous peoples, . . . and [that] (c) the right to free, prior and informed consent of indigenous

²⁷ *Ibid.*, at art 2.1(b).

²⁸ Thornberry, at p. 185.

²⁹ CERD Concluding Observations: Canada, 2007, at ¶ 17.

³⁰ *Ibid.*

³¹ CERD Concluding Observations: Canada, 2012, at ¶ 14.

³² U.N. Cmte. on the Elimination of Racial Discrimination, *Early Warning and Urgent Action Procedure Letter to the Permanent Representative of Canada to the United Nations*, U.N. Doc. CERD/89th/EWUAP/GH/MJA/ks (May 27, 2016) [hereinafter, "CERD May 2016 Letter"].

³³ *Ibid.*

peoples is fully respected whenever their rights may be affected by projects carried out on their lands.”³⁴

- C. Other UN bodies and the Inter-American Commission on Human Rights have similarly expressed concern over Canada’s failure to properly regulate Canadian corporate activity abroad

For more than a decade, UN human rights bodies and the Inter-American Commission on Human Rights (IACHR) have criticized Canada’s failure to regulate the extraterritorial activity of Canadian corporations. Collectively, these bodies have recommended that Canada implement legislation to regulate this corporate activity and ensure that victims have access to remedies.

In addition to this Committee, five other UN bodies have raised similar concerns about the negative impact of Canadian extractive sector corporations abroad – and have issued recommendations that Canada implement legislation to regulate such activities, and to ensure that victims have access to effective remedies. These include the Committee on the Rights of the Child,³⁵ the Human Rights Committee,³⁶ the Committee on Economic, Social and Cultural Rights,³⁷ the Committee on the Elimination of Discrimination Against Women,³⁸ and most recently, the UN Working Group on Business and Human Rights.³⁹

The IACHR reviewed Canada’s oversight over its corporations operating in Latin America in thematic hearings in 2013,⁴⁰ 2014,⁴¹ and 2015.⁴² At the hearing in October 2014, Commissioner

³⁴ U.N. Cmte. on the Elimination of Racial Discrimination, *Early Warning and Urgent Action Procedure Letter to the Permanent Representative of Canada to the United Nations*, U.N. Doc. CERD/91st/EWUAP/SW/ks (Dec. 13, 2016) [Hereinafter, “CERD December 2016 Letter”].

³⁵ U.N. Cmte. on the Rights of the Child, *Concluding Observations: Canada*, ¶¶ 28-29, U.N. Doc. CRC/C/CAN/CO/3-4 (Dec. 6, 2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCAN%2fCO%2f3-4&Lang=en.

³⁶ U.N. Human Rights Cmte., *Concluding Observations: Canada*, ¶6, U.N. Doc. CCPR/C/CAN/CO/6 (Aug. 13, 2015), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en.

³⁷ U.N. Cmte. on Economic, Social and Cultural Rights, *Concluding Observations: Canada*, ¶¶ 15-16, U.N. Doc. E/C.12/CAN/CO/6 (Mar. 23, 2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en.

³⁸ U.N. Cmte. on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, ¶¶ 18-19, U.N. Doc. CEDAW/C/CAN/CO/8-9 (Nov. 25, 2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f8-9&Lang=en.

³⁹ UNWG on BHR Statement on Canada.

⁴⁰ Development and Peace, *Mining and Human rights in Latin America: Canada’s responsibility* (Oct. 30, 2013), <https://www.devp.org/en/pressroom/2013/comm2013-10-30>.

⁴¹ Inter-Am. Ct. H.R., *Schedule of Hearings, 153rd Session* (Oct. 27, 2014), <http://www.oas.org/en/iachr/sessions/docs/Calendario-153-audiencias-en.pdf> (scheduling a thematic hearing on the “impact of Canadian mining activities on human rights in Latin America”).

⁴² Inter-Am. Ct. H.R., *Thematic Hearing: Extraterritoriality and Responsibility of Home States in the Protection of Human Rights for the Activities of Extractive Industries in Latin America* (Mar. 17, 2015), https://cdp-hrc.uottawa.ca/sites/cdp-hrc.uottawa.ca/files/hrrec_oral_presentation_iachr_march_17_2015.pdf.

Rose-Marie Antoine remarked that “despite the assurance of Canada that there is good [corporate social responsibility] policy, we continue at the Commission to see a number of very, very serious human rights violations occurring in the region as a result of certain countries, and Canada being one of the main ones So we are seeing deficiencies of the policy.”⁴³ The Commission’s press release following the hearing urges “states to adopt measures to prevent the multiple human rights violations that can result from the implementation of development projects, both in countries in which the projects are located as well as in the corporations’ home countries, such as Canada.”⁴⁴

IV. Canada is failing to fulfill its CERD obligations

A. Canada’s corporate social responsibility strategy fails to fulfill its international human rights obligations

Despite calls from civil society,⁴⁵ the Parliamentary Standing Committee on Foreign Affairs and International Trade,⁴⁶ Members of the Canadian Parliament,⁴⁷ and numerous UN treaty bodies to take legislative action to regulate Canadian corporations and ensure that victims of corporate

⁴³ Canadian Network on Corporate Accountability and Polaris Institute, *Submission to the Economic, Social and Cultural Rights Unit of the Inter-American Commission on Human Rights*, p. 3 (Jan. 26, 2016), <http://www.aboveground.ngo/wp-content/uploads/2016/02/CNCA-Submission-IACHR-ESCR-Unit-Jan-2016.pdf>, citing Inter-Am. Ct. H.R., *Impact of Canadian Mining Activities on Human Rights in Latin America*, 153rd Session (Oct. 28, 2014), video recording at 53:42.

⁴⁴ Org. Am. States, *IACHR Wraps Up its 153rd Session* (Nov. 7, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/131.asp.

⁴⁵ See, e.g. Canadian Network on Corporate Accountability, *Talk is Not Enough: Why Canada Needs an Extractive Sector Ombudsperson* (2016), <http://cnca-rcrce.ca/wp-content/uploads/2016/09/Talk-not-enough-E-web.pdf> [hereinafter, “CNCA, Talk is Not Enough”]; EarthRights International et al., *Report to the UN Committee on the Elimination of Discrimination Against Women, 65th Session, October 2016 for its Review of the Combined Eighth and Ninth Periodic Reports of Canada*, (Oct. 3, 2016), https://www.earthrights.org/sites/default/files/documents/eri_hrc_mwc_cedaw_committee_report_october_3_2016.pdf; MiningWatch Canada, *Time to Axe the Conservative Government’s Ineffective CSR Counsellor Office* (Jan. 22, 2016), <http://miningwatch.ca/news/2016/1/22/time-axe-conservative-government-s-ineffective-csr-counsellor-office> [hereinafter “MiningWatch Canada, Time to Axe”].

⁴⁶ Parliament of Canada, Standing Committee on Foreign Affairs and International Trade, “Mining in Developing Countries: Corporate Social Responsibility” 38th Parl., 1st Sess., 14th Rep. (June 2005), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1961949&Language=E&Mode=1&Parl=38&Ses=1>.

⁴⁷ Individual Members of Parliament have introduced bills that would fulfill some of Canada’s international treaty obligations, but none have become law. These include: (1) a bill allowing foreign nationals to bring tort claims for violations of international law or treaties to which Canada is a party for acts that occurred outside of Canada; (2) a bill requiring companies to comply with environmental and human rights standards in order to obtain, and maintain, support from EDC, the Canadian Pension Plan Investment Board or Canadian embassies; and (3) a bill creating an Ombudsman’s office to, amongst other things, receive complaints for extractive sector corporations operating abroad. See Bill C-323, “An Act to amend the Federal Courts Act (international promotion and protection of human rights),” 1st Sess., 41st Parl., 2011, <http://www.parl.gc.ca/legisinfo/BillDetails.aspx?billId=5138027&Language=E&Mode=1&View=3> (this Bill was introduced from the 39th-41st Parliamentary Sessions, from 2007-2015); Bill C-300, “An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries,” 2nd & 3rd Sess., 40th Parl., <https://openparliament.ca/bills/40-3/C-300/>; Bill C-584, “An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries,” 2nd Sess., 41st Parl., <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6497386>.

abuse have meaningful access to remedy, Canada has failed to do so. Canada frames its approach in terms of corporate social responsibility (CSR), but its strategy is inadequate in ensuring accountability and in providing meaningful and effective remedies, much less to prevent human rights violations in the first place. The framework is structured around voluntary self-regulation, CSR guidelines, and weakly mandated non-judicial dispute resolution, without a robust system for independent effective investigations based on due process with public reporting on findings, and without recourse against the corporations in question or the Canadian government for remedial justice.⁴⁸

The current CSR framework involves two main government offices: (1) Office of the Extractive Corporate Social Responsibility Counsellor (CSR Counsellor); and (2) the National Contact Point (NCP), which is an OECD-based initiative.⁴⁹ Neither office conducts effective independent investigations, or has the mandate or authority to sanction known violators, or to provide any remedies to the victims.⁵⁰

Structural impediments further limit the ability of potential claimants to access and use these processes. Before using the Counsellor's office, complainants must first attempt to resolve their claim through a local grievance mechanism or dialogue with the company.⁵¹ Complaints must be filed in English or French, and there is no information on resources provided for claimants who cannot afford to support their claim. A recent report suggests that at least one case was closed because translation was not provided.⁵² The Counsellor position was vacant for more than one year, until a new Counsellor was appointed in March 2015.⁵³ In spite of detailed critiques of the weaknesses in the first Counsellor's mandate, this mandate was not revised for the new Counsellor. The Canadian NCP is also inaccessible to individuals without financial means to pursue their claim; the main service that the NCP is capable of providing is a forum for mediation, but participants must cover their own travel costs to attend the mediation as well as any costs of translation.⁵⁴

⁴⁸ Doing Business the Canadian Way; Mariette van Huijstee et al., *Glass Half Full? The State of Accountability in Development Finance*, Annex 7, p. 3 (Jan. 1, 2016), <https://www.somo.nl/glass-half-full-2/> [hereinafter, "Glass Half Full"].

⁴⁹ JCAP, The Canada Brand, at p. 5.

⁵⁰ *Ibid.* The CSR Counsellor does not have the mandate to conduct effective independent investigations, and while some NCPs have carried out investigations the Canadian NCP limits itself to mediation. See Bernadette Maheandiran, *Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises*, 20:2015, *Harvard Negotiation Law Review* 206, pp. 225-226 (2015), http://www.hnlr.org/wp-content/uploads/HNR105_crop.pdf; Daniel, C, J Wilde Ramsing, MMG Genovese, and V Sandjojo, *Remedy Remains Rare*, pp. 41-43 (June 2015), http://www.oecdwatch.org/publications-en/Publication_4201 [hereinafter, "Remedy Remains Rare"];

⁵¹ Mining Watch Canada, *Concerns with Regard to the Mandate and Review Procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada* (March 2011), http://miningwatch.ca/sites/default/files/MiningWatch_Brief_on_CSR_Counsellor.pdf.

⁵² Glass Half Full, at p. 3.

⁵³ Mining Watch Canada, *Time to Axe*; Glass Half Full, at p. 1.

⁵⁴ Above Ground, MiningWatch Canada, and OECD Watch, *"Canada Is Back" But Still Far Behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises*, p.19 (Nov. 15, 2016), <http://miningwatch.ca/publications/2016/11/15/canada-back-still-far-behind> [hereinafter, "'Canada Is Back'"].

Neither the Counsellor's office nor the NCP process has proved capable of providing complainants with a remedy.⁵⁵ The Counsellor's office has only six reported cases, since its creation in 2009, none of which reached a resolution.⁵⁶ A recent review of NCP performance across all countries found that "the overwhelming majority of complaints have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses, leaving complainants in the same or worse position as they were in before they filed their complaint."⁵⁷ This accords with complainants' experience with the Canadian NCP.⁵⁸ For example, in one case where a resolution was reached, the company failed to implement the agreement (which was not monitored by the NCP) and the human rights violations – evictions – reportedly continued for many years.⁵⁹ In another case, the NCP was only willing to facilitate dialogue between the parties, instead of carrying out the requested fact-finding investigation.⁶⁰ Although a welcome recent change allows for "sanctions"⁶¹ against a company that refuses to participate in either dispute resolution processes, there is little reason to expect different results. Participation alone in these weak mechanisms will not correct the above-referenced inadequacies.

Civil society groups and affected communities have called upon Canada to create a human rights Ombudsperson for the extractive sector.⁶² While the governing Liberal party committed to

⁵⁵ See CNCA, *Talk is Not Enough*, for a comparison of the relative weaknesses of Canada's CSR Counsellor and NCP.

⁵⁶ Glass Half Full at pp.1, 4; Global Affairs Canada, *Registry of Request for Review* (modified on Oct. 8, 2013), http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?lang=eng; Three companies withdrew from the process: Excellon, Silver Standard, and McEwen Mining Inc. The case against First Quantum Minerals Ltd. closed because the complainants did not use the local project-level grievance mechanism, which was seen as ineffective. The case against New Gold Inc. closed, but there is no final report. The case against Golden Arrow Resources Corporation closed because the Counselor could not establish communication with the requester. See Mining Watch Canada, *The Federal CSR Counsellor Has Left the Building – Can we now have an effective ombudsman mechanism for the extractive sector?* (Nov. 1, 2013), <http://miningwatch.ca/blog/2013/11/1/federal-csr-counsellor-has-left-building-can-we-now-have-effective-ombudsman>.

⁵⁷ *Remedy Remains Rare*, at p. 5 "Canada is Back," at p. 21.

⁵⁸ See "Canada Is Back."

⁵⁹ *Ibid* at p.16; *Remedy Remains Rare*, at p. 48; The Umuchinshi Initiative (University of Toronto Faculty of Law), *Can the OECD Guidelines Protect Human Rights on the Ground? A Case Study: The Evictions at Mufulira by First Quantum Minerals / Mopani Copper Mines*, pp. 5, 7-8 (2007), http://ihrp.law.utoronto.ca/utfl_file/count/documents/WorkingGroup_Clinic/Mining%20Case%20Study.pdf.

⁶⁰ OECD Watch, *FREDEMI coalition vs Goldcorp* (Dec. 9, 2009), [HTTP://WWW.OECDWATCH.ORG/CASES/CASE_172](http://WWW.OECDWATCH.ORG/CASES/CASE_172).

⁶¹ *Doing Business the Canadian Way*; "Canada is Back," at p.20. Sanctions can include the withdrawal of Trade Commissioner Services and other government economic diplomacy, and a non-compliance designation will be taken into consideration by EDC in determining whether to provide support. This change was part of the 2014 revised CSR strategy.

⁶² See e.g. Dateline Pacific, *PNG locals pray for ombudsman to monitor Canadian miners*, RNZ (Mar. 17, 2017), <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201836916/png-locals-pray-for-ombudsman-to-monitor-canadian-miners> [hereinafter, "PNG locals pray for ombudsman to monitor Canadian miners"]; MiningWatch Canada, *Indigenous women from Papua New Guinea appeal to government of Canada for help obtaining remedy for ongoing human rights abuses at Barrick mine* (May 7, 2017), http://miningwatch.ca/news/2017/5/9/Indigenous-women-papua-new-guinea-appeal-government-canada-help-obtaining-remedy?utm_campaign=Porgera&utm_medium=Facebook&utm_source=News [hereinafter "MiningWatch Canada, Indigenous women from Papua New Guinea appeal to government of Canada"]. See also CNCA, *From Guatemala to Zambia people affected by Canadian mining plea for a human rights ombudsperson for extractive industries* (Mar. 3, 2017),

creating this office during the 2015 election,⁶³ nearly two years later this commitment remains unfulfilled. The Canadian Network on Corporate Accountability has put forward model legislation outlining key features for the Ombudsperson. According to this model legislation, the Ombudsperson must be independent and able to undertake independent investigations. Legally, companies must cooperate with investigations. The process must be transparent, and the Ombudsperson must publicly report on investigations and issue public reports for each case, including recommendations on prevention and remedy. The Ombudsperson must also monitor compliance, and companies that do not comply with recommendations must become ineligible for government support.⁶⁴

B. Victims face barriers in access to judicial remedies

Victims often face significant barriers in access to remedies in their home country, and Canada may be their only realistic possibility for justice. Moreover, some Canadian corporations may not be subject to the foreign court's jurisdiction, leaving an accountability gap unless an action is brought in Canada. But victims can also face significant barriers when they turn to Canadian courts for justice.

Within the past twenty years, victims of human rights abuses by Canadian corporations abroad have filed a handful of civil actions in Canadian courts.⁶⁵ Remarkably, five actions are currently proceeding to trial.⁶⁶ In addition, in one case, victims are seeking to enforce a judgment obtained abroad, as the company no longer has assets in the country where the harm occurred.⁶⁷ But, to date, no case has resulted in remedies for the victims, and many cases have been dismissed at

<http://cnca-rcrce.ca/recent-works/from-guatemala-to-zambia-people-affected-by-canadian-mining-plea-for-a-human-rights-ombudsperson-for-extractive-industries/> [hereinafter, "CNCA, From Guatemala to Zambia"]; CNCA, *Talk is Not Enough*.

⁶³ CNCA, *Parliamentary Report Card*, <http://cnca-rcrce.ca/wp-content/uploads/2016/03/Parliamentary-Report-Card-Corporate-Accountability-for-Canadas-mining-oil-and-gas-sectors-sept-20151.pdf>.

⁶⁴ CNCA, *Talk is Not Enough*; Canadian Network on Corporate Accountability, *Executive Summary: Draft model legislation to create a human rights ombudsperson for the international extractive-sector in Canada* (Mar. 2016), <http://cnca-rcrce.ca/wp-content/uploads/2016/03/Executive-Summary-Global-Leadership-in-Business-and-Human-Rights-Draft-Extractive-Sector-Ombudsperson-Model-Legislation-11022016.pdf> [hereinafter "CNCA, Draft model legislation"].

⁶⁵ *Recherches Internationales Québec v. Cambior Inc.*, 1998 CarswellQue 4511 (Qc. Sup. Ct.); *Bil'in (Village Council) v. Green Park International Inc.*, 2009 Q.C.C.S. 4151, *aff'd*, 2010 Q.C.C.A. 1455, *leave to appeal dismissed* [2010] S.C.C.A. No. 364; *Piedra v. Copper Mesa Mining Corp.*, 2010 O.N.S.C. 2421, *aff'd*, 2011 O.N.C.A. 191; *Association Canadienne Contre L'impunité v. Anvil Mining Ltd.*, 2011 Q.C.C.S. 1966, *rev'd*, 2012 Q.C.C.A. 117, *leave to appeal dismissed* [2012] S.C.C.A. No. 128; *Choc v. Hudbay Minerals Inc.*, 2013 O.N.S.C. 1414; *Garcia v. Tahoe Resources Inc.*, 2017 B.C.C.A. 39; *Araya v. Nevsun Resources Ltd.*, 2016 B.C.S.C. 1856.

⁶⁶ *Choc v. Hudbay*, *ibid.* (The three related cases are proceeding together); *Araya v. Nevsun Resources Ltd.*, *ibid.* (the British Columbia Supreme Court rejected Nevsun's motion to dismiss the action based on *forum non conveniens* and the act of state doctrine, among other motions; Nevsun has appealed); *Garcia v. Tahoe Resources Inc.*, *ibid.*; *Tahoe Resources Inc. v. Adolfo Agustin Garcia, et al.*, 2017 CanLII 35114 (S.C.C.) (the Supreme Court of Canada denied Tahoe Resources' application for leave to appeal).

⁶⁷ *Chevron Corp. v. Yaiguaje*, 2015 S.C.C. 42 (an action on behalf of indigenous Ecuadorian villagers to enforce a USD \$9.51 billion Ecuadorean judgment finding Chevron liable for environmental damage and health tort claims); *Yaiguaje v. Chevron Corp.*, 2017 O.N.S.C. 135; *Yaiguaje v. Chevron Corp.*, 2017 O.N.S.C. 2251.

early stages without consideration of the substance of the claims,⁶⁸ demonstrating the challenges claimants face in accessing Canadian courts.

Another hurdle that victims face in Canadian courts is litigation costs and court fees. Litigation can be very costly, and, subject to the discretion of the court, Canadian courts generally impose costs – including attorneys’ fees – on the losing party.⁶⁹ The possibility that victims will have to pay the companies’ legal fees is a huge deterrent. In addition, most provinces can require out-of-province litigants to pay a bond to the court before proceeding with litigation.⁷⁰ Bonds are ordered at the court’s discretion, to ensure there are assets to pay the defendants’ costs if the lawsuit is unsuccessful. While a court should use its discretion and not require an impecunious litigant to pay a bond, the costs regime can still act as a deterrent.⁷¹ Moreover, finding legal representation may be a challenge as legal aid is unavailable.⁷²

To avoid some of these barriers to access to judicial remedy, Canada can implement legislation to ensure that Canadian courts are considered the appropriate venue for cases brought against Canadian corporations for harm that occurred in connection with their foreign operations. Canada should follow the EU model, where Article 4 of the Brussels Regulation provides that corporations domiciled in a Member State can be sued in that state⁷³; this bars consideration of *forum non conveniens*.⁷⁴

Moreover, Canada must investigate and prosecute actors who are involved in violence, including violence against indigenous peoples and ethnic communities. Canada can prosecute corporations under the Crimes Against Humanity and War Crimes Act,⁷⁵ or the Criminal Code.

C. The numerous allegations against Canadian corporations for involvement in conduct that discriminates against indigenous peoples and ethnic communities

As indicated above, the Committee has previously expressed concern that the operations of Canadian corporations outside of Canada are violating the Convention by impairing the rights, including the right to land, health, environment and way of life, of indigenous peoples living around the natural resource project.

⁶⁸ See *Recherches Internationales Québec v. Cambior Inc.*; *Bil'in (Village Council) v. Green Park International Inc.*; *Piedra v. Copper Mesa Mining Corp.*; *Association Canadienne Contre L'impunité v. Anvil Mining Ltd.*

⁶⁹ H. Patrick Glenn, Professor of Law, McGill University, *Costs and Fees in Common Law Canada and Quebec*, p.1, http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf; See, e.g., British Columbia Court Rules Act, B.C. Reg. 168/2009, s.14.1(9) (Can.); Ontario Courts of Justice Act, R.S.O. 1990, c. 43, s.131 (Can.); Ontario Rules of Civil Procedure, O. Reg. 575/07, s.57.01 (Can.).

⁷⁰ All Canadian jurisdictions have express rules except British Columbia and the Yukon. See, e.g., Ontario Rules of Civil Procedure, O. Reg. 575/07, s.56.01 (Can.).

⁷¹ See *Lysko v. Maxbeau Company et al.*, 2010 O.N.S.C. 6523 at ¶ 6.

⁷² Legal aid is not available for civil actions. See, e.g., Legal Aid Ontario, *Legal Aid Ontario can Help*, http://www.legalaid.on.ca/en/publications/brochures/LAO_canhelp_handout.pdf?t=1475261127575; Legal Services Society, *Legal Representation by a Lawyer*, http://www.lss.bc.ca/legal_aid/legalRepresentation.php.

⁷³ Council Regulation 1215/2012, art. 4, 2012 O.J. (L 351) p.1, (EU).

⁷⁴ See *Okpabi v. Royal Dutch Shell Plc*, [2017] E.W.H.C. 89 (TCC), pp. 23-26.

⁷⁵ Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24; Interpretation Act, R.S.C., 1985, c. I21, s.35(1) (the definition of persons includes corporations).

Reports that the operations of Canadian extractive corporations outside Canada are associated with such violations, including violations of the rights of indigenous peoples living in and around projects, are frequent and continuous. In line with the Committee's previous concerns, below are case studies which provide examples of allegations of such violations, including:⁷⁶

- Environmental damage, health issues, and forced displacement, in violation of articles 5(d)(v) and 5(e)(iii)(iv) of the Convention;⁷⁷
- Inadequate consultations, which fail to obtain the free, prior and informed consent of indigenous peoples, in violation of article 5(c) of the Convention;⁷⁸
- Violence against and criminal persecution of human rights of defenders, in violation of articles 5(b) and 5(d)(ix) of the Convention;⁷⁹ and
- Violations of the right to freedom of opinion and expression, and freedom of peaceful assembly and association, in violation of article 5(d).⁸⁰

The Committee has affirmed that States parties have a duty to respect indigenous peoples' distinct culture and way of life,⁸¹ to provide indigenous peoples with sustainable economic and social development compatible with their culture,⁸² and to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."⁸³ The Committee has also recognized that environmental harm can violate the rights

⁷⁶ The rights protected in Article 5 are also protected in the United Nations Declaration on the Rights of Indigenous Peoples. See U.N. General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, arts. 3, 4, 5, 10, 24(2), 26, 32, A/RES/61/295 (Oct. 2, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁷⁷ ICERD, at art. 5(d)(v), 5(e)(iii)(iv). Though the Convention does not explicitly include a provision recognizing the right to a healthy environment, the Committee has recognized that the right to a healthy environment is implicit in other provisions, including the right to health and the right to own property. In the context of natural resource extraction, the Committee has specifically recognized that resulting pollution can constitute a threat to indigenous peoples' environment. See Office of the U.N. High Commissioner for Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Individual Report on the International Convention on the Elimination of All Forms of Racial Discrimination*, ¶¶ 45, 43 (Dec. 2013), <http://www.ohchr.org/Documents/Issues/Environment/Mappingreport/3.CERD-25-Feb.docx> [hereinafter, "Mapping Human Rights Obligations"].

⁷⁸ ICERD, at art. 5(c). The Committee has found that free, prior and informed consent builds upon Article 5(c). See Thornberry at 332. See also U.N. Cmte. on the Elimination of Racial Discrimination (CERD), *General Recommendation no. 23, Rights of indigenous peoples (Fifty-first session, 1997)*, annex V at 122, U.N. Doc. A/52/18 (1997) [hereinafter, "GR 23"]. (This Recommendation calls on States parties to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."). The Committee has also affirmed that the property rights of indigenous peoples should be the primary consideration for states when considering approving natural resources projects on indigenous territory, and support should be withdrawn for projects that threaten the traditional lifestyle of indigenous peoples. *Mapping Human Rights Obligations*, at ¶¶ 42, 47. In addition, the Committee has urged States to consult with indigenous peoples at each step of the process, as an ongoing obligation. *Id.* at ¶28.

⁷⁹ ICERD, at arts. 5(b), 5(d)(ix).

⁸⁰ ICERD, at art. 5(d).

⁸¹ GR 23, at 4(a).

⁸² *Ibid.*, at 4(c).

⁸³ *Ibid.*, at 5.

of indigenous peoples. For instance, it can impair their right to health and the rights of indigenous peoples to own, develop, control and use their land and resources.⁸⁴

The cases include allegations which could amount to direct and indirect discrimination. Many of the cases are examples of discrimination in effect. As the Committee on Economic, Cultural and Social Rights recently stated in their discussion of the obligations of non-discrimination in their General Recommendation 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, indigenous peoples are often “disproportionately affected by the adverse impact of business activities . . . particularly in relation to the development, utilization or exploitation of lands and natural resources.”⁸⁵

As the Special Rapporteur on the rights of indigenous peoples has recognized, “indigenous peoples are among the most marginalized and discriminated against groups in the world.”⁸⁶ In the context of extractive projects, “much” of the earth’s remaining natural resources are located on the lands of indigenous peoples, who in turn increasingly face the harms associated with extraction projects.⁸⁷ Moreover, in setting out the norms and jurisprudence of the Inter-American system relating to indigenous peoples’ rights over natural resource, the Inter-American Commission on Human Rights explained that States have a heightened positive duty to protect, favor, and improve the exercise of human rights by indigenous peoples because of the “greater vulnerability of these populations [and] their historical conditions of marginalization and discrimination,” recognizing “the greater impact on them of human rights violations.”⁸⁸

Moreover, the cases highlighted also involve situations of discrimination on multiple grounds, such as sex discrimination in addition to racial discrimination.⁸⁹

a. North Mara gold mine in Tanzania

The North Mara underground and open pit gold mine, located in the district of Tarime in the Mara region of Tanzania, is operated by the African subsidiary of the Barrick Gold majority-owned (63%), Acacia Mining.⁹⁰ The mine has long been associated with reports of killings and severe violence, including sexual violence, against the indigenous Kurya people,⁹¹ who live in rural

⁸⁴ Mapping Human Rights Obligations, at ¶¶ 16, 18, 21, 43, 51, 55.

⁸⁵ U.N. Cmte. on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/24, ¶ 8 (June 23, 2017).

⁸⁶ U.N. Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples*, U.N. Doc. A/HRC/33/42, ¶ 19 (Aug. 11, 2016), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_42_E.docx.

⁸⁷ U.N. Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, ¶ 1, U.N. Doc. A/HRC/24/41/Add.3 (July 1, 2013), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf.

⁸⁸ Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights Over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, ¶ 49, OEA/Ser.L/V/II. Doc. 56/09, (Dec.30, 2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>.

⁸⁹ CERD GR 32, at ¶ 7.

⁹⁰ Acacia Mining, *2015 Annual Report*, p. 104 (2015), <http://www.acaciamining.com/operations/operating-mines/north-mara/overview.aspx#>.

⁹¹ MiningWatch Canada and RAID, *Violence Ongoing at Barrick Mine in Tanzania: MiningWatch Canada and RAID (UK) Complete Human Rights Assessment* (Aug. 5, 2014), <http://miningwatch.ca/news/2014/8/5/violence-ongoing-barrick->

agricultural and herding villages surrounding the mine. There are also reports of environmental and health impacts that disproportionately harm the Kurya people.

For the past four years, MiningWatch Canada and UK-based Rights and Accountability in Development (RAID)⁹² have documented alleged human rights violations associated with the mine, including killings and injuries of indigenous peoples from surrounding areas by mine security personnel and police, who have a Memorandum of Understanding with the mine to provide security for the mine.⁹³ The mine-related killings garnered the attention of the Tanzanian government and, in 2016, the Tanzanian Ministry of Energy and Minerals set up an official inquiry into allegation of mine-related human rights violations.⁹⁴ The Committee of Inquiry's report states that it received claims that 65 people have been killed and 270 injured by police guarding the mine.⁹⁵ Opposition members of the Committee and human rights groups believe that this is far too low; they estimate that there have been 300 mine-related deaths since 1999.⁹⁶ And the government inquiry did not cover killings and injuries by private mine security, which have also been reported by NGOs.⁹⁷ Documentation from MiningWatch Canada and RAID also shows that the violence continued in recent years. For example, as of 2016, MiningWatch Canada and RAID have documented 29 recent killings and 69 injuries, most of which occurred since

mine-tanzania-miningwatch-canada-and-raid-uk-complete-human [hereinafter "MiningWatch Canada and RAID, Violence Ongoing at Barrick Mine in Tanzania"]; MiningWatch Canada and RAID, *Broken Bones and Broken Promises: Barrick Gold Fails to Address Ongoing Violence at Tanzania Mine* (Nov. 17, 2015), <http://miningwatch.ca/news/2015/11/17/broken-bones-and-broken-promises-barrick-gold-fails-address-ongoing-violence>; Mining Watch Canada and RAID, *Tanzanian Government Investigation Receives Hundreds of Reports of Violence and Deaths at North Mara Gold Mine* (Sept. 22, 2016), <http://miningwatch.ca/news/2016/9/22/tanzanian-government-investigation-receives-hundreds-reports-violence-and-deaths> [hereinafter, the three press releases will be referred to collectively as "MiningWatch and RAID press releases 2014, 2015, 2016"].

⁹² Between 2014 and 2016 MiningWatch Canada and RAID jointly carried out yearly human rights assessments at the North Mara Gold Mine Ltd. See MiningWatch and RAID press releases 2014, 2015, 2016; MiningWatch Canada and RAID, *Background Brief: Adding Insult to Injury at the North Mara Gold Mine, Tanzania* (Sept. 2016) http://miningwatch.ca/sites/default/files/adding_insult_to_injury_north_mara_0.pdf [hereinafter, "MiningWatch Canada and RAID, Background Brief"]. In 2017 MiningWatch Canada separately carried out another field assessment. See MiningWatch Canada, *Barrick Gold Tanzania Operations Accused of Financial and Human Rights Abuses – Executives Once Again Fail to Address Human Rights Abuses* (July 5, 2017), <https://miningwatch.ca/news/2017/7/5/barrick-gold-tanzania-operations-accused-financial-and-human-rights-abuses-executives>.

⁹³ MiningWatch Canada and RAID, *Violence Ongoing at Barrick Mine in Tanzania. See Memorandum of Understanding Between RPC (Tarime-Rorya Special Zone) and Successors Tanzania Police Force, Community Policing Unit (PHQ) and North Mara Gold Mine Limited* (July 8, 2010), http://miningwatch.ca/sites/default/files/nmgml-tarime_police_mou_2010.pdf, for a copy of the 2010 agreement. The MOU has since been updated but the arrangement remains in force.

⁹⁴ The Committee had 27 members: 19 were government, 4 company representatives, 4 from the Tarime Rural constituency, and one NGO, Search For Common Ground (which is funded by the mine). See MiningWatch Canada and RAID, *Background Brief*, at fn. 13.

⁹⁵ MiningWatch and RAID press releases 2014, 2015, 2016; MiningWatch Canada and RAID, *Background Brief*, at p. 2.

⁹⁶ Rights and Accountability in Development, *Acacia Mining's Troubles in Tanzania Run Deeper than Tax* (July 6, 2017), <http://www.raid-uk.org/blog/acacia-mining%E2%80%99s-troubles-tanzania-run-deeper-tax> [hereinafter "RAID, Acacia Mining's Troubles in Tanzania"].

⁹⁷ *Ibid.*; MiningWatch Canada, *Anger Boils Over at North Mara Mine – Barrick/Acacia Leave Human Rights Abuses Unaddressed*, p.9 (July 2017), <https://miningwatch.ca/sites/default/files/2017fieldreportfinal-angerboilsoveratnorthmaramine.pdf> [hereinafter "MiningWatch Canada, Anger Boils Over at North Mara Mine"].

2014.⁹⁸ On its recent visit in June 2017, MiningWatch Canada documented reports of four individuals drowning in the Nyabigena pit, which is no longer being mined. The pit has filled with water, and the walls that used to surround the pit were removed. There are no barriers or signs warning villagers of the dangers.⁹⁹

MiningWatch Canada and RAID have also documented significant allegations of gender-based violence, such as rape, gang rape and severe beatings of indigenous women by mine security and police.¹⁰⁰ Almost all of the victims of mine-related violence are living in entrenched poverty, but rape survivors report increased poverty due to rape-related injuries that impair their ability to work and provide for their families, and require ongoing medical expenses. Additionally, in some cases, married women who were raped were then abandoned by their husbands.¹⁰¹

The Kurya people have experienced disproportionate adverse socio-economic impacts from the mine. For instance, reports show that Kurya people have lost access to land needed for food security and livelihood, and have lost the economic and social contributions of male family members who have allegedly been killed or badly beaten and maimed by mine security personnel and policemen guarding the mine. There are recent reports that food security is a concern in villages around the mine.¹⁰² Due to loss of land from the mine, villagers have scavenged for gold from waste rock to make an income, but a reported decrease in gold in the pit is impairing the ability of villagers to earn an income.¹⁰³

Additionally, there are reports of significant environmental damage as a result of the mine operations, which again disproportionately affects indigenous people. Studies have found that the water around the mine is toxic, and the groundwater has element concentrations that are higher than levels accepted by the Tanzanian drinking water guidelines, the World Health Organization, and the United States Environmental Protection Agency drinking water guidelines.¹⁰⁴ Moreover, in May 2009, there was a spill from a mine waste storage facility into the Tigithe River, which reportedly killed twenty people.¹⁰⁵

⁹⁸ MiningWatch Canada and RAID, Background Brief, at pp. 2-3.

⁹⁹ MiningWatch Canada, Anger Boils Over at North Mara Mine, at p. 6.

¹⁰⁰ Nine of the twenty-one women interviewed were allegedly raped or gang raped by police or mine security personnel, and the other women reported severe beatings by mine private security and police and/or the loss of the house breadwinner (husband or son) due to alleged mine-related violence. See MiningWatch Canada and RAID, Background Brief, at pp. 2-3.

¹⁰¹ *Ibid.* at p. 6.

¹⁰² MiningWatch Canada, Anger Boils Over at North Mara Mine, at p. 7.

¹⁰³ *Ibid.*, at p. 8.

¹⁰⁴ Pasiencie Mlowe and Onesmo Olengurumwa, *Killings Around North Mara Gold Mine: The Human Cost of Gold in Tanzania – The Shootings of the Five*, Legal and Human Rights Centre (May 2011), http://www.academia.edu/7827818/killings_around_north_mara_gold_mine_the_human_cost_of_gold_in_tanzania-the_shootings_of_the_five; Mwemezi Johaiven Rwiza, Kyoung-Woong Kim and Sang-don Kim, *Geochemical Distribution of Trace Elements in Groundwater from the North Mara Large-Scale Gold Mining Area of Tanzania*, Groundwater Monitoring & Remediation, vol. 36(2), p. 83 (2016), doi: 10.1111/gwmr.12152; *Impact of Mining and Farming activities on Water and Sediment Quality of the Mara river basin, Tanzania*, Research Journal of Chemical Sciences, vol. 3(7), pp. 15-24 (July 2013).

¹⁰⁵ Mlowe and Olengurumwa.

Victims have not received effective remedies for these harms. In 2013, the North Mara mine created a non-judicial grievance mechanism to respond to claims by victims of excessive use of force by mine security and police.¹⁰⁶ Only a small number of victims have received any form of remedy from the grievance mechanism, and those that have received a remedy expressed dissatisfaction in interviews.¹⁰⁷ In particular, victims expressed concern that the value of the remedy was inadequate to address their needs. For example, most of the rape victims interviewed by MiningWatch Canada received less than CAD \$8000 for the consequences of the rapes they had endured. Women also reported that they were promised new homes and school fees for their children, but this promise was not fulfilled, or only partially fulfilled.¹⁰⁸ Men similarly reported concerns that the agreements did not reflect what they were promised orally, and expressed resentment that the two-year sponsored employment that formed part of their packages were jobs with little opportunity for skilled development and continued employment.¹⁰⁹ Additional documented concerns with the non-judicial process include the lack of independence of the mechanism from the companies involved, lack of independent legal advice, and the requirement that victims sign a waiver, waiving their right to file civil suits against the North Mara Gold Mine, Acacia and Barrick Gold.¹¹⁰

The Canadian government is aware of these abuses, but has yet to take any action. MiningWatch Canada raised allegations of environmental degradation and deaths at North Mara in testimony before the Standing Committee on Foreign Affairs and International Trade in 2009, and the allegations of killings by mine security at the North Mara mine has received coverage in Canadian national media.¹¹¹ Despite these widespread allegations, the Coalition is not aware of any governmental effort to investigate or regulate the company's actions.

¹⁰⁶ MiningWatch Canada and RAID, *Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms*, Third Annual UN Forum on Business and Human Rights Palais des Nations, p. 4 (Dec. 1, 2014), http://miningwatch.ca/sites/default/files/privatized_remedy_and_human_rights-un_forum-2014-12-01.pdf [hereinafter, "Mining Watch Canada & RAID, Privatized Remedy and Human Rights"]. The mechanism was created only after a law suit was filed against African Barrick Gold (now Acacia Mining) and North Mara Gold Mine Ltd. in the UK on behalf of victims of excessive use of force by mine security and police guarding the mine and was used to draw victims away from the lawsuit.

¹⁰⁷ MiningWatch Canada and RAID, Background Brief, at pp. 5-9; MiningWatch Canada & RAID, Privatized Remedy and Human Rights, at p. 7.

¹⁰⁸ MiningWatch Canada and RAID interviews 2014, 2015, 2016. Moreover, women reported that they did not receive copies of their remedy agreements until they staged a protest at the grievance mechanism. See MiningWatch and RAID press releases 2014, 2015, 2016.

¹⁰⁹ MiningWatch Canada and RAID, Background Brief, at p. 5.

¹¹⁰ See MiningWatch Canada and RAID, Privatized Remedy and Human Rights, at pp. 6-10; MiningWatch Canada and RAID, Background Brief, at pp. 5-9.

¹¹¹ Aaron Regent, *Barrick Gold and North Mara: the search for common ground*, Globe and Mail (June 22, 2011), <http://www.theglobeandmail.com/opinion/barrick-gold-and-north-mara-the-search-for-common-ground/article4403311/>; Geoffrey York, *Barrick's Tanzanian project tests ethical mining policies*, Report on Business Magazine (updated Sept. 6, 2012); Geoffrey York, *Deadly clashes continue at African Barrick gold mine*, Globe and Mail (Aug. 26, 2014), <http://www.theglobeandmail.com/report-on-business/international-business/deadly-clashes-continue-at-african-barrick-gold-mine/article20216197/>; Geoffrey York, *Police killed 65, injured 270 at Barrick mine in Tanzania, inquiry hears*, Globe and Mail (Sept. 22, 2016), <http://www.theglobeandmail.com/report-on-business/international-business/african-and-mideast-business/police-killed-65-injured-270-at-tanzanian-mine-inquiry-hears/article32013998/>.

b. *Porgera Joint Venture Gold Mine in Papua New Guinea*

The Porgera Joint Venture (PJV) gold mine is located in Porgera, Papua New Guinea. The mine was majority owned and operated by two Canadian companies: Placer Dome, from 1989-2006, and Barrick Gold, from 2006-2015.¹¹² Barrick has since reduced its ownership stake but continues to hold a 47.5% share in the PJV.¹¹³ Porgera is home to thousands of indigenous people including the Ipili peoples who live near the mine.¹¹⁴ As a result of the development of the mine, the Ipili have experienced systematic human rights abuses including sexual and other physical violence against men and women by mine security guards and police working for the mine,¹¹⁵ forced displacement, destruction of homes, extrajudicial killings and severe environmental degradation.¹¹⁶

Porgera is a remote community in the highlands of PNG. Prior to the mine, the community relied on subsistence farming, animal husbandry and alluvial gold mining.¹¹⁷ The development of the mine changed the landscape, required relocation, and increased the population causing

¹¹² In 2006, Barrick acquired Placer Dome, and its 95% share of PJV, which is held through its local subsidiary Barrick (Niugini) Ltd. In 2015 Barrick sold 50% of its ownership of Barrick (Niugini) Ltd. to a Chinese company Zijin Mining Group. Barrick Gold Corp., *Barrick Completes Acquisition of Placer Dome* (Mar. 15, 2006), <http://www.barrick.com/investors/news/news-details/2006/BarrickCompletesAcquisitionofPlacerDome1520061200705/default.aspx>; Barrick Gold Corp., *Barrick Announces Strategic Partnership with Zijin Mining Group* (May 26, 2015), <http://www.barrick.com/investors/news/news-details/2015/Barrick-Announces-Strategic-Partnership-with-Zijin-Mining-Group/default.aspx>.

¹¹³ Barrick Gold Corp., *Barrick Announces Strategic Partnership*.

¹¹⁴ Susan Bonnell, "Social Change in the Porgera Valley," in *Dilemmas of Development: The social and economic Impact of the Porgera Gold Mine (1989-1994)*, pp. 22-23 (Colin Filer ed., 2012), <http://press.anu.edu.au/publications/dilemmas-development/download>; [hereinafter "Bonnell, Social Change in the Porgera Valley.]; Columbia Law School, *Human Rights Clinic Teams with Scientists to Investigate Conditions at Gold Mine in Papua New Guinea* (Feb. 2, 2015), http://www.law.columbia.edu/media_inquiries/news_events/2015/february2015/papua-new-guinea.

¹¹⁵ Human Rights Watch, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine*, pp. 21, 43-55, 73-81 (Feb. 1, 2011) [hereinafter, "Human Rights Watch, Gold's Costly Dividend"]; International Human Rights Clinic, Harvard Law School and Center for Human Rights and Global Justice, New York University School of Law, *Legal Brief before the Standing Committee on the Foreign Affairs and International Development House of Commons Regarding Bill C-300*, pp. 11-16 (2009), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Harvard-testimony-re-Porgera-Main.pdf> [hereinafter, "Legal Brief Re: Bill C-300"]; Harvard Law School, International Human Rights Clinic and Columbia Law School, Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned*, pp. 23-26 (Nov. 2015), <http://static1.squarespace.com/static/562e6123e4b016122951595f/t/565a12cde4b0060cdb69c6c6/1448743629669/Righting+Wrongs.pdf> [hereinafter, "Righting Wrongs"]; Porgera Alliance, *Landowners in Porgera Demand Urgent Resettlement* (Oct. 2011), <http://www.porgeraalliance.net/wp-content/uploads/2011/10/Urgent-Resettlement-Porgera-web.pdf> [hereinafter, "Landowners Demand Urgent Resettlement"].

¹¹⁶ See OECD Complaint; Porgera Landowners Association, Akali Tange Association, MiningWatch Canada, *Request for Review Submitted to the Canadian National Contact Point of the OECD Guidelines for Multinational Enterprises* (March 2), https://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf; Akali Tange Association, *The Shooting Fields of Porgera Joint Venture* (Apr. 2005), http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ATA_Case_Documentation.pdf; Landowners Demand Urgent Resettlement; *Gold's Costly Dividend*, at pp. 44-45, 55; Amnesty International, *Undermining Rights: Forced Evictions and Police Brutality Around the Porgera Gold Mine, Papua New Guinea* (Jan. 2010), <http://www.amnestyusa.org/sites/default/files/asa340012010eng.pdf>; Legal Brief Re: Bill C-300, at pp. 16-24.

¹¹⁷ Legal Brief Re: Bill C-300, at p. 5.

overcrowding.¹¹⁸ These changes and resulting environmental degradation (discussed further below) have diminished the indigenous communities' ability to grow food and engage in alluvial mining.¹¹⁹ With their means of livelihood jeopardized, villagers have resorted to searching for gold in the open pit or the mine's waste dumps, exposing themselves to chemicals in the mine waste and river and putting themselves at risk of being caught by mine security personnel, who have reportedly engaged in sexual violence, physical assaults and killings.¹²⁰ Because the mine physically divides the community, villagers sometimes have to cross the mine site to reach agricultural land, commercial areas, school or other villages, which also places them at risk of chemical exposure and altercations with security personnel.¹²¹

Local and international organizations have been documenting these abuses against the local indigenous population and fighting for accountability since at least 2005. Placer Dome admitted to eight killings by its security forces¹²²; in 2006, the PNG government initiated an investigation into the killings, but no report was publicly released.¹²³ In December 2010, Barrick Gold recognized the credibility of the sexual assault allegations and subsequently created a non-judicial Remedy Framework to compensate victims.¹²⁴ While it is significant that Barrick acknowledged the pattern of sexual assaults, independent assessments of the Framework reveal significant concerns, including lack of independent legal counsel and a requirement to waive important legal rights.¹²⁵ 253 women filed claims and 119 women accepted the remediation packages.¹²⁶ Initially, women received 15,000 PNG kina in cash (approximately CAD \$6,700),¹²⁷ counselling, medical

¹¹⁸ See Human Rights Watch, *Gold's Costly Dividend*, at p. 33; Legal Brief Re: Bill C-300, at pp. 5-6.

¹¹⁹ Bonnell, *Social Change in the Porgera Valley*, at pp. 53-54; Mark Ekepa, Porgera SML Landowners Association, Jethro Tulin, Akali Tange Association, Catherine Coumans, MiningWatch Canada, *Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises, Specific Instance Regarding: The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea*, pp. 5-6 (Mar. 1, 2011), http://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf. [hereinafter, "OECD Request for Review"].

¹²⁰ EarthRights International, *Factsheet: Abuse by Barrick Gold Corporation* (2014), https://www.earthrights.org/sites/default/files/documents/barrick_fact_sheet_-_earthrights_international_1.pdf; *Legal Brief Regarding Bill C-300*, at pp. 5-6, 11-16.

¹²¹ EarthRights International, *Factsheet: Abuse by Barrick Gold Corporation*.

¹²² MiningWatch Canada, *Papua New Guinea Conducts Flawed Investigation of Killings at Barrick Mine* (July 10, 2016), <http://miningwatch.ca/news/2006/7/10/papua-new-guinea-conducts-flawed-investigation-killings-barrick-mine>

¹²³ *Ibid.*; EarthRights International, *Factsheet: Abuse by Barrick Gold Corporation*.

¹²⁴ Barrick Gold Corp., *A Framework of Remediation Initiatives in Response to Violence Against Women in the Porgera Valley*, p. 2 (May 16, 2013), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>.

¹²⁵ See *Righting Wrongs*, at p. 5. See also EarthRights International, *Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and Training in Exchange for Waiving Legal Rights* (Nov. 14, 2014), <https://www.earthrights.org/media/survivors-rape-barrick-gold-security-guards-offered-business-grants-and-training-exchange>; Mining Watch Canada and RAID, *Privatized Remedy and Human Rights*.

¹²⁶ *Righting Wrongs*, at p. 29.

¹²⁷ CAD amounts based on historical currency conversion for December 1, 2014. This is the date Barrick Gold released a summary of the Framework and confirmed the value of packages. *XE Current and Historical Rate Tables*, XE, <http://www.xe.com/currencytables/?from=PGK&date=2014-12-> (last accessed July 20, 2017).

expenses, a one-time business training, and school fees for a few years.¹²⁸ Women subsequently received an additional 30,000 kina (approximately CAD \$13,800).¹²⁹

Human rights advocates have reported that many women believe that the value of compensation does not reflect the gravity of harm suffered, but felt pressure to accept these packages due to a combination of factors such as poverty, years of waiting, and barriers to justice.¹³⁰ In the words of one woman: “My only way was to say yes. If during that time I had money, I would have told Barrick to get lost. It’s peanuts, it [] doesn’t compensate my life.”¹³¹ Moreover, the women have publicly denounced the compensation packages as inadequate and have stated that they did not receive all that they were promised.¹³² Eleven women who refused to accept the Framework’s remediation package, and who had separate legal representation, reached a confidential settlement with Barrick.¹³³ The 119 women have demanded the same compensation package.¹³⁴

The Framework was a temporary mechanism limited to claims of sexual violence by PJV employees that occurred prior to December 1, 2010;¹³⁵ many victims have been left without a means to pursue a remedy. Victims of physical violence, shootings, or arbitrary detention were ineligible for the Framework, as were victims of sexual violence by Barrick contractors, and there are reports that women who were eligible missed out on participation in the remedy mechanism

¹²⁸ Righting Wrongs, at pp. 88-89.

¹²⁹ CAD amounts based on historical currency conversion for July 1, 2015. This is around the date of the top up. *XE Current and Historical Rate Tables*, XE, <http://www.xe.com/currencytables/?from=PGK&date=2014-12-> (last accessed July 20, 2017). The top up is believed to be a result of advocacy following a confidential external settlement with 11 individuals that is believed to have provided greater compensation. Righting Wrongs, at 88-89.

¹³⁰ *Ibid.* at pp. 92-94; Hilary Beaumont, *Raped by Canadian Gold Mine Guards these Women are Looking for Justice*, Vice News (Nov. 19, 2015), <https://news.vice.com/article/raped-by-canadian-gold-mine-guards-these-women-are-looking-for-justice>; EarthRights International, *Survivors of Rape by Barrick Gold Security Guards Offered “Business Grants” and Training in Exchange for Waiving Legal Rights*.

¹³¹ Righting Wrongs, at p. 92.

¹³² Letter from 119 Porgera Remedy Framework Association (PRFA) Rape Victims to United Nations Working Group on Business and Human Rights (Nov. 4, 2016), http://miningwatch.ca/sites/default/files/porgera_women_to_unwg_2016_no_names_0.pdf; MiningWatch Canada, Indigenous women from Papua New Guinea appeal to government of Canada; *The Dark Side of Canadian Mining*, Vice News (2017), https://video.vice.com/en_ca/embed/5914c8dd259c687c660e967a.

¹³³ EarthRights International, *Survivors who alleged rape and killing at Papua New Guinea Mine Pleased with Barrick Gold Settlement* (Apr. 3, 2015), <https://www.earthrights.org/media/survivors-who-alleged-rape-and-killing-papua-new-guinea-mine-pleased-barrick-gold-settlement>; Rick Feneley, *200 girls and women raped: now 11 of them win better compensation from the world’s biggest gold miner*, The Sydney Morning Herald (Apr. 4, 2015), <http://www.smh.com.au/world/200-girls-and-women-raped-now-11-of-them-win-better-compensation-from-the-worlds-biggest-gold-miner-20150325-1m7ibq.html>.

¹³⁴ Letter from 119 Porgera Remedy Framework Association (PFRA) Rape Victims.

¹³⁵ According to Barrick, claims after December 2010 would be considered on a case by case basis. Barrick Gold Corp., *The Porgera Joint Venture Remedy Framework*, p. 6 n.7 (Dec. 1, 2014), <http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>.

for a variety of reasons.¹³⁶ Moreover, reports show that abuses are ongoing.¹³⁷ For example, in March 2017 mobile police reportedly burned down Wingima village, a village near the mine, for the third time since 2009, and allegedly physically and sexually assaulted local residents during the raid.¹³⁸ Hundreds of victims – of sexual and physical violence, shootings, and environmental harm – have filed claims with the permanent PJV grievance mechanism, but there is no publicly available information on how it works or the remedies it offers.¹³⁹

The local Ipili communities have also been disproportionately harmed by the environmental degradation associated with the mine, and the changed living conditions.¹⁴⁰ Approximately six million tons of “liquid tailings” – composed of rock, heavy metals, and trace elements of life-threatening chemicals, such as cyanide – go into the Porgera River every year.¹⁴¹ This “red river” of tailings pollutes the indigenous communities’ water sources.¹⁴² The mine has also created dumps

¹³⁶ MiningWatch Canada, Indigenous women from Papua New Guinea appeal to government of Canada; Righting Wrongs, at p. 5 (“[A]ccurate information about the remedy mechanism did not reach as many potential claimants as it should have, and insufficient steps were taken to overcome this problem”); Catherine Coumans, *Do no harm? Mining industry responses to the responsibility to respect human rights*, 38:2 Canadian Journal of Development Studies/Revue canadienne d’études du développement, 272, p. 282 (2017).

¹³⁷ Hilary Beaumont, *Three Men Claim They Were Forced to Perform Sex Acts on Each Other at Canadian-Owned Mine*, Vice News (Dec. 3, 2015), <https://news.vice.com/article/three-men-claim-they-were-forced-to-perform-sex-acts-on-each-other-at-canadian-owned-mine>; MiningWatch Canada, *Village Houses Burnt Down – Again – at Barrick Mine in Papua New Guinea; Violence Against Local Men and Women Continues Unabated* (Mar. 28, 2017), <http://miningwatch.ca/news/2017/3/28/village-houses-burnt-down-again-barrick-mine-papua-new-guinea-violence-against-local>.

¹³⁸ Papua New Guinea Mine Watch, *Allegations of Human Rights Abuses at the Porgera Mine – Village Burning, Forced Eviction, Assault, Rape* (May 5, 2017), <https://ramumine.wordpress.com/2017/05/05/20527/>; Jo O’Brien, *Claims of human rights abuses near a PNG goldmine*, Dateline Pacific (Apr. 7, 2017), <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201839477/claims-of-human-rights-abuses-near-a-png-goldmine>; See also Amnesty International, *Undermining Rights: Forced Evictions and Police Brutality Around the Porgera Gold Mine, Papua New Guinea* (Jan. 2010), <http://www.amnestyusa.org/sites/default/files/asa340012010eng.pdf> [hereinafter, “AI Undermining Rights”]; Amnesty International, *Papua New Guinea: Police Set Hundreds of Homes Ablaze near Porgera Gold Mine* (June 2014), <https://www.amnesty.ca/news/news-releases/papua-new-guinea-police-set-hundreds-of-homes-ablaze-near-porgera-gold-mine> (documenting earlier instances of police burning down this village).

¹³⁹ MiningWatch Canada, *Barrick Once Again Ignores Human Rights Victims Peaceful Protest Planned at Porgera Mine in Papua New Guinea* (June 23, 2016), <http://miningwatch.ca/news/2016/6/23/barrick-once-again-ignores-human-rights-victims-peaceful-protest-planned-porgera-mine>; Letter from Akali Tange Association to Barrick Niugini Limited Re: Akali Tange Association Peaceful Protest March to Petition Barrick Niugini Limited for BNL to Respond to PJV Grievance Mechanism Department’s Grievance Acknowledgment No: 3936 (June 17, 2016), <https://business-humanrights.org/en/papua-new-guinea-local-group-seeks-response-from-barrick%E2%80%99s-subsidiary-to-grievances-brought-by-victims-of-violence-by-company%E2%80%99s-security-personnel-barrick-responds>.

¹⁴⁰ See OECD Request for Review, at p. 26 (“In 2008, following a three-year-long investigation, the Norwegian Government Pension Fund announced that it had divested from roughly CAN\$230 million worth of shares in Barrick as a result of the riverine tailings disposal at the Porgera Mine.”).

¹⁴¹ Gold’s Costly Dividend, at p. 73.

¹⁴² In addition to mercury, the tailings also contain high concentrations of arsenic, cadmium, copper, lead, zinc, as well as milling chemicals, including cyanide. *Ibid.* at pp. 32, 73-74; Council on Ethics: The Government Pension Fund—Global, *Recommendation of 14 August 2008*, p. 11 (Aug. 14, 2008), <https://www.regjeringen.no/contentassets/fac9ec5f43a4750a7fe4aaa86520a9f/recommendation-barrick-final.pdf>; Columbia Law School, *Columbia University Team Investigates Sexual Assault and Right to Water in Papua New Guinea*

of waste rock that have sprawled and advanced down the mountainside, burying villages, huge tracts of farmland and forest and anything in their path.¹⁴³ Moreover, due to the overpopulation, communities around the mine are “living in overcrowded, unsanitary and potentially dangerous conditions, and have limited available land for family subsistence.”¹⁴⁴

The Canadian government is well aware of the allegations of egregious human rights violations associated with the PJV mine. In 2011, local Porgeran groups filed a complaint with the Canadian NCP over a range of issues, including sexual and physical violence by security forces against Ipili men and women, burning of homes, and environmental degradation, but the case closed without a successful resolution.¹⁴⁵ In 2009, groups testified about the allegations before the Standing Committee on Foreign Affairs and International Development,¹⁴⁶ and the 2011 NCP complaint notes that the issues had been raised with numerous government agencies, as well as Members of Parliament and the Canadian ambassador to PNG.¹⁴⁷ Just recently, in April 2017, two Ipili women from Porgera travelled to Toronto to attend Barrick Gold’s annual general meeting, and also visited Ottawa and made a speech at the Parliamentary Press Gallery specifically asking the Government of Canada “to help.”¹⁴⁸ Yet, despite this knowledge, the Canadian government has not investigated the allegations, held the companies accountable, or facilitated access to a remedy for the victims.

c. Latin America

As of 2012, the largest number of Canadian mining corporation operations outside of Canada was in Latin America.¹⁴⁹ There are correspondingly high numbers of allegations of human rights violations associated with operations in Latin America.¹⁵⁰ The Working Group on Mining and Human Rights in Latin America – a coalition of Latin American NGOs – presented allegations of human rights violations associated with 22 cases of Canadian mining projects to the Inter-American Commission on Human Rights. The documented harms include pollution that

(Jan. 27, 2016), https://www.law.columbia.edu/media_inquiries/news_events/2016/january2016/hri-papua-new-guinea-2016.

¹⁴³ Gold’s Costly Dividend, at p. 32.

¹⁴⁴ *Ibid* at pp. 33-34.

¹⁴⁵ As a participant in the process, MiningWatch Canada notes the following concerns: costs to attend mediation in Sydney were not covered and the petitioners could only afford to attend two meetings; the list of action items coming out of the mediations did not cover all issues raised; of those items no progress was made on eight out of ten; the action taken on the remaining two items was considered inadequate.

¹⁴⁶ Parliament of Canada, Standing Committee on Foreign Affairs and International Development, 40th Parl., 2nd Sess. (Oct. 8, 2009), (testimony of Catherine Coumans), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4134547&Language=E&Mode=1&Parl=40&Ses=2#Int-2885336>.

¹⁴⁷ OECD Request for Review, at p. 13.

¹⁴⁸ MiningWatch Canada, Indigenous women from Papua New Guinea appeal to government of Canada.

¹⁴⁹ Working Group on Mining and Human Rights in Latin America, *The Impact of Canadian Mining in Latin America and Canada’s Responsibility: Executive Summary of the Report submitted to the Inter-American Commission of Human Rights*, p. 3, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf [hereinafter, “IACHR Submission”].

¹⁵⁰ See McGill Research Group Investigating Canadian Mining in Latin America, *Conflicts*, <http://micla.ca/conflicts/> (last visited July 7, 2017).

contaminates water resources and harms harvests and livestock,¹⁵¹ exposure to heavy metals with potentially serious harms to health,¹⁵² forced displacement,¹⁵³ and criminalization of social protests.¹⁵⁴

i. Marlin Mine

The Marlin Mine is an open-pit and underground gold and silver mine in the process of closure that spans the municipalities of San Miguel Ixtahuacán and Sipakapa in the department of San Marcos where members of the Maya Mam and Maya Sipakapense indigenous peoples live.¹⁵⁵ The Marlin mine has had a succession of Canadian owners: Montana Gold (1999-2000); Francisco Gold (2000-2002), after it merged with Montana Gold; Glamis Gold (2002-2006); and Goldcorp (2006- present).¹⁵⁶ Goldcorp owns the mine through its local subsidiary.¹⁵⁷ The history of the Marlin mine through the present day is fraught with documented human rights violations, including the failure to obtain free, prior, and informed consent from the local indigenous population; violence; and criminal persecution of human rights defenders; and damage to human and environmental health.

Local communities were vocally opposed to the Marlin Mine, but they were not properly consulted nor was their free, prior and informed consent obtained. In June 2005, communities in the municipality of Sipakapa undertook their own consultation process according to their own customs in which 98% of voters in eleven of thirteen communities expressed their opposition to any mining in their territory, refusing to consent to this project.¹⁵⁸ In the municipality of San Miguel Ixtahuacán, no adequate consultation took place. In fact, one community member recalls being first told that prospectors were looking for orchids, not silver and gold.¹⁵⁹ These reports are consistent with this Committee's previously expressed concern that mining licenses in Guatemala were granted without prior consultation and the informed consent of mining-affected communities.¹⁶⁰ Moreover, the lack of free, prior and informed consent has also been

¹⁵¹ IACHR Submission, at pp. 10-11.

¹⁵² *Ibid.* at pp. 12, 18.

¹⁵³ *Ibid.* at pp. 12-13.

¹⁵⁴ *Ibid.* at p. 14.

¹⁵⁵ McGill Research Group Investigating Canadian Mining in Latin America, *Marlin Mine, Guatemala*, <http://micla.ca/conflicts/marlin-mine-2/> (last visited June 27, 2017) [hereinafter, "MICLA: Marlin Mine"].

¹⁵⁶ Joris van de Sandt, Cordaid, *Mining Conflicts and Indigenous Peoples in Latin America*, pp. 11-12 (Sept. 22, 2009), <https://goldcorpoutofguatemala.files.wordpress.com/2010/07/cordaid-guatemala-brochure-uk-def1.pdf>; Goldcorp., *2006 Annual Report*, p.22, http://s1.q4cdn.com/038672619/files/doc_financial/2006_Goldcorp_AR_web.pdf.

¹⁵⁷ *Id.*; Goldcorp, *Marlin-Overview & Operating Highlights*, <http://www.goldcorp.com/English/Unrivalled-Assets/Mines-and-Projects/Latin-America/Operations/Marlin/Overview-and-Operating-Highlights/default.aspx> (last visited June 27, 2017).

¹⁵⁸ Mines and Communities, *The People of Sipacapa Reject Mining Activities in their Territor* (June 21, 2005), <http://www.minesandcommunities.org/article.php?a=1066>.

¹⁵⁹ Amanda Kistler, *The Real Cost of Gold: Undermining Human Rights in Guatemala*, Center for International Environmental Law (Feb. 25, 2011), <http://www.ciel.org/the-real-cost-of-gold-undermining-human-rights-in-guatemala/>.

¹⁶⁰ U.N. Cmte. on the Elimination of Racial Discrimination, *Concluding Observations: Guatemala*, ¶ 19, U.N. Doc. CERD/C/GTM/CO/11 (May 15, 2006), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FGTM%2FCO%2

subsequently criticized by the ILO Committee of Experts and the UN Special Rapporteur on the Rights of Indigenous Peoples.¹⁶¹

Reports show that strong indigenous community opposition to the mine has been met with retaliation, criminalization of protesters and opposition voices and violence.¹⁶² There are gruesome reports of violence against individuals opposing the mine. For example, in 2007, opponents of the mine reported a raid, the disappearance of two people, and the beheading of an activist, none of which was investigated further.¹⁶³ In 2009, a community member died after reportedly being doused in gasoline and lit on fire by men who asked why he was “against mining” and “against the company.”¹⁶⁴ In July 2010, local resident Diodora Hernández Cinto was reportedly shot by two men with known connections to the mine, causing her to lose an eye as a result.¹⁶⁵

There are also reports of criminal persecution of human rights defenders. For example, in 2008, Goldcorp brought a criminal complaint against local resident Gregoria Crisanta Pérez, after she short-circuited a cable that provided power to the mine because it had been illegally installed on her property and her complaints to have it removed went ignored for six months. The prosecutor and the company also brought complaints against Crisanta and seven other women when they protested against company workers who, accompanied by police, sought to restore power to the mine. Arrest warrants for these women remained in effect for four years, causing Crisanta and the other women ongoing stress and anxiety, as well as tremendous stigmatization within their community. After a year-long drive undertaken by the women’s organization Movimiento

F11&Lang=en; U.N. Cmte. on the Elimination of Racial Discrimination, *Concluding Observations: Guatemala*, ¶ 11, U.N. Doc. CERD/C/GTM/CO/12-13 (May 19, 2010), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/GTM/CO/12-13&Lang=En.

¹⁶¹ International Labour Office, *Report of the Committee of Experts on the Application of Conventions and Recommendations at the 98th Session*, p. 680 (2009), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103484.pdf; U.N. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, James Anaya*, appendix, ¶ 30, U.N. Doc. A/HRC/18/35/Add.3 (June 7, 2011), http://unsr.jamesanaya.org/docs/special/2011-special-guatemala-a-hrc-18-35-add3_en.pdf.

¹⁶² See IACHR, Report No. 20/14, at ¶ 16 (Apr. 3, 2014); Frente de Defensa San Miguelense (“FREDEMI”) & Center for International Environmental Law (CIEL), *Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises Concerning: The Operations of Goldcorp Inc. at the Marlin Mine in the Indigenous Community of San Miguel Ixtahuacán, Guatemala*, pp. 9-11 (Dec. 9, 2009), http://www.ciel.org/Publications/FREDEMI_SpecificInstanceComplaint_December%202009.pdf [hereinafter, “FREDEMI Complaint”]; Amnesty International, *Mining in Guatemala: Rights at Risk*, p. 11 (2014), <http://www.amnesty.ca/sites/amnesty/files/mining-in-guatemala-rights-at-risk-eng.pdf>; David Hill, *Welcome to Guatemala: gold mine protester beaten and burnt alive: Indigenous people speak out against the Marlin mine run by Canadian company Goldcorp*, *The Guardian* (Aug. 12, 2014), <https://www.theguardian.com/environment/andes-to-the-amazon/2014/aug/12/guatemala-gold-mine-protester-beaten-burnt-alive>.

¹⁶³ Anabella Sibrián and Chris Van Der Borgh, *La Criminalidad de los Derechos: La Resistencia a la Mina Marlin*, Oñati Socio-Legal Series [online], 4(1), 63-82 (2014), <http://ssrn.com/abstract=2374310>.

¹⁶⁴ JCAP, *The Canada Brand*, at p. 60.

¹⁶⁵ Anabella Sibrián and Chris Van Der Borgh, at p. 80.

Tzununijah, their arrest warrants were finally overturned on May 18, 2012. As part of the court decision, the company finally removed the post from Crisanta's property.¹⁶⁶

The Marlin Mine is also associated with significant environmental contamination, which raises concerns of violations of the right to health and the indigenous communities' ability to maintain their subsistence lifestyle. Studies have shown that dangerous heavy metals – such as arsenic – are present in rivers downstream of the mine's tailings dam.¹⁶⁷ Mercury, arsenic, copper and zinc were found in higher levels in the urine of humans downstream of the mine.¹⁶⁸ The indigenous communities around the mine filed a complaint with the IACHR in 2007, arguing that the mine is having grave consequences on the life, environment and property of their communities, highlighting contamination of their drinking and irrigation water.¹⁶⁹ In response to the complaint and a request for precautionary measures, the IACHR, out of concern for the environmental impacts of the mine, asked Guatemala to suspend operations and take certain precautions.¹⁷⁰ The IACHR later lifted the request to suspend operations, but it maintained precautionary measures “to ensure that all beneficiary members of the 18 Mayan communities have access to potable water appropriate for human consumption and household use, as well as for irrigation purposes,” and to take measures “to ensure that water resources [are] not contaminated by mining operations.”¹⁷¹ In 2014, the IACHR found the communities' complaint admissible, meaning that it will assess the merits of the complaint.¹⁷²

The Canadian government has not taken appropriate action to investigate the allegations at the Marlin Mine and to provide the communities with an effective remedy. In fact, reports show that the Canadian embassy in Guatemala has supported the mine over the interests of the indigenous communities. Despite broad opposition to the Marlin mine, the Canadian government sought to promote the mining industry and showcase the benefits of mining. On November 4, 2004, the same day that a national Guatemalan newspaper released a survey finding that 95.5% of local residents opposed the Marlin mine, Canada's then-Ambassador to Guatemala James Lambert published an opinion piece in the Guatemalan *Prensa Libre* where he cited the benefits of mining to 200 indigenous communities in Canada.¹⁷³ The following month, the Canadian embassy co-sponsored a National Mining Forum to showcase the mining industry,¹⁷⁴ and Ambassador Lambert also flew an indigenous leader from Canada to Guatemala to speak favourably about mining.¹⁷⁵

¹⁶⁶ *Ibid.* at 78-79.

¹⁶⁷ IACHR Submission, at p. 13; Physicians for Human Rights, *Toxic Metals and Indigenous Peoples Near the Marlin Mine in Western Guatemala* (May 2010), https://s3.amazonaws.com/PHR_Reports/guatemala-toxic-metals.pdf [hereinafter, “Physicians for Human Rights Report”].

¹⁶⁸ Physicians for Human Rights Report, at p. 15.

¹⁶⁹ IACHR, Report No. 20/14, at ¶ 16.

¹⁷⁰ *Ibid.*, at ¶ 6.

¹⁷¹ *Ibid.*, at ¶ 6.

¹⁷² *Ibid.*, at ¶¶ 9-12.

¹⁷³ CNCA, *Dirty Business, Dirty Practices: How the Federal Government Supports Canadian Mining, Oil and Gas Companies Abroad*, p.3.1 (May 2007), <http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/DirtyPractices.pdf>.

¹⁷⁴ *Ibid.*

¹⁷⁵ Jared Ferrie, *Mining Gold and Outrage in Guatemala*, The Tyee (Dec. 21 2005), <http://thetyee.ca/News/2005/12/21/GuatamalaOutrage/index.html>.

In addition, communities attempted, but were unsuccessful, in using the Canadian NCP. Local communities filed a complaint with the NCP in 2009, asking the NCP to investigate the allegations raised – something within the NCPs mandate – and specifically not seeking dialogue.¹⁷⁶ The request to investigate was based upon the fact that many indigenous community members had been falsely detained and prosecuted in San Miguel Ixtahuacán for defending their rights, and the petitioners did not trust the company to enter into a good faith dialogue. Despite this request, the NCP only offered to mediate a dialogue, and refused requests for a site visit and investigation.¹⁷⁷ As a result, the NCP closed the case without undertaking any investigation, and produced a final report that it refused to translate to Spanish, and which failed to determine whether or not the company had abided by the OECD guidelines or to issue any recommendations.¹⁷⁸

ii. *Frontera Energy*

Similar allegations of environmental harm, inadequate consultation, lack of informed consent as well as reports of grave human rights violations against indigenous groups have dogged Frontera Energy's (formerly Pacific Exploration & Production, and before that Pacific Rubiales Energy Corp.) exploration and development of the Quifa and Rubiales fields in Puerto Gaitán, Colombia. Since 1987, Frontera has been involved in the exploration and development of Quifa and Rubiales. In 2016, the Colombian state oil company Ecopetrol assumed exclusive control of the Rubiales field, but the Quifa field is still operated by Frontera.¹⁷⁹ The oil operations have disproportionately harmed the indigenous Sikuani people who live in reserves near oil installations.¹⁸⁰

Alleging that they had not been properly consulted on the operations in Quifa field, the Sikuani people brought a legal action in Colombia to suspend the project. In February 2016, Colombia's Constitutional Court agreed, suspending the project for violating those communities' fundamental right to prior consultation.¹⁸¹ The court ordered the suspension of Frontera's

¹⁷⁶ FREDEMI complaint.

¹⁷⁷ MiningWatch Canada, *Canadian Government Abdicates Responsibility to Ensure Respect for Human Rights* (May 16, 2011), <http://miningwatch.ca/news/2011/5/16/canadian-government-abdicates-responsibility-ensure-respect-human-rights>; Correspondence from CIEL and MiningWatch Canada to the Ministers responsible for the government departments participating in Canada's National Contact Point (Jan. 11, 2011).

¹⁷⁸ Canadian National Contact Point, *Annual Report 2011* (May 9, 2011), http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/report2011-rapport2011.aspx?lang=eng#appendix_a; Correspondence from CIEL and MiningWatch Canada to the then chair of Canada's National Contact Point, Judith St. George, dated September 2, 2011.

¹⁷⁹ See *Ecopetrol se declaró lista para recibir campo Rubiales en Puerto Gaitán Meta*, RCN Radio (June 9, 2016), <http://www.rcnradio.com/locales/ecopetrol-se-declaro-lista-recibir-campo-rubiales-puerto-gaitan-meta>; Letter from Above Ground *et al.*, to Benoit Daignault, President and CEO Export Development Canada, p.1 (Sept. 21, 2016), <http://aboveground.ngo/wp-content/uploads/2017/01/Letter-EDC-Ecopetrol-Pacific-21092016.pdf> (re: Query regarding EDC's support to Ecopetrol and Pacific E&P) [hereinafter, "Above Ground letter to EDC"].

¹⁸⁰ Above Ground Letter to EDC, at p. 2; FIDH, *The Human Cost of Oil: A Human Rights Impact Assessment on the Activities of Pacific Exploration & Production Corp. in Puerto Gaitán: Executive Summary*, p. 3 (July 2016) https://www.fidh.org/IMG/pdf/colombia_executive_summary.pdf [hereinafter "FIDH Executive Summary"].

¹⁸¹ Corte Constitucional de Colombia, "*Sentencia T-765/15 del 16 de diciembre de 2015*", Expediente T-3.833.978, <http://www.corteconstitucional.gov.co/relatoria/2015/t-764-15.htm>; Paso Internacional,

operations within two kilometers of Sikuani territory, citing the detrimental effect that the operations had on the territory.¹⁸² Specifically the court held that “the constant coming and going of personnel, machinery, products and materials, the ongoing creation of odours, noise and light, and affectations to waterways . . . are all situations that must be considered to have direct effects on community members’ lives, beliefs, institutions, spiritual well-being and the land they occupy or in other ways use.”¹⁸³

The development of these oil fields has been marred by numerous alleged human rights violations against the residents of Puerto Gaitán, which includes the Sikuani people and thus raise concerns that these violations are discriminatory conduct. The documented allegations of human rights violations include targeted killings,¹⁸⁴ excessive force against protesters,¹⁸⁵ threats to human rights defenders,¹⁸⁶ and environmental degradation.¹⁸⁷ Moreover, there are serious allegations of associated violations of women’s rights to health, protection against discrimination in employment, and an adequate livelihood. For example, oil exploration activities have diminished the indigenous community’s ability to sustain their traditional subsistence livelihoods, leading many women to work as prostitutes.¹⁸⁸

Rather than investigate and punish these abuses, the Canadian government has financially supported Frontera. For example, in 2014, Canada loaned between CAD\$50 and \$100 million through the EDC to Frontera.¹⁸⁹ This loan was disbursed amidst the serious human rights concerns enumerated above. In 2016, EDC provided Ecopetrol even more support – between CDN\$250 and \$500 million.¹⁹⁰

iii. *Escobal Silver Mine*

Canadian company Tahoe Resources has owned and operated the Escobal Silver Mine in San Rafael Las Flores, Guatemala, through a wholly-owned subsidiary since 2010, with commercial

Colombian Constitutional Court Orders the Suspension of Pacific E&P Operations in Meta, (Feb. 27, 2016), <http://www.pasointernational.org/en/2016/02/colombian-corte-constitutional-orders-the-suspension-of-pacific-ep-operations-in-meta/>. [hereinafter “PASO, Colombian Constitutional Court Orders the Suspension”].

¹⁸² *Ibid.*

¹⁸³ PASO, Colombian Constitutional Court Orders the Suspension. (The quote is a translation from the decision, and was translated by PASO).

¹⁸⁴ Above Ground Letter to EDC, at p. 2. A local organization named the Center for Research and Popular Education has registered 32 targeted killings in Puerto Gaitán in 2012.

¹⁸⁵ *Ibid* at p.4; FIDH Executive Summary, at p. 4 (reports show a trend of protesters being charged criminally).

¹⁸⁶ *Ibid* at p. 4. Local human rights defenders received death threats in May 2016 stating they were “obstructing the work of other people and of the companies.”

¹⁸⁷ Above Ground Letter to EDC, at pp. 2-4 (“People who reside within the Rubiales and Quifa fields report a decrease in available ground water, which they link to wastewater reinjection. Eighty percent of the 238 residents surveyed also report that local sources of water became polluted after oil extraction began. Almost 50% of interviewees indicated that water pollution has affected their daily water consumption.”).

¹⁸⁸ Corporación Grupo Semillas, *Las historias de la violación a los derechos humanos se repiten*

Pacific Rubiales en Puerto Gaitán, *Revista No. 48/49* (Feb. 16, 2015), <http://semillas.org.co/es/revista/pacific-rubiales-en-puerto-gaitan>.

¹⁸⁹ Above Ground Letter to EDC, at p. 1.

¹⁹⁰ *Ibid.*, at p. 1.

production commencing in 2014.¹⁹¹ Tahoe acquired the mine from Canadian mining company Goldcorp,¹⁹² which maintained a 25-40% interest in Tahoe until June 2015.¹⁹³ From well before the Escobal mine went into operation, Tahoe and the Guatemalan government have been accused of criminalizing protest and dissent, and of colluding to militarize the area around the project in order to generate fear, intimidation and distrust that enabled the company to put its project into operation in 2014.¹⁹⁴ The immediate area around the mine is principally non-indigenous, but Tahoe seeks to expand the project into municipalities with a Xinka indigenous population.¹⁹⁵

The Xinka have not given their free, prior, and informed consent to the expansion, and there are troubling reports of violence against individuals who oppose the expansion. In seven municipalities neighbouring the Escobal mine, tens of thousands of people have participated in formal municipal referenda and voted against the project, including in the municipalities of Jalapa, San Carlos Alzatate, Mataquescuintla, Nueva Santa Rosa and Quesada, which form part of Xinka territory and where Tahoe has applied for exploration and exploitation licenses.¹⁹⁶ For example, the Xinka were among the community groups that released a joint statement in June 22, 2012 rejecting the government's decision to grant Tahoe's subsidiary exploration licenses.¹⁹⁷ The Xinka's opposition, and the violation to their right to free, prior and informed consent, formed part of the basis for the Norwegian Council of Ethic's recommendation to withdraw financing to Tahoe. The Council's 2015 investigation found that "The Xinka Parliament and other Xinka organisations have engaged actively in opposing the mine and what they consider the imposition of a development model based on major interventions in nature. Accordingly, they oppose the mining operation and demand that they be consulted before licences are granted in the areas in which they live."¹⁹⁸ In 2017, the Centre for Legal, Environmental and Social Action instituted legal action to suspend the project, alleging discrimination and lack of prior consultation with the Xinka; on July 5, 2017, the Guatemalan Supreme Court of Justice ordered a temporary suspension until the lawsuit is resolved.¹⁹⁹

¹⁹¹ JCAP, *The Canada Brand*, at p. 61

¹⁹² Shin Imai, Justice and Corporate Accountability Project, *Request to Investigate Tahoe Resources for Failure to Disclose Material Information*, p. 5 (Aug. 8, 2016), https://miningwatch.ca/sites/default/files/sec_disclosure_sent.pdf [hereinafter "JCAP, Request to Investigation Tahoe"].

¹⁹³ The Globe and Mail, Rachele Younglai, *Goldcorp sells Tahoe Resources stake for near \$1-billion*, (June 15, 2015), <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/goldcorp-sells-tahoe-resources-stake-for-998-million/article24968832/>.

¹⁹⁴ See e.g. JCAP, Request to Investigation Tahoe; Luis Solano, *Under Siege: Peaceful Resistance to Tahoe Resources and Militarization in Guatemala* (Nov. 2015), <https://miningwatch.ca/sites/default/files/solano-underseigereport2015-11-10.pdf>.

¹⁹⁵ JCAP, Request to Investigation Tahoe, at p. 13.

¹⁹⁶ *Ibid.*, at p. 15; JCAP, *The Canada Brand*, at p. 14.

¹⁹⁷ Comunidades de Poblacion en Resistencia, "Rechazan Licencia Minera de Exploracion Juan Bosco", June 22, 2012, online: <<https://perma.cc/8AAH-3QAB>>.

¹⁹⁸ Council on Ethics for the Government Pension Fund Global, *Annual Report 2014*, p. 172 <http://etikkradet.no/files/2017/02/Council-on-Ethics-2014-Annual-Report-1.pdf>.

¹⁹⁹ MiningWatch Canada, *Tahoe Licences Suspended for Lack of Consultation with Indigenous Communities, While Company Denies Indigenous Presence and Opposition*, (July 7, 2017), [HTTPS://MININGWATCH.CA/NEWS/2017/7/7/TAHOE-LICENSES-SUSPENDED-LACK-CONSULTATION-INDIGENOUS-COMMUNITIES-WHILE-COMPANY-DENIES](https://miningwatch.ca/news/2017/7/7/TAHOE-LICENSES-SUSPENDED-LACK-CONSULTATION-INDIGENOUS-COMMUNITIES-WHILE-COMPANY-DENIES) [hereinafter "MiningWatch Canada, Tahoe Licences Suspended"].

In addition, there are worrying reports of violence and intimidation against Xinka people who oppose the mine. Several opposition figures have been murdered,²⁰⁰ including the Xinka leader Exaltación Marcos Ucelo, who was found dead a day after he was kidnapped on his way home from a plebiscite on mining in the town of Volcancito in March 2013.²⁰¹ Three other individuals were kidnapped along with Exaltación, including the president, deputy president and secretary of the Xinka Parliament. The Xinka Parliament president stated that, during the kidnapping, he was interrogated about his connections with the opposition to the Escobal mine.²⁰² In its 2014 Annual Report, the Norwegian Council of Ethics indicated that the kidnapping and murder has not been solved; likewise, to date, there are no further reports to indicate otherwise.²⁰³

D. The Canadian government provides direct and indirect support to Canadian companies that violate human rights and discriminate against indigenous peoples and ethnic communities

In addition to its failure to investigate, prosecute, and prevent violations of the Convention by Canadian companies operating abroad, the Canadian government has also failed to uphold its Convention obligations by continuing to provide both direct and indirect support to Canadian companies that violate human rights, including those that stand accused of egregious violations under article 2(1)(b) of the Convention. As outlined above, and further below, the Canadian government provides funding, financial subsidies, diplomatic and lobbying support, and public relations assistance to Canadian extractive corporations, including those implicated in Convention violations. To fulfill its obligations Canada should not support corporations associated with such violations, and should make eligibility for its support contingent on compliance with human rights to prevent discrimination associated with their projects.

Export Development Canada provides financial support through its credit financing and insurance to foreign companies; the extractive sector remains the single greatest beneficiary of EDC support by a significant margin.²⁰⁴ In addition to its Convention obligations, under the UN Guiding Principles on Human Rights (which Canada's CSR strategy promotes), states have a duty to ensure that corporations receiving support from export credit agencies protect against human rights abuses.²⁰⁵ However, reports show that Canada is not meeting these obligations. For example, as stated above, EDC gave loans to Frontera despite its implication in numerous alleged human rights abuses. Groups have also reported concerns about EDC's funding to Brazilian mining

²⁰⁰ JCAP, *The Canada Brand*, at pp. 61-65; MiningWatch Canada, *US Securities and Exchange Commission asked to Investigate Tahoe Resources' Failure to Disclose Secret Lawsuits* (Aug. 11, 2016), <https://miningwatch.ca/news/2016/8/11/us-securities-and-exchange-commission-asked-investigate-tahoe-resources-failure> [hereinafter "MiningWatch Canada, US SEC asked to investigate Tahoe Resources"].

²⁰¹ MiningWatch Canada, *US SEC asked to investigate Tahoe Resources*.

²⁰² MiningWatch Canada, *Tahoe Resources Licenses Suspended*.

²⁰³ Council on Ethics for the Government Pension Fund Global, *Annual Report 2014*, p. 174.

²⁰⁴ IACHR Submission, at p. 25.

²⁰⁵ U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, p. 4, U.N. Doc. HR/PUB/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

company Vale S.A. for capital expenditures associated with its Carajás project in the Amazon, which is associated with alleged human rights violations.²⁰⁶

The nickel mine near El Estor, Guatemala, which the Committee is already considering, also illustrates the Canadian government's support to extractive sector corporations implicated in alleged discrimination. From its inception until 2011, this mine was owned by a series of Canadian mining corporations: INCO Ltd. (1965-2004), Skye Resources (2004-2008), and HudBay Minerals (2008-2011).²⁰⁷ The Canadian government's support traces back to at least 1974, when the government provided a CAD\$17.25 million loan to INCO's subsidiary, despite well-known abuses in the region.²⁰⁸

Canada also provides diplomatic support. As noted above, the Canadian Embassy in Guatemala has promoted its mining companies in talk show appearances and articles in local newspapers, portraying Canadian companies as leaders in environmental protection and social responsibility.²⁰⁹ In 2007, in response to a documentary released online allegedly showing the forced evictions of Mayan farmers and the burning of homes by Skye Resources agents, the Canadian Ambassador spread misinformation to discredit the film, stating that the images were old and the filmmaker had hired an actress.²¹⁰ The filmmaker, a Canadian Ph.D. student, successfully sued the Ambassador and the Attorney General of Canada for slander.²¹¹ An email released through a public information request shows that the Canadian Embassy was in touch with Skye Resources about the land conflict, and supported the company through communications with the Guatemalan government and by connecting the company with the Department of Foreign Affairs and International Trade. Rather than showing concern for human

²⁰⁶ Halifax Initiative et al, *Export Credit Agencies and Human Rights: Failure to Protect*, pp. 17-20 (2015), <http://www.aboveground.ngo/wp-content/uploads/2015/06/Failure-to-Protect.pdf>.

²⁰⁷ Klippensteins, *Canadian Mining in El Estor, Choc v. Hudbay Minerals Inc. & Caal v. Hudbay Minerals Inc.*, <http://www.chocversushudbay.com/history-of-the-mine> (last visited June 27, 2017) [hereinafter, "Canadian Mining in El Estor"]; HudBay Minerals, *HudBay Minerals and Skye Resources Announce Proposed Business Combination* (June 23, 2008), <http://www.hudbayminerals.com/English/Media-Centre/News-Releases/News-Release-Details/2008/Hudbay-Minerals-and-Skye-Resources-Announce-Proposed-Business-Combination/default.aspx>.

²⁰⁸ Canadian Mining in El Estor.

²⁰⁹ Klippensteins, *Canada's History in El Estor Guatemala, Schooner v. Canada* <http://www.schnoorversuscanada.ca/timeline.html#pfn10> (last visited July 18, 2017) [hereinafter, "Canada's History in El Estor Guatemala"]; James Lambert, *Colaboracion Minerla en Canada Como Guatemala, Canada es reconocido en el mundo entero por la riqueza de sus recursos naturales*, Prensa Libre, Nov. 4, 2004, <http://www.schnoorversuscanada.ca/docs/prensa-libre-james-lambert.pdf>.

²¹⁰ *Schnoor v. Canada, Plaintiff's Amended Claim*, SC-09-00080779-0000 (May 7, 2010), <http://www.schnoorversuscanada.ca/docs/statement-of-claim.pdf>.

²¹¹ Denise Balkissoon, *Former Canadian Ambassador Guilty of Slander*, The Toronto Star (June 17, 2010), https://www.thestar.com/news/gta/2010/06/17/former_canadian_ambassador_guilty_of_slander.html; Klippensteins, *Judge Rules the Canadian Ambassador Slandered Documentary Video Maker*, *Schnoor v. Canada* (June 10, 2010), <http://www.schnoorversuscanada.ca/>; *Schnoor v Canada*, Endorsement Record/Order of the Court, SC-09-00080779-0000 (June 16, 2010), <http://www.schnoorversuscanada.ca/docs/order-june162010.PDF>. After hearing about the slander, the filmmaker filed a complaint with the Department of Foreign Affairs and International Trades seeking a corrected statement, but the complaint was ignored. The court ordered an award against the Government for improperly handling the complaint, finding the government's actions "spiteful and oppressive."

rights, the email refers to the community as “invaders,” and describes the situation as an “anarchic free for all land grab.”²¹²

A study about the Canadian government’s support for Blackfire Exploration’s operations in Chiapas, Mexico, which is home to almost a million-people belonging to various indigenous communities, is another reported example of continuous diplomatic support to a mining company despite conflict with local communities. According to the report by MiningWatch Canada, which is based on nearly a thousand pages of documents obtained under an access to information request to the Department of Foreign Affairs and International Trade, the Canadian Embassy exerted diplomatic pressure on the Chiapas state government to facilitate the company’s operations, even when it was aware that the project was creating conflict within the communities, and endorsed the view that community resistance against the mine was dangerous.²¹³ When community leader Mariano Abarca was charged and detained, the Embassy intervened to defend the company and protect its interests.²¹⁴ Three months later, after Abarca was murdered, the Embassy took a hands-off approach, despite links to Blackfire.²¹⁵ In fact, even after the mine had been shut down for environmental impacts and despite allegations against the company for corruption of the local municipal president, the Embassy defended Blackfire’s interests in meetings with Mexican legislators and advised the company on suing the Mexican government under the terms of the North American Free Trade Agreement.²¹⁶

V. Recommendations

The Coalition calls on the Committee to urge Canada to do the following:

1) Ombudsperson

Canada should create a human rights Ombudsperson for the extractive industries. In line with the model legislation put forward by the CNCA, the Ombudsperson must be independent and able to undertake independent investigations. Companies must be required to participate in the investigation. The process must be transparent, and the Ombudsperson must publicly report on investigations and issue public reports for each case, including recommendations on prevention and remedy. The Ombudsperson must also monitor compliance, and companies that do not comply with recommendations must become ineligible for government support.

2) Access to judicial remedies

Canada should facilitate access to Canadian courts for people who have been seriously harmed by the international operations of Canadian companies, which includes the conduct of the corporation’s subsidiaries, suppliers and subcontractors.

²¹² Kenneth Cook, *Email to Canadian government officials re: Protected A Skye resources CGN-mission critical. Follow up* (Jan. 21, 2008), <http://www.schnoorversuscanada.ca/docs/cook-email-re-skye.pdf>; Canada’s History in El Estor Guatemala.

²¹³ Jennifer Moore and Gillian Colgrove, *Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy*, pp.i-ii (May 2013), http://miningwatch.ca/sites/default/files/blackfire_embassy_report-web.pdf.

²¹⁴ *Ibid.*, at pp. 11-12.

²¹⁵ *Ibid.*, at pp. 19-21.

²¹⁶ *Ibid.*, at p. 26.

Canada should enact legislation affirming that Canada is an appropriate forum for actions against Canadian extractive companies – those that are registered, headquartered, or have their principal place of business in Canada – regarding human rights abuses abroad. Canada should also ensure that impecunious victims are able to bring actions in Canadian courts without the requirement to post a bond for costs and pay the defendant's fees should they be unsuccessful, unless the claim is frivolous or vexatious. Legal aid should be available to indigenous peoples, ethnic minority communities and women to bring these cases.

3) Parent company liability

Canada should enact legislation establishing parent company liability for the actions of their subsidiaries, with the purpose of avoiding human rights violations and ensuring accountability when violations occur. This legislation should require Canadian companies and their subsidiaries to respect the international human rights embodied in Canada's treaty obligations.

Canada should also affirm, through legislation, corporations' duties to respect the human rights of individuals and communities affected by their activities, including outside Canada.

4) Investigate and prosecute

To fulfill the obligations to protect against the discrimination of indigenous peoples and ethnic communities and to provide effective remedies to those whose treaty rights are violated, Canada must investigate credible allegations of discrimination and abuse connected with the operations of corporations registered in Canada and operating abroad. Canada must prosecute cases where merited.

5) Support from Government Agencies

Canada must ensure that it is not supporting corporations that are violating human rights. To do so, Canada should:

- a. Implement binding legislation to ensure all public agencies have a legal obligation to ensure that human rights are respected prior to providing any kind of support to a company. Support should be withdrawn from companies that do not respect these rights.
- b. Require all government agencies to conduct and publicly report on the results of human and indigenous rights due diligence and environmental assessment processes prior to providing financial or political support to any company (Canadian or otherwise) and monitor compliance.

Annex I: Excerpts of UN Treaty Bodies Concluding Observations on Canada Expressing Concern over Canada’s Lack of Proper Regulation Over Extractive Corporations Registered in Canada

<p>Committee on the Elimination of Racial Discrimination, “Concluding Observations” CERD/C/CAN/C O/18, May 25, 2007, para. 17</p>	<p>17. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (arts 2. 1(d)d, 4 (a) and 5(e)).</p> <p>In light of article 2.1 (d) and article 4 (a) and (b) of the Convention and of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard.</p>
<p>Committee on the Elimination of Racial Discrimination, “Concluding Observations” CERD/C/CAN/C O/19-20, April 4, 2012, para. 14</p>	<p>14. While noting that the State party has enacted a Corporate Responsibility Strategy, the Committee is concerned that the State party has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada, in particular in mining activities (art. 5).</p> <p>The Committee recommends that the State party take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.</p>

<p>Committee on the Rights of the Child, “Concluding Observations” CRC/C/CAN/CO/3-4, Dec. 6, 2012, paras. 28-29</p>	<p>28. The Committee joins the concern expressed by the Committee on the Elimination of Racial Discrimination that the State party has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples in territories outside Canada, (CERD/C/CAN/CO/19-20, para. 14), in particular gas, oil, and mining companies. The Committee is particularly concerned that the State party lacks a regulatory framework to hold all companies and corporations from the State party accountable for human rights and environmental abuses committed abroad.</p> <p>29. The Committee recommends that the State party establish and implement regulations to ensure that the business sector complies with international and national human rights, labour, environment and other standards, particularly with regard to child rights, and in light of Human Rights Council resolutions 8/7 of 18 June 2008 (para. 4(d)) and resolution 17/4 of 16 June 2011 (para. 6(f)). In particular, it recommends that the State party ensure:</p> <p>(a) The establishment of a clear regulatory framework for, inter alia, the gas, mining, and oil companies operating in territories outside Canada to ensure that their activities do not impact on human rights or endanger environment and other standards, especially those related to children’s rights;</p> <p>(b) The monitoring of implementation by companies at home and abroad of international and national environmental and health and human rights standards and that appropriate sanctions and remedies are provided when violations occur with a particular focus on the impact on children;</p> <p>(c) Assessments of, and consultations with companies on their plans to address environmental and health pollution and the human rights impact of their activities and their disclosure to the public;</p> <p>(d) In doing so, take into account the United Nations Business and Human Rights Framework adopted unanimously in 2008 by the Human Rights Council.</p>
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<p>Human Rights Committee, “Concluding Observations” CCPR/C/CAN/C/O/6, Aug. 2015, para. 6</p>	<p>6. While appreciating information provided, the Committee is concerned about allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations and about the inaccessibility to remedies by victims of such violations. The Committee regrets the absence of an effective independent mechanism with powers to investigate complaints alleging abuses by such corporations that adversely affect the enjoyment of the human rights of victims, and of a legal framework that would facilitate such complaints (art. 2).</p> <p>The State party should: a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations, in particular mining corporations, under its jurisdiction respect human rights standards when operating abroad; b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; c) and develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad.</p>
<p>Committee on Economic, Social and Cultural Rights: E/C.12/CAN/CO/6, paras. 15-16.</p>	<p>15. The Committee is concerned that the conduct of corporations registered or domiciled in the State party and operating abroad is, on occasion, negatively impacting on the enjoyment of Covenant rights by local populations. The Committee is also concerned about the limited access to judicial remedies before courts in the State party by victims and that existing non-judicial remedial mechanisms, such as the Office of the Extractive Sector Corporate Social Responsibility Counsellor, have not always been effective. The Committee is further concerned about the lack of impact assessments explicitly taking into account human rights prior to the negotiation of international trade and investments agreements.</p> <p>16. The Committee recommends that the State party strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in their activities abroad, including by requiring those corporations to conduct human rights impact assessments prior to making investment decisions. It also recommends that the State party introduce effective mechanisms to investigate complaints filed against those corporations, and adopt the legislative measures necessary to facilitate access to justice before domestic courts by victims of the conduct of those corporations. The Committee further recommends that the State party ensure that trade and investment agreements negotiated by Canada recognize the primacy of its international human rights obligations over investors’ interests, so that the introduction of investor-State dispute settlement procedures shall not create obstacles to the full realization of Covenant rights.</p>

<p>Committee on the Elimination of Discrimination Against Women, “Concluding Observations” CEDAW/C/CAN/CO/8-9, Nov. 25, 2016, paras.18-19</p>	<p>18. The Committee is concerned about:</p> <ul style="list-style-type: none"> (a) The negative impact of the conduct of transnational companies, in particular mining corporations, registered or domiciled in the State party and operating abroad, on the enjoyment of the rights enshrined in the Convention by local women and girls; (b) The inadequate legal framework to hold all companies and corporations from the State party accountable for abuses of women’s human rights committed abroad; (c) The limited access to judicial remedies by women who are victims of human rights violations, and the absence of an effective independent mechanism with powers to investigate complaints alleging abuses by such corporations; (d) The lack of impact assessments explicitly taking into account women’s human rights before the negotiation of international trade and investment agreements. <p>19. The Committee recommends that the State party:</p> <ul style="list-style-type: none"> (a) Strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in relation to their activities abroad, including by requiring those corporations to conduct human rights and gender impact assessments before making investment decisions; (b) Introduce effective mechanisms to investigate complaints filed against those corporations, including by establishing an extractive sector ombudsperson with the mandate to, among other things, receive complaints and conduct independent investigations; (c) Adopt measures to facilitate access to justice for women who are victims of human rights violations and ensure that judicial and administrative mechanisms put in place take into account a gender perspective; (d) Ensure that trade and investment agreements negotiated by the State party recognize the primacy of its international human rights obligations over investors’ interests, so that the introduction of investor-State dispute settlement procedures does not create obstacles to full compliance with the Convention.
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<p>United Nations Human Rights Office of the High Commissioner, “Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights,” June 1, 2017</p>	<p>...Considering the significant footprint of Canadian extractives’ overseas operations, we believe that there is a role for an institution like an ombudsperson to provide effective remedy in a timely and inexpensive manner. In order to be effective, the government should establish an entity which is independent, well-resourced, and has power to investigate allegations, conduct fact finding, and enforce its orders, in line with other similar institutions in Canada.</p> <p>... The government should take measures to remove well-known barriers in access to judicial remedies, including for foreign plaintiffs. The guidance provided by the OHCHR in its June 2016 report to the Human Rights Council (A/HRC/32/19) is a useful resource.</p>
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