

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



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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.

HUMAN RIGHTS RESEARCH AND EDUCATION CENTRE

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The Human Rights Clinic is a project-based initiative from the Human Rights Research and Education Centre of the University of Ottawa that, through an interdisciplinary approach, aims: (i) to strengthen the protection of human rights, by promoting research, training and technical assistance regarding the implementation of human rights standards; (ii) to foster capacity-building and to provide recommendations to ensure that policy, law and practices have a human rights-based approach; and, (iii) to promote research regarding the implementation of human rights standards in Canada.

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. Executive summary

A coalition of civil society groups (“the Coalition”) submits this shadow report to the UN Committee on the Elimination of Discrimination against Women (“the Committee”) for consideration during its 65th session and review of Canada’s combined eighth and ninth periodic reviews.

The Committee’s list of issues sought information “on current and planned initiatives to address the challenges that indigenous women and girls face, including . . . their deteriorating health and living conditions, sometimes owing to the expansion of extractive industries into their territories; and the high rates of domestic and sexual violence against them.”¹ Under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), and specifically Articles 2(e) and 14, Canada has extraterritorial obligations to regulate the activity of its corporations operating abroad and to provide effective remedies to individuals harmed by such activity.² Canada is not meeting its obligations. Canadian extractive companies are regularly implicated in human rights violations³ in countries around the world. Despite knowledge of these allegations, Canada’s state report does not touch upon these obligations or the steps Canada is taking to ensure its corporations are not involved in conduct that discriminates against women. This submission focuses on the deteriorating health and living conditions of women affected by extractive corporations registered, headquartered, or conducting substantial business activity in Canada (“Canadian corporations”) and operating abroad to show that Canada is failing to uphold its obligations imposed by the Convention.

Allegations against Canadian extractive corporations involving discrimination against women include environmental degradation and exposure to toxic waste, and affecting the local communities’ ability to grow food, and use and drink the water, in violation of their right to health and right to enjoy adequate living conditions under Article 14 of the Convention. In many cases, advocates and victims have reported physical and sexual violence committed by the corporations’ security personnel, contractors and sometimes police, guarding mines under agreements with States, in violation of Articles 1 and 3.

Despite calls for the Canadian government to more aggressively regulate companies under its jurisdiction and ensure that victims of corporate-related human rights abuses have access to remedies in Canada, an accountability gap still exists. Rather than taking steps to prevent and remedy such abuses, the Canadian government supports the extractive industry, including companies accused of human rights abuses, through, amongst other things, economic diplomacy, development aid (Official Development Assistance (ODA)) or financial loans from Export Development Canada (EDC). Moreover, it is challenging to bring these cases in Canadian courts, which limits victims’ ability to hold Canadian companies accountable, and receive effective remedies.

In order for Canada to uphold its Convention obligations, the Coalition makes the following recommendations, which are further expanded upon in the Recommendations section:

¹ U.N. CEDAW Com., *List of issues in relation to the combined eighth and ninth periodic reports of Canada*, ¶ 16, U.N. Doc. CEDAW/C/CAN/Q/8-9 (Mar. 16, 2016).

² U.N. CEDAW Com., *Gen. Rec. No. 28 on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶¶ 36, 37(b), U.N. Doc. CEDAW/C/GC/28, (Oct. 19, 2010), <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf> [hereinafter GR No. 28]; U.N. CEDAW Com., *Gen. Rec. No. 34 (2016) on the rights of rural women*, ¶ 13, U.N. Doc. CEDAW/C/GC/34, (Mar. 7, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/061/90/PDF/N1606190.pdf?OpenElement> [hereinafter GR No. 34].

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

1) Ombudsperson

Canada should create an Ombudsperson office for the extractive industries.

2) Access to judicial remedies

Canada should facilitate access to Canadian courts for women 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 their 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 human rights of individuals and communities affected by their activities, including outside Canada.

4) Investigate and prosecute

Canada must investigate credible allegations of gender-based violence connected with the operations Canadian corporations outside Canada, 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 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 sector industry that "can result in a win-win outcome both for the Canadian economy and that of host countries."⁵ In 2013, over 50% of the world's publically listed exploration and mining companies were headquartered in Canada, and those 1500 companies were operating in 8000 properties in over 100 countries.⁶ In 2015, 52% of global mining and exploration companies were listed on the Toronto Stock Exchange (TSX) and TSX Venture Exchange.⁷

The Canadian mining industry is also well-known for its reported involvement in human rights abuses. 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.⁸ Of the Canadian-involved incidents, 60% involved community conflict, 40%

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.*

⁷ Minerals and Metals Factbook *supra* note 4, at p.1.

⁸ 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),

environmental degradation, and 30% unethical behavior.⁹ Moreover, a database compiled by the McGill Research Group Investigating Canadian Mining in Latin America currently lists 85 socio-environmental conflicts surrounding Canadian mining projects in the region since the 1990s.¹⁰ 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 CEDAW and other international instruments

A. Extraterritorial obligations under CEDAW

States parties' are obligated to regulate the extraterritorial activities of corporations under their jurisdiction. Under Article 2(e), States parties are obligated to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."¹¹ This obligation, "extend[s] to acts of national corporations operating extraterritorially."¹² This includes ensuring that women have access to effective remedies.¹³ To satisfy the "appropriate measures" requirement, States must "take steps to prevent, prohibit and punish violations of the Convention by third parties . . . and to provide reparation to the victims of such violations."¹⁴ States also have a due diligence obligation "to prevent, investigate, prosecute and punish . . . acts of gender-based violence."¹⁵

Article 14 requires States parties to "account for the particular problems faced by rural women" and "take all appropriate measures to eliminate discrimination against women in rural areas."¹⁶ To do so, "States parties should uphold extraterritorial obligations with respect to rural women by, inter alia: . . . taking regulatory measures to prevent any actor under their jurisdiction, including . . . companies . . . from infringing or abusing the rights of rural women outside their territory; and ensuring that international cooperation and development assistance, whether bilateral or multilateral, advance the rights of rural women outside their territory. Appropriate and effective remedies should be available to affected rural women when a State party has violated its extraterritorial obligations."¹⁷

The obligation to provide access to an effective remedy is also protected by Articles 2(b) and (c),¹⁸ and requires States parties to provide reparation to victims of CEDAW violations.¹⁹ Reparation includes monetary compensation, restitution, rehabilitation and reinstatement, measures of satisfaction, guarantees of non-repetition, changes in relevant laws and practices and bringing to justice the

http://miningwatch.ca/sites/default/files/CSR_Movements_and_Footprints.pdf.

⁹ *Ibid.* at p.16.

¹⁰ McGill Research Group Investigating Canadian Mining in Latin America, *Conflicts*, <http://micla.ca/conflicts/> [hereinafter "McGill Research Group Conflicts Database"].

¹¹ International Convention on the Elimination of All Forms of Discrimination Against Women art. 2(e), Dec. 18, 1979, 1249 U.N.T.S. 14, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> [hereinafter "CEDAW"].

¹² GR No. 28, *supra* note 2 at ¶ 36.

¹³ *Ibid.*

¹⁴ *Ibid.* at ¶ 37(b).

¹⁵ *Ibid.* at ¶ 19.

¹⁶ CEDAW, *supra* note 11 at art. 14.

¹⁷ GR No. 34, *supra* note 2 at ¶ 13.

¹⁸ *Vertido v Philippines*, CEDAW Communication No 18/2008 (2010), CEDAW/C/46/D/18/2008, ¶ 8.3; GR No. 28, *supra* note 2 at ¶ 32.

¹⁹ GR No. 28, *supra* note 2 at ¶ 32.

perpetrators.²⁰ In cases involving violations of the right to life and physical integrity, through for example gender-based violence, a State party is obligated to initiate criminal proceedings.²¹ To fulfill this right, States must ensure that women have recourse to affordable, accessible and timely remedies, settled through a competent and independent court or tribunal, where appropriate.²² Fulfilling this duty also requires States parties to promptly, effectively and impartially investigate allegations of violations of Convention rights, as this is a foundational element of the right to an effective remedy.²³

B. The UN and the Inter-American Commission for Human Rights have 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 for Human Rights (IACHR) have criticized Canada's failure to regulate the extraterritorial activity of Canadian corporations. In 2002, the UN Special Rapporteur on Toxic Waste raised concerns over Canada's lack of extraterritorial regulation of its corporations operating abroad.²⁴ Since then, four UN treaty bodies—the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of the Child, the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights—have expressed concern over the negative impacts of Canada's extractive sector corporations operations abroad and recommended that Canada implement legislation to regulate such activity and ensure that victims have access to remedies.²⁵

²⁰ *Ibid.*

²¹ *Ibid.* at ¶ 34.

²² *Ibid.*

²³ U.N. Hum. Rts. Com., CCPR *Gen. Comm. No. 31: Nature of the general legal obligation imposed on states parties to the covenant*, ¶ 15, UN Doc CCPR/C/21/Rev.1/Add.13, (May 26, 2004), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en; International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A practitioners guide*, pp. 49, 57–79 (2006), <http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/>.

²⁴ U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Addendum, Mission to Canada, 17-30 October 2002*, ¶ 126, E/CN.4/2003/56/Add.2, (Jan. 14, 2003) (prepared by Fatma-Zohra Ouhachi-Vesely) http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/Download.aspx?SymbolNo=E%2fCN.4%2f2003%2f56%2fAdd.2&Lang=en.

²⁵ U.N. CERD Com., *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the CERD Committee: Canada*, ¶ 17, 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 2007"]; U.N. CERD Com., *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the CERD Committee: Canada*, ¶ 14 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 2012"]; U.N. CRC Com., *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session, (17 September – 5 October 2012)*, ¶ 29 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 [hereinafter CRC "Concluding Observations"]; Hum. Rts. Com., CCPR, *Concluding observations on the sixth periodic report of Canada*, ¶ 6, CCPR/C/CAN/CO/6, (Aug. 13 2015), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en [hereinafter "HRC, "Concluding Observations"]; U.N. Econ. & Soc. Council. Com. on Economic, Cultural and Social Rights, *Concluding observations on the sixth periodic report of Canada*, ¶¶ 15-16, 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 [hereinafter "CESCR "Concluding Observations"].

These treaty bodies have expressed concern that Canadian corporations are adversely affecting the human rights of residents living in the communities impacted by their operations. The CERD expressed concern over reports that Canadian corporations operating abroad are having “adverse effects . . . on the right to land, health, living environment and way of life, of indigenous peoples living in these regions.”²⁶ The Human Rights Committee similarly expressed concern over the “allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations and . . . the inaccessibility to remedies by victims of such violations.”²⁷ The treaty bodies have also expressed concern over Canada’s corporate social responsibility strategy, as it fails to: implement legislation to regulate the extraterritorial activities of Canadian corporations; hold them accountable for their actions abroad; provide access to judicial remedies for victims of corporate human rights abuses; and create an effective independent mechanism to investigate complaints filed against corporations.²⁸

The IACHR reviewed Canada’s oversight over its corporations operating in Latin America in thematic hearings in 2013,²⁹ 2014,³⁰ and 2015.³¹ At the hearing in October 2014, Commissioner 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.”³² 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.”³³

IV. Canada is failing to fulfill its CEDAW obligations

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

Despite calls from civil society, the Standing Committee on Foreign Affairs and International Trade,

²⁶ CERD, “Concluding Observations 2007,” *ibid.* at ¶ 17

²⁷ HRC, “Concluding Observations,” *supra* note 25 at ¶ 6.

²⁸ CERD, “Concluding Observations 2012” *supra* note 25 at ¶ 14; CRC “Concluding Observations” *supra* note 25 at ¶ 29; HRC, “Concluding Observations” *supra* note 25 at ¶ 6; CESCR, “Concluding Observations” *supra* note 25 at ¶ 15-16.

²⁹ 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>.

³⁰ Inter-Am. C.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”).

³¹ Inter-Am. C.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.

³² 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. C.H.R., *Impact of Canadian Mining Activities on Human Rights in Latin America*, 153rd Session, (Oct. 28, 2014), video recording at 53:42, www.oas.org.

³³ OAS, *IACHR Wraps Up its 153rd Session*, (Nov. 7, 2014),

http://www.oas.org/en/iachr/media_center/PReleases/2014/131.asp.

Members of Parliament,³⁴ and numerous UN treaty bodies to take legislative action to regulate Canadian corporations and ensure that victims of corporate abuse have meaningful access to remedy, Canada has failed to do so. Instead, Canada has a corporate social responsibility (CSR) strategy³⁵ structured around voluntary self-regulation, promoting CSR guidelines, and non-judicial dispute resolution. This strategy fails to fulfill Canada's treaty obligations.

The dispute resolution processes available—the National Contact Point (NCP)³⁶ and the Office of the Extractive Sector CSR Counsellor—have limited mandates, and neither have proved capable of ensuring accountability or providing access to a remedy. The Counsellor, for example, does not conduct a compliance review or investigate complaints, has very limited fact-finding authority, and has no authority to monitor implementation of agreements reached during the process.³⁷ Similarly, the Canadian NCP does not investigate complaints, issue detailed considerations of matters, or properly monitor implementation of agreements.³⁸ Neither issue binding recommendations.³⁹

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.⁴⁰ Complaints must be filed in English or French, and there is no information on resources provided for indigent claimants. A recent report suggests that at least one case was closed because translation was not provided.⁴¹ The current rules of procedure are not publicly available, and the Counsellor position was vacant for more than one year,

³⁴ 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>.

³⁵ See *Doing Business the Canadian Way*, *supra* note 5.

³⁶ This is the Organization for the Economic Co-operation and Development's complaint process set up to ensure compliance with their Guidelines for Multinational Enterprises.

³⁷ MiningWatch Canada, *Concerns with regard to the mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada*, (Mar. 22, 2011), http://miningwatch.ca/sites/default/files/MiningWatch_Brief_on_CSR_Counsellor.pdf [hereinafter "MWC, Concerns with Regard to the Office of the CSR Counsellor"].

³⁸ Canadian Network on Corporate Accountability, *Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations: Thematic Hearing for 153rd Period of Sessions Inter-American Commission on Human Rights*, p.18, (Oct. 28, 2014), <http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/Canada%20Mining%20CIDH%20Oct%2028%202014%20final.pdf> [hereinafter "CNCA submission to the IACHR"]; OECD Watch, *10 Years On*, p.27, (June 2010), http://www.oecdwatch.org/publications-en/Publication_3550 [hereinafter "OECD Watch, 10 Years On"].

³⁹ CNCA submission to the IACHR, *ibid.* at pp.18-19; Global Affairs Canada, *The Review Process*, http://www.international.gc.ca/csr_counsellor-conseiller_rse/review_process-processus_examen.aspx?lang=eng.

⁴⁰ MWC, *Concerns with Regard to the Office of the CSR Counsellor*, *supra* note 37.

⁴¹ Mariette van Huijstee, Kristen Genovese, and Daniel, C., Singh, *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"].

until a new Counsellor was appointed in March 2015.⁴² The Canadian NCP is also inaccessible to indigent individuals; participants must cover their own travel costs to attend the mediation, and most NCPs do not provide or cover the costs of translation.⁴³

Neither the Counsellor's office nor the NCP process has proved capable of providing complainants with a remedy. The Counsellor's office has only six reported cases, none of which reached a resolution.⁴⁴ 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."⁴⁵ This accords with complainants' experience in the Canadian NCP. 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.⁴⁶ In another case, the NCP was only willing to facilitate dialogue between the parties, instead of carrying out the requested fact-finding investigation.⁴⁷ Although a welcome recent change allows for "sanctions"⁴⁸ against a company that refuses to participate in either dispute resolution processes, there is little reason to expect different results. Participation alone will not correct the above-referenced inadequacies.⁴⁹

As a whole, Canada's CSR strategy fails to fulfill its CEDAW obligations under Articles 2 or 14. This strategy does not require corporations to respect the human rights of those affected by their operations outside of Canada, nor does it provide victims with an avenue to pursue an effective remedy. Corporations are not required to protect against the discrimination of women, and they are not held accountable when they fail to do so.

⁴² Mining Watch 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>; Glass Half Full, *ibid.* at p.1.

⁴³ Daniel, C., J. Wilde Ramsing, M.M.G Genovese, and V. Sandjojo, *Remedy Remains Rare*, OECD Watch, p.22, (June 2015), http://www.oecdwatch.org/publications-en/Publication_4201 [hereinafter OECD Watch, *Remedy Remains Rare*]; OECD Watch, *Assessment of NCP Performance in the 2013-2014 Implementation Cycle*, s.4.7, (June 2015).

⁴⁴ See *Glass Half Full*, Annex 7, *supra* note 41 at pp.1, 4; Global Affairs Canada, *Registry of Request for Review*, (modified Oct. 28, 2013), http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-en/registrement.aspx?lang=eng. Three companies withdrew from the process: Excellon, Silver Standard, 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 also 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>.

⁴⁵ OECD Watch, *Remedy Remains Rare*, *supra* note 43 at p.5.

⁴⁶ *Ibid.* at p.48; The Umuchinshi Initiative, *Can the OECD Guidelines Protect Human Rights on the Ground? A Case Study: The Evictions at Mufulira by First Quantum Minerals / Mopani Copper Mines*, University of Toronto Faculty of Law, pp.5, 7-8, http://ihrp.law.utoronto.ca/utf1_file/count/documents/WorkingGroup_Clinic/Mining%20Case%20Study.pdf.

⁴⁷ See OECD Watch, *FREDEMI coalition vs Goldcorp*, http://www.oecdwatch.org/cases/Case_172.

⁴⁸ See *Doing Business the Canadian Way*, *supra* note 5. 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.

⁴⁹ Moreover, the threat of sanctions may not be significant enough to secure participation; at least one corporation still refused to participate in a case before the NCP in 2015. See OECD Watch, *Remedy Remains Rare*, *supra* note 43 at p.46.

B. Victims face challenges in accessing effective remedies in Canada

Access to justice in Canadian courts likewise remains elusive for victims of human rights abuse by Canadian companies operating outside of Canada. Within the past twenty years, victims of human rights abuses by Canadian corporations abroad have filed a handful of civil actions in Canadian courts, including cases alleging gender-based violence.⁵⁰ For the first time, three actions are proceeding to trial.⁵¹ 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.⁵²

But, to date, no case has resulted in remedies for the victims, and many cases have been dismissed at early stages without consideration of the substance of the claims,⁵³ demonstrating the challenges claimants face in accessing Canadian courts. One of the obstacles in these cases has been *forum non conveniens*. This is a discretionary doctrine allowing a court to dismiss a case if it believes that there is another venue that is clearly better-placed to hear the case. Courts have used their discretion to decide that at least three cases should not be heard in Canada.⁵⁴

Another hurdle victims face in accessing Canadian courts is litigation 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.⁵⁵ The potential that victims will have to pay the companies' legal fees is a huge deterrent. In addition, most provinces can require out-of-province

⁵⁰ *Recherches Internationales Québec v. Cambior Inc.*, 1998 CarswellQue 4511 (Qc. Sup. Ct.) (a class action that alleged liability for harms caused by a spill of 2.3 billion liters of liquid with high metal contents into the Esequibo River in Guyana); *Bil'in (Village Council) v. Green Park International Inc.*, 2009 QCCS 4151, aff'd, 2010 QCCA 1455, leave to appeal dismissed: [2010] S.C.C.A. No. 364 (action alleged that the construction company was involved in war crimes for building in the West Bank); *Piedra v. Copper Mesa Mining Corp.*, 2010 ONSC 2421, aff'd, 2011 ONCA 191 (action alleged liability for assaults and death threats carried out by the mine's security personnel); *Association Canadienne Contre L'impunité v. Anvil Mining Ltd.*, 2011 QCCS 1966, rev'd, 2012 QCCA 117, leave to appeal dismissed [2012] S.C.C.A. No. 128 (action alleged that the mining company was involved in numerous human rights violations including rape, torture and extra-judicial executions, carried out by the Congolese military in Kilwa); *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 (three related cases against HudBay Minerals and two of its subsidiaries for human rights abuses, and one of the three cases alleges liability for rape); *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045 (an action, currently on appeal, alleging liability for injuries the Plaintiffs sustained when the mine's security opened fire on them during a peaceful protest); *Araya v. Nevsun Resources Ltd.* (an action, currently pending, against a Canadian mining company Nevsun Resources over the use of slave labor at its mine in Eritrea). For documents on this case see Canadian Centre for International Justice, *Nevsun Resources*, <http://www.cciij.ca/cases/nevsun/>.

⁵¹ *Choc v. Hudbay*, *ibid.* The three related cases are proceeding together. The *Nevsun* action is awaiting decision on preliminary motions, and the *Tahoe* action is on appeal from a dismissal on *forum non conveniens* (FNC).

⁵² *Chevron Corp. v. Yaiguaje*, 2015 SCC 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).

⁵³ See *Recherches Internationales Québec v. Cambior inc.*, *supra* note 50; *Bil'in (Village Council) v. Green Park International Inc.*, *supra* note 50; *Piedra v. Copper Mesa Mining Corp.*, *supra* note 50; *Association Canadienne Contre L'impunité v. Anvil Mining Ltd.*, *supra* note 50.

⁵⁴ See *Recherches Internationales Québec v. Cambior inc.*, *supra* note 50; *Bil'in (Village Council) v. Green Park International Inc.*, *supra* note 50; *Garcia v. Tahoe Resources Inc.*, *supra* note 50 (currently on appeal). The defendants raised FNC in *Anvil*, and while it was dismissed by the lower court, the case was ultimately dismissed on appeal for lack of jurisdiction. It was initially raised in the *HudBay* cases, but dropped before the hearing, and it was raised in the *Nevsun* case, and a decision is pending.

⁵⁵ 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); *Ontario Courts of Justice Act*, R.S.O. 1990, c. 43, s.131; *Ontario Rules of Civil Procedure*, O. Reg. 575/07, s.57.01.

litigants to pay a bond to the court before proceeding with litigation.⁵⁶ Bonds are ordered at the court's discretion, to ensure there are assets to pay the defendants' costs should they be unsuccessful in litigation. 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.⁵⁷ Moreover, finding representation may be a challenge as legal aid is unavailable.⁵⁸ In its last report the Committee called on Canada to ensure that all women have access to legal aid to pursue legal remedies for sex-based discrimination.⁵⁹ To fulfill its obligations, Canada should ensure the availability of legal aid for these types of civil actions.

Providing effective remedies, and punishing abuses against women, requires Canada to enable access to its courts. Victims often face significant barriers to accessing 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.

Canada is also failing to fulfill its obligation to investigate and prosecute actors who are involved in gender-based violence. Canada can prosecute corporations under the Crimes Against Humanity and War Crimes Act,⁶⁰ or the Criminal Code. Despite allegations of corporate involvement in gender-based violence, we are not aware of any criminal investigations or prosecutions. In 1999, the Canadian government sent a fact-finding mission to Sudan to evaluate, in part, the link between oil development—which included the operations of Canadian Talisman Energy—and human rights violations.⁶¹ Despite concluding that the oil operations contributed to human rights abuses, including rape, the Canadian government took no action to sanction or prosecute Talisman.⁶² We are aware of no similar fact-finding mission since, but Canada should take this type of action, and where necessary, act upon the results by imposing sanctions and/or initiating prosecutions.

C. The frequent allegations against Canadian extractive corporations for involvement in human rights abuses show that Canada is failing to fulfill its CEDAW obligations

The frequent allegations against Canadian corporations for involvement in human rights abuses shows that these are not isolated incidents, but a pattern. Below are case studies which provide examples of the allegations associated with the operations of Canadian extractive corporations outside of Canada.

⁵⁶ 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.

⁵⁷ *See Lysko v. Maxbeau Company et al.*, 2010 ONSC 6523 at ¶ 6.

⁵⁸ 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.

⁵⁹ U.N. CEDAW Com., *Concluding observations of the committee on the elimination of discrimination against women, Canada*, ¶¶ 21-22, U.N. Doc. CEDAW/C/CAN/CO/7, (Nov. 7, 2008), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f7&Lang=en.

⁶⁰ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24; *Interpretation Act*, R.S.C., 1985, c. 121, s.35(1) (the definition of persons includes corporations).

⁶¹ The mission was appointed after years of advocacy around Talisman's operations in Sudan, and after pressure from the U.S. Secretary of State to compel Talisman to withdraw from Sudan. Audrey Macklin & Penelope Simons, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage*, pp.37-39 (Routledge 2014); John Harker, *Canadian Assessment Mission, Report on Human Security in Sudan*, pp.1-2, (Jan. 2000), <http://www.paxvoorde.nl/media/files/human-security-in-sudan.pdf>.

⁶² Harker, *ibid.* at pp.14-15, 105; Macklin and Simons, *ibid.* at p.53.

The allegations of discrimination against women include:

- Gender-based violence, including violent rape and gang rape and physical assaults, in violation of Article 1;⁶³
- Disproportionate socio-economic hardships, including loss of access to land needed for food security and livelihood, as well as violations of women's rights to enjoy adequate living conditions, sanitation, water supply, in violation of Article 14;⁶⁴
- Violations to women's right to health⁶⁵ through disproportionate exposure to toxic chemicals found in mine waste and tailings, and as a result of gender-based violence;
- Workplace discrimination, including dismissing pregnant women and assigning tasks based on looks, in violation of Article 11.⁶⁶

The case studies illustrate the accountability gap and the substantial barriers to justice and effective remedies for women who are victims of discrimination. Despite knowledge of allegations, the Canadian government has not taken any known action against any of the corporations, including initiating criminal investigations or prosecutions, nor have they withdrawn support or even publicly denounced the corporations' alleged involvement in such discrimination. In fact, in some of the examples, the Canadian government provided support to the companies. Together, these examples show that it is imperative that the Canadian government uphold its Convention obligations to protect, respect and fulfil women's right to non-discrimination, including taking all appropriate measures to eliminate discrimination by acts of Canadian corporations operating extraterritorially.

a. Porgera Joint Venture gold mine in Papua New Guinea

The Porgera Joint Venture (PJV) gold mine, in Porgera, Papua New Guinea, was majority owned and operated by two Canadian companies, Barrick Gold ("Barrick") and Placer Dome, from 1989-2015.⁶⁷

⁶³ General Recommendation 19 confirms that gender-based violence is a form of discrimination against women protected by Article 1. See U.N. CEDAW Com., *Gen. Rec. No. 19: Violence against women*, ¶¶ 1, 7, U.N. Doc. CEDAW/C/GC/19 (1992), http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf [hereinafter "GR No. 19"].

⁶⁴ CEDAW, *supra* note 11 at art. 14(2)(h): To enjoy a adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

⁶⁵ A number of provisions in CEDAW recognize women's right to health in specific contexts: CEDAW, Arts. 11(1)(f), 12, 14(2)(b). The Committee has also recognized the protection of the right to health in General Recommendation 24 and its interconnection with gender-based violence in General Recommendations 19. See U.N. CEDAW Com., *Gen. Rec. No. 24, Article 12 of the Convention (women and health)*, ¶¶ 2-7, U.N. Doc. CEDAW/C/GC/24 (1999), http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf; GR 19, *supra* note 63 at ¶ 7(g). The right to health includes factors that lead to a healthy life such as safe drinking water and a adequate sanitation; safe food; and a adequate nutrition and housing. See OHCHR & WHO, *Right to Health: Fact Sheet No. 31*, p.3, (2008), <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

⁶⁶ CEDAW, *supra* note 11 at art. 11.

⁶⁷ 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>.

Barrick continues to own a 47.5% share in the PJV.⁶⁸ The mine has devastated the local environment, and been the site of systemic human rights abuses against the local community—including sexual violence and brutal gang rapes of women and girls by mine security guards and police working for the mine.⁶⁹ Reports have also documented other instances of physical violence against men and women, forced displacement, destruction of homes, extrajudicial killings, and arbitrary detention.⁷⁰

The communities and victims have been fighting for accountability since 2005. While some victims have received a remedy, reports suggest widespread dissatisfaction with the level of compensation, and many victims remain without a remedy and access to justice. In 2011, local Porgera groups filed a complaint with the Canadian NCP over a range of issues, including sexual violence, but the case closed without a successful resolution.⁷¹ After finally recognizing the credibility of the sexual assault allegations in 2010, Barrick created a Remedy Framework to compensate victims.⁷² While it is significant that Barrick acknowledged the pattern of sexual assaults, independent assessments of the Framework reveal significant concerns—including lack of legal counsel and a requirement to waive important legal rights.⁷³ 253 women filed claims and 119 women accepted the remediation packages.⁷⁴ Initially, women received 15,000 kina in cash (USD 5870.61), counseling, medical expenses, a one-time business training, and

⁶⁸ Barrick Announces Strategic Partnership with Zijin Mining Group, *ibid*.

⁶⁹ 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 *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 Regarding 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*].

⁷⁰ See 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*, *ibid.* 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 Regarding Bill C-300*, *ibid.* at pp.16-24.

⁷¹ Mark Ekepa, Porgera SML Landowners Association, Jethro Tulin, Akali Tange Association, Catherine Coumans, MiningWatch Canada, Request for Review, Mar. 1, 2011, http://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf [hereinafter *OECD Request for Review*]. 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 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.

⁷² 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>.

⁷³ See *Righting Wrongs*, *supra* note 69. 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>; MiningWatch Canada & Rights and Accountability in Development, *Privatized Remedy and Human Rights: Rethinking Project-Level Grievance Mechanisms, Third Annual UN Forum on Business and Human Rights Palais des Nations*, (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"].

⁷⁴ *Righting Wrongs*, *supra* note 69 at p.29.

school fees for a few years.⁷⁵ Women subsequently received an additional 30,000 kina (approximately USD 11,000).⁷⁶ 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.⁷⁷ 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.”⁷⁸

Eleven women who refused to accept the Framework’s remediation package, and who had separate legal representation, reached a confidential settlement with Barrick, but these are only a small subset of alleged victims,⁷⁹ and many have not received any form of remedy. The Framework was a temporary mechanism that limited claims of sexual violence to those that occurred prior to December 1, 2010,⁸⁰ and victims are now turning to the permanent PJV grievance mechanism, but there is no publicly available information on how it works or the remedies it offers.⁸¹

Apart from the gender-based violence that has accompanied operations, socio-economic and environmental changes have disproportionately harmed women and infringed upon their rights to health and an adequate standard of living. Communities around the mine are “living in overcrowded, unsanitary and potentially dangerous conditions, and have limited available land for family subsistence.”⁸² The remote mountainside community is now dominated by an open pit mine, massive waste dumps, and a “red river” of tailings that pollute the communities’ water sources.⁸³ The increased

⁷⁵ *Ibid.* at pp.88-89.

⁷⁶ This is believed to be a result of advocacy following a confidential external settlement with 14 individuals that is believed to have provided greater compensation. *Righting Wrongs, ibid.*

⁷⁷ *Righting Wrongs, 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>; ERI, *Survivors of Rape by Barrick Gold Security Guards Offered “Business Grants” and Training in Exchange for Waiving Legal Rights*, *supra* note 73.

⁷⁸ *Righting Wrongs, supra* note 69 at p.92.

⁷⁹ 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>.

⁸⁰ 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>.

⁸¹ 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, (June 17, 2016) (Re: Akali Tange Association Peaceful Protest March to Petition on Barrick Niugini Limited for BNL to Respond to PJV Grievance Mechanism Department’s Grievance Acknowledgment No: 3936), <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>.

⁸² *Gold’s Costly Dividend, supra* note 69 at pp.33-34.

⁸³ In addition to mercury, the tailings also contain high concentrations of arsenic, cadmium, copper, lead, zinc, as well as milling chemicals, including cyanide. *See Gold’s Costly Dividend, supra* note 69 at pp.32, 73-74; Council on Ethics: The Government Pension Fund—Global, *“Recommendation of 14 August 2008,”* p.11, <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*, (Jan. 27, 2016), https://www.law.columbia.edu/media_inquiries/news_events/2016/january2016/hri-papua-new

population, resulting overcrowding and loss of land, and environmental degradation have diminished women's ability to grow food and support their families.⁸⁴ Because the mine physically divides the community, women sometimes have to cross the mine site to reach agricultural land or school,⁸⁵ and in addition—faced with difficulties in growing food, and a lack of employment opportunities—many women have begun searching for gold in the open pit mine and waste dumps.⁸⁶ These practices expose women to the chemicals in the mine waste and river, and put women at risk of being caught by mine security and police for trespassing, which has often resulted in reports of sexual violence.⁸⁷

The Canadian government is well aware of the allegations of egregious human rights violations associated with the PJV mine. In 2009, groups testified about the allegations before the Standing Committee on Foreign Affairs and International Development,⁸⁸ and the 2010 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.⁸⁹ Despite this knowledge, the Canadian government has not investigated the allegations, held the companies accountable, nor facilitated access to a remedy for the victims.

b. North Mara gold mine in Tanzania

The North Mara underground and open pit gold mine, located in the Tarime district of the Mara region of Tanzania, is operated by the African subsidiary of the Barrick Gold majority-owned, Acacia Mining.⁹⁰ For the past three years, MiningWatch Canada and UK-based Rights and Accountability in Development (RAID) have interviewed and documented alleged human rights violations associated with the mine, including significant allegations of discrimination against women through socio-economic impacts and gender-based violence.

The mine is surrounded primarily by Kuria indigenous women living in rural agricultural and pastoral villages who suffer mine-related discrimination through: loss of access to land needed for food security and livelihood; loss of the economic and social contributions of male family members who have allegedly been killed or badly beaten and maimed by mine security and police guarding the mine;⁹¹ and alleged gender-based violence including rape, gang rape and severe beatings by mine security and

guinea-2016.

⁸⁴ 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.53-54 (Colin Filer ed., 2012), <http://press.anu.edu.au/publications/dilemmas-development/download>.

⁸⁵ EarthRights International, *Factsheet: Abuse by Barrick Gold Corporation*, https://www.earthrights.org/sites/default/files/documents/barrick_fact_sheet_-_earthrights_international_1.pdf.

⁸⁶ *Legal Brief Regarding Bill C-300*, *supra* note 69 at p.6.

⁸⁷ *See ibid.* at pp.6, 11-16.

⁸⁸ *See ibid.*; *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>.

⁸⁹ OECD Request for Review, *supra* note 71 at p.3.

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

⁹¹ The police have a Memorandum of Understanding (MOU) with the mine. For a copy of the 2010 agreement see *Memorandum of Understanding*, (July 8, 2010), http://miningwatch.ca/sites/default/files/nmgml-tarime_police_mou_2010.pdf. The MOU has since been updated but the arrangement remains in force.

police.⁹² Almost all of the victims 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, women who were married were then abandoned by their husbands.⁹³

Less than half the women interviewed by human rights advocates have received any form of remedy from the company's non-judicial grievance mechanism, and those that received a remedy expressed dissatisfaction in interviews. In particular, the inadequacy of the total value of the remedy received to address their needs was a common concern. Most of the rape victims interviewed by MiningWatch Canada and RAID received less than 8000 dollars 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.⁹⁴ Additional documented concerns with the non-judicial process include the lack of proper 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.⁹⁵

Again, the Canadian government is aware of these abuses but has taken no action. MiningWatch Canada raised allegations of environmental degradation and deaths at North Mara in testimony before the SCFAIT in 2009, and the allegations of killings by mine security at the North Mara mine has received coverage in a national Canadian media.⁹⁶ Despite these allegations, we are not aware of any state action to investigate or regulate the company's actions.

c. Latin America

As of 2012, the largest number of Canadian mining corporation operations outside of Canada was in

⁹² Nine of the twenty-one women interviewed were allegedly raped or gang raped by police or mine security personnel. For MiningWatch and RAID press releases and summary of findings from their human rights field assessments see Mining Watch 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-mine-tanzania-miningwatch-canada-and-raid-uk-complete-human>; Mining Watch 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"].

⁹³ *Ibid.*

⁹⁴ Mining Watch Canada & 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 *ibid.* See also MiningWatch and RAID press releases, *supra* note 92.

⁹⁵ See MiningWatch Canada & RAID, *Privatized Remedy and Human Rights*, *supra* note 73.

⁹⁶ 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, *Deadly dashes 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/>.

Latin America.⁹⁷ There are corresponding high numbers of allegations of human rights violations associated with operations in Latin America.⁹⁸ 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 contaminates water resources and harms harvests and livestock,⁹⁹ exposure to heavy metals with potentially serious harms to health,¹⁰⁰ forced displacement,¹⁰¹ and criminalization of social protests.¹⁰² These harms include violations of women’s rights to adequate living conditions, health, and life and security.

i. Puerto Gaitán oil fields in Colombia

Since 1987, the Canadian company Pacific Exploration and Production (“Pacific E&P,” formerly Pacific Rubiales Energy Corp.), has been involved in the exploration and development of the Quifa and Rubiales fields in Puerto Gaitán, Colombia. In 2016, the Colombian state oil company Ecopetrol assumed exclusive control of the Rubiales field, but the Quifa field is still operated by Pacific E&P.¹⁰³ The Colombian Constitutional Court recently suspended the project for improper consultation, and in doing so, recognized that the oil development is harming the environment and waterways.¹⁰⁴

The development of these oil fields has led to the alleged 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 prostitutes¹⁰⁵ in order to support their families.¹⁰⁶ According to polling, residents believe that oil production has led to an increase in prostitution (68.1%) and unknown diseases (41.1%).¹⁰⁷ In addition, women are reportedly facing

⁹⁷ 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 on Human Rights*, p.3, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf [hereinafter “Working Group on Mining and Human Rights in Latin America Report to IACHR”].

⁹⁸ See McGill Research Group Conflicts Database, *supra* note 10.

⁹⁹ Working Group on Mining and Human Rights in Latin America Report to IACHR, *supra* note 97 at pp.10-11.

¹⁰⁰ *Ibid.* at pp.12, 18.

¹⁰¹ *Ibid.* at pp.12-13.

¹⁰² *Ibid.* at p.14.

¹⁰³ See RCN Radio, *Ecopetrol se declaró lista para recibir campo Rubiales en Puerto Gaitán Meta*, (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) (re: Query regarding EDC’s support to Ecopetrol and Pacific E&P), <http://www.aboveground.ngo/wp-content/uploads/2016/09/Letter-EDC-Ecopetrol-Pacific-21092016.pdf> [hereinafter “Above Ground letter to EDC”].

¹⁰⁴ 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, *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-constitucional-orders-the-suspension-of-pacific-ep-operations-in-meta/>.

¹⁰⁵ 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-gait>.

¹⁰⁶ Guillermo Correa, Jessica Hoyos, *Impactos en los Derechos Humanos de la implementación del Tratado de Libre Comercio entre Colombia y Canadá- Línea base*, p.72, (June 14, 2012), <http://www.pasc.ca/sites/pasc.ca/files/u6/Colombian-Base-TLC-final1.pdf>.

¹⁰⁷ FIDH, PASO and Colectivo de Abogados José Alvear Restrepo, *COLOMBIA El costo humano del petróleo: Estudio de*

workplace discrimination: women working in the oil operations are given assignments based on their looks, and are likely to be fired if they get pregnant.¹⁰⁸ This treatment suggests that Canada is failing to take all appropriate measures to ensure equal treatment between men and women in the workplace, and to prohibit dismissal on the grounds of pregnancy, as required by Article 11.¹⁰⁹

Rather than investigate and punish these abuses, the Canadian government has financially supported Pacific E&P. In 2012, EDC provided up to CAD 25 million, and in 2014 up to CAD 100 million, to fund procurement of Canadian goods and services.¹¹⁰ In addition to the allegations of discrimination against women, this loan was disbursed, despite numerous alleged human rights violations including targeted killings,¹¹¹ excessive force against protesters,¹¹² threats to human rights defenders,¹¹³ and environmental degradation.¹¹⁴ Financing corporations despite serious allegations of their involvement in human rights abuses strongly signals that Canada will not hold corporations accountable for such abuses.

ii. Fenix mine in Guatemala

From its inception in 1965 until 2011, the Fenix nickel mine near El Estor, Guatemala, was owned by a series of Canadian mining corporations: INCO Ltd. (1965-2004), Skye Resources (2004-2008), and HudBay Minerals (2008-2011).¹¹⁵ The Fenix mine began operating during the Guatemalan civil war, and its history is filled with numerous allegations of egregious abuses including forced displacement, extrajudicial killings, and gang rape.¹¹⁶ For instance, on January 17, 2007, eleven Mayan Q'eqchi' women were allegedly gang-raped by police, military and mine security personnel during a forced eviction from their homes, on contested property. These eleven women are now Plaintiffs in one of the three civil actions against HudBay Minerals proceeding to trial in Ontario.¹¹⁷

This case also illustrates the Canadian government's prioritization of its mining industry over its obligations under CEDAW. Starting in 1974, with a CAD 17.25 million loan to INCO's subsidiary, despite well-known abuses in the region,¹¹⁸ the Canadian government has provided various forms of support to the owners of the Fenix mine. The Canadian embassy in Guatemala promoted its mining companies in

impacto en los derechos humanos de las actividades de Pacific Exploration & Production Corp. en Puerto Gaitán, p.8 (July 12, 2016), <https://www.fidh.org/IMG/pdf/colombie677e2016defsanscartebassdef.pdf>.

¹⁰⁸ Guillermo Correa, Jessica Hoyos, *supra* note 106 at 63.

¹⁰⁹ CEDAW, *supra* note 11 at arts. 11(1), 2(a).

¹¹⁰ See: Export Development Canada, *Individual Transaction Information*, <https://www19.edc.ca/edcsecure/disclosure/DisclosureView.aspx?lang=EN> [hereinafter, "EDC, Individual Transactions"].

¹¹¹ Above Ground letter to EDC, *supra* note 103 at 2.

¹¹² *Ibid.* at 2.

¹¹³ *Ibid.* at 4.

¹¹⁴ See FIDH, PASO and Colectivo de Abogados José Alvear Restrepo, *supra* note 105 at 10; Above Ground letter to EDC, *supra* note 103 at 2-4.

¹¹⁵ *Canadian Mining in El Estor*, Klippensteins, <http://www.chocversushudbay.com/history-of-the-mine> [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>.

¹¹⁶ See Shin Imai, Bernadette Maheandiran & Valerie Crystal, *Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala*, Osgoode Hall Law School, (2014),

http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2211&context=scholarly_works.

¹¹⁷ Plaintiffs' Amended Statement of Claim, *Caal v HudBay*, 2013 ONSC 1414, (No. CV-11-423077), <http://www.chocversushudbay.com/wp-content/uploads/2010/11/Amended-Statement-of-Claim-Caal-v.-HudBay-FILED.pdf>.

¹¹⁸ Canadian Mining in El Estor, *supra* note 115.

talk show appearances and articles in local newspapers, portraying Canadian companies as leaders in environmental protection and social responsibility.¹¹⁹ 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.¹²⁰ The filmmaker, a Canadian Ph.D. student, successfully sued the Ambassador and the Attorney General of Canada for slander.¹²¹ 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 rights, the email refers to the community as “invaders,” and describes the situation as an “anarchic free for all land grab.”¹²²

D. Canada’s use of Official Development Assistance and support through Export Development Canada in support of the extractive sector may violate CEDAW

Canada’s failure to meaningfully regulate Canadian corporations is compounded by the substantial support it provides to the extractive sector through ODA and financing from EDC, Canada’s export credit agency, and a Crown corporation.¹²³

a. Export Development Canada’s support to the extractive sector may violate Article 2

The EDC provides significant support to extractive sector corporations, including those associated with alleged human rights violations such as Pacific E&P.¹²⁴ In 2013, the extractive sector was the largest beneficiary of EDC services receiving nearly CAD 25 billion.¹²⁵ For 2016, EDC has already approved

¹¹⁹ *Canada’s History in El Estor Guatemala*, Schnoor v Canada, <http://www.schnoorversuscanada.ca/timeline.html#pfn10> [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>.

¹²⁰ Plaintiff’s Amended Claim, *Schnoor v Canada*, SC-09-00080779-0000, <http://www.schnoorversuscanada.ca/docs/statement-of-claim.pdf>.

¹²¹ 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; *Judge Rules the Canadian Ambassador Slandered Documentary Video Maker*, Schnoor v Canada, <http://www.schnoorversuscanada.ca/>; *Schnoor v Canada*, Endorsement Record/Order of the Court, SC-09-00080779-0000, (June 10, 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.”

¹²² Email from Kenneth Cook, to Canadian government officials (Jan. 21, 2008) (Re: “Protected A Skye resources CGN - mission critical. Follow up”), <http://www.schnoorversuscanada.ca/docs/cook-email-re-skye.pdf>; *Canada’s History in El Estor Guatemala*, *supra* note 119.

¹²³ Export Development Canada, *About Us*, <http://www.edc.ca/EN/About-Us/Pages/default.aspx>.

¹²⁴ See Above Ground letter to EDC, *supra* note 103. Groups have also reported concerns about EDC’s funding to Brazilian mining company, Vale S.A. for capital expenditures associated with its Carajás project in the Amazon, which is associated with alleged human rights violations. See 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> [hereinafter “Export Credit Agencies and Human Rights”].

¹²⁵ Above Ground, *Frequently Asked Questions: Export Development Agencies*, p.1 (July 2015), http://www.aboveground.ngo/wp-content/uploads/2015/08/FAQs_EDC_July2015_LO.pdf [hereinafter “Above Ground, FAQ”].

financing for 7 different extractive projects in the Americas, totaling over CAD 1 billion.¹²⁶ Given the consistent allegations of Canadian extractive companies' involvement in human rights abuses, this level of support to the industry suggests that the Canadian government is indifferent to, if not actively supporting, such abuses.

Article 2 of CEDAW requires that Canada take appropriate measures to ensure that its Crown corporations are not discriminating against women. In 2005, the Standing Committee on Foreign Affairs and International Trade recommended that government support be contingent upon meeting clearly defined corporate social responsibility and human rights standards.¹²⁷ 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.¹²⁸ Canada has ignored these obligations: while EDC support requires consideration of adverse environmental impacts, it is not contingent upon compliance with human rights standards.¹²⁹ The EDC states that in reviewing applications it considers CSR guidelines,¹³⁰ performs political risk assessments which involve consideration of factors that influence human rights,¹³¹ and performs additional due diligence for projects that have a higher potential for human rights issues.¹³² But these measures are inadequate in light of reports that EDC is supporting corporations involved in alleged human rights abuses. This inadequacy is compounded by the lack of transparency surrounding EDC's decision-making process. The assessment processes, factors considered, and the review are not publicly available.¹³³ A transparent process will help ensure that Canada fulfills its treaty obligations.

b. Canada's Official Development Assistance raises concerns about possible Article 14 violations

Article 14 of CEDAW guarantees rural women the right "to participate in the elaboration and implementation of development planning at all levels."¹³⁴ This requires States parties to ensure that their development assistance advances the rights of rural women outside their territory, and to "ensure the full participation of rural women" in development projects relating to the extractive industries that impact them.¹³⁵ Canada's *Official Development Assistance Accountability Act* (ODAAA) states that ODA can only be provided if the Minister is of the opinion that it is "consistent with international human rights standards,"¹³⁶ which should incorporate Article 14.

¹²⁶ EDC, Individual Transactions, *supra* note 110.

¹²⁷ Parliament of Canada, Standing Committee on Foreign Affairs and International Trade, "Fourteenth Report: Mining in Developing Countries- Corporate Social Responsibility" 38th Parl., 1st Sess. (June 22, 2005) ¶ 4,

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1901089&Language=E&Mode=1&Parl=38&Ses=1>

¹²⁸ U.N. Office of the High Comm'r for Hum. Rts, Guiding Principles on Business and Human Rights, ¶ 4, UN Doc. HR/PUB/11/04, (2011).

¹²⁹ *Export Development Act*, R.S.C., 1985, c. E-20 s.10.1.

¹³⁰ EDC states that it considers the Equator Principles and the International Finance Corporation's (IFC) Performance Standards on Environmental and Social Sustainability. EDC, *Environmental and Social Assessment*,

<http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Pages/environment-and-social-assessment.aspx>.

¹³¹ Above Ground, FAQ, *supra* note 125 at p.3.

¹³² *Ibid.*

¹³³ *Ibid.* at p.2; Export Credit Agencies and Human Rights, *supra* note 124 at p.20.

¹³⁴ CEDAW, *supra* note 11 at 14(2)(a).

¹³⁵ GR No. 28, *supra* note 2 at ¶ 12.

¹³⁶ *Official Development Assistance Accountability Act*, S.C. 2008, s.4(1)(C). International human rights standards are defined as "standards that are based on international human rights conventions to which Canada is a party and on

Nonetheless, Canada's ODA has supported actions that appear inconsistent with the ODA and CEDAW obligations. For example, Canadian aid that has gone to help South American governments draft mining legislation raises questions about Canada's commitment to ensuring that development aid furthers the interests of rural women and includes them in policymaking. According to a report by MiningWatch Canada and CENSAT-Agua Viva, in Colombia, ODA supported a technical assistance project to help the Colombian government reform its mining law.¹³⁷ The resulting legislation was reportedly seen as prioritizing the interests of foreign mining companies over local indigenous communities by opening up areas formerly excluded from mining access, and limiting mining areas for indigenous and Afro-Colombian communities to areas where they have legal title.¹³⁸ Similar concerns have been voiced over Canada's development aid to Honduras, a country that has become notoriously dangerous for environmental defenders (especially women).¹³⁹

Civil society groups have also raised concerns that Canada's aid has prioritized the interests of the mining industry over the local communities affected by their operations. For example, in reviewing Canada's aid to Peru for extractive sector projects, a report commissioned by the North-South Institute and prepared by José De Echave of the Lima-based organization, Cooperación, found that: "The emphasis on corporate social responsibility and self-regulation has led to projects focusing on the short-term need of companies to obtain the social-license to operate, rather than on the medium- or longer-term vision of sustainable development and peace. The project site interventions overshadow the key role that should be played by the region's social organizations as well as by local authorities In addition, despite almost ten years of such projects having taken place, social conflicts continue to escalate."¹⁴⁰ The concerns over the use of ODA are not limited to this industry. In 2012, the Special Rapporteur on the right to food, found that, "while CIDA seeks to ensure that its projects will not result in human rights violations, it does not apply human rights norms and standards in determining aid priorities and implementing programmes."¹⁴¹

V. Recommendations

international customary law." See *ibid.* at s.3.

¹³⁷ Through this project, agents of Canadian mining companies served as expert advisors. MiningWatch Canada and CENSAT-Agua Viva for Inter Pares, *Land and Conflict: Resource Extraction, Human Rights and Corporate Social Responsibility: Canadian Companies in Colombia*, pp. 9 (Sept. 2009), <http://miningwatch.ca/sites/default/files/Land-and-Conflict.pdf>.

¹³⁸ *Ibid.* at 9-11.

¹³⁹ MiningWatch Canada, *Honduran organizations fight to have Canadian-backed mining law declared unconstitutional: Summary of two complaints against Honduras' 2013 General Mining Law*, (Feb. 26, 2015), <http://miningwatch.ca/blog/2015/2/26/honduran-organizations-fight-have-canadian-backed-mining-law-declared>.

¹⁴⁰ José De Echave C., Cooperación and The North-South Institute, "Guests at the Big Table? Growth of the Extractive Sector, Indigenous/Peasant Participation in Multi-Partite Processes, and the Canadian Presence in Peru," p.v, see also p.38 (December 2010), <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2011-Guests-at-the-Big-Table-Growth-of-the-Extractive-Sector.pdf>; MiningWatch Canada, *In the National Interest? Criminalization of Land and Environment Defenders in the Americas*, pp. 40-41 (Aug. 2015), http://miningwatch.ca/sites/default/files/inthenationalinterest_fullpaper_eng_1.pdf (citing Bonnie Campbell, Etienne Roy-Grégoire and Myriam Laforce, "Regulatory Frameworks, Issues of Legitimacy, Responsibility, and Accountability: Reflections drawn from the PERCAN initiative", in *Governance Ecosystems: CSR in the Latin American Mining Sector*, Ed. Julia Sagebien and Nicole Marie Lindsay, Palgrave Macmillan, Nov. 2011).

¹⁴¹ G.A., U.N. Hum. Rts Council, *Report of the Special Rapporteur on the Right to food, Olivier De Schutter: Mission to Canada*, ¶ 52, A/HRC/22/50/Add.1, (Dec. 24, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC2250Add.1_English.PDF.

In order to uphold its obligations, we call on the Committee to urge Canada to do the following:

1) Ombudsperson

Canada should create an Ombudsperson office for the extractive industries, which is independent, impartial and empowered to: investigate alleged abuses and potential abuses (including using gender-sensitive investigation and analysis); report publicly; and make recommendations to companies and to the government, including regarding the provision of remedy for those who have been harmed and regarding steps to be taken to prevent further harms. Canada's Ombudsperson should be empowered to recommend that the Government of Canada withhold public support to companies until specified conditions are met. In creating the office, Canada should consult with indigenous peoples and local communities impacted by the operations of Canadian mining companies to ensure their needs and priorities are met. Specifically, in relation to the rights of women, this office should have a special adviser on women's rights that would create protocols and guidelines to assure that the consultation processes have the meaningful participation of women.

This recommendation was first proposed by the final report of the national roundtables in 2006, and has since been recommended by both the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

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 suppliers and subcontractors, especially marginalized groups such as indigenous peoples and women, who tend to face greater barriers in accessing justice. Canada should enact legislation affirming that Canada is an appropriate forum for actions against extractive companies that are either registered, headquartered, or have their substantial place of business in Canada regarding human rights abuses that occurred at their operations abroad. Canada should also ensure that impecunious victims are able to bring actions in Canadian courts without the requirement to post security 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 women to bring these cases.

3) Parent Company Liability

- a. Canada should enact legislation establishing automatic 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, particularly to ensure that the operations of those corporations including through contractors do not discriminate against women or expose them to violence including sexual violence.
- b. Canada should 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 women and to provide effective remedies to women 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 human rights are respected prior to providing any kind of support. 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.
- c. Ensure that ODA prioritizes the rights of local communities, indigenous peoples and women impacted by the operations of Canadian corporations, and ensure that women participate in determining their own development strategies by including them in decisions determining the use of ODA.

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/CO/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/CO/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>
<p>Human Rights Committee, “Concluding Observations” CCPR/C/CAN/CO/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>
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