

**Canada's Extraterritorial Human Rights Obligations: *What Canada must do to prevent human rights abuses by Canadian mining companies abroad?***  
*The case of Canadian mining activities in Colombia*

Major Research Paper  
In partial fulfilment of  
Master of Arts in Public and International Affairs  
Graduate School of Public and International Affairs  
University of Ottawa  
July 17th 2019

**Author:** Agustina Gomez Altobelli  
**Student number:** 03000031687  
**Supervisor:** David Petrasek

## **Canada's Extraterritorial Human Rights Obligations**

*What Canada must do to prevent human rights abuses by Canadian mining companies abroad?  
The case of Canadian mining activities in Colombia*

### **Abstract**

The purpose of this Major Research Paper (MRP) is to evaluate Canadian policies towards Canadian mining companies operating abroad, with a special focus in the Colombian context. More specifically, this paper seeks to evaluate if Canada is fulfilling its international human rights obligations, as a home State, to protect human rights by exercising its duty to regulate the activities of its mining companies abroad and by providing effective remedy to the victims of human rights abuses by mining companies. The MRP follows a qualitative research method, relying on secondary sources, including academic papers, reports by international organizations (i.e. United Nations), international human rights treaties, official government documents as well as civil society reports. The analysis of this MRP shows that Canadian policies implemented thus far fall short to address mining companies' problematic behaviour, thus failing to prevent further human rights abuses. In addition, Canada has yet to establish an effective mechanism that facilitates access to remedy for victims of abuses. In this context, Canada needs to establish mechanisms to hold mining companies accountable for their activities abroad and to provide redress to victims, in order to fulfill its home State obligations.

## Table of Contents

|  |           |
|--|-----------|
| <b>PART I - INTRODUCTION.....</b>  | <b>5</b>  |
| RESEARCH METHODOLOGY AND LIMITATIONS .....   | 6         |
| <b>PART II - CANADIAN MINING IN LATIN AMERICA .....</b>  | <b>7</b>  |
| MEASURING THE PRESENCE OF CANADIAN MINING IN LATIN AMERICA.....  | 8         |
| THE OPERATING ENVIRONMENT FOR MINING COMPANIES IN LATIN AMERICA.....   | 8         |
| CONCLUSION .....   | 10        |
| <b>PART III - THE CASE OF CANADIAN MINING IN COLOMBIA.....</b>   | <b>10</b> |
| MINING HISTORY IN COLOMBIA .....   | 11        |
| CANADIAN PRESENCE IN COLOMBIA.....   | 15        |
| <i>Canadian Investments and Presence in the Colombian Mining Sector</i> .....  | 16        |
| <i>Canada's influence in Colombian mining through development initiatives</i> .....                                    | 16        |
| <i>Government support through crown-corporations</i> .....   | 19        |
| <i>Human rights context in Colombia</i> .....  | 19        |
| <i>Impacts of Canadian mining activity with regards to human rights in Colombia</i> .....                              | 23        |
| CONCLUSION .....   | 26        |
| <b>PART IV - EXTRA-TERRITORIAL HUMAN RIGHTS OBLIGATIONS FOR CANADIAN MINING COMPANIES.....</b>                         | <b>27</b> |
| FRAMEWORK OF ANALYSIS .....  | 27        |
| <i>Home State Duty to Regulate Private Actors</i> .....  | 28        |
| <i>Home State's Duty to Provide Access to Remedy</i> .....   | 36        |
| <i>Canada's obligations and the governance gap</i> .....   | 39        |
| CANADA'S INITIATIVES TO PREVENT HUMAN RIGHTS ABUSES BY TRANSNATIONAL COMPANIES .....                                   | 41        |
| <i>Non-judicial initiatives: Canada's CSR since 2009 to present</i> .....  | 42        |
| <i>Weaknesses/drawbacks</i> .....  | 48        |
| <i>Judicial remedies: access to litigation under the Canadian legal system and Bill C-300</i> .....                    | 50        |
| <i>Regulation through trade agreements: evaluating the Canada-Colombia Human Rights and Free Trade Agreement</i> ..... | 56        |
| CONCLUSION .....   | 58        |
| <b>PART V - ANALYSIS: WHAT SHOULD CANADA DO? .....</b>   | <b>59</b> |
| THE OMBUDSPERSON .....   | 59        |
| IMPROVING ACCOUNTABILITY AND FACILITATING ACCESS TO JUDICIAL REMEDIES .....  | 60        |
| STRENGTHENING THE METHODOLOGY OF THE HRIA.....   | 61        |
| CONCLUSION .....   | 62        |
| <b>BIBLIOGRAPHY.....</b>   | <b>63</b> |

## List of Acronyms

|        |  |
|--------|--|
| CIDA   | The Canadian International Development Agency                              |
| CIIEID | Canadian International Institute for Extractive Industries and Development |
| CCoFTA | Canada-Colombia Free Trade Agreement                                       |
| CMAAs  | Canadian Mining Assets   |
| CORE   | Canadian Ombudsperson for Responsible Enterprise                           |
| CPP    | Canadian Pension Plan  |
| CSR    | Corporate Social Responsibility  |
| EDC    | Economic Development Canada  |
| GAC    | Global Affairs Canada  |
| HRIA   | Human Rights Impact Assessment   |
| ICCPR  | International Covenant on Civil and Political Rights                       |
| IFC    | International Finance Corporation  |
| IHRL   | International Human Rights Law   |
| MNEs   | Multinational enterprises  |
| NCP    | National Contact Point   |
| NRCAN  | Natural Resources Canada   |
| OECD   | Organization for Economic Co-operation and Development                     |
| TCS    | Trade Commissioner Service   |
| TNCs   | Transnational corporations   |
| UN     | United Nations   |
| UNGPs  | United Nations Guiding Principles  |

## **PART I - INTRODUCTION**

In 2017, Canadian mining assets in foreign countries were \$260.1 billion, having operations in 101 foreign countries, with Latin America receiving 55% of the Canadian mining investments abroad, according to the latest data available. Given the size of the presence of Canadian mining globally and particularly in Latin America, and its experience in championing human rights, Canada should undertake a leadership position with regards to the promotion and enforcement of good business practice and Corporate Social Responsibility (CSR) standards.

However, in spite of the numerous efforts by the Canadian government, complaints of human rights abuses against Canadian mining companies still arise and the overall impression of Canada's mining presence abroad is still negative. Thus, good governance and regulation of mining Transnational Companies (TNCs) is still a policy problem for the Government of Canada that merits attention, given Canada's responsibilities to protect, promote and respect human rights domestically and abroad.

The goal of this brief research paper is to better understand the discrepancies between Canada's role as a champion of human rights and the perceived lack of initiative/failed initiatives to prevent human rights abuses in the context of Canadian mining activities abroad. For the purposes of this research, I limited the scope of my analysis to the Latin American region, but more specifically to the Colombian context. I decided to limit my analysis to this country for the sake of brevity for this paper, while acknowledging that the issue is present in the whole region. Moreover, Canada's historical influence in the Colombian mining sector represents a good

starting point for the analysis and evaluation of Canada's initiatives to curb abuses by mining companies. In addition, the requirement of a Human Rights Impact Assessment (HRIA) in the context of the Canada-Colombian Free Trade Agreement has the potential of being an excellent reporting tool to address human rights concerns with regards to the mining sector, if its methodology is modified. The analysis and recommendations provided are based of the Colombian context, in particular with regards to the HRIA. However, the set of suggestions for new policies and for the improvement of existing ones should also benefit other countries in Latin America who are affected by Canadian mining activities.

### **Research Methodology and Limitations**

This paper uses qualitative research methods to evaluate Canada's policy towards Canadian mining companies in Latin America and Colombia, under the premise of an existing home State duty to regulate its private actors in fulfillment of its obligation to protect human rights abuses according to international human rights law. My framework of analysis relies on provisions contained under the international human rights instruments developed by the UN, their interpretation by UN and expert committees as well as by academics. I chose to focus on the UN treaty body given that is well-established and has been widely incorporated by most member states, while acknowledging the existence and validity of instruments developed regionally. After, each policy is described, and its main challenges are identified. In the conclusion, I provide some recommendations to improve the policies.

For the analysis, I relied on secondary sources, including academic debates, governmental reports, international organizations' guidelines and reports were used for this research. Also, the contribution of reports from NGOs -regional and Canadian-based- provided up-to-date insights

on the situation of local communities as well as critical observations of the government's policy. These include MiningWatch and Amnesty International.

Given that my paper sought to analyze the Government of Canada's initiatives and policies to address human rights abuses by Canadian mining companies, the analysis of this paper focuses only on home State responsibility to regulate private actors and to protect human rights.

However, I want to acknowledge that the fulfillment of host state's and private actors' responsibility are also an essential piece of the puzzle. In fact, complex and multi-layered context in which mining companies (usually transnational companies) operate requires collective action, in order to address the companies' conduct abroad and to offer redress to victims of human rights abuses by companies. Nonetheless, I argue that home State's have an advantage in regulating their companies, given that normally, these operate in contexts of weak governance and that home states usually have the institutional capacities to do so, as well as moral and legal obligations. In this context, I have limited my analysis to Canada's CSR strategies, access to Canadian courts as well as to the effectiveness of the Human Rights Impact Assessment under the CCoFTA.

## **PART II - Canadian Mining in Latin America**

The following section will provide a brief overview of Canadian mining activities. The goal of this overview is to provide context and understanding of Canada's presence, that will help establish an analysis of the interplay between Canada's leadership in mining in Latin America, its consequences with regards to human rights and Canada's responsibilities and obligations to respond to these consequences. The following section will be structured as follows: first, I will provide data measuring Canadian mining presence. Second, I will provide a brief overview of the

mining and economic reforms of 1980-1990 that created an attractive operation environment for foreign mining companies in Latin America.

### **Measuring the presence of Canadian Mining in Latin America**

According to the latest data available at the time of writing, the total value of Canadian mining assets (CMAs) abroad reported by Natural Resources Canada (NRCAN) is of \$168.7 billion, representing an increase of 1.4% from 2016 from a total of \$166.4 billion. CMAs for the Americas (excluding Canada) for 2017 are valued at \$117.9 million (or 69% of the total). The global reach of Canadian mining can also be measured by the increasing number of mining companies listed in the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV): in 2017, 59% of the global mining financing was done in TSX AND TSXV and almost 56 billion mining shares were traded, which amounts to \$206 billion. Companies listed on TSX and TSXV raised \$4.4 billion in equity capital for investments in Latin American projects (MAC 2018). Another indicator of Canadian presence is Canada's direct investment abroad. In 2017, the projected stock flow was of \$1.12 trillion, of which mining accounted for \$82.7 billion or 7% of the total (MAC 2018). In sum, this financial information demonstrate that Canadian mining's presence in Latin America is not negligible - in fact, as it will be argued in the following sections, this increased presence and reach of Canadian mining activities should serve as additional justification for Canada to regulate the activity of these companies abroad.

### **The Operating Environment for Mining Companies in Latin America**

Latin America has been considered El Dorado for mining activities given the size of its reserves: outside of US, the largest mining assets are located in Latin America, with Mexico (11%), Chile (11%), Argentina (8%), Panama (7%), Brazil and Peru (6%) (ECLAC 2013). At the end of

1980s, newly elected neo-liberal governments, aware of the interest of foreign companies, sought economic and legal reforms, in order to attract foreign investments, including in the mining sector.

In 1980, Latin American governments held tight control over natural resource extraction, as national companies were given priority in the concession of projects. The arrival of neo-liberalism brought a change in policy, which included the revision or rewriting of existing mining codes, regulations and institutional arrangements between foreign companies and the governments of the host State. At the front of the creation of this new policies and laws were the World Bank, the UN's Economic Commission for Latin America and the Caribbean (CEPAL) as well as members from national ministries and advisors from the industry (Chaparro-A 2002; Szablowski 2007; Gordon and Todd 2008; Studnicki-Gizbert 2015). Restrictions from the 1980s disappeared, allowing for the free operation of mining companies.

Economic and mining law reforms include non-discrimination against foreign capital, which eliminates the barriers of entry for new projects and also results in foreign and local investors being subject to the same tax regimes and incentives; the removal of authorizations for mining concessions applications allows mining companies to obtain mining rights without any assessment or evaluation on the part of the State; the relaxation of the rules around operating requirements with regards to the purchase of local inputs and for preference over local engineering or locally-engaged staff; and the right to legal protection and exclusiveness over the mining right, which includes having access to natural resources and servitudes (Sanchez et al. 2001; UNCATD 2000). The amount of rights given to mining companies was disproportionate to the obligations imposed, especially when it comes to human rights impact assessments, that were

recently incorporated. Nonetheless, the reforms proved to be effective and beneficial for Canadian mining companies: between 1991-1995 the number of projects owned by Canadian mining companies in Latin America rose substantially. For instance, in Mexico, the number of Canadian companies went from 52 to 244; in Peru, from 3 to 98, and, in Argentina, from 0 to 97 (Lemieux 1995; Studnicki-Gizbert 2015).

## **Conclusion**

In sum, the reforms presented above partially explain the enabling environment in which mining companies operate. The absence of strict requirements around human rights assessments, free access to mining activities and continuous support by the home and host states have contributed to the emergence of a governance gap, that fails to address mining companies' behaviour with respect to human rights abuses. As it will be explained further in the paper, although host states have an essential role to play, home States are part of the solution in closing that governance gap. As a home State, Canada has a duty to regulate its companies' activities abroad. This duty not only stems from international human rights law obligations but also from the influence and presence of Canadian abroad.

## **PART III - The case of Canadian mining in Colombia**

The present section will provide a brief history of mining activities in Colombia, followed by Canada's influence in the country's mining sector. I will then address the consequences and human rights impacts of Canadian mining activities in the Colombian context. The conclusion of this section will provide a background of analysis for the Government of Canada's support for the industry, its CSR initiatives and other initiatives to improve the behaviour of Canadian

mining companies, against the backdrop of international human rights law and the country's transnational obligations to protect and promote human rights.

### **Mining History in Colombia**

With the arrival of neoliberalism in 1990 in the Latin American region, the size of the state was reduced and a change in paradigm of the mining model was introduced (Alvarez 2006; Prado Becerra 2013). In Colombia, these changes were reflected in the enactment of a new mining code, under the law, the size of the state was reduced and market freedom increased, leading to new reforms in the mining code or the Law 685 and the derogation of Decree 2655 of 1988. The reforms fit within the tenets of the Washington Consensus model, led by Washington-based institutions, namely the World Bank, the International Monetary Fund and the Inter-American Development Bank (Prado Becerra 2013; Fierro Morales 2012). The model promoted economic reforms in developing countries, in order to transition to market economies. Some of the measures included: trade liberalization, privatization and sale of state-owned enterprises, market deregulation and the protection of private property. These measures, albeit not imposed, were reflected in the mining reforms -although not completed- proposed by Samper (1994-1998) and in the Mining Code of 2001, under Pastrana's administration (1998-2002) (Prado Becerra 2013; Fierro Morales 2012). The World Bank's mining strategy included a fair tax regime as a guarantee for foreign investors (McMahon 2010). Latin American countries were thus encouraged to introduce these reforms in order to obtain loans and technical assistance from the entity (Prado Becerra 2013).

Under President Pastrana's administration, the reform of the mining code was initiated amidst mounting pressure from mining companies, unions protecting mining workers as well as by the necessity to align its provisions to the *Carta Política* of 1991 and to the new Constitution (Prado

Becerra 2013). In principle, the *Carta* states that the planning of the use and enjoyment of non-renewable natural resources falls under the State's pureview. This should be done in privileging sustainable development practices.

The reform of the mining code was done through an agreement between by the Colombian Ministry of Mining and Energy, the Canadian Energy and Research Institute (CERI) and the law firm Martinez & Cordoba Asociados, a group of mining lawyers, hired by the Ministry. It should be noted that the Government of Canada invested \$11 millions to assist in the reform. The objectives behind this agreement, disclosed by the office of the Comptroller General of the Republic (CGR), include: the strengthening of the institutional capacity of the Ministries of Environment, Mines and Energy; through counselling and technology, assist in the implementation of institutional reforms for the mining, energy and hydrocarbon sectors; the efficient revision of the regulations and conformity procedures; and, develop links with Canadian organizations and institutions. Once finalized, the text was circulated among entrepreneurs, ethnic minorities and mining communities. This time, the Judicial Department of the Ministry of Mining and Energy was not part of the study and debate. The modifications represented a 360 degree turn to the previous model from past decades; in fact, the government considered the mining sector and its activities as an object of public interest and utility. In this optic, the new code recognizes the autonomy of the industry and puts the private sector at the centre of mining activities. The approval of the mining code coincided with the economic restructuring, reflecting an openness to the international market (Prado Becerra 2013). The most salient reforms include:

- Reduction of the State's participation in the regulation, promotion and fiscalization of the sector;

- Formalization of the principle “first come, first served” to the access to mining titles and mining rights;
- Open access to the areas reserved by the State for mining development;
- Unification of the system for the obtention of titles through concessions, eliminating other existing layers such as the Mining Contributions (Aportes Mineros);
- Unification of the duration of concessions at 30 years and amplification of the conditions for renewal/extension of contracts.
- Delimitation of special areas including the areas of special reserve, national security zones, areas excluded from mining (protected areas for the development of non-renewable natural resources), restricted zones for mining (of archeological, historical or cultural interest, fluvial zones, Indigenous mining areas, black and mixed communities).

This reform of the Mining Code established a model that allows for the proliferation of mining titles, that are awarded without any judicial or technical evaluation to select the best candidate, except for the strategic areas delimited under the Code, whereby the interested entity has to go through a selection process (Negrete 2013). The government also moved forward with the privatization of mining companies owned by the state, introduced tax reforms to attract foreign investment, approved agreements of legal stability and strengthened the right to private practice.

Under President Santo’s administration (2010-2018) some reforms to the mining code were introduced to face the social, environmental and economic crisis in the sector. The institutions underwent a restructuring process, in that the Vice-Ministry of Mines was re-introduced to the Ministry of Mining and Energy and in the creation of two mining directorates. In addition, the process established the National Mining Agency, with an administrative function, and the Geological Service, in charge of evaluating the applications for titles, according to the norms.

At the time of writing, the National strategy around mining focuses on placing Colombia a leader in mining in the Latin America, by facilitating foreign investment and access to mining resources. For instance, the National Plan for Mining Developments of 2006-2019 envisions, that by 2019, the Colombian mining industry would be one of the most important ones in Latin America and it would have expanded its participation in the national economy (Republica de Colombia 2017). The State's role, as indicated in the strategy, is that of a facilitator of the mining activity, of a promoter of sustainable practices and of a facilitator for investments in the sector. The main objectives of the Plan were to take full advantage of the comparative advantages of the country represented by its mining potential in its territory, by the arrival of a great number of investors and by helping the State to take better advantage of the results of mining activities and, by optimizing the processes that support the institutionalization required to support the mining activity (Republica de Colombia 2017).

The past and current approach to mining contributed to the creation of conflicts, rather than to the development of communities and their well-being. Currently, the mining code does not currently contain any specific requirements on companies to respect and protect human rights. However, there have been developments on this regard, at the voluntary level. For instance, one of the pillars of the mining policy of Colombia is social development, which requires human rights protection by encouraging companies to adopt good CSR practices and to establish dialogue with the affected communities (Republica de Colombia 2017). The first step towards the establishment of binding requirements is represented by a provision established under the Plan for 2014-2018, in that concession contracts to be granted by the National Mining Authority (NMA) require the elaboration and execution a Social Management Plan, by the company or the concession-holder. The Plan has to include programs, projects and activities to be determined by

the NMA, according to the production scale and the technical and economic capacity of the company. The intended effect of this measure is to mitigate or diminish the negative impacts of mining activities in the communities (Republica de Colombia 2017). The NMA also elaborated a strategy of social management, which includes tools, guidelines and international standards on good practices, for the companies. However, all of these remain of a voluntary nature, thus failing to address human rights concerns.

In sum, the reforms introduced since the end of 1980s and early 1990s helped boost the mining sector in Colombia, by diminishing the state's participation in the control and administration of mining resources. However, the choice for this approach did not come without consequences. For instance, the proliferation of mining titles that are awarded without any judicial or technical evaluation to select the best candidate is detrimental to the environment, including to the water, soil, biodiversity and landscapes. Classifying mining as an activity of "public interest" contributed to the generation of community and social conflicts, as the rights and demands of the communities were not considered in the process of granting concessions (Negrete 2013), allowing companies to operate with total autonomy (Lleras et al. 2013). The new measures included little participation of the state in the production and regulation, increased tax exemptions, weak environmental regulations and limited consultations with communities. This resulted in an environment that allowed for human rights abuses by mining companies.

### **Canadian presence in Colombia**

The goal of this subsection is to provide context on Canada's influence in the Colombian mining sector. The evidence presented in this section serves as an additional argument for the existence of a home State obligation -in this case Canada- to regulate the activities of its mining companies operating abroad -in this case, in the Colombian context. First, I will outline Canadian presence

in the Colombian mining context through the number and value of Canadian investments in the sector, through Canadian development initiatives targeting the mining sector and through governmental support offered to mining companies operating or wanting to operate in Colombia. Second, I will present allegations of human rights abuses made against Canadian mining companies in Colombia. Third, in the conclusion, I will indicate that the evidence presented in this subsection serves as a powerful argument to justify the existence of a home State duty to regulate, complementing the existent obligation under international human rights law.

### ***Canadian Investments and Presence in the Colombian Mining Sector***

Canadian direct investment reached \$3.69 billion in 2016, making Colombia the fourth largest investment for Canada in Latin America, according to the latest available data from Global Affairs Canada (Global Affairs Canada 2018). According to Natural Resources Canada, Canadian mining assets in Colombia are of \$1,258 million for 2016 and of \$1,438 million for 2017. The number of Canadian mining companies operating in Colombia for 2016 is of 24 and for 2017, of 22 (NRCAN 2018).

### ***Canada's influence in Colombian mining through development initiatives***

Since the 1990s, the Government of Canada has funded development projects related to the mining sector, through its development agency. These took shape as exploration of geological data with mining potential, mining-related educational activities and related to Corporate Social Responsibility, with the stated aims of promoting development in the communities affected by mining (Bodruzic 2015). Critics to this approach see these projects as ways of obtaining key information and influence, that would then benefit Canadian mining companies when obtaining

mining rights and establishing their operations abroad. In this context, this subsection's aim is to provide an overview of Canadian influence in the mining sector, besides the influence reflected through investments. In my view, GoC's support for mining operations abroad serves as an additional argument to claim the existence of a duty vis-à-vis Canada, the home state.

As previously mentioned, in 1997, Ottawa invested \$11 millions in a project to assist the reform of the Mining Code of Colombia, through an agreement between the Colombian Ministry of Mining and Energy, the Canadian Energy Research Institute (CERI) and the law firm Martinez Cordoba and Associates, representing multinational companies (Rochlin et al. 2015). According to Colombia's General Comptroller, investments of these kinds, done by foreign countries - in this case Canada- are done with the aim of reaping some kind of benefit (a competitive advantage). In the first stage of the project, the sharing of geoscientific and environmental information was stipulated (Fierro Morales 2012). After the modification of the Code, about 40 per cent of the land was made available for mineral and oil exploration (Rochlin et al. 2015). More than half of those titles were granted to Canadian mining firms (Abbot 2013, p 2).

During the Harper premiership (2006-2015), the Government continued to spend significant efforts in promoting the Canadian mining industry abroad, through private-public partnerships, including industry and NGOs. This represented a policy shift, as it coordinated efforts by International Trade and Natural Resources, in order to "assist building [Canadian] investments" abroad (Leblanc 2012). In 2012, the Harper Government announced funding of \$25 million for the establishment of the Canadian International Institute for Extractive Industries and Development (CIIEID) - renamed The Canadian International Resources and Development Institute (CIRDI). CIDA selected the University of British Columbia and Simon Fraser University to lead the project, both headquartered in Vancouver, where most Canadian mining

companies are as well. The Polytechnique de Montréal was also selected as a founder. The aim of CEIID is to provide “developing countries best practice knowledge in extractive technology, public policy and regulations, and health and education outreach in order to empower industry, governments and non-governmental organizations to reduce poverty while protecting the environment” (UBC 2012). In Colombia, CIRDI has completed two projects. First, it held a one-day seminar in 2014 titled “Congress and the Extractive Sector” with the aims of advancing Colombian legislators’ knowledge on the current challenges facing the extractive sector and on the role that legislators should play. Participants included the Canadian Ambassador to Colombia, a member of the National Assembly of Quebec, representatives from the organizing institutions, members of civil society and public servants from the country’s extractive sector (CIRDI 2014). Second, it completed a project titled “Post-Conflict Transformation of ASM through Education, Organization and Consultation in Colombia”, which received \$300,000 from Global Affairs Canada (GAC). The goal of the project was to help Mining communities in the Choco region - Colombia’s second largest gold producing region- with the transition of control over Artisanal and small-scale gold mining (ASGM) from FARC to government and local authorities (CIRDI n.d.). All of this with the objective of tackling the environmental degradation and the lack of benefits for local populations. In a statement addressed to the Mining Association of Canada, the then Minister of International Co-operation Julian Fantino, told industry representatives back in 2013, that the institute would be the “biggest and best ambassador” in other countries (Mackrael 2013).

Mining companies and some NGOs -such as Barrick Gold and World Vision- were supportive of these public-private partnerships as they have they have the potential to have positive impacts in that they encourage and advocate for better mining practices (Leblanc 2012) and in that they

assist companies with the expertise to develop sound CSR practices (Mackrael 2012). However, these policies are ultimately motivated to promote Canadian commercial interests abroad, thus facilitating companies' operations, thus strengthening the claim of an existing responsibility to regulate vis-à-vis the home State, especially when it acts as a facilitator.

### ***Government support through crown-corporations***

The Government of Canada offered additional support to mining companies through coordination between CIDA (and currently through GAC) and Export Development Canada (EDC), a crown corporation providing financing and insurance for Canadian exports and foreign investments. Precise data on the value of current financial support is not publicly available given that EDC is not subject to the Access to Information Act, thus making difficult to assess the level of support provided (Blackwood et al. 2012, Gordon 2010). However, past documentation demonstrates that EDC gave considerable support to the Canadian mining industry operating in Colombia during CIDA's cooperation to write the mining code in 1990s. In fact, EDC provided a US \$160 million line of credit to Colombia to facilitate the purchase of Canadian equipment for the Cerrejon Zona Norte coal mine, from which Canada exports coal. This mine has caused the mass displacement of the Wayuu Indigenous population (CCIC 2006; Blackwood et al. 2012).

In my view, the support offered through EDC helps strengthen the claim of the existence of Canada's responsibility to regulate the activities of its mining companies in Colombia - but also in all of the countries where similar initiatives have been put forth.

### ***Human rights context in Colombia***

Before delving into the impacts of Canadian mining in human rights, it is important to provide a historical overview of the human rights situation in Colombia, a country deeply affected by

almost 52 years of internal conflict. The information to be presented is complementary to the one provided on the operating context created after the reforms introduced during 1990, whose goal was to facilitate investment and market access.

Colombia's contemporary history is characterized by long periods of civil violence, having a severe impact on civilians' enjoyment of human rights. The period of 1948 -1950 was characterized as "La Violencia" (the violence), as Liberal and Conservative parties confronted each other in a civil war. This context facilitated the rise of guerilla groups – FARC, ELN- and paramilitaries -AUC- that would drive the violent dynamics for the next decades. The Fuerzas Armadas Revolucionarias de Colombia –Ejercito del Pueblo (FARCs-EP) emerged in 1963. They are considered to be the longest active insurgent group, having being in conflict for more than 50 years, from 1964 until 2016, when the peace negotiations were reached (BBC 2016)<sup>[1]</sup>.

The FARCs were founded by 43 guerrillas as a left-winged movement, inspired by the ideas from Marx, Ernesto "Che" Guevara and the Cuban revolution (Saab and Taylor 2009). It did not adopt its name until 1966, when its recruits amounted to approximately 350 people. They mainly supported land redistribution and presented themselves as "a voice of the people" (Welsh 2015, p 10), as they represented the rural poor as well as those rebelling against the government and against U.S. influence. Between 1960 and 1980, the FARC evolved into a sophisticated force, as it reaped benefits from its involvement in narco-trafficking but also in kidnapping extortion schemes (UNMIC n.d.; Rochlin et al. 2015). Second, the Ejercito de Liberacion Nacional emerged in 1965, with a similar political agenda as the FARC – but did not get involved in drug trafficking for a long period of time for ideological reasons. The group also raised profits from kidnapping and ransoms (UNMIC n.d.). Third, Autodefensas Unidas de Colombia (AUC) or

paramilitaries emerged in 1997, representing right-wing groups with the mission to protect the economic interests and combat the FARC and ELN (UNMIC n.d.). The AUC was supported by conservative narcotraffickers and economic elites (Rochline et al. 2015). Of note is that the three groups also benefited from illegal mining -particularly gold-, as most of the current mining areas are located in departments where FARC, ELN and AUC operated (Massé et al. 2018). With the mining boom experienced since 2008, insurgent groups have benefited by controlling and extorting artisanal miners as well as companies, by laundering proceeds from other activities or by illegally capturing municipalities' royalties (Massé et al. 2018)

By 1990s violence mounted, whereby the FARC launched a series of attacks against the country's armed forces – prompting an escalation of confrontations between the FARC and the government: armed confrontations grew, in average, from 150 in 195-1990, to about 400 annually by the end of 1990s. The right-winged paramilitary also grew significantly, having 93 soldiers in 1986 and 8,140 by 2000 (Rochlin et al. 2015, p 12). The human rights situation in Colombia took a toll with as confrontation rose and both groups gained became more powerful: Human rights violations attributed to paramilitaries grew 100 per cent in 1995-1996, and by 1997 they were responsible for 69 percent of the country's assassinations (Rochlin et al. 2015). It is estimated that the conflict has displaced more than 7.7 million Colombians since 1985 (Human Rights Watch, 2017). Colombia's National Centre for Historical Memory reported in 2018, that the estimated number of killed victims after six decades of conflict was of 26 000, of which 215 005 are civilians and 46 813 were combatants. Forms of violence included kidnappings, forced disappearances, sexual violence, targeted killings and terrorist attacks (CNMH 2018). The

Centre found that disappeared persons accounted for 80 514 (of which 70 587 remain unfound); victims of sexual violence account for 15 697; victims of kidnappings amount to 37 014; and that the number of minors recruited (18 years or less) is of 17 804.

In 2016, under Juan Manuel Santo's presidency the Government achieved a historical peace agreement with the FARC – the Final Peace Agreement. The agreement provided for the creation of a Special Jurisdiction for Peace – an accountability mechanism to try those responsible for human rights violations during the conflict as well as for a demobilization process. Although some guerillas accepted the Agreement – and have since demobilized- some dissident ones continue to carry out attacks, according to the latest reports by Human Rights Watch (HRW) (2018). The ELN has also agreed to a ceasefire starting in October 2016 and ending in 2018, with a possibility to start peace talks. However, as reported by HRW, in 2018, the group continued to engage in kidnappings, forced displacement and child recruitment – and no peace agreement has been reached. As for the paramilitaries, both the government and the groups carried out a demobilization process between 2003 and 2006. However, some of its members remained active and reorganized – and they continue to commit abuses. In spite of the Peace Agreement, Amnesty International reported that in 2018, the conflict intensified in some areas as ELN and paramilitaries engaged in confrontation “seeking to fill the power vacuum left” by the demobilized FARC (Amnesty International 2018).

Although the intensity of the conflict has decreased in the past years, Colombia is still a country marked by human rights abuses and the continuous presence of insurgent groups. It is uncertain whether or not full peace will be achieved soon – and more importantly, if victims will receive

the appropriate remedies. This context is particularly important as it allows us to evaluate if the Colombian judiciary system will have the capacity to redress human rights victims – not just of the armed conflict but also of mining companies’ activities.

### ***Impacts of Canadian mining activity with regards to human rights in Colombia***

In the report “Land and Conflict - Resource Extraction, Human Rights and Corporate Social Responsibility: Canadian Companies in Colombia”, the authors note that in most lands where mining projects are established, there has been a “[...] local history of forced displacement, concentration of ownership of land, and presence of armed actors” (MiningWatch et al. 2009, p 17). The armed conflict has led to forced displacements in and out of Santander, near Greystars’ (Eco Oro Minerals Corp. since 2011) project, where the Public Defender’s Office has noted a renewed presence of paramilitaries. Further, in Antioquia, where B2Gold and Colombia Goldfields are active, massive population displacement has taken place by the paramilitaries or through the coerced sales of land. The Inter-American Commission on Human Rights, noted, in 2013, that Colombia is the country with the largest number of internally displaced people in the world (Rochlin et al. 2015). According to the Commission, this is partially due to mining and large infrastructure projects, through relocation processes, the sale of territories due to the lack of opportunities, and the concession of territories by the State without complying with the Law. The Afro-descendant communities are among the most affected by these economic developments (Rochlin et al. 2015), including in the extractive sector. For instance, under the Convention No. 169 of the International Labour Organization on Indigenous and Tribal Peoples, prior consultation and informed consent with regards to mining projects is required. However, these have not been respected, as, according to the Commission, many of these communities have

denounced the presence of mining activities and oil extractivism in their territories, without previous consultation. Sometimes, exploitation and exploration tasks are done in the company of the military or the police (CIDH 2013).

Although not exhaustive, the following two cases help illustrate and grasp the influence of Canadian mining companies operating in Colombia.

**B2Gold in Sur de Bolivar:** B2Gold is a Canadian company headquartered in Vancouver. Since 2008, its operations in Sur de Bolivar are conducted in the context of a joint-venture with the South African mining company AngloGold Ashanti. This particular case illustrates the risks associated with conducting mining activities in conflict-affected areas. Although there are no concrete allegations made against B2Gold, this example demonstrates that mining companies could contribute to conflict and ongoing human rights abuses. Sur de Bolivar is a department in the region of Magdalena Medio, which was highly affected by the armed conflict. Human rights violations suffered by the communities were attributed to the paramilitaries, the FARC, the Colombian Army and the ELN. Insurgent groups have benefited from the profits generated by mining activities - particularly through their involvement in illegal mining. Communities in this area have long depended on small-scale and artisanal mining - most of whom have been displaced to give space to large-scale mining companies. In 1994, the miners formed the Mining Association of Sur de Bolivar, later known as the Agro-Mining Federation of Sur de Bolivar (FEDEAGROMISBOL), who opposed large-scale mining since its beginnings. Its members have allegedly suffered of human rights abuses, including torture and murder (MiningWatch et al. 2009). By conducting its mining operations in conflict-affected areas, mining companies might contribute to the financing and survival of insurgent groups - who have previously undermined human rights of local communities (MiningWatch et al. 2009). Thus, although B2Gold has not

been directly and explicitly involved in human rights activities, conducting its mining operations in conflict-affected areas does create a risk to human rights of the local communities. The risk is increases more so when the home State has mining policies that do not take these considerations into account - and allows for the proliferation of mining titles without proper human rights risk assessments.

**Gran Colombia Gold Corporation (GCGCC):** GCGCC is a Canadian mining company headquartered in Toronto. Marmato is a gold mining town, with a history of small-scale mining of 500 years. Colombia Goldfield's project proposal for an open-pit mine, published in 2006, required relocating the town and eliminating numerous small-scale mining projects. The company and some authorities claimed that the extensive works had made the ground unstable, suggesting the necessity of relocating the communities to avoid subsidence (MiningWatch et al. 2009). Moreover, the enforcement of ever-increasing restrictive regulations increased small miner's willingness to sell. In 2012, the company announced in a press release that it had reached an agreement with artisanal miners, that would continue to operate for two years, until the commencement of large-scale mining. It also outlined the company's strategy to negotiate the relocation plans to the town El Llano. They justified these strategy under development and modernization projects (Rochlin 2015, p 83-84). The company faced some hurdles by 2013, as some company executives suggested that the company would not move forward with the open-pit project, considering instead an underground one. This was due to the substantial drop in gold prices as well as to some community resistance (Rochlin 2015, p. 85). At the time of writing, GCGCC's website indicates that the Marmato project is ongoing, highlighting a 2017 announcement to a shift in mining style from open-pit to underground (GCGC 2018). Rochlin (2015) notes that the company has been involved in various CSR projects, including plans to

help traditional miners without mining titles to obtain legal recognition. It has also contributed with the construction of infrastructure, such as a hospital near Marmato. In this case, CGGC's operations are tied to forced displacement, which is a classic human rights problem in the mining sector (Maasarati et al. 2007).

In light of the establishment of GCGCC's activities, the Marmato community mobilized and advocated against the plans for forced relocation of the community. It is in this context that Father Jose Reniel Restrepo, an advocate against the displacement, was found dead. The perpetrators remain unknown, but civil society as well the Regional Indigenous Council of the department of Caldas as well as Restrepo's lawyers believe there is connection with Restrepo's advocacy against GCGCC. Shortly before he was found dead, he had made declarations against the company's intention to displace the community. GCGC issued a statement, expressing: "We hope the authorities will fully investigate this crime and swiftly establish what took place. The company reiterates our complete rejection of any acts of violence"<sup>1</sup>. Moreover, civil society organizations issued letters to the Canadian Embassy asking for further cooperation with the investigators and to encourage the company to cooperate as well (CoDev 2011).

## **Conclusion**

Canada's influence and significant investment in the modification of mining laws in Colombia have been beneficial for Canadian mining companies, investing and gaining market power.

However, although there are not many documented cases of human rights abuses (as it is the case for Guatemala, Peru and Mexico) for Colombia, there is still evidence of the impacts of mining

---

<sup>1</sup> Note: I could not find the original statement from Gran Colombia Gold. However, the following sources cite its existence: <https://www.codev.org/2011/09/troubled-by-the-murder-of-father-jose-reinel-restrepo/>; <https://miningwatch.ca/news/2011/9/9/response-marmato-colombia-murder-father-jos-reinel-restrepo>

activities of Canadian companies. They still benefit from Colombia's permissive legislation, and more importantly, from the support offered by the Government of Canada, through the Embassy and Trade Commissioner Service, Export-Development Canada and the Canadian Pension Plan, to name a few. The Canadian Government's initiatives to promote Canadian activities as well as some remedy to human rights abuses will be the object of the next section.

## **PART IV - Extraterritorial human rights obligations for Canadian mining companies**

### **Framework of analysis**

In this section I will argue for the existence of home State duty to regulate the activities of its transnational corporations and to provide remedy to victims, in their fulfilment of their duty to protect human rights, under international human rights law. I will specifically focus on the legal instruments developed by the UN, while acknowledging the existence of regional instruments, such as those developed by the Inter-American Commission on Human Rights or the European Court of Human Rights. This choice was made deliberately given that the UN Conventions are well-established and has been, more or less, widely accepted by most states in the world, thus further extending its reach and influence. The section will be structured as follows: First, I will provide objections made against the existence of such a duty. Second, I will provide an overview of the UN Conventions supporting the existence of such a duty in their provisions, as well as on their interpretation by UN treaty bodies (TBs) and on the opinion of scholars. Third, I will provide a brief description and supporting arguments for the existence of a complementary duty to provide remedy. Fourth, I will present the conclusion for the framework. The framework presented in this section will then serve as a basis of analysis and evaluation of initiatives undertaken by the Canadian government, to address the behaviour of mining companies abroad.

The framework will be complemented by the next subsection addressing the existing governance gap in the context of TNCs operations, which, in my view, further strengthens the existence of a home State duty to regulate and provide remedy.

### ***Home State Duty to Regulate Private Actors***

Extraterritorial Obligations (ETOs) place duty vis-à-vis states parties to IHR Conventions, to protect human rights beyond their borders. Their existence and applicability in the context of the regulation of the conduct of private actors abroad has been the subject of much debate in the past years, as the number of publicly-known allegations and cases of human rights abuses rose dramatically in the past few years and continues to increase at present. For instance, when observing Canada's activities abroad, a 2016 report by the Justice and Corporate Accountability project documented the 30 targeted deaths and 790 cases of criminalisation related to Canadian mining companies for the period of 2000-2015 (Imai et al. 2016). In addition, according to data from the Business and Human Rights database, most of the attacks on human rights defenders pertained to the areas of mining and agribusiness, and that a significant number of the companies related to those attacks were headquartered in Canada (Business and Human Rights 2018; HRC 2018).

Whereas the current IHRL instruments developed by the UN do not create specific obligations to regulate private actors' transnational activities, upon State parties, they do give States a broad capacity to exercise jurisdiction extraterritorially, so long that they do not impinge other States' sovereignty and while respecting international law. In spite of these enabling conditions, the applicability of ETOs has proven to be controversial, partly explained by the lack of international consensus on this matter and by reticence on States to regulate private actors .

Objections to the existence of ETOs include the difficulty of extending jurisdiction extraterritorially to the home State; the inexistence of positive obligations supported in the current legal framework; the inexistence of a compelling international authority; the unlikelihood of proving sufficient nexus; and the risk of interfering with host State's sovereignty when responding to ETOs. Moreover, on the development of a legally binding international framework, -premised on the existence of ETOS- some, such as the former Special Representative to the Secretary General, John Ruggie, argued that such an initiative (like the UN Norms) would undermine the existing and accepted international practices and a "grand strategy" would states discourage States to address human rights concerns (Ruggie 2007). Authors such as O'Brien (2018) go as far as to claim that the current legal basis does not support the applicability of ETOs in the context of transnational corporations. The arguments against ETOs existence and applicability are explained and summarized below:

*Extraterritorial jurisdiction:* According to O'Brien (2018), in the context of business activities, jurisdiction could only extend extraterritorially in the case of acts committed by a state-owned or controlled enterprise. This is because violations occur in a state that has an established legal system and its own international obligations, and that, even if some consider these weak and ineffective, they should still be considered by human rights courts when adjudicating claims of violations to States. For the author, this contextual evidence is rarely examined when adjudicating claims and attributing responsibilities to home States.

*Spatial and personal extraterritorial jurisdiction:* O'Brien also refers to to the issue of the two models of extraterritoriality: the spatial and the personal. The standards applied by International

Courts of “effective and overall control” that trigger extraterritorial jurisdiction is based either on the spatial model, whereby a State exercised effective control over a geographical area; or based on the personal model, whereby it is established that the State had “physical power” over individuals. Liability only arises if it can be proven that the home state exercised physical control over the private actor, operating abroad (Danwood 2004). According to O’Brien (2018), neither the standards applicable to the spatial model or the personal model can currently be met in establishing a Home State’s extraterritorial responsibility to the victims of TNC’s activities abroad. This can be explained by the fact that jurisdiction and territory are used jointly in IHRL, such as Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2(1) of the Convention Against Torture (CAT).

*Positive obligations:* positive obligations require States to take actions to tackle or prevent negative consequences. For O’Brien (2018), the establishment of such obligations require that human rights jurisdiction be applied extraterritorially – and precedent shows that this has been achieved, internationally, in very limited cases. In fact, extrapolating home state duty to control to extend it extraterritorially has not been possible given the inexistence of a compelling authority in the IHRL system, and in particular the UN treaty bodies that do not use obligatory language in their provisions. Second, the author goes on to argue that advocates for the existence of a home state duty often confuse obligations with the “duty to regulate”. For O’Brien (2018), a duty to ensure or protect human rights does not guarantee the existence of a duty to regulate. Third, Courts would have to establish a sufficient link between the home state and the TNC in question. According to O’Brien, it is unlikely that this is achieved, except -and exceptionally- in the case of state-owned enterprises. This can partly be explained by states’ reluctance to regulate

its corporations (Danwood 2004). Instead, the focus should be on home states, which, according to the author advocates do not want to consider (O'Brien 2018).

*Proving sufficient nexus:* A requirement to establish state responsibility is the existence of a sufficient nexus between the non-state actors acts against human rights and their home State. A sufficient nexus means that it is possible to prove that the state failed to take reasonable and appropriate measures to prevent human rights abuses that were foreseeable (O'Brien 2018). For O'Brien, proving sufficient nexus is unlikely given the host State's legislation, the existence of a corporate veil. Proving sufficient nexus is particularly challenging as TNCs operate in complex contexts, whereby identifying the nationality of the parent company and of its subsidiaries might prove very difficult (Danwood 2004).

*Home State sovereignty:* the exercise of ETOs might prove difficult, given the implications this might have on the home State's sovereignty. In fact for Danwood (2004) and O'Brien (2018), home State's exercise of ETOs might hamper the host State's sovereignty, as the latter has its own regulatory bodies and legislation in place.

As well founded as the arguments below might be, the existence of the home State's extraterritorial duty to regulate its private actors' activities abroad can be found to have a legal basis as per interpretations of the UN Conventions by the UN treaty bodies and expert groups. The UN Conventions create tripartite obligation upon treaty parties: to protect, to fulfil and to respect human rights, as outlined, for example in Article 2(1) of the Covenant on Economic, Social and Cultural Rights (CESCR) (International Human Rights Council 2002; Simons et al.

2015). On the duty to protect, states parties have an obligation to prevent abuses not just by state agents but also against private entities. Moreover, as it will be outlined in the next paragraphs, the current UN Conventions do not preclude state parties from extending these obligations extraterritorially, by regulating the conduct of their private actors abroad. This premise is supported by the following UN Conventions, General Commentaries by the UN TBs, the UN Guiding Principles and the Maastricht Principles and a draft instrument from the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG):

*International Covenant on Economic, Social and Cultural Rights (ICESR)* - (16 Dec 1966): The Committee on Economic, Social and Cultural Rights (CESCR) raised the question of home State's extraterritoriality since 1998, and subsequently under 5 general comments, namely 15, 19, 22, 23 and 24. More recently, in a 2017 general comment, the Committee recognized the territorial application of the obligation, to protect the Covenant rights, within and outside national territorial, where the state party exercises control. Thus, the CESCR's interpretation suggests that the application of this obligation extends extraterritorially. On the regulation of private actors, the CESCR recognized, in a statement from 2011, the existence of an obligation to protect against human rights abuses abroad "by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant" (CESCR 2011).

*International Covenant on Civil and Political Rights (ICCPR)* - (16 Dec 1966): The UN Human Rights Committee (HRC) has also interpreted and analyzed the extraterritorial applicability of

State's obligations under the Covenant in various instances. More specifically, under General Comment 15 of 1986, the Committee underscored that Article 2 of the Covenant indicates that "the enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals" even if these are not of the same nationality. The same principle applies to those in the State's territory or jurisdiction, as well as to those within the "power and effective control" of the State party. Paragraph 8 of General Comment 31 of 2004, the HRC mentions a positive obligation upon state parties to ensure that Covenant rights are fully discharged. This is only possible if individuals are not only protected against state agents' actions but also against private entities or private persons. Moreover, the HRC adds that, if State parties would be found in violation of those rights if it is found that the State permitted or failed to take the appropriate measures to exercise due diligence to prevent, punish or address the violations committed by private actors.

*Convention on the Elimination of All Forms of Discrimination against Women - (18 Dec 1979):*

In paragraph 36 of General Comment 28 of 2011, the Committee on the Elimination of Discrimination Against Women (CEDAW) indicated the existence of an obligation upon State parties to the Convention to regulate the activities of private entities. More specifically, States are called to eliminate discrimination by state agents and/or private actors. This obligation also extends to acts of national corporations operating extraterritoriality.

*UN Guiding Principles on Business and Human Rights (UNGPs)- (June 2011):* The UNGPs were developed by the Special Representative of the Secretary-General with regards to human rights and the activities of transnational companies. Although the nature of the principles is non-

binding upon the states, it represents a first effort towards the achievement of regulation of TNCs, from the UN's standpoint. They are rather a complementary instrument to enhance standards of business operations with regards to human rights, recognizing State's obligations to respect, protect and fulfil human rights under IHRL. On States' duty to protect human rights, foundational principle number 1 is founded on the existence of a duty upon states to prevent human rights abuses by third parties, including business enterprises. The Commentary of this principle further adds that State's might be found in breach of its international human rights obligations if the abuse can be attributed to them or if it is found that the State failed to take the appropriate steps to prevent such abuses. This affirmation aligns with the due diligence principle suggested by the HRC on Commentary 31. Under operational principle number 3, it is suggested, among other actions, that States enforce laws to require business enterprises to respect human rights and to review them periodically, in order to address any gaps. Principle number 4 calls states to regulate business enterprises controlled or owned by the State, or that receive financial support and services, such as export credit agencies. The commentary suggests that in these cases, there is even stronger proof of State's duty to ensure that the relevant legislation is implemented. Although voluntary in nature, the UNGPs support the existence of Home State's ETOs.

*Maastricht Principles* (2011): drafted and endorsed by 40 international legal experts, the Maastricht Principles (herein the Principles) sought to clarify the duties of State's extraterritorial obligations with regards to the ICESCR. On extraterritoriality, the principles affirm that the duty to regulate extends to acts by non-state actors acting under the instruction, direction or control of the State. In this case, non-state actors include corporations and/or businesses empowered by the

State. Specifically, principle 24 sets an obligation upon home states to regulate non-state actors, so long they are in a position to do so. Regulation can be accomplished through “legislative, administrative, investigative and/or adjudicative” mechanisms. Principle 25(c) sets out that states must adopt measures applicable to business enterprises or parent companies domiciled in the State’s territory or that has its centre of operation in the State concerned.

*Zero draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (2018): The Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) was established by the Human Rights Council in 2014. The OEIGWG is mandated to elaborate a legally binding instrument to regulate the activities of transnational corporations and other businesses, according to international human rights law. The zero draft was published in 2018 and one of its five objectives is to “ensure effective access to justice and to prevent the occurrence of human rights violations” by transnational companies. Article 5 of the draft defines the conditions that would trigger jurisdiction, based on the existence of a home State duty to regulate third-parties, including business enterprises within its territory, jurisdiction or under its control. Article 5 (1)(b) states that State courts have jurisdiction over actions being brought to them “where the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions are domiciled”. Further Article 5(2) indicates that, a legal person is considered “domiciled” where it has its statutory seat, central administration, substantial business interest, subsidiary, agency, instrumentality, branch or representative office. Article 5 aligns with the aforementioned interpretations by the CESCR. On extraterritoriality, the Convention’s applicability assumes the

existence of this condition as this instrument is set to apply to “human rights violations in the context of any business activities of transnational character” (Article 2). Although this document is just a draft, its main premises reflect the OEIGWG’s position on the debate on Home state’s duty to regulate transnational corporations. Moreover, this initiative also reflects the OHCHR’s alike position, as it demonstrates a will to at least attempt to create international legally binding obligations upon states on the issue of transnational corporations.

As it has been demonstrated above, the existence of ETOs is currently supported under the UN treaty bodies and by Committees’ interpretation. Scholars such as Augustein and Kinley (2013) and de Schutter (2016) also argue for the existence of such a duty. De Schutter argues that the duty to protect would only be rendered explicit through the establishment of an international instrument imposing a duty to regulate its corporations. In a similar manner, Augustein and Kinley argue that businesses could be “legally bound” to respect human rights globally, specially through state regulation, as the extraterritorial condition of human rights obligations for states also extend to their duty to regulate and control corporate actors (p 275).

### ***Home State’s Duty to Provide Access to Remedy***

Access to effective remedy for victims of human rights abuses by transnational corporations is complementary to State’s duty to regulate private actors (Skinner et al. 2013). Legal sources of this obligation include Article 2(3) of the ICCPR, calling on state parties:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy

Furthermore, some UN Committees recognize the existence of that duty, through the interpretation of conventions' provisions. For instance, General Comment 9 of the CESCR recognizes that, although the ICESCR does not contain a "direct counterpart" to Article 2(3) of the ICCPR, the right to effective remedy -whether administrative or judicial- are necessary to make the Covenant rights effective. In addition, CEDAW's General Recommendation 19 considers that effective protection by the State includes effective legal measures such as penal sanctions, civil remedies, compensatory remedies as well as preventive and protective measures. General principles developed by experts also recognize the duty to provide effective remedy. For instance, access to remedy is one of the three pillars of the UN General Principles. Foundational principle 25 recognizes the dual applicability of the duty to protect and the duty to provide remedy. Its commentary states that the lack of appropriate steps to "investigate, punish and redress business-related human rights abuses" can weaken the State duty to protect. Operational principles 26 to 31 cover the different types of remedy, including state-based judicial and non-judicial mechanisms, non-state-based grievance mechanisms, industry, multi-stakeholder and other collaborative initiatives as a means to providing redress as well as effectiveness criteria for non-judicial grievance mechanisms. In addition, the Maastricht principle 38 recognizes a general obligation to provide remedy, which extends to violations occurring transnationally. To fulfill these obligations, States should, among other things, seek cooperation with concern States to provide effective remedy and ensure access and availability to remedies.

At the international level, there exist some international initiatives based on the obligation to provide remedy. For example, the OHCHR launched the Accountability and Remedy Project in 2014. Its main objective is to provide States with recommendations to enhance the effectiveness of domestic law remedies, in the context of human rights abuses committed by businesses. The project has currently three phases, covering judicial mechanisms, State-based non-judicial mechanisms and non-State-based grievance mechanisms. In addition, the zero draft of the OEIWG recognizes the right to access to justice and State parties' obligation to guarantee them, under Article 8.

In sum, both the obligation to regulate private actors and to provide access to remedy are complementary in the fulfilment of a home state's duty to protect against human rights abuses.

Besides the legal obligations under IHRL, home States have currently an advantage against host States when it comes to exercising its duty to protect. Normally, transnational companies and in particular mining companies operate in contexts where the institutional and legal structures are weak, therefore creating the environment that enables the abuses. Moreover, there exists a moral responsibility upon home States to take steps to prevent their national businesses from violating human rights or from being complicit in such conducts (Simons et al., p 182-3). Seck (2013) goes further by arguing that home States are usually the ones to enable and support the current global economic order in which transnational corporations operate – further creating such an obligation. For example, as it has been demonstrated in the previous section, the Canadian Government has actively participated in the mining reform in Colombia in 1990s, thus contributing to the creation of an enabling environment for mining companies. Moreover, it

continues to offer that support through development initiatives and the TCs who offers commercial advice and support abroad. Therefore, under these premises, I argue that Canada has an obligation as home State to regulate the activities of mining companies operating abroad and to provide access to remedy to victims.

The next subsection will complement the argument made for the existence of ETOs in the current section, by presenting the interplay between home State's obligation to regulate and the governance gap.

### ***Canada's obligations and the governance gap***

In the existing dynamic governing TNCs activities, there exists a governance gap. General international law and human rights law adopt a state-centric position, which presumes that host states will undertake the regulatory oversight over transnational enterprises. However, the context in which most of these companies operate do not have the institutional capacity or structure to do so in an effective way. At times, this can also result due to the lack of political will. This fact was outlined in the Report of the former Special Representative to the Secretary General (2009) , who stated that this lack of oversight creates a governance gap. This is when the home state can and should take a leading role to cover, at least partially, for that governance gap. This section will describe the concept of new governance applied to TNCs and in relation to the state's duty to regulate businesses, stemming from their obligations under international law.

“New governance” describes a broad range of governance forms and modalities that depart from traditional state-based command-and-control regulation (Tollefson et al. 2012). New governance is thus based on collaboration, more freedom to regulatees to determine their internal means of compliance and on giving stakeholders a broad voice and participation (Ford et al. 2006). In *The*

*Governance Gap* (2014) Simons and Macklin argue that this concept gave space to discussions about de-centralization, suggesting a shift away from traditional “command-and-control” state regulation. However, as the authors point -and citing Crawford- not all state regulation falls strictly under that category (for example, Corporate Social Responsibility and voluntary initiatives have been widely implemented by states). Moreover, there is a need for the state to regulate TNCs activities and it remains the main entity of a multi-stakeholder system to have an advantage. In fact, domestic legislation presents more advantages than the international one since unilateral action can (a) facilitate compliance; and (b) it can lead other states to take similar actions and eventually reach consensus (Simons et al. 2014, p 179). It should be recognized, though, that there still exists a grey area in the regulation on TNCs, given the complexity of their structure, especially when the actions were undertaken by subsidiaries or affiliates. These, are to be regulated by the parent company, who is itself to be regulated by the host state. In sum, the state, while enacting its own regulations towards TNCs, can act as an “orchestrator” or “facilitator in regulation projects” (Simons et al. 2014, p 186; Abbott et al 2009).

Canada, as the home state, has a legal and moral responsibility to protect human rights, as a signatory to international human rights. However, it is acknowledged that, in practice, there are no regulations explicitly targeting businesses behaviour with regard to human rights. The Canadian government’s only discussion of legal regulation pertains only to the issue of bribery of foreign officials. Article 4(2) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions states that Parties to the convention have “[...] jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a

foreign public official, according to the same principles.” The application of extraterritorial jurisdiction for offences under the Convention requires “real and substantial” link to the territory of Canada. Canada’s policy to the application of extraterritorial jurisdiction where there is an explicit treaty obligation to do so. Instead, Canada takes into account, on a case-by-case basis, the nature of the crime: Canada applies nationality jurisdiction to offences that has been condemned by the international community, such as offences against international protected persons, torture and war crimes (DFAIT 2009; Blackwood 2012; OECD 1999; OECD 2011). Thus, there exists a moral imperative but the core of the question remains on the Government’s willingness to take action to act according to these principles.

### **Canada’s initiatives to prevent human rights abuses by Transnational Companies**

The following section will discuss state initiatives – in this case Canada- to attempt to address the issue of human rights abuses by Canadian mining companies abroad, based on the assumption that Canada is exercising its duty, as a home state, to try to regulate their behaviour and provide some remedy to the victims. The section will be structured as follows: First, I will present the non-judicial policies implemented by the government, followed by the judicial options available for victims, as well as the legal initiative to make companies accountable known as Bill C-300. The third subsection will touch on the Human Rights Impact Assessment under the CCoFTA. Each of the subsections will provide a brief description of the initiatives, followed by its pros and cons. Lastly, I will provide a general conclusion for the section, following the framework presented in section 3), pertaining to Canada's obligations, as a home state, to regulate the activity of its companies operating abroad and to prevent human rights abuses.

### *Non-judicial initiatives: Canada's CSR since 2009 to present*

In 2005, the Canadian House of Commons Standing Committee on Foreign Affairs and International Trade (FAAE) presented a report on evidence relating to the activities of Canadian mining companies and their effects on local communities with regards to their economic and social wellbeing, as well as the environment. It principally suggested the establishment of stronger incentives to encourage companies to respect human rights standards, and for these incentives to be conditional to government support, such as exports, project financing and embassy assistance. Moreover, they suggested the need for Government to strengthen the role of the Canadian National Point of Contact, to create legal norms to hold companies accountable and to increase the understanding, for companies, of their impacts and the context they operate on. Though the Government acknowledged the need and usefulness of these suggestions, it also expressed reticence towards the extraterritorial applications as it could undermine the other state's sovereignty. It added that, CSR norms and standards were still under development and there exists no international consensus with regards to the boundaries between companies and governments. Lastly, with regards to the suggestion of conditioning government support to the respect of CSR standards, the Government claims that this policy option would not be as effective, since "the bulk" of investments happen without governmental support. In exchange, while the Government explores other options, they pledge to organize inter alia national roundtables with stakeholders and to develop guidelines for the Trade Commissioner Service, among other actions.

Following the Government's pledge to conduct national roundtables in 2005, the Advisory Group Report on the National Roundtables on Corporate Social Responsibility (CSR) and the

Canadian Extractive Industry in Developing Countries was published in 2007. The submissions to the Roundtables, reflected in the content of the report, integrate the views of civil society, industry, labour organisations, academics and members of the public with no stated affiliation. The Group was formed by members of the aforementioned sectors. The central recommendation of the report asks the Government of Canada to develop a Canadian CSR framework and the adoption of CSR Standards by extractive companies operating abroad. These would have to be reinforced through reporting, compliance and other mechanisms (Advisory Group 2007). The framework's main component includes:

- The creation of Canadian CSR Standards based on international standards
- Reporting obligations based on the Global Reporting Initiative (or equivalent)
- An independent ombudsman office to provide advisory services, fact finding and reporting on the operations in developing countries.
- A tripartite Compliance Review Committee to determine the nature and degree of non-compliance, following the findings of the ombudsman office.
- The development of policies and guidelines to measure serious failure of compliance with Canadian CSR Standards.
- A multi-stakeholder Canadian Extractive Sector Advisory Group to advise on the implementation and future development of the Canadian CSR Framework.

(Advisory Group 2007, p iii)

The Government's response to these materialized with the adoption of the Voluntary Principles on Security and Human Rights (norms of conduct), the Extractive Industries Transparency Initiative (transparency initiatives) (EITI), the Global Reporting Initiative (reporting initiative)

(GRI). The Voluntary Principles on Security and Human Rights are guidelines specifically designed for the extractive sector. They were established in 2000, providing a framework for companies to conduct assessments of human rights risks associated with security, to engage with public and private security providers and surrounding communities, to institute human rights screening for public and private security personnel, and to develop systems for reporting and investigating allegations of human rights abuses. This is a multi-stakeholder initiative that includes governments, companies and non-governmental organizations. In their roles, governments should facilitate the implementation of the Principles by promoting the Principles, creating guidelines, collaborating with other governments, and by taking appropriate steps to prevent, investigate, punish and redress human rights abuses. Since 2003, the EITI promotes accountability for the management of oil, gas and mineral resources. It established the EITI standard, which requires (1) oversight by multi-stakeholder group, (2) a legal and institutional framework, including the allocation of contracts and licenses, (3) the disclosure of information with regards to exploration and production, (4) the reconciliation of company payments and government revenues from extractive industries, (5) the disclosure of information related to revenue allocations, (6) the disclosure of information on social expenditures and the impact of the extractive sector in the economy, (7) the regular disclosure of extractive industry data related to outcomes and impacts and (8) parties to the initiative are required to follow deadlines for implementation (EITI n.d.). The GRI is an independent international organization established in 1997, with the goal of promoting sustainability reporting. It established the GRI Sustainability Reporting Standards are regrouped under the following modules: universal, economic, environmental and social standards. The standards provide guidelines on how to report information on an organization's material impacts on each of the areas covered by the modules.

The Initiatives and Principles presented above were all integrated in DFAIT's 2009 "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector". The aim of the Strategy is to "improve the competitive advantage" of Canadian mining companies "by enhancing their ability to manage social and environmental risks" (DFAIT 2009). The package of CSR measures introduced the first non-judicial grievance mechanism, the CSR Counsellor, for this Canadian sector, as well as a series of voluntary standards. Although these were good first steps, these remain in the realm of voluntary initiatives, that do not impose any obligations on companies and that their non-compliance did not result in any legal consequences.

The Canadian CSR Strategy evolved and in 2014 the "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad" was published. First, this new enhanced version included the adoption of the UN Guiding Principles (UNGPs) as well as the OECD Guidelines. Both of them are non-binding initiatives. The UNGPs, endorsed by the UN Human Rights Council in 2011 are based on three pillars, including the state's duty to protect human rights abuses by third parties, the promotion of corporate social responsibility for businesses operating abroad and greater access to judicial and non-judicial redress for victims. The OECD Guidelines contain recommendations for responsible business, from governments to TNCs operating abroad. These contain a human rights chapter consistent with the UNGPs. Second, the new strategy provides "dialogue facilitating mechanisms" for dispute resolution, based on the previous international frameworks:

(1) the Canadian National Point of Contact (NCP) is an interdepartmental commitment including Global Affairs Canada, Environment Canada, Innovation, Science and Economic Development, Economic and Social Development Canada, Indigenous and Northern Affairs Canada as well as Finance Canada. The NCP is required by the OECD Guidelines and has a dual function: it promotes and encourages the OECD guidelines among Canadian companies abroad and it acts as the conflict mediator under special instances. Normally, these are brought by NGOs trade unions or individuals. They can also be referred to by the Office of the CSR Counsellor. Upon review, if the case qualifies, the NCP can provide a “forum of discussion” through professional mediation or a dialogue process. Also, the cases are publicly reported once the process is completed. Although the NCP provides access to mediation to both parties, one of its main flaws is that it is not involved in the investigation process and if one of the parties refuses to participate, the case is automatically closed (Standing Committee on Foreign Affairs and International Development (FAAE) 2019, p 34-35).

(2) The Office of the CSR Counsellor, that undertaking a “preventative role” which had the option to mediate conflicts at its early stages but refer the complicated ones to the NCP. The Office provides advice to extractive companies and other stakeholders on CSR standards and guideline implementation. It also provides formal and informal dialogue facilitation between project-affected stakeholders and Canadian companies operating abroad. However, GAC underlines that the Office mostly focuses on disputes at its early stages and does not investigate after-the-fact disputes. This is part of a shift in policy, after the first Counsellor Marketa Evans resigned in the middle of her mandate as

companies refused to collaborate in the investigation of their behaviour abroad. The mandate of the Counsellor ended in May 2018.

It should be noted that there have been recent developments from the Government on this particular issue: in January 2018, the Government announced the creation of the independent Canadian Ombudsperson for Responsible Enterprise (CORE) as well as the establishment of a multi-stakeholder Advisory Body on Responsible Business Conduct. This new policy will not only apply to the extractive industry but also to the garments one. From the end of the mandate of the Counsellor in May 2018 and up until the establishment of the new Office of the Ombudsperson, the role and activities of this grievance mechanism were put on hold and no complaints are being treated. The new Ombudsperson will have the power to address complaints of alleged human rights abuses, it might direct complaints to the NCP at its own initiative. It will also have the mandate to conduct investigations, make recommendations to companies, monitor their implementation of the CSR Standards, publicly report the complaint process and recommend sanctions. These remain the same as the ones under the 2014 Strategy (FAAE 2019; PC 2019-0299). For Amnesty International and the Canadian Network on Corporate Accountability (CNCA) welcomed the announcement as it represents an improvement from NCP and the CSR Counsellor, given that it will be empowered to conduct investigations, compel information disclosure, recommend sanctions and operate independently from the government.

On April 2019, the Minister of International Trade Diversification, Jim Carr, announced the appointment of Sheri Meyerhoffer, a lawyer with extensive experience in business and international development. In its announcement, the Minister stated that it would take two additional months to finalize the powers of CORE - which, at the time of writing have not yet

been finalized (CBC 2019). Once operational, it remains to be seen whether or not these changes in policy will be effective at mitigating conflicts and redressing companies' behaviour in the future.

### ***Weaknesses/drawbacks***

The 2009 Strategy failed to incorporate the most important recommendations from the Advisory Group: toothless dispute settlement mechanism (CSR counsellor) that did not resolve a single dispute (Simons 2015, p 172). The Counsellor had no power to investigate, report or require meetings, nor to compel the companies to participate in the dialogue process (Imai et al. 2016). The policy failed to incorporate the core components of the UNGPs as well, although it made reference to the framework.

Although the 2014 Policy addressed the aforementioned shortcomings, it still failed to address the problem of access to judicial remedies for victims and to compel companies to exercise due diligence. The identified flaws include the lack of independence from Global Affairs Canada to conduct activities, the lack of legal consequences for non-compliance the absence of a strengthened mandate for the Counsellor. First, given the shift to a “preventative” role, the Counsellor engaged with the companies to provide guidance on CSR standards and on engagement in dialogue with local communities, to de-escalate conflicts when applicable. In this role, the Counsellor also determines whether or not a company will receive “enhanced [...] economic diplomacy”, which includes support by the Trade Commissioner Service (TCS) to engage locally with expert in social conflict risk assessment or local procurement. The assistance also extends to resolve problems and to assist in market preparation. This role is problematic for Coumans (FAAE 2019) since the Counsellor should be focused in conducting investigations and

not guiding the companies on CSR. Moreover, according to Mr. Davidson, GAC cannot provide advocacy and financial support and at the same time expect companies to report on human rights abuses to the TCS. This lack of independence also extends to the administrative aspects of the Office's activities. Mr. Davidson noted that the lack of funding and staff support affected their performance and ability to conduct its activities, as they heavily depended on GAC for authorizations for additional funding and hiring.

Second, the consequences of non-compliance and non-participation include the loss of diplomatic support and funding from EDC. This, according to Dr. Haslam (FAAE 2019) are not instruments that are disciplinary enough to be effective. As a result, the Strategy continues to fail to address the problem of access to judicial remedy for victims, largely in part because the strategy is designed to rely on the company to decide on the form and size of the compensation and because it does not provide the Counsellor with effective disciplinary instruments (Simons 2015; Imai et al. 2015; FAAE 2019).

Third, the lack of clear definition and strengthening of the mandate of the Counsellor, resulted in NGOs labelling the mechanism as "toothless". The fact that the Counsellor still lacked investigative powers and the authority to compel companies to participate in the dialogue process were fundamental flaws that weakened the Strategy. In fact, no new cases were brought to the Counsellor since 2013 and no cases were fully resolved, mainly because companies refused to collaborate (Imai et al. 2015). In the absence of a new mandate, NGOs decided not to engage with the Counsellor, until the Government would publish it in an Order in Council (OIC). In addition, critics were also voiced towards the NCP, the second mechanism for "more complex

cases” that also lacks independence and failed to provide remedy to complaints (OECD Watch, MiningWatch, Above Ground 2016). Civil Society, such as the Canadian Network on Corporate Accountability (CNCA) call for the creation of a human rights Ombudsperson, accessibility to Canadian courts for victims, enhanced powers for both non-judicial grievance mechanisms as well as enhanced legal and administrative mechanisms for state agencies, such as EDC (CNCA, n.d). In sum, a move from voluntary to binding mechanisms, would ensure that victims have access to effective grievance mechanisms and that companies operate diligently (Imai et al. 2016; Simons 2015). So long that the Government’s solutions stay within the voluntary realm, they will pose enforcement problems and hinder any attempts for redress and compliance with international standards, namely the UNGPs.

Fourth, although the creation of CORE and the appointment of Ms. Meyerhoffer are positive developments, the Government has been criticized for its tardiness - in that it took several months to make the announcements and in that the Office is still yet not functional. It remains to be seen whether or CORE will be effective and not influenced by corporate or political actors. There is much uncertainty on its effectiveness given that the mandate is still not finalized and that the Office nor the Ombudsperson are not yet fully operational. In addition, the looming Federal elections will have a greater impact not just on the timelines for the initiative but they could also have an effect on the mandate and role of the Ombudsperson.

### ***Judicial remedies: access to litigation under the Canadian legal system and Bill C-300***

The next section will explore legal remedies through home state and their challenges, with a special emphasis on the Canadian context. As part of those challenges, I will first present the

UNGPs outlining the home State's duty to provide legal remedies to victims of human rights abuses perpetrated by companies operating abroad, followed by the obstacles in present in the Canadian legal system and a short conclusion. Second, I will present an overview of Bill C-300, an initiative that would have brought accountability measures for mining, oil and gas activities in developing countries.

***Judiciary remedies: access to litigation for victims of human rights abuses by mining companies***

Access to legal remedy is the third pillar of the UN Guiding Principles (UNGPs) is access to remedy, as States have a “duty to protect against business-related human rights abuses”, and as part of that duty, States “must take the appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means” that “those affected have access to effective remedy” (Office of the United Nations High Commissioner for Human Rights (UNHCHR) 2011, p 27). According to Ruggie's commentary, states must undertake the appropriate steps to “investigate, punish and redress”. Otherwise, the State's duty can be rendered weak or meaningless”. He adds that the grievance mechanisms can take the form of “any routinised state-based, judicial or non-judicial process concerning business-related human rights abuses”. Principle 26, an operational principle on state-based judicial remedies highlights that “States should take the appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy”. The commentary makes reference to the barriers that claimants might face in trying to access justice. In this, the host state is given a special role in providing this access: In particular, when and if “claimants face a denial of justice in a host State and cannot access to home-state

courts regardless of the merits of the claim” (UNHCHR 2011). In this context, many claimants may choose to file suit in the home state (i.e. where the TNC holds the majority of its assets or where it is incorporated) if the home state cannot or fails to guarantee that access. However, a review of lawsuits in the UK, US, France, Germany and the Netherlands against companies having allegedly committed abuses occurring abroad concludes that these lawsuits are “rare” (Business and Human Rights Resource Centre 2012). Home states have shown reticence when it comes to limiting TNCs freedom and activities through the creation of obligations, as they do not wish to put obstacles in their companies’ operations abroad (Coumans 2014).

In Canada, litigation presents many hurdles, which can act as a deterrent for plaintiffs, as they might face high costs or little prospects of a successful suit. This is partly due to the fact that Canadian companies that operate abroad may undercapitalize its host state subsidiary or transfer assets to it to reduce liability for extractive activities. This creates a particular problem as a court has to satisfy there is “real and substantial” connection between the subject matter of the proceedings and the forum” i.e. the province in which the case is being brought (Simons et al. 2014, p 251). This requirement might be hard to satisfy, as the events occurred in a foreign jurisdiction and the subsidiary of the Canadian company might be the perpetrator of or might be complicit to the violation. For example, in the case of Anvil Mining Ltd. brought to the Quebec Court, although the company acknowledged having used its vehicles to transport members of the Congolese army -responsible for human rights violations- and to have fed and paid some of its soldiers, the Superior Court dismissed the case on appeal due to the lack of “real and substantial connection” (Simons 2015, p 200).

However, there are still situations under which few Canadian courts -such as Ontario’s- can accept jurisdiction over these types of cases. Many of them apply the doctrine of “forum of

necessity”, which allows the courts some discretion to accept jurisdiction in exceptional situations where the plaintiff has no other forum to “reasonably seek relief” (Simons 2015, p 201). If the court accepts jurisdiction over the case, plaintiffs will have to defend against forum non conveniens, a motion to dismiss a proceeding on the basis that there is a more appropriate forum to hear the case, for example the host state (Simons 2015; Larcoque 2010, p 173).

A second hurdle is related to the complex structures of TNCs and the application of the doctrine of separate legal personality and the reluctance to pierce the corporate veil. The simplest case would concern the parent company -holding 100% of its shares- being directly responsible for the acts. In reality, many companies have subsidiaries, which, under Canadian law are considered separate legal entities. In this case, plaintiffs would have to argue that the parent company is responsible for the actions of its subsidiary. According to Simons (2015) there is no cause of action in Canada that attributes liability to a parent company for the acts of a separate legal entity, even where the parent exercises legal control. Courts remain reluctant to demonstrate the liability of the parent company, which means “piercing the corporate veil” (ICJ 2008 p 47). This unlikely to happen, but in case it does, plaintiffs would have to establish “a duty of care” and that the subsidiary was under complete control of the parent and it was being used a “shield for fraudulent or improper conduct” (Simons 2015, p 203). Currently the case of Choc vs. Hudbay was successful in advancing trial, as the defendant’s motion on forum non conveniens was dismissed. The plaintiffs' primary argument was that the parent company was directly liable for its own acts and omissions, which led to the harm suffered by the plaintiffs. They also claimed the existence of duty of care between the Canadian mining company and the individuals harmed by the security personnel in the host state (Choc v. Hudbay Minerals, 2011, paras 50-53, 75; Simons 2015, p 2015).

In order to comply with its State duty to protect, Canada would need to eventually address these obstacles and facilitate access to legal remedies. Simons argues that a “real threat of litigation” might act as an incentive for companies to change their behaviour abroad.

***Bill C-300: An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries***

Bill C-300 was private bill introduced by Liberal MP John McKay in 2009. It got dismissed by a vote of 140-134 in 2010, during the last reading. The goal was, as suggested by its title, to hold accountable Canadian companies in the oil, gas and mining sectors, operating in developing countries. If passed, the Act would have promoted environmental best practices, ensured the protection and promotion of human rights standards. It would have also given the Ministers of Foreign Affairs and Trade the responsibility to issue guidelines and corporate standards based on international guidelines (such as the IFC standards) and principles (namely the *Voluntary Principles on Security and Human Rights*). The guidelines would have included obligations to undertake environmental and social impact assessments -following the IFC guidelines- Moreover, the Ministers would have the authority to receive complaints of human rights abuses and assess their validity based on the guidelines. Canadian citizens or permanent residents as well as citizens or residents from a country in which Canadian mining companies were operating could file a complaint. All the process would be published in the Gazette. If non-compliance was determined, the Ministers would have to inform the Director of EDC and of the Canadian Pension Plan Fund, and a withdrawal of funds would be initiated (*Bill C-300, 2009*). In addition, Canadian embassies, and in particular the TCS, would have to withdraw support beyond consular assistance.

Nonetheless, arguments against the bill were purported by the private sector, as well as by EDC (Marques 2012). According to the Government, the Counsellor had just been established (under the 2009 CSR Strategy) through an OiC, and it should be given a chance to evaluate its efficiency in addressing the issue (Janda 2010). The industry also circulated a memo, drafted by the former Supreme Court Justice Frank Iacobucci, where it was mainly suggested that the Bill would put Canadian companies at a comparative disadvantage and, that, the publishing of non-compliance would negatively impact their reputation.

This attempt at passing legislation to establish an accountability mechanism backed by sanctions would have been a step forward towards effective state regulation for business conduct abroad. It shows that the industry retains power when it comes to initiatives to better regulate their behaviour as well as the Government's tendency to prioritize economic interests over moral obligations.

The aim of the previous sub-section is to provide a review of the non-judicial mechanisms and initiatives put forth by the home-state, as part of its duties to regulate transnational companies and to promote and prevent human rights abuses. Although there were many positive steps taken, the policy still falls short to address the behavioural problem of companies and the lack of accountability for their actions, specially from the victim's standpoint, who do not have easy access to judicial grievance mechanisms. I also want to acknowledge that, given the complexity of the issue, there are many components and resources that could be modified to impose compliance on companies, such as security disclosure laws and regulations, transparency law, whistleblowing legislation, to name a few. Given the scope of my research, I decided to explore

the options presented above. With this, I want to highlight that, as complex as the issue is, there exist many options, available to the Canadian government, to require compliance and to pave ways for access to legal remedy to victims.

***Regulation through trade agreements: evaluating the Canada-Colombia Human Rights and Free Trade Agreement***

The Canada-Colombia Free Trade Agreement (CCoFTA), signed in 2008 and ratified in 2011, includes a novel tool for human rights reporting: an annual human rights assessment (HRIA), concerning the impacts of Canadian activities in human rights, that needs to be presented by each government to their respective domestic legislative bodies. This next subsection will provide a description of the initiative, followed by a critique and evaluation of the reports submitted by the Canadian Government thus far.

A government HRIA examining the effects of the implementation of an FTA would ideally establish a causation link between increased or sustained trade and investment and human rights (Harrison and Goller 2008). Rochlin (2014) notes that the CCoFTA is “explicitly linked” to human rights and environmental standards. Notably, under Chapter 8 related to investing contains articles 815 and 816 calling on investors to incorporate international standards of corporate social responsibility in their practices. Additionally, chapters 16 and 17 focus specifically on labour and environmental standards respectively. Thus, for the author there is no doubt that the HRIA should put emphasis on Canadian investment’s effects on human rights.

Since the first publication, the reports have drawn criticism and NGOs, such as Amnesty International have manifested their disappointment over the reports, as they fail to address

human rights violations in relation to Canadian investments in the mining and oil sector (Amnesty International 2013). The first report, presented in 2012, does not provide any evaluations on the implementation of the agreement, as it was deemed too soon since the Agreement had been ratified a year ago. However, it laid down the methodology to be followed during the next years. It is however somewhat vague, as it does not require any reporting on the conduct of Canadian investors and violations of human rights, and on the contribution that the CCFTA might have had. It should be noted that it does mention investment as part of the themes of future analysis (Rochlin 2014, p 552; Government of Canada 2012). The following reports of 2013 and 2014 did not provide any critical evaluation of the human rights situation in Colombia; review of human rights impacts were limited to actions taken to implement the FTA, limiting the scope of the reporting. For example, the second report only looked at the effect of tariff reduction on human rights – overlooking other potential findings related to foreign investors’ activities, thus completely ignoring the investment component (Rochlin 2014; Van Harten 2015). This ignores the significant number of reports on Canadian mining’s impact and issues related to human rights abuses (Van Harten 2015). Although two public submissions were made reporting concerns over the assassination of trade union activists in relation to resistance campaigns over the use of Colombian oil, mining and agricultural resources. In response to these concerns, the government concluded that the submissions were unable to establish a link between human rights and the impact of the Canadian tariff reduction measures as part of the FTA’s implementation process. The situation has not changed in the last report published in 2017 – after which Amnesty International sent a letter to GAC informing their participation withdrawal in the consultation process. They criticize the methodology, still weak and too narrowly focused on the impact of tariffs on human rights.

Despite having evidence and reports of forced displacements and of grave violations of human rights in relation to Canadian mining activities it is unclear as of why the Government refuses to examine and report on these cases. Doing so would provide a venue for those participating on the reporting process to find solutions to human rights abuses. In the analysis section I will provide suggestions that, if adopted, could strengthen the reporting methodology so that the reports achieve their full potential in addressing human rights concerns.

## **Conclusion**

The last section evaluated part of the home government initiatives, judicial and non-judicial, as well as the integration of an HRIA requirement within an FTA. The analysis was done within the framework of home State responsibility to regulate mining companies abroad and to provide remedy to the victims of human rights abuses by such companies, given that, there is currently a governance gap in the host State that the home State –Canada- can fill.

As stated at the beginning of this paper and section, the list of initiatives presented and analysed is not exhaustive, and there are other home-government initiatives that also attempt to regulate the private sector's activities abroad. Most of the Canadian policies are first good steps but remain within the realm of voluntarism that, as we have seen has not been enough in terms of reducing human rights abuses nor providing remedy to victims. Given that TNCs operate in contexts of weak governance, it is the home state's responsibility to step in and have a firmer approach towards its companies, in spite of the negative effects this may have in their competitive advantages.

## **PART V - Analysis: what should Canada do?**

In exercising its home-state duty to protect and promote human rights, Canada should take further steps to do so either by strengthening existing initiatives or introducing new mechanisms to do so. As Ruggie pointed out, it is important to recognize home state's reluctance to regulate its companies' activities abroad, as doing so might result in the loss of investment opportunities or might force the companies to relocate (Ruggie 2008). In the previous sections, the analysis of the initiatives and its weaknesses reflected the Canadian government's reluctance to impose stronger obligations and sanctions on companies whose conduct has affected human rights of the local communities. Thus, with this lens of analysis, the final section of my paper will present options that the Government could undertake to comply with its obligations.

It is worth highlighting that these are not the ultimate solution to the problem: as previously stated, the dynamics and context in which Canadian mining companies operate would require a collective effort on the part of the private actors, civil society as well as the host and home governments. However, given the scope of this paper, I will only address the potential solutions on the side of the home state.

### **The Ombudsperson**

Although it is yet too early to evaluate the effectiveness of the Ombudsperson, its newly announced mandate aligns largely with the recommendations of the Advisory Group of 2005, which largely rely on the UNGPs. I identify two main challenges that will have to be monitored in the next months: First, given that the Ombudsperson was appointed as of April 2019 and that, at

the time of writing it has not yet initiated its activities, it is too early – if not impossible to make assessments on the efficiency of the new mandate. Ideally, the new Ombudsperson will be fully independent and will be able to take more cases – especially since there has not been a person to do so since May 2018. Furthermore, the upcoming elections in October 2019 add another level of uncertainty, in that if there should be a change in government from Liberal to Conservative might impact on its level of engagement and freedom to act and conduct its engagement. Second, since the mechanism is still voluntary and the sanctions for misconduct remain the withdrawal of diplomatic and commercial support (TCS), it remains to be seen how much participation will be from the companies involved in conflicts. Unfortunately, there is precedence of withdrawal from the process by accused mining companies, leading to the closure of complaint cases.

### **Improving accountability and facilitating access to judicial remedies**

Home states have been called to establish accountability mechanisms and to facilitate access to judicial remedy in the UNGPs, as part of the exercise of their duty to protect and promote human rights and to regulate the private sector activities abroad. In Canada, various actors have asked the government to facilitate these proceedings. In particular, in its fourteenth report of 2005, the Standing Committee on Foreign Affairs and International Trade (SCFAIT) urged the Government to “Establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies” (SCFAIT 2005, p 3). Although there have been attempts to hold companies accountable, namely by the presentation of Bill C-300 and through some court cases brought to Canada (i.e. *Choc v. Hudbay*), there still

remain significant obstacles when it comes accessing legal remedy or imposing binding sanctions on companies that misbehave abroad.

As for access to courts, although the costs associated will likely remain high, there also needs to be a shift at the provincial level and the acceptance of jurisdiction over certain cases. In this case, the federal government, through the NCP or the Ombudsperson can provide assistance and strong recommendation for court proceedings if they determine that dialogue will not be enough to solve the issue. With regards to rules of accountability, there have been attempts to establish those, namely through Bill C-300. The government should reconsider such an initiative, as binding sanctions could act as a catalyst for the change in behaviour of companies, moving beyond the voluntary paradigm. Apart from retiring diplomatic and commercial assistance, government financial support should be withdrawn when there is proof of human rights abuses. Ideally, other economic sanctions, such as fines could also be effective.

### **Strengthening the methodology of the HRIA**

This solution is specific to the Colombian case, in that the HRIA has been integrated as part of the CCoFTA. First, the Government should change the reporting methodology by examining existing disputes and claims of human rights abuses by Canadian mining companies and by Canadian investments in the sector. Second, its calls for submissions should be better publicized, so that all contributions – in particular those of Colombian and domestic NGO's are part of the evaluation, as they normally contain up-to-date reports on the human rights situations on the field and provide one of the most critical views on the issue. Third, there needs to be a

requirement for an independent review of the report, to make sure there are no omissions on dispute reporting, as it has happened so far.

## **Conclusion**

Throughout the years, scholars, NGOs and government sub-committees as well as international non-governmental organizations have provided useful and sound recommendations to governments, both host and home governments, on how to regulate TNCs' behaviours and promote and protect human rights. In the case of Canada, change should primarily stem from a moral imperative that is to promote and respect human rights. A historical champion in the global scene, mainly through its rhetoric and conception of foreign policy, Canada should strive for consistency and address the issue of Canadian mining companies' complicity and/or effect on the diminishment of the enjoyment of human rights in some communities. However, there needs to be a balancing of priorities, as the promotion of economic interests abroad has been done at the detriment of the promotion and protection of human rights of local communities.

## Bibliography

- Abbot, Thomas. (2013). Pressing Gold Mining Reform in Colombia. *Washington Report on the Hemisphere*, 33(16).
- Abbott, Kenneth, & Snidal, Duncan. (2009). Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit. *Vanderbilt Journal of Transnational Law*, 42(2), 501.
- Above Ground, OECD Watch, & MiningWatch Canada. (2016). "Canada is back." *But Still Far Behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises*.
- Álvarez, J. D. (2015). Governing Mining Resources in the History of Colombia: Between Official Institutions and Resistance. *Law and Development Review*, 0(0). <https://doi.org/10.1515/ldr-2015-0022>
- Américas, J. en las. (2018, February 8). Extraterritorial obligations: A missing component of the UN Guiding Principles that should be addressed in a binding treaty on business and human rights. Retrieved June 30, 2019, from Justicia en las Américas website: <https://dplfblog.com/2018/02/08/extraterritorial-obligations-a-missing-component-of-the-un-guiding-principles-that-should-be-addressed-in-a-binding-treaty-on-business-and-human-rights/>
- Amnesty International. (2013, June 24). Canada-Colombia Free Trade: Another Human Rights Report without human rights. Retrieved June 16, 2019, from Amnesty International Canada website: <https://www.amnesty.ca/news/public-statements/canada-colombia-free-trade-another-human-rights-report-without-human-rights>
- Amnesty International. (2018). Colombia 2017/2018. Retrieved July 15, 2019, from <https://www.amnesty.org/en/countries/americas/colombia/report-colombia/>

- Amnesty International Canada. (n.d.). Citing grave concerns, Amnesty International Canada withdraws from reporting process on Human Rights and Free Trade between Canada and Colombia | Amnesty International Canada. Retrieved June 17, 2019, from <https://www.amnesty.ca/news/citing-grave-concerns-amnesty-international-canada-withdraws-reporting-process-human-rights-and>
- Apr 08, T. C. P. · P., & April 8, 2019 12:34 PM ET | Last Updated: (2019, April 8). New corporate-ethics ombud named but powers remain unclear | CBC News. Retrieved July 16, 2019, from CBC website: <https://www.cbc.ca/news/politics/corporate-ethics-ombudsperson-mining-1.5089059>
- Arseneault, Chris. (2007). COLOMBIA: Foreign Firms Cash in on Generous Mining Code. Retrieved May 18, 2019, from Inter Press Service website: <http://www.ipsnews.net/2007/10/colombia-foreign-firms-cash-in-on-generous-mining-code/>
- Biglaiser, Glen, & DeRouen, Karl. (2006). Economic Reforms and Inflows of Foreign Direct Investment in Latin America. *Latin American Research Review*, 41(1), 51–75.
- Bodruzic, D. (2015). Promoting international development through corporate social responsibility: The Canadian government’s partnership with Canadian mining companies. *Canadian Foreign Policy Journal*, 21(2), 129–145. <https://doi.org/10.1080/11926422.2014.934862>
- Bridge, G. (n.d.). *Mapping the Bonanza: Geographies of Mining Investment in an Era of Neoliberal Reform*. 16.
- Brown, S. (Ed.). (2012). *Struggling for effectiveness: CIDA and Canadian foreign aid*. Montreal ; Ithaca: McGill-Queen’s University Press.

Buhmann, K., Roseberry, L. M., Morsing, M., & European Academy of Business in Society (Eds.).

(2011). *Corporate social and human rights responsibilities: Global legal and management perspectives*. Houndmills, Basingstoke, Hampshire ; New York: Palgrave Macmillan.

Business & Human Rights Resource Centre. (n.d.). Key findings (Feb 2018). Retrieved July 16, 2019,

from <https://www.business-humanrights.org/en/key-findings-from-the-database-of-attacks-on-human-rights-defenders-feb-2017>

Campbell, Bonnie. (2011). Corporate social responsibility and development in Africa: Redefining the roles and responsibilities of public and private actors in the mining sector. *Resources Policy*, (37), 138–143.

Canada, G. A. C.-A. mondiales. (2018, June 8). Annual Report Pursuant to the Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia. Retrieved June 16, 2019, from GAC website:

[https://www.canadainternational.gc.ca/colombia-colombie/bilateral\\_relations\\_bilaterales/rep-hrft-co\\_2017-dple-rapp.aspx?lang=eng#Reporting](https://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/rep-hrft-co_2017-dple-rapp.aspx?lang=eng#Reporting)

Canada, G. of. (2019). Order in Council PC number 2019-0299. Retrieved June 14, 2019, from

<https://orders-in-council.canada.ca/attachment.php?attach=37587&lang=en>

Canadian Network on Corporate Accountability. (n.d.). Human rights due diligence gap Canada's CSR for mining companies. Retrieved June 14, 2019, from CNCA website: [http://cnca-](http://cnca-rcrce.ca/resources/due-diligence-csr-mining/)

[rcrce.ca/resources/due-diligence-csr-mining/](http://cnca-rcrce.ca/resources/due-diligence-csr-mining/)

Chirwa, D. (n.d.). The doctrine of state responsibility as potential means of holding private actors accountable for human rights. *Melbourne Journal of International Law*, 5(1).

CIDH (Comisión Interamericana de Derechos Humanos), & OEA. (2013). *Verdad, justicia y reparación: Cuarto informe sobre la situación de derechos humanos en Colombia*. Washington, D.C.: OEA.

CINEP (Centro de Investigación y Educación Popular), & (PPP) Programa por la Paz. (2012). *Minería, conflictos sociales y violación a los derechos humanos en Colombia*. Retrieved from CINEP/Programa por la Paz website:

[https://www.alainet.org/images/IE\\_CINEP\\_octubre\\_2012.pdf](https://www.alainet.org/images/IE_CINEP_octubre_2012.pdf)

CIRDI (Canadian International Resources and Development Institute). (n.d.). Post-Conflict Transformation of ASM through Education, Organization and Consultation in Colombia. Retrieved June 18, 2019, from <https://cirdi.ca/project/post-conflict-transformation-of-asm-through-education-organization-and-consultation-in-colombia/>

CIRDI (Canadian International Resources and Development Institute). (2014). Colombia Advancing Legislators' Knowledge (December 2014). Retrieved June 18, 2019, from <https://cirdi.ca/learning/colombia-advancing-legislators-knowledge-december-2014/>

Clark, Tim. (2003). *Canadian Mining Companies in Latin America: Community Rights and Corporate Responsibility*. Retrieved from York University and CERLAC website: [https://miningwatch.ca/sites/default/files/CERLAC\\_mining\\_report.pdf](https://miningwatch.ca/sites/default/files/CERLAC_mining_report.pdf)

(CNMH)Centro Nacional de Memoria Historica. (n.d.). 262.197 muertos dejó el conflicto armado. Retrieved July 15, 2019, from <http://www.centrodememoriahistorica.gov.co/noticias/noticias-cmh/262-197-muertos-dejo-el-conflicto-armado>

CoDev (CoDevelopment Canada). (2011, September 15). Troubled by the Murder of Father José Reinel Restrepo: Letter Calling for Facts Surrounding Restrepo's Murder to be Brought to Light.

Retrieved June 18, 2019, from CoDev: Building partnerships for global justice website:

<https://www.codev.org/2011/09/troubled-by-the-murder-of-father-jose-reinel-restrepo/>

Committee on Economic, Social and Cultural Rights. (2011). Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights. Retrieved July 6, 2019, from

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMKOGNxs%2FCpnVM8K6XpeNimFvrj%2F4tQZvhH%2BXM9vEaJmHSX3FSXAcTmJ%2BWc3iPSLafnoFpGQ9KIHCXooWHCPCpQt>

Conventions and Recommendations. (n.d.). Retrieved June 27, 2019, from

<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

Coordinación Observatorio de Conflictos Mineros de América. (2015). Auge de minería en Latinoamérica. *FDCL-Verlag, Berlin*. Retrieved from <https://www.fdcl.org/wp-content/uploads/2015/12/Informe-Ocmal-LA.pdf>

Coumans, Catherine. (2012). The back story to the CIDA-mining partnerships. *Embassy*. Retrieved from <http://www.embassynews.ca/opinion/2012/02/08/the-back-story-to-the-cida-mining-partnerships/41218>

DFAIT (Department of Foreign Affairs and International Trade Canada). (2009). *Building the Canadian advantage: A corporate social responsibility (CSR) strategy for the Canadian extractive sector*. Retrieved from DFAIT Canada website: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>

DFAIT (Department of Foreign Affairs and International Trade Canada). (2013). *Review Process*.

Retrieved from DFAIT Canada website: [https://www.international.gc.ca/csr\\_counsellor-conseiller\\_rse/review\\_process-processus\\_examen.aspx?lang=eng&view=d](https://www.international.gc.ca/csr_counsellor-conseiller_rse/review_process-processus_examen.aspx?lang=eng&view=d)

DFAIT (Department of Foreign Affairs and International Trade Canada). (2014). *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad*.

Retrieved from DFAIT Canada website: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

Engler, Yves. (2016, September). Foreign aid helps Canadian corporations dominate the global mining industry. Retrieved May 26, 2019, from Rabble website:

<http://rabble.ca/blogs/bloggers/yves-engler/2016/09/foreign-aid-helps-canadian-corporations-dominate-global-mining-in>

Extractive Industries Transparency Initiative. (n.d.). The EITI Requirements. Retrieved July 16, 2019, from Extractive Industries Transparency Initiative website: <https://eiti.org/eiti-requirements>

GCGC (Gran Colombia Gold Corporation). (n.d.). Maramato. Retrieved June 18, 2019, from Operations & Projects "Colombia website: <http://www.grancolombiagold.com/operations-and-projects/colombia/default.aspx#maramato>

General Comment 9. (n.d.). Retrieved July 9, 2019, from ESCR-Net website: <https://www.escr-net.org/resources/general-comment-9>

Global Affairs Canada. (2018a, January 17). Responsible business conduct abroad – Questions and answers. Retrieved June 14, 2019, from GAC website: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>

- Global Affairs Canada. (2018b, October 3). The Canadian Trade Commissioner Serviceâ€”Colombia. Retrieved June 18, 2019, from <https://www.tradecommissioner.gc.ca/colombia-colombie/index.aspx?lang=eng>
- Global Initiative Reporting. (n.d.). About GRI. Retrieved July 16, 2019, from <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx>
- Gordon, T., & Webber, J. R. (2008). Imperialism and Resistance: Canadian mining companies in Latin America. *Third World Quarterly*, 29(1), 63–87.  
<https://doi.org/10.1080/01436590701726509>
- Gwynne, R. N., & Kay, C. (Eds.). (2004). *Latin America transformed: Globalization and modernity* (2. ed). London: Hodder Education.
- Gwynne, R. N., & Kay, C. (2014). *Latin America transformed: Globalization and modernity*. Retrieved from <http://www.tandfebooks.com/isbn/9780203763704>
- Harrison, James, & Goller, Alessa. (2008). Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer? *Human Rights Law Review*, 8(4), 5–7.
- Idowu, S. O., Capaldi, N., Fifka, M. S., Zu, L., & Schmidpeter, R. (Eds.). (2015). *Dictionary of corporate social responsibility: CSR, sustainability, ethics and governance*. Cham ; New York: Springer.
- Imai, S. (2016). The “Canada Brand”: Violence and Canadian Mining Companies in Latin America. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2886584>
- International Covenant on Civil and Political Rights*. , 999 UNTS 171 § (1966).
- Janda, R. (2010). An act respecting corporate accountability for the activities of mining, oil or gas in developing countries (Bill C-300): Anatomy of a failed initiative. *McGill International Journal of Sustainable Development Law and Policy*, 6(2), 97-. Retrieved from Academic OneFile.

- Leblanc, Daniel. (2012). CIDA funds seen to be subsidizing mining firms. *Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/politics/cida-funds-seen-to-be-subsidizing-mining-firms/article1360059/>
- Levitt, M., & Vandenbeld, A. (2019). *Race to the Top: Improving Canada's Extractive Sector Corporate Social Responsibility Strategy to Safeguard Human Rights in Latin America*. 64.
- Maasrati, Tarek, Drakos, M., & Pajhowaska, J. (n.d.). Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment. *Cornell International Labor Journal*, 2007(135), 136–170.
- Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. (2011). *Netherlands Quarterly of Human Rights*, 29(4), 578–590.  
<https://doi.org/10.1177/016934411102900411>
- Mackrael, Kim. (2012). Fantino defends CIDA's corporate shift. *Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/politics/fantino-defends-cidas-corporate-shift/article5950443/>
- Mackrael, Kim. (2013). 'Huge opportunities' for Canadian mining industry to work in developing countries. *Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/politics/huge-opportunities-for-canadian-mining-industry-to-work-in-developing-countries/article12670581/>
- Marques, José Carlos. (2012). *Canada's Corporate Social Responsibility (CSR) Policy: Insights from Recent CSR Research and a Comparative Industry Study*. Institute for the Study of International Development.
- McMahon, Gary. (2010). The World Bank's Evolutionary Approach to Mining Sector Reform. *The World Bank*, (19). Retrieved from

<http://documents.worldbank.org/curated/en/550381468330990173/pdf/605130NWP0Mini10BOX358322B01PUBLIC1.pdf>

Methven O'Brien, C. (2018). The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal. *Business and Human Rights Journal*, 3(1), 47–73.

<https://doi.org/10.1017/bhj.2017.29>

Milanovic, M. (2011). *Extraterritorial Application of Human Rights Treaties*.

<https://doi.org/10.1093/acprof:oso/9780199696208.001.0001>

Mining Association of Canada. (2018). *Facts and Figures 2018*. Mining Association of Canada.

MiningWatch Canada, Censat Agua Viva (Organization), & Inter Pares (Organization). (2009). *Land and conflict: Resource extraction, human rights, and corporate social responsibility: Canadian companies in Colombia*. Retrieved from <http://www.deslibris.ca/ID/222603>

Moguillansky, G., Bielschowsky, R., & Pini, C. (2001). *Investment and economic reforms in Latin America*. Santiago de Chile: CEPAL.

Ncp, C. (n.d.). *Will the Ombudsperson be different/ better than the Canada's Extractive Sector Corporate Social Responsibility (CSR) Counsellor and Canada's National Contact Point (NCP)? 2*.

NU. CEPAL. (2013). Natural resources within the Union of South American Nations: Status and trends for a regional development agenda. *ECLAC*. Retrieved from

[https://repositorio.cepal.org/bitstream/handle/11362/3117/1/S2013190\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/3117/1/S2013190_en.pdf)

OECD. (1999). *Canada: Review of the Implementation of the Convention and 1997 recommendation* (No. Phase 1).

OECD. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. , (2011).

OECD. (2011b). *PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CANADA*.

Office of the High Commissioner for Human Rights. (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. Retrieved from [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

OHCHR. (n.d.). Optional Protocol to the International Covenant on Civil and Political Rights. Retrieved June 17, 2019, from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>

Orihuela, Sandra. (n.d.). *Latin America: A New Era for Mining Investment*. 30(1), 27.

Patterson, Brent. (2019). Vancouver mining company Eco Oro sues Colombia over protection of Santurbán wetland. Retrieved June 18, 2019, from Rabble.ca website: <http://www.rabble.ca/blogs/bloggers/brent-patterson/2019/03/vancouver-mining-company-eco-oro-sues-colombia-over>

Refugees, U. N. H. C. for. (n.d.). Refworld | General Comment No. 9: The domestic application of the Covenant. Retrieved July 9, 2019, from Refworld website: <https://www.refworld.org/docid/47a7079d6.html>

Republica de Colombia, Ministerio de Minas y Energia, & Unidad de Planeacion Minero Energetica. (2017). *PLAN NACIONAL DE DESARROLLO MINERO CON HORIZONTE A 2025*. Retrieved from [http://www1.upme.gov.co/simco/PlaneacionSector/Documents/PNDM\\_Dic2017.pdf](http://www1.upme.gov.co/simco/PlaneacionSector/Documents/PNDM_Dic2017.pdf)

Reyes, J. (1998). *Estudio sobre la reforma del Sector Minero Colombiano*. Bogota: Universidad Javeriana.

- Rich, E., & Moberg, J. (2017). *Beyond Governments: Making Collective Governance Work - Lessons from the Extractive Industries Transparency Initiative*. Retrieved from <http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=1592692>
- Rochlin, J. F. (Ed.). (2015). *Profits, security, and human rights in developing countries: Global lessons from Canada's extractive sector in Colombia*. New York : London: Routledge, Taylor & Francis Group.
- Roeder, R. W. (2016). *Foreign Mining Investment Law: The Cases of Australia, South Africa and Colombia*.
- Ruggie, J. (2009). Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. *Netherlands Quarterly of Human Rights*, 29(2), 224–253. <https://doi.org/10.1177/016934411102900206>
- Sagebien, J., & Lindsay, N. M. (Eds.). (2011). *Governance ecosystems: CSR in the Latin American mining sector*. Houndmills, Basingstoke, Hampshire ; New York, NY: Palgrave Macmillan.
- Sánchez Albavera, F., Ortiz, G., Moussa, N., United Nations, & Economic Commission for Latin America and the Caribbean. (2001). *Mining in Latin America in the late 1990's*. Santiago, Chile: Naciones Unidas, ECLAC.
- Seck, S. L. (2013). TRANSNATIONAL JUDICIAL AND NON-JUDICIAL REMEDIES FOR CORPORATE HUMAN RIGHTS HARMS: CHALLENGES OF AND FOR LAW. *Windsor Yearbook of Access to Justice*, 31(1), 177. <https://doi.org/10.22329/wyaj.v31i1.4320>

Sep 26, J. M. P. on, & 2017 4:49pm. (2017, September 26). Mining watchdog needs teeth:

Counsellor. Retrieved June 11, 2019, from IPolitics website:

<https://ipolitics.ca/2017/09/26/judicial-powers-needed-to-tackle-mining-and-human-rights-abuses-overseas-counsellor/>

Simons, P. (2014). Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses. *Canadian Business Law Journal*, 56, 167–207.

Simons, P., & Macklin, A. (2014). *The governance gap: Extractive industries, human rights, and the home state advantage*. London ; New York: Routledge.

Simons, Penelope, & Macklin, Audrey. (2010). Defeat of responsible mining bill is missed opportunity. *Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/defeat-of-responsible-mining-bill-is-missed-opportunity/article4348527/>

(UBC) University of British Columbia. (2012, November 23). UBC, SFU to further global sustainable mining practices through \$25M Institute. Retrieved June 18, 2019, from UBC News website: <https://news.ubc.ca/2012/11/23/ubc-sfu-to-further-global-sustainable-mining-practices-through-25m-institute/>

United Nations Conference on Trade and Development (UNCTAD). (2000). *Bilateral Investment Treaties: 1959-1999*. United Nations.

*Voluntary Principles Initiative – Guidance on Certain Roles and Responsibilities of Governments*.

(n.d.). Retrieved July 15, 2019:

[https://docs.wixstatic.com/ugd/f623ce\\_64253cb1f65740b7940068d7702157c8.pdf](https://docs.wixstatic.com/ugd/f623ce_64253cb1f65740b7940068d7702157c8.pdf)

*Voluntary Principles on Security and Human Rights.* (n.d.). Retrieved July 15, 2019:

<https://www.voluntaryprinciples.org/what-are-the-voluntary-principles>