Universal Periodic Review, Third Cycle/Canada

Joint Submissions for the Universal Periodic Review of Canada

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Lawyers Without Borders Canada **(LWBC, or Avocats sans frontières Canada, ASFC)** is a non-governmental international development organisation, whose mission is to support the defence of human rights for the most vulnerable groups and individuals, through the reinforcement of access to justice and legal representation. LWBC is headquartered in Quebec City, Canada, and has offices in four countries: Colombia, Guatemala Haiti and Mali.

LWBC seeks to contribute to the defence and promotion of human rights, uphold the rule of law, fight against impunity, reinforce the security and independence of human rights lawyers, support the holding of fair trials, and contribute to the continuing education of stakeholders within the justice system, as well as members of civil society. LWBC is a member organisation of the Canadian Council of International Cooperation, and participates actively in its regional working groups, including the Americas Policy Group and the Africa Canada Forum.

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Lawyers' Rights Watch Canada **(LRWC)** is a committee of lawyers and other human rights defenders who promote international human rights and the rule of law through advocacy, education and legal research.

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Summary

Lawyers Without Borders Canada ("LWBC") and Lawyers' Rights Watch Canada ("LRWC") together submitted a report to the United Nations Human Rights Council for the upcoming Universal Periodic Review (UPR) of Canada, to take place in the spring of 2018. Canada's last UPR was in 2013.

Through the UPR, undertaken by the Human Rights Council, the human rights records of all UN member states are reviewed. The ultimate aim of this process is to improve the human rights situation in all countries. Although the UPR is a state-driven peer-review process, civil society organizations have the opportunity to make submissions for consideration in the process.

This joint submission focuses on three main topic areas that are important for Canada's fulfillment of its international human rights obligations, and that reflect the organizational interests and expertise of LWBC and LRWC.

First, Canada must do a better job of addressing the significant negative human rights impacts of its extractive industry and the difficulties victims of corporate human rights violations face in accessing justice. We recommend that Canada establish an effective, independent ombudsperson with the power to investigate human rights allegations involving corporations and to sanction corporate actors, as a means of improving accountability and access to justice.

Second, Canada should increase its participation in and support for the Inter-American human rights system –which has played a critical role for people throughout the Americas–, notably by adhering to the American Convention on Human Rights.

Third, Canada must take the policy and legislative measures necessary to improve the situation of Indigenous peoples in Canada and to ensure the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

For more information on the UPR, visit the Office of the United Nations High Commissioner for Human Rights website.

Introduction

Canada's last UPR

Relevant recommendations and Canada's response

The issues discussed below are not new. In Canada's 2013 UPR, a large proportion of recommendations focused on the need to improve the situation of Indigenous peoples in Canada (see Annex). States also recommended that Canada ratify international human rights instruments, including ILO Convention No. 169 and the ACHR, and implement the UNDRIP. One recommendation (No. 128.151) suggested Canada adopt an accountability framework for corporations having had a negative human rights impact.

Overall, Canada accepted the general recommendations about improving the situation of Indigenous peoples in areas like education, economic development, sanitation, violence against women, and food security. However, Canada rejected suggestions that it should adopt a national plan of action, or that it should implement the UNDRIP, which it referred to as an aspirational, non-binding instrument.[1]

Current Canadian context

Since the last UPR, a new federal government has come into power in Canada. Canada's official rhetoric on Indigenous issues and its position on the UNDRIP have consequently changed significantly. Notably, Indigenous Affairs Minister Carolyn Bennett announced at the UN Permanent Forum on Indigenous Issues in May 2016 that Canada is now a full supporter of the UNDRIP, without qualification, and proclaimed Canada's intention to implement the UNDRIP, in accordance with the Canadian Constitution.[2] Prime Minister Justin Trudeau's September 2017 speech at the UN General Assembly reiterated this theme.[3]

Similarly, the current government has been more open to addressing civil society concerns about the human rights impacts of Canadian corporations' activities than its predecessor.

Another significant development since Canada's last UPR is the 2015 release of the Final Report of Canada's Truth and Reconciliation Commission ("TRC"), which examined the history and legacy of the Indian residential school ("IRS") system. The IRS system existed in Canada from the 1880s to 1996 and was designed to forcefully assimilate Indigenous children. The TRC issued 94 Calls to Action aimed at redressing the legacy of the IRS system, and advancing reconciliation.

Business and Human Rights

Identifying the problem

Human rights abuses resulting from Canadian corporate activity

Canada is dominant globally in the extractive sector: more than half of the world's mining companies are located in Canada, and the majority of the world's mining companies are listed on Canadian stock exchanges.[4]

There are numerous credible allegations of negative impacts of the extractive industry, including severe environmental harms, violent displacement of people and communities through forced evictions, sexual assault and violence committed by mine security personnel, injury and deaths of community members, and slavery and other labour abuses. Often affected are Indigenous peoples and their traditional lands.

Human rights defenders or opponents of extractive and other development projects, and the lawyers who represent them, have been criminalized and persecuted for their activism. Issues related to the human rights impacts of extractive activities arise both inside and outside Canada.[5]

These types of incidents involve violations of rights guaranteed in international human rights instruments, including rights: to life; to expression, association, and assembly; not to be held in slavery; to equality and non-discrimination; to take part in public affairs and decision making; to an adequate standard of living; and to the highest attainable standard of health.

Furthermore, the right of Indigenous peoples to free, prior and informed consent has been routinely encroached by Canadian corporate actors keen to extract resources from their traditional lands.

The targeting of lawyers and activists who defend the rights of those in affected communities violates the standards set out in the UN *Basic Principles on the Role of Lawyers*[6], notably that they should be able to carry out their professional functions "without intimidation, hindrance, harassment or improper interference"[7], and the UN *Declaration on Human Rights Defenders*, which sets out the right of everyone "to develop and discuss new human rights ideas and principles and to advocate their acceptance"[8] and the duty of states to take measures to protect human rights defenders from any violence or retaliation arising from the legitimate exercise of their rights.[9]

While the fact that in 2016 Canada published Guidelines on Recognizing and Supporting Human Rights Defenders for Canadian officials to follow, which includes a section on human rights defenders who focus on the activities of multinational corporations and their subsidiaries, is to be commended, it remains to be seen how those instructions will translate into concrete protection measures.[10]

Existing supervisory mechanisms

Currently, Canada's response to the great challenges posed by the presence of its extractive industry abroad relies essentially on the voluntary participation of corporations. It is a business-oriented corporate social responsibility ("CSR") approach to help companies manage risks, rather than one firmly grounded in respect for international human rights law, whether with respect to prevention of violations or ensuring access to remedies.

The main mechanism for the Canada's CSR policy is the Office of the Extractive Sector Corporate Social Responsibility Counsellor ("CSR Counsellor"), established by the Federal Government in 2009 as part of its CSR policy, later revised in 2014.[11] The CSR Counsellor has a dual mandate to provide advice on implementing CSR initiatives and to resolve disputes between communities and companies. The Office of

the CSR Counsellor is not independent, lacks significant powers, and is widely acknowledged as ineffective.

The first appointee resigned in 2013, not having successfully completed any mediation. The position was empty for over a year before the current Counsellor was appointed. His activities have largely been focused on outreach and providing advice and assistance to extractive sector stakeholders, including mining companies, civil society organizations, academics, industry associations, foreign governments and Canadian diplomats.[12] Under the revised CSR policy, the CSR Counsellor can recommend that a company that is not meeting its CSR requirements or that fails to participate in his facilitation process be denied economic diplomacy from government agencies like Export Development Canada.

However, LWBC and LRWC are not aware of any instance in which this was done. In November 2016 it was reported that the CSR Counsellor had "no active mediations or dialogues going."[13] From the website of the CSR Counsellor, this seems to still be the case.

There is cause for concern about the impartiality of the current office holder. A trip report published in July 2017 by the CSR Counsellor following a visit to Honduras, the only report of its kind, indicates a significant pro-business bias, prejudice against civil society organizations, and misunderstanding of human rights advocacy, international solidarity work, and the risks faced by human rights defenders with legitimate grievances.

The report makes damaging allegations about Canadian civil society actors, characterizing them as being ideologically motivated against mining and having taken confrontational approaches that have contributed to tensions in Honduras.[14] The CSR Counsellor's report is at odds with Canada's guidelines on supporting human rights defenders, and with his mandate to work constructively with all stakeholders.

Another mechanism is the National Contact Point of the Organization for Economic Development and Co-operation (OECD NCP), which facilitates inquiries and discussions between corporations and affected communities regarding the *OECD Guidelines for Multinational Enterprises*.[15] It does not undertake investigations, there is no public registry of complaints filed with the NCP, and it is a voluntary mechanism, although non-engagement in NCP processes results in the withdrawal of Canada's trade advocacy support.[16]

Past efforts to improve accountability mechanisms for Canadian corporations operating extra-territorially have not been successful. For example, Bill C-300, The Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act, was defeated in 2010. It was a private members' bill that sought to provide a mechanism for the government to hear complaints and withhold financial and political support from companies failing to adhere to Canadian and international environmental and human rights standards. It was vigorously opposed by the extractive industry and was narrowly defeated by six votes in the House of Commons.[17]

Canadian civil society organizations have for many years campaigned for an independent and effective ombudsperson to accept and investigate complaints, make recommendations to address problems, provide remedy, and sanction companies that do not comply with set standards by making them ineligible for government services. The Canadian Network on Corporate Accountability has developed useful model legislation that sets out the recommended mandate and procedures for an extractive sector ombudsperson, based on established legal principles.[18]

During the last federal election campaign, the Liberal Party –which wound up forming the government– promised to establish such an entity to investigate allegations of human rights violations involving Canadian corporations.[19] Since the election, the government has stated that it is reviewing how to reinforce the role of the CSR counsellor.[20] However, there has been no official announcement of any meaningful policy change.

Canada must improve its corporate accountability framework in order to fulfill its state duty to protect against human rights abuses by third parties, under the first pillar of the UN Guiding Principles on Business and Human Rights; and to comply with the third pillar of these Principles, to ensure victims have greater access to remedies.[21]

Access to justice

People alleging human rights violations committed by, or with the complicity of, corporations acting outside of Canada have difficulties accessing justice. In their own country (a corporation "host" state), there may be a defective justice system, whether due to corruption or other institutional weaknesses.

It has also been difficult for these plaintiffs to access Canadian courts and to survive preliminary challenges to lawsuits. The main reasons why cases of extraterritorial harm have not been heard on the merits are: a finding of lack of jurisdiction, application of the *forum non conveniens* doctrine, and the perceived or real lack of a strong connection between a parent company and harms involving its subsidiary, which has precluded finding a duty of care of parent companies toward the people seeking redress for alleged human rights violations by extractive operations.

For example, class action litigation was initiated against Anvil Mining Limited in Québec Superior Court for the company's role in the Kilwa massacre in the Democratic Republic of the Congo, in which over 70 people were killed by the military, among other grave human rights violations. Anvil admitted to having provided logistical support to the military. Overturning the Superior Court ruling[22] that the case could advance, the Québec Court of Appeal found that there were insufficient connections to Québec, because the company's Montréal office was not involved in decisions that led to the massacre.[23]

In *Garcia v. Tahoe Resources Inc.* the plaintiffs allege that a Canadian corporation is responsible for damages suffered when they were shot by mine security personnel during a protest outside the Escobal mine in Guatemala. The case was brought in British Columbia. The BC Supreme Court found that it had jurisdiction simpliciter, but that Guatemala was clearly the more appropriate forum for the trial.[24] The Court rejected the plaintiffs' arguments that they would not be assured a fair and impartial trial in Guatemala.[25] This decision was overturned by the BC Court of Appeal,[26] which concluded there was "some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state."[27]

Other precedent-setting cases moving forward to trial in Canadian courts are the *Araya v. Nevsun Resources Ltd.* case in British Columbia, involving allegations of forced labour in a Canadian-run Eritrean mine (appeal decision currently pending),[28] and the *Choc v. Hudbay Minerals Inc.* case in Ontario. The plaintiffs in the latter case allege that Hudbay is responsible for harms caused by mine security personnel: the killing of community leader Adolfo Ich, the shooting and paralysis of German Chub, and the gang-rape of 11 women from the community of Lote Ocho during the forced eviction of their village.

The Ontario Superior Court of Justice found that the allegation that the "corporate veil" shielding the Canadian parent corporation Hudbay Minerals from liability for the actions of its Guatemalan subsidiary could potentially be "pierced", if the plaintiffs could prove there was an agency relationship between parent and subsidiary.[29] Furthermore, the Court found that there was a *prima facie* duty of care directly owed to the plaintiffs by Hudbay; the plaintiffs had "properly pleaded the elements necessary to recognize a novel duty of care".[30]

While it is encouraging that some cases alleging extraterritorial harms are proceeding to trial, access to justice in a Canadian court is by no means assured. Even in cases that successfully advance, litigation is slow, very costly, and logistically complicated, and plaintiffs are at a disadvantage against well-resourced corporate defendants. As such, it is imperative that accountability frameworks be improved and that

victims can access remedies without having to take their claim through the trial and appeal process in Canadian courts.

Recommendations from UN human rights monitoring bodies

Human rights treaty bodies of the UN have recognized the human rights abuses resulting from Canadian extractive activity and called on Canada to take action.

In its March 2016 concluding observations for Canada, the Committee on Economic, Social and Cultural Rights ("CESCR") expressed its concern that the right to free, prior and informed consent of Indigenous peoples was "not adequately incorporated in domestic legislation and not consistently applied"[31]. It recommended effective mechanisms be established to enable the meaningful participation of Indigenous peoples in decision-making in relation to development projects on or near their lands or territories.

Moreover, the CESCR expressed concern about the conduct abroad of corporations registered or domiciled in Canada, the limited access to judicial remedies before Canadian courts for victims, and the ineffectiveness of non-judicial mechanisms such as the CSR Counsellor.[32] It recommended that Canada strengthen its legislation, including by requiring corporations to conduct human rights impact assessments and to facilitate access to justice to Canadian courts.[33]

The Committee on the Elimination of All Forms of Discrimination against Women ("CEDAW"), in its November 2016 Concluding Observations on the combined eighth and ninth periodic reports of Canada, expressed its concern about the negative impact of mining corporation behaviour on girls' and women's rights, the inadequate legal framework for holding corporations accountable, and the absence of an independent mechanism with powers to investigate complaints of corporate abuses.[34]

It recommended Canada strengthen its legislation governing corporate conduct abroad and introduce effective investigative mechanisms, including an ombudsperson with the mandate to receive complaints and conduct independent investigations.[35]

Most recently, in June 2017, after its official visit to Canada, the UN Working Group on Business and Human Rights urged Canada to improve its efforts to prevent and address the human rights impacts of Canadian business activities.[36] It endorsed the creation of an institution like an ombudsperson "to provide effective remedy in a timely and inexpensive manner."[37]

According to the Working Group, the entity should be independent and well resourced, and have the power to investigate allegations and enforce its orders. The Working Group urged Canada to train its trade officers on the UN Guiding Principles on Business and Human Rights, examine how it might use regulatory measures such as mandatory human rights due diligence and non-financial reporting requirements, improve Export Development Canada processes in relation to social and environmental impacts, and to improve access to judicial and non-judicial remedial mechanisms, among other recommendations.

Ratification of the American Convention on Human Rights

Canada's status vis-à-vis the Inter-American Human Rights System

Canada joined the Organization of American States (OAS) on January 8, 1990, after 28 years as an observer.[38] By virtue of Canada's ratification of the OAS Charter, the Inter-American Commission on Human Rights can accept individual complaints against Canada that allege violations by Canada of the American Declaration of the Rights and Duties of Man.[39]

However, cases cannot proceed to the Inter-American Court of Human Rights because Canada has not adhered to the ACHR. The ACHR is but one of the human rights instruments in the Americas that Canada has not adhered to; others include the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* ("Convention of Belem do Para"), and the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*.

Almost half of the binding international human rights instruments that Canada is not a party to are from the IAHRS.[40] This suggests that Canada has not taken a human rights leadership role in the Americas, despite its substantial amounts of foreign investment and corporate activity throughout the region, which has in several cases had significant negative human rights impacts, as described above.

Canada's failure to adhere to the ACHR and other Inter-American treaties stands in stark contrast to its current stated priorities at the OAS, the first of which is to "[c]ontribute to building a stable foundation for the Inter-American Human Rights System in support of diversity and pluralism."[41] Adhering to the ACHR, and thus being more fully engaged in the IAHRS, would allow Canada to meet its stated goals and would increase Canada's ability to positively influence other states in the Americas with respect to human rights.

In addition, it would likely encourage other states, notably from the English-speaking Caribbean, to ratify the ACHR. Canada's credibility on human rights in the Americas and its degree of influence suffer from not having fully committed to the IAHRS, and notably from not allowing the IACtHR to review Canadian cases.

Importance of the IAHRS for Canadians

Apart from allowing greater opportunity to contribute to norm building, ratification of the ACHR would provide an additional avenue of redress for Canadian victims of human rights violations. The IAHRS has had a unique and indispensable role in providing justice to victims of gross human rights violations throughout the Americas, especially those in countries that have gone through periods of highly repressive dictatorships. However, jurisprudence of the IAHRS, including notably judgments on Indigenous rights, is relevant to Canada despite its different history.

Alleged problems of compatibility between Canadian laws or values and the IAHRS are largely overblown or no longer relevant. For example, in the past some groups expressed concern about the ACHR's right to life provision being incompatible with Canadian women's reproductive rights, but recent jurisprudence of the IACtHR[42] restricting the applicability of right to life protections to unborn fetuses should alleviate those concerns.

The IACHR has already addressed human rights issues in Canada. It has assessed individual complaints in a number of cases, for example, from an asylum seeker facing the risk of being deported to torture,[43] from a Mohawk (Indigenous) Chief on trade and the right to culture,[44] and from an Indigenous woman who was separated from her children.[45]

The IACHR has published reports on thematic areas of pertinence to Canada, such as its 2016 report on extractive industries: *Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*.[46] The IACHR's 2014 report *Missing and Murdered Indigenous Women in British Columbia, Canada*[47] was an important report that increased awareness about this national crisis and was a precursor to the current National Inquiry into Missing and Murdered Indigenous Women and Girls.[48]

These cases confirm there is an important role for the IAHRS to encourage the implementation and enforcement of international human rights in Canada.

Implementation of the UNDRIP

Indigenous peoples in Canada

Canada's treatment of Indigenous peoples throughout its colonial history is rife with oppression and systematic violations of their fundamental human rights. Indigenous peoples were neither informed nor represented in the proceedings that led to Canadian Confederation in 1867.[49] Britain delegated authority to negotiate with "Indians" to the federal level of Canada's government, and some treaties were negotiated to permit the extension of British imperial settlement; however, Indigenous peoples were not informed of significant decisions affecting their rights.[50]

Many injustices against Indigenous peoples have been perpetrated through the *Indian Act*, first passed in 1876 and still in existence, having been amended many times. Various iterations of the *Indian Act* have acted to: prevent status « Indians » from voting, prohibit Indigenous people from hiring lawyers to bring land claims in Canadian courts, restrict movement off Indian « reserves », ban cultural and religious ceremonies/practices, discriminate against women, subject Indigenous governance to paternalistic control by the Canadian government, and uphold the IRS system.

As found by the TRC, the IRS system was characterized by poor quality education and school conditions, children being subjected to physical and sexual abuse, forced labour, high levels of disease, elevated death rates compared to the rest of the population, separation of families, and condemnation of Indigenous languages and culture (although there was some variance between schools).

In addition, beginning in the 1960s, many Indigenous children were removed from their families for purported child welfare reasons, in what is referred to as the « Sixties Scoop ». The IRS system resulted in severe cultural loss and other enduring socio-economic harms.

Indigenous peoples (or "Aboriginal peoples" in the language of the Canadian Constitution, referring to First Nations, Métis, and Inuit peoples) in Canada now make up roughly 4.3% of the national population.[51] The Indigenous population is growing at a greater rate than the non-Indigenous population, and more than half of Indigenous people now live in urban centres.[52] There are approximately 90 distinct Indigenous languages in Canada.[53]

Current levels of socio-economic development for Indigenous peoples in Canada are well below those for the rest of the population, which the Final Report of the TRC explains is the legacy of the IRS system and colonialism. In a 2014 report on Canada, the UN Special Rapporteur on the Rights of Indigenous Peoples referred to the socio-economic conditions as "distressing".[54]

Some of the conditions highlighted in that report include the lower levels of educational attainment, a severe housing crisis (particularly in Northern Indigenous communities), significantly worse health outcomes (life expectancy, infant mortality, suicide, injuries, etc.), over-representation in the prison population, higher than average violence against women, and a lack of safe drinking water on reserves throughout Canada. The poverty rate for Aboriginal children is 40%, compared to 17% for all children in Canada.[55]

There is discriminatory underfunding of child welfare services by the Federal government for children living on reserves, as found by the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* in January 2016. Since the Tribunal's decision on merits, the Tribunal has issued three non-compliance orders against the Government for failure to comply with the Tribunal's orders to remedy this inequality.[56]

Overview of provisions of the UNDRIP

The UNDRIP is a detailed human rights instrument that sets out the standards applicable to Indigenous peoples; it enshrines their distinct status and rights. It is the product of 25 years of international negotiations between state governments and Indigenous leaders, and clarifies how international human rights protected in other instruments apply to Indigenous peoples, protecting their individual and collective rights. The concept of self-determination is at the heart of the UNDRIP.[57]

Defined simply, this means that Indigenous peoples have the right to control their own affairs. Self-determination is considered to be the foundation for all other rights.

Also, several provisions of the UNDRIP confirm rights that are not as explicitly protected by the Canadian Constitution. For example, the right not to be subjected to forced assimilation (Art. 8.1), the right to belong to an Indigenous community or nation in accordance with customs or traditions (Art. 9), the right to establish and control educational institutions and systems (Art. 14.1), and the right to determine and develop priorities and strategies for exercising the right to development (Art. 23) are all recognized in the UNDRIP. One particularly important provision in relation to economic development is Article 19:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

The right to free, prior, and informed consent is also recognized in other provisions of the UNDRIP. However, it is not explicitly recognized in Canadian law. In the latter, a "duty to consult" has been established, through the Supreme Court of Canada's interpretation of section 35 of the Constitution.

Indigenous peoples must be allowed to meaningfully participate in decisions of the Federal government that affect them, which has not generally been done.[58] The lack of consultation on major amendments to several environmental protection laws in 2012 prompted the Canada-wide "Idle No More" advocacy movement in 2012. Also, in many cases Indigenous peoples have not been adequately consulted before projects affecting their lands and territories have been approved.

In keeping with the provisions of the UNDRIP, government and corporate actors must obtain the free, prior, and informed consent of the Indigenous peoples potentially affected before proceeding with development projects.[59] The main party responsible for assuring the protection of Indigenous rights is the government. The starting point for dialogue must be the recognition of indigenous peoples as distinct rights holders.

Full implementation of the UNDRIP would allow Indigenous nations to strengthen their own self-governance, which has been shown to improve educational achievement and employment levels.[60] The TRC has called on all levels of Canadian government to fully adopt and implement the UNDRIP as the framework for reconciliation, and "to develop a national action plan, strategies, and other concrete measures to achieve the goals" of the UNDRIP.[61] The full respect and implementation of the UNDRIP in Canada is a cornerstone of the TRC's Calls to Action.

Recommendations

Based on the discussion above, LWBC and LRWC recommend that Canada:

1. Adopt effect mechanisms to supervise Canadian corporations operating extra-territorially and hold them accountable;
   - Enact laws that allow Canadian courts or other tribunals to determine and impose binding remedies for complaints of violations of domestic law and Canada's international human rights obligations committed within and outside Canada;
   - Establish an independent ombudsperson or other mechanism with the mandate and capacity to receive complaints, investigate allegations of human rights violations by Canadian corporations, provide remedies to victims, and to sanction corporations found to have violated internationally protected rights;
   - Make political, economic, diplomatic and other forms of support accorded to Canadian extractive sector companies conditional upon adherence to international human rights and environmental standards, including the right to free, prior, and informed consent;
2. Increase its engagement in the Inter-American Human Rights system, notably by ratifying the *American Convention on Human Rights* and other Inter-American human rights treaties;
3. Take necessary legislative and policy measures to comply with the TRC Calls to Action and fully implement the UNDRIP, preferably including the adoption of a comprehensive framework and the creation of procedural mechanisms to safeguard rights.

[1] See Tim Fontaine, "Canada officially adopts UN declaration on rights of Indigenous Peoples" *CBC News* (10 May 2016), online: <http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>.
[2] *Ibid*.
[3] "Prime Minister Justin Trudeau's Address to the 72nd Session of the United Nations General Assembly" (21 September 2017), online: < http://pm.gc.ca/eng/news/speeches>.
[4] In 2009, the Canadian Mining Association indicated that 75 percent of the world's mining companies are registered in Canada, operating in 10,000 projects in more than 100 countries. See: Mining Association of Canada, "Canada's Mining Industry: Socially Responsible Global Leader: Bill C-300 Will Hurt Canadian Mining Companies" (1 September 2010), online: <http://www.pdac.ca/docs/default-source/public-affairs/fact-sheet-mining.pdf>.
[5] See, for example, Shin Imai, Leah Gardner, and Sarah Weinberger, "The 'Canada Brand': Violence and Canadian Mining Companies in Latin America" (20 November 2016) Osgoode Legal Studies Research Paper No. 17/2017, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886584>.
[6] *Basic Principles on the Role of Lawyers,* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990), online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.
[7] *Ibid.* at principle 16.
[8] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res 53/144, UNGAOR, 53rd sess, 85th plen mtg, Agenda item 110(b), UN Doc A/RES/53/144 (9 December 1998), Annex, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms", online: <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>, at Art. 7.
[9] *Ibid.* at Article 12.
[10] Government of Canada, "Voices at risk: Canada's guidelines on supporting human rights defenders", online: <http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng> (last modified 5 June 2017). See Section 4.2, "Cases involving Canadian entities."
[11] The Office of the CSR Counsellor was a cornerstone of Canada's first CSR strategy, "Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad". Canada's enhanced CSR Strategy, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" was launched in 2014.
[12] Global Affairs Canada, The Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor Government of Canada, 2016 Annual Report to Parliament: May 2015 – May 2016 (November 2016), online: <http://international.gc.ca/csr_counsellor-conseiller_rse/publications/2016_annual_report-rapport_annuel_2016.aspx?lang=eng>.
[13] Ian Bickis, "Canadian miners need stronger oversight abroad: Liberal MP McKay*," Canadian Press/CTV* (5 April 2015), online: <http://www.ctvnews.ca/politics/mining-companies-need-stronger-oversight-abroad-liberal-mp-mckay-1.2845636>.
[14] Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, "Honduras Country Trip Overview (26 July to 7 August 2016)", 11 July 2017, online: <http://www.international.gc.ca/csr_counsellor-conseiller_rse/trip_overview_Honduras-apercu_voyage_Honduras.aspx>.
[15] See OECD, Guidelines for multinational entreprises, online: <http://www.oecd.org/corporate/mne/>.
[16] Global Affairs Canada, "Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs) ", online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R> (last modified 17 July 2017).
[17] The vote was 140 to 134, with the opposition Liberal leader and other Liberal Members of Parliament (MPs) ensuring its defeat through their noticeably absence from the vote. The MP who introduced Bill C-300 has called for an ombudsperson. See: Ian Bickis, "Canadian miners need stronger oversight abroad: Liberal MP McKay," *Canadian Press/CTV* (5 April 2016), online: <http://www.ctvnews.ca/politics/mining-companies-need-stronger-oversight-abroad-liberal-mp-mckay-1.2845636>.
[18] See Canadian Network on Corporate Accountability, Executive Summary: Draft model legislation to create a human rights ombudsperson for the international extractive-sector in Canada, online: < http://cnca-rcrce.ca/wp-content/uploads/2016/03/Executive-Summary-Global-Leadership-in-Business-and-Human-Rights-Draft-Extractive-Sector-Ombudsperson-Model-Legislation-11022016.pdf>; and Draft model legislation, "The Global Leadership in Business and Human Rights Act: An act to create an independent human rights ombudsperson for the international extractive sector" (2 November 2016), online: < http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf>.
[19] Canadian Network on Corporate Accountability, "Corporate Accountability for Canada's Mining, Oil, and Gas

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[23] Anvil Mining Ltd. c. Association canadienne contre l'impunité, 2012 QCCA 117 (CanLII), online: <https://www.canlii.org/en/qc/qcca/doc/2012/2012qcca117/2012qcca117.html>. The plaintiffs appealed to the Supreme Court of Canada, but their appeal was refused.

[24] *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045 (CanLII), online: <http://canlii.ca/t/gm0pn>.

[25] *Ibid*. at para. 66. Plaintiffs' position is described at para. 38.

[26] *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 (CanLII), online: <http://canlii.ca/t/gx49k>.

[27] *Ibid.* at para. 130.

[28] *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 (CanLII), online: <http://canlii.ca/t/gv11z>; Renee Bernard, "Court to Hear Vancouver-based Mining Company Appeal" *News 1130* (24 Sept. 2017), online: <http://www.news1130.com/2017/09/24/court-hear-vancouver-based-mining-company-human-rights-appeal/>.

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[30] *Ibid.* at para. 75. The discussion of a novel duty of care is at paras. 50 – 75.

[31] UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Canada* (23 March 2016), UN Doc E/C.12/CAN/CO/6, at para. 13.

[32] *Ibid.* at para. 15.

[33] *Ibid*. at para. 16. The Committee also recommended that Canada's trade and investment agreements recognize the primacy of human rights over investors' interests.

[34] UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada* (25 November 2016), CEDAW/C/CAN/CO/8-9, at para. 18.

[35] *Ibid.* at para. 19.

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

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[38] Government of Canada, "Permanent Mission of Canada to the Organization of American States", online: <http://www.international.gc.ca/oas-oea/index.aspx?lang=eng> (last modified 13 June 2016).

[39] This is in conformity with Article 20 of the IACHR's Statute and Article 51 of its Rules of Procedure.

[40] See www.hri.ca/database. Based on the instruments included in the database, Canada has not ratified 21 Inter-American human rights instruments, and 24 international human rights instruments from other systems.

[41] Government of Canada, "Canada's priorities at the Organization of American States", online: <http://www.international.gc.ca/oas-oea/priorities-priorites.aspx?lang=eng>.

[42] *Artavia Murillo et al. v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (28 November 2012), online: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf>.

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[45] *Report No. 89/13, Admissibility, Petition 879-07, Loni Edmonds And Children Canada*, Inter-Am.C.H.R. (4 November 2013).

[46] *Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (31 December 2015), Inter-Am.C.H.R., OEA/Ser.L/V/II. Doc. 47/15, online: <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>.

[47] Missing and Murdered Indigenous Women in British Columbia, Canada (21 December 2014), Inter-Am.C.H.R., OEA/Ser.L/V/II., Doc. 30/14, online: <http://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf>.

[48] See National Inquiry into Missing and Murdered Indigenous Women and Girls, online: <http://www.mmiwg-ffada.ca>.

[49] Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: University of

Saskatchewan Native Law Centre, 1989).

[50] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto : Belfords, Clarke and Co., 1880). Significant post-confederation developments concerning Indigenous rights include the "sale" of the Hudson's Bay Company trading territory to Canada, Rupert's Land Act, 1868, 31-32 Vict, c. 105 (U.K.) and the transfer of natural resources from federal to provincial jurisdictions by the Constitution Act, 1930, 20-21 George V, c. 26 (U.K.) which instituted Natural Resource Transfer Agreements.

[51] Statistics Canada, "Aboriginal Peoples in Canada: First Nations People, Métis and Inuit", National Household Survey, 2011, online: <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>.

[52] Indigenous and Northern Affairs Canada, "Fact Sheet – Urban Aboriginal population in Canada", online: <http://www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302> (last modified 15 September 2010).

[53] *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of indigenous peoples in Canada,* UN Human Rights Council, 27th sess, Agenda item 3, UN Doc A/HRC/27/52/Add.2 (4 July 2014), online: <http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf>.

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[55] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy, The Final Report of the Truth and Reconciliation Commission of Canada: Volume 5* (Montreal: McGill-Queen's University Press, 2015), online: <http://www.myrobust.com/websites/trcinstitution/File/Reports/Volume_5_Legacy_English_Web.pdf>, at p. 5.

[56] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 16; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14.

[57] It is recognized in Article 3 of the UNDRIP.

[58] See Anaya report, *supra,* at paras. 46 – 51.

[59] Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), at CTA 92.i.

[60] See Anaya report, *supra,* at para. 38.

[61] Truth and Reconciliation Commission of Canada, *supra*, at CTAs 43, 44.

ANNEX

Relevant recommendations from Canada's 2013 UPR

Bold = recommendations accepted by Canada

Regular = recommendations accepted in principle

Italic = recommendations not accepted

128.1. Ratify international human rights instruments to which Canada has not yet become party (Burkina Faso);

[…]

128.12. Consider the ratification of ILO Convention No. 169 (Ecuador, Nicaragua, Paraguay);

[…]

128.14. Ratify (Brazil)/Consider ratifying (Mexico)/Give priority to the ratification/accession to the American Convention on Human Rights in order to adjust its legislation to the standards of the Inter-American system of promotion and protection of human rights (Uruguay)/including the possibility of making reservations or interpretative declarations to Article 4, as done by other countries in the region (Mexico);

[…]

128.45. Take the necessary measures aimed at removing the root causes of racial discrimination, xenophobia and overincarceration of Aboriginals, AfroCanadians and ethnic minorities including women (Democratic People's Republic of Korea);

[…]

128.53. Continue to address the problems relating to minority groups including Aboriginal peoples, Metis and African Canadians, as identified in the first cycle of the UPR (Sierra Leone);

[…]

128.57. Adopt legislative and administrative measures to improve the living conditions of indigenous peoples, effectively combat and prevent violent action against indigenous women and girls through legal measures (China);

128.58. Take effective legal measures with a view to the adoption of a national plan of action so that the rights of indigenous peoples will be respected and all forms of violence against Aboriginal women and girls will be ended (Iran (Islamic Republic of));

128.59. Abolish all discriminatory implications of the Indian Act and grant women and men the same rights with regard to their aboriginal status (Germany);

128.60. Consider the adoption of a national plan of action in pursuance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) **and implement, inter alia, the recommendations of the CRC on the national system to protect Aboriginal children (Cape Verde);**

128.61. Adopt, in consultation with indigenous peoples, a national action plan for the implementation of the UNDRIP (Mexico);

128.62. Adopt a comprehensive strategy on the situation of Aboriginal people at the federal level, to intensify the monitoring of the Nutrition North Canada Program, launched in 2011 and to develop a national plan of action (Bulgaria);

128.63. Enhance, through consultation mechanisms, the participation of indigenous peoples in the determination of public policies that affect them (Peru);

128.64. Ensure parity of funding and services between Aboriginal and non-Aboriginal communities (United States of America);

128.65. Continue to strengthen its relationship with indigenous peoples (Gabon);

128.66. Give full effect to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (Togo);

128.67. Take all necessary measures, including the implementation of the UNDRIP, to ensure to its indigenous peoples the **full enjoyment of all their human rights, including economic, social and cultural rights, so that their quality of life is similar to the rest of citizens (Cuba);**

128.68. Implement the recommendation of CERD to realise the economic, social and cultural rights of aboriginal people (Turkey);

128.69. Adopt effective measures to implement political, economic, social and culture rights of aboriginal communities and minorities, as well as prevent discrimination against them (Uzbekistan);

128.70. Continue to ensure the human rights of the Aboriginal people, including by realizing their economic, social and cultural rights (Indonesia);

128.71. Continue in its endeavours to consistently address the skills development and training needs of Aboriginal peoples to ensure access to sustained decent work (Trinidad and Tobago);

128.72. Step up its efforts in order to raise the level of employment and education of indigenous peoples and to react to the difficulties facing people living in isolated communities (Gabon);

128.73. Continue its efforts to improve access to health services for indigenous peoples (Burundi);

128.74. Ensure the right to health, and an adequate standard of living for the First Nations, Metis and Inuit (Namibia);

128.75. Continue to promote the empowerment of Aboriginal peoples, primarily through the protection of their lands, their education and their health (Holy See);1

128.76. Continue its efforts to develop and implement sustainable solutions engaging relevant provincial government, as well as representatives of Aboriginals, on issues such as guaranteeing the property rights for Aboriginals and their participation on issues related to natural resources development (Republic of Korea);

128.77. Address the issues raised by the Special Rapporteur on the right to food concerning the deep and severe food insecurity faced by Aboriginal peoples across Canada living both on and off reserves, in remote and urban areas, especially for children (Namibia);

128.78. Take further measures to increase the political representation of indigenous peoples, and expand the dialogue with these communities so that they can better represent their perspectives in the decision-making process (Morocco);

[…]

128.80. Ensure effective implementation of CEDAW at the federal, provincial and territorial levels with particular attention to Aboriginal women and girls (Turkey);

[…]

128.83. Continue its efforts to prevent and punish all forms of violence against women and girls, particularly indigenous women and girls (Peru);

128.84. Take all appropriate measures to address violence against indigenous women (Sweden);

128.85. Take effective measures to combat violence against Aboriginal girls and women (Cape Verde);

128.86. Put an end to all forms of violence against Aboriginal women and girls (Honduras);

128.87. All necessary measures be taken to address all forms of violence against Aboriginal women and girls (India);

128.88. Expand services and support to prevent violence and discrimination against Aboriginal women and girls (United States of America);

128.89. Take further steps to prevent and protect Aboriginal women and children from all forms of violence (Estonia);

128.90. Regarding combating all forms of violence against Aboriginal women and girls, support effective participation of Aboriginal peoples, especially women and their organizations, in the development, implementation and evaluation of measures taken (Finland);

128.91. Continue with the measures for the promotion of women's rights, primarily by preventing and combating violence against women, particularly those belonging to indigenous peoples (France);

128.92. Strengthen measures to eradicate violence against women and children, especially those belonging to indigenous peoples and diverse ethnic groups (Ecuador);

128.93. Develop strategies to address the causes and consequences of violence against Aboriginal women and girls (Togo);

128.94. Work proactively with partners to address the violence against Aboriginal women and its root causes (United Kingdom);

128.95. Put an end to all forms of violence against women and girls belonging to Aboriginal communities (Uzbekistan);

128.96. Develop a national plan of action to end violence against indigenous women **and take the necessary measures to ensure that national protection laws against domestic violence are enforced at all levels in a consistent and effective manner (Switzerland);**

128.97. Develop and implement a national plan of action to address violence afflicting indigenous women and girls, providing for an adequate reaction of authorities and a resolution to the root causes of the violence (Slovakia);

128.98. Devise a national action plan to address the structural roots of violence, raise awareness, and ensure effective access to justice, redress and protection for indigenous women (Slovenia);

128.99. Develop a comprehensive national strategy for addressing violence against Aboriginal women in a timely manner and in collaboration with relevant stakeholders such as Aboriginal women's organizations (New Zealand);

128.100. In collaboration with indigenous representatives, implement concrete measures, so that a comprehensive and coordinated national action plan can be under way by 2015, as recommended by the United Nations SecretaryGeneral's campaign to end violence against women (Norway);

128.101. Carry out, with the Special Procedures of the Council, an independent investigation of cases of disappearances and murders of Aboriginal women and girls (Belarus);

128.102. Ensure access to justice; investigating an alarming pattern of violence afflicting indigenous women throughout the country and allegations of an inadequate response by authorities, as well as addressing the root causes of violence against indigenous women in order to end all forms of violence against Aboriginal women and girls (Indonesia);

128.103. Continue its support and assistance to the provincial and territorial governments in improving the response of law enforcement and justice system to cases of violence against women and children in Aboriginal communities (Montenegro);

128.104. Develop a comprehensive national action plan for addressing violence against indigenous women, and, also, give due consideration to an independent national enquiry into missing indigenous women (Ireland);

128.105. Implement measures to ensure that the Aboriginality of victims of gender-based violence is accurately recorded (Australia);

[…]

128.123. Recognize in the national legislation access to water and sanitation as a human right, and develop a national plan to guarantee it, in consultation with indigenous peoples and the society in general, in order to reduce the gap in access to this right between indigenous peoples and the rest of society (Ecuador);

[…]

128.132. Strengthen the guarantees for access to drinking water and sanitation for the entire population, especially for indigenous populations and the most remote areas (Spain);

[…]

128.134. Ensure the access to education for all children, including those belonging to indigenous peoples (France);

[…]

128.136. Take further effective measures to ensure access to education for all Aboriginal girls and women as an essential part of the full realization of their human rights (Finland);

128.137. Make every effort to ensure that the graduation rate from the First Nations' students reaches the level of other Canadian students (Chad);

[…]

128.151. Continue efforts towards the establishment and implementation of an effective regulatory framework for holding companies registered in Canada accountable for the human rights impact of their operations (Egypt);