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Valuing Vigilance:

Confronting the role of Canadian mining companies in resource colonialism in Guatemala, an analysis of the viability of human rights impact assessments in operationalizing the right of Indigenous peoples to free, prior and informed consent (FPIC)

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Abstract

This paper calls into question the Canadian government's complicity in resource colonialism in Guatemala by way of failing to effectively regulate the operations of Canadian mining companies. These companies repeatedly ignore their responsibilities as duty bearers to effectively engage in consultations of good faith with communities in a way that protects, respects and fulfills their right to Free, Prior, and Informed Consent as outlined in various international human rights frameworks. In view of this, the principle purpose of this thesis is to assess the potential viability of human-rights impact assessments (HRIAs) in facilitating the operationalization of FPIC processes and safeguarding the human rights entitlements of local Indigenous rights-holders who stand to be affected by a particular mining project, policy or practice. By juxtaposing the strengths and shortcomings of collaborative and community-based HRIAs, this thesis aims to provide a comprehensive overview of the utility and viability of HRIAs as an authoritative human rights due diligence mechanism. This thesis uses a multidisciplinary methodological approach which relied primarily on qualitative research by way of *testimonios* provided by mining-affected people in predominately Indigenous communities throughout Guatemala. One of the key findings of this research is that community participation and ownership over the HRIA is critical, as involvement of right-holders helps to ensure that human rights analysis throughout the assessment process reflects and is responsive to the demands of Indigenous Peoples, helping to preserve procedural integrity in contrast to other HRIA processes where communities play a less significant role, ultimately leading to more optimal outcomes with respect to the protection and promotion of human rights.

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"There's really no such thing as the 'voiceless'. There are only the deliberately silenced, or the preferably unheard."

--- Arundhati Roy

For those whose voices have been smothered by the weight of a viscerally perverse and unjust world.

"All these things we have to do – pick up the bodies of our loved ones, of wounded people and get them on a motorcycle, people have been tear gassed, children have been tear gassed – this is how we live. Thank you for coming, but learn this stuff. This is the reality. Hopefully it sinks into your heart and into your conscience. This is how things work. Join together with other people and amongst each other, become activists, work together for our common humanity. Only if we work together for our common humanity will these foreign companies stop coming in here and treating us like the way they do."

Testimonio from Maria Choc, a Q'eqchi community leader and human and lands-rights defender from El Estor, Guatemala

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Introduction: Canadian Mining and Free, Prior and Informed Consent (FPIC)

Despite Indigenous peoples only accounting for five per cent of the earth's population, it is estimated that over half of the world's remaining mineral resources lay beneath lands and territories they inhabit.[1] The presence of such immense natural wealth on Indigenous territory has subsequently brought many of the world's indigenous communities in direct conflict with foreign investors looking to exploit and expropriate their lands and resources. Seeing that many Indigenous territories are governed using a system of collective land tenure rights, a system which is often not recognized as being legitimate by State governments, foreign investors are often able to engage in large-scale land acquisitions that flagrantly disregard customary Indigenous ownership of the land. This, in part, can be attributed to the fact that in many countries the State maintains ownership over subsurface mineral rights regardless of pre-existing surface, often collective land tenure rights. By means of this prevailing code of practice, mining companies are able to secure mineral concessions from national governments who often act as a spokesperson for local communities despite neither being commissioned nor authorized by indigenous communities to do so. The failure of the national government to ensure the meaningful participation of communities affected by a proposed mining project has spurred anti-mining movements across Latin America, particularly in Central America.

In Guatemala, the pervasiveness of Canadian mining companies has produced a nation-wide movement of resistance, predominantly led by the country's Indigenous populace. Many of these companies have been negligent in failing to recognize their obligations as duty bearers,

[1] Doyle, Cathal M. *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative role of free prior and informed consent*. New York: Routledge, 2015. Page 5.

often failing to exercise a duty of care by conducting adequate human rights due diligence processes including meaningfully engaging with local Indigenous communities in a way that respects their right to free, prior and informed consent (FPIC). Such omissions on the part of Canadian mining companies has precipitated a mass-mobilization of the country's Maya communities to unite behind the common purpose of rejecting mining on their ancestral lands and territories. Such resistance to Canadian mining companies has manifested itself primarily through public protests, blockades and *consultas communitarias* (consultas), which are municipal plebiscites used to determine community perspectives surrounding mining activities. The prevalence of *consultas* across Guatemala arguably implies a failure by Canadian mining companies to uphold their corporate responsibility to respect human rights by conducting adequate human rights due diligence processes, specifically their legal duty to effectively consult communities who stand to be impacted by a particular policy, project or practice as advised in the United Nations Guiding Principles on Business and Human Rights (UNGPS).[2]

As the global standard for promoting respect for human rights in business, the UNGPs outlines a four-step process for business enterprises to conduct human rights due diligence. First, the establishment of a corporate human rights policy which outlines a commitment towards meeting their responsibility to respect human rights. Second, conducting human rights risk/impact assessments as a way to identify, prevent and mitigate their impacts on human rights. Third, the integration of assessment procedures into corporate governance structures and fourth, iteratively tracking and reporting the effectiveness of the human rights assessment

[2] 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.* United Nations, Office of the High Commissioner for Human Rights. New York: United Nations. Retrieved from http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

process. In that regard, Human rights impact assessments (HRIAs) are an emerging human rights due diligence tool which offer companies a proactive way to translate the policies enshrined in the UNGPs into corporate practice. On the other hand, HRIAs provide Indigenous communities with a substantive means by which to proclaim and assert their collective land tenure and resource rights in a way that is in accordance with their customary laws and practices. Whereas other conventional impact assessment procedures such as social or environmental impact assessments view risk primarily from a company perspective by which adverse human rights impacts are surveyed in relation to the reputational, operational, legal and financial costs that they pose to a company's bottom line, HRIAs in contrast examine and emphasize the ways in which human rights risks affect rights-holders, for instance local indigenous communities.

In light of this, this paper hopes to call attention to the various ways in which Canadian mining companies in Guatemala are failing to fulfill their human rights obligations by neglecting to conduct crucial due diligence processes despite them being a core requirement of their role as duty bearers under international human rights law. Following from this, the paper argues that mining companies can contribute to the operationalization of human rights in the regions in which they operate by incorporating human rights impact assessments (HRIAs) into their corporate accountability, social responsibility and risk management strategies. Recognizing the principal role that respecting the right of Indigenous Peoples to FPIC processes ought to play in each of these businesses components, the central question that then frames this paper is what impact, if any, can HRIAs have on operationalizing FPIC processes to promote self-determined development? Could the institutionalization of HRIAs -- particularly ones that are collaborative

or community based -- as a mandatory human rights due diligence requirement (similar to Environmental Impact Assessments) for Canadian mining companies be an appropriate procedure to facilitate both effective and meaningful stakeholder engagement in a way that reflects and realizes the principles upon which FPIC is based: transparency, agency, participation, proactivity and self-determination. The principal purpose of this paper is to assess the potential relevance of HRIAs to the operationalization of FPIC processes. In doing so, this article hopes to contribute to the existing literature on HRIAs by highlighting how the right of Indigenous peoples to free, prior and informed consent can be advanced through collaborative or community-based HRIAs, a topic which to the author's knowledge has yet to be explored.

Finally, the central argument that frames this paper is that HRIAs, when conducted in accordance with local indigenous customary laws and practices offer Indigenous peoples a formidable mechanism through which to proclaim and protect their non-derogable subsistence and existence rights particularly those pertaining to the protection of their customary land and resource tenure systems. By the same token, it will be argued that community-based HRIAs which adhere to local cultural and consultative processes and are free from any external influence, interference and intimidation will help to empower Indigenous peoples with a substantive methodology by which to safeguard their right to FPIC as enshrined in the international human rights regime. Considering that in countries such as Guatemala, where the national government reserves the right to subsurface resources regardless of customary indigenous land tenure systems on the surface, this thesis contends that community-led HRIAs allow Indigenous peoples to harness international legal accords in which FPIC is enshrined such

as ILO Convention 169 and the UNDRIP in their defense against the state-sanctioned appropriation of their lands, territories and resources.

Chapter One: Canadian Mining Companies' Dereliction of Duty in Guatemala

METHODOLOGY

This article used a multidisciplinary methodological approach that focused primarily on document analysis and qualitative research through *testimonios* conducted in mining-affected communities adjacent to Canadian mining operations in Guatemala. A comprehensive review of the principal literature on business and human rights was undertaken in order to provide a broad overview of the state of art as it pertains to the corporate responsibility to respect human rights through human rights due diligence procedures. That being said, various reports on processes related to human rights due diligence were surveyed with a particular focus on contemporary tools used to conduct human rights impact assessments and subsequent literature examining their efficacy. The various primary source documents that were reviewed include: the World Bank's Compliance Advisor Ombudsman's Assessment of the Marlin Mining Project in Guatemala reviewed in conjunction with a Human Rights Assessment of Goldcorp's Marlin Mine conducted by On Common Ground Consultants. Relatedly, the article reviewed key publications pertaining to HRIAs including Oxfam and Rights and Democracy's Getting it Right: Human Rights Impact Assessment Guide," the Danish Institute for Human Rights Human

Rights Impact Assessment Guidance and Toolbox[3], a joint report published by the Columbia Center on Sustainable Investment as well as the Danish Institute for Human Rights and SciencePo Law School report titled, "A Collaborative Approach to Human Rights Impact Assessments," among others.

Further, the scope of this article's research was narrowed to the Guatemalan context for three reasons. The author's initial research interests sought to examine ways in which the human rights violations of Indigenous peoples could be prevented by enforcing respect for FPIC by Canadian mining companies. In light of this, a preliminary review of the most-recent business and human rights literature revealed that HRIAs, particularly collaborative HRIAs, offer corporations a potential mechanism for undertaking human rights due diligence in a way that effectuates the UNGPs and to a certain extent the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In view of the high concentration of Canadian mining companies in Guatemala, coupled with the fact that country is preponderantly Indigenous, Guatemala seemed like an ideal reference point from which to examine how the human rights due diligence processes of Canadian mining companies can potentially be improved through HRIAs. Secondly, of the remarkably few HRIAs publicized by a mining company, one was completed at a Canadian mining company's operations in Guatemala and therefore provided substantial literature which could be critically scrutinized. Lastly, the author tailored the scope of this article's research to the Guatemalan context upon learning that he would be participating in a field school to Guatemala whereby mining-affected Indigenous communities could be interviewed.

[3] The Danish Insitute for Human Rights. *Human Rights Impact Assessment - Guidance and Toolbox*. Copenhagen: The Danish Institute for Human Rights , 2016.

The field-school was led by Catherine Nolin, a geographer from the University of Northern British Columbia and Grahame Russel, a non-practicing Canadian lawyer who founded RightsAction, a Toronto-based non-profit organization which, "funds grassroots human rights, environmental and development organizations in Guatemala and Honduras."[4] RightsAction, as stated on the organization's website works to; "build north-south relationships and support education, legal work and activism to hold accountable the U.S. and Canadian governments, our companies and investors that oftentimes cause and profit from exploitation and poverty, environmental destruction, repression and violence, corruption and impunity in Honduras and Guatemala, and beyond."[5] Both Nolin and Russel have worked in Guatemala on academic and solidarity work for the past four decades and have therefore built-up respectable rapport with indigenous communities combating oppression inflicted by Canadian mining companies. Such connections allowed for introductions to communities and human and environmental organizations in a manner that respected their safety as well as agency and autonomy. Therefore, participating in the field-school seemed like a non-invasive way to garner information from mining-affected communities considering the attendant time-constraints associated with the requirements of this thesis. That being said, ethics-review approval was granted by the University of Northern British Columbia.

This thesis used a methodological approach which relied extensively on personal *testimonios* provided by mining-affected people in indigenous communities throughout Guatemala. Embraced by activist researchers, *testimonios* allow for the amplification of marginalized voices in academic discourse and beyond. These voices from the margins often

[4] RightsAction. *About US*. n.d. 10 June 2018. <http://rightsaction.org/about-us/>.
[5] Ibid.

speak of collective rather than individual experience and do so in relation to what Nolin and Shankar (2000) describe as "the systems or situations that have historically suppressed the ability to speak."[6] In outlining how *testimonios* differ from autobiography, Nolin and Shankar cite the work of Beverely (1998) and Gelles (1998) which is worth quoting at length.

> *Testimonio* is a form of collective autobiographical witnessing that gives voice to oppressed peoples and has played an important role in developing and supporting international human rights, solidarity movements and liberation struggles … such a narrative is always linked to a group or class situation marked by marginalization, oppression and struggle, the loss of which moves the piece from *testimonio* to autobiography. (Geller, 1998, p.3)

That being said, reliance of this research on the use of *testimonios* was done in order to provide a highly sensitive space through which previously silenced mining-affected individuals could speak their truth by giving voice to the various human rights violations and injustices that they have endured. In this respect, *testimonios* offer a perceptive platform for victims of mining-abuses to recount how such abuses has impacted them individually, but also collectively. Given the vulnerability of the Maya in Guatemala with regard to state-sanctioned violence against them, historically and currently coupled with extreme oppression inflicted by foreign mining companies, every-effort was made to uphold the highest standard of ethical research practices and the utmost sensitivity during the process of receiving *testimonios. Testimonios* were received by the author during May 2018 in four mining-affected communities across Guatemala where Canadian mining companies have been granted concessions. *Testomonios* were facilitated by

[6] Hanlon, Catherine Nolin and Finola Shankar. "Gendered Spaces of Terror and Assault: The Testimonio of REMHI and the Commission for Historical Clarification in Guatemala." *Gender, Place and Culture* 7.3 (2000): 265-286.

Grahame Russel and Catherine Nolin and conducted in Spanish and Mayan Q'eqchi' with the former being translated by Russel and the latter with the help of Joseph Ich.

Moreover, before this article begins, it is important that several key terms be defined so as to provide some conceptual clarification in the hopes of preventing potential misunderstanding surrounding nomenclature. The article uses the term "project-affected people", "local communities" and "indigenous peoples" almost interchangeably. The reason for this is that, in the context of Guatemala's mining sector, project-affected people and local communities in the regions in which mining companies operate overwhelmingly self-identify as indigenous. This article also uses the UN Guiding Principles Reporting Framework's definition of human rights due diligence which it defines as: "An ongoing risk management process…in order to identify, prevent, mitigate and account for how [a company] addresses its adverse human rights impacts. It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed."[7] This article is particularly interested in the initial assessment procedures of human rights due diligence processes known as human rights impact assessments (HRIAs).

This article's definition of an HRIA echoes that of The Danish Institute for Human Rights which describes an HRIA "as a process for identifying, understanding, assessing and addressing the adverse effects of a business project or activities on the human rights

[7] Shift and Mazars LLP. *UN Guiding Principles Reporting Framework with implementation guidance*. Mazars LLP. New York City: Shift and Mazars LLP, 2015. Page 110.

enjoyment of impacted rights-holders such as workers and community members."[8] Building on this definition, the article understands HRIAs to be a process that prioritizes risks to rights holders (in this case local indigenous peoples) ahead of corporate business risks; gives precedence to community perspectives regarding the design and implementation of the assessment process and finally is a process that is deeply imbued with the very human rights principles that HRIAs seek to promote that is, transparency, equality, participation and non-discrimination. Lastly, this article refers to FPIC processes as procedures which exhibit respect for indigenous self-determination over their ancestral lands, territories and natural resources. It will be argued that *ex*-ante HRIAs offer a formidable tool to advance respect for the right of Indigenous peoples to free, prior and informed consent in the mining sector.

Finally, the article seeks to analyze how HRIAs can support the operationalization of FPIC as ensconced in international human rights frameworks such as the UNDRIP in the hopes of advancing Indigenous peoples rights over their lands and resources. It is important to point out however, that respecting the right of indigenous peoples to FPIC is as much about process as it is about outcome. As RESOLVE underscores in a recent report, FPIC is considered to be a mechanism, "that safeguards the individual and collective rights of indigenous and tribal peoples, including their land and resource rights and their right to self-determination. This means that neither consultation nor consent can be viewed as outcomes in and of themselves, nor can consultation and consent be

[8] The Danish Insitute for Human Rights. *Human Rights Impact Assessment - Guidance and Toolbox*. Copenhagen: The Danish Institute for Human Rights , 2016. Page 9.

seen as stand-alone rights."[9] The report goes on to add that "While negotiation of FPIC provides a means for indigenous and tribal peoples to exercise their human rights, it does not represent the full scope of those rights."[10] This interpretation of FPIC is particularly important for this research as it highlights that the concept of FPIC is just one tool to safeguard indigenous peoples' individual and collective rights, including their rights over traditionally used and occupied lands and resources, and therefore FPIC should be viewed as a framework through which to recognize and respect those rights.

MINING INDUSTRIES AND THE RIGHT OF INDIGENOUS PEOPLES' TO FREE, PRIOR AND INFORMED CONSENT

By its very nature, resource extraction is inherently disruptive, environmentally and – increasingly when it comes to resources located on Indigenous peoples' traditional lands and territories – socially and culturally. The dominant paradigm of resource extraction often does not consider a culturally sensitive and human-rights based approach to development. As such, resource extraction processes in general, and mining activities in particular, often inhibit indigenous peoples from accessing their lands and natural resources or degrade or destroy land of prime agricultural and cultural significance thereby directly impacting their physical well-being and the integrity of their cultures and livelihoods. In his final report to the United

[9] Anaya, J.S., Evans, J. and D. Kemp (2017) Free, prior and informed consent (FPIC) within a human rights framework: Lessons from a Suriname case study. RESOLVE FPIC Solutions Dialogue: Washington DC. Preface, Page ii.

[10] Ibid. Page 4

Nation's Human Rights Council the former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, in support of this writes that, "The business model that still prevails in most places for the extraction of natural resources within indigenous territories is not one that is fully conducive to the fulfillment of indigenous peoples' rights, particularly their self-determination, proprietary and cultural rights in relation to their affected lands and resources."[11] Anaya is putting things lightly when he states that the operations of extractive industries are not "fully conducive" to indigenous rights considering that it would not be an overstatement to suggest that extractive industries in general and mining companies in particular are overwhelmingly responsible for the contravention of the rights of indigenous peoples worldwide.

A common thread running through the majority of these violations however is the repeated disrespect of indigenous peoples' right to self-determination of which FPIC is one expression. FPIC is a decision-making process whereby indigenous peoples' right to self-determination is respected through their participation and consultation in decisions that directly affect them, typically regarding development and extractive projects. The UN Permanent Forum on Indigenous Issues (UNPFII) Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples sought to "develop realistic and concise methodologies on how the principle of free, prior and informed consent should be respected in activities relating to indigenous peoples."[12] According to the

[11] Anaya, J. (2013). *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Extractive industries and indigenous peoples*. United Nations Human Rights Council. New York: United Nations. Page 3

[12]

report, at the heart of efforts to mainstream FPIC is an understanding that indigenous peoples should be *free* to reach their own decisions and not be coerced, intimidated or manipulated. Decisively the report outlines that *Prior "*Should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes." Importantly for the purposes of this paper, the UNPFII's definition of *Informed* is worth quoting at length seeing that indigenous communities adjacent to mining companies are rarely instructed on the various ways in which mining can impact their lives and livelihoods.

> *Informed* should imply that information is provided that covers (at least) the following aspects:
>
> a) The nature size, pace, reversibility and scope of any proposed project or activity;
> b) The reason(s) for or purpose(s) of the project and/or activity;
> c) The duration of the above;
> d) The locality of areas that will be affected;
> e) A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
> f) Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);
> g) Procedures that the project may entail.

Lastly, the report underscores that *consent* has to be granted by indigenous peoples in a manner that reflects their interpretation to the agreement. In addition to defining the principle

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Permanent Forum on Indigenous Issues. *Report of the International Workshop on Methodolgies regarding Free, Prior and Informed Consent and Indigenous Peoples*. United Nations Economic and Social Council . New York: United Nations, 2005. Page 4, UN doc. E/C.19/2005/3

of FPIC, the UNPFII's report also makes a series of important recommendations pertaining to the operationalization of the principle, specifically in relation to impact assessment processes. The report highlights that FPIC is particularly relevant "In relation to development projects encompassing the full project cycle, including but not limited to *assessment* (emphasis added), planning, implementation, monitoring, evaluation and closure, whether the projects are directed towards indigenous communities, or while not directed towards them, may affect or impact upon them." Moreover, the report also maintains that the operationalization of FPIC is pertinent "in relation to United Nations organizations and other intergovernmental organizations that undertake studies on the impact of projects to be implemented in indigenous peoples' territories."

The failure of Canadian mining companies to respect the right of Indigenous peoples to FPIC frequently results in a number of serious human rights implications directly associated with natural resource extraction operations. A number of scholars have framed the unwillingness of transnational mining corporations to show regard for Indigenous land ownership and their economic and social systems as *resource colonialism* or "accumulation by dispossession."[13] In terms of the former, Caxaj et al write that "The dynamics of colonial appropriation and racist ideology in conjunction with economic models of wealth accumulation have been referred to as resource colonialism," later adding that "Resource colonialism requires ignoring land ownership and other distinct rights through the legal/political

[13] Caxaj, C. Susana, et al. "Promises of Peace and Development - Mining and Violence in Guatemala." *Advances in Nursing Science* 36.3 (2013): 213-228. Page 215.
Harvey, David. "The 'New' Imperialism: Accumulation By Dispossession ." *Socialist Register* 40 (2004).

construction of Indigenous communities as dependent domestics (wards of the state)."[14] Similarly, the experience of Canadian mining companies in violating the rights of Indigenous peoples in Guatemala buttress David Harvey's concept of accumulation by dispossession which serves as an evaluative expansion of Marx's writings on primitive accumulation. Harvey describes his theory of accumulation by dispossession in relation to Marx's concept of primitive accumulation in a *Brief History of Neoliberalism*, which is worth quoting at length:

> By this I mean the continuation and proliferation of accumulation practices which Marx had treated of as "primitive" or "original" during the rise of capitalism. These include the commodification and privatization of land and the forceful expulsion of peasant populations [....] Conversion of various forms of property rights (common, collective, state, etc) into private property rights; suppression of rights to the commons; commodification of labour and power and the suppression of alternative (indigenous) forms of production and consumption; colonial, neocolonial, and imperial processes of appropriation of assets (including natural resources); monetization of exchange and taxation, particularly of land; the slave trade (which continues particularly in the sex industry); and usury, the national debt and, most devastating of all, the use of the credit system as a radical means of accumulation by dispossession.[15]

It is this theoretical backdrop which underpins the *raison d'être* of this article. The persistent failure of Canadian mining companies operating in Guatemala (and across the globe) to respect the right of Indigenous peoples to FPIC can only be viewed as a continuation of colonial dispossession and appropriation. This is indicative by the fact that Canadian mining companies have been implicated in crimes such as forced displacement, the assassination of indigenous human rights defenders, gang rapes of Indigenous women by mine security personnel and the deliberate desecration of indigenous ancestral lands and sacred sites all of which have been

[14] Caxaj, C. Susana, et al. "Promises of Peace and Development - Mining and Violence in Guatemala." *Advances in Nursing Science* 36.3 (2013): 213-228. Page 215.

[15] Harvey, David. "The 'New' Imperialism: Accumulation By Dispossession ." *Socialist Register* 40 (2004).

committed with near perfect impunity and underscore the neocolonial tactics such corporations employ to further their objectives.

Although a comprehensive report regarding the various ways in which disregard for FPIC often leads to egregious violations of human rights of Indigenous peoples is beyond the scope of this article, the right of Indigenous peoples to FPIC, as codified in international human rights law, can be interpreted as sanctioning respect for Indigenous self-determination so as to prevent further human rights violations stemming from the non-observance of FPIC. As the following sections will illustrate, the right of Indigenous Peoples to FPIC is firmly ensconced in international human rights law, therefore any disregard for the concept as such is a failure of mining corporations to uphold their obligations as duty bearers under international human rights law, specifically as it pertains to the rights of Indigenous peoples. Before I outline how FPIC is grounded in International law, I will first provide some historical background regarding how Canadian mining companies have violated the right of Indigenous peoples to FPIC in the various regions throughout Guatemala where they operate and recount how such violations of human rights has spurred an Indigenous resistance movement to the influx of foreign mining capital in the country.

INDIGENOUS RESISTANCE TO CANADIAN MINING COMPANIES IN GUATEMALA

In Latin America, Canadian mining companies dominate the regional mining sector amassing huge profits at the expense of Indigenous peoples' rights and the environment. Roughly 50-70% of mining projects in Latin American are being orchestrated by Canadian

companies.[16] Despite pledges of sustainable development, job creation and promises to engage in consultations with local communities, the arrival of Canadian mining companies are often viewed as harbingers of environmental destruction and signal a continuation of colonial tactics namely the use of violence and oppression to secure the illegal expropriation of natural resources using all means necessary and the denial of indigenous self-determination. Further, antagonistic sentiments of Canadian mining companies by local indigenous communities often stem from the failure of these companies to respect their right to FPIC and thus include them in various decision-making processes which often results in the direct imposition of neoliberal developments projects despite clear community opposition to such projects.

Failure to receive the consent of local indigenous communities and respect their right to self-determination has induced conflict and in turn resulted in egregious violations of human rights. Between 2000 and 2015, 28 Canadian mining companies have been in involved in conflicts resulting in 44 recorded deaths in Latin America alone.[17] The deaths of anti-mining activists, the environmental destruction and the outright dismissal of Indigenous peoples' rights by Canadian mining companies has also engendered a mass mobilization of indigenous organizations looking to assert their citizenship rights. The following section will examine how the presence of Canadian mining companies in Guatemala has led to the burgeoning of anti-mining Indigenous movements in the country as an effect of the various ways in which such companies adversely impact human rights.

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[16] Working Group on Mining and Human Rights in Latin America. "The impact of Canadian Mining in Latin America and Canada's Responsibility - Executive Summary of the Report submitted to the Inter-American Commission on Human Rights." n.d. Page 3-4.

[17] Justice and Corporate Accountability Project. *The "Canada Brand": Violence and Canadian Mining Companies in Latin America*. Osgoode Hall Law School. Toronto: York University , 2017. <https://justice-project.org/the-canada-brand-violence-and-canadian-mining-companies-in-latin-america/>.

The oppression, political marginalization and mass, reoccurring violations of Indigenous peoples' rights is as much a feature of Guatemala's contemporary history as it is its past. Internal conflict erupted in Guatemala in 1960 and continued for a period of 36 years with peace accords eventually being signed in December of 1996. During the course of the conflict, an estimated 300,000 people were displaced and 200,000 are believed to have been murdered or disappeared. Of those killed, 83% were Mayan Indigenous peoples, leading many human rights defenders to accuse the country of state-sanctioned genocide.[18] It is against this historical backdrop that Indigenous peoples within Guatemala have rejected the militarization of mining concessions and the continued denial of their land tenure rights and oppression by both transnational foreign mining companies and the national government.

Following the cessation of conflict in 1996, Guatemala rewrote its mining law, removing many of its social safeguards to reflect neoliberal reforms being promoted by international finance institutions in an effort to entice foreign investment. Among the reforms was the removal of restriction on foreign ownership, the establishment of several tax-exemptions for mining companies, and a reduction of the royalty rate from 6 to 1%.[19] Even more outrageous was the liberalization of stipulations surrounding environmental and social impact assessments (ESIA) which as the term suggests, refers to a process to predict potential environmental and social impacts of a proposed project in the hopes of preventing adverse impacts. This is achieved through designing appropriate risk mitigation, management and monitoring measures as a way to maximize benefits. Following the mining legislation reforms, updated provisions

[18] Schnoor, Steven. "Governmentality and The New Spirit of Exploitation: The Politics of Legitimacy and Resistance to Canadian Mining In Guatemala and Honduras." Toronto: York/Ryerson Universities , 2013. Dissertation. Page 116.
[19] Ibid. Page 156

stipulated that if Guatemala's National Commission on the Environment was unable to review ESIAs -- which can be "hundreds and hundreds of pages long" -- submitted by mining companies within a period of 30 days, then the proposed project is to be granted automatic approval.[20] The revised law also ignores specifications that incorporate the inclusion of indigenous communities in decision-making processes involving development projects in their territories despite such provisions being outlined in ILO Convention 169, which Guatemala ratified in June 1996.

According to Gordon and Webber, it was Canadian mining company Goldcorp that led the re-emergence of large-scale industrial mining in the country subsequently initiating a rush for the country's natural resource wealth.[21] Located in Guatemala's western highlands Goldcorp's Marlin gold mine was the first mining project constructed following the 1996 peace accords. Following the approval of the Environmental and Social Impact Assessment in November 2003, Glamis Gold (who owned the mine at the time) began construction of the mine's facilities with production eventually beginning in the third quarter of 2005.[22] The Marlin mine is spread across two municipalities: San Miguel Ixztahuacan and Sipacaca both of which are home to two distinct indigenous communities. The former hosts 87% of Marlin's operation and is home to the Mam Mayan and the latter to the Sipakapense Mayan with the remaining 13% of the operation being located on their ancestral territory.

Since the inception of the Goldcorp's operation, mining has rapidly proliferated in Guatemala. Today, according to recent figures published by Guatemala's Ministry of Energy

[20] Ibid. Page 165

[21] Gordon, Todd and Jeffery R. Webber. *Blood of Extraction - Canadian Imperialism in Latin America*. Fernwood, 2016. Page 97.

[22] Sandt, Joris van de. *Mining Conflicts and Indigenous Peoples in Guatemala*. Cordaid. The Hague: Cordiad, 2009. Page 24

and Minerals, there are an estimated 307 active mining licenses in the country, most of which are concentrated in rural indigenous regions. Another 600 more are pending review by the Ministry.[23] This rush of foreign mining companies has a long sordid history following the cessation of the Guatemalan Government's genocidal campaign against the country's Indigenous peoples. Sandt in his report on Mining Conflicts and Indigenous Peoples in Guatemala citing the Bank Information Center highlights how even as early as 2005, "ten percent of Guatemala [was] covered by mining license, the majority of which are held by foreign interests; 90% of the land covered by these licenses is in indigenous territory.[24] Much of this activity can be attributed to the influx of Canadian mining capital to the region. As Gordon and Webber note, Canada is the second largest foreign investor in Guatemala with the majority of the investment centered on the mining sector.[25] This is supported by the fact that in May 2012, sixteen out of the seventeen active mining concessions in Guatemala were being operated by a Canadian company.[26] In Latin America more broadly, 50 to 70 percent of the region's mining industries are controlled by large-scale Canadian mining companies.[27]

Indigenous peoples within Guatemala, whose ancestral territories is where the majority of the country's natural resource wealth can be found have responded to the rush of Canadian mining companies by facilitating the political mobilization of indigenous organizations. The

[23] Lakhani, Nina. *In Guatemala, one of the world's largest silver deposits reaps millions for its Canadian owners but for local farmers the price is their land and even their lives*. 13 July 2017. 20 June 2018. <https://www.theguardian.com/environment/2017/jul/13/the-canadian-company-mining-hills-of-silver-and-the-people-dying-to-stop-it>.

[24] Sandt, Joris van de. *Mining Conflicts and Indigenous Peoples in Guatemala*. Cordaid. The Hague: Cordiad, 2009. Page 6

[25] Gordon, Todd and Jeffery R. Webber. *Blood of Extraction - Canadian Imperialism in Latin America*. Fernwood, 2016. Page 93

[26] Ibid.

[27] Council on Hemispheric Affairs – Canadian Mining in Latin America: Exploitation, Inconsistency and Neglect

objective of such organizations has been to protest the imposition of neoliberal development policies by specifically challenging existing mining governance structures and demanding greater recognition and respect for their collective rights. The manifestation of community consultations or *consultas comunitarias* across the nation highlights both the strength and scope of the indigenous movement to resist foreign mining companies in Guatemala. Although the numbers vary, as many as 78 Maya communities, encompassing an estimated one million Guatemalans have participated in community consultations as a way in which to assert their right to self-determination and customary ownership over their lands, territories and resources.[28] Guatemala's *consultas* movement has its origins in 2005, when the community Of Rio Hondo Zacapa organized a community referendum to protest the construction of a hydroelectric project.[29] Shortly thereafter, in June of the same year, the community of Sipacapa also organized a *consulta* to resist the presence of Goldcorp in their municipality. The *consulta*'s conclusion was that an overwhelming majority of Sipakapenses rejected the presence of Goldcorp's mining operations on their territory. The outcome of the Sipacapa *consulta* has coincided with similar community referenda across the country, the overwhelming majority of which have almost unanimously rejected mining and all forms of neoliberal development.

As such, the establishment of these community consultations can be viewed as a way in which to protest the historical exclusion of indigenous voices from national and local decision-

[28] Laplante, J.P. and Catherine Nolin. "Consultas and Socially Responsible Investing in Guatemala: A Case Study Examining Maya Perspectives on the Indigenous Right to Free, Prior, and Informed Consent." *Society & Natural Resources* (2004). Page 231

[29] Ibid. Page 236.

making processes as well as defy the attendant effects such exclusion has produced: that is dispossession and displacement, economic marginalization and the unbridled violation of their rights as Indigenous peoples. For many indigenous communities, as the outcome of countless *consultas* confirms, contemporary mining processes are viewed as a continuation of this exclusion, one which mirrors colonial tactics of appropriation and is inextricably suffused with racist ideology. In light of this, the neocolonial undertones of Canadian mining companies' approach to resource extraction are hard to deny when such companies consistently fail to uphold their international human rights obligations, specifically their responsibility as duty bearers to effectively engage in consultations of good faith with indigenous and local communities in a way that protects, respects and fulfills their right to FPIC.

In Guatemala, Canadian mining companies have largely circumvented this obligation by choosing instead to deal directly with the Guatemalan national government rather than the communities who stand to be most-affected by the company's operations. In the rare occasions in which companies have held consultations such as the several that Goldcorp purportedly held in 2003, indigenous activists described the meetings more as glorified company promotional sessions than a space for meaningful consultation.[30] Again, this underscores the unwillingness of Canadian mining companies to listen to indigenous perspectives surrounding the implementation of a proposed project and the failure of such companies to respect the right of indigenous peoples to autonomously manage their own development.

[30] Rasch, Elisabet Dueholm. "Transformations in Citizenship - Local Resistance against Mining Projects in Huehuetenango (Guatemala)." *Journal of Developing Societies* 28.2 (2012): 159-184. Page 189

Much of the discourse on the nexus of indigenous rights and the impact of foreign mining companies in Guatemala has focused on the multi-scalar nature of Guatemala's indigenous anti-mining movement and the way in which the movement has led to the reclamation of traditional Maya communitarian structures through the manifestation of *consultas*. For instance, Urkidi argues that the organization of community consultations has resulted in a renewed sense of collective solidarity among indigenous peoples affected by the onslaught of foreign mining companies on their ancestral lands and territories.[31] In a similar vein, Rasch argues that the process and outcomes produced by community consultations in Guatemala "demonstrate that liberal principles of political participation are not opposed to local, sometimes indigenous, ways of "doing politics," but that its combination can produce new, hybrid forms of citizenship."[32] Rasch goes on to add that, the political processes within *consultas* have deviated from traditional forms of political participation by virtue of their inclusivity.[33] Community organizing of consultations has transformed local citizenship by removing typical bureaucratic barriers to participation such as not requiring voter registration.[34] The removal of such formalities has not only ensured that *consultas* reflect indigenous decision-making processes but has also allowed for women to be equally represented.[35] In this sense, *consultas* have helped forge a sense of unity among Indigenous

[31] Urkidi, Leire. "The Defence of Community in the Anti-Mining Movement of Guatemala." *Agrarian Change* 11.4 (2011): 556-580.
[32] Rasch, Elisabet Dueholm. "Transformations in Citizenship - Local Resistance against Mining Projects in Huehuetenango (Guatemala)." *Journal of Developing Societies* 28.2 (2012): 159-184. Page 178.
[33] Ibid.
[34] Ibid. Page 174.
[35] Ibid.

communities by bringing people from disparate groups; indigenous peoples, *ladinos*, men and women together to oppose mining companies.[36]

As Rasch and Urkidi have noted, the organization of *consultas* throughout Guatemala can be viewed as a demonstration of Indigenous Maya agency, an exercise in affirming their autonomy, self-determination over their ancestral lands and as a mechanism to have their voices heard both by the Guatemalan Government and transnational mining companies.[37] In addition to drawing on the terminology of self-determination, Nolin's interviews with Sipakapa *consulta* organizers revealed that the majority of interviewees regarded *consultas* as an authoritative expression of the community's voice, with the outcome of the vote being termed as "our voice."[38] Despite every effort by the Guatemalan Government and transnational mining companies to silence and override Indigenous Maya voices, communities affected by mining developments continue to demand recognition for their collective rights by holding community consultations.

Two years after the Sipakapa consultation was held, Guatemala's Constitutional Court declared in 2007 that, although the *consulta* was determined to be valid under the Municipal Code and ILO Convention 169 although it's outcome was to be considered non-binding. In its ruling the Court cited the ambiguous nature of laws and conventions used by the *consulta* to assert their rights, further stating such legal procedures were not aligned with the State's

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[36] Ibid.

[37] Urkidi, Leire. "The Defence of Community in the Anti-Mining Movement of Guatemala." *Agrarian Change* 11.4 (2011): 556-580.
Rasch, Elisabet Dueholm. "Transformations in Citizenship - Local Resistance against Mining Projects in Huehuetenango (Guatemala)." *Journal of Developing Societies* 28.2 (2012): 159-184. Page 178.

[38] Laplante, J.P. and Catherine Nolin. "Consultas and Socially Responsible Investing in Guatemala: A Case Study Examining Maya Perspectives on the Indigenous Right to Free, Prior, and Informed Consent." *Society & Natural Resources* (2004). Page 10.

Constitution and lastly because subsurface minerals were of national public interests, they were under the State's jurisdiction and therefore the community had no authority to reject extractive activities within their municipality.[39] Regardless of such an unjust precedent, Maya communities have adopted a proactive approach to resisting foreign mining companies. According to Urkidi, more that 40 municipalities have held community *consultas* in municipalities where exploratory licenses were granted but where the prospect of potential mining projects was not believed to be imminent.[40]

Guatemala's anti-mining movement and the manifestation of *consulta communitars* illustrate that local Indigenous communities want a platform to express their voice in a way that allows them to play a meaningful role in the decision-making processes of mining projects that threaten to impact their ancestral lands and territories. The assassination of environmental and human rights activists throughout Latin America and the violent suppression of anti-mining protests both show that the articulation of such views in the public domain is often met with fatal consequences. As has been mentioned previously, considering that 50 – 70 percent of the mining activity in Latin America involves mining companies with links to Canada, the Canadian Government has the opportunity to play a crucial role in the regulation of corporate accountability as it pertains to Latin America's mining sector.[41] The widespread violation of indigenous rights linked to Canadian mining companies necessitates policy prescriptions that

[39] Schnoor, Steven. "Governmentality and The New Spirit of Exploitation: The Politics of Legitimacy and Resistance to Canadian Mining In Guatemala and Honduras." Toronto: York/Ryerson Universities , 2013. Dissertation. Page 176

[40] Urkidi, Leire. "The Defence of Community in the Anti-Mining Movement of Guatemala." *Agrarian Change* 11.4 (2011): 556-580. Page 573.

[41] Working Group on Mining and Human Rights in Latin America. "The impact of Canadian Mining in Latin America and Canada's Responsibility - Executive Summary of the Report submitted to the Inter-American Commission on Human Rights." n.d. Page 4.

advocate for preventative procedures which pressure mining corporations to fulfill their obligation to conduct human rights due diligence processes. Such processes ought to recognize and give precedence to the right of indigenous peoples to FPIC, considering the principal role that compliance with FPIC processes plays in the protection and promotion of all other rights related to indigenous peoples.

THE RIGHT OF INDIGENOUS PEOPLES TO FPIC IN INTERNATIONAL HUMAN RIGHTS LAW

The right of Indigenous peoples to participate in meaningful consultation processes is codified in several binding and non-binding international legal frameworks including ILO Convention 169, the Convention on Biological Diversity as well as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Covenant on Economic, Social and Cultural Rights. In the UNDRIP, the participatory rights of Indigenous Peoples are viewed as an explicit affirmation of the right to self-determination which is often framed under the umbrella term, "Free, Prior and Informed Consent" or FPIC. The standard of FPIC is explicitly referred to in the Declaration's Preamble and is outlined in six provisions of the UNDRIP entitling indigenous people to cultural and environmental protection and safeguarding indigenous ownership over their lands, territories and natural resources. The six articles in the UNDRIP refer to FPIC in relation to forced displacement, the right to redress, the right to FPIC as a prerequisite to adopting policies or procedures that may affect them including the storage or disposal of hazardous materials on the lands or territories of indigenous peoples or approving any development project that involves the utilization or exploitation of their natural resources.

The following section will outline, in the order that they appear, the various articles in the UNDRIP in which the right of indigenous peoples to FPIC is affirmed. Moreover, in the analysis I will also provide a close reading which also draws from Ishita Petkar's article on *Conceptualizing Free, Prior and Informed Consent: Interpreting Interpretations of FPIC* in which the author scrutinizes the various conceptual manifestations of FPIC "by deconstructing the language used in eight influential guidelines for implementing FPIC."[42]

The first mention of FPIC in the UNDRIP appears in Article 10 which specifies that "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the *free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Thus, this article explicitly prohibits state or corporate actors from forcibly evicting indigenous communities from their lands and territories in the pursuit of natural resource exploitation. It stipulates that receiving the FPIC of communities, who stand to be impacted from a particular policy, project or practice, is a compulsory precondition to their relocation. Anything to the contrary constitutes a violation of Indigenous peoples' rights. Section 2 of Article 11 certifies that "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without *free, prior and informed consent* or in violation of their laws, traditions and customs." Specifically, this article requires that the State make every effort to provide remedy for its failure to enforce or respect that right of indigenous peoples to FPIC. According to Ishita Petkar, FPIC as mentioned in

[42] Petkar, Ishita. *Conceptualizing Free, Prior and Informed Consent: Interpreting Interpretations of FPIC*. Columbia University. New York: Columbia University, 2017. Page 2.

Article 10 functions as a safeguard and as "embodying consent itself" in so far as it offers protection to Indigenous communities who face relocation."[43] Petkar, in her close reading of Article 11 outlines that whereas Article 10 centered on FPIC as a safeguard, "Article 11 describes FPIC as acting as an indicator of whether or not Indigenous rights to cultural, intellectual, religious and spiritual property have been violated."[44] Importantly, Petkar underscores that Article 11 is somewhat reactionary in that FPIC can be interpreted as acting as a "route into understanding the severity of the infractions."[45]

Articles 18 and 19 of the UNDRIP outline the right of Indigenous peoples to effective participation, self-determination and the operationalization of the principle of FPIC. Although Article 18 does not explicitly mention the term FPIC, it underscores the right of indigenous peoples to be involved in the decision-making processes of planned interventions that will affect their lives, which is particularly relevant for the purposes of this paper. With that said, Article 18 affirms that, "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." Clearly this specific article certifies that indigenous peoples are entitled to participate in any decision-making process that has the potential to impact their rights. As well, implicit in the article's statement is the ability of indigenous people to decide on their own terms how such a participatory decision-making approach would look like. Perhaps most importantly, Article 18 provides indigenous peoples with complete

[43] Ibid. Page 47
[44] Petkar, Ishita. *Conceptualizing Free, Prior and Informed Consent: Interpreting Interpretations of FPIC*. Columbia University. New York: Columbia University, 2017. Page 2. Page 47
[45] Ibid.

autonomy with respect to protecting and promoting their rights through institutions and processes of their own creation rather than those that are imposed on them.

Article 19 proclaims that "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." Much the same as the articles before it, Article 19 underscores the right of indigenous peoples to self-determination with regard to having the ability to directly influence authoritative-decisions that will affect them. Through the use of the statement *through their own representative institutions*, the UNDRIP explicitly provides indigenous peoples with the power to determine the manner in which consultation processes take place in turn certifying that such processes ought to mirror indigenous decision-making practices. According to Petkar, the "consulting and cooperating in good faith" as included in the Article clarifies the manner in which FPIC can be effectively operationalized echoing earlier wording contained within the Preamble which mentions a "spirit of partnership and mutual respect."[46] Importantly, Petkar writes that, "These negotiations in good faith guarantee the macro-objective of "participation in decision-making", which in turn ensures that consent is obtained."[47] Taken together, the participation of Indigenous peoples in decision-making that directly impacts them is arguably the underlying objective of the operationalization of FPIC within the Preamble of the UNDRIP as well as in various Articles mentioned subsequently throughout the Declaration.

[46] Petkar, Ishita. *Conceptualizing Free, Prior and Informed Consent: Interpreting Interpretations of FPIC*. Columbia University. New York: Columbia University, 2017. Page 48
[47] Ibid.

Article 28 declares that, “Indigenous peoples have the right to redress, by means that include restitution or, which this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their *free, prior and informed consent*. Section 2 of Article 29 pronounces that, “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their *free, prior and informed consent*.” In relation to mining, this Article is tragically relevant in view of the reality that tailing ponds and the toxic chemical discharge which they so often fail to contain are a lamentable corollary to mining operations. Critically, this specific article underscores that mining operations violate the right of indigenous peoples to FPIC in a myriad of ways and are not limited to just the physical establishment of the operation at the outset but rather can continue to lead to the infringement of Indigenous peoples’ rights long after the mine has ceased to operate for example through water contamination, irrevocable environmental degradation, loss of livelihoods etc. Relatedly the Article highlights the fundamental importance of receiving consent of indigenous peoples from the preliminary stages of project development so as to prevent the escalation of human rights violations as outlined in the UNDRIP.

Section 2 of Article 32 asserts that, “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent prior* to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” This specific article expounds

that national governments, as the primary human rights duty-bearer are first and foremost required to meaningful engage with indigenous communities who stand to be affected by a project or policy intervention. The onus to receive the free, prior and informed consent is therefore a required responsibility of the State under the international human rights framework as it pertains to indigenous peoples.

The Convention on Biological Diversity's Akwé Kon Voluntary guidelines also recognize the importance of involving indigenous peoples and local communities in the development and implementation of cultural, environmental and social impact assessments. The Akwe Kon guidelines seek to operationalize FPIC by insisting on the full and effective participation and involvement of Indigenous and local communities in screening, scoping and development planning exercises, beginning at the very inception of the development or private-sector project. Article 53 of the Akwé Kon Voluntary guidelines explicitly requires that,

> Where the national legal regime requires prior informed consent of indigenous and local communities, the assessment process should consider whether such prior informed consent has been obtained. Prior informed consent corresponding to various phases of the impact assessment process should consider the rights, knowledge, innovations and practices of indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information. Modifications to the initial development project proposal will require the additional prior informed consent of the affected indigenous and local communities.[48]

By advocating a collaborative strategy whereby governmental, indigenous and local community stakeholders work together, the Guidelines when followed take a proactive approach towards respecting the rights of Indigenous peoples and local communities through reducing many of

[48] Secretariat of the Convention on Biological Diversity . *Akwé: Kon Guidelines*. Montreal: Secretariat of the Convention on Biological Diversity , 2004. Page 21.

the power and informational asymmetries that are inherent to many mining negotiations. Whereas the previous section has focused on voluntary, non-binding expressions of FPIC within international human rights frameworks, the following section examines international law and policy documents where FPIC is, in theory, considered binding to State parties.

The International Labour Organization's Indigenous and Tribal Peoples Convention, (No. 169) adopted in 1989 remains the most influential, legally binding, instrument pertaining to the protection and promotion of indigenous peoples' rights, particularly in Latin America.[49] The right of Indigenous peoples to consultation, participation and the ability to grant consent surrounding any development process that may affect them is codified in Articles 6, 7, and 15 of the Convention. Article 6 (1) requires that governments "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly. Article 7(1) takes into account the requirement that indigenous peoples should have the power to assess whether any proposed development aligns with their collective aspirations as peoples when it states that indigenous peoples "shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly." Although the Convention only requires the consent of indigenous peoples when they are faced with relocation, the provisions set forth in the Convention clearly outline the positive obligations of States in regard to safeguarding the rights of Indigenous peoples.

[49] Rombouts, S.J. *Having a Say - Indigenous Peoples, International Law and Free, Prior and Informed Consent*. Oisterwijk: Wolf Legal , 2014. Page 198.

In her article, *The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law,* Tara Ward discusses the aforementioned legal instruments and asserts that the right of indigenous peoples to FPIC does not yet exist as a customary international legal principle, however she writes that, "There does appear to be a minimal norm developing that requires consultation in good faith."[50] She later points out that, "This developing norm requires that consultations take place prior to both the exploration and exploitation of resources within the territories of indigenous peoples or that affect traditionally used resources."[51] Rombouts shares a similar view, arguing that FPIC "is emerging as the key standard for including indigenous peoples in decision-making processes of their concern," however the author points out that there is a lack of guidance in terms of the way in which FPIC can be implemented in various contexts.[52] As the following section will showcase, FPIC when viewed as a voluntary requirement or as part of voluntary initiatives is rarely followed. What this proves is that FPIC processes must coincide or at the very least be incorporated within mandatory procedures under international law, such as impact assessments, given the fact that environmental impact assessments are already a non-negotiable precondition for mining operations in most host-country jurisdictions.

[50] Ward, Tara. "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law." *Northwestern Journal of International Human Rights* 10.2 (2011). Page 84.
[51] Ibid.
[52] Rombouts, S.J. *Having a Say - Indigenous Peoples, International Law and Free, Prior and Informed Consent*. Oisterwijk: Wolf Legal , 2014. Page 408.

Chapter Two: Human Rights Impact Assessments (HRAIs) and FPIC

Carrying out Human Rights Impacts Assessments (HRIAs) has become an important way for corporations to operationalize human rights due diligence policies in an effort to prevent adverse human rights impacts stemming from their operations. What differentiates HRIAs from other impact assessment mechanisms is the fact that they are based on a universally recognized, binding legal framework. As a recent joint-report on HRIAs published by the World Bank and the Nordic Trust Fund points out, "The legal nature of the human rights framework can give greater force to recommendations arising from a HRIA, as it imposes clear legal obligations on states and other duty-bearers. Consequently, a failure to comply with those duties represents a violation of a state's legal obligation and gives rise to enforceable claims by rights-holders."[53] In this respect, by utilizing the international human rights framework, HRIAs help to identify and address human rights impacts and thus hold business accountable for any adverse human rights impacts to rights-holders by way of local stakeholder engagement, data collection and analysis as well prevention, mitigation and remediation efforts.[54]

Grounded in the international human rights framework, a HRIA refers to the process by which human rights risks to rights-holders are assessed for the preventative, advocacy and

[53] The Nordic Trust Fund, The World Bank. "Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development." February 2013. Page xi (Executive Summary).

[54] The Danish Insitute for Human Rights. *Human Rights Impact Assessment - Guidance and Toolbox*. Copenhagen: The Danish Institute for Human Rights , 2016. Page 6.

remedial potential. HRIAs thus aim to strengthen positive outcomes associated with a business or development project by minimizing human rights risks and adverse impacts on community stakeholders. To further ensure that the agency and autonomy of rights-holders are both recognized and respected, human rights practitioners have begun advocating that such assessments are based on procedural components that emphasize participation and non-discrimination. As such, HRIAs have evolved from a largely company-led initiative to encompass alternative approaches to assessing potential adverse human rights risks that are more reflective of the very human rights framework which they are based on. Today, community-based and collaborative (or hybrid) HRIAs have emerged as an important human rights due diligence tool aimed at reorienting and redefining risk, whereby potential adverse human rights impacts to communities is prioritized ahead of the risks such impacts might pose to shareholder value or to a company's reputation. By definition, community-based HRIAs emphasize that community perspectives offer the best vantage point from which to examine and assess human rights risks for a proposed project, policy or practice.

COLLABORATIVE HRIAS

On the other hand, a collaborative or hybrid approach to a HRIA is a multi-stakeholder approach whereby project-affected people and a company work in concert with one another from the beginning of the assessment process to jointly investigate, measure and respond to the human rights impacts of the project.[55] Unlike traditional company-led HRIAs which typically

[55] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A

hire external human rights consultants to assess a project's human rights risks and in doing so often fails to adequately involve community stakeholders, collaborative HRIAs seek to create a company-community partnership by increasing the participation of affected people in decision-making processes regarding the protection and promotion of their human rights.[56] By creating a system in which key stakeholders can communicate and collaborate with one another, hybrid HRIAs have a number of important advantages.

Firstly, through their emphasis on mutual co-operation, collaborative HRIAs can minimize informational asymmetries through providing a platform for dialogue wherein critical information can be shared. This is supported by research conducted by the Columbia Center on Sustainable Development, the Danish Institute for Human Rights and SciencePo Law School, who in their report on collaborative HRIAs, state that such mechanisms can "contribute to a deeper understanding of each stakeholder's perspectives and priorities, help to build trust, and result in more effective action plans to address a project's human rights impacts."[57]

By the same token, collaborative HRIAs provide a platform for project-affected people to directly negotiate and communicate with company representatives which produces several mutually beneficial outcomes in terms of the protection and promotion of human rights. Collaborative HRIAs, through establishing an avenue for reciprocal dialogue enables companies participating in such a process to better comprehend the differential operational impacts of

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Collaborative Approach to Human Rights Impact Assessments." March 2017. Page 7.

[56] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017. Page 35

[57] Ibid. Page 12.

their projects on local communities and their obligations as duty-bearers.[58] By actively and meaningfully engaging with local community stakeholders by way of a collaborative HRIA, companies are more likely to earn the trust of communities and in turn receive a social license to operate (SLO).[59] Earning an SLO through consultation with local communities and conducting comprehensive human rights due diligence processes will decrease the likelihood that social-conflicts stemming from the implementation of a particular project will erupt, arguably increasing the likelihood that human rights can be protected and promoted.

In an effort to mainstream HRIAs into corporate practice, numerous NGOs have made a business case for operationalizing HRIAs arguing that they can become an effective risk mitigation and management tool.[60] The business case for collaborative HRIAs is based on the belief that when companies assess risks to right-holders in a decision-making process that includes meaningful engagement with community stakeholders, the risk of project-related social conflicts is reduced as well as the attendant financial and reputational costs that such conflicts engender. A study by Davis and Franks which examined 50 cases of company-community conflict within the extractive sector revealed that the majority of extractive companies "do not currently identify, understand and aggregate" the significant and full range of costs associated with the manifestation of company-community conflict, which they characterize as both real and significant.[61] That being said, HRIAs, particularly those of the collaborative kind, offer mining companies a way to inform communities adjacent to their

[58] Ibid. Page 18.

[59] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017. Page 8

[60] Lenzen, Drs Olga and Marina d'Engelbronner. *Guide to Corporate Human Rights Impact Assessment Tools*. Aim for human rights. Utrecht: Aim for human rights, 2009. Page 5

[61] Davis, Rachel and Daniel Franks. *Costs of Company-Community Conflict in the Extractive Sector*. Cambridge: CSR Initiative at the Harvard Kennedy School, 2014. Page 8.

proposed operations of the impact of their activities through knowledge sharing. In order to avoid costly company-community conflict, mining companies should dedicate more of their resources to human rights due diligence, specifically developing mechanisms to increase communication, information and collaboration with local communities located in the regions in which they operate.

COMMUNITY-BASED HRIAs

In contrast to collaborative approaches to HRIAs, community-based HRIAs take local stakeholder engagement further with local communities directly overseeing the process of identifying human rights risks and ensuring that such processes are rooted and begin from a community rather than from a company perspective.[62] For local community stakeholders, community-based HRIAs effectuate the very human rights risks they seek to assess. They achieve this by focusing on the capacity building and empowerment of local communities through education and training on human rights.[63] When compared with collaborative approaches to HRIAs, community-based HRIAs take local stakeholder engagement and community participation as the foundation on which to ground the assessment. The intense community involvement which characterizes community-based HRIAs offers many benefits in terms of operationalizing human rights, arguably leading to more productive outcomes.[64]

[62] Oxfam America. "Community Voice in Human Rights Impact Assessments." 2016. Page 1.
[63] Ibid. Page 20
[64] Ibid. Page 24

By allowing communities to take a leading role in identifying impacts on human rights, community-based HRIAs place potentially affected stakeholders in a position of power in negotiations and decision-making processes with companies, investors and governments.[65] This is a marked departure from traditional approaches to local community engagement with respect to project approval. As a report published by the World Resources Institute points out, "Official approval processes often marginalize – or bypass entirely – host communities and other locally affected interests."[66] Such processes are as paternalistic as they are paradoxical. The very stakeholders – the host communities -- who are most likely to be impacted the most by the implementation of the project, the operations of which, in terms of the mining sector, will have irrevocable impact on their surrounding environment, are relegated to what the World Resources Institute describes as "observer status." As such, community-based HRIAs have the view that host communities should play a principal role in decision-making processes especially those that have the potential to impact their fundamental human rights.

Community-based HRIAs operationalize human rights in a myriad of ways. Considering that community participation and respect for local agency is the starting point from which the assessment process occurs, community-based HRIAs are more likely to attain greater community participation in comparison to company-led HRIAs which are typically met with apprehension and distrust.[67] Robust community participation in the HRIA resulting from the empowerment, capacity building and intense engagement of local communities ensures more comprehensive assessment outcomes. This can be attributed to the fact that local stakeholders

[65] Ibid. Page 20

[66] Herz, Steven, Antonioa Vina and Jonathan Sohn. *Development Without Conflict - The Business Case for Community Consent*. World Resources Institute. Washington DC: World Resources Institute, May 2007. Page 13.

[67] Oxfam America. "Community Voice in Human Rights Impact Assessments." 2016. Page 19.

are best placed to identify serious human rights risks that companies or external-consultants are more likely to overlook.[68] Further, because of community based HRIA's focus on capacity-building and community empowerment they avoid a critical shortcoming that company-led HRIAs suffer from: the failure to obtain and retain the trust of local community members.[69]

HRIAs have emerged as relatively new human rights due diligence tools and therefore their utility in terms of enforcing a corporate duty of care in regard to human rights remains controversial. As the previous section has argued, many human rights organizations and academics have heralded HRIAs as an important mechanism to assess whether a company is respecting or failing to respect international human rights standards. However, similar to other human rights tools there exists the potential for HRIAs to be misused. Examining the efficacy of HRIAs is difficult to entertain in so far as very few of the completed assessments are publically available. However, in 2010 Goldcorp's was forced to carry out a human rights assessment at its Marlin Mine in Guatemala, the findings of which were eventually made public by the company and which will be analyzed in the following section.

[68] Ibid. Page 7
[69] Oxfam America. "Community Voice in Human Rights Impact Assessments." 2016. Page 20.

Chapter Three: Assessing the Utility of HIRAs in Safeguarding the Rights of Indigenous Peoples

SHORTCOMINGS OF GOLDCORPS HRIA OF THE MARLIN MINE IN GUATEMALA

Situated in Northwestern Guatemala, in the country's mountainous "Altiplano" highlands, the Marlin Mine is an open pit and underground gold and silver mine that encompasses an estimated area of five square kilometers.[70] Positioned between the two municipalities of San Miguel Ixtahuacán (SMI) and Sipakapa, the region is home to two indigenous Mayan groups: with the first home to mostly Mayan-Mams and the latter of Mayan – Sipakapense. According to a 2003 census, SMI has a total population of around 37,000 spread across seventeen villages and forty-three communities.[71] On the other hand, Sipakapa consists of twelve villages and nineteen communities amounting to roughly 14,000 inhabitants.[72]

In the face of overwhelming pressure from company shareholders worried about the adverse human rights impacts that Goldcorp was having in Guatemala, the company agreed to carry out an HRIA at the Marlin Mine and commissioned Common Ground Consultants to conduct the assessment. Many of the challenges that Common Ground faced while identifying

[70] Zarsky, Lyuba and Leonardo Stanley. *Searching for Gold in the Highlands of Guatemala: Economic Benefits and Environmental Risks of the Marlin Mine*. Tufts University. Medford: Global Development and Environment Institute, 2011. Page 9.

[71] Ibid.

[72] Ibid.

the impacts of the Marlin Mine on human rights, illustrate important lessons that should be incorporated into future HRIAs. Most importantly, the findings of the assessment revealed the value of *ex-ante* assessments versus *post-ante* risk management procedures and the importance of implementing HRIAs that are collaborative or community-based. Goldcorp's decision to conduct the HRIA occurred after the mine had already been in operation for several years thereby enabling dissension to be fomented within the community regarding the overall sufficiency of the consultation process.[73] According to the assessors, the escalation of conflict around the mine had reached the point at which a comprehensive participatory process would have jeopardized the safety of participants making a HRIA no longer feasible.[74] As such, the decision was made to reformulate the work as a Human Rights Assessment in place of a Human Rights Impact Assessment.[75]

Aside from underscoring the utility of ex-ante HRIAS when it comes to assessing a company's impacts on human rights, Goldcorp's HRIA reveals that in the right environment HRIAs can do more harm than good. What is meant by this is that in contexts where a mining corporation has already breached the trust of community, any effort to mitigate previous abuses will likely be viewed with apprehension or through a highly critical lens. Catherine Coumans from MiningWatch Canada argues that the HRIA conducted at the Marlin Mine essentially provided Goldcorp with a diversion to deflect criticism away from the company by pointing to the ongoing HRIA process as indicative of its vigilance towards human rights,

[73] Coumans, Catherine. "Do no harm? Mining industry responses to the responsibility to respect human rights." *Canadian Jounal of Development Studies* 38.2 (2017): 272-290. Page 283.
[74] Ibid.
[75] On Common Ground Consultants Inc. *Human Rights Assessment of Goldcorp's Marlin Mine*. Vancouver : On Common Ground Consultants, May 2010.

meanwhile business operations remained unchanged.[76] Furthermore, Coumans underlines that "the HRIA relieved increasingly effective community pressure on the company to cease land acquisitions and halt expansion plans" with Goldcorp ultimately ignoring these recommendations by local communities once the HRIA concluded with the end result being "increased conflict in communities already experiencing high levels of tension and violence."[77] Although the implementation and publication of Goldcorp's HRIA is commendable in its own right given the reluctance of most companies to initiate them let alone publish their findings, the HRIA reveals several important findings.

To start with, Goldcorp's HRIA reveals that mining activities should be suspended until a formal consultation process, one reflective of international human rights law, can be facilitated. Suspension of mining activities will signal to local communities that the company is serious when it comes to preventing any additional adverse human rights impacts and that the company is willing to halt mining activities until it is able to engage with local communities in a meaningful manner. Further, suspending mining activities will also prevent HRIAs from being used as a mere window-dressing as egregious human rights and environmental impacts continue unabated. As Coumans outlined, Goldcorp was able to continue with business as usual as the HRIA process was conducted over a period of two years despite widespread community suffering.[78] In effect, the commissioning of the HRIA provided Goldcorp with a *de facto* license to continue to adversely impact human rights and the environment unabated. Common Ground's HRIA also makes clear that in contexts where there are pre-existing

[76] Coumans, Catherine. "Do no harm? Mining industry responses to the responsibility to respect human rights." *Canadian Jounal of Development Studies* 38.2 (2017): 272-290. Page 283.
[77] Coumans, Catherine. "Do no harm? Mining industry responses to the responsibility to respect human rights." *Canadian Jounal of Development Studies* 38.2 (2017): 272-290. Page 283.
[78] Ibid.

company-community conflicts, a community-based HRIA, with an external consultant firm like Common Ground acting as a neutral third-party arbiter, would have likely been advantageous given the situational factors surrounding the Marlin mine.

The need for collaborative or community-based HRIAs, with respect to mining projects in Guatemala, is further buttressed by the ineffectiveness and exclusionary nature of government mandated Environment and Social Impact Assessments (ESIAs). During the course of 79 interviews of various stakeholders involved in ESIAs, including project-affected people, municipal officials and public servants from Guatemala's Ministries of Energy and Mining (MEM) and of the Environment and Natural Resources (MARN), Aguilar-Støen and Hirsch found that ESIAs preclude meaningful community participation in decision-making processes due to the Government of Guatemala's lack of capacity of and mishandling of ESIAs.[79] Additionally, the interviews revealed that the EIA processes in Guatemala suffer from a lack of government oversight making them susceptible to abuse. Moreover, because mining companies often hire consultants to conduct ESIAs accountability is further decreased. For example, Interviewees in the study recounted instances of fraudulent FPIC processes by which consultants asked community stakeholders to offer their signatures following an information session without informing them as to what their signatures represented.[80] The consultants were then able to use the signatures as evidence that they had followed proper government protocol and involved project-affected people in the EIA process and thus had proof of community consent

[79] Støen, Mariel Aguilar and Cecilie Hirsch. "Environmental Impact Assessments, local power and self-determination: The case of mining and hydropower development in Guatemala." *The Extractive Industries and Society* (2015): 472-479. Page 477.

[80] Ibid. Page 475

for the project.[81] Other interviewees disclosed similar examples of corruption such as consultants offering community leaders jobs, projects or bribes in exchange for persuading various community-stakeholders to grant consent for a given project.[82]

The ease at which ESIAs are used as a means to further the objectives of -- external consultants, mining companies and the government of Guatemala --every actor except the one they are intended for underscores that appropriate government authorities and company representatives are too far removed from the process. The ability of mining companies to transfer their ESIA responsibilities to consultants in effect translates into an abdication of responsibility. As Aguilar-Støen and Hirsch note, this creates conflict and mistrust which is further exacerbated given that the Government of Guatemala lacks the necessary capacity to effectively monitor and evaluate the work of consultants.[83] Furthermore, in Guatemala the various procedural requirements of ESIAs have had the effect of excluding its intended beneficiaries. For instance, community-capacity building is not a required precondition of ESIAs and thus community members do not receive the necessary training and education in order to understand the highly technical and scientific vernacular that ESIAs often use.[84] Aguilar-Støen and Hirsch's research also highlighted that project companies in Guatemala do not inform affected communities about ESIAs rather it is the responsibility of communities to search for information regarding the ESIAs on their own.[85] Similarly, information gathered from interviews also indicated that the Government of Guatemala also does not have any

[81] Ibid.
[82] Ibid.
[83] Støen, Mariel Aguilar and Cecilie Hirsch. "Environmental Impact Assessments, local power and self-determination: The case of mining and hydropower development in Guatemala." *The Extractive Industries and Society* (2015): 472-479. Page 475
[84] Ibid. Page 477
[85] Ibid. Page 475

procedures in place that allows for EIA reports to be distributed among affected parties.[86] The inaccessibility of information pertaining to EIAs is further increased given that EIA reports are only publicized at the MARN offices in Guatemala City forcing project-affected people to travel long distances in order to gain access to the reports.[87] When, and if, communities discover such information, it is often not translated in local indigenous language despite government regulations stipulating that such translations be a required component of ESIAs.[88] More than anything, calculated attempts to deprive local communities' of access to important information regarding how a proposed project will affect their lands, natural resources and ultimately their lives and livelihoods speaks to, and is indicative of, the various processes at play to circumvent the need for meaningful participation of local communities, particularly those of Indigenous peoples.

The blatant disregard for the right of indigenous peoples to FPIC processes by various EIA stakeholders showcases that current best practices are inadequate in ensuring Indigenous involvement prior to, and following the assessment. The significant barriers surrounding the use of foreign language that is highly technical, coupled with geographical distance makes EIAs an unsuitable mechanism to safeguard the right of indigenous people to FPIC and self-determination. Several organizations such as Columbia Center for Sustainable Investment (CCSI) and The Danish Human Rights Institute have stated that companies may be more willing to undertake a collaborative HRIA if they can incorporate it into ESIAs given that they are

[86] Ibid. Page 477
[87] Ibid.
[88] Støen, Mariel Aguilar and Cecilie Hirsch. "Environmental Impact Assessments, local power and self-determination: The case of mining and hydropower development in Guatemala." *The Extractive Industries and Society* (2015): 472-479. Page 475

already planned or required.[89] As the Guatemalan context illustrates, such recommendations should be critically scrutinized and reviewed on a case by case basis. In countries where substantial governance gaps exist and where EIAs are often just a box-ticking exercise, collaborative HRIAs provide an opportunity for both companies and project-affected people to face many of the structural shortcomings innate to traditional assessment processes.[90] In contrast to traditional EIAs and company commissioned HRIAs, collaborative HRIAs offer considerable benefits as a result of their emphasis on the inclusion of project-affected people in important decision-making processes. Bearing in mind that community stakeholders are generally best-placed to understand local contexts in terms of human rights, collaborative or community-based HRIAs offer an opportunity for more detailed and nuanced impact assessments.

VIABILITY OF HRIAs IN OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO FPIC

The pervasive violation of human rights in all of the communities where I conducted interviews indicates that existing assessment procedures analyzing social or environmental impacts are grossly inadequate in terms of their ability to secure respect for the human rights of rights-holders or correspondingly hold duty-bearers to account when adverse impacts arise. Although a comprehensive comparison of the strengths and shortcomings of each impact assessment methodology is well-beyond the scope of this paper, it is important to acknowledge

[89] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017. Page 25.
[90] Ibid. Page 21

and underscore that the central objective of HRIAs is to empower rights-holders, hold duty-bearers to account and in doing so help to identify and address human rights impacts in such a way that leads to the reconfiguration of power-relations.[91]

In countries such as Guatemala, the focus of HRIAs on power redistribution is especially important considering that the manifestation of mining companies within the country occurs through the exploitation and subjugation of historically marginalized indigenous communities whose agency and autonomy continues to be kept in check by the National Government. The perception that such communities are powerless to stop mining companies and other private actors from the illegal encroachment and misappropriation of their lands, territories and resources is confirmed by the very presence of mining operations on their ancestral lands. The presence of such companies despite their failure to receive the FPIC of communities as well as the impunity with which military and private security personnel are able to execute anyone who attempts to speak truth to power underscores the fact that such companies (often working in concert with the government) view Indigenous communities as immaterial and non-autonomous actors who must be controlled by the State.

Interviews with mining-impacted communities across Guatemala revealed the blatancy and ease with which human rights violations were committed by mining companies without fear of consequence. Repeatedly, interviewees cited the lack of consultation as the precursor to serious human rights abuses. For instance, Miguel Angel, a Mayan leader from San Miguel Ixtahuacán, a community affected by the Marlin Mine, voiced his indignation with the mining company's perception that they could circumvent their obligation to engage in good-faith

[91] Götzmann, Nora, Frank Vanclay and Frank Seier. "Social and human rights impact assessments: what can they learn from each other?" *Impact Assessment and Project Appraisal* 34.1 (2016): 14-23. Page 20.

consultations with members of his community by communicating and receiving authorization to conduct mining operations from the Guatemalan Government instead; "This mining company (referring to Goldcorp) established themselves without consultation but through the government."[92] Angel went on to describe Goldcorp as monster, stating that, "This monster is a big invader. An invader of our communities and of our lives and livelihoods. That's why we said no to mining because they are putting our lives in danger." In addition to accusations that Goldcorp's ignored their obligation to consult the communities of Sipakapa and San Miguel Ixtahuacán, Angel also spoke of the terrorization tactics that were used by armed men believed to be linked to Goldcorp who used violence to intimidate and silence community members who resisted and opposed the mining project through peaceful protests.

> Last year in 2017, we had a blockade, we wanted to ask the government if they were hearing us and what we were demanding. On April 5th, they tricked us because at that time they changed the government. So finally, we got a date where we could meet with the general manager of the company. They said the meeting would be at a military base. We are not delinquents or criminals so they cannot take us to a military base and intimidate us in that way. Instead of a military base we went to the police base.[93]

During my interviews, Angel also spoke of a failed assassination attempt on his life, specifying April 14th, 2010 as the day that, "they (armed gunman allegedly linked to Goldcorp) tried to kill me."[94] Information collected from Angel also underscored community-led efforts to initiate their own FPIC processes. Despite attempts by local authorities to prevent the community from holding a *consulta*, Angel spoke defiantly when explaining how "there were

[92] M. Angel, personal communication, May 9, 2018.
[93] Ibid.
[94] Ibid.

some (*consultas)* that were done almost clandestinely."[95] The presence of *consultas* despite the Guatemalan government unleashing grave threats in order to enforce their prohibition illustrates the degree to which the community of San Miguel Ixtahuacán was willing to go to resist the expropriation of their lands, territories and natural resources. Similarly, the conversation with Angel also made clear that neither the Guatemalan Government nor Goldcorp made any effort to inform the local community surrounding the potential impacts resulting from the mining operation. Responding to this negligence, Angel again spoke of his community's independent aspirations to educate themselves regarding the various ways in which the mine may impact their local environment. "We are starting a study of water contamination and we want to do more science studies in the future."[96] Such studies, according to Angel are being done to accompany scientific research conducted by Guatemala's Ministry of Health which determined that 45 members of San Miguel Ixtahuacán had serious health effects including skin infections and disease.[97]

Efforts by the community of San Miguel Ixtahuacán to facilitate their own local plebiscites, in addition to scientific impact assessments showcases the inadequacy of similar efforts orchestrated by Goldcorp and the Guatemalan Government. Suggestively, the formation of *consultas* and the initiation of additional impact assessment research by community-members points to a prevailing practice that permits powerful corporate and government actors to bypass people who stand to be most affected by the mining project. Relatedly, the experience of San Miguel Ixtahuacán indicates that FPIC processes, specifically

[95] M. Angel, personal communication, May 9, 2018.
[96] Ibid.
[97] Ibid.

those pertaining to the preliminary impact assessment phases, ought to be defined by unreserved community-ownership and participation. Such processes should also be preferable to corporate or government led procedures which engage with local community-members on paper but not in practice.

Aniseto López, the Director of FREDEMI (San Miguel Ixtahuacán Defense Front or *Frente de Defensa Miguelense* in Spanish) also outlined how the operation of Goldcorp's Marlin Mine adversely impacted the sociopolitical situation of the community of San Miguel Ixtahuacán. Lopez alleges that the mine created very serious divisions within the community through the co-optation of local government authorities. According to Lopez, such divisions and struggle for power "played itself out at the municipal level where wealthy political parties who wanted the mine profited."[98] Furthermore, these divisions were exacerbated when members of the local political elite allegedly attempted to intimidate local community members into submission by commissioning armed assailants to assault those resistant to the mine.[99] Lopez believes that municipal political authorities "hired local people and thugs as hitman to orchestrate attacks."[100] He went on to explain how on February 28th 2011, "*pistolarios* used very serious violence to break up the roadblock" that the community had established to peacefully protest Goldcorp's mining operations.[101]

The following section will provide a detailed description of a *testimonio* given by Diadora Hernández, a woman living in San Miguel Ixtahuacán next to the Marlin Mine, who is

[98] A Lopez, personal communication, May 9, 2018.
[99] Ibid.
[100] Ibid.
[101] Ibid.

believed to have been shot in the head for her refusal to sell her three hectares of land to Goldcorp.

> *This is a story of suffering. Before the mining company came here, we were happy. Look at my eye. They (Goldcorp) didn't ask for my permission to build a road across my land. All my suffering has to do with me not wanting to sell my land. I was complaining to the compoyetes and they threatened me with a machete. I had my grand-daughter in my hands. After threatening me they tried to kill her. Former mining security tricked me and my daughter when they invited us out for coffee and one of them pulled out his gun and shot me in the head. All these people came here to screw with me to pressure me to sell my land: the mayor, the company. I own and live on this land, I am not a renter. Where would I go if I were to sell this land. Most people who sold (their land) did so because they were obliged to by the Mayor's office. Most of the people who sold their land are only left with a small parcel of land. With respect to the Canadian Government, all it did was result in suffering. The strength to remain comes from the conviction that it doesn't make sense to leave my land and animals. I have neighbours/friends who love me. Every time I think about the mine or answers to these questions I start to cry.*[102]

Aside from highlighting the sheer depravity Goldcorp was willing to unleash on those who opposed their mining operations, Diadora's *testimonio* also substantiates widely-held allegations that Goldcorp failed to receive the FPIC of the communities of Sipakapa and San Miguel Ixachtuacán. Furthermore, Diadora's *testimonio* indicates that even if Goldcorp didn't directly instruct armed men to use violence to intimate opposing the mine, they clearly did not fulfill their duty of care as a signatory to the Voluntary Principles on Security and Human Rights by ensuring that violence wasn't used to coerce community members to accept the mine.

The interviews conducted in San Miguel Ixtahuacán underscore that many community members adjacent to Goldcorp's operations feel neglected, disregarded and violated. With hindsight, it is clear that the company's assessment of the potential adverse impacts of its

[102] D Hernandez, personal communication, May 9, 2018

operations was at best inadequate, by failing to engage and encourage the participation of a wide array of community stakeholders and at worst, non-existent. The failure to include community stakeholders from the outset and operationalizing the right of indigenous people living within the community to FPIC has been a costly mistake for Goldcorp; financially, reputationally, environmentally and most importantly in terms of its cost to human life. That being said, the experience of the Marlin Mine makes clear that assessment and consultation processes, especially those being facilitated in post-conflict contexts such as Guatemala, require a participatory and human rights based approach, one where community stakeholders can voice their concerns and/or perspectives in a meaningful way. Anything less than this with respect to a mining operation, will in all likelihood, create a climate of rampant suspicions, fear, miscommunications and community-divisions. For that reason, community-based and to a lesser degree, collaborative HRIAs, through their emphasis on transparency, participation and the empowerment of rights-holders reflect a human-rights based paradigm and therefore offer a viable, and preferable alternative to traditional, company-led assessment and human rights due diligence processes.

CONFRONTING THE COMPLICITY OF CANADIAN MINING COMPANIES IN THE CONTRAVENTION OF INDIGENOUS PEOPLES RIGHTS WORLDWIDE

In Canada, the absence of a strong regulatory framework able to ensure that the foreign activities of mining companies domiciled in the country act in accordance with international human rights obligations is palpably absent. Rather than develop proactive approaches to

preventing adverse environmental impacts and egregious violations of human rights, the Government of Canada has instead focused their efforts on reactionary responses that seek to safeguard the status quo by providing Canadian mining companies with virtually free rein to plunder and pillage at will. Canadian mining companies have taken advantage of Canada's weak regulatory landscape amassing huge profits at the expense of the rights of Indigenous peoples and environmental sustainability. That being said, in a country where saying "sorry" is synonymous with national identity, Canadian mining companies have stayed true to form, adopting apologist tactics when pressed to explain their role in contributing to gross violations of human rights and environmental degradation in the regions in which the operate.

A leaked report from the Prospectors and Developers Association of Canada, an organization which represents 8,000 members of the international mining community, discovered that Canadian mining companies are disproportionally involved in incidents of human rights violations, environmental degradation and company-community confrontations at a rate four times higher than any other country.[103] In many ways this is foreseeable in view of the fact that Canada is home to 75% of the world's mining companies.[104] Such a high concentration of mining companies in the country can be attributed to Canada's permissive mining regulatory framework coupled with political, economic and legal privileges granted to such companies by the Government of Canada.

Canada's role as a global financial hub for the mining industry is illustrated best by the fact that in the 2016 fiscal year 57% of the global mining financing was traded on the Toronto

[103] Garcia, Mercedes. "Canadian Mining: Still Controversial in Central America The Case of Honduras." *Council on Hemispheric Affairs* (2016). Page 2.
[104] Butler, Paula. *Colonial Extractions*. Toronto: U of Toronto, 2015. Print. Page 8.

Stock Exchange (TSC) with a total value of $189 billion.[105] Interestingly, there were 6,307 mining projects listed on the TSX in 2016, 47% of which were located outside of Canada.[106] The increasing domiciliation of mining companies in Canada implies that there are significant incentives for registering a mining company in the country. Considering that Canada's mining industry contributed $8.5 billion in tax income to the Canadian government in 2012 (most recent data available), and was responsible for 18% of Canada's GDP in 2015,[107] the sector plays a crucial role in the nation's economy. In light of this, the Canadian government has enacted policies to sustain the supremacy of Canada's mining sector, both domestically and internationally. Government agencies such as the Department of Foreign Affairs and International Trade (DFAITD), the Investment Board of the Canadian Pension Plan and Export Development Canada (EDC) taken together provide government grants, insurance, loans and investment guarantees to Canadian mining companies.[108] However, the significant financial and political support provided to such companies has neither been supplemented by strong Environmental, Social and Governance (ESG) screening mechanisms, such as HRIAs nor sufficient guarantees from the companies themselves that their operations will not contribute to negative environmental and human impacts in the regions in which they operate.

In order to better promote and protect human rights within Canada's extractive sector, moving forward the Government of Canada must ensure that the agencies responsible for

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[105] Toronto Stock Exchange *Mining* . 2017. 1 May 2017. <https://www.tsx.com/listings/listing-with-us/sector-and-product-profiles/mining>.

[106] Toronto Stock Exchange. "Mining." 31 March 2017. *Toronto Stock Exchange.* 1 May 2017. <https://www.tsx.com/resource/en/193 >. Page 13

[107] The Mining Association of Canada. "Facts and Figures of the Canadian Mining Industry." 2016.

[108] Deneault, Alain and William Sacher. *Imperial Canada Inc. Legal Haven of Choice for the World's Mining Industries.* Vancouver: Talonbooks, 2012. Page 42

providing mining companies with fiscal supports are made more transparent. For instance, the EDC which provides mining companies insurance against political risks is not required to disclose its due diligence processes for proposed projects and does not stipulate that the FPIC of communities be a necessary prerequisite for project approval. As mentioned at the beginning of this paper, considering that approximately half of the world's remaining natural mineral resources are estimated to lie beneath lands and territories inhabited by Indigenous Peoples[109], making consultations with Indigenous communities through HRIAs a prerequisite to accessing finance and receiving project approval would help to ensure that such projects are in accordance with international human rights obligations, specifically the United Nations Declaration on the Rights' of Indigenous People and the ILO's Convention 169. The effectiveness of this enforcement measure is relative to the amount of financial support these companies receive from the Canadian Government. As Schnoor points out, "many companies may operate with relatively minimal public support, or may not be significantly affected by the withdrawal of support that they do receive."[110] Therefore, this shortcoming highlights that threatening to withdraw government support for foreign investment projects, by itself is not enough. Thus, to combat this flaw, such policies ought to be accompanied with the possibility of punitive measures to pressure companies to act in accordance with their human rights obligations and uphold the UNGPS to which they are, in theory, answerable to.

A recent report entitled, *The impact of Canadian Mining in Latin America and Canada's Responsibility* which investigated the impact of 22 mining projects of Canadian mining

[109] Doyle, Cathal M. *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative role of free prior and informed consent*. New York: Routledge, 2015. Page 3.

[110] Schnoor, Steven. "Governmentality and The New Spirit of Exploitation: The Politics of Legitimacy and Resistance to Canadian Mining In Guatemala and Honduras." Toronto: York/Ryerson Universities , 2013. Dissertation. Page 221

companies in nine countries in South America found that the Government of Canada's support for some extractive projects was unperturbed by allegations of environmental abuses and human rights violations with some Canadian embassies even serving as negotiators between the company, the host state and Canada despite the knowledge of such harms.[111] Even more damning the report revealed that, "the Canadian government has advised several governments of countries where Canadian companies operate on the need for them to change their regulatory frameworks regarding environmental studies, citizen participation, oversight, and land availability for mining concessions."[112] Such actions signal that, for the Canadian government, profit motives take precedence over human and environmental considerations and that the complicity of the Canadian government in human rights violations committed by its mining industries takes many forms.

The Government of Canada could also advance human rights and help promote more inclusive, sustainable development within its mining sector by making the financial transactions between host-country governments and Canadian mining companies more transparent by implementing the EITI in Canada. The benefits of doing so are twofold. First, the implementation of the EITI in Canada would contribute to better natural resource governance both domestically and internationally, ensuring that Canadian companies are not concealing taxable income, that corruption is minimized and developing economies are not deprived of the resource rents derived from their countries natural resource wealth. Canada's involvement

[111] Working Group on Mining and Human Rights in Latin America. "The impact of Canadian Mining in Latin America and Canada's Responsibility Executive Summary of the Report submitted to the Inter-American Commission on Human Rights." 2014. Page 25.

[112] Ibid. Page 8.

with the EITI has been stagnant since it first gained supporter status in 2007.[113] With 3 out of 4 of the world's mining companies headquartered in country, Canada's membership within the EITI would deal a significant blow to corruption, tax evasion and non-transparency which is pervasive in the global extractive sector in general and especially prevalent in Canada's mining industry in particular. Secondly, the implementation of the initiative would complement Canada's recent Extractive Sector Transparency Measures Act (ESTMA) which is designed to deter corruption through establishing mandatory reporting requirements for extractive entities who make payments of $100,000 more to "any level of government in Canada or abroad."[114]

Unlike similar extractive sector transparency laws enacted in the United States and the European Union, Canada's ESTMA does not specify that extractive companies domiciled in the country must report on a project by project basis. In effect, this restricts the ability of the ESTMA to promote local accountability and in turn limits its overall utility in terms of being able to hold extractive companies and governments accountable.[115] As such, the act should be reexamined so as to mirror other extractive sector transparency regulations such as section 1504 of the U.S. Dodd-Frank Act, which stipulates project-level reporting,[116] and should also consider the degree to which such information will be made accessible to the public.

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[113] Global Affairs Canada. *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad*. 16 September 2016. 1 May 2017. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.

[114] Ibid.

[115] Williams, Joseph. *Canada's Proposed Oil and Mining Payment Transparency Law: A Welcome Step But Improvements Needed*. 29 October 2014. 1 May 2017. <https://www.resourcegovernance.org/blog/canadas-proposed-oil-and-mining-payment-transparency-law-welcome-step-improvements-needed>.

[116] Publish What You Pay Canada, Prospectors & Developers Association of Canada, the Mining Association of Canada, Revenue Watch. "Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments ." The Resource Revenue Transparency Working Group, 2014.

At present, Canada's permissive regulatory framework and a combination of political and economic privileges provided to mining companies has resulted in Canada becoming a haven for the world's mining industries. Going forward, the Government of Canada must take proactive steps to oblige mining companies domiciled within Canada to exercise greater environmental and human rights due diligence within its operations, both at home and abroad. So far, the Government of Canada's response has largely been the inverse, choosing instead to devise strategies to establish or strengthen mechanisms that deal with the repercussions of human rights violations rather than focusing on preventative efforts. Even then, the Canadian Government's response has been appallingly inadequate in so far as victims of Canadian mining companies have few avenues for legal recourse or remedy as will be illustrated in the following section.

As an adhering government to the OECD Guidelines for Multinational Enterprises, the Government of Canada is required to set up a National Contact Point (NCP) as a way to promote and implement the Guidelines.[117] NCPs are a voluntary, non-judicial grievance mechanism whose purpose is to facilitate constructive dialogue and mediation between aggrieved parties and an enterprise once a formal complaint has been submitted and reviewed. The Canadian NCP's objectives might be noble in theory, however in practice the Government of Canada has failed to mirror the implementation procedures regarding the establishment of a NCP set forth in the OECD Guidelines. As a consequence of this, Canada's NCP is characterized by severe structural weaknesses to the effect that the mechanism is rendered virtually powerless, further constraining the ability of victims to receive judicial redress.

[117] OECD (2018), *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises*. Page 5.

A case in point is the complaint submitted by a local Guatemalan NGO working in concert with international NGOs to have allegations of human rights violations resulting from the Marlin Mine reviewed by the Canadian National Contact Point. Guatemalan NGO, FREDEMI supported by the Centre for International Environmental Law (CIEL) (the "Notifiers"), a land-rights advocacy NGO based in Washington D.C., filed a request for review with Canada's NCP on December 9, 2009.[118] Contained within FREDEMI's submission are allegations that Goldcorp operations at the Marlin Mine "are not consistent with Guatemala's obligations to respect the rights to life, health, water, property, to be free from racial discrimination, and to free, prior and informed consent."[119] Further, FREDEMI demanded that in order for the NCP to effectively address human rights concerns held by the community, the Marlin Mine must be closed.[120] As stated in the NCP complaint, FREDEMI was of the view that a facilitated dialogue with Goldcorp would only result in delays. In order to move forward, FREDEMI urged the NCP to undertake a full investigation into Goldcorp's activities and the various adverse impacts associated with the mine's operations.[121]

The NCP's response to the issues raised by FREDMI and CIEL attributed the gross injustices of the Marlin Mine to a lack of communication or "possible miscommunication."[122] In its consideration of the specific instance, the NCP went as far as recommending that because of the significant operations surrounding mining, mining companies, "should endeavor to use

[118] Global Affairs Canada. *Final Statement of the Canadian National Contact Point on the Notification dated December 9, 2009, concerning the Marlin mine in Guatemala, pursuant to the OECD Guidelines for Multinational Enterprises*. 30 July 2014. 20 June 2018. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-marlin-decl_finale.aspx?lang=eng>.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Ibid.

effective communication strategies in order to engage the communities affected by the mine and to disseminate information of a technical or scientific nature." The report goes on to add that such efforts are a vital component of corporate social responsibility which the NCP states believes "if managed successfully may benefit all parties concerned." In the NCP's final recommendations, it outlined that "communication and dialogue between the company and the notifies are essential to the resolution of any disputes … Therefore, the NCP recommends that the parties participate in constructive dialogue in good faith with a view to addressing the issues raised. The sooner the parties agree to engage in a meaningful dialogue, the better it will be for all concerned." The NCP's recommendations consisted of a mere five sentences before stating that "the NCP considers this specific instance to be closed."

In recommending that Goldcorp and the Notifiers engage in dialogue, the NCP is in effect siding with the company. FREDEMI's request that mining operation cease as prerequisite to dialogue with the company was not an unreasonable demand to make in light of its daily detrimental effects to the surrounding communities and their local environment. Had Goldcorp halted its operations, it would have signaled to FREDEMI and affected-community members that it took the recommendations set forth in the OECD Guidelines for Multinational Enterprises seriously and that it was willing to make a concerted effort to rectify and eradicate any previous or current adverse impacts associated with the company's operations. Furthermore, as far as the NCP recommending facilitated dialogue, the appropriate time for that would have been prior to the mine's construction. Goldcorp, by virtue of establishing the mine without the FPIC of the communities of Sipakapa and San Miguel Ixtahuacán has demonstrated that it does not respect neither the autonomy nor agency of these communities,

nor has it provided any credible actions or evidence, other than willing to engage in dialogue after the mine was already constructed and in operation for several years. Had Goldcorp halted its operations until after dialogue with FREDEMI and CIEL was facilitated, the company would have signaled that it was willing to change course by, at the very least, being open to listening to the perspectives and grievances of local community stakeholders before reaching a conclusion as to how to move forward.

As FREDEMI's experience with Canada's NCP makes clear, Canada's efforts to implement the OECD Guidelines for Multinational Enterprises and by extension promote some semblance of corporate accountability is seriously wanting. Such sentiments are well known within Canadian human rights based advocacy organizations. A recent report published by Above Ground, MiningWatch Canada and OECD Watch revealed that Canada's NCP is somewhat inconsistent with other NCPs in that it does not contain an independent decision-making or oversight committee, is opaque, took approximately three to four times longer to present an initial assessment, inhibited by unjustified delays, maintains a high threshold for accepting complaints, does not publish its findings in terms of company breaches of the OECD guidelines, requires that complaints assume a portion of the associated costs.[123] Finally the report notes that, "The process rarely concludes with an agreement or recommendations, and there are no effective follow-up procedures in place" and "the government penalty is ineffective in promoting compliance with the OECD Guidelines."[124] What is made clear is that the available channels to hold mining companies to account for gross abuses in Canada are either non-

[123] OECD Watch, Above Ground, MiningWatch Canada. ""Canada is Back." But Still Far Behind An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises." 2016. Page 19.
[124] Ibid.

existent or grossly inadequate. In light of this, and as the filing to Canada's NCP on the Marlin Marlin makes clear, the Government of Canada ought to commit to reforming the Canadian National Contact Point so that affected stakeholders' groups have access to judicial recourse and mining companies are held accountable for their acts or acts of omission.

By the same token, in order to move beyond toothless, voluntary initiatives, the Government of Canada ought to consider reintroducing legislation similar to Bill C-438 or the *Extraterritorial Activities of Canadian Business and Entities Act* which failed to pass in front of Canada's parliament. Such legislation should include the establishment of a permanent, independent of the government mechanism, such as a human rights ombudsman for the extractive sector. The Human Rights Ombudsman should have the power to receive and independently investigate complaints and in turn offer recommendations for remedial action to the Canadian government, extractive corporations. Most importantly, as MiningWatch Canada recommends, "The ombudsman also should be able to recommend the suspension or cessation of political, financial and diplomatic support by the Government of Canada.[125] At present, Canada's strategy to enforce business practices which entail respect for human rights and sustainable development while abroad, lacks the investigative, mandatory requirements and judicial mechanisms necessary to give it effective power.

When it comes to enforcing human rights obligations in business, the United Nation's Guiding Principles on Business and Human Rights recommend "a smart mix of measures –

[125] Coumans, Catherine. "Submission to the Government of Canada's Review of Corporate Social Responsibility Strategy for the Canadian Extractive Sector." 8 January 2014. *Mining Watch.* 20 June 2018. <https://miningwatch.ca/sites/default/files/submission_to_the_government_of_canada_on_csr_jan-2014.pdf>. Page 5

national and international, mandatory and voluntary."[126] The government of Canada has not heeded this advice and has chosen instead to base its extractive sector regulatory framework on a series of voluntary requirements that effectively provides mining companies domiciled in Canada with a license to commit human and environmental violations with near perfect impunity. When asked why so many of the world's mining companies are headquartered in Canada and why so many of them are industry leaders for all the wrong reasons, the mining industry and the Government of Canada are rife with apologists – blaming the jurisdictional complexities of prosecuting crimes committed abroad and the number of human rights violations committed by Canadian mining companies as an unfortunate by-product of doing business in a sector prone to such risks. Considering that extractive industries in general and mining in particular are known for having increased adverse human rights and environmental impacts, it only seems logical that the sector should then have heightened due diligence requirements proportional to their human rights risk potential. In this respect, Canada's current course of action is wanting and thus requires a paradigm shift from reactive responses to human rights violations committed by Canadian mining companies to one that prioritize the adoption of prescriptive policy reforms that concentrate on preventative procedures and is inclusive of an immediate plan of action. One such policy reform that ought to be considered is introducing mandatory HRIAs in legislation and other jurisprudential processes aimed at improving Canada's track record with regard to responsible resource development. The significance of mandatory HRIAs in Canadian mining legislation will be discussed in the following section.

[126] United Nations Human Rights Office of the High Commissioner. *Guiding Principles on Business and Human Rights*. United Nations. New York and Geneva: United Nations, 2011. Page 5.

Chapter Four: Prioritizing Proactive Policy Prescriptions

WHY MANDATORY HRIAS IN CANADIAN RESPONSIBLE MINING LEGISLATION ARE NECESSARY

In its concluding observations on the sixth periodic report of Canada, published in March of 2016, the United Nations Committee on Economic, Social and Cultural Rights urged Canada to strengthen legislation in order to effectively monitor the extraterritorial activities of corporations registered or domiciled in Canada and their compliance with international human rights law.[127] To further this goal, the Committee recommended that the Government of Canada establish a mechanism with investigative powers in order to examine complaints filed against corporations. Moreover, the Committee outlined that historically, Canada has neither ensured that victims of corporate abuses have had access to judicial remedy nor worked to improve the effectiveness of existing non-judicial remedial mechanisms as was mentioned previously. Further the Committee highlighted its concern surrounding the absence of *human rights impact assessments* (emphasis added) conducted "prior to the negotiation of international trade and investment agreements," and that such "investment agreements negotiated by Canada recognize the primacy of its international human rights obligations over investors' interests, so that the introduction of Investor-State dispute settlement procedures shall not create obstacles to the full realization of Covenant rights." In this respect, the Committee rather than recommending HRIAs on a project-by-project basis goes a step further

[127] United Nations Committee on Economic, Social and Cultural Rights. *Concluding observations on the sixth periodic report of Canada*. United Nations. New York : United Nations, 2016.

when it advocates for a country-level HRIA prior to conducting and engaging in a trade and investment agreement with a potential partner. Considering that most Canadian mining companies operate in countries with appalling human rights histories, requiring a country level HRIA prior to trade agreements would have beneficial implications for human rights. In Guatemala and Honduras, where the Canadian and American governments have played a pivotal role in overthrowing democratically elected governments to secure easier access to both countries immense resource wealth, instituting such a policy would be a critical turning point for advancing human rights in both countries.

The Government of Canada's response to the list of issues highlighted in the Committee on Economic, Social and Cultural Rights' sixth periodic report of Canada focused on the mechanisms outlined in the country's Corporate Social Responsibility Strategy which was updated in November 2014.[128] The report references the Office of the CSR Counsellor and Canada's National Contact Point, while stating that companies who refuse to participate in either of these mechanisms following complaints brought against them will no longer receive the support, or have access to the "economic diplomacy" that the Government of Canada provides to Canadian extractive companies operating abroad. For example, such companies would no longer have access to financing by Export Development Canada (EDC), the Canadian Commercial Corporation nor would they receive support from Canada's diplomatic and trade missions found throughout the globe.[129]

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[128] Committee on Economic, Social and Cultural Rights. *List of issues in relation to the sixth periodic report of Canada: Replies of Canada to the list of issues*. United Nations Economic and Social Council. New York: United Nations, 2016. 21 06 2018. <https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties.html>.

[129] Global Affairs Canada. (2016, Septmeber 16). *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad.* Retrieved November 19, 2016, from Global Affairs Canada

As Amnesty International has pointed out, the absence of mandatory human rights standards for Canadian companies is compounded by the fact that the Government of Canada's trade policies are not made parallel to the country's international human rights obligations.[130] Honduras, as the organization explains, is a notable example. Canadian based mining companies finance 90 percent of all foreign investment in Honduras, which to date has resulted in over $600 million USD being channeled to mining concessions across the country.[131] Historically, the concentration of Canadian extractive corporations operating in Honduras accelerated in 2009 following a coup that deposed Honduras' democratically elected president Manuel Zelaya. Rather than publically denouncing the violent deposition of a democratically elected president, Canada chose to instead develop a new mining law with the new Honduran government aligned with Canadian corporate interests. Efforts to change Canada's corporate social responsibility landscape will inevitably be restricted unless the Government of Canada commits to only engaging in multilateral and bilateral trade agreements which are aligned with its international human rights obligations.

In the absence of regulatory measures to monitor the international activities of mining companies domiciled in Canada, the government of Canada should enact legislation that stipulates that HRIAs are mandatory. Such a view has also been supported by members of Canada's Standing Committee on Foreign Affairs and International Trade. In response to numerous allegations accusing Canadian mining companies of corporate negligence and having

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: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng

[130] Amnesty International. (2016). *Canada - Submission to the UN Committee on Economic, Social and Cultural Rights 57th Session, 22 February 2016.* London: Amnesty International.

[131] Garcia, M. (2016). *Canadian Mining: Still Controversial in Central America The Case of Honduras.* Council on Hemispheric Affairs. Washington : Council on Hemispheric Affairs. Page 4.

adverse effects on the communities in which they operate in, Canada's Standing Committee on Foreign Affairs and International Trade recommended that the government:

> Put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards. Measures in this area must include making Canadian government support – such as export and project financing and services offered by Canadian missions abroad – conditional on companies meeting clearly defined corporate social responsibility and human rights standards, *particularly through the mechanism of human rights impact assessments* (emphasis added).[132]

This recommendation necessarily begs the question as to who is responsible for financing the HRIA. In order to be perceived as impartial, mining companies cannot be expected to foot the costs associated with conducting an HRIA out of fear that the findings would be biased towards the company commissioning the assessment or the potential for them to be perceived as such by local community members. To overcome perceptions of partiality, Oxfam's Report titled Community Voice in Human Rights Impact Assessment recommends that an independent "business and human rights fund" be established in order to compensate the prohibitive costs of conducting a community or collaborative HRIA.[133] In a similar vein, CCSI in a report on collaborative HRIAs recommends that home country governments or an industry body raise the funds necessary for a collaborative HRIA going on to add that, "Those funds could be managed by a neutral entity in the international sphere, and then interested companies and project-affected people could apply jointly for support."[134] For this to be effectively achieved, concerted efforts must be undertaken to reduce the power disparities and

[132] The Standing Committee on Foreign Affairs and International Trade. *28th Parliament, 1st Session - Fourteenth Report*. Parliamentary. House of Commons. Ottawa: Government of Canada, 2005. Page 2.

[133] Oxfam America. "Community Voice in Human Rights Impact Assessments." 2016. Page 30.

[134] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017. Page 65.

informational asymmetries that exist between Indigenous peoples and extractive companies. In order for the informed aspect of the FPIC to be performed, it is imperative that indigenous communities receive the necessary financial and technical assistance necessary to be on an equal footing with the mining companies thereby increasing the likelihood that an effective participatory framework is in place. This financial assistance must be independent so as to ensure that it does not influence the outcome of a FPIC process and similarly must encompass an array of community empowerment and capacity-building needs.

The Government of Canada, as a home-country government where three-quarters of the world's mining companies are domiciled has an important role in financing HRIAs. Canada is also home to several of the world's leading mining associations and industry bodies. For example, the Prospectors and Developers Association (PDAC) and the Mining Association of Canada could play a crucial role in encouraging Canadian mining companies to establish a HRIA fund. The PDAC website states that, "With over 7,500 members around the world, our mission is to promote a globally responsible, vibrant and sustainable minerals industry."[135] Fostering the financial wherewithal from its members to support HRIAs would be the surest way for PDAC to bring its mission into force. The global reach of the International Council on Mining and Metals (ICCM) also has a significant role to play in advancing HRIAs as industry best practice and securing the funds necessary for their implementation. With 25 mining companies and over 30 national and regional associations as part of the consortium, the ICMM could also positively influence the uptake of HRIAs as well as develop innovative ways to produce the requisite resources from its members to help fund community capacity building efforts

[135] Prospectors & Developers Association of Canada. *About Us*. 1 January 2018. 1 January 2018. <http://www.pdac.ca>.

necessary for collaborative or community-based HRIAs. Such funding would signal that the ICMM views human rights due diligence as a salient issue while simultaneously providing an impartial financial source for local communities who stand to be impacted from the mining development projects put into operation by ICMM members. The funding source would be impartial in so far as not being directly linked to a particular mining company, however the fact the funding would be connected to a regulatory association pertaining to the mining sector raises important ethical questions which merit further analysis, particularly in terms of how such funding may unintentionally influence the outcome of an HRIA process.

As the CCSI report notes, the extraterritorial human rights obligations of home governments provide a strong incentive for sponsoring a collaborative HRI.[136] This support can take many forms such as contributions from embassies, ministries or departments of foreign affairs or through bilateral development agencies. In Guatemala, as in other countries across the globe, the deleterious impact of Canadian mining companies has shown that effective host and home state government oversight is lacking. The formation of *consultas* across the country largely in response to this dereliction of duty underscores that Indigenous peoples are prepared to establish their own local democratic processes to ascertain community perspectives in regard to mining projects when companies neglect to do so. Enacting legislation that requires Canadian mining companies to undertake collaborative HRIAs will ensure that project-affected people do not have to take responsibility for corporate acts of omission: namely the failure of companies to exercise a duty of care by facilitating FPIC processes and receiving the consent of Indigenous peoples prior to project implementation.

[136] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017.

Requiring collaborative HRIAs make sense from a human rights and business perspective. By means of bringing project-affected people, company representatives and other relevant stakeholders together to co-operatively develop and perform an assessment, collaborative HRIAs mitigate many of the procedural shortcomings that typically plague company-led HRIAs and FPIC processes. Firstly, by facilitating collective decision-making processes, collaborative HRIAs allow for increased information disclosure among key stakeholders which helps to minimize knowledge asymmetries and in turn distrust stemming from a lack of transparency. Stakeholder collaboration is especially important during the formative stages of the assessment so as to ensure meaningful engagement by key stakeholders. According to CCSI, "By ensuring that stakeholders collaborate at the initial scoping phase of the assessment, and by allowing shared control over relevant information and its use, collaborative HRIAs can incorporate more perspective and information, and enable more comprehensive assessments."[137] According to CCSI this can "contribute to a deeper understanding of each stakeholder's perspective and priorities, help to build trust, and result in more effective action plans to address a project's human rights impacts."[138] For project-affected people, increased information sharing provides access to important information that likely would not have been divulged through community-based assessments alone. This allows for a more comprehensive understanding of the potential impacts of the mining project as well as the capacity of the company to mitigate adverse risk impacts. For mining companies, the involvement of community stakeholders in the assessment process provides them with a

[137] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017.

[138] Ibid.

platform through which to better understand project-affected people's perceptions and expectations of the project and how project operations can be adapted to accommodate the needs of the community.

By including community stakeholders in decision-making processes so that traditional power imbalances are reduced, collaborative HRIAs arguably lead to more optimal outcomes. A pre-condition for community stakeholders to be able to participate in an HRIA in a meaningful way and the likelihood that a collaborative assessment will be successful is the extent to which community capacity-building is undertaken. Considering that mining companies often operate in rural contexts characterized by abject poverty, low education levels with minimal access to telecommunications and transportation networks, HRIA participants in such communities will require substantial preparation in terms of human rights education, training as well as skill development. As such, capacity building efforts will need to focus on increasing project-affected people's familiarity with relevant national and international laws, working to develop the necessary technical and research skills for such laws to be effectively understood as well as negotiation and assessment skills.[139] In order to address these obstacles, CCSI recommends that in advance of the HRIA, a systematic evaluation of capacity-building and resource needs be determined, followed by a plan of action aimed at addressing any inadequacies.[140] CCSI also notes that capacity-building can also become a collective effort whereby project-affected people and company stakeholder combine their efforts so as to "balance each stakeholder's

[139] Oxfam America. "Community Voice in Human Rights Impact Assessments." 2016. Page 33
[140] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017. Page 28

knowledge base while, potentially building trust between them."[141] In order to maximize the efficacy of a collaborative HRIA and that it reflects international law in regards to the right of Indigenous peoples to FPIC, *ex ante* HRIA should be preferable to *ex post* assessments. According to CCSI the earlier that a collaborative HRIA is conducted the higher the likelihood that the assessment will influence the initial development of the project and in turn result in a reduction of the project's negative human rights impacts.[142]

The need for collaborative HRIAs in regard to mining projects in Guatemala is further buttressed by the ineffectiveness and exclusionary nature of government mandated ESIAS [in full]. During the course of 79 interviews of various stakeholders involved in ESIAs, including project-affected people, municipal officials and public servants from Guatemala's Ministries of Energy and Mining (MEM) and of the Environment and Natural Resources (MARN), Aguilar-Støen and Hirsch found that ESIAs preclude meaningful community participation in decision-making processes due to the Government of Guatemala's lack of capacity of and mishandling of ESIAs.[143] Additionally, the interviews revealed that the EIA processes in Guatemala suffer from a lack of government oversight making them susceptible to abuse. Moreover, because mining companies often hire consultants to conduct ESIAs accountability is further decreased. For example, Interviewees in the study recounted instances of fraudulent FPIC processes by which consultants asked community stakeholders to offer their signatures following an information session without informing them as to what their signatures represented. The consultants were

[141] Ibid

[142] Columbia Center on Sustainable Investment, The Danish Institute for Human Rights, SciencesPo Law School. "A Collaborative Approach to Human Rights Impact Assessments." March 2017. Page 23

[143] Støen, Mariel Aguilar and Cecilie Hirsch. "Environmental Impact Assessments, local power and self-determination: The case of mining and hydropower development in Guatemala." *The Extractive Industries and Society* (2015): 472-479.

then able to use the signatures as evidence that they had followed proper government protocol and involved project-affected people in the EIA process and thus had proof of community consent for the project. Other interviewees disclosed similar examples of corruption such as consultants offering community leaders jobs, projects or bribes in exchange for persuading various community-stakeholders to grant consent for a given project.

Most importantly, considering that at the heart of FPIC is ensuring respect for Indigenous Peoples right to self-determination, it is crucial that Indigenous peoples themselves play a central role in the definition, implementation and outlining the parameters of FPIC in relation to HRIAs. In order to avert considerable delays caused by normative negotiations between IPs and the Canadian Government, such efforts should be informed by the work on UN indigenous bodies such as the Expert Mechanism on the Rights of Indigenous Peoples (EMPRIP) whose 11th Session in July 2018 is centered on the theme of free, prior and informed consent.[144] The United Nations Permanent Forum on Indigenous Issues and the United Nations Special Rapporteur on Rights of Indigenous Peoples have also produced important publications on ways to further indigenous participation in decision-making processes in a way that aligns and reflects their right to FPIC.

Canadian mining corporations have, for far too long, been able to act with impunity: using distance as a safeguard for gross violations of human rights. The establishment of legislation that one, requires mining companies to put into effect HRIAs in a manner that operationalizes the right of indigenous peoples to FPIC and two, is inclusive of prosecutorial powers enabling the Canadian government to enforce corporate accountability abroad

[144] Office of the United Nations High Commissioner on Human Rights. *Study on free, prior and informed consent*. n.d. 10 June 2018. <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx>.

including retroactively offers Canada an opportunity to transform itself from a country widely regarded as a safe haven for much of the world's extractive sector to one where Canadian corporations respect internationally recognized human, environmental and labour standards, nationally as well as internationally. The need for such legislation is confirmed with each cyanide spill, forced displacement of indigenous communities and assassination of human and lands rights defenders.

RECOMMENDATIONS FOR IMPROVING AND INSTITUTIONALIZING HRIAs

Much like other corporate governance mechanisms for promoting human rights, such as corporate social responsibility and multi-stakeholder initiatives, HRIAs are not invulnerable to abuse. Much like the aforementioned approaches, HRIAs can also be utilized by government and corporate actors to further their own ulterior motives. When government or corporate actors exert too much influence over the HRIA process they are liable to suffer from whitewashing. In support of this Götzmann, Vanclay and Seier point out when HRIAs are orchestrated by governmental or business actors, the process runs the risk of becoming at best just another bureaucratic, tick-box exercise or at worst, nothing more than a cunning method to validate and legitimate particular policies or practices by appealing to human rights standards.[145] More than anything, this point makes clear the fundamental importance of civil-society oversight of the HRIA process.

[145] Götzmann, Nora, Frank Vanclay and Frank Seier. "Social and human rights impact assessments: what can they learn from each other?" *Impact Assessment and Project Appraisal* 34.1 (2016): 14-23.

Another criticism put forward by Catherine Nolin - a professor from UNBC who was originally commissioned to do the HRIA of Goldcorp's Marlin Mine - during a personal conversation is that HRIAs for all intents and purposes appear to be unjustifiably complex. Citing the community *consultas* that have taken place across Guatemala, Nolin argued that why should potentially affected communities, often ones with limited resources go to the effort of learning and facilitating a HRIA when they can convene a community meeting and simply state yes, or no to the proposed project.[146] Moreover, Nolin argued that HRIAs appear to be needlessly complicated to the point of rendering them unfeasible for the very communities they are intended for.[147] Nolin raises an important point, however she presupposes that the outcome of community *consultas* are respected by mining corporations and the national government. Such insightful first impressions of HRIAs raise several important questions. Why should communities go to the effort of organizing and conducting an HRIA when they can simply hold a community consultation and grant approval or outright reject a mining company's operations from taking place on their lands and territories? If *consultas* are not respected by neither governmental nor corporate stakeholders then what makes one think that the outcome of an HRIA will be? These questions get to the heart of the impetus behind the author's decision to write this thesis.

As more and more HRIAs are performed and published, best-practices and a procedural baseline will slowly start to emerge making HRIAs arguably less complex. Similarly, the complexity of contemporary HRIA processes is a result of the need to leave no stone unturned in terms of assessing and anticipating potential ways in which the process can be discredited

[146] C.Nolin, personal communication, May 17, 2018
[147] C.Nolin, personal communication, May 17, 2018.

including for example on the grounds that the HRIA was incomplete, biased etc. For that reason, the complexity of HRIAs as they stand today, derives from the fact that methodologically, HRIAs have neither been mainstreamed as a human rights due diligence nor have their parameters been effectively delineated from a policy and procedural perspective. Further, current HRIAs also need to provide corporations and government stakeholders with substantive documentation that can withstand external efforts of disparagement and invalidation.

The author of this paper is of the view that HRIAs need to be accessible and to the extent possible, simplistic in order to maximize their uptake and usage by potentially-affected communities. However, it goes without saying that in the pursuit of making HRIAs more accessible, maintaining the procedural integrity of HRIAs must remain the top priority. The complexity or simplicity of a HRIA process is of course going to vary dependent on contextual circumstances such as the size of a potentially affected community or particular mining operation etc. In any case, this isn't to say that HRIAs should be uniform in their size and scope in the hopes of maximizing their accessibility as a human rights methodology but rather that procedurally HRIAs should not be unnecessarily complex. The purpose of this is to ensure that HRIAs can be actively utilized as a pragmatic tool by indigenous and local communities to operationalize their right to FPIC and participatory development in a manner that is reflective of a human-rights based and self-determined approach to development.

Such a belief is also supported by Dr. James Harrison, who highlights that the higher the complexity and stipulations of a HRIA the less likely that the process will be applied in practice writing that, "If HRIAs can only be utilized by a very few experts and the process of undertaking

them is extremely protracted, their widespread transformational potential is massively reduced."[148] Adding that "All of this should mean that HRIAs are a form of impact assessment that are more engaged with affected people than other forms of impact assessment."[149] This point is especially salient in countries such as Guatemala where -- the Government is not afraid to use coercion to forcibly evict communities from their lands and assassinate human and land-rights defenders -- it is clear that HRIAs must be orchestrated by potentially-affected communities and civil society organizations in an effort to prevent the abuse of the mechanism by business and governmental actors. Such collaboration will help ensure that the process is not plagued by unnecessary bureaucratization and lack of transparency which in turn will help maximize its efficacy with regard to safeguarding and strengthening human rights.

Given the potential of HRIAs to be abused through them legitimating policies and practices that violate human rights, it is patently obvious that community participation and ownership over the HRIA process is of the utmost importance. Participation of community stakeholders will maximize the utility and viability of HRIAs in protecting and promoting human rights by providing rights-holders with a platform to play a pivotal part in decision-making processes that will affect their lives. As well, the involvement of rights-holders in HRIAs will ensure that human rights analysis throughout the process reflects, and is responsive to, their demands helping to preserve procedural integrity arguably leading to more optimal outcomes than HRIA processes where communities play an insignificant role.

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[148] Harrison, Dr. James. *Measuring Human Rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future*. Warwick Law School. Warwick: University of Warwick School of Law, 2010. Page 21.

[149] Ibid.

Further, coordinating with international human rights organizations can help amplify the impact of the HRIA by virtue of such organizations disseminating the findings of the process to the international community as well as by acting as an eyewitness or providing protective accompaniment. The ability of international human rights organizations to potentially provide physical and financial support to communities threatened by a particular policy, practice or activity has the potential to reduce the likelihood that an HRIA would face intimidation by the government to end the process or financial constraints stemming from the lack of financial support. Writing in a similar vein, a recent report on HRIA published by the Warwick School of Law underscores the awareness-raising and accountability potential of HRIAs, outlining that the mechanism has the "potential to raise awareness about human rights issues in affected communities and more widely in society. This can increase public debate around the issues raised and the accountability of decision-makers."[150] Therefore international human rights organizations committed to promoting corporate accountability should examine ways of accompanying or helping to build the capacity of local civil-society organizations and indigenous communities themselves so that they have the necessary knowledge and tools to effectively conduct HRIAs in a manner that clearly outlines their collective aspirations in regards to their right to self-determined development. How to facilitate local capacity-building initiatives in a way that doesn't entrench pre-existing power-imbalance and are devoid of paternalistic and patronizing undertones should be a central focus of such research.

[150] Harrison, Dr. James. *Measuring Human Rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future*. Warwick Law School. Warwick: University of Warwick School of Law, 2010. Page 6

Finally, the history of Canadian mining companies in committing egregious human rights violations abroad necessitates a concerted effort by the Government of Canada to enact a national action plan on business and human rights as part of its State responsibility to implement the UNGPs. Canada is the only G7 country who has yet to produce or even commit to produce a national action plan on business and human rights. Canada's current policy approach to enforcing corporate respect for human rights has focused on responding to human rights violations rather than enacting legislation in an effort to prevent them. As such, the Government of Canada ought to formulate and implement a public policy that outlines prescriptive human rights due diligence procedures that mining companies domiciled in Canada are required to follow which stresses the need for proactive approaches towards preventing human rights violations. Considering the egregious human rights impacts that Canadian mining companies have on local indigenous communities in Guatemala and beyond, it is crucial that such a response focuses on ensuring meaningful engagement with project-affected stakeholders, potentially through collaborative or community-based HRIAs. This policy should prioritize *ex-ante* ahead of *ex-post* assessment processes given that the former has a higher potential to positively influence the design and implementation of a project's due diligence process than the latter, leading to more optimal human rights outcomes. Canada's national action plan must also devise a strategy outlining how HRIAs and other human rights due diligence processes can be funded both in the immediate and long-term. Similarly, the Government of Canada could examine possible ways in which the Department of Foreign Affairs and other government agencies can support the capacity building of Indigenous peoples

and local communities through human rights education and other knowledge sharing initiatives.

Chapter Five: Conclusions and Areas for Future Research

The rapes of 11 indigenous women in Loto Ocho, Guatemala prior to many of their homes being set ablaze, the countless assassination of indigenous leaders across the country and the globe, many of whom opposed the establishment of a Canadian mining operation on their lands and territories is what materializes when land is viewed as nothing more than a space from which wealth can be derived; when people located in areas of such spatial significance are thought of as immaterial or beneath the riches that lie in the earth underneath them; when the pursuit of profits takes precedent over respect for human rights; and when the decisions of mining executives are far removed from the local aspirations of the communities in which they operate. The blockades, protests, and *consultas* orchestrated across much of Central and South America underline that there is more than just a mere disconnect between Indigenous communities and mining executives, but rather such forms of resistance can be interpreted as indicating that the two have diametrically opposed visions of development. This argument is supported by Petkar, cited earlier on in this paper who attributes the failure to successfully implement FPIC to a divergence in perspectives and worldviews which have

resulted in "multiple understandings of its (FPIC) nature, its goal, and the way in which it functions."[151]

The disjuncture between community and company stakeholders and their dichotomous visions of development and FPIC to a degree was corroborated by Miguel Angel, a man previously mentioned in this paper whose opposition to the Marlin Mine nearly cost him his life. Angel communicated that for indigenous peoples living in the community of San Miguel Iztahuacán, "Land is our mother, it is the honey of our lives. It is what we live off of and use to survive. This mother is our land and it is our home. We have pride in ourselves and self-esteem. We know we have been dealing a lot with people who sit in their offices wearing suit and ties who know nothing about our lives but we get strength from other people who are resisting."[152] More than anything, and at the risk of a well-substantiated generalization, this statement makes clear that mining-affected communities feel at best ignored or irrelevant, and at worst, an obstacle that must be overcome at all costs in the pursuit of natural resource extraction by foreign mining companies.

In an article she wrote on how transnational corporation were violating the social, economic and cultural rights of indigenous people, the UN Special Rapporteur on the rights of indigenous peoples Victoria Lucia Tauli-Corpuz writes that, "Now that national governments are liberalizing laws and regulations to match WTO rules, corporations are aggressively moving into new communities seeking to exploit the world's last remaining natural resources, most of which

[151] Petkar, Ishita. *Conceptualizing Free, Prior and Informed Consent: Interpreting Interpretations of FPIC*. Columbia University. New York: Columbia University, 2017. Page 2.

[152] M. Angel, personal communication, May 9, 2018.

are found on indigenous peoples' lands." [153] She goes on to state, "We have been fighting such exploitation for ages, so naturally, the places where the resources are left are the places where indigenous peoples have been the most successful in resistance." As this statement illustrates, the rise in demand for natural resources spurred by population growth and globalization will likely coincide with increased community resistance as more and more communities protest the encroachment of transnational corporations who threaten their livelihoods and in some cases, their lives. Moving forward it is essential that the Government of Canada enact legislation that requires mining corporations to conduct human rights impact assessments before becoming operational. The purpose of such assessments should be to ascertain whether the potential environmental and human rights impacts of the mining project justify its existence. And finally, considering that most of the resources mining companies are in pursuit of lie beneath land inhabited by indigenous peoples as Tauli-Corpuz points out, it is especially important the Government of Canada follow up to its commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in domestic legislation. This includes the establishment of mandatory requirements for Canadian mining corporations to abide by in terms of respecting FPIC of indigenous peoples both domestically and abroad.

This article has attempted to illustrate the various ways in which Canadian mining companies have capitalized on a corporate human rights framework that is based on self-monitoring, voluntary and non-binding mechanisms while amassing huge profits at the expense of the rights of Indigenous peoples. The experience of Canadian mining companies in Guatemala showcased that current human rights due diligence processes are characterized by

[153] Tauli-Corpuz, V. (2006). Our Right to Remain Separate and Distinct. In J. Mander, & V. Tauli-Corpuz, *Paradigm Wars: Indigenous Peoples' Resistance to Globalization.* Michigan, United States of America: Sierra Club.

severe informational and power asymmetries resulting in a lack of trust rendering them virtually useless in terms of protecting and promoting human rights. Furthermore, despite a nation-wide grassroots movement leading to the establishment of *consultas* across the country, whereby Indigenous communities have asserted their right to self-determination through demanding that FPIC processes be a prerequisite to the implementation of mining projects in Guatemala, Canadian mining companies have turned a blind eye to such efforts. In doing so the article aimed to highlight the importance of human rights due diligence processes which are more reflective of the human right principles of non-discrimination, inclusivity, transparency, accountability and participation. Community-based and collaborative human rights impact assessments through their emphasis on collective decision-making, information sharing, local capacity building and increased stakeholder engagement, overcome many of the obstacles that affect more traditional human rights due diligence processes arguably leading to more optimal outcomes in terms of promoting and protecting human rights in business operations.

By informing project-affected people of their rights and potential adverse impacts stemming from the implementation of a mining project as well as providing avenues for communication between company representatives and community stakeholders, collaborative and community-based HRIAs help operationalize FPIC processes. Further, by virtue of drawing from international human rights frameworks, HRIAs by nature emphasize a systematic approach towards assessing economic, social, cultural, civil and political rights thus ensuring a comprehensive approach towards human rights due diligence. In this respect, enacting legislation that requires HRIAs as a way to operationalize the right of indigenous peoples to FPIC becomes a moral imperative if Canada is to transform itself from a country widely

regarded as a safe haven for much of the world's mining sector to one where Canadian mining corporations respect their human rights obligation as duty bearers in the regions in which they operate, as is expected under international human rights law.

I opened this thesis with a quote from Arundhati Roy's 2004 Sydney Peace Prize Lecture in which she reminds us, albeit implicitly, that those without a metaphorical voice are only so because of violence, repression and economic debilitation, often times unleashed and or sanctioned by the very actor tasked with the protection and promotion of human rights: the State.[154] Later on, in her article she poses several questions including asking, "What does peace mean in this savage, corporatized, militarized world? What does it mean to the millions who are being uprooted from their lands by dams and development projects?" And lastly, she asks "What does peace mean to the poor who are being actively robbed of their resources and for whom everyday life is a grim battle for water, shelter, survival and, above all some semblance of dignity? For them, peace is war." What the research included the preceding pages has made abundantly clear is that there is a virulent war for our planet's resources being waged against Mother Earth and her First Peoples with catastrophic consequences so complete and pervasive that if left unchecked will unequivocally threaten the very continuation of our human civilization. Our only hope at combating such an inconceivable outcome is to fundamentally learn from, and defend cultures in which respect for land and resource conservation is an integral part; a principle poignantly absent from the dominant cultures presiding over our planet. A necessary prerequisite to this is a dramatic paradigm shift: one which gives

[154] Roy, Arundhati. "Peace & The New Corporate Liberation Theology." 3 November 2004. *Sydney Peace Foundation.* 25 June 2018. <http://sydneypeacefoundation.org.au/wp-content/uploads/2012/02/2004-SPP_-Arundhati-Roy.pdf>.

precedence to the empowerment and amplification of marginalized indigenous voices by bringing them to the forefront of decision-making processes in a way that demonstrates respect for their right to self-determined development. It would neither be an overstatement nor a simplification to suggest that the viability of our planet depends on more participatory decision-making processes in which each of us, especially those most marginalized, has the ability and opportunity to speak truth to power.

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