

***“Canadian Economic Diplomacy & Canada’s Systematic Failure to Fulfill its International Obligations to Human and Environmental Rights Defenders”***

**Brief provided by Dr. Charis Kamphuis on behalf of the Justice & Corporate Accountability Project (JCAP) on February 20, 2023**

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**To the House of Commons’ Standing Committee on International Trade RE a study of environmental and human rights considerations regarding Canadian mining firms abroad**

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## **Overview**

Part 1 of this submission summarizes the overall findings of a large body of research that has identified the human rights impacts of Canadian economic diplomacy, as well as related statements from international bodies. Part 2 summarizes the Canadian policy context that informs economic diplomacy and Canada’s policies to support human and environmental rights defenders (HRDs). Part 3 summarizes statements of international law that establish that economic diplomacy elevates Canada’s extra-territorial obligation to HRDs. In conclusion, we offer a recent example from Ecuador of an embassy’s complete failure to support HRDs in the clearest of cases.

### **1. Canadian Economic Diplomacy Impacts Human Rights**

#### **a. Research Documenting the Human Rights Impacts of Canadian Economic Diplomacy**

The success of Canadian mining companies abroad is due in part to considerable government support for the sector, including through economic diplomacy. However, a growing body of research demonstrates that embassy staff, Trade Commissioners, and senior government officials often continue to support and defend Canadian resource companies amid strong community opposition, significant levels of violence and criminalization, and credible evidence of environmental contamination.<sup>1</sup> This research suggests that the policies and actions of the Canadian state, designed to ensure that extractive projects succeed, have exacerbated specific conflicts in Guatemala, Peru, Mexico, Ecuador and Honduras, among other countries, and escalated the risk

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<sup>1</sup> MiningWatch, News Release, “Canadian Ambassador Sued for Defaming Documentary Film Maker Steven Schnoor” (29 April 2010), online: *MiningWatch Canada* <miningwatch.ca/news/2010/4/29/canadian-ambassador-sued-defaming-documentary-film-maker-steven-schnoor> [perma.cc/2KN6-CP93]; Charlotte Connolly, Jen Moore & Caren Weisbart, “Qualifying as Canadian: Economic Diplomacy, Mining, and Racism at the Escobal Mine in Guatemala” in Veldon Coburn & David P Thomas, eds, *Capitalism & Dispossession: Corporate Canada at Home and Abroad* (Blackpoint, Nova Scotia: Fernwood Publishing, 2022). See also “Backgrounder: A Dozen Examples of Canadian Mining Diplomacy” (8 October 2013), online (blog): *MiningWatch Canada* <miningwatch.ca/blog/2013/10/8/backgrounder-dozen-examples-canadian-mining-diplomacy> [perma.cc/K7LA-5T8B].

of harm for affected communities and HRDs who face threats, kidnappings, and assassinations.<sup>2</sup> For example, in 2013, the Working Group on Mining and Human Rights in Latin America published a report profiling 22 case studies of Canadian mining operations, with strong support from the Canadian state, linked to Indigenous and human rights violations.<sup>3</sup>

At present, there are four substantial reports published between 2013 to 2022 by Canadian civil society groups and legal academics, detailing Canada’s approach to conflicts, occurring between 2008 and 2017, between Canadian resource companies operating in Central and South American countries and HRDs. These reports are:

- The first report, published in 2013 by MiningWatch Canada, is entitled “Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy”.<sup>4</sup>
- The second report, published in 2015 by MiningWatch Canada, is entitled “Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy, and the Violation of Land and Labour Rights in Durango, Mexico”.<sup>5</sup>
- The third report, published in 2022 by the Justice & Corporate Accountability Project (JCAP), is entitled “The Two Faces of Canadian Diplomacy: Undermining International Institutions to Support Canadian Mining”<sup>6</sup>. This report relates to Goldcorp Inc.’s operation of the Marlin Mine in Guatemala.
- The fourth report, published in 2022 by the Justice & Corporate Accountability Project (JCAP), is entitled “The Two Faces of Canadian Diplomacy: Undermining Human Rights and Environment Defenders to Support Canadian Mining”.<sup>7</sup> It relates to Canadian Hudbay Minerals Inc.’s operation of the Constancia Mine in Peru.

All four reports are based on records obtained through federal access to information and privacy (“ATIP”) legislation. While the findings in these reports reveals disturbing trends, the picture remains incomplete as the ATIP records upon which they are based contain many redactions. In spite of this, there are three main themes that emerge from all four reports:

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<sup>2</sup> Jen Moore, “In the National Interest?: Criminalization of Land and Environment Defenders in the Americas” (2015) at 14, online (pdf): *MiningWatch Canada* <miningwatch.ca/sites/default/files/inthenationalinterest\_fullpaper\_eng\_1.pdf> [perma.cc/7834-AKHR]; Jen Moore, “More than a few bad apples: ‘militarized neoliberalism’ and the Canadian state in Latin America,” (2016), online: *Canadian Centre for Policy Alternatives* <policyalternatives.ca/publications/monitor/more-few-bad-apples> [perma.cc/KL5E-XWKQ].

<sup>3</sup> Working Group on Mining and Human Rights in Latin America, “The impact of Canadian Mining in Latin America and Canada’s Responsibility” (2013), online (pdf): *Due Process of Law Foundation* <www.dplf.org/sites/default/files/report\_canadian\_mining\_executive\_summary.pdf> [perma.cc/AXT9-538H].

<sup>4</sup> Online: [https://miningwatch.ca/sites/default/files/blackfire\\_embassy\\_report-web.pdf](https://miningwatch.ca/sites/default/files/blackfire_embassy_report-web.pdf)

<sup>5</sup> Online: [https://miningwatch.ca/sites/default/files/excellon\\_report\\_2015-02-23.pdf](https://miningwatch.ca/sites/default/files/excellon_report_2015-02-23.pdf)

<sup>6</sup> Online: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4025474](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4025474).

<sup>7</sup> Online: [https://justice-project.org/wp-content/uploads/2022/12/2022-12-09\\_JCAP\\_TheTwoFacesofCanadianDiplomacy\\_Reduced-2.pdf](https://justice-project.org/wp-content/uploads/2022/12/2022-12-09_JCAP_TheTwoFacesofCanadianDiplomacy_Reduced-2.pdf)

1. Canadian officials had direct notice of credible allegations of human rights violations and/or risk to the HRD connected with the Canadian resource company in question, and yet they failed to undertake any due diligence and investigate the matter. Rather, in these circumstances, Canadian officials continued to support the Canadian resource company and failed to meaningfully support the HRD in question.
2. In supporting the company and failing to support the HRD, despite notice and knowledge of alleged violations and risks detailed above, Canadian officials systematically disregarded Canada's domestic policies and international obligations.
3. In combination, these actions and inactions on the part of Canadian officials contributed to an increased risk of harm to the HRDs in question.

### **b. International Bodies Recognize the Human Rights Impacts of Canadian Economic Diplomacy**

Multiple international treaty bodies have taken note of this research and these impacts, and expressed concern about the adverse effects of Canadian companies' extractive activities abroad.<sup>8</sup> The Inter-American Commission on Human Rights (IACHR) and the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises ("the UN Working Group on Business & Human Rights") have called on Canada to make state support conditional on corporate respect for human rights and to refrain from influencing the adoption of norms or policies that solely favour corporate economic interests.<sup>9</sup> The Committee on Economic, Social, and Cultural Rights has also called on member states to revise relevant tax codes and export credits, and other forms of state support, privileges, and advantages in order to align business incentives and diplomatic support with human rights responsibilities.<sup>10</sup>

However, in a 2018 report on Canada, the UN Working Group on Business & Human Rights noted that while the potential for loss of state support can be an important policy lever, "it was unclear how effective it had been in producing tangible results with respect to changes in corporate

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<sup>8</sup> See e.g. Commission on Human Rights, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, UNECOSOCOR, 59th Sess, UN Doc E/CN.4/2003/56/Add.2 (2003) at para 126; Concluding observations on the combined 21st to 23rd periodic reports of Canada: Committee on the Elimination of Racial Discrimination: addendum, UN Doc CERD/C/CAN/CO/21-21 (2019) at paras 21—22; Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations on the sixth periodic report of Canada, UNECOSOCOR, UN Doc E/C.12/CAN/CO/6 (2016) at paras 15—16 <[undocs.org/E/C.12/CAN/CO/6](https://undocs.org/E/C.12/CAN/CO/6)> [[perma.cc/3NTF-RDB3](https://perma.cc/3NTF-RDB3)].

<sup>9</sup> OAS, Inter-American Commission on Human Rights (IACHR), Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OR OEA/Ser.L/V/II Doc. 47/15 (2015) at paras 79—80, 334 (13), online: <[www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf](http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf)> [[perma.cc/UF72-NG2H](https://perma.cc/UF72-NG2H)] [IACHR, Indigenous Peoples]; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada, UNGAOR, 38th Sess, UN Doc A/HRC/38/48/Add.1 (2018) at para 35 [Working Group on Business and Human Rights, Canada Report].

<sup>10</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UNECOSOCOR, UN Doc E/C.12/GC/24 (2017) at para 15 [CESCR, General Comment No 24].

practices or in providing greater access to effective remedies,” and that withdrawal of trade support appears to have happened in only two instances.<sup>11</sup> The Working Group’s statements suggest that Canada’s policy framework in this area is inadequate. The present submission argues that when Canadian officials fail to follow applicable domestic policies and international legal standards, they undermine the protection of human rights and the environment for some of the most vulnerable communities and ecosystems on the planet, and moreover, that there are significant barriers to holding Canadian officials to account for these failures and harms.

## 2. Policy Context for the Canadian State’s Support for Mining Companies & HRDs

### a. Canadian Economic Diplomacy

Canada has long provided political, economic, financial, and legal support for Canadian resource companies operating abroad.<sup>12</sup> Economic diplomacy in particular has a long history in shaping the culture of the federal foreign service. In 2007, the federal government introduced the Global Commerce Strategy, followed by the 2013 Global Markets Action Plan, which entrenched the practice of “economic diplomacy” as the “driving force behind the Government of Canada’s trade promotion activities.”<sup>13</sup> This policy committed to marshalling “all diplomatic assets of the Government of Canada...on behalf of the private sector” in order to support the commercial success of Canadian companies and investors abroad.<sup>14</sup> As part of this plan, Canada sought to “improve and coordinate [the] branding and marketing of Canada abroad” to make its private sector more competitive on international markets.<sup>15</sup>

Canada’s *Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad* (2014) describes economic diplomacy as a suite of services offered to Canadian businesses engaged in trade and export, including the “issuance of letters of support, advocacy efforts in foreign markets and participation in Government of Canada trade missions.”<sup>16</sup> The Trade Commissioner Service plays a key role in advancing Canada’s economic diplomacy mandate by offering companies “privileged access to foreign governments, key business leaders and decision-makers,” in addition to on-the-ground intelligence.<sup>17</sup> Embassy personnel and government ministers also advocate on behalf of Canadian companies in meetings with foreign public officials and at major trade shows.<sup>18</sup>

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<sup>11</sup> Working Group on Business and Human Rights, Canada Report, *supra*, at para 34.

<sup>12</sup> See Todd Gordon & Jeffery Webber, *Blood of Extraction: Canadian Imperialism in Latin America* (Halifax: Fernwood Publishing, 2016).

<sup>13</sup> Foreign Affairs, Trade and Development Canada, *Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadians Through Trade*, Catalogue No FR5-84/2013E (Ottawa: Foreign Affairs, Trade and Development Canada, 2013) at 4 [perma.cc/Q9NH-VFG8] [*Global Markets Action Plan*].

<sup>14</sup> *Global Markets Action Plan*, at 11.

<sup>15</sup> *Global Markets Action Plan*, at 11.

<sup>16</sup> Global Affairs Canada, *Canada's enhanced corporate social responsibility strategy to strengthen Canada's extractive sector abroad*, Catalogue No FR5-164/1-2014E (Ottawa: Global Affairs Canada, 2014) at 12 [perma.cc/8UN7-J44A] [*Enhanced CSR Strategy*].

<sup>17</sup> “Trade Commissioner Service – Eligibility and Services” (2021), online: *Government of Canada* <[www.tradecommissioner.gc.ca/about-a\\_propos/services.aspx?lang=eng](http://www.tradecommissioner.gc.ca/about-a_propos/services.aspx?lang=eng)> [perma.cc/K855-5WXR].

<sup>18</sup> Working Group on Business and Human Rights, Canada Report, at paras 9, 24.

## **b. Voices at Risk Guidelines (2016 and 2019)**

The federal government introduced another relevant policy in 2016 (updated in 2019) entitled, *Voices at Risk: Canada's Guidelines on supporting human rights defenders*, which creates specific obligations for embassies to promote respect for and support human rights defenders, “even when they allege or appear to have suffered human rights abuses by a Canadian company that receives support from Canada’s Trade Commissioner Service.”<sup>19</sup> This policy states that “depending on the facts of a case, there may be an impact on the support that the mission offers to the Canadian company in question, including denying or withdrawing trade advocacy support.”<sup>20</sup>

## **c. Canadian Ombudsperson for Responsible Enterprise (created in 2019)**

The Canadian Ombudsperson for Responsible Enterprise (CORE) has a primary mandate of investigating allegations of human rights violations against Canadian companies in the resource extraction and garment industries. In theory, the CORE could play a role in supporting practical, as well as more fundamental, reforms to Canada’s policy approach to HRDs. It has a mandate to provide advice to Ministers and may make recommendations for Ministerial review of responsible business conduct and due diligence policies. This includes policies related to funding and services provided to Canadian companies by the Government of Canada.<sup>21</sup>

However, unfortunately, in spite of the body of research described in this submission, to our knowledge, the CORE has not made any recommendations in this area. For years, civil society, experts, members of parliament, and international human rights bodies have expressed concerns about CORE’s lack of independence from Global Affairs Canada, among other serious problems.<sup>22</sup> This is because the CORE is a public servant and her employment security is at the discretion of the Minister of International Trade, whose very policies she might review. As such, there are legitimate doubts about the institutional capacity of CORE to rigorously and transparently evaluate the conduct of public officials, and the efficacy of policies, within Global Affairs.

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<sup>19</sup> Global Affairs Canada, *Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders*, Catalogue No FR5-110/2019E (Ottawa: Global Affairs Canada, 2019) at 21, online: *Global Affairs Canada* <[www.international.gc.ca/world-monde/assets/pdfs/issues\\_development-enjeux\\_developpement/human\\_rights-droits\\_homme/rights\\_defenders-guide-defenseurs\\_droits\\_en.pdf?\\_ga=2.65464426.570807074.1624291594-1582140248.1619455244](http://www.international.gc.ca/world-monde/assets/pdfs/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders-guide-defenseurs_droits_en.pdf?_ga=2.65464426.570807074.1624291594-1582140248.1619455244)> [perma.cc/4MYK-6EZC] [*Voices at Risk*].

<sup>20</sup> GAC, *Voices at Risk* at 11 (An updated version of the policy, released in 2019, adopted a similar approach and nearly identical language).

<sup>21</sup> See articles 4(f) and 12 of the Order in Council establishing the powers of the CORE: Government of Canada, Canadian Ombudsperson for Responsible Enterprise, PC 2019-1323, September 6, 2019, online: Government of Canada <[orders-in-council.canada.ca/attachment.php?attach=38652&lang=en](http://orders-in-council.canada.ca/attachment.php?attach=38652&lang=en)> [perma.cc/3ABA-VMTR].

<sup>22</sup> See, for example, House of Commons, Mandate of the Canadian Ombudsperson for Responsible Enterprise: Report of the Standing Committee on Foreign Affairs and International Development and Subcommittee on International Human Rights (June 2021) (Committee Chair, Sven Spengemann) (Subcommittee Chair, Peter Fonseca), online: <[ourcommons.ca/DocumentViewer/en/43-2/FAAE/report-8](http://ourcommons.ca/DocumentViewer/en/43-2/FAAE/report-8)>; Mike Blanchfield “UN official criticizes Canadian delays setting up corporate ethics watchdog”, CBC News (April 20, 2019), online: <[cbc.ca/news/politics/un-watchdog-carrporate-ethics-1.5116399](http://cbc.ca/news/politics/un-watchdog-carrporate-ethics-1.5116399)>. Some other serious limitations with the CORE’s current mandate in the context of investigations are: its lack of power to compel the disclosure of evidence, its lack of power to make binding recommendations, and its lack of power to enforce remedies for victims.

#### **d. Responsible Business Strategy (2022)**

Canada newest policy in this area is the 2022 *Responsible Business Conduct Abroad: Canada's Strategy for the Future* ("2022 RBS").<sup>23</sup> However, despite strong critiques of Canada's previous approaches, as outlined above, unfortunately this new strategy is virtually identical to Canada's previous strategies. It merely requires companies to "attest" that their operations are consistent with certain international human rights standards, and that Canada "may" consider a company's responsible business practices before providing political advocacy support.<sup>24</sup> Thus the 2022 RBS makes no meaningful progress in outline concrete actions or obligations on the part of Canada and Canadian companies.

### **3. Canada's Extra-Territorial Obligations to HRDs in Public International Law**

This section summarizes Canada's international obligations to support and protect HRDs, with particular attention to HRDs who are impacted by the operations of Canadian companies abroad. It reviews relevant norms originating from a range of United Nations (UN) instruments and bodies.

#### **a. Canada is Obligated Under International Law to Protect HRDs**

Canada bears certain extraterritorial responsibilities to ensure its extractive companies respect human rights abroad,<sup>25</sup> particularly in the context of projects that receive government services under the policy of economic diplomacy.<sup>26</sup> The following illustrates how these extraterritorial obligations arise under Canada's ratified UN treaty commitments.

##### *The International Covenant on Civil and Political Rights (ICCPR)*

In 2019, the UN Human Rights Committee (UNHRC) recognized that the right to life in Art. 6 of the ICCPR requires states to protect HRDs.<sup>27</sup> Additionally, states are obligated to protect extraterritorial HRD's right to life where the HRDs are under the power or effective control of that foreign state and the person's right to life is affected by a domiciled company in a "direct and reasonably foreseeable manner".<sup>28</sup> These foreign state obligations include:

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<sup>23</sup> Global Affairs Canada, "Responsible Business Conduct Abroad: Canada's Strategy for the Future" (2021), online: *Government of Canada* <[www.international.gc.ca/trade-commerce/rbc-cre/strategy-2022-strategie.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/rbc-cre/strategy-2022-strategie.aspx?lang=eng)> at 2, 8.

<sup>24</sup> *Ibid* at 13.

<sup>25</sup> UN Committee on Economic, Social & Cultural Rights (CESCR), General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UNESCOR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 39, online (pdf): <[www.refworld.org/pdfid/4538838d0.pdf](http://www.refworld.org/pdfid/4538838d0.pdf)> [perma.cc/ZF9D-54FB] [CESCR, General Comment No. 14] (states have an extra territorial obligation to prevent third parties from violating human rights in other countries, "if they are able to influence these third parties by legal or political means" at para 39).

<sup>26</sup> Enhanced CSR Strategy, *supra*, (economic diplomacy is a suite of services offered to Canadian businesses engaged in trade and export, including the "issuance of letters of support, advocacy efforts in foreign markets and participation in Government of Canada trade missions" at 12).

<sup>27</sup> UNHRC, *General Comment No. 36: Article 6, Right to Life*, UN Doc CCPR/C/GC/36 (2019) online: <[undocs.org/CCPR/C/GC/36](http://undocs.org/CCPR/C/GC/36)> [perma.cc/G937-EUUY] at para 53.

<sup>28</sup> *Ibid* at paras 21-23, 63.

- a) a duty to require due diligence in relation to private entities;<sup>29</sup>
- b) a duty to prevent reasonably foreseeable threats to life from private entities;<sup>30</sup> and
- c) a duty to take special protective measures towards “specific threats or pre-existing patterns of violence”, which includes human rights defenders.<sup>31</sup>

There is an emerging consensus that this Art. 6 duty to support and protect HRDs extends to home states who are directly involved in procuring investment in host states.<sup>32</sup> For instance, the UN Special Rapporteur on the Situation of Human Rights Defenders recommends that “where attacks have been carried out against defenders in host States, home States should use all avenues possible to advocate for an independent, impartial and transparent investigation and should provide financial and technical support to such an investigation”.<sup>33</sup> The UN Working Group on Business & Human Rights echoes this recommendation by calling upon home states to enable effective adjudication to prevent, investigate, punish and redress all forms of threats and attacks against HRDs.<sup>34</sup>

### *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*

In 2017, the UN Committee on Economic, Social and Cultural Rights (CESCR) reiterated that “States parties’ obligations under the Covenant did not stop at their territorial borders”.<sup>35</sup> State parties are instead “required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction [...] without infringing the sovereignty [...] of the host States”.<sup>36</sup> These ICESCR obligations are extraterritorial because the Covenant does not express any restrictions linked to territory.<sup>37</sup> According to CESCR, extraterritorial obligations “arise when a State party may influence situations located outside its territory [...] by controlling the activities of corporations domiciled in its territory and/or under its

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<sup>29</sup> *Ibid* at para 7.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* at para 23.

<sup>32</sup> Michel Forst, *Report of the Special Rapporteur on the situation of human rights defenders*, UNGAOR, 72nd Sess, UN Doc A/72/170 (2017) at para 3, online: <[undocs.org/en/A/72/170](https://undocs.org/en/A/72/170)> [perma.cc/9G72-X2LR] [Forst] (threats to HRD are compounded by State inaction, including from the business’s home state); Working Group on Business and Human Rights, Canada Report, *supra*, at para 22 (trade missions may provide avenue for addressing the risks faced by HRD when business receiving support from home government).

<sup>33</sup> Forst, *supra* at para 51; see also, *Report of the Special Rapporteur on the rights of Indigenous peoples*, UN Doc A/HRC/39/17 (2018) at para 91, online: <[www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.pdf](https://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.pdf)> [perma.cc/97V5-YPFX] (calls on states to also provide effective redress and remedy); see also at *Report of the Special Rapporteur on the situation of human rights defenders*, “Final warning: death threats and killings of human rights defenders” (2020) A/HRC/46/35 at para 29, 108 (foreign states have a duty to protect against corporations that they have jurisdiction over; foreign embassies should publicly denounce threats to HRDs).

<sup>34</sup> Working Group on the issue of human rights and transnational corporations and other business, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, UNGAOR, 47th Sess, UN Doc A/HRC/47/39/Add.2 (2021) at paras 41, 88, online: <[documents-dds-ny.un.org/doc/UNDOC/GEN/G21/161/49/PDF/G2116149.pdf?OpenElement](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/161/49/PDF/G2116149.pdf?OpenElement)> [perma.cc/4HEZ-C3R5] [Working Group Report, Guiding Principles].

<sup>35</sup> CESCR General Comment No. 24, *supra* at para 26.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at para 27.

jurisdiction, and thus many contribute to the effective enjoyment of economic, social and cultural rights outside its national territory”.<sup>38</sup>

Pursuant to the ICESCR, Canada has an extraterritorial obligation to respect,<sup>39</sup> to protect<sup>40</sup> and fulfill economic, social and cultural rights of persons outside of their national territories.<sup>41</sup> Further, the CESCR explained that a State party would be in breach of its obligations whenever there is a “failure by the State to take reasonable measures that could have prevented” corporate caused harm, even when “other causes contributed to the occurrence of the violation.”<sup>42</sup> Such a risk is expressly indicated as a possibility in the extractive industry, and as such “particular due diligence is required with respect to mining-related projects and oil development projects”.<sup>43</sup> Canada would be in breach of its obligations where it fails “to take reasonable measures that could have prevented” a private entity’s harm, even when “other causes contributed to the occurrence of the violation.”<sup>44</sup>

Accordingly, Canada bears extraterritorial responsibilities to ensure its extractive companies respect human rights abroad,<sup>45</sup> particularly in the context of projects that receive government services under the policy of economic diplomacy.<sup>46</sup>

#### **b. International Bodies Encourage Canada to Take Positive Action**

The UNGA Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998) (the “UN Declaration”), to which Canada is a signatory, outlines Canada’s non-binding obligation to protect HRDs:

12(2) The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.<sup>47</sup>

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<sup>38</sup> *Ibid* at para 28.

<sup>39</sup> *Ibid* at para 29.

<sup>40</sup> *Ibid* at paras 30 – 35.

<sup>41</sup> *Ibid* at paras 36 – 37.

<sup>42</sup> *Ibid* at para 32.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*.

<sup>45</sup> CESCR, General Comment No. 14, *supra* at para 39, (extraterritorial obligations of states to prevent third parties from violating human rights in other countries arises “if they are able to influence these third parties by legal or political means” at para 39).

<sup>46</sup> See GAC Strategy, *supra* at 12.

<sup>47</sup> UNGA, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, (1999) A/RES/53/144 at art 12, online: <documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement> [perma.cc/EZR4-PYM4].



Both the UN Working Group on Business & Human Rights and the UN Special Rapporteur on the Rights of Indigenous Peoples have called upon states to take appropriate steps to ensure that all business enterprises domiciled in their territory and/or jurisdiction respect the rights of HRDs, including by enacting mandatory due diligence obligations for companies.<sup>48</sup>

Further, guidance and jurisprudence from both the Inter-American Court for Human Rights and the IACHR firmly establishes the obligations of states to support and protect human rights wherever they exercise jurisdiction or effective authority and control.<sup>49</sup>

### **c. Canada has a History of Failing to Fulfill its Obligations to Protect HRDs Abroad**

In December 2015, the IACHR published a report where it expressed concern about the human rights impacts of economic diplomacy and called on states like Canada to make state support conditional on corporate respect for human rights and to refrain from influencing the adoption of norms or policies that solely favour its economic interests.<sup>50</sup>

In July 2017, the UN Special Rapporteur on HRDs reiterated this concern and remarked on the role of Canadian companies, along with Chinese and U.S. companies, in creating and contributing to violence against HRDs.<sup>51</sup> The Special Rapporteur concluded that these countries accounted for 25% of the 450 reported attacks against HRDs globally in 2015 and 2016.<sup>52</sup>

In 2018, the UN Working Group on Business & Human Rights published a report raising concern “about reports of the persecution of human rights defenders who have raised concerns about the operation of Canadian companies abroad”.<sup>53</sup> The Working Group directed the Canadian government to provide support to defenders to enable “more effective protection of the legitimate activities of defenders”.<sup>54</sup> It encouraged the Canadian government to “develop training for its public servants and trade officers, as well as guidance for companies that relates more directly to the role of the private sector in ensuring respect for the rights of human rights defenders in the extractive sector”.<sup>55</sup>

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<sup>48</sup> Working Group Report, Guiding Principles, *supra* at paras 42-43; see also James Anaya, *Report of the Special Rapporteur on the rights of Indigenous peoples*, UNGAOR, 39th session, UN Doc A/HRC/39/17 (2018) online: <[www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.pdf)> [perma.cc/97V5-YPFX] at para 91(c).

<sup>49</sup> ELAW, *The Environment and Human Rights (Republic of Colombia)*, (2017) Advisory Opinion OC-23/17, Inter-Am Ct HR (Ser A) No 23 at para 102, online: <[www.elaw.org/IACHR\\_CO2317](http://www.elaw.org/IACHR_CO2317)> (“in cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory” at para 102); See also *Jose Isabel Salas Galindo and Others v United States* (2018), Inter-Am Comm HR, Case 10.573 No 121/18, OEA/Ser.L/V/II/doc.138, online: <[oas.org/en/iachr/decisions/2018/USPU10573-EN.pdf](http://oas.org/en/iachr/decisions/2018/USPU10573-EN.pdf)> [perma.cc/UZG9-S3RV] at para 308.

<sup>50</sup> IACHR, *Indigenous Peoples*, *supra* at paras 13, 78-81.

<sup>51</sup> Forst, *supra* at paras 3-5.

<sup>52</sup> *Ibid* at para 5.

<sup>53</sup> Working Group on Human Rights, Canada Report, *supra* at para 45.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* at para 44.

The Working Group has also noted that most home states, including Canada, are not doing enough to ensure the protection of HRDs through their own trade policies and economic diplomacy, and, among other things, it has repeatedly recommended that states...“raise the issue of risks to HRDs in the context of trade missions...,maintain contact with HRDs, including by receiving them at embassies and visiting their places of work where it is safe to do so; and stand up for HRDs when they are threatened or attacked, including by formally raising concerns as part of diplomatic dialogues, generating public awareness of the work of HRDs, and observing and monitoring trials involving HRDs.”<sup>56</sup>

The Working Group has recommended the following specifically in regard to Canada, “ensure that Global Affairs Canada explores additional tools of economic diplomacy that it could leverage to promote greater business respect for human rights”.<sup>57</sup>

#### **d. Conclusion on Canada’s Extraterritorial Obligation to Protect HRDs**

The statements and recommendations from international bodies cited above clearly set out the obligations of home states like Canada to support HRDs abroad, and they have often named Canada specifically for failing to discharge its obligations. This obligation is heightened where the risks of violence, threats, retaliation, and arbitrary actions against HRDs are connected to extractive projects that receive support from the Canadian state. In this context, Canada has a duty to exercise its influence and control to protect HRDs, and the legitimate exercise of their rights recognized in the *UN Declaration* and other international human rights instruments.<sup>58</sup>

### **4. Conclusion to the Submission**

#### **a. The Problem is Ongoing: One Egregious Example from 2021**

As stated, this submission summarizes the findings from four in-depth case studies of Canada’s approach to economic diplomacy and HRDs in the context of Canadian mining abroad. These reports document events that occurred between 2008 and 2017. However, there is compelling evidence that the problems these studies depict are on-going and that little progress has occurred in spite of various policy changes. We provide a recent example here to illustrate how egregious and systemic Canada’s disregard for its own policies continues to be.

On August 26th, 2021, the Shaur Arutam People (PSHA) in Ecuador wrote to Sylvie Bedard, Canada’s Ambassador to Ecuador, with respect to Canadian company Solaris Resources Inc.’s Warintza mine project. In their letter, a PSHA representative detailed allegations of violations of PSHA’s indigenous rights, as well as alleged threats and violence experienced by PSHA

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<sup>56</sup> Working Group Report, Guiding Principles, *supra* at paras 48-51.

<sup>57</sup> *Ibid* at para 79(h).

<sup>58</sup> See: International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration on Human Rights. See: Voices at Risk 2019, *supra* at 5-6.

environmental defenders at the hands of Solaris.<sup>59</sup> This included an allegation that PSHA Josefina Tunki had received a telephone death threat from Solaris' VP Operations, that she feared for her life, that she had filed a complaint with Criminal Prosecutor Office, and that for six months Ecuadorian authorities had failed to respond to the complaint.<sup>60</sup> This letter to Ambassador Bedard included 137 signatories and it urged the Embassy to take a number of actions in accordance with the *Voices at Risk Guidelines*, including to help provide safety measures for PSHA President Tunki.<sup>61</sup>

After more than three-months, Ambassador Bedard responded in a letter dated December 6, 2021. In her reply, the Ambassador refused to take any action at all. She stated that she had "taken note of the facts indicated" in the August 26, 2021, letter<sup>62</sup> but that in light of the criminal complaint that had been filed, the embassy would refrain from coming to any conclusions, and would simply allow the criminal complaint process to play out.<sup>63</sup> In other words, the Ambassador appears to have used the fact of a criminal complaint to avoid taking any of the requested actions of support under the Guidelines, in spite of the fact that the complaint in question had received no reply from authorities after more than 9-months.<sup>64</sup> In doing so, the Ambassador simply ignored the other allegations of violence and threats that Indigenous environmental defenders had detailed in their letter.<sup>65</sup> This brief case study shows that five years after the *Voices at Risk Guidelines* were first announced, this particular Canadian Ambassador feel free to completely ignore them.

## **b. Conclusion**

Unfortunately, there is abundant research to demonstrate that Canada's diplomatic approach to HRDs impacted by Canadian companies has often elevated the risk for defenders, supporting the company regardless of credible evidence of harm. There is no question that the credibility of Canada's policies in the areas of economic diplomacy, CSR and HRDs abroad is in crisis. It is time for Canada to engage in profound policy reform in these areas. This reform must be oriented around the fundamental principle that the Canadian state should not be providing political support to companies that are perpetuating human or environmental rights harms. Reforms should be meaningfully informed by the HRDs who are most vulnerable and in need of support.

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<sup>59</sup> Letter from Marcelo Unkuch, external management for the Shuar Arutam People to Sylvie Bedard, Ambassador of Canada to Ecuador (26 August 2021).

<sup>60</sup> *Ibid* at 2.

<sup>61</sup> *Ibid* at 4.

<sup>62</sup> Letter from Sylvie Bedard, Ambassador of Canada to Ecuador to Marcelo Unkuch, external management for the Shuar Arutam (6 December 2021).

<sup>63</sup> Letter from Marcelo Unkuch, external management for the Shuar Arutam People to Sylvie Bedard, Ambassador of Canada to Ecuador (26 August 2021) at 2; Letter from Sylvie Bedard, Ambassador of Canada to Ecuador to Marcelo Unkuch, external management for the Shuar Arutam (6 December 2021).

<sup>64</sup> Letter from Marcelo Unkuch, external management for the Shuar Arutam People to Sylvie Bedard, Ambassador of Canada to Ecuador (26 August 2021) at 2.

<sup>65</sup> *Ibid*.