

GUATEMALA:

MINING IN GUATEMALA:
RIGHTS AT RISK

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Cover photo: A local woman from the La Puya resistance camp pleads with police to retreat. La Puya was set up in 2012 to show peaceful community opposition to a gold mine. In May 2014 police were sent in to clear the road so that mining equipment could enter the mine site. State police and company security forces used tear gas to disperse protestors and dismantle the camp.

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1. INTRODUCTION

Disputes around mining have been widespread in Guatemala in recent years. Across the country Indigenous peoples and non-Indigenous communities have protested against the installation of mine sites on their lands and near their homes. Motivated by fears that mining will contaminate their environment and/or negatively impact their livelihoods and the enjoyment of their human rights, protests and disputes over such projects have erupted. Years of threats and violence, including injuries and deaths, and division and resentment within communities have been the result. Community leaders protesting against mining are often targeted with threats, acts of intimidation or attacks. In the majority of cases the perpetrators of such acts have yet to be held to account.

Industrial-scale mining of metals in Guatemala is predominantly based in rural areas.¹ As such, mining has a disproportionate impact on Indigenous peoples, who tend to live in rural areas, and their lands. Indigenous peoples have suffered discrimination historically and continue to be over-represented in those sections of the population living in extreme poverty and with limited access to education and health, among other rights. Indigenous peoples have often borne the brunt of inadequate mechanisms for resolving disputes around land tenure, which are frequent owing, amongst other factors, to Guatemala's extreme inequality in the distribution of land. Indigenous peoples also suffered the worst excesses of the internal armed conflict which ended in 1996 and claimed the lives of over 200,000 people.²

As this report outlines, communities worried about the impact that mining might have on their human rights have consistently complained that they are not adequately consulted when such projects are proposed. In accordance with international human rights standards, Guatemala must ensure that those potentially affected are consulted and adequately informed of potential positive *and* negative impacts.

The existing legal framework that governs the mining licence application process does not ensure opportunities for meaningful consultation with those affected. In addition, international human rights standards require that such projects should proceed only with the free, prior and informed consent of affected Indigenous peoples.

It is crucial that in any development project human rights are protected without exception. That is certainly the case with extractive industry projects. The fact that conflict may arise in and around mining projects is no excuse for a failure to comply with human rights obligations. In 2013, the government declared a state of emergency in some areas affected by protests against mining and hydro-electric projects, a measure normally used in times of war or when natural catastrophes occur.³

The current government of Guatemala has acknowledged problems with the existing mining legal framework and therefore, in July 2013, proposed a two-year moratorium on the awarding of new metallic mining licenses.⁴ In addition, the Government proposed in 2012 a series of reforms to the Mining Law, which are currently before Congress.⁵ The proposed moratorium and the intention to reform existing laws present a window of opportunity for the government to strengthen human rights protections while bringing current mining regulations in line with Guatemala's international obligations.

With this report, Amnesty International urges the Guatemalan authorities to ensure that the new regulatory framework builds in human rights safeguards.

The report outlines the wider background context in which conflicts and disputes around mining are set, then moves on to examine specific case studies of conflicts, before considering some of the international human rights obligations Guatemala has toward Indigenous peoples and non-Indigenous communities prior to the awarding of mining licences.

Many of the high profile mining companies currently operating in Guatemala are subsidiaries of Canadian companies.⁶ Amnesty International calls on all companies to fulfil their responsibility to respect human rights in the context of their operations and specifically urges the Canadian government to enact legislation that would establish mandatory corporate accountability standards for Canadian extractive companies operating abroad, as well as legal remedies, in Canada, for non-nationals who are affected by Canadian extractive companies.

THE GOVERNMENT'S PROPOSED REFORMS

The 2012 proposed reforms are wide-ranging; covering issues such as royalties, auditing, tax payments and the creation of a national mining council. They include a proposal that health studies be conducted before, during and after the mining project, and that the use of water by the company should not negatively affect the local population.⁷

With regard to consultation, however, the proposed reforms say little. They include some process changes such as a requirement to present the Environmental Impact Assessment to local Municipal Development Councils (known as COMUDES) and a reduced timeframe for people to lodge objections to mining licences.⁸ However, they do not address issues such as accessibility of information or the rights of Indigenous peoples, nor do they include any proposals to improve overall consultation.

The proposed reforms introduce a system of indirect consultation and reduce the time period in which licence applications can be opposed to 10 days – replicating one of the most serious problems of the existing Environmental Impact Process in which communities have very short periods available to comment and/or object. If adopted, this may contribute to greater barriers for public participation and more conflicts around mining. If indirect consultation is established as a result of the reforms, many community members may be left out of being able to express their views on a proposed mine.⁹

2. BACKGROUND CONTEXT

Guatemala is still struggling to deal with the legacy of past human rights abuses from the internal armed conflict (1960-1996) at the same time that it faces continuing challenges to human rights in the present.

Between 1960 and 1996, over 200,000 people were killed in the country's internal armed conflict, including an estimated 40,000 who were subjected to forced disappearance.¹⁰ Countless others suffered torture including sexual violence. The UN-sponsored Commission for Historical Clarification concluded in its 1999 final report that State forces, and groups allied to the state, were responsible for 93 per cent of documented human rights violations¹¹, and an estimated 83 per cent of victims of the internal armed conflict were Indigenous Mayan people.¹² The 1999 report also stated that a culture of racism had led to Indigenous peoples being viewed as 'the enemy within'.¹³

Almost 20 years after the conflict ended, the vast majority of these past crimes remain mired in impunity, with perpetrators held to account just in a few cases: two massacres and five cases of enforced disappearance.¹⁴ In most of the cases where convictions have been secured, only lower-ranking soldiers and officers have been brought to justice.



Mounds of arrest files and other documents stored in the National Police Historical Archives. On July 5, 2005, archives from the former National Police force were found in an abandoned arms depot in the outskirts of Guatemala City. The discovery of these documents, which were allegedly lost after the 1996 Peace Accords, provide important evidence in the search for the thousands of people who were detained and subsequently disappeared by State security forces during the internal armed conflict (1960-1996). Guatemala City, Guatemala. March 20, 2009.

Today, Indigenous peoples remain economically and socially marginalised.¹⁵ Land tenure is a particular problem, with Indigenous communities bearing the brunt of acute inequality in the distribution of land and ineffective mechanisms for addressing land disputes.¹⁶

In addition, Guatemala's public security situation is dire.¹⁷ In response, in 2007 the government and the United Nations established the International Commission against Impunity in Guatemala (known by its Spanish acronym CICIG) to support the work of the Public Prosecutor's Office.¹⁸ There have been reports of improvement, with some estimates of convictions for criminal offences increasing from 7 per cent to 30 per cent.¹⁹ CICIG's mandate is due to end in 2015, and it is not yet clear how these advances will be consolidated.

Crime levels, however, remain persistently high. Guatemala, alongside Honduras and El Salvador, forms part of the Northern Triangle, recognised by the UN Office on Drugs and Crime as one of the most violent regions in the world.²⁰ According to the state-run Institute of Forensic Science 6,072 homicides occurred in 2013, which included 522 female victims.²¹

In this context, human rights defenders continue to suffer attacks and intimidation. In 2013, the Human Rights Defenders Protection Unit (UDEFEQUA), a specialist NGO working on the situation of human rights defenders, registered a total of 657 incidents of aggression against defenders in the country. This represents an increase of 46 per cent in comparison with 2012, and is the highest number of incidents registered in one year by UDEFEQUA over the last 14 years.²²

In recent years, private individuals and groups have circulated documents via social media and national print media depicting human rights defenders as "terrorists and communists", as creating conflict for their own economic benefit and as opposed to the development of the country. Negative references to human rights defenders have also been made publicly by high-ranking government officials.²³ Criminal cases against human rights defenders also appear to be on the rise, with a reported 58 legal complaints made against defenders in 2013, an increase from the 18 complaints made the previous year.²⁴ Human rights organisations in Guatemala have noted a specific increase in criminal cases against those defending human rights in the context of 'mega projects' (mining, hydroelectric projects and others).²⁵

Trade unionists also pay a heavy price for their work. The trade union movement was particularly targeted for assassination and disappearance during the conflict years, and today, those working to ensure that workers' rights are respected and upheld continue to face killings, threats and intimidation. The International Trade Union Confederation reports that 53 Guatemalan leaders and trade unionists were killed between 2007 and 2013, and that the level of violence and threats has created "a culture of fear and violence where the exercise of trade union rights becomes impossible".²⁶

The UN Special Rapporteur on the situation of human rights defenders, writing in 2013, noted that Guatemala was one of the six countries which had received the most communications from her office. The Special Rapporteur noted that "[a]lmost one third of the communications sent during the period under review relate to allegations of killings and attempted killings. In the opinion of the Special Rapporteur, this shows that the risks faced by human rights defenders working in the context of development projects are extremely serious. Very often, defenders receive threats, including death threats that are then followed by attacks. Moreover, defenders working on these issues are arrested and detained and their activities are criminalized, including when they are carried out in accordance with the exercise of fundamental rights, notably the right to freedom of peaceful assembly and the right to freedom of expression."²⁷



Formal ceremony at the La Verbena Cemetery in Guatemala City. The Guatemalan Forensic Anthropology Foundation (FAFG) undertook a complex and ambitious project to search for, exhume and match with living relatives remains found of the 45,000 detained-disappeared victims of Guatemala's internal armed conflict during the 1970s and 80s. To date, they have identified 1,592 victims whose remains were recovered from clandestine graves. Guatemala City, Guatemala. February 26, 2010.

In Guatemala approximately 30 per cent of the population lives in extreme poverty.²⁸ Since the end of the internal conflict, successive governments have proposed economic development plans with a particular focus on the extraction of mineral resources (mostly gold, silver and nickel). Mining therefore has boomed in the last decade.

In 2012 total mining production was valued at approximately US\$600 million.²⁹ The mining of metals, a sector that has seen steady growth in recent years, made up 95 per cent of that figure.³⁰ As of 4 January 2014, 100 metallic mining licences were in operation in Guatemala and 355 metallic licence requests had been made to the authorities.³¹

The establishment of mining projects has been marked by dispute and conflict. Protests, injuries and deaths have occurred in various sites and affected anti and pro-mining groups, as well as police and mining company security personnel. As stated by the UN Special Rapporteur on the Rights of Indigenous peoples, in 2011 the presence of large scale mining has *“generated a highly unstable atmosphere of social conflict which is having a serious impact on the rights of the indigenous people and threatening the country's governance and economic development”*.³²



Goldcorp billboard posted near Guatemala City in 2008 and 2009. The sign reads: "Since I believe in education, I believe in the mine. Over 5,800 children with access to education. Development is the most valuable."

3. THE RISE OF CONFLICT IN MINING-AFFECTED COMMUNITIES

The development of mining in Guatemala has been accompanied by community protests and regular incidents of violence involving protestors, state security forces and private security personnel employed by mine companies. The situation is complex: while there is strong opposition to mining amongst affected communities, some people support it, seeing mining as important for economic development. Those who oppose mining are concerned about potential negative impacts including: environmental pollution; risks to agriculture and, by extension, food and livelihoods; restrictions on access to the traditional land of Indigenous peoples; as well as concerns about the presence of security forces around mine sites. One of the most frequently cited causes of mining-related conflicts is a lack of meaningful consultation with communities about mining projects.³³

Guatemala's recent history has a significant impact on how mining is perceived. Amongst both Indigenous and non-Indigenous populations there are concerns that human rights will not be protected in the context of mining. The presence of security forces to protect mine sites tends to exacerbate rather than alleviate tensions.

This chapter describes a number of cases where mining operations have commenced, or re-commenced, in the last decade, and examines some of the tensions that have accompanied mining. These cases raise serious questions about how the government and the mining companies are addressing community concerns and protests.

Both the Guatemalan authorities and the mining companies have responsibilities, rooted in human rights law and standards, to ensure adequate consultation with affected communities and to prevent negative impacts on human rights.³⁴ The state must also ensure that security forces operate in a manner that is consistent with human rights law and standards, including standards on the use of force, while companies must act with due diligence to ensure that the way security is provided to mining projects does not result in human rights violations.³⁵

CASE 1: THE MARLIN MINE, SAN MIGUEL IXTAHUACÁN AND SIPACAPA, DEPARTMENT OF SAN MARCOS

The municipalities of San Miguel Ixtahuacán and Sipacapa, in the department of San Marcos, lie some 150 kilometres west of the Guatemala City. This area is home to approximately 52,000 people, the majority of whom are Mayan Indigenous peoples.³⁶ The main livelihood in the area is subsistence agriculture. Successive governments have granted subsidiaries of the Canadian company Goldcorp Inc. (and subsidiaries of its predecessor Glamis Gold Ltd., acquired by Goldcorp in 2006³⁷) mining licences in the department of San Marcos, including one exploitation licence for a gold mine. This mine - known as Marlin I - is located in San Miguel Ixtahuacán and Sipacapa, and operated by Goldcorp subsidiary Montana Exploradora.³⁸

A HISTORY OF PROTEST AND CONTROVERSY

The Marlin mine has been the subject of community protests since its inception. Both protestors and police have been injured during protest actions. The root causes of the protest are described by community members and local NGOs as a lack of consultation before the mine began operating, disagreements over land acquisition and the failure of the company to address risks associated with the mine.⁴⁰ Tensions have been exacerbated by the way in which the security forces have dealt with protests and by attacks, carried out by unknown persons, on anti-mining activists.

The concerns expressed by the community have been reiterated in the reports of other actors who have investigated the situation around the Marlin mine over the years since it was established. For example, in 2005 the Compliance Advisor/Ombudsman (CAO) of the International Finance Corporation of the World Bank carried out an assessment of the situation and noted that:

*“[b]oth company as well as community representatives concur that there is simmering tension, threats and intimidation associated with the project. These tensions are a result of various factors including local fears surrounding the presence of security forces and a heightened level of conflict between groups for and against the development of the mine”.*⁴¹

In the years that followed the CAO assessment, local communities raised further concerns about negative impacts, including pollution and damage to houses caused by vibrations from mining processes. Although Montana Exploradora carried out certain studies in 2006-2008, the company has been criticized for its failure to remedy small grievances, allowing them to flare into more serious conflicts.⁴²

A Human Rights Impact Assessment of the mine, carried out at the request of Goldcorp investors and published in 2010⁴³ concluded:

*“The number one stakeholder concern relates to the environment of conflict, tension, and fragmentation in the project-affected communities. The social and psychological effects of conflict are inseparable from the overall perceptions and impacts of the mine’s human rights performance. While conflict has direct negative impacts on the right to security of the person and the right to health, it also has serious implications for all human rights discussed in the assessment. A vicious circle is created when conflict leads to human rights violations and infringements, which in turn lead to further conflict.”*⁴⁴

The report also identified a key cause of the ongoing conflict and tension:

*“Perhaps the most serious pattern identified is the systematic failure to address grievances in the communities, allowing them to accumulate and exacerbate. When this happens, new incidents then spark reactions of community members that may be interpreted by mine managers as being out of proportion to the incident or extremism.”*⁴⁵

Most recently, in 2011, the UN Special Rapporteur on the Rights of Indigenous peoples concluded that there had been no consultation in the case of the Marlin mine which conformed to applicable international standards such as the UN Declaration on the Rights of Indigenous Peoples.⁴⁶ During Amnesty International visits to the communities in San Miguel Ixtahuacan and Sipakapa in 2011 and 2012 local activists spoke of ongoing tensions around the presence of the mine.

Amnesty International wrote to Goldcorp seeking the company's response to the issues detailed above. In response Goldcorp stated that following the Human Rights Impact Assessment in 2010, the company had undertaken a number of initiatives to improve relations with the communities. The company went on to assert:

"Following intense efforts to engage proactively, acknowledged past gaps and addressed pressing development needs Goldcorp relationship with Sipakapa has shown marked improvement over the years..."

Goldcorp also noted that studies into alleged negative impacts on housing and water quality have demonstrated that the company's activity is not resulting in damage to houses or water.⁴⁷

ATTACKS ON ANTI-MINING ACTIVISTS

Activists who oppose the Marlin mine have been threatened, and some have been killed, by unknown individuals. The apparent failure - in several of the cases - of the authorities to bring the perpetrators of these crimes to justice is another factor in communities' deepening distrust of mining. For many people living near the Marlin mine, the state is not acting in their interests or to protect their rights; on the contrary, state security forces are seen as protecting the mining operations and allied with mining companies.

For example, in January 2005, Raúl Castro Bocel was fatally shot when police and soldiers broke up a protest against the transportation of heavy equipment to the mine site.⁴⁸ Protestors had blocked the transportation of equipment to the mine site for some 40 days.⁴⁹ Contemporary media reports described the break-up of the blockade as a 'battle' with shots fired on both sides. Sixteen police officers as well as a number of protestors were injured.⁵⁰ Raúl Castro Bocel's family told Amnesty International that they believed he was killed by shots fired by army personnel. His widow was called to give a declaration to the Public Prosecutor's Office in 2008, but since then, according to the family, no progress has been made in the investigation of his death.⁵¹

On 7 July 2010, Diodora Hernández a local activist who opposed the mine because of concerns about environmental impacts, was shot. According to eyewitnesses, at around 7pm, two unknown men entered her home asking for lodging for the night. A relative of Diodora replied that they could not stay, but sold them two cups of coffee. When Diodora went to the door with the coffee, one of the men shot her in the right eye. Both men then ran off. Diodora Hernández survived but was seriously wounded. The Public Prosecutor's office has investigated the case, but to date no one has been held to account for the attack.⁵²



On July 7th, 2010, Deodora Hernandez was shot point blank in the face outside her home in the small community of San José Nueva Esperanza, in the municipality of San Miguel Ixtahuacán. She survived but lost the sight in her right eye and the hearing in her right ear. She believes she was attacked for speaking out against Goldcorp's Marlin mine. To date, no one has been arrested or brought to justice for her attack.

THE CURRENT SITUATION

After more than a decade of conflict, the situation around the Marlin mine remains tense and polarised. The company continues to face opposition, including to new exploration work being carried out in the municipality of Sipacapa. Protests over exploration activities erupted in December 2013 when local communities set up road blocks on a major highway.⁵³ A local leader from Sipacapa called on the President to cancel all mining licences awarded in the area of Sipacapa.⁵⁴

Goldcorp, responding to Amnesty International's concerns about the ongoing tensions, stated "we do not agree that significant tensions persist". The company stated that "we do however agree that opposition groups, many of them made up of people from outside the area continue to successfully disseminate misinformation campaigns that ultimately create security risk for local residents of San Miguel Ixtahuacán and Sipacapa."

CASE 2: SAN RAFAEL LAS FLORES, DEPARTMENT OF SANTA ROSA

In some cases the tensions and protests around mining have escalated to the point where several lives have been lost. On 2 May 2013 the government declared a state of emergency in and around San Rafael Las Flores, a town some 90 kilometres from the capital, following a series of violent incidents around the mining operation of Minera San Rafael, a subsidiary of the Canada and US-based Tahoe Resources Inc.⁵⁵ The series of incidents leading to the state of emergency is described below.

In January 2013 unknown armed men attacked the mine site resulting in the deaths of two security guards and another person, presumed to be part of the group attacking the site.⁵⁶ According to media reports key access routes to the mine site were blocked and electricity cut beforehand.⁵⁷ The authorities continue to investigate the attack and to date no one has been prosecuted.

According to Tahoe, after the Escobal exploitation license was issued on 3 April 2013, the number of anti-mining protests around the mine increased significantly. The company has



Soldiers observe the scene where four police vehicles were burned during a scuffle between local residents and police officers. Day one of the State of Siege declared by the Guatemalan government in four municipalities near to the El Escobal silver mine, owned by Tahoe Resources. Numerous civil rights were suspended under the 30 day State of Siege order. Laguna del Pito, Jalapa, Guatemala. May 2, 2013

stated that: “While many of these activities were peaceful and respectful, violence from mostly outside sources escalated, culminating in an altercation between Minera San Rafael’s contract security guards and individuals blocking the mine gate.”⁵⁸

On 27 April 2013, six protestors were injured when company security guards fired tear gas and rubber bullets at them.⁵⁹ According to the company, the protestors were armed with sticks, clubs and machetes. The company stated that: “non-lethal force was used at the mine gate against protestors armed with large sticks, clubs and machetes who were engaged in impeding traffic to and from the mine.”⁶⁰

Tear gas and rubber bullets can cause serious injury and States are required to ensure their use is carefully controlled.⁶¹ In a context where there are protests around mine operations governments have obligations to ensure that the policing of protests meets international human rights standards, including the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. These principles, which apply at all times, including during times of public emergency, stipulate that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty,⁶² and that as far as possible, they should use non-violent means before resorting to the use of force, which should only be used if other means are ineffective. When the use of force is deemed unavoidable those deploying force should exercise restraint and act in proportion to the seriousness of the offence and the legitimate objective to be achieved, minimize damage and injury, and respect and preserve human life. Firearms must not be used except in self-defence or defence of others against the imminent threat of death or serious injury.⁶³

Companies that hire private security guards – whether as direct employees or as contractors – are expected to take steps to ensure that such private security personnel act in a manner consistent with international standards on the use of force and firearms. This expectation flows from the UN Guiding Principles on Business and Human Rights and – in the case of mining companies - is set out in the Voluntary Principles on Security and Human Rights (Voluntary Principles), a multi-stakeholder initiative of which the USA and Canada are participating governments.⁶⁴

The Voluntary Principles also make clear that private security providers should, consistent with their function, provide only preventative and defensive services and should not engage in activities exclusively the concern of state law enforcement authorities, and their equipment should be used for defensive purposes only.

The use of force by Minera San Rafael private security providers using rubber bullets against protesters in April 2013 was inconsistent with these principles. While the protestors were, according to the company, carrying sticks and machetes, there is no evidence that they posed a risk to the lives of the security guards or any other person; indeed, Tahoe's own public statement does not suggest that there was any imminent threat, but refers only to the fact that the protestors were "impeding traffic".

Amnesty International contacted Tahoe to express the organization's concerns about the use of force by Minera San Rafael private security providers and specifically noted that the lack of any evidence of a security risk that necessitated such use of force. Tahoe's response was:

"As previously disclosed by Tahoe, the following occurred on April 27th: 1) approximately 20 men, carrying machetes and sticks, came to block the mine gate during the evening shift change; 2) MSR's contract security forces used tear gas and rubber bullets to repel the protesters; and 3) seven individuals were treated for injuries at the hospital and released."

Tahoe did not address the issue of whether the force used was necessary. Moreover, any use of force for the purpose of keeping the road to the mine clear of protestors goes beyond the scope of "preventative and defensive services" provided for in the Voluntary Principles, and should have been a matter for state law enforcement officials, acting in compliance with international law enforcement standards. In any event the use of rubber bullets, which are known to be capable of causing serious injury, in such circumstances does not meet the tests of necessity and proportionality set out in international law enforcement standards and would appear to be arbitrary and abusive use of force.

The company's head of security was arrested on 30 April 2013 at Guatemala City's airport as he attempted to leave the country, and charged in relation to the incident.⁶⁵ He was charged with "injuries" and "obstruction of justice" by the public prosecutor's office (Ministerio Publico). Charges of "attempted murder" and "attempting to influence government officials" were dropped for lack of evidence.⁶⁶ At the time of writing his trial was pending.

Protests followed the April 2013 use of tear gas and rubber bullets against protestors, resulting in more violence. In addition, a number of police officers were seized and held for 24 hours by protestors, and one police officer and one protestor were killed in unrelated violence in the community of Sabana Redonda.⁶⁷ One person was arrested in connection with the killing of the police officer and is awaiting trial.⁶⁸

Following the declaration of the state of emergency on 2 May 2013 some 3,500 soldiers and police officers were sent into the area and the homes of local anti-mining leaders were searched.⁶⁹ The Office of the UN High Commissioner for Human Rights in Guatemala reported that "[...] 26 people [had been] detained in San Rafael las Flores, in April, on charges of 'unlawful assembly' and attacks on public authorities, who were subsequently released due to lack of evidence".⁷⁰

After eight days the state of emergency was downgraded to a state of prevention which was terminated at the end of May 2013.

Following the incidents described above, in June 2013 Tahoe formally adopted the UN Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights. According to Tahoe, Minera San Rafael had implemented an initiative to benchmark its security procedures and protocols against the Voluntary Principles. In addition, Minera San Rafael hired a new security contractor, which is licensed under Guatemala's new security laws, and which has conducted comprehensive, formal human rights training for contract security personnel in accordance with the UN Guiding Principles.⁷¹



Oscar Morales, founding member of the Committee in Defence of Life and Peace in San Rafael Las Flores, Guatemala, overlooks the Laguna de Ayarza, a volcanic lake, that sits 2.5 Kilometers downstream from Tahoe Resources' El Escobal, silver mine. He says that other farmers and cattle ranchers like him are concerned that they do not know the full risks mining operations pose to water and the environment – and their livelihoods - over the long term.

THE CONSULTATION PROCESS FOR MINING IN GUATEMALA

One of the main concerns of those who protest against mining operations is the lack of adequate information and consultation about mine projects. The perception that companies and the government are not being transparent about potential negative impacts fuels public distrust and anger. The only recognised avenue for consultation with local and Indigenous communities on proposed mine projects in Guatemala is through the preparation of the Environmental Impact Assessment (EIA).

Under Guatemala's 1997 Mining Law companies seeking an exploitation licence must complete an EIA for review by the Ministry of Environment and Natural Resources (known by its acronym in Spanish, MARN). The 2007 Regulations on Environmental Evaluation, Control and Monitoring (*Reglamento de Evaluación, Control y Seguimiento Ambiental*),⁷² which govern the current EIA process, stipulate that local communities should be involved as early as possible in discussions about the environmental impact of a proposed project and that MARN is responsible for facilitating public participation. The regulations also specify that if Spanish is not the predominant language of the communities in the region of the proposed project, this should be considered when organising the public participation process.⁷³ However, beyond this there is little detailed guidance on the consultation process and there are a number of serious concerns with how it has operated in practice in relation to mining.

Amnesty International interviewed people living close to mine sites in the departments of San Marcos and Santa Rosa, and the municipalities of San Jose del Golfo/San Pedro Ayampuc who had attended meetings as part of the EIA public participation process. They stated that, in their view, the focus of these meetings was on promises of employment or infrastructure improvements, such as schools and clinics, which company representatives claimed mining would bring to the community. They expressed frustration that there was little discussion of potential negative impacts, even when community members raised these issues.⁷⁴

These concerns have been echoed in the findings of assessments done on some mine sites. For example, the 2005 assessment of the Marlin mine, carried out by the World Bank CAO (referred to earlier) found that the consultations took place in 2003, largely after the company completed the EIA. The CAO further noted:

“[p]ublic disclosures prepared by the company – including the [EIA] – were highly technical and did not at the time have sufficient information to allow for an informed view of the likely adverse impacts of the project.”⁷⁵

Five years later, in 2010, Goldcorp commissioned a human rights impact assessment of the Marlin mine carried out by consultants. The assessment noted that during the consultation the company:

“emphasized positive project impacts without identifying potential risks to communities from a range of predictable negative socioeconomic impacts, including in-migration, presence of non-local construction labour force, inflation, and an increase in social ills”⁷⁶

It went on to observe:

“[f]or stakeholders, consultation was an important issue, with more people expressing concerns about consultation than any other issue area. [...] The biggest concerns for local interviewees were the need to address negative impacts, that consultation had involved biased or misleading information [...]”⁷⁷

In 2011, the UN Special Rapporteur on the Rights of Indigenous peoples concluded that there had been no consultation in the case of the Marlin mine which conformed to applicable international standards such as ILO 169 and the UN Declaration on the Rights of Indigenous Peoples.⁷⁸ The Special Rapporteur specifically noted that the company had made efforts to distribute information, gain local support and guarantee participation “mostly in the area of social development projects initiated by the company supposedly as a way of sharing benefits” (emphasis added).⁷⁹

Marlin has since reported a number of significant improvements to its consultation process.

The failure to put in place mitigation measures to prevent environmental and social problems arising from mining is a major concern of all communities with whom Amnesty International spoke. If consultation processes do not provide clear information to potentially affected people this significantly undermines the possibility of either the State or the company developing meaningful and acceptable mitigation strategies.

Once an EIA is completed it is made public for 20 days at a MARN office. The EIA is almost invariably in Spanish. EIAs are, by their nature, largely technical documents. The 2007 Regulations on Environmental Evaluation, Control and Monitoring specify that MARN and the licence applicant will agree by what media notice is given to the public that an EIA has been submitted and is available for comment.⁸⁰ In practice this usually means publishing a notice in a newspaper.

In terms of offering affected people the opportunity to review the findings of the EIA and any proposed mitigation measures, the procedure described above is extremely limited. People interviewed by Amnesty International rarely knew when an EIA was published; many would be unable to read a technical document in Spanish. It is not surprising that, for example, in the cases of Marlin and of Santa Rosa respectively no comments or objections to either EIAs were received during the 20 day period.⁸¹

CASE 3: SAN JOSE DEL GOLFO AND SAN PEDRO AYAMPUC, DEPARTMENT OF GUATEMALA

In 2000, Canadian company Radius Gold Inc. staked a gold deposit 40 kilometres north-east of Guatemala City. The government of Guatemala granted the company's wholly-owned subsidiary, Exploraciones Mineras de Guatemala (Exmingua) an exploitation licence in November 2011.⁸² The licence covers some 20 square kilometres in the municipalities of San Pedro Ayampuc and San Jose del Golfo. San Pedro Ayampuc is predominantly an Indigenous Maya-Kakchikel community while San Jose del Golfo is predominantly ladino, or non-Indigenous. Radius Gold Inc. sold Exmingua to the US-based company Kappes, Cassidy & Associates in August 2012.⁸³

Community members interviewed by Amnesty International in June 2013 said they had not been consulted before the exploitation licence was awarded to the company, and they had concerns about the potential for environmental damage. They were aware that an environmental impact assessment had been carried out but said they only became aware of this after the EIA was published.⁸⁴

As part of their actions to protest the mine community members established a permanent presence at one of the mine entrances, blocking entry and preventing full access for heavy machinery to the mine site.⁸⁵ In May 2012, dozens of police trucks and hundreds of police officers escorted equipment to the mine site. The protestors occupying the mine entrance refused to let the equipment pass, demanding the government meet with them to discuss the situation. A standoff ensued, and eventually the police, along with the equipment, left.⁸⁶



Local leader Yolanda Oquelí shows the bullet scar where the bullet entered and is still lodged in her back after the June 13, 2012, attempt on her life.

THE SHOOTING OF YOLANDA OQUELÍ

On 13 June 2012, one of the protest leaders, Yolanda Oquelí, was shot and seriously injured by two unknown assailants. She was returning from her shift at the protest camp when two men on a motorbike cut across her path and fired at her with a pistol. She was hit by one bullet which lodged close to her liver. She survived the attack and went into hiding with her family.⁸⁷ Two-and-a-half months later the Inter-American Commission on Human Rights ordered the Guatemalan government to provide protection to Yolanda Oquelí and her family.⁸⁸ The Public Ministry opened an investigation, but to date no one has been brought to justice for the attack.⁸⁹

In June 2013, representatives of protestors met with the President and the Ministers for Energy & Mines, Environment & Natural Resources and the Interior. According to a subsequent press release issued by the Ministry of Energy & Mines, agreement was reached to jointly revise the EIA and evaluate the mitigation measures implemented by the company.⁹⁰ However, community representatives disputed the government's claim that specific agreements had been reached, stating that they had agreed to take proposals back to their communities for discussion.⁹¹ Following this difference of understanding of the outcomes of the June meeting, and despite some exchanges between the parties in July, August and September, the negotiations stalled.

In May 2014, the National Permanent System of Dialogue, a public institution which facilitates conflict resolution, invited the parties to resume negotiations. However, on 23 May, the authorities evicted the protestors from the mine entrance.⁹² The press and human rights organisations reported that approximately 23 protestors and 15 police officers were injured during the eviction.⁹³ The conduct of the eviction was criticised by the Office of the UN High Commissioner for Human Rights in Guatemala, which sent staff to observe. They noted that the high number of injuries "evidenced failings in the adequate implementation of protocols on the use of force in accordance with human rights, which should be corrected."⁹⁴

CASE 4: EL ESTOR, DEPARTMENT OF IZABAL

Most metals mining operations are relatively new; however, one operation examined by Amnesty International had a longer history, one which directly intersected with the internal armed conflict in Guatemala.

Since operations began in 1965, the mine at El Estor has been associated with disputes and violence.⁹⁵ In August of that year the Government of Guatemala granted Exmibal (Exploraciones y Explotaciones Mineras Izabal SA) a 40-year concession to operate a nickel mine site at El Estor, a predominantly Maya-Q'eqchi region, in the department of Izabal.⁹⁶ Exmibal was originally owned by INCO Ltd (80 per cent), a Canadian mining company, and the US-based Hanna Mining Company (20 per cent).⁹⁷ After renegotiations with the Guatemalan government in 1971, 30 per cent of Exmibal's stock was purchased by the Guatemalan government.⁹⁸

The UN-sponsored Commission for Historical Clarification frequently mentions El Estor in its report as somewhere where massacres, enforced disappearances, sexual violence and other human rights violations occurred during the conflict.⁹⁹ Specifically in regard to the mine site, the Commission found that Exmibal personnel and equipment had been used in committing human rights violations. The Commission concluded that: in May 1978, unidentified individuals aboard Exmibal vehicles shot and wounded two people; in June 1978, company employees, together with army personnel, had executed four people; and in 1981 police officers using Exmibal vehicles executed one person.¹⁰⁰

The mine ceased production in 1980 and lay dormant until 2004 when Exmibal was granted a new mining licence for the area. In the same year, the company was acquired by Canada-based Skye Resources and subsequently renamed Compañía Guatemalteca de Niquel (CGN). Skye Resources was acquired by HudBay Minerals Inc in 2008.¹⁰¹ In September 2011, CGN was acquired by Solway Investment Group Limited, which currently owns 98.2 per cent, with the Guatemalan government owning the remaining 1.8 per cent.¹⁰²

According to members of the Indigenous Maya-Q'eqchi community the heart of the dispute between the community and the companies is a disagreement over ownership of the land on which the mine is located. A number of Maya Q'eqchi families claim ownership of the land, which they consider to be their ancestral lands. The Indigenous community also asserts that CGN's claim to the land is illegitimate since it is based on titles awarded to it by the military government in 1965, at a time when local Indigenous people were being massacred and driven off their lands in the context of the internal armed conflict.¹⁰³

Since 2006 there have been incidents of violence and allegations of serious human rights violations linked to the mine and the efforts by Indigenous people to reclaim their traditional land.¹⁰⁴ Some of these cases are the subject of investigations in Guatemala and legal action in Canada (see box below). The question of ownership of the land and the rights of Indigenous peoples to the land has never been resolved.



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On September 27th, 2009, Adolfo Ich Chamán (pictured on the photograph), a respected indigenous Q'eqchi' Maya community leader and an outspoken critic of mining activities in his community, was hacked and shot to death witnesses say, by private security guards contracted to Compañía Guatemalteca de Niquel, a subsidiary at the time of HudBay Minerals. Angelica Choc, Ich Chamán's widow, has launched a legal case in Canadian courts (Choc v. HudBay).

LITIGATION IN CANADA

Members of the Maya-Q'eqchi community have brought three separate civil claims in a Canadian court against HudBay Minerals and its subsidiaries. In one case, brought in 2010, the widow of Adolfo Ich Chamán, a school teacher and anti-mining activist, claims that in 2009 security personnel employed by HudBay's subsidiary, CGN, shot and killed her husband during a confrontation with Maya-Q'eqchi villagers. In a separate claim brought in 2011, German Chub Choc claims he was shot and paralyzed during the same incident. In 2011, 11 Maya-Q'eqchi' women brought a claim that, in 2007, prior to HudBay's involvement, they were gang-raped by CGN security personnel and state security forces during the implementation of a court-sanctioned eviction.

HudBay brought a Motion to Strike, arguing that the cases should be dismissed without being heard on the grounds that a parent company (HudBay and Skye Resources) cannot be held legally responsible for the alleged actions of a subsidiary (CGN). That Motion was dismissed, HudBay did not appeal the ruling and the lawsuits are now being heard in full. HudBay has stated that: "Based on extensive internal investigations and eye witness reports, HudBay believes that the allegations in these matters are without merit and it is vigorously defending itself against them".¹⁰⁵ The cases are currently proceeding in Canada.

In Guatemala, CGN's former head of security is currently awaiting trial for the murder of Adolfo Ich Chamán and the grievous injury to German Chub Choc.¹⁰⁶



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German Chub Choc, who is seeking justice in the Ontario Superior Court of Canada, claims he was shot and paralyzed in 2009 by security personnel employed by CGN when it was a subsidiary of the Canadian company HudBay Minerals Inc.

Solway Investments acquired CGN in 2011, several years after the events described above occurred. The incidents of violence and the claims with regard to the land had been widely reported.¹⁰⁷ Amnesty International asked Solway Investments to comment on what due diligence they undertook, prior to acquiring the mine, to become aware of any issues surround claims to the land. Solway Investments stated that there was no evidence that the land was traditional land, but also stated that the company relied on the permits and other documentation they had been given.¹⁰⁸

The phenomenon of Indigenous peoples and rural communities being forced off their land to make way for mining is well known. As the clearance of land is frequently carried out by the State authorities it is not sufficient to rely on documents that originate with the State and companies should look at other publically-available sources of information.

THE FAILURE TO ADDRESS THE COMMUNITY TENSIONS

Each of the cases described above is complex, with numerous incidents occurring over several years. The accounts of community members and those of the government and companies involved are frequently at odds with each other. There is evidence that both the state authorities and protestors have, in some cases, acted unlawfully, and that mining companies have failed to adhere to international standards on business and human rights.

Two issues consistently arise in the conflict over mining: consultation and security operations. While there are features of the mining situation in Guatemala that are specific to the country and its history, consultation and the operation of security forces around mine sites are widely recognised as amongst the most prominent concerns of mine-affected communities in many countries where mining occurs, particularly when mining occurs in rural areas.

In a context where there are protests around mine operations governments have obligations to ensure that the policing of protests meets international human rights standards; this includes upholding the right to peaceful protest and ensuring that, if the use of force becomes necessary – for example, if protests turn violent – security forces abide by the international standards (see above).

In a context, such as Guatemala, where there are persistent protests over mining, the government must consider how to address the underlying problems. Failure to do so allows a situation to persist where the rights of protestors and police officers are put at risk.

Mining companies also have responsibilities when operating in post-conflict contexts and when security forces – public or private – are deployed to safeguard mining. The parameters of business responsibility for human rights has been developed in the UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in 2011. A core concept articulated in the UNGPs is that of human rights due diligence – a process whereby companies must actively, and in good faith, seek to “identify, prevent, mitigate and account for how they address their impacts on human rights”.¹⁰⁹

The UN Guiding Principles on Business and Human Rights are not limited to the impact of a company once it has begun operations; they also require companies to consider the context into which they are investing. The way companies interact with that context is an important part of any corporate human rights due diligence. The Guiding Principles state that:

“The purpose [of human rights due diligence] is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.

“In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.”¹¹⁰

The Guiding Principles go on to note:

“To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement.”¹¹¹

In addition to the UN Guiding Principles on Business and Human Rights, the Voluntary Principles on Security and Human Rights are a due diligence framework for extractive companies (oil, gas and mining) that engage with public and private security providers. The Voluntary Principles state:

“The ability to assess accurately risks present in a Company’s operating environment is critical to the security of personnel, local communities and assets; the success of the Company’s short and long-term operations; and to the promotion and protection of human rights.”¹¹²

They go on to call on companies to carry out conflict analysis as part of their risk assessment, providing the following guidance:

“Identification of and understanding the root causes and nature of local conflicts, as well as the level of adherence to human rights and international humanitarian law standards by key actors, can be instructive for the development of strategies for managing relations between the Company, local communities, Company employees and their unions, and host governments.”¹¹³

While acknowledging the challenges faced by mining companies in Guatemala, including, at times, threats and violence by protestors, the cases described in this Chapter raise serious questions about the way companies engage with communities and respond to protests. While companies claim they have carried out consultations, independent assessments – where they exist – have noted serious flaws in the processes. This includes assessments by the World Bank agency, the CAO, and the UN Special Rapporteur on the rights of indigenous peoples. In the case of the Exmingua operation in San Pedro Ayampuc and San Jose del Golfo, the government appears to have conceded that the consultation process for the EIA was flawed. Of particular concern are the allegations about serious criminal acts committed by private mine security personnel. Two former heads of security for mine companies are currently facing criminal charges connected to the use of force.

4. STATE OBLIGATIONS REGARDING INFORMATION, PARTICIPATION AND CONSULTATION

Extractive operations and other large scale development projects can affect the human rights of the people living in, close to, or downstream of the operations sites. Rights that may be affected include rights to housing, food, health, and water. Communities that are already impoverished, marginalised, and unable to influence decision-making processes due to discrimination can be particularly at risk of negative impacts. In view of these risks, during the last decades international standards have been established with the aim of ensuring communities are fully informed and consulted when such projects are proposed and that people can participate in decisions that affect their human rights. For Indigenous Peoples, special safeguards have been articulated in international law, including the United Nations Declaration on the Rights of Indigenous Peoples, in order to take into account the negative, even devastating, consequences of extractive industries that Indigenous peoples have experienced all over the world,¹¹⁴ and their history of discrimination and marginalisation.

THE RIGHT TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS

The right to participation is firmly established in international human rights law. For example, the International Covenant on Civil and Political Rights (ICCPR), to which Guatemala is party, recognizes under article 25 the right of citizens to take part in the conduct of public affairs, directly or through their freely chosen representatives, without discrimination.¹¹⁵ The UN Human Rights Committee, which monitors the implementation of the ICCPR, has further elaborated the concept by affirming that “[t]he conduct of public affairs, [...], is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”¹¹⁶ In addition, Article 27 of the ICCPR protects the rights of ethnic, religious or linguistic minorities and, as interpreted by the UN Human Rights Committee, requires “measures to ensure the effective participation of members of minority communities in decisions that affect them”.¹¹⁷

To ensure non-discrimination of the most vulnerable in society, further standards have been developed so that all people are able to take part in the conduct of public affairs. The International Convention on the Elimination of All Forms of Discrimination against Women, for example, obliges states to “take all appropriate measures to eliminate discrimination

against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to participate in the elaboration and implementation of development planning at all levels".¹¹⁸ Furthermore, the Committee on the Elimination of Discrimination against Women has urged states to identify and overcome barriers to women's full participation in the formulation of government policy.¹¹⁹

The UN Committee on Economic, Social and Cultural Rights has also affirmed in relation to the right to health that "the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations".¹²⁰ International human rights standards increasingly demand that States include consultation with and participation of those potentially most affected, giving special provisions to include the voices of those traditionally most marginalized from decision-making, as an integral part of the large-scale development project proposed. For example, the UN Human Rights Committee has identified the adequacy of consultation, and its outcomes, as crucial tests of whether governments should proceed with a decision when the cultural rights of Indigenous peoples and minorities are at stake:

[T]he acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.¹²¹

The UN Declaration on the Rights of Indigenous Peoples states 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 (Article 18)."

In order for any consultation process to adequately protect human rights it is essential that the state resource the process adequately and that the process is carried out in good faith: information on proposed initiatives or developments should be shared in a timely manner and must be clear and accessible; and communities have to be free from being harassed or intimidated into agreeing or disagreeing with a particular project. Project proponents must be prepared to modify their plans to avoid harm and, where necessary in order to protect human rights, delay or even abandon such plans.

The UN Special Rapporteur on the Rights of Indigenous Peoples has acknowledged the importance of consultation mechanisms in allowing "prior assessment of all potential impacts of the proposed activity, including whether and to what extent their substantive human rights and interests may be affected" and whether any negative effects can be avoided or appropriately mitigated. The Special rapporteur notes, however, that consultation is not an end in itself and ideally any decision-making process should enable Indigenous peoples "to set their own priorities and strategies for development and advance the enjoyment of their human rights."¹²²

FREE, PRIOR AND INFORMED CONSENT

In those cases where projects may have an impact on Indigenous peoples' lives and livelihoods, international human rights standards require an even more rigorous standard of protection for human rights. As a general rule, extractive activities should not take place within the territories of Indigenous peoples without their free, prior and informed consent.¹²³ According to international human rights standards, Indigenous peoples have the right to use and benefit from their traditional or customary lands and to be full participants in all decisions concerning how these lands, territories and resources are developed.

Free, Prior and Informed Consent, (FPIC) is recognized in the UN Declaration on the Rights of Indigenous Peoples. In addition, a number of rulings of the Inter-American Court of Human Rights, and Concluding Observations and General Comments of various UN treaty monitoring bodies explain how the treaties must be interpreted and implemented.¹²⁴

In the Americas, the Inter-American Court on Human Rights ruled in the *Saramaka People v. Suriname* case that when a proposed activity is expected to have a significant impact, the state has a duty not only to consult but to proceed only with Indigenous people's free, prior and informed consent, granted in accordance with their customs and traditions.¹²⁵ In the *Saramaka* case, the Court argued that large scale development projects have the clear potential to affect the integrity of Indigenous peoples' lands and resources and therefore require free, prior and informed consent.

However, States (and companies) should not engage with Indigenous communities with the sole expectation of obtaining consent to the activity as they originally proposed it, without any modifications. States and companies should approach the process in good faith, and be willing to take on board concerns of the community and make necessary compromises. An outcome in which consent is withheld cannot be excluded, and in the case of extractive activities, which will have a significant impact on the Indigenous peoples' rights, the State should accept the withholding of consent as final.¹²⁶

The process for obtaining free, prior and informed consent will need to be agreed in advance with the community concerned. It will need to allow sufficient time for the community's consensus-building and decision-making processes, and should be iterative, allowing for the community to consult internally, ask for clarifications, then return to their deliberations, possibly on a repeated basis.

Information about the results of social and environmental impact assessments, in particular the extent of impacts on the community's enjoyment of land and other rights, risk analysis and contingency plans, alternative proposals, time-scales, the involvement of employees from outside the community and how this may impact on the community, and proposals for sharing of revenues with the community, must be provided in a form that the community can absorb, allowing for varying levels of illiteracy where appropriate. Interpreters, identified in consultation with the community, may be needed. It is not acceptable to engage exclusively with a limited number of community members, even if these community members are their chosen representatives; instead the meaningful participation of all sectors of the community, including women, youth, the elderly and other sectors, must be guaranteed.¹²⁷

The link between FPIC and the rights of Indigenous peoples to own, use, control and benefit from their traditional lands also underscores how crucial the recognition of the latter is to the fulfilment of a broader range of human rights for Indigenous communities. In the *Yakye Axa* case, the Inter-American Court of Human Rights stated that “the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.”¹²⁸ In the *Saramaka* case, the Court has also said that “due to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory... is necessary to guarantee their very survival.”¹²⁹

The UN Committee on the Elimination of Racial Discrimination (CERD) released a report on Guatemala on March 16, 2010 in which it evaluated Guatemala’s implementation of the *Convention on the Elimination of All Forms of Racial Discrimination*. The Committee expressed concern that Guatemala had not implemented the UN Declaration on the Rights of Indigenous Peoples by instituting provisions for free, prior and informed consent. Further, it called on the State to establish consultation processes to bring it in line with its obligations under ILO 169¹³⁰ and to adopt a consultation law to enshrine the right of Indigenous peoples to free, prior and informed consent.¹³¹



Detail of corn being carried during celebrations at the ancient Mayan site of Zaculeu to mark the end of the Mayan Era known as 13 Baktun. Zaculeu, Huehuetenango, Guatemala. December 21, 2012.

5. MULTINATIONAL CORPORATIONS AND HOME STATE OBLIGATIONS

The concepts of the “home” state and the “host” state are used frequently in discussions on business and human rights. The **home state** is the state where a company is incorporated or registered, where it has its legal address (domicile) or registered main office. In law, this place is considered the centre of a corporation’s affairs. The **host state** is any state, other than the home state, in which a multinational company operates – directly or through a subsidiary or other business relationship.

In recent years there has been considerable attention given to the responsibility of the home States of multinational corporations in relation to the human rights impact of those companies’ operations abroad. This attention reflects a growing concern over the way in which multinational companies’ have been able to benefit from globalization – operating across State borders with ease – but, all too often, evading accountability when their operations result in environmental damage and human rights abuses.

A particularly worrying dimension of the problem is the fact that corporate groups headquartered in developed countries but operating in developing countries – directly or through subsidiaries – have been shown to operate to standards that would be unacceptable in their home State.¹³² There are two main reasons for this; in some developing countries the regulatory framework is weak and there are not sufficient resources to enforce laws and regulations, whilst in other cases the company, as a relatively powerful economic actor, has undue influence in the country. The phenomenon of parent companies benefiting from human rights abuses associated with the operations of their subsidiaries abroad has led to calls for home States to regulate parent companies, to require them to respect human rights throughout their global operations.

While States have clear responsibilities to respect and protect human rights within their own territories, there is a growing legal consensus that, in certain circumstances, these responsibilities also extend extraterritorially. Article 55 of the UN Charter requires Member States to promote the full range of human rights, including “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹³³ All UN Member States are bound by an obligation in Article 56 of the UN Charter “to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”¹³⁴ These UN Charter provisions reflect an obligation of all States to co-operate in the protection and fulfilment of human rights within and beyond their borders.

UN human rights treaty bodies have further developed the understanding of extraterritorial legal obligations. Based on these developments, States have an obligation to regulate the conduct of non-State actors (such as companies) that are under their control in order to prevent them from causing or contributing to human rights abuses. Regarding corporate actors in particular, international human rights law has been increasingly interpreted as requiring States in whose territory or jurisdiction corporations are domiciled or headquartered to take measures to ensure that these corporations do not cause or contribute to human rights abuses abroad.¹³⁵

The Committee on Economic, Social and Cultural Rights (CESCR) – the expert body that monitors adherence to the International Covenant on Economic, Social and Cultural Rights – has, for example, highlighted that in order to comply with their international obligations in relation to the right to health, States parties: “have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries if they are able to influence these third parties by way of legal or political means...”.¹³⁶ Similarly, in relation to the rights to water and social security, CESCR has stated that steps should be taken by States parties to prevent their citizens and companies from violating these rights in other countries, and that: “[w]here States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken...”.¹³⁷

A number of recent Concluding Observations by the UN Committee on the Elimination of Racial Discrimination (CERD), the expert body that monitors the UN Convention on the Elimination of All Forms of Racial Discrimination, also call on home States to secure corporate accountability for abuses committed by companies (or their subsidiaries) abroad. CERD noted that the activities of certain transnational corporations registered in Canada, the US, Australia, Norway and the UK were having adverse impacts on the human rights of Indigenous peoples in other countries, and encouraged these States to take legislative or administrative measures to prevent these impacts and to explore ways of holding the corporations to account.

The responsibility of the home State, or a State other than the one in which human rights abuses occur, does not diminish the legal responsibility of the host State. In a statement specifically addressing home State obligations, CESCR says that States in whose jurisdiction companies have their main seat should take measures to prevent human rights abuses abroad “without ... diminishing the obligations of the host States under the Covenant.”¹³⁸ A home State’s obligations are parallel and complementary to those of the host State and respond to different rationales.

International legal experts have also expanded on the nature of extraterritorial obligations. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted by a group of experts on international law and drawn from international law, aim to clarify the content of extraterritorial state obligations to realize economic, social and cultural rights.¹³⁹ Principle 24 of the Maastricht Principles formulates a general “obligation to regulate” in the following terms:

“All States must take necessary measures to ensure that non-State actors which they are in a position to regulate... such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures.”¹⁴⁰

Referring to the obligations of home States in particular, Principle 25 of the Maastricht Principles notes that States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means... [where] a corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned.¹⁴¹

CANADA AND CORPORATE ACCOUNTABILITY

According to the government of Canada, more than three-quarters of all minerals exploration and mining companies in the world are headquartered in Canada.¹⁴² A 2009 government report identified 1,293 Canadian-registered mining companies involved in operations in more than 100 countries around the world.¹⁴³ The government of Canada actively promotes the involvement of Canadian companies in mining and extractive projects abroad through financial and diplomatic assistance and through the negotiation of bilateral and multilateral trade agreements. The government's actions often open the doors for Canadian companies to be involved in exploration and extraction activities in areas not previously subject to intensive development, including the lands and territories of Indigenous peoples.¹⁴⁴

In promoting the involvement of Canadian corporations in global resource extraction activities, the government of Canada continues to rely almost exclusively on the national laws, regulations and enforcement mechanisms of the host countries to ensure that Canadian investment abroad does not contribute to human rights abuses - even when there is reason to believe that those laws are inadequate or are not enforced.¹⁴⁵

There has been mounting concern over the last several years that Canada does not have any adequate mechanisms in place to regulate Canadian mining companies operating abroad, even when those companies are receiving State support.¹⁴⁶ Human rights groups, including Amnesty International, have published reports that implicate Canadian mining companies in human rights abuses.¹⁴⁷ In 2010, in response to a lengthy national roundtable process aimed at understanding the extent of the impact of Canadian overseas mining operations on human rights, the Canadian government released its voluntary corporate social responsibility policy, *Building the Canadian Advantage: A Corporate Social Responsibility Policy for the Canadian International Extractive Sector*¹⁴⁸. Non-government organizations (NGOs) inside and outside Canada expressed disappointment that the policy falls far short of the due diligence framework required to ensure Canadian companies respect human rights in their overseas operations.

Concern about Canada's lack of effective action to regulate Canadian companies operating abroad – particularly mining companies – has been reflected in statements by UN human rights bodies. For example, in 2007 and again in 2012, the UN Committee on the Elimination of Racial Discrimination (CERD) recommended that the government of Canada “take appropriate legislative or administrative measures” to prevent Canadian corporations “carrying out acts which negatively impact on the enjoyment of rights of Indigenous peoples in territories outside Canada” and to hold corporations accountable for such abuses.¹⁴⁹ In 2012 the Committee on the Rights of the Child recommended that Canada establish and implement regulations to ensure that Canadian companies (in particular oil, gas and mining industries) operating in territories outside Canada do not negatively impact on human rights in particular those of children. It furthermore called on Canada to ensure “monitoring of implementation” and “appropriate sanctions and remedies” when violations occur.¹⁵⁰

In 2013, the Canadian government published its Global Markets Action Plan and associated policy of economic diplomacy, which directs embassy staff around the world to prioritize Canada's economic interests above other foreign policy considerations.¹⁵¹ Canada has also expanded and strengthened its Trade Commissioner Service and now has 400 Trade Commissioners in 60 countries. Their role is to assist Canadian companies in accessing markets and to engage in advocacy in support of Canadian corporate interests.¹⁵² There is no reference to Canada's human rights obligations or companies' human rights responsibilities in the Global Markets Action Plan. Commenting on the plan Canada's Minister for International Trade, Ed Fast, said:

"By concentrating on core objectives within our priority markets, the Global Markets Action Plan will also entrench the concept of "economic diplomacy" as the driving force behind the Government of Canada's trade promotion activities throughout its international diplomatic network. This new focus represents a sea change in the way Canada's diplomatic assets are deployed around the world. In so doing, we are ensuring that Canada's long-term economic success becomes one of our priority foreign policy objectives".¹⁵³

Canada – like many other States – has shown itself willing to take action with extraterritorial effect to promote and protect corporate interests. The failure to take action – in line with the requirements and recommendations of UN human rights treaty bodies – to effectively regulate Canadian companies operating abroad is enabling these companies to benefit from human rights abuses occurring outside of Canada.



Community members look down on Marlin Mine from the surrounding hillside. San Miguel Ixtahuacan, Guatemala.

6. CONCLUSION AND RECOMMENDATIONS

Mining in Guatemala is marked by dispute and conflict. The reasons a particular community may have for opposing a proposed, or already operating, mine site, may be varied. Communities may be concerned about the potential environmental pollution, mostly, but not exclusively, water contamination. They may also be worried about the social upheaval that mining brings to local communities. Other local communities remain unconvinced that the benefits that mining may bring outweigh the long term harm it may cause. In some Indigenous communities, industrial development may be at odds with Mayan world views, particularly with regard to a community's spiritual connection to the land or traditional practices.

One consistent issue raised by both Indigenous and non-Indigenous communities located close to mine sites is the lack of opportunities for consultation prior to the awarding of mining licences, in order to be fully informed and participate in the mitigating strategies that the state must put in place to protect their human rights.

In this context, Amnesty International welcomes the current government's proposal of a two-year moratorium on granting new mining licences.

However, it is paramount that any new legislation ensures that the Guatemalan state fulfils its human rights responsibilities. It is crucial that sufficient human and financial resources are incorporated into this process so that those communities possibly affected by these large-scale development projects are given adequate space and time to participate and are consulted respecting the following principals:

- a. All dialogue and decision-making processes must take place without coercion, manipulation, threat, fear of reprisal, corruption or unequal bargaining power;
- b. All dialogue and agreements must take place before any mining activity begins and the communities must be given sufficient time to engage;
- c. Communities must be provided with full and objective information, in a clear manner and disclosed in a culturally appropriate way, and they must have the possibility of obtaining independent advice.

These principles must underpin the forthcoming mining regulations currently under review, so that:

- The proposed laws, policies and measures that affect communities undergo a process of consultation with those communities affected before any decision is being made.
- Transparent, accessible, timely and culturally appropriate mechanisms and procedures for carrying out consultations with affected communities are established in good faith, including a mechanism for monitoring enforcement and reporting grievances.
- In consultation with Indigenous peoples and in line with international human rights standards, transparent, accessible, timely and culturally appropriate procedures are established to guarantee their right to free prior and informed consent. Mechanisms and procedures should be consistent with Indigenous decision-making processes, in accordance with their values and traditions.
- Sufficient resources are allocated to effectively carry out consultations and to ensure that members of the community are not precluded from taking part in the process due to distance, literacy in a language, or any other circumstance.

AMNESTY INTERNATIONAL'S RECOMMENDATIONS TO HOME STATE GOVERNMENTS OF COMPANIES DOING BUSINESS IN GUATEMALA

- Establish and implement an effective regulatory framework for holding companies accountable for the human rights impact of their activities wherever they operate.
- Require companies to put in place due diligence processes to ensure respect for human rights based on international human rights standards, including the UN Declaration on the Rights of Indigenous peoples and other standards for the protection of Indigenous peoples' human rights, and to disclose those due diligence processes in a public report.

RECOMMENDATIONS TO THE GOVERNMENT OF CANADA

- Enact legislation that would establish mandatory corporate accountability and reporting standards for Canadian extractive companies operating abroad.
- Provide foreign victims of human rights violations involving Canadian companies operating overseas the opportunity to seek remedy in Canada, through legislated access to Canadian courts.
- Establish an extractives sector ombudsperson with the power to investigate complaints about Canadian overseas mining operations, publicly report findings and recommend remedy including withdrawal of financial or political support to companies found in violation of human rights.

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¹²⁶ The UN Special Rapporteur on Indigenous Peoples cautions that if Indigenous communities have already engaged in a process of consultation with the State and have clearly rejected a proposed extractives project, they should not be pressured by the State or companies into further consultation processes. If the State has engaged in good-faith consultations with Indigenous Peoples at the outset of a proposed project, and the Indigenous rights-holders have clearly stated their opposition to the proposed project, the State shall be considered to have discharged its duty to seek consent. The Special Rapporteur suggests that, “The question then becomes what consequences for decisions about the project follow from the Indigenous opposition and withholding of consent” Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *Extractive Industries and Indigenous Peoples* (A/HRC/24/41) [paras 24, 64, 65 available at <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf> [accessed 5 May 2014]

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