Loyola of Los Angeles International and Comparative Law Review

Volume 44 | Number 2 Article 2

Fall 9-23-2021

A Cielo Abierto: Constellations for Extraterritorial Multinational Corporate Accountability for Environmental Damage in Human Rights Law

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A Cielo Abierto: Constellations for Extraterritorial Multinational Corporate Accountability for Environmental Damage in Human Rights Law

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Abstract: Human rights abuses resulting from Canadian mining operations in Latin America have increasingly surfaced, and new, bold paths of accountability are being forged. However, this is not the end. Few regulations exist for mine closure, a process that itself can leave devastation in the communities affected. In this Comment, I ground my analysis in the facts and history of the Marlin Mine in western Guatemala. I set forth the structural barriers to justice posed by multinational corporations with operations abroad, and discuss two possible routes for accountability in relation to mine closure. First, within the universal human rights system, the International Covenant on Economic, Social, and Cultural Rights

offers some hope through the expansion of its extraterritorial application, particularly in relation to third parties. Second, I explore possibilities within the Inter-American human rights system, including progress in terms of environmental rights and the extraterritorial application of human rights. I conclude with a reflection on the appropriateness of human rights law as a mechanism of accountability for these abuses.

I. INTRODUCTION

Open pit mining, as the name suggests, can be environmentally devastating. Its name in Spanish, however, tells the story from a different perspective: *la minería a cielo abierto,* which loosely translates to "open sky mining."[1] In this paper, I trace new possibilities within international human rights law for holding multinational corporations (MNCs) accountable for environmental damage abroad, a goal which has been elusive within the human rights regime.[2] To be clear, I do not argue that the available human rights protection mechanisms are sufficient – an open pit mine is an open pit mine whether it faces the stars or not. Rather, I outline developments that, when strung together, indicate an opening for the kind of accountability that has thus far been nearly impossible to secure. Whether these developments will actually lead to accountability, despite the structural barriers in place preventing this kind of justice, remains an open question.

To remove this analysis from the realm of the abstract, I anchor my discussion in the closure of the Marlin Mine in Guatemala. The Marlin Mine was a gold mine operated by a wholly-owned subsidiary of Goldcorp Inc., a Canadian company, which uses a combination of open pit and underground mining techniques.[3] It closed in 2017 and left a legacy of

* J.D., UCLA School of Law. My gratitude to Charis Kamphuis for the unwavering encouragement, and all my Justice and Corporate Accountability Project colleagues for their valuable feedback. Sincere thanks to the editors of Loyola of Los Angeles International and Comparative Law Review for providing thoughtful edits and support.

1. Similarly, rather than lie on your back, in Spanish you lie *boca arriba*, or mouth up. In both instances you find yourself in a vulnerable position; in the second, however, you might have something to say about it.

2. *See*, *e.g.*, Anna Grear & Burns H. Weston, *The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape*, 15 HUM. RTS. L. REV. 21, 25-26, 32 (2015).

3. ON COMMON GROUND CONSULTANTS INC., HUMAN RIGHTS ASSESSMENT OF GOLDCORP'S MARLIN MINE 4, 9 (2010), https://www.goldcorpoutofguatemala.files.wordpress.com/2010/07/ocg_hra_exec_summary.pdf.

ongoing environmental and social damage.[4] Since human rights law focuses, naturally, on humans, my analysis folds environmental damage into the framework of economic, social, and cultural rights.[5]

In Part II, I set forth the structural barriers to justice posed by MNCs with operations abroad. In Part III, I review the facts and history of the Marlin Mine, specifically focusing on the interconnectedness of environmental, economic, social, and cultural harms related to closure. With this foundation, in Part IV I discuss the possibilities for accountability within a universal human rights system through the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the expansion of its extraterritorial application, particularly in relation to third parties. Part V explores possibilities within the Inter-American human rights system, including progress in terms of environmental rights and the extraterritorial application of human rights. I conclude with a reflection on the appropriateness of human rights law as an accountability mechanism for these abuses.

II. THEORETICAL BACKGROUND

It is notoriously difficult to hold MNCs accountable for abuses committed outside their country of origin. Although this paper will not focus on these structural barriers, it is important to describe this underlying framework in order to assess whether certain legal developments have the capacity to promote justice and disrupt these structural barriers to accountability.

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4. BUS. FOR SOC. RESP., MARLIN MINE AT CLOSURE: A REVIEW OF GOLDCORP COMMITMENTS TO THE 2010 HUMAN RIGHTS ASSESSMENT 84 (2017); Frente de Defensa San Miguelense (FREDEMI, The Front in Defense of San Miguel Ixtahuacán), *Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises Concerning: The Operations of Goldcorp Inc. at the Marlin Mine in the Indigenous Community of San Miguel Ixtahuacán, Guatemala*, CTR. FOR INT'L ENV'T L. 10-12 (Dec. 9, 2009), https://www.ciel.org/Publications/FREDEMI_SpecificInstanceComplaint_December%202009.pdf (outlining damage including, among others, skin abnormalities in children, contaminated water, dried up springs, broken homes, bridges and roads, and dead cattle). Goldcorp's understanding of the closure was, predictably, different: "While Goldcorp and Montana have, in general, made great strides in implementing the recommendations proposed by OCG [ON COMMON GROUND CONSULTANTS INC., *supra* note 3], gaps remain. Some cannot be fulfilled, given that the mine's closure is underway and opportunities for action are now limited."

5. This relationship is particularly important in the context of mine closure. UYANGA GANKHUYAG & FABRICE GREGOIRE, MANAGING MINING FOR SUSTAINABLE DEVELOPMENT: A SOURCEBOOK 17 (Andy Quan ed., 2018) ("Since mining often takes place in peripheral, less developed regions and locations, the socio-economic impact of mine closure can heavily impact local communities"); Vlado Vivoda, Deanna Kemp & John Owen, *Regulating the Social Aspects of Mine Closure in Three Australian States*, 37 J. ENERGY & NAT. RES. L. 2-3 (2019).

The development of the modern corporation in the U.S. happened, not coincidentally, alongside the expansion of the public sphere after the Civil War.[6] That is, just as the enslavement of Black people came to a legal end, the private sphere expanded in order to continue to exclude newly freed Black communities from means of accumulating capital.[7] This interpretation aligns with contemporary understandings of the moment; for example, W.E.B. Du Bois' description of the post-Civil War amendments period as "a brief moment in the sun" for Black Americans who "then moved back again toward slavery".[8] At the same time, mechanisms were being developed to undo paths for inclusion, such as the civil rights cases' gutting of the Civil War amendments.[9] In Canada, a similar movement toward the consolidation of corporate power was taking place.[10] Considering that many white Canadians feared an influx of Black Americans into Canada as a result of the Civil War,[11] while harboring explicitly racist attitudes towards the Black Canadian community,[12] the U.S. analysis of corporate history is relevant to Canada. Understanding the corporation as a means of entrenching existing power relations helps uncover at a theoretical level why corporate accountability is so difficult.

To add another level to this structural analysis, international law itself can pose a barrier to justice. I focus on international law here because it is the primary justice mechanism for abuses conducted outside of an

6. *See* Amanda Werner, *Corporations Are (White) People: How Corporate Privilege Reifies Whiteness as Property*, 31 HARV. J. RACIAL & ETHNIC JUST. 129, 134-35 (2015); ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS xv (2018) ("At the same time the [Supreme Court] was upholding Jim Crow laws . . . the justices were invalidating minimum-wage laws, curtailing collective bargaining efforts, voiding manufacturing restrictions . . . . The Fourteenth Amendment, adopted to shield the former slaves from discrimination, had been transformed into a sword used by corporations to strike at unwanted regulation").

7. Werner, *supra* note 6, at 135 ("Because the power to exclude is so central to the white identity, when the Civil War amendments forced whites to share the public space, they responded by situating many of their interests in the private sphere and erecting the arbitrary barrier of state action to keep blacks out").

8. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880 30 (Free Press, 1st ed. 1998).

9. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

10. HISTORICAL ATLAS OF CANADA: VOLUME III: ADDRESSING THE TWENTIETH CENTURY 1891-1961, at 13-14 (Donald Kerr & Deryck W. Holdsworth eds., 1990).

11. *See* ROBIN W. WINKS, BLACKS IN CANADA: A HISTORY 288-92 (1997). A second wave of fear arose at the turn of the century when Canadians realized that many of the newcomers and their children would likely remain in Canada permanently, rather than return during Reconstruction as they had previously assumed. *Id*. at 289-92.

12. *See*, *e.g*., Matthew Furrow, *Samuel Gridley Howe, the Black Population of Canada West, and the Racial Ideology of the "Blueprint for Radical Reconstruction*," 97 J. AM. HIST. 344, 356 (2010); GREG MARQUIS, ARMAGEDDON'S SHADOW: THE CIVIL WAR AND CANADA'S MARITIME PROVINCES 59-84 (1998).

MNC's country of origin.[13] But international law is not neutral: "it was only because of colonialism that international law became universal; and the dynamic of difference, the civilising mission, that produced this result, continues into the present."[14] For example, the law's characterization of original inhabitants as "inferior" legitimized conquest; at the same time, however, in many cases these "inferior" individuals were nonetheless able to enter treaties handing territories over to Europeans.[15] Ultimately, much of international law was developed to serve colonial interests.[16]

This process did not end with decolonization. Decolonization simply meant that colonialism was replaced by neocolonialism.[17] In other words, a blanket was thrown over the structural inequality that was a direct result of colonialism, effectively hushing any protest that the cessation of colonialism, and the grant of "rights" presumed to accompany it, did not necessarily dismantle the systems creating inequality. A similar hushing of inequality was the basis of undermining the Civil Rights amendments in the U.S. context.[18]

Pulling these two dimensions together, B.S. Chimini notes that "a whole host of international laws seek to free transnational capital of spatial and temporal constraints."[19] Chimini discusses, for example, the

13. Space has certainly opened (and closed, in the U.S. context) for domestic remedies. *See, e.g.*, Brian Sableman, Note, *Ending Alien Tort Statute Exceptionalism: Corporate Liability in the Wake of Jesner v. Arab Bank and Implications for U.S. Private Military Contractors*, 63 ST. LOUIS U. L.J. 349, 364 (2019). For a more hopeful future on domestic remedies in the Canadian context, see Nevsun Resources Ltd. v. Araya [2020] 5 S.C.R (Can.), also discussed below.

14. Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 742 (2006).

15. *Id*. at 745.

16. *See* James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 *passim* (2011) (giving an overview of scholars exploring this connection extensively).

17. Anghie, *supra* note 14, at 749; B. S. Chimini, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3, 14 (2006) ("Poor and rich states are to be treated alike in the new century and the principle of special and differential treatment is to be slowly but surely discarded").

18. The U.S. Supreme Court stated just 15 years after the passage of the Civil Rights amendments, "[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws." The Civil Rights Cases, 109 U.S. 3, 25 (1883). This false baseline continues to be a tool of dismantling civil rights. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978) ("The clock of our liberties, however, cannot be turned back to 1868 . . . . It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others").

19. Chimini, *supra* note 17, at 9 n.25.

"internationalization of property rights" for the benefit of MNC operations,[20] the jurisdictional limits of international law,[21] the increased influence of MNCs in developing international law,[22] and increased MNC funding for the United Nations.[23] The interplay between neocolonialism and corporate exceptionalism is deeply relevant to the history of the Americas.[24]

This paper focuses on the potential of international human rights law to address environmental abuses through the lens of economic, social, and cultural rights. Human rights law has been criticized for simply maintaining the status quo, for reasons related to the development of international law outlined above.[25] While this is a valid critique, I, perhaps optimistically, trace recent developments in human rights that may disrupt this stagnation.[26] Concretely, I use the closure of the Marlin Mine in Western Guatemala as an example of ongoing injustice to argue that changing human rights norms indicate Canada can no longer hide under the aforementioned blanket, and to underscore the urgency of interpreting these legal developments in this way.

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20. *Id*. at 8.

21. *Id*. at 12.

22. *Id*. at 13.

23. *Id*. at 14.

24. The extraction of free labor from enslaved Africans in the U.S. and the Americas more broadly was an essential piece of the colonial logic that is the foundation of racial capitalism. *See generally* CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (U. of N. Carolina Press 2d ed., 2000) (1983).

25. Chimini himself criticizes the way human rights law centers property rights to the benefit of MNCs and to the detriment of Third World peoples. Chimini, *supra* note 17, at 12. *See also* Tshepo Madlingozi, *Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution*, 28 STELLENBOSCH L. REV. 123, 136 (2017) (Human rights "cannot dislodge white supremacy, institutional racism and structural exclusion and invisibility"); Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 58 (2019) ("Naming the challenge as human rights racism aims to illuminate the depth of the problem and to reveal the ways that international human rights law is not racially neutral"). This is by no means a new critique; for example, practitioners and scholars of liberation theology in the last century have denounced the Western vision of human rights, which focuses excessively on the individual and obscures the collective harms that imperial and neo-imperial relations have imposed on the Third World. PHILLIP BERRYMAN, LIBERATION THEOLOGY: ESSENTIAL FACTS ABOUT THE REVOLUTIONARY MOVEMENT IN LATIN AMERICA AND BEYOND 115-18 (Bert B. Lockwood, Jr. ed., 1987). On individualism versus collectivism, see also MAKAU MUTUA, HUMAN RIGHTS A POLITICAL AND CULTURAL CRITIQUE 71 (2002).

26. "Can anything be done to redeem the human rights corpus, as well as its movement and discourse? I think so . . . The current corpus is largely a product of the West . . . . It is only from a healthy intercourse of different types of knowledge that a new human rights project can emerge." MAKAU MUTUA, HUMAN RIGHTS STANDARDS: HEGEMONY, LAW, AND POLITICS viii (2016).

III. CASE STUDY: THE MARLIN MINE

The Marlin Mine is a gold mine located in western Guatemala, in the Department of San Marcos, on the territory of the Maya Sipacapa community in Sipacapa and the Maya Mam community in San Miguel Ixtahuacán.[27] Glamis Gold, a Canadian company, through its wholly-owned subsidiary, Montana Exploradora, developed the mine.[28] In 2006, Glamis Gold merged with another Canadian company, Goldcorp Inc.[29] Human rights violations pre-dated the merger and continued afterwards.[30] The close connection between environmental damage and other human rights violations are notable in the story of Marlin.

Although this paper focuses on a single mine, lessons from the Marlin story can be applied to many other situations. This is particularly true considering a 2013 estimate that 75% of the world's mining companies are based in Canada,[31] and a 2017 estimate that 65% of Canadian mining assets are located abroad, with 70% of those assets residing in the Americas.[32]

A. Human Rights Abuses During Consultations

The substandard consultation process deserves mention as a foundational moment in the story of the mine as it was the basis of a number of legal battles. Initially, the company only consulted communities in San Miguel Ixtahuacán, despite the proximity of Sipacapa and its potential for social impact.[33] For this and other reasons, the Compliance Advisor Ombudsman (CAO) and the accountability mechanism of the International Finance Corporation (IFC), which in part funded the mine, concluded in 2005 that the consultation process did not adequately consider Mayan

27. *See generally* Simona V. Yagenova & Rocío Garcia, *Indigenous People's Struggles Against Transnational Mining Companies in Guatemala: The Sipakapa People vs GoldCorp Mining Company*, 23 SOCIALISM AND DEMOCRACY 157, 159-60 (2009).

28. Joris van de Sandt, *Mining Conflicts and Indigenous Peoples in Guatemala*, CATH. ORG. FOR RELIEF AND DEV. AID, Sept. 2009, at 19.

29. *Id*. at 12.

30. *See, e.g*., ON COMMON GROUND CONSULTANTS INC., *supra* note 3, at 198 (finding that Montana Exploradora likely infringed mine employees' right to association by selectively dismissing individuals that attempted to form a union).

31. Dave Dean, *75% of the World's Mining Companies Are Based in Canada*, VICE MEDIA GRP. (Jul. 9, 2013, 1:59 PM), https://www.vice.com/en_ca/article/wdb4j5/75-of-the-worlds-mining-companies-are-based-in-canada.

32. NAT. RES. CAN., MINERALS AND THE ECONOMY (2019), https://www.nrcan.gc.ca/our-natural-resources/minerals-mining/minerals-metals-facts/minerals-and-economy/20529.

33. ON COMMON GROUND CONSULTANTS INC., *supra* note 3, at 8.

customary perspectives and local decision-making norms.[34] For example, a popular consultation took place in June 2005 in Sipacapa where an absolute majority (98%) voted against the project.[35] However, the Guatemalan Constitutional Court ultimately ruled that this consultation was nonbinding,[36] and the International Labour Organization (ILO) clarified that the obligation to ensure proper consultation lies with the State and not the company.[37] Corporations, as a "class of innocents,"[38] were not to blame and the development of the Marlin Mine moved forward.

This troubled beginning demonstrates the inability of international law to reach either private actors or MNC origin countries extraterritorially. Considering existing global inequalities that often render host States like Guatemala unable or unwilling to properly address these problems, the gaping hole in human rights protections, specifically for individuals in the Global South, is clear.

B. Human Rights Violations During Mine Operations

Since the establishment of the Marlin Mine, residents have reported skin infections, among other health problems.[39] Between 2008 and 2010, the Guatemalan Ministry of Environment and Natural Resources filed

34. COMPLIANCE ADVISOR OMBUDSMAN (CAO), ASSESSMENT OF A COMPLAINT SUBMITTED TO CAO IN RELATION TO THE MARLIN MINING PROJECT IN GUATEMALA 32 (2005) [hereinafter Complaint].

35. Yagenova & Garcia, *supra* note 27, at 160-61. *See also id.* at 5.

36. Yagenova & Garcia, *supra* note 27, at 162.

37. ON COMMON GROUND CONSULTANTS INC., *supra* note 3, at 5. *See also* BIRGITTE FEIRING, ADVISOR INT'L LABOUR ORG., HANDBOOK FOR ILO TRIPARTITE CONSTITUENTS: UNDERSTANDING THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169), at 14 (2013).

38. Alan Freeman argues that anti-discrimination law's focus on intentional discrimination "creates a class of innocents, who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations." Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1055 (1978) (internal quotations omitted). Likewise here, corporations are insulated from accountability despite benefitting from inequitable circumstances (here, Guatemala's unwillingness to enforce consultation requirements, likely a result of the disproportionate power and influence of capital from the North in the Global South). Anti-discrimination law developed to protect complicit whites – and corporate law essentially does the same, obscuring systemic inequities that it produces and perpetuates.

39. Inter-Am. Comm'n H.R., Report No. 20/14, Petition 1556-07, Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, Guatemala, ¶ 16 (Apr. 3, 2014). *See also Urgent Action: Crackdown on Local Citizens Opposing Goldcorp's "Marlin" Mine Escalates in San Marcos, Guatemala*, BREAKING THE SILENCE NET (July 18, 2008, 6:30 AM), https://www.breakingthesilencenet.blogspot.com/2008/07/urgent-actioncrackdown-on-local.html.

three separate complaints against the mine relating to the location of the tailings dam, a spill of toxic materials, and the unauthorized discharge of the tailings dam.[40] In May 2010, a Physicians for Human Rights study found higher concentrations of blood lead, as well as urinary mercury, arsenic, copper, and zinc in residents close to the mine.[41] However, the study explained that it is "not clear if the current magnitude of these elevations poses a significant threat to health," and recommended additional study as these impacts tend to increase with the life of the mine.[42] It further detailed the harm caused to the cultural fabric of the Mam Mayan community as a result of the environmental damage, with residents expressing fear for the future due to the pollution in the river.[43] In August 2010, the NGO E-Tech International evaluated a number of studies performed on the water quality near Marlin. The report found that the water in the tailings dam exceeded IFC guidelines for allowable concentrations of cyanide, copper, and mercury, and that the mine's waste had a "moderate to high potential to generate acid and leach contaminants," posing a risk to water resources.[44]

Parallel to these environmental issues, social harms also emerged. These social harms were felt most acutely by those criminalized for their resistance. In January 2007, community members blocked access to the mine until Montana Exploradora agreed to meet with them; however, rather than meet and confer, seven arrest warrants were issued to individuals involved in the blockade for coercion and instigating delinquency, among other charges.[45] In February 2007, the National Civil Police forcibly removed two of the individuals for whom warrants were issued from their homes and jailed them for three days.[46] They were sentenced

40. Rep. of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories, Hum. Rts. Council, 18th Sess., ¶ 16, U.N. Doc. A/HRC/18/35/Add.3 (June 7, 2011).

41. NILADRI BASU & HOWARD HU, TOXIC METALS AND INDIGENOUS PEOPLES NEAR THE MARLIN MINE IN WESTERN GUATEMALA: POTENTIAL EXPOSURES AND IMPACTS ON HEALTH 3, 15 (Susannah Sirkin ed., 2010).

42. *Id*. at 3.

43. *Id*. at 16.

44. ANN MAEST & DICK KAMP, EVALUATION OF PREDICTED AND ACTUAL WATER QUALITY CONDITIONS AT THE MARLIN MINE, GUATEMALA 6-7 (2010).

45. John Ahni Schertow, *Trial of "Goldcorp 7" Continues in Guatemala*, INTERCONTINENTAL CRY (Nov. 28, 2007), https://www.intercontinentalcry.org/trial-of-goldcorp-7-continues-in-guatemala/.

46. James Rodriguez, *Mina de oro agrava situación social,* DEGUATE (Jul. 19, 2007, 8:21 AM), https://www.deguate.com/artman/publish/article_10762.shtml.

to two years of probation and a fine, while the other five individuals were acquitted of all charges.[47] In June 2008, arrest warrants were issued against eight women who also actively opposed the mine.[48] These incidents illustrate how a host State's judiciary can be used to further the interests of private actors from the Global North. Once again, this demonstrates the pressing need for MNCs' home States to play a role in protecting human rights.

Important moments in the subsequent seven years of mine operation include: a 2010 order from the Inter-American Commission on Human Rights to cease mine operations, later revised to only require Guatemala to ensure that residents had potable water;[49] a 2012 visit to the Marlin site by a number of Canadian Members of Parliament (on Goldcorp's dime);[50] and a 2014 determination by the Inter-American Commission for Human Rights that the petition of the Sipacapa and Mam Mayan communities against Guatemala was admissible on the basis of violations to their rights of, inter alia, consultation, equal protection, and the progressive development of economic, social and cultural rights.[51] Production at Marlin ceased in May 2017, and Marlin became the first commercial mine in Guatemala to undergo a formal closure process.[52]

C. Remedies Sought in Guatemala During the Mine's Operation

Guatemala did not offer many remedies during the mine's operation. In 2007, the NGO Madreselva sought an *amparo*, a kind of injunction, on behalf of the Sipacapa community against a number of Guatemalan government agencies for issuing a mining license without proper consultation as required by ILO 169.[53] The Constitutional Court not only denied the *amparo*, but also fined the attorneys that represented Madreselva for

47. John Ahni Schertow, *Goldcorp 7 Verdict is In. . . Justice in Guatemala?*, INTERCONTINENTAL CRY (Dec. 17, 2007), https://www.intercontinentalcry.org/goldcorp-7-verdict-is-injustice-in-guatemala/.

48. Report No. 20/14, *supra* note 39, ¶ 22.

49. Precautionary Measures: PM 260-07 - Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala, ORG. OF AM. STATES, http://www.oas.org/en/iachr/decisions/precautionary.asp?Year=2010&Country=GTM (last visited Feb. 24, 2021).

50. Jen Moore, *Goldcorp Organizes Junket to Guatemala for Canadian Parliamentarians*, MINING WATCH CAN. (Aug. 28, 2012), https://www.miningwatch.ca/news/2012/8/28/goldcorp-organizes-junket-guatemala-canadian-parliamentarians.

51. Report No. 20/14, *supra* note 39, ¶ 14.

52. BUS. FOR SOC. RESP., *supra* note 4, at 6.

53. Corte de Constitucionalidad [Constitutional Court], Jan. 9, 2008, En Calidad de Tribunal Extraordinario de Amparo, Expediente 123-2007, Amparo en Unica Instancia, p. 1-2 (Guat.).

presenting a "notoriously improper" *amparo*.[54] This is particularly disturbing considering that in 2005, Montana Exploradora itself sought an *amparo* against the municipality of Sipacapa, asking the Constitutional Court to find the community consultation unconstitutional.[55] It found the consultation non-binding, but not unconstitutional – and no fines were imposed on those lawyers.[56]

This illustrates that, although in theory, Guatemala could act to protect communities such as the Sipacapa and Mam Mayan communities, in practice it cannot. Canada, on the other hand, is able to influence operations abroad to a much greater extent.[57] Establishing comprehensive and effective regulations in Canada on mining and mine closure abroad would fill this long-ignored (and arguably built-in) gap in international human rights law. Legal developments that focus on the responsibility of States that domicile corporations, as will be discussed further, can help ensure that the blanket obscuring of deeply rooted global inequities cannot continue to insulate beneficiaries of the system from accountability.

D. Human Rights Violations Arising from Mine Closure

Guatemala's mining laws did not regulate closure when Marlin shut down in 2017.[58] A month after Marlin's closure, Goldcorp released a report indicating that it had fulfilled the majority of its human rights commitments arising from the 2010 On Common Ground report.[59] Goldcorp approved a $75 million budget for closure, not including severance payments or post-closure monitoring, which it estimated would amount to

54. *Id.* at 7-8.

55. Corte de Constitucionalidad [Constitutional Court], Feb. 28, 2008, Expedientes Acumulados 1643-2005 y 1654-2005, Apelacion de Sentencia en Amparo, p. 1, (Guat.).

56. *Id.* at 8-9. For more on domestic remedies pursued in Guatemala, see Raquel Aldana, *Transforming Students, Transforming Self: The Power of Teaching Social Justice Struggles in Context*, 24 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 53, 69-71 (2011).

57. Canadian Embassies, for example, are generally involved in facilitating the work of Canadian firms operating abroad. *See* Inter-Am. Comm'n H.R., *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, at 45-46, OEA/Ser.L/V/II., doc. 47/15 (Dec. 31, 2015).

58. BUS. FOR SOC. RESP., *supra* note 4, at 16-17. *See also* Montana Exploradora de Guatemala, S.A., MINA MARLIN: PLAN DE CIERRE [MARLIN MINE CLOSURE PLAN] 7-9 (2017), https://www.newmont-marlin.com/wp-content/uploads/2018/01/Plan-de-Cierre-Mina-Marlin-MEM.pdf. (outlining the various applicable national and legal standards for mining in Guatemala generally, with no mention of specific closure standards).

59. BUS. FOR SOC. RESP., *supra* note 4, at 6.

$11 million.[60] How much Goldcorp would pay for closure did not proceed without controversy.[61]

What this money actually goes to (assuming it is allocated appropriately)[62] is unclear, since the government of Guatemala continues to insist that the infrastructural damage in the area was not due to the mine.[63] This infrastructural damage includes cracked homes, bridges, and roads.[64] In addition, the social divisions between those who supported the mine and those who opposed it also persists, eroding trust and a sense of community responsibility.[65]

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60. *Id.* at 19.

61. In 2010 Goldcorp posted a $1 million bond with the Guatemalan government for unanticipated costs. BUS. FOR SOC. RESP., *supra* note 4, at 19. In 2012 it agreed to post an additional $27 million after Rob Robinson, an American mine and environmental engineer, presented a shareholder resolution together with the Unitarian Universalist Service Committee to Goldcorp urging an increased bond amount in light of his estimate that the actual closure costs would be $49 million. *Communities Shouldn't Pay To Clean Up Goldcorp's Mess in Central America*, MINING WATCH CAN. (June 15, 2012, 3:42 PM), https://www.miningwatch.ca/blog/2012/6/15/communities-shouldn-t-pay-clean-goldcorp-s-mess-central-america; AMBER MOULTON, UNITARIAN UNIVERSALIST SERV. COMM., DEFENDING THE HUMAN RIGHT TO WATER: A DECADE OF SUPPORT FOR GLOBAL WATER JUSTICE 23 (2015), http://www.uusc.org/sites/default/files/human_right_to_water_retrospective.pdf. *See also* KEITH CAMPBELL ET AL., ASUNTOS DE RECUPERACIÓN Y COSTOS APROXIMADOS PARA LA RECUPERACIÓN DE LA MINA MARLIN, COPAE & UUSC 9 (Molly Butler, Maria J. Van Der Maaten, H. Alejandro Alfaro Santiz, trans., 2010), https://www.goldcorpoutofguatemala.files.wordpress.com/2010/07/reclamation-issues-and-estimated-cost-of-reclamation-marlin-mine.pdf.

62. It is important to note here the close relationship of the Guatemalan elite with the development of mining projects. For example, Oscar Berger, President of Guatemala from 2004 to 2008, was an important supporter of the development of mining, and particularly the Marlin Mine. His cousin, Francois Berger, was married to Maria Eugenia Novella de Berger. During Serrano Elías' administration in the early 90s, Novella was essential in the naming of Milton Estuardo Saravia Rodríguez as the Executive Secretary of the National Council of Protected Areas, a role for which many believed he was not qualified. Saravia Rodríguez later became the general manager of Montana Exploradora, responsible for the Marlin Mine. *See* Luis Solano, *La transnacionalización de la industria extractiva: la captura de los recursos minerales e hidrocarburos*, 4 EL OBSERVADOR 19, June – July 2009, at 3, 26, https://www.issuu.com/observadorguatemala/docs/el_observador_no._19_hunio_2009; DIEGO PADILLA VASSAUX, POLÍTICA DEL AGUA EN GUATEMALA: UNA CADIOGRAFÍA CRÍTICA DEL ESTADO 7 n.65 (Cara Parens ed., 2019), https://www.plazapublica.com.gt/sites/default/files/digital_politica_del_agua_en_guatemala.pdf.

63. *Según Conred, daños a casas no fueron por actividad minera*, LA HORA (Aug. 29, 2019), https://www.lahora.gt/segun-conred-danos-a-casas-no-fueron-por-actividad-minera/.

64. Frente de Defensa San Miguelense, *supra* note 4, at 9. *See also* Fredemi San Miguel (@fredemi.sanmiguel), FACEBOOK (Feb. 16, 2018, 2:04 PM), https://www.facebook.com/fredemi.sanmiguel/videos/1982969668622086/.

65. Jeff Abbott, *Something in the water: The lasting violence of a Canadian mining company in Guatemala*, (Aug. 29, 2018), https://www.briarpatchmagazine.com/articles/view/something-in-the-water. An extreme example of the social divisions that mine closure can have is the Fénix mine in Izabal, Guatemala. In 2019 the Guatemala Constitutional Court granted an injunction to a union of fishermen who alleged the mine was opened without proper consultation and had created

The current environmental harm and future risks are serious. Water has been an ongoing issue; residents note that 28 sources of water have dried up.[66] Rob Robinson, an American mining and environmental engineer who investigated Marlin's closure, highlights other environmental risks including the tailings dam leaking (which would likely be toxic since cyanide was used to dissolve gold from ore), water entering the open pit and carrying toxic material into groundwater, and erosion during heavy rains due to the steep slopes of the rock dump.[67] Montana Exploradora will monitor the site until 2026,[68] although Robinson concludes that monitoring for at least thirty years, rather than ten, is necessary to mitigate the risks outlined above.[69]

Goldcorp has been quiet on the closure process, discreetly acknowledging for example that "[m]ine closure, reclamation and remediation costs for environmental liabilities may exceed the provisions we have made," mentioning, among others, an unnamed closed mine site in Guatemala, in its 2020 SEC 10-K filing.[70] This may be a standard risk disclosure, but that's not all it says about Guatemala. It also specifically cites community opposition to the Marlin Mine and the 2010 Inter-American

environmental damage. This led community members who supported the mine to file a request for provisional measures from the Inter-American Commission, alleging that the closure and resulting loss of economic opportunities was a violation of their economic, social and cultural rights. The Covid-19 pandemic impeded the implementation of the Constitutional Court's injunction. *CIDH y las presencias de ONU Derechos Humanos reiteran su llamado para la creación de un ambiente propicio y seguro para quienes defienden los derechos humanos en la región*, ORG. OF AM. STATES (Nov. 7, 2019), https://www.oas.org/es/cidh/prensa/comunicados/2019/288.asp; Natiana Gándara, *Mina de níquel acudirá a Corte Interamericana por cierre de operación en Guatemala*, PRENSA LIBRE (Aug. 6, 2019), https://www.prensalibre.com/economia/mina-fenix-representantes-de-trabajadores-y-empresarios-acudiran-a-la-cidh/. *See also Pobladores de El Estor solicitan medidas cautelares ante la CIDH por suspensión de Mina Fénix*, IMPACTO.GT (Aug. 9, 2019), https://www.impacto.gt/pobladores-de-el-estor-solicitan-medidas-cautelares-ante-la-cidh-por-suspension-de-mina-fenix; *Solicitarán medidas cautelares por cierre de proyecto minero Fénix*, MININGWORKS.GT (Aug. 6, 2019), http://www.miningworks.gt/mineria-responsable/cgn-solicitara-medidas-cautelares-ante-la-cidh-por-suspension-de-actividades-en-mina-fenix/; Jody García (@JodyNomada), TWITTER (July 25, 2019, 11:23 AM), https://www.twitter.com/i/status/1154427031016394752; Anna-Catherine Brigida, *Una polémica mina de níquel de Guatemala "ignora el confinamiento por coronavirus"*, MONGABAY (Aug. 28, 2021), https://www.es.mongabay.com/2020/08/una-polemica-mina-de-niquel-de-guatemala-ignora-el-confinamiento-por-coronavirus/.

66. Abbott, *supra* note 65, at 8. *See also*, San Miguel, *supra* note 64.

67. Robert H. Robinson, Presenter at Special Session: Legal Strategies to Address Goldcorp's Marlin Mine Closure, Workshop of the Centre for Indigenous Conservation and Development Alternatives held at McGill University (June 20, 2018) (slides on file with author).

68. BUS. FOR SOC. RESP., *supra* note 4, at 7.

69. Robinson, *supra* note 67.

70. Newmont Corp., Annual Report (Form 10-K) 17 (Feb. 20, 2020). Newmont bought Goldcorp in 2019. *Id*. at 5.

Commission order to close the mine. Goldcorp even cited that "evolving expectations related to human rights, indigenous rights, and environmental protections may result in opposition to our current and future operations. . . Opposition by community and activist groups to our operations may require modification of, or preclude the operation or development of, our projects and mines or may require us to enter into agreements with such groups or local governments."[71]

IV. INTERNATIONAL LEGAL FRAMEWORKS ON MINE CLOSURE

Despite an increasing focus on State responsibility vis-à-vis private actors based in those countries,[72] international law does not offer specific guidance on mine closure.[73] The existing guidelines focus on encouraging effective domestic legislation.[74] However, a limited number of domestic jurisdictions effectively regulate mine closure, such as Canada where individual provinces manage mining regulation within their territories.[75] For this reason, establishing international responsibility in relation to mine closure is imperative. I argue that existing human rights law creates obligations for home States of MNCs that engage in mine closure abroad.

In the universal human rights system, the ICESCR is an important instrument from which such responsibility can be derived. The Economic and Social Council, the treaty body of the ICESCR, specifically addresses the role of private actors in guaranteeing human rights in General Comment 24.[76] It confirmed that:

> [e]xtraterritorial obligations arise when a State party may influence situations located outside its territory . . . by controlling the activities of corporations domiciled in its territory

71. *Id*. at 24.

72. *See*, *e.g*., U.N. Off. of the High Comm'r for Hum. Rts. [OHCHR], Guiding Principles on Business and Human Rights (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; ORGANISATION FOR ECON. COOP. AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTER. (2011).

73. A. Morrison-Saunders et al., *Integrating Mine Closure Planning with Environmental Impact Assessment:Challenges and Opportunities Drawn from African and Australian Practice*, 34 IMPACT ASSESSMENT AND PROJECT APPRAISAL 117, 118 (2016) (discussing international industry expectations rather than firm guidance).

74. *See* CHRISTOPHER G. SHELDON ET AL., IT'S NOT OVER WHEN IT'S OVER: MINE CLOSURE AROUND THE WORLD 10 (2002); GANKHUYAG & GREGOIRE, *supra* note 5, at 420.

75. ALLEN L. CLARK & JENNIFER COOK CLARK, AN INTERNATIONAL OVERVIEW OF LEGAL FRAMEWORKS FOR MINE CLOSURE 67 (2005); Vivoda et al., *supra* note 5, at 10. *See*, *e.g*., The Mines and Minerals Act, Mine Closure Regulation, C.C.S.M. 67/99 (Can.).

76. U.N, Econ. & Soc. Council, Gen. Comment No. 24 on State Obligations Under the Int'l Covenant on Econ., Soc. and Cultural Rts. in the Context of Bus. Activities ¶ 11, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017).

> and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.[77]

This was not the first time this duty was clarified. In 2011, the Economic and Social Council published a statement on the obligations of States regarding the corporate sector.[78] In addition, the Economic and Social Council has previously affirmed the ICESCR's extraterritorial application with regards to the right to health,[79] and the right to water,[80] both relevant here. As such, States' responsibility to prevent third parties over which they exercise influence from violating the economic, social, and cultural rights of individuals outside their territories is not new.[81]

Canada is a party to the ICESCR, but not its Optional Protocol, which allows the Committee on Economic, Social and Cultural Rights to receive communications from individuals alleging violations of rights protected by the ICESCR.[82] Nonetheless, as a party to the ICESCR, Canada is obligated to provide periodic reports to the Committee every five years.[83] The Committee then provides concluding observations in response to these periodic reports.

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77. *Id.* ¶ 28.

78. U.N., Econ. & Soc. Council, Statement on the Obligations of States Parties Regarding the Corp. Sector and Econ., Soc., and Cultural Rts., U.N. Doc. E/C.12/2011/1 (July 12, 2011).

79. U.N., Econ. & Soc. Council, Substantive Issues Arising in the Implementation of the Int'l Covenant of Econ., Soc. and Cultural Rts. ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) ("To comply with their international obligations in relation to article 12, 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, in accordance with the Charter of the United Nations and applicable international law").

80. U.N., Econ. & Soc. Council, Substantive Issues Arising in the Implementation of the Int'l Covenant of Econ., Soc. and Cultural Rts. ¶ 33, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) ("Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries").

81. More recently, in relation to the right to life as guaranteed in the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee in its General Comment 36 made clear that States must take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with Article 6 [of the ICCPR]. Hum. Rts. Comm., General Comment No. 36, ¶ 22, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (citations omitted).

82. G.A. Res. 63/117, at 2 (Dec. 10, 2008).

83. *See Canada's Appearance at the United Nations Committee on Economic, Social and Cultural Rights*, CANADA, https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties/commitments-economic-social-cultural-rights/canada-appearance.html (last visited Feb. 28, 2021).

Canada's next periodic report is upcoming, as its last report was made in 2016.[84] On that occasion, the Committee noted its concern "that the conduct of corporations registered or domiciled in the State party and operating abroad is, on occasion, negatively impacting on the enjoyment of Covenant rights by local populations."[85] It recommended that Canada strengthen legislation governing such operations, including requiring human rights impact assessments prior to initiating projects, establishing more robust and effective mechanisms to receive complaints, and facilitating justice in local courts for victims of such abuses.[86]

In the concluding observations of periodic reports issued since the release of General Comment 24, the Committee has consistently recommended that States in the Global North adopt a legal framework that requires businesses domiciled in each State to exercise human rights diligence, allows businesses in violation of ESC rights to be held liable, and enables victims to seek remedies domestically.[87] However, the procedures available against Canada by means of the ICESCR are limited due to its non-ratification of the Optional Protocol. This again is a symptom of how international law is built and applied by powerful States to limit the justiciability of certain abuses. Even so, the Committee's interpretation of the ICESCR clearly establishes the expectation in international human rights law that countries exert their influence over private actors that are domiciled in their state when such influence can limit or remedy human rights abuses abroad, an obligation that should extend to mine closure. This is a step towards cracking the international human rights system's resistance to addressing these kinds of abuses.

V. REGIONAL HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM AND MINE CLOSURE

Rights surrounding mine closure have yet to be addressed by the Inter-American system, but relevant rights and responsibilities can be derived from existing sources. In 2017, the Inter-American Court of Human Rights took a monumental step forward in recognizing environmental

84. U.N., Econ. & Soc. Council, Concluding Observations on the Sixth Periodic Report of Canada, U.N. Doc. E/C.12/CAN/CO/6 (Mar. 23, 2016).

85. *Id.* ¶ 15.

86. *Id.* ¶ 16.

87. U.N., Econ. & Soc. Council, Concluding Observations on the Fifth Periodic Report of Belgium ¶ 12, U.N. Doc. E/C.12/BEL/CO/5 (Mar. 25, 2020); U.N., Econ. & Soc. Council, Concluding Observations on the Fourth Periodic Report of Switzerland ¶ 11, U.N. Doc. E/C.12/CHE/CO/4 (Nov. 18, 2019); U.N., Econ. & Soc. Council, Concluding Observations on the Sixth Periodic Report of Denmark ¶ 19, U.N. Doc. E/C.12/DNK/CO/6 (Nov. 12, 2019).

rights when it issued Advisory Opinion 23, which places the right to a healthy environment squarely within the framework of economic, social and cultural rights as contemplated in Article 26 of the American Convention on Human Rights.[88] The Advisory Opinion goes even further by saying that States must "take measures to prevent significant damage to the environment, within *or outside* their territory."[89]

This important development reflects the "evolving expectations related to human rights"[90] that Goldcorp alluded to. However, in the context of the Marlin Mine and similar situations, a number of dots must be connected for this development to make a difference in practice, including the applicability of the Convention to non-parties such as Canada and its extraterritorial application.

A. The American Convention and Non-Party OAS States

A majority of the States which form the Organization for American States (OAS) have signed the American Convention on Human Rights, on which Advisory Opinion 23 is based. However, a number have not – most notably, the United States and Canada. Accordingly, holding accountable a host State, such as Canada in the Marlin context, which has conveniently insulated itself from accountability, becomes challenging. Nonetheless, there may be a way forward. This framework leaves two links that must be established, the first easier than the second: (1) whether petitions can be lodged against a non-party to the Convention; and (2) whether a right read into the Convention can indicate an obligation for non-parties. I propose the answer to both is yes.

The Inter-American system does offer some accountability for the actions of OAS States that have not ratified the Convention. Although only those States that have ratified the Convention fall under the jurisdiction of the Inter-American Court of Human Rights, all OAS States are held to their obligations in the American Declaration of the Rights and Duties of Man, and thus subject to procedures under the Inter-American Commission on Human Rights.[91] Article 20 of the Commission's Statute

88. Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 ¶ 57 (Nov. 15, 2017).

89. *Id.* ¶ 140 (emphasis added).

90. Newmont Corp., *supra* note 70, at 24.

91. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 14/94, OEA/Ser.L./V/II.85, doc. 25 at 9 (1994).

empowers the Commission to examine communications and request information from a non-party OAS State and make recommendations to that State "in order to bring about more effective observance of fundamental human rights."[92] Likewise, Article 51 of the Commission's Regulations empowers the Commission to "receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man," specifically in relation to OAS States not a party to the Convention.[93] The jurisdiction of the Commission to examine petitions against such States is no longer seriously questioned.

The next step, then, is finding the link between the Convention rights cited in Advisory Opinion 23, and the American Declaration, on which any petition against Canada must be based. This is a weaker point than the first in this legal patchwork, but I argue that the right recognized in Advisory Opinion 23 can be found in Article XIII of the American Declaration.

First, by the Opinion's own language, the right to a healthy environment can be read into Article 26 of the American Convention because it *already exists* in the OAS Charter and the American Declaration of the Rights and Duties of Man.[94] Specifically, it cites Articles 30, 31, 33, and 34 of the OAS Charter, which establishes the obligation of States to achieve the integral development of their peoples.[95] Integral developments means the promotion of sustainable development, which has an environmental dimension.[96] The American Declaration, in turn, "contains and defines those human rights essential to which the Charter refers."[97] Thus, since the Convention derives its meaning from these two underlying documents, non-parties to the Convention can still be held to the obligations set forth in the Advisory Opinion by virtue of their ratification of the OAS Charter rather than based on the Convention.

92. Statute of the Inter-American Commission on Human Rights, O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, vol. 1 at 88 (1979), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. Comm'n H.R, OEA/Ser.L.V/II.82, doc.6 rev.1, at 93 (1992), *available at* http://www.hrlibrary.umn.edu/oasinstr/zoas4cms.htm.

93. Regulations of the Inter-American Commission on Human Rights, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc.6 rev.1, at 103 (1992), *available at* http://www.hrlibrary.umn.edu/oasinstr/zoas5cmr.htm.

94. Advisory Opinion OC-23/17, *supra* note 88, ¶ 57.

95. *Id.* at 26 n.85.

96. *Id.*

97. *Id.* ¶ 57.

Second, previous determinations of the Commission support this reading. Although the relationship between the environment and human rights has not previously been the subject of an Advisory Opinion issued by the Inter-American Court, the relationship has been addressed by the Commission.

In fact, allegations of the destruction of the environment and natural resources have been lodged against Canada in the past.[98] The Hul'qumi'num Treaty Group alleged that starting in the 19th century their lands were transferred by force to third parties without consultation or compensation.[99] While the petitioners continued to hunt, fish, and gather food on their ancestral lands, increased concessions to third parties in light of the 2010 Winter Olympics and subsequent felling of forests and other environmental damage severely impeded their ability to pursue these activities.[100] These activities are essential to preserving their culture and way of life.[101] On these facts, the Commission found that the destruction of the environment and natural resources, and its impact on the Hul'qumi'num culture and way of life, characterized violations of Article XIII of the American Declaration, which protects the right to the benefits of culture.[102] Thus, the obligation to protect the environment, as outlined by Advisory Opinion 23, codified the pre-existing obligations of OAS States that are non-parties to the Convention.[103]

Canada has an obligation to protect the environment in terms of economic, social, and cultural rights on the basis of the OAS Charter and the Declaration. The mechanisms for accountability are more limited under the Declaration than under the Convention, a symptom of powerful States' ability to circumvent international responsibility. Nonetheless, this obligation exists and the increased attention to this issue is a promising step forward in addressing abuses that might arise from mine closures abroad.

98. Inter-Am. Comm'n H.R., Report No. 105/09, Petition 592-07, Hul'qumi'num Treaty Group v. Canada, (Oct. 30, 2009).

99. *Id.* ¶ 10.

100. *Id.* ¶ 11.

101. *Id.* ¶ 12.

102. *Id.* ¶ 53.

103. The Commission itself has signaled the importance of the intersection between the environment and economic, social and cultural rights, by creating in 2017 (prior to the Opinion) the position of Special Rapporteur on Economic, Social, Cultural, and Environmental Rights. *IACHR Chooses Soledad García Muñoz as Special Rapporteur on Economic, Social, Cultural, and Environmental Rights (ESCER)*, ORG. OF AM. STATES (July 5, 2017), https://www.oas.org/en/iachr/media_center/PReleases/2017/090.asp.

B. Extraterritorial Application

Applying this obligation in the Marlin context, and likely many others, creates another two-step analysis: (1) whether the obligations of OAS non-parties to the Convention applies extraterritorially; and (2) if so, whether this obligation still applies in the case of third parties operating abroad, rather than operations of the State itself.

Again, the first question is easier to answer. In the Advisory Opinion, the Court notes that jurisdiction is not limited to acts carried out within the territory of the State in question.[104] The Court cites a number of admissible cases where the respondent State has carried out military operations outside its territory.[105] In particular, it cites two cases that came before the Commission in which the U.S. was the respondent State:[106] *Caso Coard*, dealing with U.S. military intervention in Grenada;[107] and *Salas*, dealing with U.S. military intervention in Panama.[108] Neither report addresses extraterritorial application directly, but the Commission in *Coard*, for example, roundly rejects the U.S. assertion that U.S. military action in Grenada is not subject to the Commission's examination, concluding that the facts characterize a violation of a human right and thus provided a basis for admissibility.[109] This reading of jurisdiction represents a crack in the human rights system that, at times, protects abusers on the basis of jurisdiction.[110]

The inclusion of these two cases in the Advisory Opinion also suggests that the Opinion's conclusions on extraterritoriality implicate non-parties to the Convention. The *Salas* merits report, issued after the Opinion, makes this explicit. The report explained that in assessing the scope of the Declaration, the Commission must ascertain "whether there is a

104. Advisory Opinion OC-23/17, *supra* note 88, ¶ 78.

105. *Id.* ¶ 79.

106. *Id.*

107. Coard, Inter-Am. Comm'n H.R., Report No. 14/94 at 1.

108. Salas v. United States, Case 10.573, Inter-Am. Comm'n H.R., Report No. 31/93, OEA/Ser.L./V/I.85, doc. 9 (1993).

109. Coard, Inter-Am. Comm'n H.R., Report No. 14/94 at 11.

110. The U.S. position on the International Covenant on Civil and Political Rights (ICCPR) for example, is that its requirement that States protect the rights of "all individuals within its territory and subject to its jurisdiction," should be read conjunctively – that is, an individual must be both within U.S. territory and subject to its jurisdiction in order for an obligation to arise. Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights, U.S. Dep't of State, Off. of the Legal Adviser (Oct. 19, 2010). This is despite clear guidance from the Human Rights Committee that the clause should be read disjunctively. Hum. Rts. Comm., General Comment No. 31, U.N. Doc.CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Chang*e, 90 INT'L L. STUD. 20 (2014).

causal connection between the extraterritorial conduct of a state through the actions or omissions of its agents . . . and the alleged violation of the right . . . ."[111] Although the Commission does not directly cite the Opinion, it uses much of the same language from the Opinion. Such use avoids the question of the direct applicability of the Court's Advisory Opinion on the Commission, but effectively sets forth a parallel standard for non-party States.[112]

Both *Coard* and *Salas* concerned military activities, but in the Opinion the Court clarifies that military situations are not the only instances where extraterritorial jurisdiction may apply.[113] This issue leads into the second question – whether home States are responsible for acts of their non-State actors. Although the Opinion was ground-breaking in setting forth the inclusion of environmental rights that are protected by the Inter-American system, the Court takes a quieter but equally significant step forward in discussing extraterritoriality. It broadens the concept of extraterritoriality, concluding that a State is responsible for activities carried out outside its territory if the State "exercises a[n] effective control over the activities."[114] Thus, it establishes a causality requirement between an act or omission of the State and the human rights violation.[115] Again, this is almost precisely the language used by the Commission in the *Salas* merit report,[116] indicating that this standard is applicable to non-party States.

111. Sala Galindo v. United States, Case 10.573, Inter-Am. Comm'n H.R., Report No. 121/18, OEA/Ser. L/V/II.169, doc. 138 ¶ 314 (2019). In a 2020 report on a case involving extradition to the U.S., the Commission again stated that "States have the duty to respect the rights of all persons within its territory and of those present in the territory of another State but subject to the control of its agent. . . [I]t is necessary to determine whether there is a causal nexus between the extraterritorial conduct of a State through the acts or omissions of its agents and/or of persons who have acted under its command or acquiescence, and the alleged violation of the rights and freedoms of a person." Nelson Ivan Serrano Saenz v. United States, Case 13.356, Inter-Am. Comm'n H.R., Report No. 200/20, OEA/Ser.L/V/II, doc. 214 at 48 (2020) (finding that Ecuadorian officers who arrested the petitioner were acting as U.S. agents because a U.S. special agent present in Ecuador in his official capacity orchestrated the arrest). The Commission had previously addressed the extraterritorial application of the Declaration, requiring victims be subject to the control of the other state through the acts of its agents. Djamel Ameziane v. United States, Petition Judgment, Inter-Am. Comm'n H.R., Report No. 17/12, ¶ 30 (2012).

112. The Commission's hesitance to pronounce the Advisory Opinions directly applicable to non-party States is understandable – it avoids protests of non-parties to being held responsible to a Convention they never signed, while at the same time properly developing a strong parallel jurisprudence based on the Declaration.

113. Advisory Opinion OC-23/17, *supra* note 88, ¶¶ 79-80.

114. *Id.* ¶ 104(h).

115. *Id.* ¶ 103.

116. *See* Galindo, Inter-Am. Comm'n H.R., Report No. 121/18, ¶ 314.

The Opinion is broad in its description of the causality test,[117] but it does contemplate a situation in which the actions or omissions of a State in relation to a MNC incorporated in that State are causally connected to a human rights violation abroad.[118] The Court refers to such a situation when it notes that States have the obligation to prevent human rights violations by private third-parties.[119] This responsibility could stem from a State failing to regulate, supervise, or investigate such actors.[120] In terms of regulation, the Court considers that States must regulate activities that might cause "significant damage" to the environment.[121] Specifically, it cites the "positive tendency" in international human rights law to protect human rights in situations of MNCs operating abroad.[122] The Court's pronouncements on the issue are a positive development, although one that is yet to be clearly defined.[123]

The missing link here, then, is whether the piece relating to third parties will be applicable to non-party States on the basis of the Declaration. The *Salas* merits report did not have an occasion to address this issue, as the basis of the allegations was military activity. The Commission addressed this issue in its 2015 report on the extractive sector and indigenous and afro-descendant peoples, recognizing the increasing pressure to hold origin countries accountable, without pronouncing on the issue.[124]

In 2019, the Commission signaled more pointedly that such extraterritorial jurisdiction may exist based on the Declaration. In its report on business and human rights, it replicated the language of regulation, supervision, and investigation used in the Opinion, noting that this act or omission can be analyzed on the basis of the general obligation to protect

117. Antal Berkes, *A New Extraterritorial Jurisdictional Link Recognised by the IACtHR*, EJIL: TALK! (Mar. 28, 2018), https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/.

118. *Id.*

119. Advisory Opinion OC-23/17, *supra* note 88, ¶ 118.

120. *Id.* ¶ 119.

121. *Id.* ¶ 149.

122. *Id.* ¶ 151.

123. Berkes, *supra* note 117.

124. Inter-Am. Comm'n H.R., Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II., doc. 47/15 ¶ 80 (Dec. 31, 2015). The Commission addressed the issue again in 2017 in a report on Poverty and Human Rights, noting that a state must protect against human rights abuses carried out "'within their territory and/or jurisdiction by third parties, including business enterprises.'" Inter-Am. Comm'n H.R., Report on Poverty and Human Rights in the Americas, OEA/Ser.L/V/II.164, doc. 147, at 248 (Sept. 7, 2017), *citing* Case of the Kaliña y Lokono Peoples v. Suriname*,* Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 309, ¶ 248 (Nov. 25, 2015).

human rights as outlined in the Convention "and other applicable Inter-American instruments."[125] Ultimately, the report does not dwell much on the issue of parties who have not ratified the Convention and their responsibility vis-à-vis MNCs operating abroad. Yet, through these reports the Commission has signaled its openness to this kind of extraterritorial application of human rights obligations. Again, these advances indicate cracks in the walls of international human rights law as it was established.

In these Parts, I've set forth the links within the Inter-American system that would recognize Canada's responsibility for the environmental harm resulting from the closure of the Marlin Mine. Specifically, a parallel to the environmental rights set forth in the Advisory Opinion can likely be found in the American Declaration, and therefore the Commission is empowered to examine petitions against non-parties to the Convention on that basis. Further, the fact that the harm has occurred abroad as a result of the activities of a third party is not an obstacle.

VI. WHAT THIS MEANS FOR CANADA

This exploration of universal and regional human rights law indicates that Canada likely has a responsibility to regulate, supervise, and investigate corporations responsible for abuses during mine closures abroad. The ICESCR requirements that States exercise human rights diligence, hold corporations liable for violations of ESC rights, and provide remedies to victims track closely with the Inter-American Commission for Human Rights requirements.

This responsibility would require Canada to adopt a framework governing mine closures abroad. Although for Marlin the time has passed for initial diligence, for future mine sites, this responsibility may mean developing a regulatory framework that requires companies to provide detailed closure plans during the early stages of development that are responsive to environmental and social risks specific to the community in which the mine will operate. For example, the Initiative for Responsible Mining Assurance proposes standards for closure plans that include the role of affected communities in reviewing the plan, the disposal of hazardous materials, long-term maintenance and monitoring, and a detailed determination of the costs of closure.[126] The responsibility to regulate and supervise would require monitoring Canadian corporations for

125. Inter-Am. Comm'n H.R., Informe Empresas y Derechos Humanos: Estándares Interamericanos, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19 ¶ 153 (Nov. 1, 2019).

126. INITIATIVE FOR RESPONSIBLE MINING ASSURANCE, IRMA STANDARD FOR RESPONSIBLE MINING IRMA-STD-001 70-71 (2018).

compliance with these regulations in their mine closure operations. Here, although the nexus requirement for finding origin State responsibility is broad, as described by the Economic and Social Council,[127] with time the Court[128] and the Commission[129] will have more opportunities to address this issue, and this area of law will continue to grow. Considering the trajectory so far, Canada would do well to assume that further development on the nexus requirement will not significantly narrow instances of responsibility.

In relation to the responsibility of investigating and bringing corporations to justice, a judicial or administrative mechanism for holding corporations liable for damage resulting from improper closure will likely be required, in addition to providing remedies for victims of these violations. Communities and advocates have certainly attempted to pursue remedies in Canadian and U.S. courts for the abuses of mining corporations incorporated in those States.[130] The Supreme Court of Canada emitted a decision in 2020 in a case concerning Nevsun Resources, in which there were allegations that Nevsun's agents perpetrated atrocities, including slavery, in its operations in Eritrea.[131] The Supreme Court of Canada held that Nevsun could be sued in Canada, since customary international law is part of Canadian law and it is not "plain and obvious" that the Eritrean workers' claims could not succeed.[132] This was not a decision on the merits of the case, and considering the barriers to accessing this kind of justice, new legislation would likely be needed for Canada to fulfill its

127. E/C.12/GC/24, *supra* note 76, ¶ 28.

128. *See* Berkes, *supra* note 117.

129. *See* Informe Empresas y Derechos Humanos: Estándares Interamericanos, *supra* note 125, ¶ 152.

130. In the U.S., a case against Newmont Mining Corporation alleging that its agents violently dispossessed inhabitants of land acquired by the company for gold exploration is moving its way through the judiciary. *Acuna-Atalaya v. Newmont Mining Corp*., No. CV 17-1315, 2020 WL 1154783 at *1 (D. Del. Mar. 10, 2020). The Third Circuit affirmed the District Court's decision granting Newmont's motion to dismiss on the basis that Peru is the more appropriate forum. *Id*. at *13; *Acuna-Atalaya v. Newmont Mining Corp.*, No. 20-1765 (3d Cir. Dec. 11, 2020).

131. Nevsun Resources Ltd. v. Araya [2020], 5 S.C.R. (Can.).

132. *Id.* ¶ 132. [M]odern international human rights law [is] the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed. *Id.* ¶ 1. This is not the first time individuals harmed by Canadian mining companies abroad have sought remedy in Canada. *See* Chilenye Nwapi, *Resource Extraction in the Courtroom: The Significance of Choc v Hudbay Minerals Inc for Transnational Justice in Canada*, 14 ASPER REV. INT'L BUS. & TRADE L. 121, 150 (2014) ("Hudbay is significant in at least three respects: (1) its jurisdictional use of the direct liability theory; (2) its attempt to enunciate a novel duty of care; and (3) good lawyering").

human rights responsibility of providing a remedy to victims of human rights violations as a result of mine closures.[133]

The developments in international human rights law outlined here indicate Canada has the responsibility to develop robust legislation regulating mine closures, enforce these regulations, and create effective avenues for victims' pursuit of remedies. This process will help remove the deception of global equality and provide justice for those previously written out of human rights protections.

VII. CONCLUSION

Mine closure is by no means the end. Rather, it is an epilogue that desperately needs to be told. The Marlin Mine is an emblematic example of the problems in regulating and providing accountability for the operations of MNCs that close mines abroad. In the preceding parts, I outline the developments within the universal human rights system, showing that the ICESCR likely requires States to put in place frameworks that can hold MNCs liable for damage resulting from mine closures, and provide remedies to victims. Next, I explore a similar progression within the Inter-American system, connecting the dots between environmental rights, the responsibilities of OAS States that have not signed the American Convention, and the extraterritorial applicability of these obligations to private actors. These are powerful steps forward, but they are by no means enough.

Although I argue that space has opened in the Inter-American and universal systems for the kind of accountability needed in the Marlin context and others similar to it, the patchwork required to reach this point is indicative of the ways that international law has built-in protections for powerful States in the Global North that are complicit in the abuses against communities in the Global South. Enforcement of human rights

133. There are three mechanisms within Canada for accountability for human rights violations abroad, aside from civil litigation like *Nevsun* and the Corruption of Foreign Public Officials Act. They are the Canadian Corporate Social Responsibility Framework (now defunct), the National Contact Point, and the Canadian Ombudsperson for Responsible Enterprise (CORE) announced in 2018. JUSTICE AND CORP. ACCOUNTABILITY PROJECT, RESPONSIBILITY OF CANADA FOR ACTIONS OF CANADIAN COMPANIES IN LATIN AMERICA (2018). In the Marlin context, petitioners attempted to address the Canadian National Contact Point pursuant to the OECD Guidelines for Multinational Enterprises. Frente de Defensa San Miguelense, *supra* note 4, at 4 (The contact point in its final statement recommended the parties engage in dialogue and closed the instance). CANADIAN NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES FINAL STATEMENT OF THE CANADIAN NATIONAL CONTACT POINT ON THE NOTIFICATION DATED DECEMBER 9, 2009, CONCERNING THE MARLIN MINE IN GUATEMALA, PURSUANT TO THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (May 3, 2011).

law is difficult, since ultimately the responsibility is with States to honor their human rights obligations.[134] For example, the problem of extraterritorial application persists, in part because powerful States can otherwise rely on borders, a "technolog[y] of racialized exclusion,"[135] to insulate themselves from accountability for these abuses. A human rights framework focused on the State, rather than non-State actors such as MNCs and the home States that enable their activity, impedes accountability by obscuring inequalities. This means that companies, with the indirect and sometimes direct support of their origin States, can carry out racialized human rights abuses with few avenues for accountability. Nevertheless, the fact that the universal and Inter-American systems have expanded possibilities for environmental protection and the extraterritorial application of human rights laws are rays of light in the open pit of international human rights law.

134. For this reason, other forums, such as international criminal law, should be explored. *See* Christopher St. Martin, *Criminalize It: A Proper Means of Addressing Environmental Abuses Perpetrated by Multinational Corporations in the Extractive Industr*y, 28 GEO. ENV'TL. L. REV. 107, 128 (2015).

135. *See*, *e.g.*, Tendai Achiume, *Migration as Decolonization*, 71 STAN. L. REV 1509, 1530-31 (2019) ("[B]ecause of the persisting racial demographics that distinguish the First World from the Third—demographics that are, in significant part, a product of passports, national borders, and other successful institutions that partially originated as technologies of racialized exclusion — most whites enjoy dramatically greater rights to freedom of international movement (by which I mean travel across borders) than most nonwhites. The reality is that the mortal cost of international mobility is largely a nonwhite problem").