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Recommended Citation

Sara L Seck & Penelope Simons, "Resource Extraction and the Human Rights of Women and Girls: Policy Recommendations Associated with the Feminist International Assistance Policy" (July 2018).

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Research · June 2018

DOI: 10.13140/RG.2.2.19594.31680

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RESOURCE EXTRACTION AND THE HUMAN RIGHTS OF WOMEN AND GIRLS
POLICY RECOMMENDATIONS ASSOCIATED WITH THE FEMINIST INTERNATIONAL ASSISTANCE POLICY

SARA SECK* & PENELOPE SIMONS**

Background:

On October 28, 2017, we held a half day policy meeting on gender and resource extraction. The meeting was co-sponsored by the Social Sciences and Humanities Research Council, the International Law Research Program (ILRP) at the Centre for International Governance Innovation (CIGI), the Schulich School of Law at Dalhousie University, the Canadian Partnership for International Justice along with the Shirley Greenberg Chair of Women in the Legal Profession, the Faculty of Common Law, the Human Rights Research and Education Centre, and the Interdisciplinary Research Group on Territories of Extractivism, all of the University of Ottawa.

The policy meeting brought together industry and government representatives, civil society experts, an interdisciplinary group of scholars and students and other members of the public. We considered options for law and policy reform based on presentations and discussions from, and ideas put forward and questions raised at, the two-day conference on resource extraction and the rights of women and girls held at the University. Participants considered how to integrate a gender perspective into international and domestic laws, policies and standards that govern Canadian and global large-scale resource extraction companies to ensure their practices respect the rights of, and, where possible, empower, women and girls. While the discussion focused equally on law and policy reform regarding extractive activities that take place both within and outside Canada, this policy brief will focus only on resource extraction by Canadian companies operating abroad for the purposes of providing recommendations regarding Canada's Feminist International Assistance Policy. It will draw on research and some of the insights from the Policy meeting.

Introduction:

Governments, international organizations, non-governmental organizations (NGOs), and resource extraction affected communities have been grappling with how best to regulate transnational business activities that may cause or contribute to violations of human rights and environmental harm. With respect to the governance of resource extraction, such as mining and oil & gas development, much of the global public focus has been on the development of

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soft regulatory mechanisms and policies. In some jurisdictions, governments have modified mining and other resource extraction regimes, including assessment laws, to address select human rights issues, most notably Indigenous and local community participation and consent rights. However, in the development of these domestic and international laws, soft standards and policies, little attention has been paid to the effects of large-scale mining and oil & gas development on the lives of women and girls. At the global level, despite considerable state endorsement of women's and girls' rights under international law (CEDAW 1979; Beijing Declaration 1995; SDG 2015), and of the responsibility of business actors to respect all human rights (UN Guiding Principles 2011), to date most domestic laws and international standards providing guidance for the extractive industry do not integrate a gender analysis. A recent exception is Annex C "Engaging with Women" of the 2017 OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (OECD 2017).

Canada is a leader in the global mining industry and is also home to a number of major oil & gas companies (Industry Canada 2014). Federal government policy suggests a commitment to ensuring corporate social responsibility and sustainable development in resource extraction (GAC, Enhanced CSR 2014), although the sufficiency of this commitment has been criticized for failing to ensure corporate accountability (Seck 2011; Simons & Macklin 2014; Simons 2015). Having said this, the announcement of the office of Canadian Ombudsperson for Responsible Enterprise is a welcome development and important step forward in this regard. Canada is also formally committed to the promotion and protection of women's rights and gender equality, both as a human rights issue and as an essential component of sustainable development, peace and security (GAC 2016; FIAP 2017). The need to ensure gender equality and to empower the rights of all women and girls in sustainable development has recently been endorsed by the international community (SDG 2015 #5). Yet, to date, and consistent with most global norm development, Canada's commitment to responsible global mining has been largely gender-blind.

The relationship between women and resource extraction is complex. Large-scale mining and oil & gas development is highly gendered and deeply masculine. Some women do work within or for these extractive industries, whether as executives, employees, lawyers, business partners or as artisanal or small-scale miners (Beckton & Ozkan 2012; Eftimie *et al.* 2012). Yet other women from resource extraction-affected communities may be vocally opposed to mining or oil & gas development projects. Gender-specific extraction-related harms include: gender-based violence perpetrated by security forces or exacerbated by the broader impacts of resource extraction including the influx of male workers; displacement and loss of local subsistence livelihood leading to high risk lifestyles; and contamination of lands, water and wildlife with gender specific health impacts (WoMin & IANRA 2013; Lahiri-Dutt 2011). Under both scenarios – resource extraction-related work and resource extraction-related effects - many women experience discrimination and girls experience a double disadvantage due to gender and age (Beckton & Ozkan 2012; Eftimie *et al.* 2012). When armed conflict is fueled by resource extraction, women and girls suffer increased vulnerabilities (Ní Aoláin *et al.* 2011: 35-36). Different and increased burdens and challenges confront indigenous women and girls (Gibson & Kemp 2008; O'Faircheallaigh 2012). While the experiences of women and girls in, and affected

by, resource extraction differ depending on the country and extraction contexts, all such ventures risk exacerbating existing problems of gender discrimination and violence.

Despite the endorsement by states and international institutions of women's and girls' rights under international law, and of the business responsibility to respect human rights, to date most domestic mining, oil & gas laws and international standards providing guidance for extraction companies do not integrate a gender perspective. As a result, there is an ongoing failure to prevent extraction-related violations of the rights of women and girls, a lack of attention to accountability and remedy for past gender-based harms, and a failure to empower women and girls with meaningful choices about their futures.

Addressing Gaps in Canada's Feminist International Assistance Policy relating to resource extraction:

Canada's Feminist International Assistance Policy (FIAP) is an important step forward. It commits to supporting and taking action in a range of areas to meet Sustainable Development Goal 5 of achieving equality and empowering women and girls. For Canada "this is an entry point for ... international assistance and will drive progress in the other Sustainable Development Goals (SDGs)". Thus, "gender equality and empowering all women and girls ... is at the heart of Canada's approach to implementing the [SDGs]" (FIAP 2017). However, the FIAP overlooks two key issues: 1) the impact of natural resource extraction on the rights of women and girls; and 2) the human rights, environmental and humanitarian implications of Canadian resource extraction in countries to which Canada provides development assistance.

Action Area 1 – Gender Equality and Empowerment of Women and Girls and Action Area 5 - Inclusive Governance

Action Area 1 targets gender equality and the empowerment of women and girls. One of the key sub-actions is to address sexual and gender-based violence. However, this sub-action does not address the fact that violence against women, including sexual violence is often perpetrated in the context of resource extraction, particularly mining and oil & gas extraction. The UN Special Rapporteur on Violence Against Women, Dubravka Šimonovi has referred to sexual violence as "rife" within the mining industry (Šimonovi 2016: 20). Additionally, Canadian extractive corporations have been implicated in rape and gang rape perpetrated by the security forces (whether public or private) in the context of protecting the extractive activity (Harker 2000; Gagnon & Ryle 2001; Human Rights Watch 2011; Choc v Hdbay Minerals Inc.; Columbia & Harvard Human Rights Clinics 2015).

Action Area 5 addresses rule of law issues, reform of discriminatory laws and policies, reform of the judicial system and justice for survivors of gender based violence. This action area does not expressly deal with rule of law issues and justice for survivors of gender-based violence associated with Canadian extractive activity in host countries to which Canada is providing development assistance.

First, gender-based sexual violence that occurs in the context of resource extraction does not occur in a vacuum. It is a result of, and helps to perpetuate, existing “structural gender inequalities that manifest themselves in the subordination of women in societies.” (Anderson 2008: 179). Such structural factors are not simply domestic constructs but are directly linked to the “broader structure of global power relations” (True, 2012: 32). Foreign investment in the extractive industries can help to prop up and sustain patriarchal structures of a society. Therefore, the Canadian government in its FIAP needs to consider the extent to which Canadian extractive activity in the countries in which the government is providing financial assistance may support the power structures in place that oppress and marginalize women and contribute to violence against women, including sexual violence.

Second, the rule of law reforms must include Canadian extractive companies operating abroad and violence against women, including sexual violence. Soft law standards and mechanisms have been an important first step in addressing transnational extractive industry conduct but have not proven sufficient to prevent complicity by Canadian extractive companies in violations of human rights (Simons & Macklin 2014), including gender-based violence (Simons 2017). Nor do these standards and mechanisms sufficiently address the differentiated impacts of resource extraction on women and girls. The Canadian government should enact legislation that requires Canadian extractive companies to respect human rights and to take steps to ensure that they do not become complicit in violence against women, including sexual violence. The government should also, through legislation and policy, take measures to ensure that where such companies are complicit in such violence against women that the victims of these acts have access to an effective remedy in Canada and that there are laws and mechanisms in place to hold such companies to account. The new ombudsperson office is a very important step forward in terms of providing access to a non-judicial remedy. However, additionally the Canadian government should take appropriate steps to ensure that such victims have access to Canadian courts to seek damages from the such corporations. This requires that legal barriers such as *forum non conveniens* are removed (OHCHR 2016: 31). The British Columbia courts have found in two civil claims against Canadian extractive companies headquartered in British Columbia, that the BC courts are the most appropriate forum to hear these cases (*Garcia v Tahoe Resources Inc; Araya v. Nevsun Resources Ltd*). However, the second of these decisions is currently under appeal to the Supreme Court of Canada and its outcome is uncertain. The Government of Canada should take legislative or policy action, including engagement with all of the provinces and territories to ensure that such claims against companies headquartered in the other provinces will not be dismissed prematurely under this or similar doctrines. It is also recommended that parent company or full enterprise liability be established for these types of claims to prevent extractive companies from avoiding liability through separate legal personality and the ability to transfer funds between members of their corporate group in order to avoid paying damages in these types of cases (Amnesty International 2014: 201-202). Finally, the Canadian government should take steps to ensure that extractive corporations and responsible corporate officials that perpetrate or are complicit in violence against women, including sexual violence in their overseas operations can be, and are, prosecuted under Canadian criminal law.

A related issue is the lack of gender diversity within extractive companies themselves. The ability of heavily male-dominated companies to proactively anticipate and prevent issues of violence against women, including sexual violence and other gendered impacts of resource extraction is extremely limited, let alone the likelihood that such companies will acknowledge and take steps to remedy past harms. It is imperative that issues of management and board diversity in Canadian extractive companies operating internationally are tackled through legislative reform at all levels (See recent discussions in relation to Bill C-25), beyond current securities laws and policies and the amended Canadian Business Corporations Act that only require publicly traded companies to report on whether or not there is gender or other diversity (respectively) among board members (Explanatory note re C-25 2018). Requiring more diversity on boards, however is only a first step. It will also be necessary to address corporate law rules, including directors' duty of care and fiduciary duty (CBCA s. 122). The obligation of directors to act in the best interests of the corporation has generally been interpreted as an obligation to make a profit and "any consideration of other constituencies [is] required to be incidental to the end of maximizing stockholder wealth" (Strine 2008: 260). While a few Supreme Court of Canada decisions have suggested that directors may take stakeholders into account in their decision making (*Peoples Department Stores Inc (Trustee of) v Wise; BCE Inc. v 1976 Debentureholders*), there is currently no obligation to do so. Furthermore, with the increased power of institutional investors, directors and officers are even more focused on profit (Strine 2008: 264).

Action Area 2 – Human Dignity and Action Area 4 – Environment and Climate Action

Action Area 2 focusses on access to good health care and nutrition, quality education and timely gender responsive humanitarian assistance. Action Area 4 focusses on the environment and climate change and the gendered impacts of climate change. The FIAP states that "in particular, lack of clean drinking water – coupled with a gender-based imbalance in household responsibilities – means that climate change can have a disproportionate impact on women and girls".

Neither of these Action Areas address the impact of Canadian extractive corporations on the environment, their role in climate change or the contribution of resource extraction to the scarcity of resources. With regard to climate change, it is notable that in December 2017, the World Bank Group announced that after 2019 it will no longer be financing upstream oil & gas development (World Bank Group 2017). A month earlier, the Committee of the Convention on the Elimination of Discrimination Against Women (CEDAW) recommended in its concluding observations of its ninth periodic report on Norway, that Norway review its oil and gas extraction policy, "to ensure that they take into account the disproportionate negative effects of climate change on the rights of women." (CEDAW 2017). Most recently, in February 2018, CEDAW released its General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change (CEDAW 2018). Among other recommendations is, in paragraph 46, that States parties should, separately and in cooperation, "[t]ake effective steps to equitably manage shared natural resources, particularly water, and limit carbon emissions, fossil fuel use, ... and all other environmental, technological and biological hazards

and risks that contribute to climate change and disasters which tend to disproportionately affect women and girls”. For the FIAP to take seriously the gendered impacts of climate change, one essential step is to eliminate support for fossil fuel extraction both within Canada and internationally.

In addition, environmental pollution from resource extraction, whether through tailings treatment (mining), or change to ecosystems through strip mining, mountain topping etc. can all have the effect of undermining health, access to water and sufficient nutrition. Mining tailings often pollute water and land where individuals from the local community (usually women and girls) grow or forage for food. In terms of transnational resource extraction activity, companies may operate in countries or areas where environmental laws, regulation and/or oversight is weak, or where there is government corruption. The gendered environmental impacts of extractive industries have been identified by Special Rapporteurs at the UN Human Rights Council on the disposal of hazardous wastes and substances, (Georgescu 2012; Tuncak 2017: 37) including the particular vulnerability of women environmental human rights defenders (Tuncak 2017: 47). Most recently, the Special Rapporteur on Human Rights and the Environment has released Framework Principles which highlight the need for States to “prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment” (principle 3); to “provide for and facilitate public participation in decision-making related to the environment” with special attention to the participation of women (principles 9 and 14); and generally to “take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm”, including women (principle 14) (Knox 2018).

Barrick Gold Corporation’s gold mine in Porgera, PNG is a salient example. The corporation has used the river system to dispose of its tailings contrary to best international practices. (Human Rights Watch 2011:73-78; Norway 2008). Concerns have been raised about health impacts of heavy metals and other toxins in the river water and land abutting the river for the villagers who source water from the river and grow vegetables in the area (Norway 2008). These concerns have also been raised by the two female residents of Porgera who attended the conference and the policy meeting on resource extraction and the human rights of women and girls in October 2017 (Seck & Simons forthcoming).

In addition to addressing the impact of Canadian mining companies operating internationally on the rights of women and girls, Canada should use its influence in international fora such as the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development to more fully implement gender considerations into the IGF Mining Policy Framework, which serves as guidance for IGF member countries (IGF Mining 2013). Canada has also been an active member of the Voluntary Principles on Security and Human Rights, including in the governance of the initiative. Canada has mentioned the FIAP in its 2017 annual report and although the issue of gender based violence by security forces has been raised at some of the annual meetings, the text of Voluntary Principles has not been modified to reflect the differentiated impacts of extractive industry security forces on the human rights of women and girls. (Voluntary Principles 2000). The government should use its influence to ensure that these issues are

consistently raised at the plenary meetings and integrated into the text of the principles, and into verification and implementation guidance.

In discussing the requirements of humanitarian action in situations of forced displacement caused by conflict or natural disasters, Action Area 2 does not address the potential contribution of Canadian resource extraction to conflict, whether it takes place in the context of conflict (Harker Report 2000) or is itself the cause of, or a contributor to, conflict or local tensions. It also does not address voluntary or forced displacement of populations in host countries associated with resource extraction, whether it is effected for the purposes of a particular extractive project or the project is slated to take place on land that has been the subject of conflict and prior forced displacement (*Choc v Hudbay Minerals Inc.*: paras 11-13). Even where communities agree to be relocated, community members may not receive the promised land or housing. Such land or housing might be inadequate for the purposes of providing a livelihood to persons. Or the housing may not be adequate in addressing community, family and specific cultural needs and may not be located near to sources of potable water and other necessary resources, including arable or pasturable land. Where this is the case it can impose additional burdens on women and girls, who because of their domestic duties, may have to travel further to find water and gather or grow food (Eftimie *et al.* 2012).

Summary of Policy and Law Reform Recommendations

In order to address the impact of Canadian resource extraction on gender equality in other states, it is recommended that the Canadian Government:

1. Ensure coherence between the FIAP and its other areas of foreign policy including regarding the behaviour of Canadian extractive companies abroad.
2. Ensure coherence between foreign policies and Canada's positions and advocacy within intergovernmental organizations such as the G7 and the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development and the Voluntary Principles on Security and Human Rights.
3. Recognize and address, through law and policy, the role of investment by Canadian resource extraction companies in propping up structural inequality and as part of its commitment under the FIAP.
4. Take regulatory action to prevent Canadian extractive companies from perpetrating or becoming complicit in violence against women, including sexual violence and provide access to effective judicial and non-judicial remedies in Canada for foreign victims of such violence, as well as criminal sanctions for companies that are complicit in such acts.
5. Take regulatory action to ensure gender and other diversity on boards of resource extraction companies.

6. Take regulatory action to broaden directors' duties to require them to take the gendered impacts of resource extraction into account in their decision-making and to prevent actions that have such impacts including violations of women's human rights or environmental harm.
7. In addition to advocating for humanitarian principles and international humanitarian law and the unique challenges faced by women and girls, the FIAP needs expressly to recognize the role that Canadian extractive companies may have in creating or contributing to the conditions that will necessitate a humanitarian response. Where displacement is related to Canadian resource extraction, the Government of Canada should provide temporary gender sensitive humanitarian assistance to the affected peoples. It should also impose legal obligations on such companies to ensure that displaced communities are provided with culturally appropriate housing, access to potable water and land that will allow such communities to continue their previous means of livelihood.
8. Ensure that the legislative framework developed by the Government of Canada also requires resource extraction corporations to abide by the highest standards of environmental impact assessment and environmental protection in host states in dealing with waste, and that it provides access to effective remedies in Canada (both judicial and non-judicial) for victims alleging negative impacts on their health.
9. Eliminate support for fossil fuel extraction both within Canada and internationally.

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