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Chair: Mr. Peter Fonseca

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• (1830)

[English]

The Chair (Mr. Peter Fonseca (Mississauga East—Cooksville, Lib.)): Welcome to all the members, the clerk, the analysts, all the staff, all the interpreters and everybody who makes this happen. Thank you to everybody. I hope everybody is recharged from the break.

This is meeting number 15 of the Subcommittee on International Human Rights. Today we meet to hear from Dr. Penelope Simons in view of our study of the role of the Canadian ombudsperson for responsible enterprise.

To ensure an orderly meeting, I'd encourage all participants to mute their microphones when they're not speaking and to address all comments through the chair. When you have about 30 seconds left in your time of questioning, I'll flash a card. I think everybody knows about it. I think that's it.

Dr. Simons, there is interpretation in English or French available in the globe icon at the bottom of your screen if you require it.

Members, this first session with Dr. Simons is going to go to 7:20. I'll try to figure out the timing on our questions so that it's all even and fair.

Now I'd like to welcome our witness for the first panel: Penelope Simons, associate professor at the University of Ottawa, who is appearing as an individual.

Dr. Simons, I now invite you to make your opening statement for up to five minutes. You have the floor.

Dr. Penelope Simons (Associate Professor, Faculty of Law, Common Law Section, University of Ottawa, As an Individual): Thank you very much, Chair.

Thank you very much for inviting me to testify before this committee on this really important issue.

I have been working on issues of corporate accountability in the area of resource extraction for over two decades. I was a member of the Canadian assessment mission to Sudan, also known as the Harker mission, which was sent by Lloyd Axworthy to investigate allegations of grave violations of human rights perpetrated to protect the business assets of the consortium of which the Canadian oil company Talisman Energy was a part.

I want to talk today about the right to an effective remedy. Canada has an obligation to provide effective remedies for victims

of human rights violations, including violations that are committed by private actors such as business enterprises.

The right to an effective remedy is widely recognized as a fundamental human right. It's been enshrined in a range of core human rights treaties that Canada has ratified. It's not only a rule of customary international law but an erga omnes obligation. What does that mean? It means it's owed by states to the international community as a whole.

The obligation to provide an effective remedy is an essential aspect of the state's obligation to protect human rights, so states not only have to respect and fulfill human rights but also have to protect human rights. That means they have to take steps to prevent private actors such as business enterprises from violating or becoming complicit in violations of human rights.

Where those violations occur, or where they are alleged to have occurred, the state has a duty to investigate. This includes taking appropriate steps through judicial, administrative or legislative measures to provide an effective remedy, including where corporations are based within a state's territory or are subject to its jurisdiction and engage in activities that have a direct and reasonably foreseeable impact on the human rights of individuals or groups in other states.

This obligation was recently recognized, as you probably know, by the Supreme Court of Canada in the *Nevsun* case.

Non-judicial remedies play a fundamental role in ensuring the right to an effective remedy, so states have to, as part of a comprehensive state-based system for remedy of business and human rights obligations, have not only judicial remedies but also non-judicial remedies. They fill a crucial gap where a judicial remedy is not required or chosen, or where perhaps there is not a cause of action that relates to the substance of a complaint, or the complainant doesn't have the resources or the capacity to bring a complaint.

Non-judicial remedies need to be effective in order for a state to meet its obligation under international law. You can't just create a remedial mechanism. It also has to be capable of delivering an effective remedy.

In the case of CORE, the Canadian ombudsperson for responsible enterprise, the ability to engage in a credible, independent investigation of a complaint against a Canadian extractive or garment corporation—that is, the ability to ensure it has all the evidence before it before coming to a conclusion—is crucial to its being effective and to meeting this standard of an effective remedy.

Canada, with the current status of the CORE, is failing to meet its international human rights obligations in this regard. The effective remedy aspect was also confirmed by Barbara McIsaac in her legal advice to the government, in which she said that the effectiveness, as it currently stands, is going to be dependent on the co-operation of the complainant and the entity being investigated. This means the CORE's effectiveness may be compromised.

It's not only that it will be compromised. Making a finding of fact that isn't based on all the facts can be harmful because it will not reflect the full situation of the allegation. This is also harmful, not only for complainants but also for corporate entities.

Without the powers to investigate—in other words, to compel witnesses and documents—the CORE is just a replication of the Harper government's CSR counsellor, which failed to ever resolve a dispute. The only difference here is that it has a new name and a longer term.

This is also a reputational issue for Canada. Canada can't claim to be a champion of human rights when it fails to comply with its own human rights obligations and allows its corporations to operate with impunity and then also fails to provide effective remedy for those who are harmed by the latter's activities.

I will leave it there. I welcome your questions.

• (1835)

The Chair: Thank you very much, Dr. Simons.

Now we're going to move to questions from the members.

We're going to begin with the Liberals, with Anita Vandenberg, for seven minutes.

Ms. Anita Vandenberg (Ottawa West—Nepean, Lib.): Thank you very much, Professor Simons. As an Ottawa MP, I'm very happy to see a University of Ottawa professor here. Thank you very much for the work you've been doing on this issue.

I'm going to pick up on something you said in your opening remarks. It actually surprised me, because from most of the evidence and the testimony I have heard about the CORE, it's a good first step. It's new, and it's just now really starting to undertake the things it set out to do, but it's a good first step that needs to be improved. Your word was that it is "harmful". You said that it's harmful not [*Technical difficulty—Editor*] victims of human rights abuses. You're suggesting it's also harmful to the corporations.

That's not something we've heard yet. Could you elaborate on that?

Dr. Penelope Simons: Absolutely. If a body is asked to investigate a complaint and it can't access the information, then it will come to a conclusion that is not based on the full set of facts. This can be, I think, detrimental also for companies, because it may come to a conclusion that the company has violated its responsibility

to respect human rights or otherwise acted in a way that is harmful when in fact it might not have done so. Therefore, it can be harmful also to the company.

Ms. Anita Vandenberg: What would be your recommendations, then? First of all, what are things that are actually being done right at the moment? What would be your recommendations in terms of how to improve the CORE?

Dr. Penelope Simons: I think the original plan was for the CORE to be an independent entity that could make credible investigations. It was supposed to have powers to compel witnesses and documents. This is how it could be improved. Allow it to engage in investigations in a credible way and come to conclusions about a situation with all the evidence before it.

Ms. Anita Vandenberg: You also spoke about judicial, administrative and legislative measures that are under Canada's international obligations. Could you talk about where there might be some gaps in any of those areas?

Dr. Penelope Simons: Yes. Thanks for that question. I think you mentioned in your first question that the CORE has been talked about as being a first step. It's a good first step, by providing a remedy, in terms of addressing that aspect of the issue, but there's no legislation in place that requires companies to engage in human rights due diligence, for example, to prevent them from becoming involved in violations of human rights in the first place. We don't have effective incentive mechanisms set up in addition to human rights due diligence obligations that would encourage companies to take those preventative steps, for example.

What we really need in Canada is an overarching legislative framework that can address this variety of issues—preventative measures and remedial measures, not just simply remedial measures.

Ms. Anita Vandenberg: The CORE is a good first step. It needs to have more powers. It is one part of a much larger set of policies and mechanisms that are necessary and that you're suggesting would also need to be improved and added to.

Dr. Penelope Simons: Yes. That's exactly right.

Ms. Anita Vandenberg: I also want to ask about the impact on women. I've worked in the Democratic Republic of Congo and I've seen the direct link. The women themselves have drawn a direct link between the mining activities and the companies, and the human rights abuses and the sexual violence that they experience.

Can you tell us if there are ways, certainly with regard to the CORE but also other mechanisms that Canada can use, to ensure that there isn't an indirect link? We were talking about direct links, when companies are actually doing something, but there's that indirect link between the militias and other groups that are battling over the resources, and then the resulting sexual violence that occurs. I'm wondering if you could comment on that.

• (1840)

Dr. Penelope Simons: That's a great question.

First let me say that it's important to understand, too, that sexual violence does not occur only in areas of conflict. It actually is a risk that follows large-scale resource extraction everywhere. It doesn't matter if it's in Canada or in other countries, there's a high risk of sexual violence. That means that, for any kind of regulatory measures that are in place, if you put in place human rights due diligence, you have to ensure that it takes into account the gender impacts of resource extraction and the risk of sexual violence in this context. If there's a human rights impact assessment done, there has to be a gender impact assessment that is part of that human rights impact assessment.

The whole legislative framework would have to take that into account. If the CORE were investigating allegations of something that happened in another country, she would also have to take into account the differentiated impacts on women and particularly this risk of sexual violence.

Ms. Anita Vandenberg: Is that part of the CORE's mandate—

The Chair: Thank you.

We'll move to MP Chiu from the Conservatives for seven minutes.

Mr. Kenny Chiu (Steveston—Richmond East, CPC): Thank you, Professor Simons, for coming to speak with us.

I'd like to start with your book, *The Governance Gap*, which makes this conclusion:

...legal and other non-binding governance mechanisms...are incapable of systematically preventing human rights violating behaviour by transnational corporations, or of assuring accountability of these actors or recompense for victims of such violations.

It also contends that “home state regulation...has a crucial role to play in regulating such conduct.”

Would you say that this applies very well in the case of the CORE? If so, how would this apply to the CORE?

Dr. Penelope Simons: Thank you for that. Thank you as well for reading my book.

That's a very good question, but I think probably the first statement you made does not say “legal” mechanisms. I think what we were arguing for in that book was that we need to go beyond self-regulation, that self-regulatory initiatives are incapable of ensuring, in any systematic way, that companies do not become complicit in violations of human rights.

The second statement you read was that the home state has an important role. We were arguing in that book, and I think it's a really important thing, that if we are going to start to change the human

rights impacts of business, then home states need to start regulating their corporations when they're operating overseas. That would entail, as I said to MP Vandenberg, having a comprehensive legislative framework that ensures there are preventative measures in place but also effective remedial mechanisms for private actors.

Mr. Kenny Chiu: Thank you.

You might have already addressed [*Technical difficulty—Editor*] provided with MP Vandenberg earlier, but what regulatory framework—

[*Translation*]

Mr. Alexis Brunelle-Duceppe (Lac-Saint-Jean, BQ): I apologize, Mr. Chair, but the interpreter just said that the connection was poor, which was preventing them from doing their job. I don't know whether this has been resolved. Could the interpreters tell us whether it has been resolved?

[*English*]

The Chair: Mr. Clerk, can we see about correcting that? Is it the way the mike is positioned?

The Clerk of the Committee (Mr. Naaman Sugrue): Mr. Chair, we're not sure if it's on Mr. Chiu's end or ours. Perhaps I'll ask him to move his mike a little bit closer to his face and we'll make another attempt.

I'll continue to investigate.

• (1845)

Mr. Kenny Chiu: Mr. Chair, I'll proceed with the questioning. If you or the members have any connection or audio problems, please let me know.

What regulatory framework would you propose in place of the CORE? What changes could be made to make the CORE more effective? I suppose the second part of that question was kind of addressed earlier, but if you wouldn't mind expanding on it, that would be great.

Dr. Penelope Simons: Yes. I don't think it's an either-or situation.

The CORE could play a role in any framework of legislation by providing, with the appropriate powers, an effective non-judicial remedy for this, but as I think I said before, you need measures that prevent companies from engaging in human rights due diligence. You may or may not be aware, but there's a lot going on in Europe now, where states are putting in place or contemplating putting in place mandatory human rights due diligence obligations for companies that are operating abroad.

This is something that Canada should definitely put in place as part of its framework, but also a range of different mechanisms that could incentivize companies and could allow private actors to hold companies to account. It would allow better access to Canadian courts and also allow bringing claims to a CORE with the appropriate powers and sanctions for companies that have become involved in some of the worst violations of human rights, such as, for example, those [*Technical difficulty—Editor*] Sudan many years ago.

Mr. Kenny Chiu: Thank you.

I'm glad that you bring up some of the examples you mentioned. Could you please take a moment to elaborate on your experience in the Sudan in studying Talisman Energy?

Dr. Penelope Simons: Okay. I could tell you a little bit about that.

We were sent there to investigate these grave allegations of violations of human rights. We found, in fact, that public security forces that were protecting the assets of the consortium, the Greater Nile Petroleum Operating Company, of which Talisman was a 25% shareholder, were perpetrating terrible violations of human rights.

They engaged in a scorched-earth policy. They were forcibly displacing people. They were murdering people. They were raping women. They were abducting women and children, and they were burning villages and looting. They were also committing violations of humanitarian law and international crimes.

Mr. Kenny Chiu: It was not a direct instruction by the company itself. It was the contractors they hired who were conducting this.

Dr. Penelope Simons: Yes. It was the Sudanese public security forces. In many cases of human rights abuse, it is security forces that engage in this, but that doesn't absolve the company of a responsibility to ensure that those who they engage are screened and to have clear instructions not to engage in violations of human rights.

Mr. Kenny Chiu: I appreciate that.

Mr. Chair, how much time do I have left?

The Chair: You have about 20 seconds.

Mr. Kenny Chiu: Okay. Thank you.

The Chair: Thank you.

We'll move to MP Brunelle-Duceppe from the Bloc for seven minutes.

[*Translation*]

Mr. Alexis Brunelle-Duceppe: Thank you, Mr. Chair.

Ms. Simons, thank you so much for joining us this evening. Your testimony will help us shed light on the numerous human rights violations committed by businesses that are tarnishing our reputation and making a mockery of our values abroad.

At our last meeting, Ms. Meyerhoffer told us she was sure she had enough powers and resources to fulfil her mandate, but she also admitted to having fewer than 10 people in her service and did not specify what her budget is.

The magnitude of the task is enormous. There are 200 Canadian mining companies in Mexico alone. Am I wrong in saying that it is

difficult to be reassured? Do you share Ms. Meyerhoffer's optimism concerning her current resources?

[*English*]

Dr. Penelope Simons: Thank you very much for that question.

I'd have to look at the full budget to understand exactly what resources she has, but I do agree that Canada is host to a majority of the world's largest mining companies, many of which operate overseas. As you point out, there are a significant number operating in Mexico, but also in other parts of Latin America and in Africa.

It is important to have a CORE, an ombudsperson's office, that is sufficiently resourced so that it can undertake investigations of complaints. If the office doesn't have the power to investigate, then it can have all the resources it wants, but it needs those powers as well to compel witnesses and documents.

• (1850)

[*Translation*]

Mr. Alexis Brunelle-Duceppe: Since you brought this up, should the ombudsman's investigative power be essential? If so, how would it change the outcome of the many human rights violation situations right now? What do you think that would change in concrete terms?

[*English*]

Dr. Penelope Simons: Thank you very much. That's a great question.

I think one of the things that would change is that we would be provided with—the Canadian public and also the government—public reports that have been properly investigated in relation to allegations that have been made against Canadian mining companies. We would know what the situation is with respect to those allegations.

Providing those public reports, then, will inform not only citizens but also the government, in terms of what other steps it should take in order to regulate corporations. I think it would provide a lot of very useful information for the government, in that sense.

[*Translation*]

Mr. Alexis Brunelle-Duceppe: Thank you for the answer. I agree with you on that point.

I want to keep discussing Ms. Meyerhoffer's comments. She has said that the power to recommend that government support be withdrawn was effective. I was not convinced of the effectiveness of that kind of a recommendation. Do you think it would be enough?

[English]

Dr. Penelope Simons: In terms of sanctioning an entity...? Is that what you're saying?

[Translation]

Mr. Alexis Brunelle-Duceppe: That's right. Do you think the power to recommend that government support be withdrawn is sufficient?

[English]

Dr. Penelope Simons: I think she could also recommend other types of remedial action. She could recommend that a Canadian company pay some sort of remedy or that sort of thing.

This is where the powers would be necessary. It would be very unfortunate for a company if they withdrew support without having looked at the full facts because they couldn't compel witnesses and documents. I think that it's in the companies' interests as well to have a CORE with the proper powers here.

[Translation]

Mr. Alexis Brunelle-Duceppe: I have put my next question to other witnesses, but I think it is important to put it to you, as well.

Many Canadians think that Canada is a leader in human rights. We are certainly not the worst on the planet, but I am not sure we are as good as we think we are. How do you think Canada compares to other countries when it comes to its businesses operating abroad respecting human rights?

[English]

Dr. Penelope Simons: I think it's difficult to always compare Canada.

Canada does have a problem in terms of its reputation with respect to its extractive companies operating abroad. There have been different studies done that have documented the human rights violations that have been associated with Canadian companies operating abroad. There are a lot of Canadian companies out there, so if they are not regulated, then it's going to look bad compared with other countries that have fewer companies out there.

Canada does not have a good reputation. If you go a lot of places in Latin America—you brought up Mexico—you will find that Canadian mining companies do not make it easy for Canadians to go to those countries.

• (1855)

[Translation]

Mr. Alexis Brunelle-Duceppe: I know that I don't have much time left, so I will put a question to you quickly.

To your knowledge, does—

[English]

The Chair: Mr. Brunelle-Duceppe, we have 10 seconds, so we'll move on.

[Translation]

Mr. Alexis Brunelle-Duceppe: It's over? That's too bad.

Thank you so much, Ms. Simons.

[English]

The Chair: We're moving to MP McPherson now from the NDP, for seven minutes.

Thank you.

Ms. Heather McPherson (Edmonton Strathcona, NDP): I'll try to use Alexis's 10 seconds to give value.

Thank you so much for being here today. This is very valuable for us, and your expertise is very welcome.

I come from the international development sector, and I spent a number of years in my career before politics working on this particular issue. You have just spoken about the impacts on companies, and the fact that a strong CORE ombudsperson is actually good for those companies that are acting with ethical behaviour.

I spoke to a number of representatives from the mining sector. I've spoken to representatives from the Mining Association of Canada, and they say that they have a framework, that they have sustainable mining standards already and that they don't need our CORE ombudsperson to be able to compel testimony.

Do you think that's sufficient, and why or why not?

I think I know your answer, but I'll let you respond.

Dr. Penelope Simons: I appreciate the question, but I guess it goes back to allowing corporations to self-regulate. Of course, there are companies that have good business practices in this regard, but there are always the laggards. We've looked at self-regulation over the last decade. It has been absolutely insufficient in terms of preventing companies in any systematic way from engaging or becoming complicit in violations of human rights.

I don't think what the Mining Association of Canada has in place is sufficient. It's good that they do have these business practices, but it is certainly not sufficient.

Ms. Heather McPherson: In fact, the good players, or the good mining companies, will be tarred with the same brush because of the behaviour of the bad companies if we don't have a strong ombudsperson who can compel testimony and witnesses. Is that what you're saying?

Dr. Penelope Simons: Yes, that's exactly right. They will be tarred with the same brush.

For the companies that believe [Technical difficulty—Editor] good business practices and engaging in human rights due diligence, making sure that any allegations are looked into or making sure that they don't actually commit violations of human rights, if they're actually doing that, then they have nothing to fear from a CORE that has powers to compel witnesses and documents.

Ms. Heather McPherson: Okay.

One of the other [*Technical difficulty—Editor*] the ombudsperson had spoken about to this committee [*Technical difficulty—Editor*] power of naming and shaming or the power of these voluntary measures. Again, could you comment on whether or not you think those things are sufficient to ensure that all Canadian companies are not wrecking the reputation of Canadians around the world?

Dr. Penelope Simons: Yes. I absolutely don't think that they are sufficient or that naming and shaming is sufficient. That's what we've had in place for many years. We have policies. We ask companies to align themselves to certain multi-stakeholder initiatives or intergovernmental initiatives like the guiding principles, but they are not sufficient to prevent companies from becoming engaged or to ensure that Canada's reputation is protected as protector and promoter of human rights.

Ms. Heather McPherson: You spoke earlier today about the impacts on Canada's reputation and whatnot. One of the things that you also spoke about is the harm that this would cause companies.

I've talked to a number of different NGOs or CSO representatives who have said that they are recommending to their populations that they not bring forward their complaints to the CORE, to the ombudsperson, because it actually could put them in danger, and there is no protection for them with the process as it stands.

Do you agree with that? Do you have any comments you'd like to make in that regard?

• (1900)

Dr. Penelope Simons: Yes, I do agree with that. For somebody to even mount a complaint to the Canadian ombudsperson, it's not going to be super easy, because it's going to cost some money. The other thing is that if it's not going to come to anything, if there's not going to be a full investigation with all of the facts, then it will not be worth their while.

You spoke about people who might be in danger: the human rights defenders who are protecting it or other people who might bring the complaint. There might be backlash against them, and there aren't protections for them.

Ms. Heather McPherson: Yes. We know that this disproportionately will impact indigenous people, women and people living in situations of poverty. I think that's something we need to keep in mind.

Very quickly, just to finish off, I'll ask one question about Minister Ng's testimony when she came before this committee. She was very vehement that the NCP is very different from the CORE, that it is a very different thing and that this is a much better situation.

I struggle to see how that is the case. Could you take a moment to talk about where those similarities are, but more importantly, maybe where those differences are?

Dr. Penelope Simons: Yes. The CORE, without the powers to compel witnesses, to compel documents and to engage in investigations, is not that dissimilar from the NCP. The CORE has a mandate so that it can advise companies. I don't think the NCP does that, but the NCP engages in mediation.

A CORE that doesn't have power to compel witnesses and documents can settle disputes only with the agreement of both parties participating and providing information. It's in no different a position than the NCP. I think there is a lot of overlap, in that the CORE isn't different enough without its powers to compel witnesses and documents.

Ms. Heather McPherson: I know I'm running out of time, so I will cede my time.

I want to thank you very much. Your testimony today will make our report much stronger. I really do appreciate that.

Dr. Penelope Simons: Thank you.

Ms. Heather McPherson: Mr. Chair, I'll pass it back to you.

The Chair: Thank you.

We'll move to our second round, which will be five minutes of questions from each member.

We'll commence with MP Khalid from the Liberals.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you very much, Chair.

Thank you, Professor Simons, for your very compelling testimony today. I just want to take a step back. We've been studying this issue over the past number of meetings. We're exploring what I think is ultimately the objective of the CORE, which is to prevent human rights abuses from occurring specifically on behalf of Canadian corporations as they operate around the world.

We look at the CORE and we look at the NCP as tools to use to lead to that prevention. Can you perhaps contextualize a little bit the court system and the litigation of these companies in the courts? What role does that whole scenario have to play within this model of prevention that we're trying to put into place in Canada?

Dr. Penelope Simons: I'm glad you're talking about prevention, because I think that's absolutely a key thing. As I mentioned before, we need to have measures like human rights due diligence in place to ensure that companies prevent. However, effective remedies also play a role in prevention in the sense that if you get a decision in the courts that holds a company liable for violating human rights and that requires it to pay compensation, then that liability and that precedent will have a preventative effect. The corporate accountability would have a preventative effect.

With the CORE, a report of an investigation that finds that a company has in fact violated human rights and engaged in whatever type of harmful conduct, and that gets that information out into the public and to the government, will also have a preventative effect. Companies will not want to be brought before the CORE, as it were, in a complaint, just as no company wants to get sued and have to go through the courts.

I think both of these mechanisms have the potential to have a preventative effect if, in the case of the CORE, it has the capacity to compel witnesses and documents.

• (1905)

Ms. Iqra Khalid: Thank you for that.

Do you think that, as it currently stands, the court system would be a better route to remedy versus what the CORE is currently?

Dr. Penelope Simons: Unfortunately, it's very difficult to bring cases to the courts. I've participated in a number as an intervenor. Only a very few cases get to the courts. You have to actually be able to fit the harm into a particular cause of action. You have to have resources. You have to have a lawyer and all of that. It's expensive, it's complex and it takes a long time.

I don't think it's an alternative to a CORE that has proper powers, but it is a complement. Judicial remedies are at the centre of the right to an effective remedy, but they also require non-judicial remedies, like the CORE with appropriate powers, to engage in proper and credible investigations of violations of human rights.

Ms. Iqra Khalid: Thank you for that. I really appreciate that clarification.

We've heard testimony here that the office of the CORE is very unprecedented in creating a space to define those remedies to hold companies to account. I'm wondering if perhaps you can guide us through other jurisdictions internationally that have put in similar offices or have led the charge on holding corporations to account that commit human rights abuses across the world.

Dr. Penelope Simons: A lot of western countries or members of the OECD have national contact points. Some of them are much more effective than the Canadian one, because they actually investigate allegations. The Canadian NCP has always held itself, even though there is a lot of leeway for NCPs in terms of deciding how to conduct themselves.... The Canadian NCP has always said, "No, we're just about mediation. We're only going to resolve the dispute. We're not actually going to investigate allegations as to whether a company complied with the OECD guidelines."

I guess I would hesitate to say that the CORE is so unprecedented. If it had the power to compel witnesses and documents, then yes, it would be kind of a beacon of light in terms of holding companies to account. It's something we should have in this country, where we have so many extractive companies that operate across the globe and that do engage in human rights violations.

The Chair: Thank you.

Ms. Iqra Khalid: Thank you very much, Dr. Simons. I appreciate that.

The Chair: Thank you, Dr. Simons.

We went a little over time, so we're going to move over to MP Reid for the Conservatives for five minutes.

Mr. Scott Reid (Lanark—Frontenac—Kingston, CPC): Thank you, Professor, for being here.

I wanted to start with the erga omnes obligation you referred to. I had never heard of this before, but thanks to Wikipedia I now have three paragraphs' worth of knowledge.

I'm left with the impression that while "erga omnes" means that it's an obligation that is owed to everybody and owed by everybody, what I'm wondering is beyond that, in that these are not enforceable in any form. There's no special enforceability at this point. You'd have to create an enforcement mechanism for any kind of erga omnes obligation. Is that correct?

Dr. Penelope Simons: Erga omnes obligation is a kind of higher level of customary international law, and it's an obligation that is owed by states to the international community as a whole. What it does is give standing to other states that haven't been harmed by a violation of an erga omnes norm to bring a claim, perhaps in the International Court of Justice. It's not that you would have to create special mechanisms. It depends on who violates it, what the violation is and whether another state would be interested in bringing a claim against Canada, for example.

Mr. Scott Reid: If a claim is brought, imagine a situation in which.... Well, let's use a real case. There was the Nevsun mine in Eritrea. Are you familiar with that case?

• (1910)

Dr. Penelope Simons: Yes.

Mr. Scott Reid: I assume you are. It's come up in this committee a number of times, and of course it has gone to the Supreme Court.

Let's assume, then, that it's in Eritrea. That government is not going to bring forward a claim, because of course the accusation is that a state-owned enterprise that was a contractor was effectively engaged in the use of compulsory labour. Some other state brings that case forward.

Is it brought against Nevsun or is it brought against Canada?

Dr. Penelope Simons: In theory, I guess if one state violates an erga omnes obligation, then another state could bring a claim in an international tribunal.

I just want to distinguish between a private party bringing a claim against a non-state actor, a corporation, in [*Technical difficulty—Editor*] being able to bring a claim in an international tribunal such as the UN International Court of Justice in The Hague—

[*Translation*]

Mr. Alexis Brunelle-Duceppe: Unfortunately, Mr. Chair, the interpreter is letting me know that she is struggling to do her job. Out of respect for the interpreter, I think we should look into this.

[*English*]

The Chair: Yes, the clerk has been checking.

Clerk, could you give us a brief 30-second on why this is happening?

The Clerk: We don't fully know why it's happening.

It has happened before to other committees in other rooms. There's no known solution for it, other than to have people speak slowly and clearly and, if necessary, have them repeat part of their statement or question. This applies especially if anyone is reading off a piece of text. Then especially, speak slowly and clearly.

I'll be following up on this. Hopefully, it will stop occurring.

The Chair: Thank you. We'll try again.

I guess the best practice is just to speak slowly and clearly and into the mike.

Dr. Penelope Simons: Okay.

Was I speaking or was MP Reid speaking at that point?

The Chair: I can't recall.

Dr. Penelope Simons: Okay.

I think what I was saying was that there's a difference between a private individual suing a corporation for violations in Canadian courts for something that happened in Eritrea and, say, Canada bringing a claim against Eritrea for a violation, an erga omnes violation, for example.

Mr. Scott Reid: I wasn't wondering so much about whether it was completely brought against Eritrea, because from our perspective as Canadian policy-makers who are trying to influence the actions of Canadian companies headquartered in Canada or traded on Canadian stock exchanges, what happens in terms of the liability of the country in which the extraction is taking place is not going to incentivize in the same way that it would if Canada itself were the defendant. It would have a different effect.

You can see what I'm getting at here, I think.

Dr. Penelope Simons: I'm not quite sure I understand what—

Mr. Scott Reid: What I am getting at is this. If we want to create a situation in which Canada changes the rules under which its corporations operate, then it makes sense for Canada to be the one that is potentially suable for allowing its corporations to act in a manner that is unacceptable. Does that not make sense?

The Chair: MP Reid, thank you. I did add additional time for the time we had to take out—

Mr. Scott Reid: In all fairness, Mr. Chair, you added 30 seconds. I have a timer, and that took more than two minutes.

If you don't mind, can you let her give the answer to my question?

The Chair: Sure.

Can you keep it brief?

Dr. Penelope Simons: Okay.

I guess I'm still not.... You're saying that if Canada regulates its corporations...?

Mr. Scott Reid: No. I'm saying that if it can be structured so that Canada itself...

There are two participants here in terms of nations. There is Canada, the headquarters for extractive companies, and there is the country in which the activities take place. A situation in which the liability is only on the country in which the extraction takes place leaves Canada, or any other country that is headquartering a company, essentially free from the kinds of remedies that can be sought out. We're the country that has the functioning legal system. That's what I'm getting at.

Dr. Penelope Simons: Right. I think, then, the onus is on us, and actually we have obligations under international human rights law to regulate our corporations and provide effective remedies. I don't think it's a question, if I understand you correctly, of somehow bringing a claim against Canada. I mean, that could happen at the international level, and I'm sorry if I'm misunderstanding, but I think if a corporation is operating somewhere, then they can be liable for violations of human rights.

I'm looking at the chair to see if I am okay to continue.

• (1915)

The Chair: We're kind of done. Perhaps you could conclude.

Mr. Scott Reid: Thank you very much for that, Professor. It's much appreciated.

Dr. Penelope Simons: No problem.

The Chair: Thank you.

We'll move to MP Brunelle-Duceppe for five minutes.

[*Translation*]

Mr. Alexis Brunelle-Duceppe: Thank you, Mr. Chair. I would very much like to get five minutes every time just like Mr. Reid.

Ms. Simons, you gave us an overview earlier of Canada's human rights obligations when it comes to Canadian businesses operating abroad. Could you specify what those obligations are?

[*English*]

Dr. Penelope Simons: It's an obligation to ensure that companies that are operating within Canada's jurisdiction are not making decisions and taking actions that can have...or that through subsidiaries are violating the human rights of people in other countries.

[*Translation*]

Mr. Alexis Brunelle-Duceppe: I apologize, but I did not hear the interpretation from the beginning. Could you repeat your answer?

I am really sorry. I speak English, but I want to comply with the Official Languages Act.

[*English*]

The Chair: Maybe the interpreter can repeat that, please.

[Translation]

Mr. Alexis Brunelle-Duceppe: Mr. Chair, let's reset the clock. I will ask my question again.

Earlier, you gave us an overview of Canada's human rights obligations when it comes to Canadian businesses operating abroad. Could you clarify what obligations you were talking about, please?

[English]

Dr. Penelope Simons: I am talking about Canada's obligations to exercise due diligence to ensure that Canadian companies operating in other countries do not violate human rights while they are operating abroad. Canadian companies make decisions. They do a lot of things. Their subsidiaries or their contractors may violate human rights in another country.

[Translation]

Mr. Alexis Brunelle-Duceppe: Is Canada meeting those obligations?

[English]

Dr. Penelope Simons: I think this is what we're all talking about. If Canada were to put in place a legislative framework to require its companies to engage in human rights due diligence and then make sure that there are effective remedies, both through the courts and through a properly empowered CORE, then that would be getting much closer to Canada respecting or complying with its obligations.

[Translation]

Mr. Alexis Brunelle-Duceppe: One of my colleagues asked a good question about prevention earlier. I no longer remember who it was, as all of my colleagues ask good questions.

What is behind one business committing violations and another one not committing violations? Is it a matter of business culture or simply of financial advantages? In short, according to you, as an expert on this issue, do businesses commit human rights violations because it pays to do so or does the behaviour stem from business culture? I don't know whether you understand my question.

[English]

Dr. Penelope Simons: Again, companies probably don't go out seeking to commit human rights violations, and some of them care greatly if their personnel or the contractors they hire or whatever become complicit or commit or perpetrate human rights violations.

I think what companies need to have in place—and this is one of the requirements of the United Nations guiding principles on business and human rights—is that the responsibility of corporations to respect human rights includes that they undertake human rights due diligence: that they look at what the risks are to the people, not to themselves; that they engage in meaningful consultation with local communities; and that they prevent and, if not, mitigate violations of human rights.

That would be what a company should do. They should put in place these internal processes. This is something that European countries are actually going to mandate of corporations.

• (1920)

[Translation]

Mr. Alexis Brunelle-Duceppe: My next question may appear a little unusual to you. Do you think businesses would behave in the same way if the ombudsman had the desired coercive power?

[English]

Dr. Penelope Simons: No. I think it would start to have a preventative affect on corporate behaviour if the CORE could properly investigate, if it had the powers to compel witnesses and documents. Then it would have a preventative effect. That would help to ensure that corporations engage in better practices through, probably, human rights and environmental due diligence.

[Translation]

Mr. Alexis Brunelle-Duceppe: As we say,

[English]

“money talks”.

[Translation]

Thank you very much for joining us, Ms. Simons.

[English]

The Chair: Thank you, Mr. Brunelle-Duceppe.

MP McPherson will be our last questioner for five minutes.

Ms. Heather McPherson: Thank you, Mr. Chair.

This has been a very interesting meeting. I always get the privilege of being the last person to ask questions, so forgive me if I jump around a bit.

[*Technical difficulty—Editor*] about whether or not judicial remedies are something that would be sufficient to deal with this. I think you spoke about the idea that they were insufficient because it is very difficult for those people who have suffered at the hands of mining companies to access those judicial remedies.

I also think that this is in fact why this government had put in place a CORE, an ombudsperson, to start with. I'm just wondering if you had any more comments on the reason for the CORE and, I guess, the fact that judicial remedies were always seen as not being sufficient for this.

Dr. Penelope Simons: Yes. Judicial remedies are of course central to the right to an effective remedy, but as I think you've mentioned, and as I've said before, too, they aren't sufficient because not every set of facts can be a tort claim. Harm that is caused will not be necessarily remedied through the courts.

Plus, there are all the other barriers. It's very difficult to bring a claim because many companies can bring a lot of motions to try to have the claim dismissed before it gets to the merits.

Having a CORE allows for investigation of complaints that would not be brought to the courts. We get a public document that comes to a conclusion about what happened and, if it had the powers, the CORE would be a good remedy alongside the courts, which are not sufficient in this situation.

Ms. Heather McPherson: Following up, I'd just ask for a little more clarity on one of the questions my colleague from the Bloc asked. We heard from Export Development Canada about what they could withhold from companies who weren't acting appropriately and what the CORE could withhold from companies who weren't acting appropriately. You spoke about how, if we did have a good CORE ombudsperson, they actually would make a change in behaviour.

Do you feel that the sanctions, or the disapproval, I guess, of either EDC or the CORE ombudsperson, are sufficient to...? Do you feel that companies really care about whether or not that is withdrawn?

Dr. Penelope Simons: For some companies, it will be important to have that withdrawn, but it's important to remember that the CORE can only recommend to Export Development Canada. Export Development Canada has to decide that it's not going to provide funding to a company. That's a problem. As well, it will only hit certain types of companies. There will be other smaller ones, such as junior mining companies, that won't necessarily be getting export development money when they're operating overseas.

It's not sufficient. It's a start. It's something that's important to have in place, but no, it's not enough. I think there have to be other sanctions.

• (1925)

Ms. Heather McPherson: One of my big concerns and one of the things I see all the time is that companies change their names and use subsidiaries. They avoid being able to be held to account through some of these mechanisms.

You talked a little bit about what was being done in Europe and how some countries around the world are doing a much better job of holding their companies to account and ensuring that their companies are going beyond the bare minimum to ensure that human rights are being protected within their supply chains or within their operations. We have only about a minute left, but can you very quickly talk about where you've seen great examples and about which countries this subcommittee should be looking at?

Dr. Penelope Simons: I think the first country would be France. They have in place this duty of vigilance law that requires compa-

nies over a certain size to take steps to ensure that they have a vigilance plan in place and to make sure that their subsidiaries, other contractors and other entities in the global supply chain do not violate human rights, etc. That's important to look at.

Germany is also looking at mandatory human rights due diligence laws. They basically gave companies a year or maybe a bit more for 50% of them to voluntarily engage in human rights due diligence. That didn't happen, which was unsurprising. They right now have some legislation going through their parliament on mandatory human rights due diligence.

The EU is also talking about this issue at an EU level.

Ms. Heather McPherson: Wonderful. Thank you so much.

Thank you for your testimony.

The Chair: Thank you, MP McPherson.

Thank you, Dr. Simons, on behalf of the entire committee. We appreciate your taking the time to appear before us.

Mr. Scott Reid: Chair...?

The Chair: Yes.

Mr. Scott Reid: Before we let the professor go, could I make a request that she forward her information regarding France's model? I suspect that it would be very helpful.

The Chair: That's a good point.

Ms. Heather McPherson: And Germany's...?

Dr. Penelope Simons: Okay.

The Chair: Thank you, Dr. Simons. There's some more homework for you. Thanks for doing that for us.

Members, we will suspend now. Then we will come back in camera for committee business.

Thank you.

[*Proceedings continue in camera*]

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