Suggestions for the List of Issues: Canada
to be considered in connection with the Sixth periodic report of Canada (CCPR/C/CAN/6) on its compliance with the International Covenant on Civil and Political Rights

Canada’s Mining Interests in Latin America and the Urgent Need for Measures to Prevent and Remedy Human Rights Harms Caused Abroad

This report seeks to assist the UN Human Rights Committee in carrying out a constructive review of Canada’s compliance with the International Covenant on Civil Political Rights. It is our hope that the review will give priority consideration to the civil and political rights of especially vulnerable and marginalized groups. With this report, we respectfully urge the Committee to include in its considerations the human rights impacts of Canada’s actions and omissions felt by communities across Latin America.

I. Systemic Abuses of Rights Recognized under the Covenant
II. State-Business Nexus between the Government of Canada and its Extractive Sector
III. Regulatory Framework to Prevent Human Rights Abuses and Guarantee Accountability
IV. Access to Effective Remedy for Victims of Human Rights Abuses Committed Abroad
V. Key Findings and Recommendations from Other UN Bodies Calling on Canada to Take Increased Measures to Prevent Abuses
VI. Proposed Formulations of Concerns to Include in the List of Issues

Submitted July 2014 by

Franciscans International
NGO in General Consultative Status with ECOSOC
Introduction

Part I of this submission briefly comments some of the dimensions of the systemic violation and undermining of civil and political rights that can be observed. These abuses take place in connection with shortcomings in Canada’s governing of corporations pursuing the extraction of natural resources in Latin America as well as the Canada’s own foreign policy promoting conditions favorable to the mining sector. Part II notes the strong nexus between the Government of Canada and the Canadian mining sector—an element that increases the duty and expectation of regulation to prevent and guarantee accountability for human rights abuses. Part III and IV comment the gaps in the existing regulatory framework and the challenges for victims to find effective remedy.

Part V aims to support the work of the Human Rights Committee by offering a condensed summary of the most important findings and recommendations of other UN bodies and special procedures on these issues. Importantly, these UN mechanisms have urged Canada to align its official development assistance to human rights norms and to take measures to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.

The catalogue of these factors establishes the urgency of including these topics in Canada’s periodic review before the Committee. Part V thus concludes with proposed requests for information that could be included in the List of Issues to ensure a robust and thorough evaluation of Canada’s compliance with the Covenant along these lines.

For a detailed account of human rights violations related to the current model of extractive development promoted by Canada and its mining industry, we urge the members of the Committee to refer to the recent report: El impacto de la minería canadiense en América Latina y la responsabilidad de Canadá. This extensive study was conducted by the Working Group on Mining and Human Rights in Latin America and submitted to the Inter-American Commission on Human Rights in 2013.

The Working Group is made up of the following organizations: Observatorio Latinoamericano de Conflictos Ambientales–OLCA (Chile), Colectivo de Abogados José Alvear Restrepo–CAJAR (Colombia), Fundación para el Devido Proceso–DPLF (regional), Centro Hondureño de Promoción para el Desarrollo Comunitario–CEHPRODEC (Honduras), Asamblea Nacional de Afectados Ambientales–ANAA (Mexico), Asociación Marianista de Acción Social (Peru), and Red Muqui (Peru).

The Impact of Canadian Mining report is a study of 22 mining projects developed by Canadian companies in 9 Latin American countries. In addition to useful information about each case, the study identifies clear trends both in terms of the human rights impact and the Canadian policies that relate to them.

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1 An executive summary is also available in English with the title, The Impact of Canadian mining in Latin America and Canada’s Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights.

2 Submitted for the 149th session, November 2013.
I. Systemic Abuses of Rights Protected under the Covenant

About 75% of the world’s exploration and mining companies are headquartered within Canada’s national territory and jurisdiction.\(^3\) This is “partly because the country acts as a major banker for the extractive industry, but partly also due to weak corporate governance and enforcement.”\(^4\) Approximately 2/3 of Canada’s total mining activity measured by financial investment is in Latin America and this regional concentration is intensifying.\(^5\) Because of this reality, we must look to communities in Latin America affected by Canadian mining companies to considering Canada’s fulfilment of its obligations and the realization of the civil and political rights codified in the Covenant.

Under its assessment of the right to peaceful assembly and freedom of association (arts. 21 and 22) in its report to the Committee, the Government asserts that it “supports the work of defenders of human rights worldwide and at home.”\(^6\) Yet, while the Government affirms that “non-violent social and political protest receives the highest level of legal protection in Canada,”\(^7\) one of the most concerning trends we observe in relation to the efforts to promote the extractive development model in Latin America is the increased criminalization of social protest and human rights defense. This is in addition to the well-known patterns of threats and violence against environmental and human rights defenders. The report *Impact of Canadian Mining* documents these patterns specifically as identified across the study of cases where Canadian corporations are operating.\(^8\)

The precarious situation of human rights defenders and community leaders touches on a wise range rights protected by the Covenant. Parallel to efforts to remove obstacles for the expansion of the mining sector in Latin America, abuses that are observed include threats and violence against defenders and community leaders, the use of excessive force against peaceful protesters, assignment of the security and armed forces to protect private interests, arbitrary use of the criminal justice system, impunity for abuses against defenders, and invasions of the right to privacy.

Other systemic human rights abuses have been widely documented and which affect rights recognized in the Covenant include obstacles affecting the rights to participation including a lack of access to information and democratic decision-making spaces; the right to self-determination and free, prior, informed consent; and forced evictions.

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\(^3\) *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (March 2009), available through the Department of Foreign Affairs, Trade, and Development of Canada: Trade Topics, [www.international.gc.ca](http://www.international.gc.ca).


\(^5\) *Building the Canadian Advantage*, supra note 1.


\(^7\) *Id.*

\(^8\) *See El impacto de la minería canadiense*, pp. 25-27, 28-36.
II. The State-Business Nexus between the Government of Canada and its Extractive Sector: Elevated Duty to Protect

Principle 2 of the UN Guiding Principles on Business and Human Rights is that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

This principle of extraterritorial duties must be informed by what the Guiding Principles refer to as the State-Business Nexus. This nexus principle, elaborated as Principle 4, establishes that in those circumstances where business enterprises receive substantial support and services from the State agencies, States should take additional steps to protect against human rights abuses. The Commentary explains that “the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.”

The logic is that the closer the State-Business nexus, the greater the State’s means (and therefore duty) to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented.

Credit and investment agencies, development agencies, and development finance institutions are singled out in this section of the Principles because:

Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

The nexus between the Canadian State and its extractive sector is notoriously direct. Among the varied ways that the Government of Canada supports Canadian extractive companies working in foreign countries, especially relevant for this analysis are the financing loans and guarantees through Export Development Canada; political and financial support through embassies; and technical and financial support for reforming mining codes (e.g. Colombia, Honduras, Peru).

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10 Id.
11 Id. Commentary Principle 4.
12 Id.
14 For more, see The Impact of Canadian Mining. The Canadian government reports that in Latin America it has provided assistance to resource-rich developing countries to improve their governance capacity in the extractive sector and has held discussions with free trade agreement on how best to address voluntary principles of corporate social responsibility in the context of negotiations. Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector (March 2009), available through the Department of Foreign Affairs, Trade, and Development of Canada: Trade Topics, www.international.gc.ca.
The Working Group on Mining in Latin America’s convincingly documents this State-Business nexus in the context of Canada and its extractive sector in its in-depth report covering 22 cases across 9 countries in Latin America.\(^\text{15}\) Beyond the existence of the nexus, the case studies reveal in fact that the political, economic, and legal support that Canada offers its mining companies “have extremely negative consequences for the protection of the human rights of the populations of the countries in which the projects are developed.” Canada is providing and increasing this support without ensuring the appropriate controls that could prevent the abuse and undermining of human rights in the context where the beneficiary companies operate.

The recent changes to CIDA (the Canadian International Development Agency) would appear to further tighten this nexus without contributing to human rights due diligence. In March 2013 the Government announced that CIDA would be absorbed into the Ministry of Foreign Affairs and International Trade.\(^\text{16}\) CIDA has increased the priority given to the Latin America region where its mining industry is especially active. According to the Overseas Development Assistance Accountability Act section 4.1, for activities to be considered Official Development Assistance, they must meet three criteria: contribute to reducing poverty; take into account the perspectives of the poor; and be consistent with international human rights standards. Despite this mandate, compliance with international human rights norms in orienting development priorities as well as monitoring and preventing possible human rights harms has not been meaningfully incorporated into the operations of the new joint Department or its reporting. For more, see the analysis of the Special Rapporteur on the right to food following his visit to the country in 2012 (infra Part V).

As an illustration of the type of clarification that is needed in this regard: in reporting its achievements for 2011-2012 in terms of its international development assistance to Peru, CIDA cites that it “Trained some 1,500 officials and civil society representatives on preventing and managing conflicts linked to natural resources.” This achievement was included under the “Economic Growth” objectives (as opposed to governance of capacity-building in legal rights for example).\(^\text{17}\)

### III. Regulatory Framework to Prevent Human Rights Abuses and Guarantee Accountability

The gap in the legal and regulatory framework in Canada has been widely recognized. As is summarized below, UN mechanisms have increasingly called on Canada to accelerate legislative and institutional measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights by people outside of Canada, and to hold companies and corporations from Canada accountable for human rights and environmental abuses committed abroad.\(^\text{18}\)

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\(^{15}\) See especially, *El impacto de la minería canadiense*, pp. 85-96.


\(^{18}\) Recommendations from the UN Committee on the Elimination of Racial Discrimination and the UN Committee on the Rights of the Child, respectively. *See infra Part V.*
Yet attempts to push legislative measures forward have failed. Industry lobby has been very active and well organized and increased political will and leadership will be needed to align Canada’s framework to the standards of the international human rights framework.

The Working Group on Mining and Human Rights in Latin America offers a helpful summary of these initiatives. Most recent was Bill C-300, the “Corporate Accountability of Mining, Oil, and Gas Corporations in Developing Counties Act.” The stated purpose of the Act was “to ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with international environmental best practices and with Canada’s commitments to international human rights standards.” The Act contained provisions related to codes of conduct for companies, clear criteria conditioning governmental support on compliance with those standards, and authority for the government to investigate acts of noncompliance. The Bill was narrowly defeated in October 2010 by a margin of only 6 votes.

Other proposed but defeated initiatives include Bill C-298 to address the “Corporate Social Responsibility for the Activities of Canadian mining Corporations in Developing Countries”; and Bill C-438 on the “extraterritorial activities of Canadian businesses and entities.”

IV. Access to Effective Remedy in Canada for Victims of Human Rights Abuses Committed Abroad

The third foundational principle of the UN Business and Human Rights framework is that as part of their duty to protect against business-related human rights abuses, States must take appropriate steps to ensure that when such abuses occur those affected have access to effective remedy. Having personal jurisdiction over the companies (through their incorporation and registration within the national territory) would trigger this duty where those companies are alleged to have responsibility for human rights abuse committed abroad.

Article 2.3 of the ICCPR sets out the obligations related to the right to effective remedy. The Government addresses its efforts related to effective remedies in its report but makes no mention of the situation of victims that have suffered human rights abuses related to the operations of corporations registered in Canada but operating abroad.

The Government has recognized that: “To the extent that crimes or wrongs, such as damage to the environment or personal injuries, committed outside Canada also constitute claims of the sort cognizable as a tort, civil law remedies may be available to the foreign plaintiff in Canadian courts. As such, Canadian corporations or their directors and employees may be pursued in Canada for their wrongdoing in foreign countries.”

19 El impacto de la minería canadiense, pp. 102-104.
21 Id. para. 3.
However, in practice victims’ attempts to seek remedy in Canadian courts have been by-and-large rejected. The only exception to date is a recent decision related to three connected cases against HudBay Minerals before the Ontario Supreme Court of Justice for its imputed responsibility for violent acts in Guatemala, namely the rape of eleven indigenous women and the murder of an indigenous leader. Despite this important, precedent setting advance, most victims do not count on the necessary resources to attempt to overcome the numerous judicial obstacles that exist for accessing justice for these cases in Canada.

Bill C-323 (later C-354) was a legislative initiative that aimed to amend the Federal Courts Act in the interest of international promotion and protection of human rights. It was an innovate bill modelled after the United States’ Alien Torts Claim Act. If it had been approved it would have expressly recognized the authority of the Federal Court system to order remedy for foreign victims of human rights violations, including genocide and torture as well as environmental harms and violations of labor rights.

V. Key Findings and Recommendations from Other UN Bodies Calling on Canada to Take Increased Measures to Prevent Abuses

UN human rights mechanisms have increasingly called on Canada to take measures to prevent and curb the negative impacts of its foreign policy and of corporations falling under its jurisdiction. This is in large part because of the increasingly well documented role of Canadian policy in relation to the commission of systemic violations of civil, political, economic, social, and cultural rights abroad. This section will briefly summarize persuasive key findings and recommendations that should instruct the Human Rights Committee in its drafting of the List of Issues for Canada.

In 2012 the Committee on the Elimination of Racial Discrimination reviewed Canada’s compliance with its obligations and expressed its concerns over transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada, in particular in mining activities. Based on the treaty obligations, the Committee recommended that the State “take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.”

26 Id. para 14.
Later that year the Committee on the Rights of the Child reviewed Canada’s compliance with that treaty and explicitly aligned itself to the concern of the CERD committee,27 especially with regard to gas, oil, and mining companies abroad. The CRC Committee noted that its particular concern was the lack of a framework “to hold all companies and corporations from the State party accountable for human rights and environmental abuses committed abroad.”28 The Committee proceeded to make a series of recommendations for the State to establish and implement proper regulations that would ensure the Canadian business sector complies with international and national human rights, labor, environmental and other standards.29

The CRC Committee specifically recommended that Canada ensure:

(a) The establishment of a clear regulatory framework for, inter alia, the gas, mining, and oil companies operating in territories outside Canada to ensure that their activities do not impact on human rights or endanger environment and other standards…;

(b) The monitoring of implementation by companies at home and abroad of international and national environmental and health and human rights standards and that appropriate sanctions and remedies are provided when violations occur…;

(c) Assessments of, and consultations with companies on their plans to address environmental and health pollution and the human rights impact of their activities and their disclosure to the public; and

(d) In doing so, take into account the United Nations Business and Human Rights Framework adopted unanimously in 2008 by the Human Rights Council.30

Also in 2012, the UN Special Rapporteur on the Right to Food undertook an official review of Canada’s relevant legislative and policy efforts in that area, including the human rights impact of Canada’s foreign policy and official development assistance.31 The Special Rapporteur expressed his concern over recent changes to Canada’s official development assistance. Namely he mentioned budgetary cuts that would disproportionately affect the Canadian International Development Agency (CIDA) and the International Development Research Centre, which had been promoting important sustainable agricultural projects focused on small-scale farmers living in rural areas, in particular the role that women farmers play in agricultural production.32

27 Committee on the Rights of the Child, Concluding Observations: Canada, UN Doc. CRC/C/CAN/CO/3-4 (6 Dec. 2012), para. 28 (“The Committee joins the concern expressed by the Committee on the Elimination of Racial Discrimination that the State party has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples in territories outside Canada, (CERD/C/CAN/CO/19-20, para. 14), in particular gas, oil, and mining companies.”)

28 CRC, Concluding Observations: Canada, para. 28.

29 Id. para. 29. The Committee specifically cited in this regard the 2008 and 2011 Human Rights council resolutions establishing the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (HRC Res. 8/7) and endorsing the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (UN Doc. A/HRC/17/L.17/Rev.1).

30 CRC, Concluding Observations: Canada, para. 29.


32 Id. paras. 49-50.
The Special Rapporteur highlighted his concern that the criteria for selecting recipient countries might not comply with Canada’s ODA Accountability Act’s requirement that all ODA be consistent with international human rights and consider the perspectives of persons living in poverty.³³ He added his concern that the Government has failed to ensure that the respective ministers apply human rights criteria in their annual reports on compliance with the Act.³⁴

The Special Rapporteur observed that CIDA does not apply human rights norms and standards in determining aid priorities and implementing programs. He recalled the Maastricht Principles on the extraterritorial obligations of States, “which clearly describe the duties international human rights law imposes on States, to ensure not only that they respect human rights outside their national territory, but also that they protect human rights and contribute to fulfilling human rights.”³⁵ He concluded his evaluation by urging Canada to (1) apply human rights criteria in reporting as per the 2008 ODA Accountability Act; (2) apply human rights norms and standards in determining international cooperation priorities and implementing programs; and (3) to take steps to ensure that Canada’s international policies do not have a negative impact on the realization of the right to food.³⁶

Finally, Canada participated in its second-cycle session of the Universal Periodic Review in 2013. Again the issue of accountability for Canadian companies abroad was explicitly addressed. Canada received a recommendation to “continue efforts towards the establishment and implementation of an effective regulatory framework for holding companies registered in Canada accountable for the human rights impact of their operations.”³⁷ Canada accepted this recommendation on business and human rights and pledged to “continue its efforts to encourage responsible business conduct by Canadian companies in their operations abroad.”³⁸ This specific recommendation and commitment is in addition to numerous others that apply to human rights impacts both inside and outside national territory.

In sum, despite the persistent request and instruction of UN oversight bodies to report on this dimension of its human-rights compliance, the Government’s sixth periodic report to the Human Rights Committee,³⁹ submitted April 9, 2013, makes no mention of the relevant regulatory framework for these questions or information regarding the human rights impacts of Canadian foreign policy and corporations under its jurisdiction. We respectfully urge the Committee to request additional information from the Government in order to ensure continued dialogue and positive progress on the realization of rights protected by the Covenant.

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³³ Id. para. 50.
³⁴ Id. para. 51.
³⁵ Id. para. 52.
³⁶ Id. para. 69(f).
VI. Proposed Formulations of Concerns to Include in the List of Issues

To evaluate more thoroughly the fulfilment of the Covenant, we propose that the Committee request that the Government of Canada provide information on steps taken to:

- ensure that all business enterprises domiciled in its national territory and/or within its jurisdiction respect human rights standards in accordance with the Covenant, throughout all stages of their operations including outside of the national territory;

- guarantee that international cooperation and ODA promotes, protects, respects and fulfils Covenant rights, is compliant with human rights standards, and meets the requirements of the ODA Act of 2008;

- investigate allegations regarding abuses committed by Canadian corporations, especially the protocols or mechanisms for diplomatic embassy staff abroad receiving the complaints;

- incorporate international human rights norms into the mandate of the Office of the Extractive Sector Corporate Social Responsibility Counsellor; and

- strengthen the remedies provided to protect people that have been victims of activities of Canadian business enterprises operating abroad.

About Franciscans International

Franciscans International relies on the expertise and first-hand information of Franciscans and other partners working at the local level around the world to advocate at the United Nations for structural changes addressing the root causes of injustice. From our offices in Geneva and New York, FI works together with grassroots movements, national and international civil-society organizations, UN agencies and human rights bodies, and government representatives to promote our vision of a global community in which the dignity of every person is respected, resources are shared equably, the environment is sustained, and nations and peoples live in peace. The FI Americas Program currently works with Franciscans and other partners on human rights issues in 16 countries in the region. For more information, please see www.franciscansinternational.org.