

**Proposal of Thematic Hearing for the
166th Period of Sessions of the
Inter-American Commission on Human Rights**

TOPIC

Canada and the responsibility of home States in the protection of human rights for the activities of extractive industries in Latin America

PETITIONERS

**Due Process of Law Foundation (DPLF), the Human Rights Clinic of the
Human Rights Research and Education Centre at the University of
Ottawa, Mining Watch Canada**

Ottawa and Washington, D.C.

30 September 2017

Petitioners

Due Process of Law Foundation (DPLF)

DPLF is a regional organization comprised by a multi-national group of professionals. Its mandate is to promote the rule of law and human rights in Latin America through analysis and recommendations, cooperation with public and private organizations and institutions, the sharing of experiences, and advocacy.

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Human Rights Clinic—Human Rights Research and Education Centre, University of Ottawa

The Human Rights Clinic is a project-based initiative from the Human Rights Research and Education Centre of the University of Ottawa that, through an interdisciplinary approach, aims: (i) to strengthen the protection of human rights, by promoting research, training, and technical assistance regarding the implementation of human rights standards; (ii) to foster capacity-building and to provide recommendations to ensure that policy, law and practices have a *human rights-based approach*; and (iii) to promote research regarding the implementation of human rights standards in Canada.

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Justice and Corporate Accountability Project (JCAP)

JCAP specializes in supporting litigation and legal work at the intersection of transnational corporate activities, resource extraction, and communities. Our approach to working with communities is guided by the principles of community self-determination, corporate accountability and transnational legal activism. JCAP provides legal support and advice to communities that are negatively affected by the Canadian Extractive Industry, primarily in Latin America. It is mostly composed of volunteer lawyers and law students from Osgoode Hall Law School and Thompson Rivers Law School.

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30 September 2017

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Washington, D.C.

Request for Thematic Hearing:
“Canada and the responsibility of home States in the protection of human rights for the activities of extractive industries in Latin America”

Distinguished Dr. Abrão:

In conformity with Articles 61, 62 and 66 of the Rules of Procedures of the Inter-American Commission on Human Rights (IACHR), the aforementioned organizations hereby respectfully request a thematic hearing during the IACHR’s 166th period of sessions, to be held in November and December 2017 in Washington, D.C.. The subject of our proposed hearing is “Canada and the responsibility of home States in the protection of human rights for the activities of extractive industries in Latin America.”

Introduction

The purpose of the hearing requested by the Due Process of Law Foundation (DPLF), the Human Rights Clinic of the Human Rights Research and Education Centre at the University of Ottawa, the Justice and Corporate Accountability Project and Maritimes – Guatemala Breaking the Silence Network, to the IACHR during its 166th period of sessions is to discuss the responsibilities of the Canadian government to implement measures that would prevent human rights violations from Canadian extractive industries operating in Latin America as well as to implement mechanisms to facilitate access to justice to victims that have been harmed by the international operations of Canadian companies within the Canadian judicial system.

The IACHR has held, in 2013,¹ 2014,² and 2015³ a series of thematic hearings on the alleged responsibility of the Government of Canada for human rights violations attributed to private extractive corporations domiciled in Canada and operating in Latin America. In

¹ Development and Peace, *Mining and Human rights in Latin America: Canada’s responsibility*, (Oct. 30, 2013), <https://www.devp.org/en/pressroom/2013/comm2013-10-30>.

² Inter-Am. C.H.R., *Schedule of Hearings, 153rd Session*, (Oct. 27, 2014), <http://www.oas.org/en/iachr/sessions/docs/Calendario-153-audiencias-en.pdf> (scheduling a thematic hearing on the “impact of Canadian mining activities on human rights in Latin America”).

³ Inter-Am. C.H.R., *Thematic Hearing: Extraterritoriality and Responsibility of Home States in the Protection of Human Rights for the Activities of Extractive Industries in Latin America*, (Mar. 17, 2015), https://cdp-hrc.uottawa.ca/sites/cdp-hrc.uottawa.ca/files/hrrec-oral_presentation_iachr-march_17_2015.pdf.

addition to these hearings, the IACHR⁴ and the Inter-American Court of Human Rights have issued several decision related to the violation of Indigenous Peoples⁵ in the context of extractive activities.

Recent pronouncements of the IACHR, under the scope of the *American Convention on Human Rights*⁶ and the *American Declaration on the Rights and Duties of Man*,⁷ maintain a system of cooperation and co-responsibility between the host State that grants concessions for extractive corporations and the home States where those corporations are headquartered.⁸

In the report, *Indigenous Peoples, Communities of Africa Descent, Extractive Industries*, the IACHR has addressed the importance of the “extraterritorial application of human rights within the context of extractive and development projects”.⁹ This hearing seeks in part to propose recommendations for States so that they can assure the existence of concrete regulations that will not only facilitate the fulfillment of their obligation to protect human rights, but also assure that vulnerable populations interests’ are protected, including mechanisms ensure that projects are not pursued where communities are saying no to extractive projects because of their severe damaging impacts on the environment and their wellbeing..

Purpose of the Hearing Requested

For more than a decade, the United Nations (UN) human rights bodies and the IACHR have criticized Canada’s failure to regulate the extraterritorial activity of Canadian corporations.

⁴ Among others, see: Inter-American Commission on Human Rights, *Indigenous and Tribal People’s Rights over their Ancestral Lands and Natural Resources: Norms and jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc.56/09 (Washington: IACHR, 2009) and Inter-American Commission on Human Rights, *Indigenous peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the full respect of their Human Rights*, OEA/Ser.L/V/II. Doc.47/13 (Washington: IACHR, 2013).

⁵ Among others, see: *Yakye Axa Indigenous Community (Paraguay)* (2005), Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 125; *Sawhoyamaxa Indigenous Community (Paraguay)* (2006), Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 146; *Case of the Saramaka People (Suriname)* (2007), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 172; *Case of the Xákmok Kásek Indigenous Community (Paraguay)* (2010) Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 214; *Case of the Kichwa Indigenous People of Sarayaku (Ecuador)* (2012), Merits and Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 245 and *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) (Colombia)* (2013), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 270.

⁶ *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force 7 July 1978).

⁷ *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁸ See: Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (New York: Routledge, 2014).

⁹ Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II. Doc.47/15 (Washington: IACHR, 2015).

In 2002, the UN Special Rapporteur on Toxic Waste raised concerns over Canada's lack of extraterritorial regulation of its corporations operating abroad.¹⁰ Since then, four UN treaty bodies, the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of the Child, the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights, have expressed concern over the negative impacts of Canada's extractive sector corporations operations abroad. These bodies have recommended that Canada should implement legislation to regulate such activity and ensure that victims have access to remedies.¹¹

More recently, the UN Committee on the Elimination of all forms of discrimination against Women (CEDAW) stated that Canada has an inadequate framework to regulate the conduct of transnational companies. This also includes limitations regarding access to justice or impact assessment regarding the effects of international trade on women.¹² Among other measures, the CEDAW Committee recommended that Canada should "strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in relation to their activities abroad, including by requiring those corporations to conduct human rights and gender impact assessments before making investment decisions".¹³

¹⁰ U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Addendum, Mission to Canada, 17-30 October 2002*, para. 126, E/CN.4/2003/56/Add.2, (Jan. 14, 2003).

(<http://spinternet.ohchr.org/Layouts/SpecialProceduresInternet/Download.aspx?SymbolNo=E%2fCN.4%2f2003%2f56%2fAdd.2&Lang=en>).

¹¹ U.N. CERD Com., *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the CERD Committee: Canada*, para. 17, CERD/C/CAN/CO/18, (May 25, 2007), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f18&Lang=en [hereinafter "CERD, "Concluding Observations 2007"]; U.N. CERD Com., *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the CERD Committee: Canada*, para. 14 CERD/C/CAN/CO/19-20, (Apr. 4, 2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f19-20&Lang=en [hereinafter "CERD, "Concluding Observations 2012"]; U.N. CRC Com., *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session, (17 September – 5 October 2012)*, para. 29 CRC/C/CAN/CO/3-4, (Dec. 6, 2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCAN%2fCO%2f3-4&Lang=en [hereinafter CRC "Concluding Observations"]; Hum. Rts. Com., CCPR, *Concluding observations on the sixth periodic report of Canada*, para. 6, CCPR/C/CAN/CO/6, (Aug. 13 2015), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en [hereinafter "HRC, "Concluding Observations"]; U.N. Econ. & Soc. Council. Com. on Economic, Cultural and Social Rights, *Concluding observations on the sixth periodic report of Canada*, ¶¶ 15-16, E/C.12/CAN/CO/6, (Mar. 23, 2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en [hereinafter "CESCR "Concluding Observations"].

¹² U.N. CEDAW Com., *Concluding observations on the combined eighth and ninth periodic reports of Canada*, para. 18, CEDAW/C/CAN/CO/8-9, (November 25, 2016).

(http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f8-9&Lang=en

¹³ *Ibid*, para. 19.

These treaty bodies have expressed concern that Canadian corporations are adversely affecting the human rights of residents living in the communities impacted by their operations. The CERD has expressed concern over reports that Canadian corporations operating abroad are having “adverse effects (...) on the right to land, health, living environment and way of life, of indigenous peoples living in these regions.”¹⁴ The Human Rights Committee similarly expressed concern over the “allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations and (...) the inaccessibility to remedies by victims of such violations.”¹⁵

In September 2017, the CERD reiterated its recommendation on the importance to regulate Canadian companies operating abroad. In its Concluding Observation to the latest report by Canada, the Committee reiterated the need to “(...) ensure access to justice through judicial and non-judicial remedies for violations of rights of persons by transnational corporations registered in Canada, operating abroad. The Committee also recommends that the State party swiftly establish an independent ombudsman mandated to receive and investigate human rights complaints against Canadian corporations operating in other countries.”¹⁶

The treaty bodies have also expressed concern over Canada’s corporate social responsibility strategy, as it fails to: implement legislation to regulate the extraterritorial activities of Canadian corporations; hold them accountable for their actions abroad; provide access to judicial remedies for victims of corporate human rights abuses; and create an effective independent mechanism to investigate complaints filed against corporations.¹⁷ The UN Working Group on Business and Human Rights has reiterated these concerns after a country visit that took place in May 2017.¹⁸

Within the Inter-American Human Rights System and as stated in the introduction, the IACHR has reviewed Canada’s oversight over its corporations operating in Latin America. At a hearing in October 2014, Commissioner Rose-Marie Antoine remarked that “despite the assurance of Canada that there is good [corporate social responsibility] policy, we continue at the Commission to see a number of very, very serious human rights violations occurring in the region as a result of certain countries, and Canada being one of the main ones (...). So we are seeing deficiencies of the policy.”¹⁹ The Commission’s press release

¹⁴ CERD, “Concluding Observations 2007,” *supra* 11 at para. 17

¹⁵ HRC, “Concluding Observations,” *supra* note 11 at para. 6.

¹⁶ CERD, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, para. 22, CERD/C/CAN/CO/21-23, (September 13, 2017).

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f21-23&Lang=en

¹⁷ CERD, “Concluding Observations 2012” *supra* note 11 at para. 14; CRC “Concluding Observations” *supra* note 11 at para. 29; HRC, “Concluding Observations” *supra* note 11 at para. 6; CESCR, “Concluding Observations” *supra* note 25 at para. 15-16.

¹⁸ UN Working Group on Business and Human Rights, Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights, (June 1, 2017).

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>

¹⁹ Canadian Network on Corporate Accountability and Polaris Institute, *Submission to the Economic, Social and Cultural Rights Unit of the Inter-American Commission on Human Rights*, p.3, (Jan. 26, 2016),

following the hearing urged “states to adopt measures to prevent the multiple human rights violations that can result from the implementation of development projects, both in countries in which the projects are located as well as in the corporations’ home countries, such as Canada.”²⁰

Concerns of civil society regarding the activities of Canadian mining companies mirror the concerns formulated by these human rights bodies. For example, the Working Group on Mining and Human Rights in Latin America presented in 2014 allegations of human rights violations associated with 22 cases of Canadian mining projects to the IACHR. The documented harms include pollution that contaminates water resources and harms harvests and livestock,²¹ exposure to heavy metals with potentially serious harms to health,²² forced displacement,²³ and criminalization of social protests.²⁴

The issue of Canada and the Responsibility of Home States was addressed again in March 2015 by the IACHR. During its 154th session, the IACHR held a hearing on “Corporations, Human Rights, and Prior Consultation in the Americas”. One of the issues raised was the extraterritorial responsibility of States, and in particular, Canada’s responsibility for the financial support provided to mining companies involved in human rights abuses in the region.²⁵

Last year, the Justice and Corporate Accountability Project released a report documenting 100 incidences of violence associated with Canadian extractive companies operating in Spanish-speaking Latin America.²⁶ This is the first report to document specific incidents, name the companies involved, and ask for responses from the companies.

In April 2016, more than 180 organizations from Latin America and Canada sent a letter to Prime Minister Justin Trudeau,²⁷ calling for the adoption of policies to ensure that Canadian companies operating in Latin America do so in conformity with the international human

<http://www.aboveground.ngo/wp-content/uploads/2016/02/CNCA-Submission-IACHR-ESCR-Unit-Jan-2016.pdf>, citing Inter-Am. C.H.R., *Impact of Canadian Mining Activities on Human Rights in Latin America*, 153rd Session, (Oct. 28, 2014), video recording at 53:42, www.oas.org.

²⁰ OAS, *IACHR Wraps Up its 153rd Session*, (Nov. 7, 2014),

http://www.oas.org/en/iachr/media_center/PReleases/2014/131.asp.

²¹ Working Group on Mining and Human Rights in Latin America, *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*, p.3,

http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf [hereinafter “Working Group on Mining and Human Rights in Latin America Report to IACHR”] at pp.10-11.

²² *Ibid.* at pp.12, 18.

²³ *Ibid.* at pp.12-13.

²⁴ *Ibid.* at p.14.

²⁵ Inter-Am. C.H.R., *Thematic Hearing: Extraterritoriality and Responsibility of Home States in the Protection of Human Rights for the Activities of Extractive Industries in Latin America*, *supra* note 3.

²⁶ See: Justice and Corporate Accountability Project, *The “Canada Brand”: Violence and Canadian Mining Companies in Latin America* (Toronto: Osgoode Hall Law School, 2016).

²⁷ The text of the letter may be found, here:

http://www.dplf.org/sites/default/files/letter_to_trudeaueng_0.pdf

rights standards established in treaties. This applies to both host countries and to Canada as well as to guarantee effective access to Canadian courts so that victims of human rights violations caused by Canadian businesses abroad can obtain justice, truth, and reparations, among other measures.

To date, the Canadian government has neither introduced legislation nor implemented an effective policy establishing clear standards of conduct for Canadian extractive corporations operating abroad and a credible complaints mechanism with powers of investigation. Moreover, no legislation been adopted in any of the provinces or territories of Canada to ensure that Canadian courts are considered an appropriate forum to hear these claims. The current government has made a pledge²⁸ to introduce legislation to create an Ombudsperson for the International Extractive Sector²⁹. However, to this date no bill has been submitted to Parliament.

The petitioners will present to the IACHR updated information regarding the impact of Canadian mining companies in Latin America and also some concerns regarding the creation of an Ombudsperson, in order to assure that this office fulfills a mandate that can assure victims access to justice and remedy. This includes:

- Ensure Canadian mining companies operating in Latin America do so in conformity with the international human rights standards established in treaties and the UN Guiding Principles on Business and Human Rights, which apply to both host countries and to Canada.
- In recognition of the increasing number of mining conflicts in Latin America and the Caribbean, it is vital that the Canadian government ensure Canadian mining companies respect the rights of Indigenous communities to self-determination and to free, prior, and informed consent before any mining activities are undertaken on their territories; and respect the decisions of numerous communities, Indigenous and non-Indigenous, who have said no to large-scale mining because of its severe damaging impacts on the environment and social wellbeing.
- End Canadian intervention and the provision of any kind of governmental support, be it through overseas development aid, trade, and investment agreements, public financing or technical assistance, or diplomacy that seeks to influence the adoption or modification of regulatory frameworks in recipient countries for extractive projects.

²⁸ See: The Hill Times, *Liberals 'seriously' considering mining ombudsperson, says federal corporate social responsibility adviser*, (November 9, 2016). <https://www.hilltimes.com/2016/11/09/feds-seriously-considering-mining-ombudsman-says-canadas-corporate-social-responsibility-envoy/86691>

²⁹ More information the Ombudsman for the International Extractive Sector can be found at the Canadian Network for Corporate Accountability website: <http://cnca-rcrce.ca/campaigns-justice/ombudsperson/>

- Incorporate international human rights and transparency standards in the regulation of credit agencies and public and private investment that finance extractive activities and impose safeguards on companies that receive state subsidies.
- Guarantee effective access to Canadian courts so that victims of human right violations caused by Canadian businesses abroad can obtain justice, truth, and reparations.
- Create objective and impartial mechanisms to effectively monitor and investigate complaints of individual and collective human rights violations in connection with Canadian mining companies abroad. These mechanisms should be designed in conformity with the Paris Principles regarding the status and functions of national human rights institutions.

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Executive Secretary Abrão, the undersigned organizations appreciate your consideration of our request for a thematic hearing in accordance with Articles 61, 62 and 66 of the Rules of Procedures of the IACHR.

Yours sincerely,

Due Process of Law Foundation

Human Rights Clinic—Human Rights Research and Education Centre, University of Ottawa

Justice and Corporate Accountability Project