

# Canadian Network on Corporate Accountability

Amnesty International Canada

Africa-Canada Forum

Asia Pacific Working Group

Americas Policy Group

Canadian Council for International  
Co-operation (CCIC)

Canadian Labour Congress (CLC)

Canada Tibet Committee

CAW-Canada

Development and Peace

Entraide Missionnaire

Friends of the Earth (Canada)

GlobalAware Canada

Halifax Initiative Coalition (HI)

International Criminal Defence  
Attorneys Association  
(Advisory Member)

Inter Pares

KAIROS - Canadian Ecumenical  
Justice Initiatives

MiningWatch Canada

North South Institute

Steelworkers Humanity Fund

United Church of Canada

## Submission to the UN Secretary-General's Special Representative on Business and Human Rights (SRSB)

July 21, 2008

The Canadian Network on Corporate Accountability (CNCA) unites non-governmental organizations, including human rights, environmental and development groups, unions and faith-based institutions around the shared objective of improving the accountability of Canadian corporations.

In Canada, growing attention is focused on the human rights impacts of Canadian companies' overseas operations. Canadian extractive investments have generated particular concern. A dynamic debate is underway regarding policy and law reform in Canada to address these issues.

In 2005, the Parliamentary Standing Committee on Foreign Affairs and International Trade (SCFAIT) conducted hearings on the overseas operations of Canadian mining companies. In June of that year, the Committee released a ground-breaking report that called for the adoption of widespread policy and law reforms, in Canada, to encourage Canadian mining companies to conduct their operations in a responsible manner, and to hold Canadian companies accountable for the human rights and environmental impacts of their operations in developing countries.

In 2006, the Canadian government hosted the National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries. The purpose of this cross-country consultation was to present "recommendations for government, NGOs, labour organizations, businesses and industry associations on ways to strengthen approaches to managing the external impacts of international business activities to benefit both businesses and the communities within which they work." At the conclusion of the process, a multi-stakeholder Advisory Group issued an unprecedented, consensus-based report outlining detailed recommendations for the government to improve the CSR performance of Canadian extractive companies operating abroad. The CNCA was a key participant in the roundtable process.

## **Final Report of the Special Representative**

The members of the CNCA wish to thank the Special Representative for his important work in the area of business and human rights. The central recommendation of the SRSG's final report, the adoption of a framework that includes three elements (state duty to protect, corporate responsibility to respect and the need for more effective access to remedies), is consistent with both the SCFAIT recommendations and the core demands of the CNCA.

### **State Duty to Protect**

While the CNCA agrees with the SRSG's emphasis on the state duty to protect, it regrets the Special Representative's reluctance to provide more guidance to states regarding the specific legislative or policy options that should be implemented in order to discharge this duty. In particular, the CNCA regrets the failure to emphasize the state obligation to adopt domestic legislative instruments to hold corporate actors to account for their activities overseas.

A study prepared to inform the mandate of the SRSG canvasses the jurisprudence of the UN treaty bodies and finds that, "[m]ost treaties impose obligations on States to adopt legislative measures as a means to ensure enjoyment of rights. Consequently, the treaty bodies have generally confirmed that adopting appropriate legislation to prevent and address third party abuse is among States' minimum obligations under the treaties in order to fulfill the duty to protect."<sup>1</sup> The report further explains that, "States are expected to take legislative or administrative measures to protect local communities and prevent violations by business enterprises in the course of conducting large infrastructure or mining projects, particularly those affecting indigenous peoples."<sup>2</sup>

The CNCA also regrets the scant attention paid by the SRSG, in his final report, to the important issue of extraterritorial regulation. Rather than merely noting that the permissible scope of national regulation with extraterritorial effect remains poorly understood, the Special Representative might have emphasized the growing expectation, by some authorities, including treaty bodies, that states adopt extraterritorial regulatory measures. For example, the Committee on the Elimination of all Forms of Racial Discrimination has addressed this issue with regard to the overseas operations of transnational mining companies that are registered in Canada. The Committee encouraged Canada to:

...take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee

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<sup>1</sup> *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties*. Prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. February 2007, at paragraph 42.

<sup>2</sup> *Ibid.*, at paragraph 45.

recommends that the State party explore ways to hold transnational corporations registered in Canada accountable.<sup>3</sup>

Canadian parliamentarians have expressed a similar expectation. In its ground-breaking report, the Parliamentary Standing Committee on Foreign Affairs and International Trade expressed concern that “Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples.”<sup>4</sup> The Committee called on the Government of Canada to:

- establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies; and
- put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards. Measures in this area must include making Canadian government support – such as export and project financing and services offered by Canadian missions abroad – conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments.<sup>5</sup>

The members of the CNCA applaud the SRSR for his focus on the responsibility of diverse state actors in the area of human rights, including those public agencies that fund or otherwise facilitate overseas corporate investment. In particular, the CNCA supports the Special Representative’s recommendation that export credit agencies (ECAs) should require that their clients undertake rigorous due diligence regarding the potential human rights impacts of their investments. As the SRSR points out, this due diligence should have a decisive influence on ECA approval processes. However, the CNCA regrets that the Special Representative chose not to explore the legal rationale for this practice, that is, the legal responsibility of states to ensure that their ECAs operate in a manner that is consistent with their international human rights obligations.

Finally, the CNCA has strong concerns about the SRSR's recommendation that governments establish a closer alignment between their export credit and official development agencies, given the commercial objectives of export development agencies. Official development assistance should focus on poverty reduction and should address a country's developmental needs, as identified by government, in consultation with citizens.

Development assistance should not be instrumentalized to facilitate or legitimize commercial objectives. This is especially true with regard to those sectors that are heavily

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<sup>3</sup> CERD/C/CAN/CO/18, paragraph 17.

<sup>4</sup> <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=8979&Lang=1&SourceId=178650>

<sup>5</sup> *Ibid.*

supported by export credit agencies such as the mining, oil and hydroelectric industries, which are often responsible for significant, adverse environmental, social and human rights impacts. Coherence of public policy instruments must be driven by the developmental purposes of aid, and take account of donor and recipient states' primary obligations to respect, protect and fulfill human rights.

### **Access to remedies**

The CNCA supports the SRSG's focus on effective grievance mechanisms and agrees with his call for states to address obstacles to access to justice, especially for foreign plaintiffs. In Canada, non-nationals that are impacted by Canadian corporations are effectively blocked from accessing the Canadian judicial system.

The CNCA further agrees with the Special Representative that non-judicial mechanisms play an important role alongside judicial processes. The CNCA supports the recommendation, in the Advisory Group report from the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, that the Government of Canada create an Extractives Ombudsman. This office would receive complaints from aggrieved individuals and communities, and would undertake independent fact-finding and public reporting regarding the circumstances of the allegations. This office may also recommend sanctions in specific cases. The elements identified by the Special Representative for non-judicial grievance mechanisms are a useful reference for the creation of the Canadian Extractives Ombudsman.

Finally, the CNCA agrees with the SRSG's assessment that National Contact Points have too often failed. The Special Representative is right to point out that "[t]he housing of some NCPs within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation." These problems plague the Canadian NCP.

### **Mandate extension**

The CNCA supports the extension of the Special Representative's mandate, which has made an important contribution to the international debate on the critical issue of business and human rights.

During the extension, the CNCA calls on the SGSR to consider the role of the international financial institutions (IFIs) in promoting the full realization of human rights in the business context. The IFIs are key actors in the area of business and human rights. The International Finance Corporation (IFC) has positioned itself as the *de facto* source of international corporate social responsibility standards for project finance. IFC standards are also under evaluation as the basis for government regulation. Moreover, the IFIs play a significant role in facilitating corporate activity. For example, the worldwide committed portfolio of just the IFC, for fiscal year 2006, surpassed US \$21 billion.

International financial institutions often support high-risk projects with the potential to generate serious social and environmental impacts, frequently in areas of conflict and/or weak governance – that is, projects that are more likely to be associated with human rights concerns. Several IFIs are specifically mandated to finance projects that do not attract private capital on “reasonable terms” due to the associated risks. In such cases, IFI involvement frequently determines whether and how these risky projects are developed.

In recognition of the pivotal role that IFIs play in this area, both as standard-setters and the purveyors of significant financial and political backing, the Canadian Parliamentary Standing Committee on Foreign Affairs and International Trade has called for Canada to “[w]ork with like-minded countries to integrate and mainstream international human rights standards in the work of international financial institutions (IFIs) such as the World Bank and the International Monetary Fund – as outlined, for example, in the final report of the Extractive Industries Review (December 2003) – to ensure that projects and investments funded by IFIs conform to international human rights standards.”

Finally, the CNCA supports the calls of other civil society organizations that the SRSO seek the participation of experts from the global South in the operationalization of the three pillars. The CNCA believes that Southern experts, who have region-specific expertise and credibility with the victims of human rights violations, have a uniquely important role to play in the crafting of solutions. These experts can ensure that solutions respond to the realities of those problems identified in Mr. Ruggie’s previous mandate.