# The Need for Courage: Regulating Extractive Industries

***A consideration of efforts to regulate industries over the past decade and the desperate need for improvement as conflicts continue to be fuelled by resource greed***

**July 31, 2009**

**By Gianne Broughton and Lee Webb**

**Canadian Friends Service Committee**
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**Response to a Prayer for Help**

It was the tensest moment I had ever seen in a gathering of Quaker peaceworkers in Central Africa. It was January 21, 2009, and the leaders of the Friends Church peace projects in North and South Kivu, D. R. Congo, were sitting at the head table and telling us about the devastation that they had witnessed recently, and their expectations of worse. Why? Because the Congolese President, Laurent Kabila, had made a deal with the Rwandan President, Paul Kagame. Rwanda would arrest Laurent Nkunda, leader of the Congolese factional rebel army (called CNDP) that had been preying upon North Kivu evermore brutally since 2006. In return, Kagame was given permission to enter North Kivu with 2000 troops and forcibly return soldiers of the FDLR, the remainder of the Rwandan army that had escaped to North Kivu when Kagame's invading army overcame them during the 1994 genocide. Through years of exile, the FDLR had forcibly established control over many territories in North and South Kivu, and the Congolese Friends knew from experience that a limited military operation could only round up a few soldiers and that reprisals against civilians would follow. In their fear and anger, they had begun to think of all Rwandans as enemies, and to speak as if the Rwandan Quaker peaceworkers in the room were causing their misery.

The Rwandans in the room could have defensively criticized the Congolese, because some of what they heard hurt them. But they didn't. They spoke gently, telling how they try in so many ways to convince their government not to use force, how they work with the exiles one on one to find ways to help them feel safe and ready to return to Rwanda. They recommended that the Rwandan, Burundian and Congolese gathered there work together on a declaration to be sent to Friends around the world, explaining the situation in the Kivus and requesting solidarity, advocacy for non-violent responses, and humanitarian aid. And the Congolese understood that they were among Friends, and the declaration was crafted co-operatively and sent around the world.

CFSC's Quaker Peace and Sustainable Communities program responded by allocating its budgetary remainder for 2008-9 to Congolese Friends' work with internally displaced people through the African Great Lakes Initiative and the Jeunes Artisans de la Paix. (We reported about their work in the winter 2008 issue of QC). Since the war in the Congo is sustained by commerce in minerals illegally controlled by armed groups, or misappropriated through Congolese governmental and foreign hands, we also renewed our monitoring of the role of Canadian extractive industries in conflicts in developing countries. The purpose of this article is to summarize the results of our monitoring.

Levi Munyemana discusses violence reduction at a workshop organised by Jeunes Artisans de Paix in an Internally Displaced Persons camp in Goma, North Kivu. *Photo: B. Butt*

**Why Regulate?**

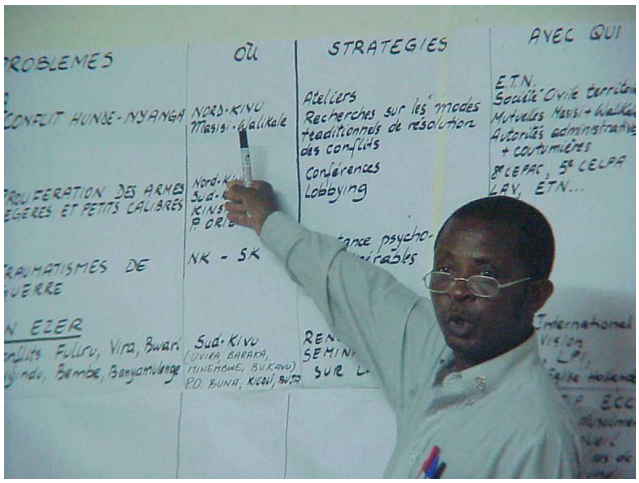
Back in spring 2001, an article ran in *Quaker Concern* entitled "Understanding Economic Agendas in Civil Wars". The article characterised the economies in some civil war situations as "Force Markets", where production and the commercial transactions of buying and selling are carried out at gun point and revenues are used only to maintain the system of force. This was CFSC's initiation into the role of extractive industry in armed conflict. The conflict in Sierra Leone was still raging brutally, and the ways that the rebels exploited the country's diamond mines was coming to light. Since then, many human rights and social justice organizations have been working hard to convince institutions like the World Bank and financing-nation governments to regulate the world metal, mineral and fuel markets, and to regulate the actual extractive activities in order to cut the flow of money, and therefore, weapons and power, to armed groups and in some cases, violent governments. This strategic work has known some successes, but few effective measures have been implemented.

In the spring 2001 article, I noted that "As consumers and as citizens of a democratic country with some economic and political influence, there are things Canadians can do in solidarity. For example, to break their links in the commercial connections between Force Market Buyers and Suppliers, consumers require:

1. A transparent way for people to divest from Force Market companies
2. A transparent and convenient way for people to invest in Peace Market companies and companies offering practical solutions to resource over-consumption
3. A transparent way for people to choose to buy Peace Market consumer goods, for example, to differentiate between peace and conflict diamonds."

**The Kimberly Process for Regulation of the Diamond Industry**

In the case of diamonds, there is a centralized marketing system involving De Beers and the diamantaires primarily in Belgium, so NGOs like Partnership Africa Canada (PAC) and Global Witness could focus their persuasion and offer a practical solution. All the various stakeholders eventually co-operated to establish the Kimberly Process which requires diamond-producing countries to transparently account for the origin of all of their diamonds. An external watchdog role for the NGOs was accepted. Regular reports on each country have been made. However, some countries have been letting suspicious diamonds through, and the negative reports have not been followed up by corrections. Ian Smillie, the charismatic leader from PAC who had driven the establishment of the process and had led the watchdog investigations, has very publicly resigned, condemning the slipshod implementation in many countries, and the defiant refusal to improve. This was a very largely voluntary regulatory process with few sanctions other than the publication of results that could sour the market for diamonds. Though some people still hold out hope for its resuscitation, this experience shows again that a legal framework for sanction consequences for non-compliance is a necessary part of these regulatory processes.




Pascal Kabungulu shares the details of the programs of Heritiers de la Justice at a conference in Kinshasa in 2004. *Photo: G. Broughton*

**Canada's National Roundtables, Bill C-300 and the Corporate Social Responsibility (CSR) Strategy**

Maurice Namwira describing a human rights defender's challenges in Bukavu, South Kivu, D.R. Congo. *Photo: J. Lewis*

For most natural resources, the commercial system is much more diffuse, and therefore more challenging. Nevertheless, the 2006-07 National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries developed a consensus between human rights defenders and industry spokespeople. Based on internationally recognized guidelines, such as those from the World Bank and the OECD, their recommendations balanced "facilitative environment" with "sanction consequences". That is, in addition to providing for capacity building for both Canadian companies and Canadian and foreign governments so that they could learn how to build and operate mines fairly, so that they do not contribute to conflict and environmental degradation, they also provide for legal complaints procedures, including a proactive Ombudsman and financial sanctions, such as divestment by the Canada Pension Plan and Canadian Export Development Corporation from erring companies. CFSC partners KAIROS and Christian Peacemaker Teams and Peace Brigades International were among the NGOs who facilitated people from developing countries to give evidence at the roundtables.

This consensus was a major advancement, and if the recommendations had been implemented, Canada would have led the world. This would have had a major global impact because 75% of the world's exploration and mining companies are headquartered in Canada. Mining and exploration companies based in Canada account for 43 percent of global exploration expenditures.[i] After demanding consensus, the government of Canada remained silent on implementation for 2 years. Unwilling to wait, opposition parties presented private members' bills early in 2009 (bills C-298 and C-300). Bill C-298 proposed the recommended ombudsman, but had to be withdrawn because private members' bills can only propose new spending when they have ministerial approval. Bill C-300 avoids this problem by giving responsibility for sanctioning errant companies to the Minister of Foreign Affairs and International Trade, who would have to investigate all complaints that are not spurious. The roundtable had recommended a tri-partite process including government, industry and NGOs, but again, such could not be proposed by a private members' bill. Bill C-300 passed second reading, and is in committee now. (Readers can follow its development by surfing to www.howdtheyvote.ca.)

In March 2009, the government finally responded with its CSR Strategy which provides only the "facilitative environment" and does not include sanctions of any kind. For dispute-resolution, instead of an Ombudsman, it provides for an Office of the Extractive Sector Counsellor. This office can respond to complaints, and, if both the community representatives and the company agree, it can investigate and mediate. This requirement for both sides to agree provides more protection for the company than for the community, and is inadequate in the view of the NGO participants from the roundtable. In a press

release, Gordon Peeling of the Mining Association of Canada, who had participated in the roundtable process as an industry representative, praised the components of the CSR Strategy with their capacity-building focus: "The strategy's focus on capacity building, through direct government support via Canadian International Development Agency and Natural Resources Canada and also through its support of the Extractive Industries Transparency Initiative (EITI) and the World Bank Multi-Donor Trust Fund, provides an essential building block in helping countries achieve their poverty reduction goals and development objectives through responsible development of their natural resources." At a June 2009 press conference, Gordon Peeling indicated his association's continued support for the recommendations of the roundtable. From what we non-experts can discover, 22 of CMA's 30 member companies would be regulated under the definitions given in Bill C-300. The CMA's website states: "Member companies account for the vast majority of Canada's output of metals and major industrial minerals. Most companies with producing mines and plants are members. The Association also encourages small operators and exploration organizations, as well as firms in related businesses, to become members."

Although not as carefully balanced as the recommendations of the Roundtable, elements of the government's CSR Strategy bolstered by the sanctions proposed by Bill C-300 would be a serious step in the right direction.

**Bilateral Investment Treaties**

Most foreign mining agreements are investment agreements, rather than trade agreements. While trade agreements are dealt with centrally, through the World Trade Organization, investment treaties occur outside of any formal governing body, without any agreed upon way of comparing one treaty to another, or to other legislation. These agreements are generally known as bilateral investment treaties (BITs) but also known as or Foreign Investment Protection and Promotion Agreements in Canada. They usually have the following features:

1) the guarantee that the company will receive no worse a deal than any other company, the so-called most-favoured nation clause
2) properties sold or leased to a company cannot be appropriated without compensation
3) through stabilization clauses, a nation's laws can be frozen for up to 100 years
4) companies can insist on being treated 'fairly' by the host nation

These agreements have been causing concern because in addition to forcing countries to liberalize their economies, and allowing companies to take advantage of weak environmental regulations and enforcement while not getting any new responsibilities, these agreements can supersede local constitutions and laws and did not lead to any extra revenue for African states during the resource boom of 2007. In addition, because there is no central governing body, investment disputes are settled by private arbitration, in a way that has led to more and more arbiters who are pro-business. In response to this, communities in mine-affected communities have been resisting through direct action, shareholder activism, and legal action.

**Two International Initiatives: Publish What You Pay and Extractive Industries Transparency Initiative**

Established in 2000, Publish What You Pay (http://www.publishwhatyoupay.org/) is an international civil society coalition that monitors countries' extractive industries' business transactions, advocates for clearer transparency, and provides training to locals who want to take up this work. The Publish What You Pay campaign, supported by over 130 NGOs in nearly 70 countries, calls for:

- the use of templates to shape mandatory arrangements

- reinforcement of the principles through conditionality on export credit agency funding, requirement to disclose on the part of aid programmes
- building capacity of civil society,
- mainstreaming of revenue transparency in the policies and programmes of the World Bank and IMF
- disaggregated disclosure of company data.

There is a coalition of local organizations in the D. R. Congo, and one of their members, Organisation des Ecologistes et Amis de la Nature, has chapters in North and South Kivu. In Canada, PWYP is supported by Revenue Watch Institute and Partnership Africa Canada.

Where Publish What You Pay is an advocacy and capacity building coalition or civil society organizations, the Extractive Industries Transparency Initiative is a certification regimen among governments and companies. And, as PWYP is encouraging companies and governments to undertake EITI certification EITI can be thought of as a manifestation of some of PWYP's goals. The Extractive Industries Transparency Initiative (http://eitransparency.org/), established in 2003, is a multi-sectoral alliance of states that promotes good governance through verifying and publishing company payments and government revenues from the extractive sector.

Like the Kimberly Process, compliance with standards is voluntary, and the possible souring of the market due to the publishing of the data is the only sanction. D. R. Congo is a "candidate country" at EITI. This means that they can answer yes to the following questions:

1. Has the government issued an unequivocal public statement of its intention to implement EITI?
2. Has the government committed to work with civil society and companies on EITI implementation?
3. Has the government appointed a senior individual to lead on EITI implementation?
4. Has a fully costed Work Plan been published and made widely available, containing measurable targets, a timetable for implementation and an assessment of capacity constraints (government, private sector and civil society)?

A compliant country has two years to get EITI validation so that they can become a compliant country. Currently only Azerbaijan is compliant. The only industrialized country on the road to getting EITI certified is Norway.

Canada supports EITI and by 2011 will have given it over one million dollars and technical and policy advice. This donation allows Canada to sit on the management board of EITI's trust fund which provides support to countries wanting to implement EITI. While Canada endorses the goals of EITI Canada has not started the process of complying with EITI standards itself. Initially this was because "those Agreed Actions [in the EITI agreement] include a commitment to building policies on actions that are still not fully developed", and because Canada felt that their practices were as open as can be. It is unclear what Canada's current position is on joining EITI.

**Back to the Congo**

These regulatory processes facilitate the strategies from the spring 2001 *Quaker Concern* article. If followed in good faith, they would provide a governance framework for environmentally sound mining to generate income that could be managed locally to provide the public goods and social services required for a stable society. Here in Canada, we can provide the governance for one of the aspects of the natural resources market. For peace and stability, local governments also have to regulate the activities in their countries. In every country experiencing unjust extraction of natural resources, there are local organizations struggling to create that local governance framework. In North and South Kivu, there is an

organization called Héritiers de la Justice. Wholly staffed and directed by local Congolese people, they are creating a network of community legal clinics, rebuilding civil institutions from the grassroots. They document cases of human rights abuse of all kinds. KAIROS, the ecumenical justice organization of which Quakers are a part, is their primary Canadian partner, and their director, Maurice Namwira addressed the KAIROS national gathering in June 2009.
In the Kivus, mining is organized artisanally. That is, people dig in open pits or shafts by hand, extracting the ore in 10 litre buckets. After some crushing and sifting, the ore is sold to "comptoirs" in the provincial capitals of Bukavu and Goma on the Rwandan border, or shipped across Lake Edward into Uganda. Rival armed groups control different pits, use road blocks to "tax" the ore on its way to the comptoir, extort payments from the comptoir, or own it themselves, or extort "export tax" at a border crossing. Most of the people involved in the digging and the transporting are living under a threat of some kind in extremely abusive conditions. Sometimes these people can get to a community legal clinic, or otherwise contact a human rights defender such as the staff and voluntary network of Héritiers de la Justice. The knowledge that Maurice and his staff and network have is extremely dangerous. Maurice came to be director because the former director, Pascal Kabungulu, was assassinated in his own home in front of his family by men wearing the uniforms of one of the rebel groups. The assassins have been identified, and this is one of the cases that Maurice continues to pursue, so that these people will be charged and tried. But the Congolese justice system is weak, undermined by the control of various armed groups. The task of rebuilding it is daunting and dangerous.

For the case of artisanal mining, the international market is still the place where the revenue is generated, and the abusive system could be changed if that source of revenue were blocked. An example of the kind of regulation that can affect this has recently been introduced in the United States Congress. Bill S-891, the Congo Conflict Minerals Act, has two purposes: (1) monitor and stop commercial activities involving the natural resources of the DRC (the minerals columbite-tantalite [coltan], cassiterite, wolframite, and gold); and (2) develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving such natural resources in order to reduce exploitation by illegal armed groups and promote local and regional development. It directs several branches, from the executive on down, co-operate so that sellers can accountably certified that their ore and subsequent products did not come from sources that support the armed groups.

Women gather in front of one of their homes in Sake, a village west of Goma, North Kivu, D. R. Congo, where the Jeunes Artisans de Paix have assisted inhabitants upon their return from internally displaced persons camps. The picture was taken in December 2005, and the village has been sacked twice by armed groups since then. These women may not have survived. *Photo: G. Broughton*

When I attended the Parliamentary Foreign Affairs Committee's first hearings on Bill C-300 on June 1, 2009, I noticed that there was debate about the fundamental question of whether it is appropriate for governments to regulate companies for their human rights practices. In a globalized world, our only hope of peace requires us to do so. We must respond to the courage of people like Maurice Namwira and Pascal Kabungulu by doing our part.

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**Links:**

CNCA and the National Roundtable on Corporate Social Responsibility
http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.aspx
Http://www.halifaxinitiative.org/index.php/Issues_CNCA
http://www.miningwatch.ca/index.php?/92/CNCA_statement
http://www.pdac.ca/pdac/misc/060829-2.html
http://www.devp.org/devpme/eng/pressroom/2007/comm2007-03-30-eng.html
Bill C-300
http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80507
www.howdtheyvote.ca
Partnership Africa Canada
http://www.pacweb.org/
Kimberly Process
http://www.kimberleyprocess.com/
Extractive Industries Transparency Initiative
http://eitransparency.org/
http://www2.dfid.gov.uk/news/files/eitireportconference17june03.asp
Publish What You Pay
http://www.publishwhatyoupay.org/
Héritiers de la Justice
http://www.heritiers.org/
KAIROS
http://www.kairoscanada.org/

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[i] Government of Canada. March 2009. "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" Foreign Affairs and International Trade Canada. July 2009. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx>