This paper serves as input to the Public Hearing on Business & Human Rights of the Parliamentary Commitee on Human Rights, April 16th 2009.

All organizations listed below want to stop the injustice related to business activities in developing countries. European based and/or listed companies must be hold accountable by the European Institutions for human rights abuses committed in the areas of operation. The ECCJ (European Coalition for Corporate Justice) provides legal proposals to tackle this very issue. JEO, CAFOD, IPIS, Fatal Transactions and Global Witness focus on business activities of mining corporations in the Democratic Republic of Congo and collect evidence that due to a lack of European legislation, corporate abuse against local people in mining areas continues.

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Businesses have a huge impact on human rights in the developing world

The private sector has a significant and growing influence on human rights and the environment, especially in the developing world. In 2006, UNCTAD identified 78,817 parent companies globally with 794,894 foreign affiliates. Of the largest 100 non-financial transnational corporations, more than half of them are head-quartered in the European Union (EU). John Ruggie, the UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (SRSG) has stated that "there are few if any internationally recognised rights business cannot impact – or be perceived to impact – in some manner."

The current legal framework underpinning company structure, consisting of separation of legal persons and thus limited liability of the parent for the actions of its subsidiaries, has had the undesired consequence of shielding Multinational Enterprises (MNEs) from liability for human rights and environmental abuses and other public-interest law violations. Implicit in the structure is the notion that a company acts solely in the economic interests of its shareholders. This imperative has often sidelined companies' accountability to society at large. The SRSG identified the "governance gaps" caused by globalisation as the root cause of the business and human rights predicament: businesses can use national and international laws to protect their interests but it is much harder for those suffering from corporate abuses to pursue legal redress. In addition, the expansion of firms' legal rights under investment and trade treaties can make it harder for governments to take action to protect the environmental and social rights of their citizens.

The SRSG's response was to develop three core principles for a common framework to address this power imbalance concerning business and human rights:

- the State duty to protect against human rights abuses by third parties;
- the corporate responsibility to respect human rights; and
- the need for access to more effective remedies.

One of the developments flagged up in the SRSG's report was "home countries taking regulatory action to prevent abuse by their companies abroad." Here the EU can take a decisive step to increase corporate accountability and set a standard for other countries to follow. Such measures would be particularly valuable for countries where the local rule of law and government institutions are weak or absent or where the country is unwilling or unable to take action itself, such as the Democratic Republic of Congo.

Why Europe should act

The development of effective accountability mechanisms is key if the EU' aspirational objectives in relation to poverty alleviation and sustainable development are to be met. Action to integrate better corporate accountability measures in all relevant policies is essential for the success of the EU's own commitment to tackling climate change, delivering sustainable development, promoting and defending human rights, respecting biodiversity and creating growth and jobs.

The EU is the biggest aid donor globally with progressive founding principles, and given the economic clout of its companies operating abroad is best positioned to take the lead. It is important to ensure that the actions of businesses based in the EU are not undermining the objectives of European aid to support human rights and good governance. By taking a proactive approach, the EU could respond to this urgent challenge and shape the nature of any future international measures. It would also ensure that EU based businesses were 'ahead of the game.'

International law "firmly establishes that states have a duty to protect against non-state human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities."[1] A growing number of international 'soft law' instruments have been undertaken to encourage businesses to adhere to human rights standards.[2] In line with this, the European Commission also promotes responsible business activities. Its approach is based on the narrow understanding of

[1] Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts", UN Doc. A/HRC/4/035. 9 February 2007.

[2] *Ibid,* page 14.

voluntary commitments and CSR to support initiatives which go beyond common regulatory requirements.

The Commission's current proposals and work to date are clearly not enough. While a very significant first step is being taken at the moment in the form of a study to clarify the nature and scope of the existing EU legal framework applicable to EU companies operating abroad, more needs to be done to ensure a broad understanding and proactive approach to the issue.

The EU Council has yet to make any pronouncements despite the fact that some Member States are taking steps in different directions including, in some cases, legislation. Some agencies, such as CIDSE the European Network of Catholic development agencies, with experience of participating in a number of established voluntary and multi-stakeholder CSR initiatives pointed out in their submissions to the SRSG that voluntary approaches are "piecemeal" and need to be backed up by home country regulation[3]. The SRSG has noted it "is a well-known fact that even among the leaders, certain weaknesses of voluntarism are evident."[4] The annexed case studies demonstrate the practical limitations of existing approaches.

Recognising the problems with the status quo, in 2007 the European Parliament passed a resolution:

- Encouraging the Commission to develop, in particular, mechanisms that ensure that communities affected by European companies are entitled to a fair and accessible process of justice.[5]
- Recommending that the Commission extends the responsibility of directors of companies with more than 1,000 employees.[6]
- Reminding the Commission of the Parliament's invitation to put forward a proposal[7] so that social and environmental reporting is included in the reporting by companies alongside financial reporting requirements.[8]

Next steps for European action to increase corporate accountability

The EU needs to ensure that any European business enterprises responsible for human rights violations and environmental destruction abroad are sanctioned for these activities and most importantly that prevention mechanisms are put in place to avoid liability issues. A developed legal framework exists; applicable to European companies' actions within the EU. We believe that the EU should respond by enacting a set of minimum binding rules to enforce corporate accountability of EU MNEs outside the EU.

There is also a strong business case to be made. A clear legal framework will greatly increase the legal certainty of companies. As a result, social and environmental risk management of EU MNEs and their worldwide operations would improve significantly, thus increasing their economic benefits. Moreover, the lack of clear rules of engagement and the proliferation of voluntary CSR initiatives make it difficult for investors, consumers and the society at large to identify which companies are not complicit or involved in human rights or environmental abuses. This results in a situation of unfair competition for companies which are ensuring the respect human and environmental rights in their production chains.

As a contribution to the debate at EU level, the European Coalition for Corporate Justice (ECCJ)[9], a coalition of national platforms of civil society organizations from all over Europe has already provided detailed legal proposals[10] on several of these issues, namely:

[3] CIDSE Submission to the UN Special Representative: Recommendations to reduce the risk of human rights violations and improve access to justice, February 2008

[4] Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, para 74

[5] *Ibid*, para 43.

[6] *Ibid*, para 29.

[7] It relates to a proposal to amend the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (the Fourth Company Law Directive)(18)

[8] European Parliament resolution of 13 March 2007 on corporate social responsibility: a new partnership (2006/2133(INI)), para 27.

[9] ECCJ represents over 250 NGOs, trade unions, consumers' organizations and academic institutions from 16 different countries including FIDH and national chapters of Oxfam, Greenpeace, Amnesty International and Friends of the Earth[0],

[10] European Coalition for Corporate Justice, Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses, 2008.

- Enhancing direct liability of parent companies.
- Establishing a parental company duty of care
- Establishing mandatory environmental and social reporting[11]

The ECCJ's proposals provide a general framework on key areas of reform and are strongly based on existing European law. If introduced, they will:

- Provide opportunities for victims to bring a company[12] to court in one of the European Member States and reverse the burden of proof.
- Enhance the duty of care of a company to influence the operations of other companies that are not formally part of the company group but are economically dependent on the group.
- Bring the companies involved (or their parent companies) to account for any inaccuracies in their reports or in other information they are required to provide to, for example, victims of abuses.

Together with ECCJ, the organizations CAFOD, Fatal Transactions, IPIS, Global Witness and the Jesuit European Office believe the proposals could make a real difference for victims of corporate abuses, as well as creating a new corporate culture which would help to prevent future abuses. The attached ECCJ report "Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses" provides a detailed overview of the various concrete legislative proposals at the EU level.[13]

The proposals are strongly rooted in the SRSG's belief that the State duty to protect is a core principle of the business and human rights framework. They also provide a concrete mechanism for linking this duty to the corporate responsibility to respect human rights and the need for access to effective remedies. We hope that the SRSG will ensure that his recommendations also provide clear proposals for binding measures, to overcome the limitations of soft law instruments outlined above.

The following case studies highlight the way in which people's lives have been and continue to be affected by the operations of extractive companies. Although both case studies are from the Democratic Republic of Congo (DRC), they were chosen not because the DRC is the only third country which would serve as a relevant example, but because it is a context clearly characterised by weak governance and poorly implemented legislation, thereby highlighting the limitations of voluntary engagement even more clearly. Furthermore, the direct link between the instability in this heavily resource-rich country and the unregulated exploitation of minerals has been recently highlighted by both the European Parliament and the UN.

Case One: the limitations of voluntary approach to disclosure
South African firm AngloGold Ashanti (AGA) is one of the world's largest gold mining companies, which is developing a mine in Ituri district, in north eastern DRC, an area which has been plagued by conflict and continues to be unstable. The enormous size of this proposed mine means that its impact on the local community will be significant. There are concerns about existing livelihoods, the question of employment for artisanal miners already on the concession (approx 60,000 people), the environmental impacts of the mine, and possible relocation of communities. Regular and transparent disclosure of information is an important means of preventing local conflict, especially considering the significant impacts that a mine of this size could have for the local community. AGA has experienced serious conflict with artisanal miners at its Ghanaian site and the Mongbwalu community in DRC is keen to avoid similar problems.

Since 2006, CAFOD has been supporting civil society in Ituri to organise and lobby AGA on behalf on the communities who stand to be affected by the mining project.[14] In particular, the community has been asking the company for disclosure of information regarding the company's revenue payments and contract with the government, as well as the social and environmental impacts of the mine. However, the reality is that, despite engaging in regular dialogue with AGA, the company has failed to disclose this information to the community, reflecting the limitations of a voluntary approach to

[11] The proposals can be found at: http://www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf.
[12] A company can constitute the following: parent company, any element of the parent company that has assets within the EU, or when the company has a contractual business relationship with an European company.
[13] http://www.corporatejustice.org/Two-new-ECCJ-publications,240.html?lang=en [0]

[14] Cf. http://www.cafod.org.uk/content/download/6632/55356/version/4/file/CAFOD+GOLD+REPORT+FINAL.pdf

disclosure. It is also important to note that AGA has publically committed to the quasi-voluntary Extractives Industries Transparency Initiative (EITI) but that in DRC this process has stalled and has failed to deliver meaningful results.

AGA is a South African company but has a clear link to Europe. It was previously part of the British Anglo American group, which until 2005 was the controlling shareholder and, although it currently has no operations or head offices in the EU, it still has a European shareholdership of 12.97% and is listed on the London, Brussels and Paris stock exchanges. According to its 2007 Annual Report, AGA sold 29% of its total gold production in Europe.[15]

The lessons that can be drawn from the Mongbwalu case are applicable to other contexts. A legislative requirement for company disclosure would compel companies to publicly disclose project information, including information about the human rights, environmental and social impacts of private sector projects, as well as details of contracts and the payments they make to government. This would enable citizens to access the information they need about the costs and benefits of such projects and allow them to better hold companies to account. With this level of disclosure, the gaps between company policy and practice can be more effectively monitored by civil society. As can be seen in the AGA case, this is currently very difficult for civil society to do when there is no obligation on a company to disclose that information.

Case Two: corporate accountability in conflict zones

In February 2007, Global Witness filed a complaint against the UK-registered company Afrimex, for breaches of the OECD Guidelines for Multinational Enterprises, in connection with its trade in minerals during the war from 1998.[16] Afrimex, operates in eastern DRC through the Congolese registered companies Société Kotecha and SOCOMI, both based in Bukavu.[17] The UK National Contact Point (NCP) investigated the case and in August 2008, published its final statement, upholding the majority of Global Witness's allegations. The Final Statement concluded that Afrimex had failed to ensure that its trading activities did not support armed conflict and forced labour. A significant part of its conclusions rested upon the fact that Afrimex had not exercised sufficient due diligence in its supply chain, and that some of its suppliers[18] made payments to rebel groups, thus contributing to the conflict.[19]

Since Global Witness submitted its complaint to the NCP in February 2007, and throughout the period that the NCP was investigating the case, Afrimex continued buying minerals from eastern DRC.

In January 2009, Global Witness wrote to Afrimex requesting an update on the company's activities undertaken since the NCP's final statement. In March 2009, Afrimex replied to the UK NCP (copied to Global Witness) stating: "*For your information, following the publication of the NCP's Final Statement, Afrimex was left with no option but to cease all mineral trading. The last shipment of minerals left DRC in around the first week of September 2008."* This claim remains unsubstantiated. It is important to note that previous claims made by Afrimex in 2007 and 2008 that they had ceased trading in minerals were disproved by Congolese government statistics[20] and Global Witness interviews with sources in eastern DRC.[21]. Global Witness is urging the UK government to carry out an independent verification of Afrimex's claims.

[15] http://www.anglogoldashanti.com/subwebs/InformationForInvestors/Reports07/ReportToSociety07/gold-uranium.htm

[16] See Global Witness, "Afrimex (UK) - DRC: Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises", 20 February 2007.

[17] For an explanation of the relationship between Afrimex, Société Kotecha and SOCOMI, see Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd

[18] 2 of Afrimex's comptoirs - Muyeye and Groupe Olive - have since been named by the UN Group of Experts as knowingly trading in minerals produced by armed groups, in particular the *Forces démocratiques pour la libération du Rwanda (*FDLR). See Final report of the Group of Experts on the DRC, S/2008/773, 10 December 2008.

[19] Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008; Department for Business Enterprise and Regulatory Reform (BERR) press release, "Mineral trade helped fund rebels", 28 August 2008.

[20] Congolese government statistics list Afrimex as having imported cassiterite from Goma and cassiterite and wolframite from South Kivu in 2007. A sample of monthly reports for 2008 from the Centre d'Evaluation, d'Expertise et de Certification (CEEC), the Congolese government agency responsible for certifying minerals, shows Afrimex as having imported cassiterite in may and june. Afrimex's mineral comptoir, SOCOMI, is listed as an officially licensed comptoir for cassiterite in South Kivu, having paid its licence fee of US$9,000 for 2008.

[21] Global Witness interviews in Bukavu, 28 July and 3 August, and in Goma, 7 and 8 August 2008. .

In its final statement, the UK NCP made a number of recommendations to Afrimex, relating, among other things, to the formulation, implementation and periodic review of a corporate responsibility policy which should take into account the human rights impact of the company's activities. Six months after its final statement, the NCP had not received any information from Afrimex regarding its implementation of the recommendations.

Global Witness welcomes the positive precedent set by the NCP in its final statement, but further action is needed. The continuing violence and widespread human rights abuses in eastern DRC call for more immediate and harder-hitting actions that deter European mineral and trading companies from financing armed groups. The situation with Afrimex could have been prevented if it had been legally required to undertake due diligence within its supply chain and, specifically, the sourcing of minerals from eastern DRC.

If backed up with strong political support, the UK government's findings on the Afrimex case could mark an important precedent in holding companies accountable for their activities in conflict zones and could set an example for other governments in Europe. The UK government should send out a clear signal that it is monitoring the company's behaviour; this would also show other companies in Europe that they too could be held accountable for their actions overseas.

The OECD Guidelines for Multinational Enterprises remain a weak, non-binding mechanism. The British government will have to take further action to ensure that Afrimex fundamentally changes its practices and that the investigation and conclusions of the NCP are more than just a theoretical exercise.

Conclusions and concrete recommendations to the European Parliament

The European Parliament has stated the need to strengthen corporate accountability mechanisms within Europe, yet at present there is no clear process in place to make this happen. As this report shows, there are significant improvements that could be made through changes in European law which would improve accountability mechanisms and thereby contribute to the improved behaviour of MNEs internationally. The EU urgently needs to develop and enact binding rules to enforce corporate accountability of EU MNEs.

There is no silver bullet to stop MNEs profiting at the expense of people and the environment and solutions must be found in a range of arenas. Clearly, the European Parliament has a great role to play and in doing so the following committees are of key relevance: AFET, DROI, DEVE, INTA, ECON, EMPL, ITRE, JURI and LIBE.

Concrete recommendations to the EP:

- Political groups could include demands matching the proposals included in this document on the issue of corporate accountability in their electoral programs aimed at the upcoming European elections of June 2009. Some have already done so at the national level;

- The relevant committees should address the importance of European regulation on corporate accountability during the approval of new Commissioners in order to make sure that the issue stands high in their agenda;

- The relevant committees in the European Parliament need to engage in this debate in the future 2009-2014 exercise, as the issue of corporate accountability spans several areas of the EU's work. Some concrete ideas include hosting hearings, inviting affected communities to share their views, developing opinions on co-decision and non co-decision issues where relevant;

- Most important would be the follow-up to the upcoming Commission (DG Enterprise) study to clarify the nature and scope of the existing EU legal framework applicable to EU companies operating abroad: the European Parliament could play a key role in making sure that recommendations are followed by legislative proposals, through consultations with all stakeholders and where possible co-decision powers.