

## 5 GOVERNANCE, HUMAN RIGHTS AND MINING IN THE DEMOCRATIC REPUBLIC OF CONGO

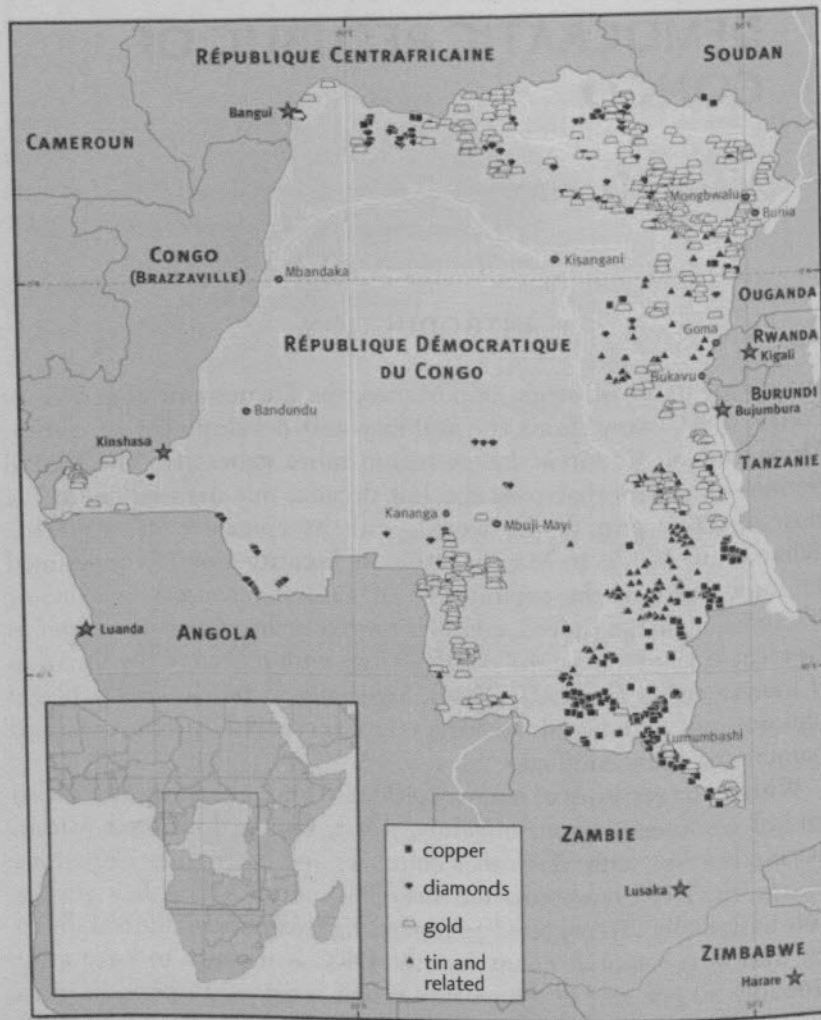
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### INTRODUCTION

In view of its geostrategic importance, the Democratic Republic of Congo (DRC) conditions the stability and development of central Africa and of the Great Lakes region more generally. The United Nations considers that over the last decade, this area has been the most unstable part of the world, with its epicentre in east DRC (Biliaminou, 2007). In March 2007, the Security Council underlined the importance of the exploitation of natural resources as a major destabilising factor. Indeed, conflicts have overthrown several states in the area, leading to harmful consequences with regard to the situation of human rights (EURAC, 2007), especially in border areas. Illegal exploitation of natural resources has increased, supporting and maintaining these conflicts.

With a vast territory of almost 2,400,000 km<sup>2</sup>, abundant and varied natural resources (wood, minerals, water, fauna, flora, and so on), sharing borders with nine other countries and more than 250 ethnic groups, the DRC represents the 'heart' of central Africa. It is also its 'soft underbelly'. Recognised as possessing exceptional mineral diversity and in substantial quantities, the DRC is thought to have most probably 50 per cent of the world's cobalt reserves, 10 per cent of its copper deposits, 30 per cent of its diamonds, as well as having an important potential for gold, uranium and manganese (Hocquard, 2006). The DRC is today the world's leading cobalt producer.

The national economy has been based historically on the exploitation of mineral resources. The mining industry flourished under Belgian colonisation and later under the Mobutu regime. In the 1980s, the country provided 6 per cent of world copper production (Hasselback, 2007) and the mining sector alone ensured approximately 60 per cent of the state's tax receipts (Karsenty, 2006). In the 1970s and



Map 5.1 Principal minerals in DRC

Source: Géoatlas.

1980s, Gecamines – the state mining company – represented on average more than 60 per cent of export income (AFDB/OECD, 2006). Although activity in the Congolese mining industry slowed down after the 1980s, it has an enormous potential on which the majority of economic and political actors count to revive economic growth and the social development.

The 'geological scandal'<sup>1</sup> which is the way certain analysts have characterised the DRC is however also the archetype of what some have described as 'the curse of raw materials' (Neary and van Wijnbergen, 1986). No other country in Africa presents such an extreme combination of potentialities and problems. The conflicts that have succeeded each other since independence in 1960 (Lanotte, 2004) reveal how difficult nation-building can be.

Indeed, the mining resources of the Great Lakes region have been the prey of countless parties (Martineau and Boulanger, 2006: 2, 4). During the last decades, tensions have increased as a result of the grab for raw materials and mining revenues. With the centre of power located in the west of the country and mining resources located mainly at the peripheries, the potential for dissension has been multiplied. This dichotomy creates certain tensions, and in particular on the eastern borders where the state can only count on very weak representation (Raeymaekers, 2007).

The 1960–5 civil war, the Katangese conflicts later on (1978), the secessionist or centrifugal armed uprising, as well as the more recent conflicts (1996–8, 1998–2002, 2007–08) have all scarred the history of a country where the economic and social system has always been structured around revenues from mining. These resources are the main reason for the 42 years of dictatorship, for the 15 years of political transition, and the seven years of armed national and international conflicts. Between 1998 and 2004, the death toll throughout the whole territory,<sup>2</sup> including all nationalities, has been estimated at 4 million (Coghlan et al., 2006). More than 3.4 million inhabitants were displaced, including 411,000 to neighbouring countries, and 17 million people still suffer from food shortages. Added to this there are also the pandemics, acts of physical and psychological violence, raping, executions and so on. The majority of victims are civilians, far from the battlefields, 'collateral casualties' as a result of the degradation of basic infrastructure, lack of public services, shortages in food supplies, proliferation of diseases and so on.

In keeping with the third major area of recommendations identified by the Extractive Industries Review (EIR) as enabling conditions in

order for the extractive industries to contribute to poverty alleviation through sustainable development, and needed to be met by the World Bank Group (WBG) in order for it to play a positive role, the analysis of this chapter will focus on the relations between mining activities and the respect for human rights. It takes as its point of departure the World Bank's observation, 'Many countries fail to make best use of the benefit streams provided by the extractive industries. Unfortunately, the Democratic Republic of Congo is among these countries' (World Bank, 2007: 13).

Within this framework, this chapter will examine the reforms undertaken in the mining sector and their implications for promoting or impeding the respect of human rights. The DRC provides a striking illustration of the complexity of the stakes raised by the issue of human rights, which is increasingly considered as one of the main 'development' issues for countries of the South.

In countries with fragile institutions, the mining sector is recognised by many to have produced more misery than wealth for local populations. It has been shown in this regard that countries rich in natural resources may be characterised by worse economic performances than less endowed countries. No consensus has yet emerged to explain such an apparent paradox (Collier and Hoeffler, 2005; Ross, 1999) and this manner of approaching such issues is itself the subject of debate. However, twelve of the states that are most dependent on mining production and six that depend on petroleum are classified by the World Bank as heavily indebted poor countries (HIPC) and have among the worst ratings on the Human Development Index (HDI), according to data compiled by the UN Development Programme (EIR, 2003a: 15).

In such a context, given its mandate to 'fight against poverty', the WBG has proposed that the mining sector be transformed into a macroeconomic lever for growth and development, in order to enable the DRC to achieve the Millennium Development Goals (MDGs) (DRC and UN Congo, 2004).

In the DRC, as in many African countries, the reform measures strongly encouraged by the international financial institutions (IFIs) have emphasised an overall redefinition of the architecture and role of the state (Mazalto, 2005a). Such a strategy and the risks it represents can be illustrated by the policy adopted by the same institutions a few years earlier (in 2000) in Chad, where under different circumstances an attempt was made to use oil revenues in order to reinforce a weak state (Magrin, 2003; Tulipe, 2004).

In the DRC mining sector, these reforms have led to creating a new legal framework and a new set of standards aimed at improving practices as a means to achieve development objectives. While, on the one hand, these reforms provide a legal framework for rights, on the other hand, they are often the vehicle for a heavily technical approach that tends, in the name of promoting 'good governance', to deny the political dimensions of the socioeconomic considerations associated with the management of this sector. Encouraged, conceived and most often implemented from abroad and/or with the strong participation of international experts, the very origin of these reforms creates problems of the legitimacy of their application and appropriation by the national and local authorities. Further, and as was illustrated in the first two chapters of this book, the model of development based on resource extraction that is promoted presents a number of difficulties in terms of the national redistribution and local appropriation of the wealth produced.

Insofar as human rights are best promoted through the implementation of equitable wealth distribution mechanisms, and since this requires the existence of legitimate institutions established throughout the whole territory, the links between the reforms put forward to promote mining activities and their implications for the respect of human rights merit detailed analyses. Furthermore, in the DRC, the institutional reforms currently being undertaken in the name of promoting 'governance', with the goal of introducing the rule of law, raise a number of questions which still remain to be answered. In this chapter we attempt to provide certain elements towards an understanding of these issues.

It was in response to grave concerns raised concerning the lack of impact of mining activities on poverty reduction, and notably in the face of criticism of its own involvement, that the WBG became involved in this area. As noted, among other initiatives but of central importance, the WBG commissioned the EIR in order to help revise the institution's practices in the sector (EIR, 2003a, 2003b). The central place given to the respect for human rights in its recommendations by the EIR initiative has been a factor contributing to the emergence of the human rights agenda as an essential component in order for investments to contribute to the objectives of programmes to 'fight poverty'.

While the setting-up of the EIR was a commendable initiative by the IFIs to monitor their practices in the extractive sector, the major contribution of the report which resulted lies in proposing concrete solutions to the problems identified. In this context, we cannot help but draw



attention to the gap that exists between on the one hand, the diagnosis and the EIR recommendations, and on the other, the low priority assigned to them by the WBG in its subsequent practices.

The principal recommendations made by the EIR concerning rights can be summarised as follows:

1. The WBG is strongly encouraged to adopt a human rights-based approach to development.
2. Human rights obligations must be considered at all stages of every project, from design to implementation and monitoring. To guarantee the application of these standards, the WBG should include independent reviews, hiring expert external consultants, capable of analysing the human rights situation.
3. The International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) must assess the past records of companies with which they cooperate in terms of their respect for human rights. It is important to guarantee that projects financed by the WBG are developed and implemented according to the standards of the Universal Declaration of Human Rights. The adoption of these principles and the proof of their respect must be a prerequisite for any mining company seeking support from the WBG.
4. Since the WBG has adopted the fundamental labour standards of the International Labour Organization (ILO), the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)<sup>3</sup> must insist that these standards be written into the contracts of any funding project by including them as compulsory elements for contracts to be awarded. They must also adopt the four, and not simply two, fundamental labour standards included in the eight fundamental conventions which establish the labour principles and laws. These are: the freedom of association (the right to organise and to bargain collectively); the abolition of forced labour; equality (non-discrimination); and the elimination of child labour (ILO, 2005). The WBG must collaborate with governments, trade unions, industry groups and other organisations, as well as with the ILO, to promote the respect of these standards.
5. The promotion of gender equality and of women's rights should be a priority for the WBG, given its objective of poverty reduction.
6. The WBG is also invited by the authors of the EIR report to increase their efforts to certify that the Group's participation in any project is conditional on respecting the rights of indigenous peoples.

With the recommendations proposed by the EIR expert group in mind, we turn now to the role of the IFIs in restructuring the mining sector in DRC. By comparing the development policies that have been introduced in this country's mining sector with the priorities promoted by the EIR, we shall be in a better position to understand the implications of WBG policies in this particular area.

The extent and depth of the reforms undertaken particularly since 2002 in the strategic mining sector, in which the multilateral financial institutions have invested heavily, require us to monitor how the reforms have been implemented in order to examine their potential to promote development directed towards poverty reduction, conducive to the promotion of and respect for human rights.

In the case of DRC, a prerequisite for any analysis of the complexity of the issues at stake requires the adoption of a historical perspective capable of considering the orientation these reforms have taken, the role of the IFIs and the conditions in which they have been elaborated and adopted. This contextualisation then leads to questioning how the recovery of the mining sector is linked to poverty-reduction objectives which in turn give legitimacy to the resulting activities. The very particular situation of DRC raises a series of considerations around issues related to the promotion of human rights in a post-conflict nation, in a context of only very recent commitment to 'democratisation'.

To the extent that the issue at stake, from the perspectives of the IFIs, concerns moving from the current state of affairs to a situation where the rule of law prevails,<sup>4</sup> the mining sector merits careful examination. The study of recent changes in the Congolese mining sector will allow us to reconsider the recommendations of the EIR and assess more generally the issue of the social and political responsibility for the promotion and protection of human rights in a context such as that of the DRC.

### THE ROLE OF THE IFIs AND OTHER FINANCIAL INSTITUTIONS IN THE DRC: TOWARDS A REDEFINITION OF THE ARCHITECTURE AND ROLE OF THE STATE

To what extent can we assess how the interventions of the principal financial institutions in the DRC have contributed to the promotion of human rights? Part of the answer can undoubtedly be found in an analysis of the particular nature of the interventions,



notably by examining the reforms accompanying the proposed development programmes.

As shown elsewhere in general terms, since the years of the structural adjustment programmes it seems that multilateral funding institutions have attempted to impose what appear as standardised development programmes based on new regulatory modes in an attempt to deal with structural poverty on a massive scale (Saldo-mando, 2005: 53). These have been combined with constantly increasing preconditions attached to financing, and characterised by a short-term agenda. In many ways, these programmes seem poorly adapted to the capacity of the countries to which they are directed to implement them (this includes both human and material capacities), to the financial and administrative liabilities left by previous governments, to the political culture and to the major social problems related to transition processes or post-transition contexts.

Starting in 2001, under the auspices of the World Bank and IMF, development programmes have been restructured to ensure that multilateral and bilateral initiatives become more coherent. Developing a harmonised framework for their actions was part of the process of elaborating the 'world partnership for development', as defined by the MDGs. An illustration of this can be seen in the enactment of a US law in December 2006 encouraging collaboration between the United States and its international partners to increase aid to the DRC (USA, 2006).

The degree of mobilisation in this regard can be considered impressive if we take into account the amount of funds invested, the diversity of actors involved, and the diversity of aid that was proposed, which resulted in extensive economic, administrative, technical, legal, political and humanitarian support. The desire to support and collaborate with the Congolese government around a particular vision of development culminated in 2006 with the elaboration of a joint intervention programme, intended to create convergence between the various development initiatives.

This mobilisation was conditional on three factors:

- pursuing a strategy to further the reform of the state
- adopting international development agendas and standards
- democratising and stabilising the political environment.

Through the massive support of bilateral and multilateral funding agencies, two major events in the political history of the country

occurred in 2006. The first was the adoption of the new Constitution in February 2006, further to the constitutional referendum which had been held on December 18–19, 2005; and second, in October 2006, the presidential election took place.

Shortly after the election of Joseph Kabila, the country's creditors confirmed their increased support to the DRC: 'After consultation with the government, we will develop appropriate flexible mechanisms to continue our engagement and ensure effective coordination of support for the development of the country' (Solana et al., 2006: 1). As of March 2007, the World Bank committed itself to invest US\$1.4 billion in the DRC (over the period 2008–10), in the form of grants and loans.

Convergence of the various aid programmes reached its highest point during the same year (2006), with a World Bank initiative, in collaboration with the United Nations, to develop a 'common strategic framework' to support the DRC. The resulting September 2006 document *Country Assistance Framework* (CAF) (UNDAF, 2007) became the reference framework for all development programmes supported by the European Commission, the United States, China, the United Kingdom, Belgium, Germany and France. The declared objective was to enable the DRC to achieve the MDGs as soon as possible, namely in five years. The *Framework* is structured around five objectives:

- effective management (which is to lead to drawing up of a 'governance compact')
- pro-poor growth
- the provision of basic social services (education, water and health)
- providing a social safety net
- HIV/AIDS treatment and community development.

This concerted initiative reminds us how, in Sun City (South Africa) in April 2002,<sup>5</sup> the international community, along with leading Congolese political actors, signed a political agreement with a view to ensuring a jointly managed transition. The International Committee for the Accompaniment of the Transition (CIAT) and MONUC (United Nations Mission in the Democratic Republic of Congo) oversaw the political transition. With the election of the new government, CIAT was replaced by a new mechanism for monitoring and political-economic coordination, with the support of the same countries, which signalled the renewed commitment by the international community to intervene in support of the DRC (UNSC, 2006).

Prior to the introduction of new mechanisms to monitor the proposed development programmes, as of 2001, the reform of the state had already been initiated. As a result, in the mining sector, the adoption of new norms in order to promote 'good governance' was facilitated by the reform undertaken in 2002. This led to the adoption of the new Mining Code and new mining regulations, the reform of the land tenure system and a new Investment Code.

For the IFIs, the legal framework was considered as the essential vector to establish new development norms and to guarantee their application within the programmes put forward as a means to reduce poverty. In Africa, these programmes have led to a substantial reconfiguration of the nature of the state. A new architecture has been constructed within which new approaches are adopted, the most striking feature of which has been the treatment of development issues in a more technical manner. The objective of such approaches has been to reinforce the institutional, legal and management control mechanisms, in order to guarantee that new 'good governance' or 'effective management' practices are put into practice. Such an emphasis was put forward in order to put an end to practices that have been described as reflecting those of 'patrimonial states', in which resource flows tended to contribute above all to the personal enrichment of an elite, henceforth designated as 'corrupt'. Consequently, the new approaches to development policies were presented as the way to reorganise the state and to establish good management practices for public affairs. Reinforcing the rule of law, ending the economic crisis and ensuring repayment of outstanding debt, were put forward as the key pillars at the heart of the new development agenda.

These reforms have been accompanied by a desire to transfer a maximum number of state prerogatives to the private sector, among other reasons, in order to reduce the financial burden associated with certain state functions. More specifically, this overhaul involved reducing to the minimum the production and distribution functions of the state, through a dual logic of decentralisation and privatisation. Such a transfer was made possible by the enabling environment introduced through the strengthening of the legal framework. In such a context, the notion of rights takes on a pivotal role in the equation that makes the reform of the legal framework an essential requirement for both macroeconomic recovery and the strategy to reduce poverty.

Another major element of the reform, promoting investments, is closely tied to economic liberalisation policies aimed at attracting foreign investments in the mining sector. The state is largely displaced

from this sector by resorting to major bilateral and multilateral assistance and to foreign direct investment (FDI). To reach this objective, achieving an appropriate and secure new legal framework is of pivotal importance to the success of the reform process. Ensuring the rule of law is no longer considered to be an instrument of social change, but rather it implies establishing the appropriate legal framework required to ensure the optimisation of free market mechanisms and securing investments.

In this context, in the mining sector, the main orientations introduced by the reform (Mazalto, 2005a) have as their objective opening up the sector to foreign private investments, liberalisation, leading to the progressive dismantling of state companies, reducing the financial burdens borne by companies (Otto et al., 2006) and reinforcing administrative control mechanisms, with the espoused purpose of fighting against corruption and promoting transparency. According to analyses of the evolution of African mining codes, the reform opened the way, in the case of the DRC, to the introduction of what has been characterised as a third-generation mining code, in which the role of the state is reconfigured and seen above all as that of facilitating investment and regulating mining activity (Campbell, 2004).

The 2002 Mining Code thus reflects the creation of a new environment characterised by one of the most liberal tax and customs regimes in Africa, designed to ensure the profitability of projects through transparency and efficiency in granting licences and providing investment security (DRC, 2005).

Another important dimension was to significantly restrict the state's room for manoeuvre (Bond, 2002). Private investors are given more powers, as holders of mining rights, as investors, as operators, as buyers and sellers, and as taxpayers. The funding agencies thus intend the state to cease its functions as a producer, retaining above all only the function of facilitating investment and providing security to the sector. State revenues are henceforth to be dependent on revenues resulting from the exploitation of resources by private capital, and in most cases foreign capital.

In economies where growth is dependent on economic rents, as Pourtier (2003) has pointed out, in its interventions, the state is encouraged to maximise its capacity to accumulate. Its income derives mostly from exploiting and exporting raw materials. The country is transformed into an immense reservoir of raw materials in which the central challenge is to manage to the best the flow of revenue resulting from resource exploitation, marketing and exporting. It is the state's



role to ensure that it obtains its revenues through the strict application of its sector laws (taxes, royalties and so on). It also has to guarantee a fair redistribution of mining revenues among the different sectors of the population, through decentralisation within a legal framework. We find such a conception for overseeing the mining sector in certain recent documents produced by the WBG: 'There is no immediate role for governments in short-term metals supply management. Markets are working to balance supply and demand, and higher prices are part of this process' (World Bank and IFC, 2006: 10).

The linkages between the social and economic dimensions are presumed to flow naturally one from another to the point where the introduction of macroeconomic policies and the reconfiguration or even the reduction of political space are presented as a normal consequence of the introduction of policies in favour of the poor. Indeed, following this logic, policies of decentralised redistribution permit public institutions to have the financial means and political will to satisfy the needs of the local population for basic services (education, health, sanitation, housing and so on). For their part, the companies are invited to scrupulously respect the legal frameworks, to guarantee that they will continue generating revenue for the state and, on a voluntary basis, to commit themselves to resolving certain negative externalities, such as pockets of poverty around mining sites, or pollution (for example, cyanide residues). Rather than regulations being promulgated in the national arena, these voluntary obligations are based on standards and norms which emanate from what has been described as a 'new transnational legal order', such as those, for example, which guide practices concerning environmental impact assessments (Szablowski, 2007).

In contrast to what is generally understood by a human rights-based approach to development, that proposed through the reforms recommended by the IFIs appears to resemble a logic favouring the promotion of private property rights. Such an approach appears to aim to harmonise the modes of regulation in the public domain with those of the market (maximisation of opportunities, a favourable environment and so on). It is therefore in such a perspective that the objective of the promotion of human rights is reset. Their promotion and respect are seen as a function of the achievement of standards defined in the set of legal and technical constraints, as for example exists in setting up a mining project. Such frameworks serve as the basis permitting the regulation, which becomes almost automatic, not only of financial but also political and social equilibriums – or in other words, of the social

peace. In a nutshell, what is involved is the introduction of new modes of social regulation of the public sector and of access to social services.

However, this process of the privatisation of rights involves a profound redefinition of the role and functioning of public institutions, which tends to reduce their space and their already limited options for social and political intervention. In brief, the function of these institutions is seen henceforth as to implement reforms, secure investments and regulate the operating practices of the companies. This is precisely where contradictions arise. In a country such as the DRC, does the state really have the means to guarantee the strict application of the law? Beyond the development of a legal framework and the institutional reconfiguration of the mining sector, what human and financial resources are available to ensure that the framework is really implemented, notably in view of the fact that it is presented as the guarantor of the struggle against poverty? The issue of means or resources is unfortunately too rarely broached.

As an illustration of the way that reforms have led to the substantive restructuring of institutions, we could cite the example of the creation of the Steering Committee on the Reform of Public Enterprises (*Comité de pilotage de la réforme des entreprises publiques*: COPIREP), set up in 2002. Its main purposes have been to reorganise the public finances and to boost the competitiveness of the principal sectors of the economy. To achieve this, COPIREP, which is supported technically and financially by the World Bank, rapidly became a key centre of power. It presides not only over the introduction of the Investment Code by the National Agency for the Promotion of Investments (*Agence nationale pour la promotion des investissements*: ANAPI), but also the introduction of the Mining Code, the land registry and the Forest Code, and the export agencies. It is responsible as well for improving the mining administration's functioning and reforming public sector enterprises. ANAPI is also in charge of implementing the antiterrorism law, fighting against money laundering and providing care for the most vulnerable sectors of the population. This excessive centralisation of the new legal and institutional structure in the mining sector is in strong contrast with the IFIs' call for promoting decentralisation and participation of the local population, with campaigns against poverty, as the basis of democracy in the DRC.

In the EIR final report, the recommendations adopted a rights-based approach, including civil rights and allowing for participation in the public sphere. Proposing broader participation as a condition for

improving the operation of mining activities amounts to raising the issue of the democratisation of the sector.

In the DRC, the political and economic democratisation of mining governance is all the more important because up to now, the local populations have profited very little from the positive outcomes of development programmes in this sector.

The Mining Registry Service (*Service du cadastre minier*: CAMI) created as part of the reforms illustrates some of the limitations of the reforms in view of the fact that the history, culture and the political and social dimensions of the sector are not – or are barely – taken into account in the institutional changes. CAMI, a public institution, is a major stakeholder, since its purpose is to provide security for mining property, to manage procedures for licensing, and when appropriate, to terminate mining rights. For this reason, for mining investors, CAMI could be considered as the Congolese ‘shop window’. Shortly after its creation in 2003, however, following a series of complaints from foreign companies, CAMI was charged with being poorly managed and partiality on the part of some of its personnel. After its first director general was dismissed, CAMI was closed down in 2004 and its organisation was examined by a foreign auditing firm to see how it could be restructured (Kuediasala, 2007). Since November 2005, four directors-general have succeeded each other at the head of CAMI.

Intended to ensure the correct application of the new Mining Code and regulations, the institutional reforms rapidly revealed insufficiencies which resulted in serious dysfunction. The Congolese State, even with new institutions, is not yet able to guarantee an environment providing investment security and good management of a mining sector that is in full expansion. These embryos of the rule of law still seem to be limited in their ability to intervene effectively, essentially because of liabilities that are intrinsic to the institutional culture, with roots that stretch back to long before the war (Willame, 2007). The clear lack of resources considerably limits the state’s new role of guarantor of ‘good governance’, without even adding the fact that outside interventions on the Congolese agenda may have contributed directly to weakening the transitional government, which in effect lost political control of the directions the reforms were taking. In the end, these various dimensions may well have contributed to delaying any true appropriation of the new standards of functioning and development objectives by national and local leaders.

Now that we have presented why the reforms that have been introduced raise an important number of questions, one of these merits

more careful attention. Are the reforms that have been implemented adapted to the country’s needs, and can they, by reviving its economy, lead to progress towards development that is respectful of the ways of life and interests of the local population? Can they be conducive, in the long term, to sustainable development? The study of the mining sector provides some interesting points of reflection on this subject.

### REVIVING THE MINING SECTOR AND POVERTY REDUCTION: THE COMPLEX ISSUES OF APPLYING THE LEGAL FRAMEWORK AND PROMOTING HUMAN RIGHTS

#### The First Steps towards Transparency: Rigorous Monitoring of the Mining Sector

In a context that made reviving the mining sector particularly difficult, several studies were commissioned to examine practices in this area, notably because mining occupies such a strategic role in national recovery. The publication of some of these reports took on the form of major political events because they officially acknowledged the shortfall between what was really happening on the one hand, and the objectives of good governance and the struggle against poverty that had provided the original reason for the reform process, on the other. As in 1982, when the Blumenthal Report<sup>6</sup> revealed serious and substantial administrative shortcomings in the Congolese mining sector, the more recent reports revealed serious dysfunction at the highest levels of the state, and they also provided analyses of the major contextual constraints in understanding some of the factors limiting reforms that had been observed in the DRC. Three reports in particular merit our closer attention.<sup>7</sup>

- The first series of reports was written by an Expert Group set up to examine illegal exploitation of natural resources in the RDC. This group was created by a UN Security Council resolution adopted on July 2, 2000. The group produced a number of reports for the Security Council, all of which were made public, except for the last one, dated October 2003, classified as confidential (Kassem et al., 2003).
- The second was the ‘Kalala Report’ (Budimbwa, 2006), named after the DRC Minister of Human Rights, presented to the Human Rights Committee at the UN General Assembly in March 2005.
- The third report, known as the ‘Lutundula Report’ (Lutundula



Commission, 2005), compiled the results from surveys carried out by a special subcommittee of the Congolese National Assembly. These surveys focus on the mining contracts cosigned by rebel groups and government authorities during the first war of 1996–7 and the ‘first African continental war’ of 1998–2003<sup>8</sup> (De Villers, Omasombo and Kennes, 2002). Although a moratorium on signing new mining contracts was passed in 2007 by the Ministry of Mines, the complete Lutundula Report had yet to be examined by the Congolese Parliament, even though the Parliament was the principal commissioner of the study. It seems that some of its conclusions, considered too politically sensitive, have persuaded the past two governments to avoid its presentation before the Parliament.

What conclusions should be drawn from these reports? First, mining remains a very sensitive issue economically, politically and socially. The three reports emphasised that before and during the transition, the mining sector was managed in a manner that was beyond any standard of ‘good governance’. It was characterised by inadequate accounting mechanisms, an absence of transparency and numerous human rights violations.

The weakness in the capacity of the state to control mining areas makes it almost impossible to implement a coherent mining policy, under the effective control of its own institutions. The conclusions of the Kalala Report depict a post-conflict situation marked by numerous human rights violations (tortures, the use of child soldiers, assassinations, kidnappings, rapes, various brutalities inflicted by the armed forces). In several mining provinces, the members of the Armed Forces of the Democratic Republic of Congo (FARDC) have been found guilty of extensive exactions against local populations. Reforming the army to improve the situation has therefore become one of the government’s crucial challenges to bring peace to the country’s main mining areas.

The gap observed between the policies, laws and resolutions that have been adopted and the climate of almost total impunity which reigns in the mining sector is emphasised in all three documents. On these issues, the reports on illegal mining operations by the group of experts revealed that the majority of belligerents diverted mining incomes for their personal benefit and/or to finance military operations, with a direct impact on human rights violation. The Lutundula Report corroborated these conclusions, and confirmed that the adoption of new mining legislation would not be sufficient to restore the rule of law and a situation capable of mobilising the government and

investors around a development project that would truly reflect national interests. After a long and difficult enquiry process (NIZA, 2006), the Lutundula Special Subcommittee submitted its report (Lutundula Commission, 2005) to the Congolese Parliament, which then delayed its public circulation until February 2006. This report revealed that dozens of contracts had been signed since the end of the 1990s, and that they were totally lacking in transparency and were probably illegal<sup>9</sup> or at the least, not in the country’s interest. The report thus recommended the abrogation or renegotiation of these contracts. Its authors also recommended that lawsuits be brought against a certain number of politicians and financial backers, some of whom were very close to the centre of power in the DRC.

The Lutundula Report also exposed how the Congolese government had arbitrarily exempted certain joint ventures from paying taxes, over periods extending from 15 to 30 years. A number of state civil servants were directly identified as advancing their own personal financial interests through these negotiations. As for the participation of the state, which according to the 2002 Mining Code had to be a minimum of 5 per cent of profit-sharing in mining projects,<sup>10</sup> in certain contracts this was reduced to a foreign presence which left little doubt concerning the absence of public control mechanisms over the development of such projects.

In short, what emerges from these reports is that the revival of the mining activity has been based on a logic of attributing rights almost completely outside the legislative and institutional mechanisms that had been adopted for the good management of the sector. The Kalala Report provided a number of hypotheses to try to account for this. The ‘patrimonial’ modes of political regulation which had been used by corrupt elites as a source of enrichment for decades had become part of the political culture; this was the foundation on which the reforms were implemented without the introduction of any countervailing mechanism to hold these individuals responsible, and without any means for reforming the processes of political and economic power broking in the mining sector.

Further, in the DRC, the new legal frameworks seemed all the more difficult to enforce because of insufficient governmental resources (Human Rights Watch, 2005), both human and material, as they had been to a large extent diminished by the objectives of debt repayment and reducing the costs of running the state. In spite of the commitment to reforms, a number of decisions with regard to the functioning of the mining sector have very disquieting implications for protecting human rights. Moreover, certain of these

decisions imply commitments that the country has made for several decades into the future.

The publication of these official reports created a major political crisis for the government during the period of transition, as the reports directly or indirectly identified members of the government, the directors of foreign mining companies and a number of senior international civil servants. These reports marked a critical turning-point in the country's history. For the first time, there was official recognition of the problem of collusion between the political system and financial dealings, which up until then had always had total impunity, counter to the interests of the state and the population.

Commissioned by the state and by the United Nations, these reports, based on official sources, confirmed a number of hypotheses which had been widely held by most analysts and observers of the DRC since the Mobutu era. The reports on illegal mining operations, presented by the UN Expert Group to the Security Council, confirmed that natural resources continued to be plundered, despite the withdrawal of foreign troops. Fifty-four political and business leaders from the DRC, Rwanda, Uganda and Zimbabwe were accused of being directly involved in the illicit trading of high value-added minerals (Tegera and Johnson, 2007). Beyond the accusations of failure to respect the country's legislation, it is easy to understand that these charges targeted the political and economic elites' direct or indirect support of situations that have led to massive human rights violations.

Despite the denial by many of those accused, the charges contained in the three reports had major consequences within succeeding governments. With the publication of the UN expert group's latest report, President Kabila found himself, for instance, obliged to dismiss three of his closest ministers, accused of being directly implicated in illegal practices and transactions contrary to the state's interests.<sup>11</sup> These accusations raised a number of questions.

First, the new Mining Code contained ambiguities, notably by stipulating, among other clauses, that even though being a minister means 'ineligibility to benefit from underground or surface mining activities ... this prohibition does not concern the acquisition of shares in mining companies' (DRC, 2002: Tit. II, chap. I, our translation). However, in reality owning mining rights differs little from being a shareholder in a company that owns them, especially if the shareholder holds the controlling interest.

A second problem relates to the context in which the new laws are implemented, which involves encouraging major increases in

investment in a context of 'good governance'. In the DRC, the wealth accumulated by the national and international elites from state revenues derived from the mining sector has had deep historical roots. Practices observed under colonialism, then during the regimes of Mobutu and Laurent-Désiré Kabila (the current president's father, who was assassinated in January 2001) (De Villers et al., 2002), were characterised by considerable continuity (Braeckman, 2003). However, with the introduction of the reforms, some of the established practices were challenged, in the name of international policies to 'fight corruption' and to introduce 'good governance'.

The question that arises here is clearly one of the transition from a political and economic system in which a certain elite had effectively appropriated mining revenues for personal enrichment, to a more equitable and sustainable pattern of redistribution based on public control, firmly entrenched in 'good governance' practices.

Finally, the responsibility of the IFIs received very little mention in any of the three reports. Kalala Budimbwa pointed out nonetheless the role that multilateral funding agencies should assume in reforming the sector, and called on them to make long-term commitments so that the mining sector could be completely reorganised and so that raw materials and mining resources would no longer be sold off at giveaway prices (his term was '*bradage*') (Budimbwa, 2006).

This call resonated in a context where the transition government was still signing mining contracts relatively opaquely. Concerns expressed within the World Bank questioned the nature and limitations of the Bank's intervention during periods when turmoil was at its zenith. A WBG internal memorandum, released by the media, however, raised serious questions about how the Bank should be supervising reforms being adopted by the government. Particular concern was expressed about prior consultations required before signing important contracts, as well as the ways to ensure transparency and ensure public access to relevant information:

The Bank's mining memo referred to three joint venture deals worth billions of dollars, signed last year between the state-owned copper mining company Gécamines and three international mining groups. Analysts say the deals would account for at least 75% of Gécamines mineral reserves and have raised questions over whether Congo has maximised state revenues from them.

(Mahtani, 2006)



In response to the repeated calls to reform political processes after his election, President Joseph Kabila officially urged his government to ensure:

the strict application of the Mining Code in order to allow the State to recover the revenue generated by mining operations, to use these funds for the economic development of the country and the fight against fraud and the plundering of mining resources.

(Kabila, 2006, our translation)

This declaration is revealing of the magnitude and the complexity of the task of reforming the mining sector and redefining the role played by the state in this regard. In March 2007, reacting to expressions of concern coming from national and international civil society, as well as repeated calls by funding agencies, the Minister of Mines released a memorandum (McKay, 2007) declaring a moratorium on any new mining activities until the contracts signed between 1996 and 2003 had been re-examined (*'revisités'*).<sup>12</sup> In April 2007, the Minister of Mines, Martin Kabwelulu, acknowledged that more than 50 per cent of the mining contracts signed in the DRC were, in his words, probably 'disadvantageous' for the state and should therefore be renegotiated, while declaring at the same time that none of the contracts would actually be cancelled. By creating this space for negotiations, some Congolese NGOs offered to assist the ad hoc ministerial committee, Commission ministérielle chargée de la revisitation des contrats miniers (DRC, 2007) that had been mandated to re-examine some 60 mining contracts, 41 involving companies operating in Katanga, eleven in the eastern province of Kivu, six in Eastern Kasai and five in Maniema province.

The re-examination process began in June 2007 and created a tense political climate, in particular because of the reservations expressed by some pressure groups at risk of losing the advantageous financial arrangements they had negotiated. Considering the political and financial pressures exerted on the government, this initiative has been severely criticised by civil society as being both opaque and insufficient. At an August 2007 Civil Society Forum (CSF, 2007), a number of groups called for a re-examination of twelve further mining contracts by a Civil Society Forum Committee of Experts.

Although the Lutundula Report remains a significant landmark in resolving the DRC's problems, many observers remain pessimistic about the feasibility of modifying contracts which have been endorsed with the support of the presidency. This is all the more the case since,

with his re-election as head of state, Joseph Kabila has retained a number of the political and economic actors involved in the erratic management of the transition government.

Beyond the process of economic recovery, the continuing irregularities, the lack of transparency and the lack of opportunity for civil society participation in the process, are maintaining the Congolese mining sector in a state of tension between two contradictory cultures (opacity and corruption versus transparency and legality). We should recall that in 2007 only six of the 237 mining companies present in the DRC published their mining production data (IMF, 2007). The potential state revenues from the extractive sector (mining and petroleum) are still largely unknown and thus probably underestimated, just as the principal mining regions of the country lie, at least in part, outside the central state's control.

#### The Complexity and Diversity of Regional Realities

In the DRC, national development indicators cannot be understood without taking into account territorial disparities. These disparities reflect four main factors:

- the nature of the productive processes responsible for developing mining resources
- economic imbalances among the provinces
- uncontrolled violence
- the inability of the centralised political authorities to maintain control.

Each region is affected by a different permutation of problems, at least when it comes to the question of the impact of the mining sector on the population's living conditions and on promoting human rights.

This complexity is likely to be reinforced by the new administrative regions created by the Constitution, which increased the number of provinces from 11 to 26. In each province Assemblies, whose members are elected by universal suffrage, have seen their powers reinforced by the policy of decentralisation. But implementing the new Constitution, which created a 'united decentralised state', is being hampered by the complexity of local dynamics.

#### *The Nature of the Productive Processes Responsible for Developing Mining Resources*

The main mining regions are Katanga, Western and Eastern Kasai, and Kivu. The Eastern Province and Équateur also possess

important deposits of iron, gold and diamonds, while bauxite and phosphate deposits are principally found in Lower Congo. The nature of productive processes varies considerably according to the types of minerals and the history of mining development in each province. Productive processes strongly affect human rights and the respect of economic, cultural and social rights.

In the province of Katanga, located in the south of the country, the exploitation of copper, uranium, silver and cobalt has historically dominated a province that forms part of the Copperbelt, extending into Zambia. This is the province with the most important mining potential, containing, according to Baracystse (1999), the world's greatest unexploited copper reserves as well as a significant mining infrastructure, even if much of this is in an advanced state of decay. The Shinkolobwe uranium mine, located near the town of Likasi, has become the symbol of these mines, which have gained a sad notoriety by the number of deaths they have provoked. The uranium extracted was used to make the atomic bombs that fell on Hiroshima and Nagasaki. Officially, the site was sealed off when the country gained independence, following industrial exploitation of the uranium deposits from 1921 to 1959. However, at the end of the 1990s, small-scale miners (in French: *creuseurs* meaning 'diggers'),<sup>13</sup> including children, extracted copper from the site, and heterogenite (rich in cobalt), regardless of any safety requirements. Although a January 2004 presidential decree closed access to the Shinkolobwe site, in July 2004, the collapse of part of the area mined caused ten deaths among the 6000 illegal *creuseurs* working on the site. In August 2004, to displace the miners' families, the village of Shinkolobwe, where 15,000 people lived, was burned to the ground. According to EMAK (the trade union representing Katanga's small-scale miners), the majority of those expelled had no intention of changing what they were doing. Left completely to their own resources, without any form of official or unofficial support, and without any alternative source of income, these *creuseurs* will probably return to work illegally on this highly contaminated site, risking new exposure to ionising radioactivity.

In Katanga, access to small-scale mining sites has become a crucial part of the provincial economy. Today, some 20 per cent of these small-scale miners are former employees of Gecamines, laid off when the company was restructured. Rehabilitating mining sites is also a tendentious question, raising the issue of how responsibilities are to be shared among the industrial producers, the state and the creditors of the Congolese mining sector. However, at the present time, according to a

UN report (Dupin and Mialaret, 2004), the small-scale miners' trade union, the Mining Environment Service,<sup>14</sup> and the Small-Scale Mining Technical Assistance and Training Service for Small-Scale Mining (SAESSCAM)<sup>15</sup> do not have the means to guarantee the application of mining regulations, or to provide assistance to small-scale miners. Looking back at the history of the Katanga mining giant Gecamines helps us understand part of the region's mining history.

In the past, the Congolese State had concentrated on developing what was known as the Upper Katanga Mining Union (*Union Minière du Haut Katanga*: UMHK), controlled by Belgian industry until it was nationalised in 1966 and converted into the *Société Générale des Carrières et des Mines* (Gecamines). Gecamines currently produces copper, cobalt, zinc, nickel and uranium in such quantities that it is one of the world's major sources of these materials. The real motor of the Congolese economy, the UMHK and later Gecamines has been recognised as providing the inhabitants of Katanga with one of the highest standards of living in the country, through job creation and significant investments in educational, medical and sporting infrastructure for company employees and their families. For example, Gecamines runs its own hospitals. Until 2005 the Swende hospital, located in Lubumbashi, was the most important hospital in Katanga province. Based on what has been described as a 'paternalist management model', widespread in Africa (Hernandez, 2000), the UMHK and later Gecamines played a major role in providing access to basic services, developing the economic and social structure in the provinces where it was operating. For this reason, the 'bankruptcy' of Gecamines at the beginning of the 1990s created major socioeconomic transformations in the region. By 2005, nonferrous ores and other concentrates represented only 17.2 per cent of the country's total exports (AFDB/OECD, 2007). The crisis of copper prices and years of drastic fall in production also had disastrous social consequences on the region's economy: 'The whole population of the Katanga basin which depended on this company found itself from one day to the next in a situation of absolute poverty' (DRC, 2006b: 35, our translation).

With the restructuring of the industrial and quasi-industrial activities of Gecamines, 'each day ... 50,000 to 70,000 *creuseurs* are invading numerous mining sites in Katanga to look for heterogenite, an ore exceptionally rich in cobalt. These people work under terrible conditions for hardly more than a dollar per day' (NIZA and IPIS, 2006: 6, our translation). A recent report was produced by the NGO Global Witness (2006a) which has worked on this subject extensively,



investigating the deplorable working conditions in small-scale mines. 'The tragedy of the miners' comes from the absence of adequate equipment and safety measures, child labour, contamination risks and mortal accidents. The lives and working conditions of small-scale miners remain a crucial issue in the DRC. It is indeed surprising to note the inadequate mobilisation around this issue by the actors providing development funds, given the importance of human rights challenges which these conditions pose to the population.

In view of the fact that mining incomes are one of the only sources of revenue for workers, in a context of extreme poverty, the degree of disorganisation is more or less consciously accepted, and maintains this status quo. Certain more optimistic observations point to the growth of the informal economy that is said to have allowed, through the development of urban and peri-urban agriculture, the generation of at least subsistence-level survival in the mining towns of Lubumbashi, Likasi and Kolwezi.

It seems that the mentality of receiving assistance, so characteristic of the inhabitants of the copper towns, is now dying out. For them, Gecamines was the only lifeline. Beyond it there was nothing' (Bruneau et al., 1986: 252, our translation). Today, investments are starting up again. Exploiting Katanga's mining potential might be the solution not only for the area, but also more widely for the entire country. Yet one issue remains unanswered: how will this recovery benefit the local populations who have adopted the logic of subsistence, as a response to the failure of public authorities to provide for their basic needs?

In Eastern Kasai diamond production dominates the regional economy. In 2005, non-industrial diamonds from this area represented 42.6 per cent of the country's total exports (AFDB/OECD, 2007). Over recent years, observers have been reporting some improvement in humanitarian conditions, thanks to the stabilisation of 'open conflicts'. On the other hand, the working conditions of the 800,000 gold washers in the area condemn whole sectors of the population to extreme poverty, working and living in severe physical and economic insecurity.

The Bakwanga Mining Company (*Société Minière du Bakwanga*: MIBA), the country's leading diamond company, 80 per cent under state ownership, is on the brink of bankruptcy today. In 2006, its deficit amounted to some US\$140 million. This industrial giant had however experienced much more profitable times, from its creation in 1961 until crumbling at the end of the

1990s, to the ultimate benefit of the informal sector. This collapse provoked a major economic and cultural shock in the region. Ever since independence, Bakwanga had been organised on an economic and social paternalist model; MIBA provided a number of welfare benefits to miners' families. In the same way as Gecamines in Katanga, the company played a role in the socioeconomic development of the country, of Eastern Kasai and of the town of Mbuji-Mayi. Schools, hospitals, energy resources, agricultural services and housing benefited the population of the city of Mbuji-Mayi and its surrounding area. Today, miners' families are plunged into extreme poverty; MIBA is very much behind in paying salaries (eight months on average). In 2007 strikes spread, with employees demanding the payment of wages and respect for the rights of retired and laid-off employees, as well as the provision of food (Okapi Radio, 2007). Diamond production, despite constant increases in output, remains the object of bitter struggles for the control of the production channels and zones of exploitation.

The province of Northern Kivu depends on the exploitation of cassiterite and coltan (colombo-tantalite), an essential material for high-technology industries, in particular for cellphones (Martineau, 2008). In Southern Kivu, gold, diamonds and cassiterite are the main minerals extracted. Controlling the production process is thus a major issue, especially because small-scale mining potentially represents an enormous source of self-financing for regional development (Pourtier, 2005: 1). However, important trafficking is developing in these border provinces (Bruylant, 2007b). Small-scale production is dominant in these areas, and between 30,000 and 200,000 *creuseurs* (according to Pourtier, 2004) extract the ore for subcontractors who resell it, transporting it to Rwanda, to networks of traffickers and smugglers. A *creuseur* can earn up to US\$4–5 a day in gross income, but major racketing networks of gold and diamond washers result in a substantial loss of income by the local population.

The porous borders between the two Kivu provinces and Rwanda, and between the district of Ituri and Uganda, continue to encourage fraudulent trade, often deadly but still flourishing. According to a 2002 Belgian Commission of Enquiry, traceability in the diamond trade is almost impossible to ensure in the area and this situation harms local populations in a direct manner:

The informal diamond economy has become the symbol of the loss

of the State's influence .... Diamonds are extracted from thousands of small mines in numerous different locations. We do not really know how many diamonds come from the Congo, Angola or the Central African Republic. Statistics are meaningless. The rebels and government soldiers benefit less from the diamond trade than from maintaining a system of scarcity within an informal economy based on diamond extraction.

(Belgian Senate, 2002, our translation)

#### *Imbalances among Provinces*

For a long time, economic imbalance among provinces in the DRC has been determined by the presence of resources and the patterns of resource exploitation (water, wood, and mineral deposits).<sup>16</sup> In the 1970s, the mining sector represented nearly 70 per cent of the Congolese GDP, but today it is down to barely 10 per cent. This drastic reduction of the contribution of resource exploitation in the DRC has further ignited conflicts of interest around the sensitive issue of the distribution of mining income. Confronted by a state that is clearly fragile, but also one undergoing major and rapid reorganisation, the mining sector is one of the keystones to the political unity and social stability of the country. Because of the vast size of the country, the mining provinces located in the east have been largely cut off from control by the political power centre in the west of the country. Yet historically, in the DRC, the state's functioning and legitimacy have depended above all on state control over the principal mining regions.

The importance of the decisive role of the mining provinces in determining peace and maintaining national unity has been well illustrated by the violently suppressed secessionist attempts of the rich provinces, Southern Kasaï (1960) and Katanga (1960–1963), which had been supported by a number of foreign powers. The invasions by neighbouring countries during the two Congo wars underline the continuing importance of the mining provinces in maintaining national peace and unity. The source of all political crises since independence, the resource issue leads to some fundamental questions. How can mining income be shared equitably between the producing provinces and the rest of the country? What is the central power's legitimacy, and what methods of control can it adopt to ensure that mining income is collected and redistributed? Clearly despite what is prescribed in the legislation, mining income is still today failing to benefit the population as a whole.

If the issue of frontiers with neighbouring countries is an important stake in the mining problem, that of the borders between producing

and non-producing provinces is no less problematic. As Jean-Luc Piermay has pointed out, 'The main characteristic of borders is that they create differentials: differentials in prices, income, regulations, distribution networks, how things are organised' (Piermay, 2005: 608, our translation).

Mining resources determine not only economic borders (zones of exploitation), but also social boundaries (mining increases inequalities) and political boundaries (the power base of political parties). On the other hand, they flout administrative borders, giving conflicts a regional dimension by drawing in the whole Great Lakes region.

In Katanga, the true 'economic lung' of the country, there are more than 150 mining companies operating, including ten majors, which are currently investing in major expansions (Bruyland, 2007a). After years of crisis, the price explosion of certain minerals from 2000 (copper, cobalt, and rare minerals) inaugurated a new mining cycle in Katanga and stirred up a new struggle for control. With the increase of cobalt and copper prices, the province of Katanga became the new Eldorado for investors. The conditions for attributing Gecamines' concessions, the country's largest mining company, are at the centre of discussions. When the DRC was cut off from multilateral assistance between 1991 and 2001, from 1996 Gecamines' assets began to be sold at giveaway prices to finance the running of a state in crisis.

In an attempt to avoid the complete bankruptcy of the company and to spark the economic revival in Katanga, the Congolese government decided as of 2003 to restructure Gecamines by privatising it, as the IFIs had long been recommending (Mazalto, 2005a). According to a 2006 Organisation for Economic Co-operation and Development (OECD) report:

the Government Economic Program (PEG) had already in 2004 foreseen such reorganisation, with World Bank funding, of a series of companies with negotiated 'voluntary' worker layoffs. This started to be applied in public companies, such as Gecamines and the Congolese Post and Telecommunications Service (*Office Congolais des Postes et Télécommunications*: OCPT), in spite of strong resistance from the trade unions.

(AFDB/OECD, 2006: 242, our translation)

The objective was to stimulate production through private sector funding and through initiatives which almost always involved joint ventures. Some of these were signed before 1997, and in fact were



singled out as unacceptable in the Lutundula Report, because they had principally benefited foreign investors rather than the Congolese State. For Paul Fortin, general manager of Gecamines, the main advantages of restructuring were to be the financial consequences which would guarantee the state an income of US\$7.5 billion (through various taxes and revenues) for the next 30 years, as well as US\$2 billion for the company and US\$7 billion to the various partners (Fortin, 2007). The social and economic benefits to the population were presented as:

- community development: according to the Mining Code, 40 per cent of mineral royalties must be paid to the province and to the local authority where the projects are developed
- an employment programme: approximately 6,000 new jobs would be created over the next five years.

With World Bank funding (Fortin, 2007), the Gecamines management committee introduced a programme to lay off 10,000 of the 25,000 employees during the year 2003. Because of the company's deplorable financial results, it was a matter of paring down the workforce (Fortin, 2007) to match the productive capacities. Those 'departing voluntarily' received a modest payment out of a total fund of US\$45 million, varying from US\$40,000–50,000 for the management-level employees, and from US\$2,000–10,000 for other professional categories. Under current financial conditions, Gecamines does not have the means to guarantee the security of its workers.

Furthermore as it does not have the means to exploit all its concessions, the company enters into short-term contracts with small-scale foreign companies which assume responsibility themselves for extraction and securing control of their part of its concessions, which would otherwise be subject to what some would consider as 'plundering' by local small-scale miners. This method of private subcontracting contributes to the recruitment of former Gecamines miners and the small-scale local miners, thus reducing the employer's contribution which is normally required to be paid (to cover services such as health-care, transport costs and children's education). The small-scale miners, in effect self-employed, are remunerated at a fixed rate, under conditions frequently below ILO norms. This situation has contributed to the increased insecurity that miners in Katanga are facing, both financially and in terms of the duration of their work contracts, material employment conditions and possible assistance in case of an accident.

The study of Gecamines shows the extent to which, in the DRC

mining provinces, the mining sector reforms have had a limited positive impact on the rights of local populations, on the rights of women and children, and on labour rights that remain largely flouted. It would seem that inhuman conditions observed around mining sites are tolerated in the name of moving ahead with the application of the reforms. This observation holds true in most of the mining provinces, even if the production techniques, the state's capacity to intervene and the international economic actors (IFIs, private sector companies) differ.

The adoption of a new Mining Code undoubtedly contributed to an increase in investments in this sector. But as for promoting rights, the law seems totally out of touch with Congolese political, economic and social realities. This context ought to have been recognised more clearly, in view of the fact that it interferes with the application of the new mining legislation.

The current decentralisation policy represents both an opportunity for harmonising practices and a new risk for breaking up the country. What legitimacy will the Mining Code acquire in view of its provisions (DRC, 2002: Art. 242) for mineral royalties to be divided 60 per cent for the central government, 25 per cent for the provincial administration and 15 per cent for the local authority where the mining company is operating? The absence of effective regulating capacity explains more generally, and in large part, the continuing conflicts and human rights violations in the mining provinces (Kasaï, Kivu and Katanga). Given the importance of the interests at stake, the conditions necessary for effectively applying the country's mining legislation do not in fact exist at present.

The Constitution instituted a 'Governors Conference chaired by the Head of the State' (DRC, 2006a: Art. 3) to make arrangements for applying the clauses of the Mining Code. However, the legal framework, which allots 40 per cent of royalties to the mining provinces, seems to be conditional on two principal factors. Firstly, the current needs of the central state are immense, notably to pay off debt – still significant even after part of it was cancelled – and to restore its authority and legitimacy. Yet the mining provinces are counting on the fact that mining revenues be 'assigned exclusively to constructing basic infrastructures of community interest' (DRC, 2002: Chap. III, Art. 242, our translation). These provinces are applying political pressure so that they will receive their constitutionally guaranteed rights. As Bonne (2003) has remarked, 'Regimes are unlikely to devolve real power and resources to rural leaders they do not trust and/or cannot control.' This reality, a

reflection of the history of the country, is sufficient grounds to explain why revenues are likely to be withheld by the central authority.

#### *Uncontrolled Violence*

There are three principal factors contributing to maintaining an overall climate of violence surrounding mining activities in DRC:

- living conditions and working conditions of populations around mining sites
- corruption and threats which dominate the mining economy
- the armed conflicts which continue to proliferate in the country's border regions.

At present, the majority of Congolese mining sites are exploited without any control over payments to workers or of job safety standards. Many international NGOs, as well as the ILO, have focused particularly on child labour. A recent study in heterogenite mines in the south of Katanga Province estimated that several thousand children under the age of 7 years were employed as *creuseurs* (Groupe One, 2006). The presence of uranium on some sites endangers in a most direct manner the lives of workers and of the local population (Mazalto, 2005b). Several independent initiatives have been introduced. The ILO has attempted to improve living and working conditions for those working in the Katanga mines (Abedi, 2007). The aim is to strengthen 'good governance', ensure the respect of legislation and rights, and encourage negotiations involving social dialogue between all interested parties.

Corruption and the use of threats continue to dominate relationships between the different actors in the mining sector. The various reports mentioned previously (the UN Expert Group, Kalala, Lutundula) give a good idea of the practices observed at the highest levels of the state, and raise the issue of how 'power is exercised in the management of a country's economic and social resources for development' (Campbell and Ahado, 2007: 1). At both the provincial and local levels, such practices, which combine corruption and threats, often directly involve the principal economic actors and the representatives of public authority.

Uncontrolled violence often assumes a 'war-like' logic that is still very present, even though conflicts have officially ended. Illicit traffic in minerals feeds into the arms trade and finances the militias who control

the still highly strategic mining zones. The reports of the Expert Group on the illegal exploitation of natural resources in the DRC surveyed the principal conflict zones directly linked to the mining economy (Kassem et al., 2003). The mining zones located in the east of the country (Ituri, Northern and Southern Kivu) and in the north of Katanga are still areas where the local populations are under constant threat. It is precisely in these zones that the mining economy is least well organised, where the small-scale sector dominates, as opposed to the provinces where Gecamines and MIBA exploit minerals on an industrial scale. During and after the transition, violence perpetrated against civil populations by the army (FARDC) is a continuing leitmotiv of the majority of MONUC reports (MONUC is the UN mission in the DRC). Arms traffic, ethnic violence, sexual violence, kidnappings and exploitation of local populations, population displacements, child soldiers, are all part of the day-to-day experience of most inhabitants of these regions.

The NGO Human Rights Watch has written a report on *The Curse of Gold in Democratic Republic of Congo* testifying to the human rights violations observed in dozens of mining sites they visited:

Gold has been a critical factor in human rights abuses in north-eastern DRC. The DRC government, its neighbours, the UN international donors and the private sector need to work together to stop the trade in illegally smuggled gold and other resources.

(Human Rights Watch, 2005: 129)

Similarly, the district of Ituri, in the Eastern province, has over the past few years gradually become one of the most dangerous areas in Africa. In the Kivu region, armed factions are fighting for the control of resources. The areas where arms sales are most intense are the mining zones, border zones, farming areas and urban zones (Berghezan, 2006: 46). The lack of control at the borders between Ituri and Uganda, and the Kivu provinces and Rwanda, encourages the development of arms trafficking, of precious stones and minerals smuggling, sustaining a local guerrilla force that is part of the destabilisation of the east of the country. In this context, in 2007, Northern Kivu still had to deal with the presence of a significant number of soldiers of the Rwandan army.

This rapid overview reveals the importance of the challenges existing in applying the national mining policy to promote and respect human rights. The January 2007 UN Security Council's report on the DRC showed just how complex are the stakes linking the armed groups, the various states of the region and criminal networks, to which have to be



added the various forms of large-scale corruption (UNSC, 2007a). However, the situation at the borders seems to have improved since the end of the transition period. The links between resource exploitation and armed activities nonetheless remain very much in place.

To what extent can such a culture of violence continue to dominate, despite the fact that, at least in theory, the sector has undergone serious reform (Dufresne, 2007)? According to a report commissioned in 2005 by the UN Economic and Social Council, part of the explanation may lie in the extremely insecure status of those working for the armed forces, as well as civil servants and other government officials. 'Underpaid or unpaid, these "legal representatives" probably contribute to encouraging impunity, corruption, harassment and assassinations, particularly of journalists and human rights advocates' (Pacéré, 2007). This climate, which approaches a state of anarchy, has to be understood in its historical context, for since independence, under the Mobutu regime, these practices have become part of a strategy of governance by terror.

*The Lack of Control by the Central Power and the Weakness of Institutions*

When the IFIs recommended restructuring the country's strategic sectors, did they really take into account the importance of the political and economic context in determining the likely effectiveness of reforms? With reference to the conditions in which the reforms were undertaken, Kabanda has noted:

Unfortunately, it was in a climate of political uncertainty and division among the Congolese political actors that, paradoxically, the international community and the European Union chose to invest in a fundamental reform of the political process in the Congo. This process ought to have been truly inclusive and especially to have been supported by all the representative forces of the country in order to lead to a credible and acceptable result for the majority.

(Kabanda, 2006: 2, our translation)

After adopting the first reforms in 2002, the country waited a whole year, until June 2003, before electing a government of national unity, named the 'transition government'.<sup>17</sup> At its head, Joseph Kabila and other former rebel leaders followed a consensual logic based on negotiation. The three main military factions (PPRD, RCD and MLC),

which had been transformed into political parties (CRR, 2006), participated in the government.

The degree of serious political instability reflected the weakness of the institutions at both central and provincial levels. These two factors raise the question whether the newly formed government had the capacity to implement the mining reforms adopted by governments whose legitimacy was widely challenged. In this context, even the legitimacy of the reforms advocated by the IFIs can be questioned, especially since they are being implemented by a 'fragile State' (Châtaigner and Magro, 2007). As Bayart (1996) has noted, although the former Zaire has a strong sense of being a nation, the state's legitimacy 'in a changing world' (World Bank, 1997) still faces important challenges. This climate, propitious for the violation of rights, received clear confirmation in the 2006 'Growth Strategy and Poverty Reduction Document' (*Document de la stratégie de croissance et de réduction de la pauvreté*: DSCR), published during the transition government:

The restructuring and liberalisation of the mining sector that started in 2004 throughout the country led to the expropriation of peasants from their land to the benefit of mining concessions, to fraud and to certain parties seizing the lion's share as a result of the signing of very unfavourable contracts.

(DRC, 2006b: 35, our translation)

If the reforms have made restructuring the mining institutions and legislation possible, under the difficult conditions that we have described, these reforms seems to have been introduced mainly from the state capital, Kinshasa, seat of the central power. How can we expect them to be applied when, in such a vast country, the state is still too often represented by armed forces, notorious for their acts of plundering and massive violations of rights? The decentralisation policies designed to give the provinces financial autonomy can only work under certain conditions.

First, the mining revenues have to be collected and redistributed by the central state, through protected and secure procedures, a situation which is not yet the case today. According to IMF figures, in 2006 the Tax Recovery Directorate (*Direction Générale des Impôts*) collected approximately US\$100 million out of the anticipated US\$250 million (DIA, 2007a). The current challenge is therefore to strengthen the presence of the state in all provinces in order to ensure not only better tax recovery, but also the equitable redistribution of these revenues

throughout the whole national territory. To be able to do this, the political leadership has to be able to count on suitably trained and adequately paid local authorities that have the means to guarantee that the revenue collected is used appropriately.

Second, restructuring the local administrative grid in the whole territory is one of the main challenges of the reform. Indeed, at both the national and local levels, embezzlement of funds thrives on a lack of control by the representatives of the state and civil society and upon a generalised situation of sectoral disorganisation.

Third, the central state has to be in a position to adopt a mining policy adapted to the needs of the different provinces, with fund traceability mechanisms and capable of rendering of accounts. Both private investors and government employees must be subjected to these policies, in order to create common obligations of transparency and collaboration.

Even if the legislation has provided for the application of such mechanisms, the lack of funds, of human resources and of local expertise persist and are likely to compromise their introduction in the principal mining regions. However, it is precisely these measures that could give teeth to the new mining legislation in order to break out of the plundering logic that has dominated the sector for decades. At present however, the reform has been introduced in a context characterised by the effective lack of control by the central power and by weak institutions. We can only speculate concerning the real probability that the state will apply the most costly and potentially the most restrictive clauses (notably concerning social and environmental aspects) in a climate that continues to be marked by such a degree of impunity. It would appear that resorting to imposing a system of rights and standards has become the option privileged by the IFIs to mitigate the weakness of the state.

### THE MINING SECTOR AND THE INTRODUCTION OF A SYSTEM OF RIGHTS AND STANDARDS: THE HUMAN RIGHTS SITUATION IN THE DRC MINING SECTOR

#### The Different Systems of Rights

The restructuring of the Congolese mining sector has above all aimed at promoting the rights of investors and the security of the population, in order to provide a guarantee of social peace. Beyond respecting the new legislation and reinforcing public control mechanisms,<sup>18</sup> the IFIs encour-

aged the state and investors, as partners in development, to join international initiatives and to adopt what are presented as transnational 'good governance' standards. As Campbell (2005) has emphasised, however, in doing so, the political and social dimensions at stake and the rights and standards that are recommended tend to be treated above all as procedural considerations and issues of good administration, 'in terms that are principally procedural'.

As a result, what becomes apparent is that the perspective of the IFIs concerning human rights is to adopt an approach that associates these rights with a series of norms to guarantee an increase in the achievement of the performance standards of multilateral institutions, states and investors:

What are the human rights objectives for the performance standards?

- Helping clients understand human rights as risk in their business.
- Helping clients use human rights to identify opportunities for value creation.

The challenge is to take accepted human rights norms and translate them into practical and generally applicable standards for investment in the private sector in developing countries.

(Kyte, 2005)

Codes of conduct thus become the preferred instruments of the international community (Campbell and Mazalto, 2004). This pragmatic approach contributes to depoliticising the issues raised by rights. According to Brugvin, 'these new instruments of control by citizens aim to compensate temporarily for the lack of national and international public regulatory systems' (Brugvin, 2002: 1, our translation). However, this option generates the complex question of the social and political legitimacy of the different levels of authority and forms of control.

At the beginning of the new millennium, the reform of the Congolese mining sector was thus characterised by the approval of a dual process: the country's adherence to new development standards which incorporate both public law (the rule of law) and private law. Transnational initiatives encouraged a technical and managerial logic of control based on the voluntary mobilisation of economic and political actors around human rights, understood narrowly however, as involving one dimension, providing basic human security. In fact, the responsibility of the economic actors was limited to adhering to



international codes of conduct which concentrate on the transparency of standards and ensuring the security of sites where mines are operating, as well as the areas surrounding the concessions.

We can also note that the majority of transnational initiatives introduced in the country are concentrated in subsectors with high human risks, such as diamonds, because of the deadly conflicts in Central and West Africa (Sierra Leone, Nigeria, Rwanda and the DRC). In the DRC, diamond exploitation alone contributes up to 75 per cent of the money paid to the National Treasury. There are nearly 1 million small-scale *creuseurs* throughout the country. The main objectives of the international codes of conduct concern reinforcing control over practices in each sector and the transparency of revenue management. Reference is also made to the improvement of the living conditions of the small-scale miners. In this context, in 2003 the Congolese State signed the Kimberley Process Certification Scheme adopted by the UN General Assembly. It subsequently joined the Diamond Development Initiative (DDI) (Partnership Africa Canada, 2005), aimed at ensuring that diamond production would benefit local communities and national governments. Joining the Extractive Industries Transparency Initiative (EITI), in 2005, with strong World Bank backing, beyond its objective of promoting greater traceability of mining revenues, was intended to promote the productivity of small-scale producers and to ensure the development of the production zones (DRC, 2007).

The tendency to resort to certification schemes and mechanisms based on transnational expert systems can be observed in many countries of the South. It proposes what appears as an interesting solution for the mining industry, which is increasingly challenged concerning the social, economic and political consequences of its activities. However, and as suggested in the Introduction of this book, this dual process of both transnationalising and privatising national regulatory mechanisms has questionable consequences. Among other reasons it:

suggests a generalised process through which areas of national public legal responsibility are systematically privatised and uploaded to the transnational sphere. Economic globalisation has triggered new local demands for the social regulation of private sector development .... Thus national law and politics are converted into transnational laws and politics.

(Szablowski, 2007: 290-1)

As can be seen, the reform of the Congolese mining sector is based simultaneously on privatising mining companies, adopting free-market laws aimed at encouraging foreign investment, and establishing a control system over public affairs through the adoption of transnational regulatory mechanisms based on private law. These new mechanisms come as an answer to a social demand for better control of mining practices. However, they reflect above all the concerns of competitiveness and the short-term considerations of private actors, which operate under conditions that fall largely outside systems of public accounting based on the notion of the rule of law. Issues such as the integrated management of the sector and the redistribution of wealth to the benefit of the whole population are most likely to be side-stepped by these regulatory instruments, for these mechanisms seem to reflect a logic in which control is externalised. On the one hand, this tendency contributes to depoliticising human rights by reducing them to the objectives of providing security for investments, sites and people; on the other hand, it tends to weaken the authority and legitimacy of the state, by confining it to the roles of regulation and redistribution, neither of which it can fulfil however because of its lack of means.

The issues raised here are revealing of what could be characterised as a bicephalous rights system. The complexity of this regulatory system raises questions about the hierarchy of the standards involved, their legitimacy and the conditions of their coexistence. It also brings us back to the responsibility of the various actors concerned, particularly when we recognise that private law systems address the concerns of the leading industrial actors, the major corporations, without solving the issue of the compliance of mining-operation rules by small companies and small-scale miners, who represent the majority of producers in the DRC.

What remains to be explored is the extent to which these various instruments will indeed help promote the civil, economic and social rights of the population, as well as maintaining peace in the mining zones where violent confrontations are still frequent.

#### The Human Rights Situation in the Mining Sector in DRC

If international norms have been superimposed on the Congolese legal system to ensure that minimal standards for mining operations are respected and to attempt to re-legitimise these activities, to some extent and at least temporarily, a similar phenomenon can be observed with regard to maintaining peace. The main mining regions in conflict zones

were still, as of the end of 1999, under the control of the UN Mission in the DRC (MONUC), which is the most important peacekeeping mission in the organisation's history.<sup>19</sup> Its mandate consists of supporting the peace process and protecting the civilian populations threatened by physical violence in the Ituri and Kivu provinces. The numerous MONUC reports<sup>20</sup> show just how extensive this task is, and will continue to be until the state acquires an effective and legitimate judicial system to guarantee 'the essential protection of human rights in the DR Congo' (Yacoubian and MONUC, 2007, our translation).

In March 2007, an IMF mission recognised that the situation was difficult. What about the country's social development now that the DRC 'has emerged as a new hot spot for the global mining industry which has been forced to search in increasingly difficult areas to find untapped sources of mineral wealth' (Hoffman, 2007: 1)? In a context in which the expansion of mining is encouraged, how are the populations affected by the accompanying development programmes, when the country continues to be the prey of violent conflicts in regions relatively inaccessible to the public security forces and characterised by institutions which lack capacity to control and enforce?

The various official reports, financial indicators and HDIs all point to living conditions that are still very difficult, even a few years after the end of the war. They also underline the size of the challenges of redistributing the gains of growth and promoting human rights. An April 2006 IMF report concluded that successive civil wars (1993, 1997 and 1998–9) had had very negative socioeconomic effects. The Bank estimated that between 70 and 80 per cent of the population was living below the poverty line (defined as US\$1 per day), compared with approximately 30 per cent in 1993 (IMF, 2006: 5).

According to the IMF, some limited progress in macroeconomic growth has accompanied the mining sector reforms (IMF, 2006: 24). Foreign investments are returning to the country and this is bringing some growth: 5.1 per cent in 2004, 6.5 per cent in 2005 and 5 per cent in 2006 (DIA, 2007b). The recovery is mainly explained by the positive performances of the mining, construction, telecommunication and wholesale sectors. The increase in exports in 2004 resulted mostly from the rise of cobalt prices and the increase in mining production of 35.3 per cent compared with 2003 (AFDB/ADF, 2005). On the other hand, the majority of the Congolese population do not benefit from the positive effects of this growth. Much work still has to be done to apply Article 58 of the Constitution: 'Every Congolese has the right to enjoy the national wealth. It is the state's duty to redistribute it

Table 5.1 Human development and health indicators in DRC\*

Economy and access to services	Health
<ul style="list-style-type: none"> <li>• 80 per cent of the Congolese population is economically vulnerable: more than cent of urban population lives with US\$1 per day. 55 million people live on US\$0.30 per day (2005).</li> <li>• Gini Index of Income Inequality: 42 per cent, revealing the existence of distributive injustice, with an almost endemic discrimination and exclusion in the country.</li> <li>• 92 per cent of households do not have enough to eat at least once a day (less than three meals). 75 per cent of the population is undernourished and without regular access to drinking water.</li> </ul>	<ul style="list-style-type: none"> <li>• Caloric deficit in children below 5 years of age: about 30 per cent of weight insufficiency. One child in five does not survive beyond the age of 5.</li> <li>• Malaria causes 52.4 per cent of registered deaths; tuberculosis 40 per cent. Sleeping sickness affects approximately 12.5 million people.</li> <li>• Maternal mortality rate (990/100,000 births) and child mortality rate (118.7/1,000) are among the highest in Africa.</li> </ul>

\* 'Rich countries neglect the humanitarian crisis in the Democratic Republic of Congo', warned the NGO Oxfam International. Since the call made on February 13, 2007, donor countries have only given \$94 million (14%) of the \$682 million needed for the Humanitarian Action Plan (HAP) developed by the United Nations, Red Cross and agencies. During this three-month period, deaths linked to the conflict are estimated at 100,000 people (Oxfam press release, May 13, 2006).

Sources: AFDB and ADF (2005) and AFDB (2006).

equitably and to guarantee the right to development' (DRC, 2006a, our translation). Yet, despite the richness of the soil and subsoil, in the main mining towns, such as Mbuji-Mayi in Eastern Kasai, the population continues to live in dismal poverty. Countless women and children attempt to survive through small-scale diamond mining, as *creuseurs*. The existing climate of violence in the informal concessions coincides with a complete lack of any form of security for the workers.

In Katanga, it is true that some communities living close to the mining sites occasionally benefit from social projects by large foreign companies. They may also benefit from the infrastructural programmes built to help the sites operate: roads, electricity and running water, but such benefits are not guaranteed and remain inadequate. Consequently it would appear that the main development challenges concern making the mining zones more secure and ensuring that policies for the equitable redistribution of mining incomes are implemented. Beyond this, in view of the existence of regional disparities and the diversity of the forms of



production (industrial sector, small mines, small-scale industry), the complexity of the situation represents a major challenge for the government, which has to develop approaches that reflect the extent and diversity of needs.

Responding to the human rights situation goes far beyond obtaining 'good' macroeconomic development indicators, because it depends on the state's capacity to redistribute equitably the benefits of growth, apply security standards at the mining sites and guarantee peace at the national borders. For local populations to escape from conditions of bare survival, they must also be protected from cycles of inflation which force up the price of basic food products. (These have mostly been imported since the adoption of a free trade policy in the 1980s.) Thus, the human rights situation in the mining sector in the DRC remains extremely alarming. It seems likely that only an integrated approach to development, combining policies to secure mining zones, to stimulate both mining and agricultural activities among the local populations, and providing macroeconomic stability, would be in a position to improve the situation.

Such an integrated approach to development would also benefit from an increasing mobilisation of civil society, both in the DRC and at an international level. As recommended by the IFIs and the EIR report, there is currently a will to place social participation at the centre of a rights-based approach to development. Given the inadequacy and dysfunctional nature of any form of multistakeholder dialogue in the sector, in May 2007 the public authorities in the DRC, working together with the mining companies and civil society, initiated a new joint-action framework which was to be continuous. According to UN sources (Okapi Radio, 2007), the objective of this round table was to generate a social dialogue among local NGOs, the mining companies and the Congolese State.

Henceforth, all problems, especially those related to human rights violations, were to be discussed within this council before being brought into the public arena. This initiative testifies to the need to develop participatory mechanisms and better public control over the introduction of laws. Creating new political spaces, as in this scheme, has resulted in the mobilisation of citizens, whether experts or not, who are concerned to integrate their involvement in a process of participation and appropriation of current development policies being implemented in their country.

## CONCLUSION

No other country in Africa has as much mining potential as the DRC. As certain analysts have remarked, nowhere else has the disintegration of the state reached such an advanced stage (Misser and Vallée, 1997).

For Colette Braeckman, during the last few years, the DRC has been running a true obstacle course:

constitutional referendum, legislative and presidential elections, setting up an elected Parliament .... A pedestal of legitimacy has been built, divergent political currents exist, and alliances are negotiated. At this stage, it appears that the worst is not certain to happen, that the most pessimistic forecasts are being contradicted by facts.

(Braeckman, 2006, our translation)

Now that the country is emerging into a post-crisis stage, the issue of the conditions necessary to permit implementing reforms takes on considerable importance. In this regard, studying the human rights situation constitutes an appropriate entry point because of the holistic approach it requires and because the international community formally recognises this dimension as a priority in order to measure the effectiveness of progress that has been achieved.

One of our hypotheses was that the promotion of human rights presupposes creating mechanisms for equitable wealth distribution, and requires the existence of legitimate institutions throughout the whole country. We also postulated that promoting rights requires a developmental approach that goes beyond ensuring the existence of legal and administrative measures, and also entails the corporate and political responsibility of the different actors in order to guarantee the protection of rights. It seems essential to take into account these two dimensions in a country as complex as the DRC, since (as in many other countries of Africa) their implementation represents a major challenge. Analysing the issue of rights comes down not only to questioning the capacity of the mining sector to contribute to sustainable development, but also to evaluating the experience of this country with regard to the development programmes recommended by the multilateral funding institutions.

Kirsti Samuels has pointed out in this regard that 'Although there is growing focus on the rule of law in post-conflict countries, there is little guidance on how to approach such rule of law reform, nor how the strategy adopted ought to differ from that in developing countries' (Samuels, 2006: 6). In the short term in the DRC, the attempt to

restore the rule of law seems to depend on achieving performance criteria and promoting corporate governance. Human rights, translated into the language of development standards to promote good governance, may well contribute to reinforcing the legitimacy of the activities of certain economic and state actors. But the issue of rights, which are in fact eminently social, cultural and political, goes well beyond such a managerial perspective. Paradoxically, and beyond the EIR recommendations, these dimensions seem to have been given relatively low priority in the development programmes presently being applied in the Congolese mining sector.

In the context of current discussions concerning the orientations of development programmes, the EIR recommendations represent an interesting contribution as they have the merit of giving priority to a rights-based approach and the conditions necessary for implementation of rights. However, if the main EIR recommendations are considered in the light of WBG policies in DRC, many questions still remain unanswered:

- Can it be considered that the passage to a so-called 'democratic' regime, but one that lacks functional and therefore legitimate institutions in most of the provinces, is sufficient to guarantee the application of the proposed new legal frameworks or even the EIR recommendations?
- How is it possible to imagine that the mining provinces in the DRC could be pacified and the new standards of the Congolese legal framework applied when the Congolese army itself, already very poorly equipped, is only just slowly beginning the necessary process of reintegrating the various militias?
- How could this come about in view of the fact that the presence of private security forces, which presently control the perimeters of the mining sites, is likely to increase with the massive return to the country of foreign investors?
- How can better living conditions be provided to the millions of *creuseurs* currently threatened with expulsion by the upsurge of industrial mining activity?
- Under what conditions can international norms and standards that are introduced in the DRC, especially those concerning the mining sector, be integrated into the Congolese sociopolitical system?
- Will the attempt to re-establish 'mining legitimacy' by reforming the legal and institutional frameworks be sufficient to ensure that the

practices of a sector involving high human and environmental risks evolve in a positive direction?

- In this context, will the manner in which the reforms are implemented – in which the management of mining liabilities (social and environmental) relies mainly on a state which lacks the means to do this – ensure that they receive the support they deserve from bilateral funding agencies and the IFIs, which have committed themselves to promoting sustainable development in the DRC?
- Does the superimposition of the different systems of rights, encouraged by the IFIs, really constitute a transitional measure with a view to reinforcing national legal frameworks, or does it mark the passage to a legal system intended above all to support the promotion of investments based on the respect of voluntary international standards of private rights? If the latter is the case, are the mining sites not likely to be converted into true territorial, cultural, economic and legal enclaves? Under these conditions, how will it be possible to think about an integrated approach to policies to 'fight against poverty' which would really take into account the specificities of each region as well as the needs of the country as a whole?
- Can the willingness to involve Congolese civil society in the mining sector, mainly through trade associations and civil society organisations – trade unions, and specialised legal teams and human rights associations – lead to their acquiring a strategic role to encourage the appropriation and the diffusion of new standards by and among the Congolese population?

Our analysis of the Congolese mining sector leads us to suggest that the participative option of development programmes needs to be clarified, but the extent to which constraints in the political arena will condition the emerging forms of participation remains to be seen.

Finally, we could question the perception of the Congolese population with respect to human rights (Gbago, 1997), which are so central to international concerns. Under what conditions could this concept find an echo in a country that is still suffering from significant instability in the eastern provinces, and where extreme violence is still present, particularly against women and children? Respecting and/or reconstructing economic, cultural and social equity and tolerance among different sectors of the population, through the mobilisation of local initiatives and resources available, with the benefit of support programmes – all preconditions to opening up space for political intervention – would



appear as important avenues to be explored. Studying the reforms that have been introduced in the Congolese mining sector raises in a very direct way a further and complementary issue, the corporate and political responsibility of the actors engaged in the reform process. Designing and adopting new frameworks constitutes only the first step in a process that must be capable of leading to mechanisms that permit the appropriation and implementation of these changes.

## NOTES

- 1 Believed to be an expression of Cecil Rhodes, founder in 1880 of the South African company De Beers.
- 2 This expression simplifies reality: the human consequences of conflicts must be considered in their regional dimension. Many Rwandan refugees, for example, died on Congolese territory.
- 3 The World Bank is composed of two distinct development organisms, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), and is under the control of its 185 member countries. The IBRD works for middle-income countries and creditworthy poorer countries, whereas the IDA is devoted to the poorest countries.
- 4 Translation of the French expression '*d'État de fait à État de droit*'.
- 5 With the Pretoria Peace Agreements (South Africa, March 1, 2003), the Presidents of the DRC, Joseph Kabila, and of Rwanda, Paul Kagamé, signed an agreement to end a four-year-long war in the DRC and to safeguard the stability of the Great Lakes region.
- 6 In 1982 Erwin Blumenthal, a German banker and senior member of the IMF, was mandated by the IMF to reduce the kleptomania of the Mobutu regime. He published a condemnatory report. Following this assignment, he resigned and denounced the continued aid and increase in payments by the World Bank and the IMF.
- 7 Other confidential reports could be included in this list: Ernst & Young (2006) and Duncan and Allen (2006).
- 8 Result of the resolution no. DIC/CEF/04 of April 2002 (Inter-Congolese Dialogue, 2002).
- 9 For example, the four-year contract signed in April 2003, between MIBA (Bakwanga Mining Company), 80 per cent controlled by the Congolese State, and the Canadian company Emaxon required MIBA to sell the majority (88 per cent) of its production to the Canadian company, in exchange for a US\$15 million loan, at a price half that prevailing in the small-scale market. This illustrates how some inequitable agreements can still today deprive the state, and therefore the population, of the income from mineral resource exploitation.

- 10 According to the Mining Code, 5 per cent of the shares of mining companies must be ceded to the state to enable it to prospect for new deposits. This share is from 12.5–25 per cent in the case of a partnership with state companies in default.
- 11 The three accused are the Minister of Order and Public Security, accused of illegal diamond and cobalt trade; the Minister Delegate in the Presidency, denounced for having participated in signing inequitable and exploitative joint-venture contracts with Zimbabwean and South African companies; and the Minister of Planning and Reconstruction, also president of the National Commission of the Fight against Corruption and shareholder of the Sengamines company, specialising in the diamond trade. The report of the expert group on illegal exploitation of natural resources also reveals the alleged participation of the person in charge of the security services, presumably involved in various forms of trafficking, especially the arms traffic. Accusations are also directed at the former Minister of Foreign Affairs in the government of Laurent Désiré Kabila, currently director of MIBA, the biggest state company specialising in diamond exploitation and trade.
- 12 The term used (*revisités*) is significant. Renegotiating contacts already signed is a complex process which requires several stages (Africa Mining Intelligence, 2008).
- 13 '*Creuseurs*' is often maintained in English texts, as it refers to the very particular situation in the DRC, with many small-scale informal miners.
- 14 The Mining Environment Service is a public service which is part of the Ministry of Mines.
- 15 With its own juridical personality, SAESSCAM is an autonomous public service with specific responsibility for small-scale mining.
- 16 For more information about ores in the DRC, see Euromines (1999).
- 17 This government's executive was composed of a president and four vice-presidents.
- 18 In 2006, the terms of reference of the Mining Plan were established in order to define the orientations, objectives and means of policy in the sector.
- 19 For more information, see the many reports written for the Security Council by the expert group on the situation in DRC (see UN, 2007).
- 20 MONUC chief William Swing held a meeting at the Africa Center for Strategic Studies in Washington D.C., on May 3, 2007. 'War, Peace and Beyond' was the title of his presentation, in which he explained MONUC's achievements and the challenges lying ahead not only for this mission but for the entire UN peacekeeping operations more generally.

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