



# **PR or Progress? Glencore's Corporate Responsibility in the Democratic Republic of the Congo**

June 2014

## **Authors**

Chantal Peyer, Patricia Feeney, François Mercier



## Impressum

Authors: Chantal Peyer, Patricia Feeney, François Mercier

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Contact: RAID, 1 Bladon Close, Oxford, OX2 8AD, United Kingdom

Phone: +44 1865 436 245. E-mail: [raid@raid-uk.org](mailto:raid@raid-uk.org). Internet: [www.raid-uk.org](http://www.raid-uk.org)

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Main office: Bread for All, Bürenstrasse 12, P. O. Box 1015, CH-3007 Bern

Phone: +41 31 380 65 65. E-mail: [bfa@bfa-ppp.ch](mailto:bfa@bfa-ppp.ch). Internet: [www.brotfueralle.ch](http://www.brotfueralle.ch)

Regional office: Av. du Grammont 9, CH-1007 Lausanne

Phone + 41 21 614 77 17. E-mail [ppp@bfa-ppp.ch](mailto:ppp@bfa-ppp.ch). Internet: [www.ppp.ch](http://www.ppp.ch)

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Main office: Fastenopfer, Alpenquai 4, Postfach 2856, CH-6002 Lucerne

Phone: +41 41 227 59 59. E-mail: [mail@fastenopfer.ch](mailto:mail@fastenopfer.ch). Internet: [www.fastenopfer.ch](http://www.fastenopfer.ch)

Regional office: Av. du Grammont 7, CH-1007 Lausanne

Phone +41 21 617 88 81. E-mail: [actiondecareme@fastenopfer.ch](mailto:actiondecareme@fastenopfer.ch). Internet: [www.actiondecareme.ch](http://www.actiondecareme.ch)

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## A. Executive summary

This is the third report published by Bread for All and Fastenopfer on the activities of Glencore in the Democratic Republic of Congo (DRC), this time in collaboration with the British organisation *Rights and Accountability in Development* (RAID)<sup>1</sup>. It is based on research carried out over a period of one and a half years assessing the impact of the operations of two subsidiaries, the Kamoto Copper Company (KCC) and Mutanda Mining (MUMI). Field research was conducted in close cooperation with a Congolese non-governmental organisation (NGO)<sup>2</sup> and local observers based in Kolwezi, each of whom produced a monthly report. Two international research missions took place in October 2013 and March 2014. The information published in this report is based on a study of the documentation, field investigations and interviews with over two hundred people including representatives of the Congolese national and provincial administrations, non-governmental organisations (NGOs) and customary chiefs and residents of the towns and villages located close to the Glencore mines.

Throughout the investigation, RAID, Bread for All and Fastenopfer remained in regular contact with Glencore. A research team visited Glencore mines and installations in the DRC between 7 and 11 October 2013. The researchers conducted interviews with selected senior managers at KCC and MUMI on the issues of the environment, human rights and taxation. We sent the main conclusions of the investigation to Glencore at the end of May to which the company gave a written response. The company's response is included in the report.

We are grateful to Glencore, particularly to members of the Sustainability Department based in Switzerland and the DRC, for having allowed us unprecedented access to their mining sites and for organising interviews with managers of their Congolese subsidiaries. Glencore may not always agree with the conclusions we have reached, but we hope that our recommendations will help the company translate its policies into practical changes on the ground.

### A.1. Introduction

#### The Democratic Republic of Congo: a strategic investment for Glencore

Glencore is a giant in the raw materials sector and has a presence in more than 50 countries. Last year, the company had a turnover of **US\$ 239.7 billion**. Glencore's senior managers are also shareholders, which allowed the company's CEO, Ivan Glasenberg, to receive, in addition to his salary, US\$ 182 million in tax-free dividends in 2013, despite the losses resulting from the merger with Xstrata.

Since it was formed in 1992, Glencore has had a controversial history. And the company continues to be hit by scandals, in the Philippines, Colombia, Zambia and the DRC. Since 2013, Glencore has responded with a charm offensive: the company has organised meetings with the Government, politicians, Swiss NGOs and the general public to try and persuade them of the legitimacy of its business and to criticise the "myths" disseminated about Glencore.

Glencore's turnover is more than 30 times the DRC's national budget, a scandalously poor country despite the wealth of its natural resources. In the DRC, Glencore controls two mining complexes, KCC and Mutanda-Kansuki and buys their entire production. These companies are strategically important: they supply 19% of Glencore's copper and 82% of its cobalt and enjoyed a 50% increase in production last year. Glencore obtains from its DRC operations one fifth of the world's cobalt production, an essential component in all electronic appliances.

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<sup>1</sup> Chantal Peyer and François Mercier: *Glencore in the Democratic Republic of the Congo: Profit Before Human Rights and the Environment*, Bread for All and Swiss Catholic Lenten Fund, 2012.

<sup>2</sup> *Action contre l'impunité et pour les droits humains* (ACIDH).

## A.2. Glencore's corporate social responsibility: improved policies

Since its merger with Xstrata, the company has been engaged in a lengthy process of developing and rolling out its policies for the Group. During 2013 Glencore issued policies on environmental management, community and stakeholder engagement and human rights. Glencore is committed to upholding the United Nations (UN) Guiding Principles on Business and Human Rights and has applied for admission to the Voluntary Principles on Security and Human Rights. In May 2014 Glencore joined the International Council on Mining and Metals (ICMM), which aims to improve sustainable development performance in the mining and metals industry.

Glencore key sustainability targets for 2013 include achieving zero fatalities in its operations, supporting community health programmes in areas such as HIV/AIDs and malaria, allocating 1% of Group profits for community investment activities and preventing major environmental incidents. As regards human rights, Glencore's main targets are achieving corporate membership of the Voluntary Principles Initiative, and integrating these into security arrangements. The company is reviewing its contracts with private security providers and strategies for engagement with public security for its operations in the DRC, Bolivia, Peru and Colombia.

Many of the targets are process orientated. Other targets are not readily measurable or are too general to be verified or meaningful. The main exception is the information on its zero fatalities goal: 26 fatalities were reported during 2013. Despite the serious challenge that artisanal and small-scale mining activities represent in some countries, including the DRC, no overall strategy appears to have been developed and no targets have been set.

During our visit to KCC and MUMI the attitude of staff seemed somewhat defensive. They were anxious that the impact of the companies' operations and activities should be viewed not in the light of actual performance but rather as 'a work in progress' whereby improvements were being brought about in a difficult and complex context.

There is little doubt that Glencore has made great strides in integrating many relevant international standards into its policies but questions remain about its capacity and resolve to translate these into effective action in its day-to-day operations.

## A.3. Environmental issues

### Management of mining effluent: broken promises at Luilu

The study published by Bread for All and Fastenopfer in 2012 showed how KCC discharged untreated effluent from its hydro-metallurgical plant into the River Luilu. The pH of 1.9 and concentrations of copper, cobalt and lead were above international and Congolese environmental thresholds. In April 2012, the company acknowledged the facts and claimed to have resolved the problem: 'Glencore has been working on a complex engineering project, which includes 4,500 metres of intricate steel piping and over 30 specialised pumps, to address this issue [...]. This work has been completed in the past few weeks and all effluent is now delivered to a tailings pond.'<sup>3</sup>

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<sup>3</sup> Glencore's response to up-coming BBC Panorama report, 12 April 2012.





Point where effluent was previously discharged into the River Luilu (photo by Glencore – April 2012)

Photo sent by Glencore in April 2012 to Bread for All and Fastenopfer and international media, indicating that effluent was no longer discharged into the River Luilu via the Albert Canal.

Effluent into the River Luilu

However, that is not what we observed in October 2013. We discovered that waste from the Luilu plant was still being discharged into the River Luilu, only further upstream. We saw how the Albert Canal has been diverted and now there is a bend in its course before it discharges effluent upstream into the River Luilu.



KCC plant waste (October 2013)



Bend in the Albert Canal, where it has been diverted (October 2013)

We took several samples of the effluent.<sup>4</sup> Laboratory analysis showed that:

- the pH level, which was between 5.2 and 6.14, had significantly improved since April 2012. However, the acid content remained high.
- the concentrations of copper and cobalt remained extremely high. Copper concentrations were up to six times (9.927 mg/l) higher than the thresholds set by the Congolese Mining Code for effluent. They were also above the threshold set by the World Health Organisation (WHO) for drinking water. Cobalt concentrations were up to fifty-three times (53.59 mg/l) higher than WHO thresholds.

<sup>4</sup> Six samples were collected in polystyrene flasks at all sampling sites and analysed at the Industrial Toxicology and Occupational Health Laboratory at the Saint-Luc University Clinics of the Catholic University of Louvain.

Glencore therefore continues to pollute the River Luilu and to exceed current environmental standards. Questioned on this issue, the company said that it regularly monitors the situation and has not noted the pollution. It also said it had been putting acid neutralisation systems in place since 2012. It added that: 'KCC is not the only operator in the area, and cannot take responsibility for any discharge that may occur as a result of the operations of other companies.' However, Bread for All, Fastenopfer and RAID believe there is no doubt that the source of the pollution documented above is KCC's installations. This is confirmed by satellite images.

#### MUMI: a concession in a game reserve

The other environmental issue for Glencore in the DRC concerns the Basse-Kando game reserve. The DRC game reserves were created to protect wildlife. No new human activities are allowed in the reserves, as set out in article 3 of the Mining Code: 'Mining or quarrying rights cannot be granted in a protected area and artisanal production is also prohibited.' Given that Basse-Kando is a game reserve and that MUMI's concession (No. 662) is in the middle of this reserve, the exploitation permit should never have been granted. Questioned on this issue, Glencore said that the responsibility for the situation lies with the Mining Registry (CAMI) and the Ministry of Mines, which granted the licences: 'We refute that there was any exploitation of ambiguities in the mining law. The mining law is very clear in that the *Cadastre Minier* grants all mining licences in accordance with the laws of the country including the Mining Code. In addition, our operations fall under the Ministerial direction of the Minister of Mines.'

RAID, Fastenopfer and Bread for All believe that the situation is more complicated. In fact, MUMI managers have known for a long time that the company is operating in a reserve and have done nothing to clarify the situation. On the contrary, they have taken advantage of the lack of coherence within the Congolese government to establish a long-term presence and have refused to enter into dialogue with those responsible for protecting the reserve, notably the Congolese Institute for Nature Conservation (ICCN). As long ago as 2006, the director of the Basse-Kando reserve wrote to Group Bazano – the first title holder of the concession and Glencore's former partner in MUMI – to denounce an infringement of Congolese law on protected areas<sup>5</sup>. However, neither Group Bazano nor Glencore contacted ICCN to try and clarify the situation. In 2009, the same scenario: invited by ICCN to a meeting in Lubumbashi to discuss the status of the Basse-Kando reserve, MUMI did not reply or attend. 'It's a very stubborn company', explained an ICCN official in Katanga. 'The other companies are prepared to discuss the situation, but MUMI has always refused to talk to ICCN.'<sup>6</sup>

#### A.4. Security and Human Rights:<sup>7</sup> New Policies, Old Problems

KCC's sprawling concession presents enormous security challenges as it is surrounded by the townships of Luilu, Musonoi and Kapata, all of which have high levels of unemployment and poverty. Many of the young men living there are involved in artisanal mining. At KCC, security is provided by its internal security staff, a number of different private security contractors - of which the British company, G4S, is the largest - and the Congolese police. Controversially, Congolese military are also based inside MUMI's concession. Mine police deployed to guard KCC's site often use disproportionate force when trying to prevent incursions of artisanal miners on to its concessions. On several occasions over the past 18 months, mine police have fired live ammunition in pursuit of artisanal miners on KCC's site resulting in deaths and serious injury, not only of artisanal miners, but also passers-by. The report examines a number of these cases in detail,<sup>8</sup> including the death of 23-year old Eric

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<sup>5</sup> Letter from the ICCN, the Upemba National Park and the Kando reserve to the Bazano group, 27 September 2006.

<sup>6</sup> Interview, 12 March 2014.

<sup>7</sup> References and Glencore's responses can be found in the main report.

<sup>8</sup> See annex Incidents at KCC and MUMI 2013-2014.

Mutombo Kasuyi, who died on 15 February 2014, shortly after being apprehended by a KCC security patrol.

Post mortem results concluded that Mutombo's injuries were consistent with his having been beaten. Glencore maintains that 'the arrest was undertaken solely by the officers of the Mine Police, with no involvement of KCC or G4S employees, and that no violation of human rights had been perpetrated by KCC or G4S staff'. Yet Fastenopfer, Bread for All and RAID are concerned that unanswered questions remain: a lack of clarity about what happened and actions by KCC that appear to have obstructed the investigation.

Glencore states that it has no control over the DRC mine police, yet they are in the company's pay and provide security services on KCC's sites.<sup>9</sup> Their operations appear to be directed by KCC's Security Department. The fact that, according to numerous reports, mine police are susceptible to bribes by artisanal miners and are ill-disciplined demonstrates the urgent need for greater supervision.

Moreover, there is a pattern of failure by the Kolwezi authorities to investigate violent or suspicious deaths of artisanal miners. The number of serious incidents involving the use of firearms or excessive force by the mine police should be a matter of the utmost concern to Glencore. Under the Voluntary Principles security guards should only use force when strictly necessary and to an extent proportionate to the threat. Passive acceptance of the flawed procedures of the DRC authorities is not compatible with the UN Guiding Principles. RAID, Bread for All and Fastenopfer believe that the current system whereby KCC's own security staff carry out the functions of judicial police officers on site is open to abuse or the perception of abuse.

A major source of friction between KCC and the surrounding communities is its closure of the only road (originally built by Gecamines) connecting the townships of Kapata and Luilu. The control of this road engages rights of freedom of movement. Using the road can lead to arrest on charges of trespass (*circulation illicite*), engaging rights of protection from arbitrary detention. There have been instances where minors have been detained without proper safeguards.

The Tilwezembe mine – about 30 kilometres from Kolwezi - is part of KCC's concession. According to our investigations, artisanal mining continues to take place at Tilwezembe under the control of the same local trader, who according to the BBC and Bread for All and Fastenopfer, was allegedly responsible for serious human rights abuses in 2012 and 2013.<sup>10</sup> When questioned about action it had taken, Glencore said: 'KCC continues to engage with the DRC government for a peaceful resolution to this issue.'<sup>11</sup>

Glencore appears to have adopted a military-style response to the problem of artisanal mining which ultimately is a complex social problem. This approach is only likely to heighten the risk of further human rights violations. Until Glencore improves its relations with local communities and puts in place a security strategy that is compliant with international standards, violent incidents are likely to recur.<sup>12</sup>

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<sup>9</sup> Glencore Response 21 May 2014: 'KCC has no control or jurisdiction over the DRC Mine Police, and cannot comment on their actions'.

<sup>10</sup> Bread for All and the Swiss Catholic Lenten Fund, *Glencore in the Democratic Republic of Congo: profit before human rights and the environment*, April 2012, pp. 13 and 19. BBC Panorama, *Billionaires behaving badly?*, 16 April 2013; and Amnesty International, *Profit and Losses*, 2013, pp. 9-15.

<sup>11</sup> Glencore Response 21 May 2014.

<sup>12</sup> The Commentary to Guiding Principle 13 states: 'For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.'

## A.5. Glencore and the communities

### A top-down approach that lacks transparency

We do not believe that Glencore's approach to community participation and complaints procedures complies with international standards, notably the UN Guiding Principles on Business and Human Rights<sup>13</sup> and the Sustainability Framework of the International Finance Corporation (IFC)<sup>14</sup>.

Glencore conducted Environmental and Social Impact Assessments (ESIAs) for its two subsidiaries, KCC and MUMI, in 2009 and 2008 respectively. The company began the process of updating the ESIs in 2013. Glencore refused to provide a list of community representatives who had been consulted or participated in the process. According to our own survey of several dozen residents of the townships and villages closest to the concessions, nobody had even heard about the ESIs. So the people most affected by KCC and MUMI's operations, contrary to the DRC's Mining Regulations (Article 451), have not been consulted nor have they received a summary of the ESIs. There is a complete lack of transparency: Glencore, unlike other mining companies, refuses to make its ESIs publicly available. Bread for All, RAID and Fastenopfer believe that Glencore should use a variety of methods including newspapers and local radio to disseminate information about its operations; affected communities should be invited to the ESIA consultations. The company should post the complete ESIs on its website, with a summary in local languages, and list its liaison officers, so that residents know whom to contact with their complaints or concerns.

### Large budgets – failure to prioritise local communities

Our analysis shows that Glencore's investments only marginally benefit the communities who live close to its concessions. Out of US\$16.7 million spent in 2011 on social projects, around 15 million were spent on major infrastructure projects, including roads, bridges and the renovation of Kolwezi airport, which directly benefit Glencore's subsidiaries. The central problem of Glencore's community work is the lack of a rights-based approach. This is evident in three specific areas:

– *The right to water*

For the last ten years KCC's operations have been responsible for the pollution of the Luilu River which has denied local people of their right to water. In the past, Gécamines mitigated the problem by installing an electric pump and pipes to provide the township with drinking water. But these were damaged in 2007. Since it took over KCC, Glencore has refused to accept responsibility for Luilu's water: 'In accordance with DRC regulation, water supply and delivery is the responsibility of the State, and managed by state entities REGIDESO and SNEL.' Local people have no option but to use dirty water drawn from small artisanal wells they dig in their gardens. Bread for All, RAID and Fastenopfer believe that Glencore does have responsibility for providing access to clean water to Musonoi and Luilu. This should be a priority in its community development budget.

– *The right to a livelihood*

The villages of Kapaso, Riando, Kando and Kisenda are extremely poor. They do not appear on any maps, have not been included in any census or considered by any development plan. The main sources of income in these villages are agriculture, the sale of firewood and fishing. The villagers sell their produce on the side of the main road (National Highway No 1), which is used by thousands of lorries and cars every day. Three years ago, MUMI closed the access road to the highway. As a result, instead of a 5 km journey on foot or bicycle, villagers now have to travel 15 km. This detour is an enormous handicap, further isolates the villages and

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<sup>13</sup> See UN Guiding Principles 18, 20 and 31.

<sup>14</sup> IFC Performance Standards on Environmental and Social Sustainability. (PS 1§ 25-36): Assessment and Management of Environmental and Social Risks and Impacts, 2012.

exacerbates their poverty. It is practically impossible for them to sell their maize and manioc. On the other side of the National Highway, another access road was closed, again without prior consultation. These closures are contrary to international best practice. Fastenopfer, RAID and Bread for All believe that Glencore should have consulted the communities and assessed the negative impact of these decisions before closing the roads. The company should also have introduced mitigating measures, for example, the construction of an alternative road towards Mwazaminda and the introduction of a bus service to Kando.

- *Right to Housing: Secret Plans for the Relocation of Musonoi*  
Glencore claims to be committed to ensuring that KCC will follow the IFC's Performance Standard on Resettlement. But KCC has failed to consult the affected community neither has it provided them with information about its Resettlement Plans. This goes against the UN Guiding Principles<sup>15</sup>.

Houses in Musonoi, particularly those closest to the T17 open pit mine, are in an extreme state of disrepair, the walls have gaping fissures as a result of the blasting. One reason for the company's unwillingness to spend money on rehabilitating the buildings or upgrading the local infrastructure may be due to the fact that resettlement of most if not all of the residents has long been considered inevitable.<sup>16</sup> In September 2009 Katanga Mining Katanga Mining (KML)<sup>17</sup> cut \$58 million US dollars of capital expenditure earmarked for the relocation of Musonoi village. KML told investors that it was accelerating its plan to increase production. KML said that it was 'assessing the potential to mine the Kamoto East orebody from underground'.<sup>18</sup> What Glencore failed to mention was that blasting at the T17 mine would also accelerate. The suspension of the resettlement programme is part of Glencore's cost cutting approach. This was the case in 2009 and it remains true in 2014. Glencore continues to give evasive or ambiguous responses to our questions about its plans for Musonoi.<sup>19</sup> An official - *Chef de Quartier* - in Musonoi told us that KCC had warned him to keep this information to himself because 'this is a secret, if people know too much, it will cause tension and they might make a fuss.'<sup>20</sup> RAID, Fastenopfer and Bread for All believe that Glencore, in line with IFC and international human rights standards, has an obligation to consult and inform the affected community about its intentions and provide compensation for the damage their operations have already caused.

## A.6. Taxation – Substantial profit transfers to tax havens

KCC is part of the Katanga Mining Ltd (KML) group controlled by Glencore. Despite strong growth, KCC has systematically recorded **losses since 2008** and its shareholders' (negative) equity is close to US\$ -2 billion. With a situation like this, the company should have been liquidated or recapitalised.

In fact, the heavy losses can be explained principally by significant interest payments to five parent companies, all registered in tax havens and to which KCC has become more and more indebted. While KCC has recorded systematic losses in the DRC, its parent KML group has made substantial profits for investors overseas.

This practice of shifting recorded profits to offshore jurisdictions with low company taxes is not illegal in itself, but it allows KCC to avoid paying tax on profit (30%) and dividends to the DRC, which owns

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<sup>15</sup> UN Guiding Principle 11 and 15 (b).

<sup>16</sup> SRK Consulting, An Independent Technical Report on the Material Assets of Katanga Mining Limited, Katanga Province, Democratic Republic of Congo ("DRC"), 17 March 2009, pp. 185-186.

<sup>17</sup> Katanga Mining Katanga Mining Ltd (KML) a Canadian listed company is controlled by Glencore.

<sup>18</sup> Bloomberg, Katanga Announces Accelerated Development Plan, 9 August 2009: <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTkEDGdU8HVQ>.

<sup>19</sup> Letter from Anna Krutikov, GlencoreXstrata, 31 January 2014.

<sup>20</sup> Interview neighbourhood chief, Musonoi, 10 March 2014.

25% of KCC. On the basis of the results of KML, the company should have paid the DRC an estimated **US\$ 153.7 million** more than it has done since 2009. In comparison, Swiss development aid to the DRC during the same period only amounted to **US\$ 58 million**.

Glencore's support for certain social projects does not offset the far greater loss to the DRC's social budget resulting from Glencore's aggressive tax optimisation strategy. Avoiding tax aggravates poverty in Africa. To put an end to these practices, Fastopfer, Bread for All and RAID are calling for an international requirement for companies to **publish their accounts on a country by country basis** (*country-by-country reporting*).

#### Large degree of opacity in tax and fee payments despite the EITI

Questions about whether KCC and MUTANDA pay the right level of tax arise because there are wide discrepancies and a large degree of opacity in the available information. The amounts that KCC declares it paid to the state under the EITI (Extractive Industries Transparency Initiative) do not correspond to our estimates of amounts due according to the production carried out or to the amounts contained in the accounts of KCC.

Civil society groups are concerned that mining companies in the DRC seek to exaggerate their costs and investments to reduce their basis for taxation. It is noteworthy that the subsidiaries of Glencore have had several legal disputes with the tax authorities: KCC paid **US\$ 44.0 million** in fines and tax penalties over the last 5 years and MUTANDA was given formal notice in October 2013 to pay **US\$ 41.2 million** of fees and fines due.

To determine if the taxes paid are correct and if the accounting entries were over or under estimated, Fastenopfer, Bread for All and RAID are calling for an **audit** of Glencore's subsidiaries as well as of other mining companies.

#### Controversial sales of mining concessions to a friend of the President

In 2011, shares in MUTANDA-KANSUKI belonging to the state company Gécamines were sold far too cheaply and without competitive tender to the group of the Israeli businessman Dan Gertler. The DRC state is said to have lost close to **US\$ 630 million** in these sales. Between 2012 and 2013, equivalent shares were sold to Glencore at a "market price" several times higher. A remarkable fact is that Glencore could have made a competitive offer for these shares in 2011, but turned it down. Dan Gertler, a close associate of the DRC President, Joseph Kabila, has been implicated in several other controversial transactions and secretive sales from Gécamines to offshore companies.

In 2013, history repeated itself: negotiations took place for the sale of shares of Gécamines in KCC to Dan Gertler. Once again, the deal was shrouded in secrecy and, once again, Glencore chose not to exercise its right of first refusal over Gécamines shares. Glencore refused to comment at the time. According to our information, the sale of shares was stopped by the DRC government, but other transactions that have not been publicly disclosed still took place between KCC and Gécamines concerning mining deposits.

Fastenopfer, Bread for All and RAID are demanding greater transparency and compliance with good governance agreements concluded with the international financial institutions.

## **B. Preliminary remarks: methodology used to investigate Glencore's operations in the DRC**

This is the third report published by Bread for All and Fastenopfer on the activities of Glencore in the Democratic Republic of Congo (DRC). The first report was published in March 2011<sup>21</sup> and the second in April 2012<sup>22</sup>. In the preparation of this report, which assesses developments at Glencore's subsidiaries, the Kamoto Copper Company (KCC) and Mutanda Mining (MUMI) in Kolwezi over the past two years, the Swiss organisations worked with the British non-governmental organisation, Rights and Accountability in Development (RAID).

The research for this report was carried out over an eighteen-month period in Switzerland, the United Kingdom and the DRC. The report draws on hundreds of interviews with representatives of the Congolese national and provincial administrations, Glencore (in Switzerland and Katanga), non-governmental organisations (NGOs) in Lubumbashi and Kolwezi and customary chiefs and residents of the towns and villages located close to the Glencore mines.

A three part field research plan was implemented:

- Our Congolese partner, Action Against Impunity and for Human Rights (*Action contre l'impunité et pour les droits humains*, ACIDH) conducted research missions in Kolwezi, in July 2012, August 2013 and January 2014.
- ACIDH also trained local observers, based in Kolwezi, who sent a monthly report about the situation at and near the Glencore concessions, describing any new events that had taken place.
- Finally, two international research missions of respectively twelve and eight days took place between October 2013 and March 2014. These two missions allowed all those involved in the project to compare data, verify their information, check the facts and complement each other's interviews, particularly of the company's official representatives.

Throughout the investigation, RAID, Bread for All and Fastenopfer remained in regular contact with Glencore. A Memorandum of Understanding was prepared between March 2013 and September 2013, in order to define the basis for discussion between the company and the NGOs. The Memorandum set out the following arrangements:

- an international research mission was allowed to visit Glencore sites and installations in the DRC in October 2013. During this visit, the mission was allowed to interview representatives of Glencore's two subsidiaries KCC and MUMI on the following issues: environment, security and human rights, communities and taxation.
- In exchange, Bread for All and Fastenopfer and RAID agreed not to publicly divulge information on their research before June 2014<sup>23</sup>, to present their conclusions to Glencore, give the company a right of response and include the company response in the report.

The international mission took place on 2-15 October 2013 and Glencore sites<sup>24</sup> were visited between 7-11 October 2013. The research team comprised two of the authors of this report and three

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<sup>21</sup> Contract, human rights and taxation. The case of Glencore in the Democratic Republic of Congo, Chantal Peyer and Yvan Maillard, March 2011.

<sup>22</sup> Glencore in the Democratic Republic of Congo: Profit before Human Rights and the Environment, Chantal Peyer and François Mercier, April 2012.

<sup>23</sup> The Memorandum of Understanding included an exception clause: in the event of serious human rights violations, Bread for All, RAID and Fastenopfer were permitted to publish information before the final report was ready in June 2014.



Congolese researchers, who have contributed to the report: a human rights specialist, an economist and a university professor specialising in toxicology and the environment<sup>25</sup>. Two representatives of Glencore Switzerland (the spokesperson and a member of the social responsibility team) accompanied the team.

At the end of this mission, we had a series of email exchanges with the company<sup>26</sup> and a meeting with representatives of Glencore Switzerland. We sent the main conclusions of the research to Glencore at the end of May and the company gave a written response. The company's response is included in the report<sup>27</sup>.

We are grateful to Glencore for having allowed us unprecedented access to their mine sites and the chance to exchange views with senior managers at KCC and MUMI. We are aware that our visit put demands on staff time and resources but it provided us with a greater understanding of the challenges that Glencore's subsidiaries face in the Congo. While we may not have reached the same conclusion on certain issues, the presentations and the focus meetings that were organised gave us an opportunity of hearing the companies' views and obtaining answers to some of our questions.

Discussions with Glencore were detailed and intense but always polite. However, there was a lack of transparency. Glencore refused to show the researchers most of the documents they asked to see, even those (such as security contracts and environmental and social impact assessments) that should, *a priori*, be public. Bread for All, RAID and Fastenopfer also regret that this first dialogue with Glencore was accompanied by intense pressure. At the end of March 2014, the company threatened to take legal action against Bread for All and RAID. This threat followed the publication of a press release on the death of a young man – Mutombo Kasuyi – on the Glencore concession (see chapter 4 – the case of Mutombo Kasuyi)<sup>28</sup>. Three months ago, the company also threatened to take legal action against other Swiss organisations<sup>29</sup>. This represented a change of approach: until then, the company had never resorted to threatening legal action against European NGOs. Glencore consistently and publicly states that it is open to dialogue with NGOs. Bread for All is even mentioned in its last Sustainability Report. However, it would seem, that should major differences of opinion emerge, the company will not hesitate to resort to legal action to try to silence criticism. We can only regret this state of affairs, which interferes with democratic debate.

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<sup>24</sup> Mission members visited KCC's and MUMI's opencast mines, the Kamoto underground mine, the KTC plant, the Luilu plant laboratory, MUMI hydro-metallurgical plant and several community development projects (agriculture, poultry, school, health centre).

<sup>25</sup> The members of the international mission were Patricia Feeney (Director, RAID – UK), Chantal Peyer (Head of the Companies and Human Rights team at Bread for All – Switzerland), Emmanuel Umpula (Executive Director, ACIDH – DRC) and Jean-Pierre Okenda (independent economist, DRC). Mr Célestin Banza Lubaba Nkulu, professor at Lubumbashi University's Toxicology and Environment Unit also participated in the mission as an independent researcher, to support the NGOs in its environmental analyses.

<sup>26</sup> After the October mission, RAID, Bread for All and Fastenopfer wrote a six-page letter to Glencore and representatives of its subsidiaries. This letter set out the main criticisms and recommendations of the NGOs. Glencore replied on 31 January 2014.

<sup>27</sup> The Key Findings of our report were sent to the company on 5 May 2014. These Key Findings were discussed at a meeting with Glencore representatives on 12 May 2014 and Glencore also gave a written response to these conclusions.

<sup>28</sup> The publication of this press release did not infringe the Memorandum of Understanding signed by Glencore and the NGOs because the memorandum contained a clause allowing publication of information before June in the event of a serious violation of human rights.

<sup>29</sup> See: Glencore Xstrata fait modifier le titre d'un livre à son sujet, 2 March 2014:

[http://www.swissinfo.ch/fre/nouvelles\\_agence/international/Glencore\\_Xstrata\\_fait\\_modifier\\_le\\_titre\\_dun\\_livre\\_a\\_son\\_sujet.html?cid=38071960](http://www.swissinfo.ch/fre/nouvelles_agence/international/Glencore_Xstrata_fait_modifier_le_titre_dun_livre_a_son_sujet.html?cid=38071960).



The report reviews the progress that has been made over the past two years. We hope that the report's findings and recommendations will help the company go beyond its paper commitments and translate its recently formulated policies into effective action on the ground.

## 1. Introduction to Glencore

### 1.1. From Glencore to Glencore Xstrata to... Glencore

Glencore is the world's third largest company in the raw materials sector and in terms of its market capitalisation. The company controls immense chains of economic activities, including exploration, production, refining, trade and logistics. Glencore has a global presence: its networks include 90 offices in more than 50 countries. The company has more than 150 production sites and 190,000 employees throughout the world<sup>30</sup>.

In 2013, Glencore's turnover was US\$ 239.7 billion<sup>31</sup>, an increase of 1% compared to 2012. Glencore's turnover was equal to 38% of Switzerland's gross national income in 2013. Sales are in three business sectors:

- Energy products: coal, oil, etc. (US\$ 142.2 billion)
- Metals and minerals: copper, nickel, zinc, aluminium, etc. (US\$ 67.2 billion)
- Agricultural products: wheat, maize, rice, agrofuels, etc. (US\$ 30.0 billion)

In 2012, merger negotiations took place between Glencore and Xstrata, in which Glencore already had shares. Shareholders were due to decide on whether to accept the proposal in July 2012. However, Xstrata's second largest shareholder, the oil emirate Qatar's State Fund, Qatar Holding, wanted Glencore to improve its offer and the merger was rejected. Shareholders finally accepted the merger in November 2012 and it became effective in 2013 under the name of Glencore Xstrata.

In 2014, the company proposed a change of name, which was accepted by shareholders. The company is now called Glencore plc. The name Xstrata was dropped once the merger had been approved.

# GLENCORE

### 1.2. CEO Remuneration: US\$ 182 million tax free

Last year's merger involved significant costs, mainly because of a revaluation of assets. In 2013, Glencore therefore made a loss of 7.4 billion following extraordinary costs of US\$ 11.1 billion. Despite this loss, the company proposed two dividend payments in that year.

This surprising initiative is also related to the company's pay structure. The CEO, Ivan Glasenberg, was paid a fixed annual salary of US\$ 1.4 million, a salary that has not changed for several years. It is surprisingly "modest" for a company of this size (in comparison, UBS's CEO was paid a US\$ 11.7 million in salary and bonuses in 2013). Ivan Glasenberg is prepared to forgo any profit-related bonuses. On the other hand, he and other directors are shareholders and therefore receive dividends. This system is designed to motivate them to produce good results, as the Directors' Remuneration Report explains: '[...] the Executive Directors' significant personal shareholdings create sufficient alignment of interest with shareholders in the absence of participation in a long term incentive arrangement.'<sup>32</sup>

However, it could be argued that this system encourages the directors to focus on increasing company profits to the detriment of environment and society, as the present study shows.

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<sup>30</sup> GlencoreXstrata, Factsheet, 3 May 2013.

<sup>31</sup> GlencoreXstrata, Annual Report 2013.

<sup>32</sup> GlencoreXstrata, Annual Report 2013, p. 94.

Ivan Glasenberg owns Glencore's second largest shareholding, forming 8.3% of the capital (1,101,848,752 shares). That is about US\$ 6 billion at the share price and exchange rate valid on 31.12.2013. With a dividend of US\$ 16.5 cents per share in 2013, Ivan Glasenberg received **US\$ 181.8 million** in dividends. It is worthwhile to note that thanks to the most recent company tax reform in Switzerland, dividends paid out of the company's capital reserves are exempted from taxes<sup>33</sup>. Of course, the CEO's shares are a personal investment in the company and therefore made at his own personal risk, but this system allows him to avoid paying a significant amount of tax on his income.

In 2013, Glencore paid US\$ 254 million tax on profits. On pre-tax profits<sup>34</sup> of US\$ 4.6 billion (without including extraordinary costs related to the merger), the rate of tax was only 5.5%, a very nice result for the company as well, in terms of tax optimisation.

### 1.3. Scandals: Glencore's charm offensive

The merger in 2012 was accompanied by a series of power struggles to take control of the company. Finally, Ivan Glasenberg became CEO of the new giant company. The merger was negotiated in 2012 at the same time as the European Union revealed a corruption affair concerning Glencore<sup>35</sup>.

Glencore's history is tarnished by many scandals<sup>36</sup>. Did the merger change anything? It's doubtful. Allegations about violations of human rights and environmental legislation by Glencore continue to surface. For example:

- In June 2013, a study by Fastenopfer, Bread for All and Misereor<sup>37</sup> showed that a Glencore Xstrata mine in the Philippines was endangering the human rights of the local population. The project, which was planned to create one of the biggest opencast mines in the world, threatens the livelihoods of 10,000 people and exacerbates social tensions in the area.
- Since 2011, the Swiss-Colombia working group (ASK) has monitored the situation in three communities affected by Glencore activities<sup>38</sup>. ASK states that the displacement of these communities has greatly reduced their chances of earning a decent income and feeding themselves. In 2013, Glencore did nothing when one of these communities suffered a serious food crisis. Glencore denies this.
- In May 2014, a report on Swiss television<sup>39</sup> revealed that a Glencore copper plant in Zambia emits 100,000 tonnes of sulphur dioxide per year, that is eight times more than the entire country of Switzerland. The sulphur dioxide concentrations in the air are well above international standards and, in all likelihood, cause serious health problems for the local population. Glencore acquired this plant in 2000 and has since greatly increased production without installing adequate filters. The company is now upgrading the smelter.<sup>40</sup>

Glencore, which used to be a very discreet company, decided to change tack in the way it addressed these criticisms. In 2013, the company began a veritable charm offensive in an attempt to improve its image. Most of the time, the company denies any responsibility for the issues raised and denigrates its detractors: 'The people who criticise us have never visited our mines in Africa and South America',

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<sup>33</sup> 182 Millionen Dollar Dividende warten steuerfrei auf Glasenberg, Tages Anzeiger, 5 March 2014.

<sup>34</sup> See: allocated profit before tax, GlencoreXstrata, Annual Report 2013, p. 206.

<sup>35</sup> Glencore ready to pull Xstrata merger, Financial Times, 27 July 2012.

<sup>36</sup> See our previous report: Glencore in the Democratic Republic of Congo: Profit Before Human Rights and the Environment, Chantal Peyer and François Mercier, April 2012.

<sup>37</sup> Une mine de Xstrata met en danger les droits humains aux Philippines, 12 June 2013 : [www.fastenopfer.ch/sites/content/news.html?view=details&id=1397](http://www.fastenopfer.ch/sites/content/news.html?view=details&id=1397).

<sup>38</sup> See: [www.askonline.ch/themen/wirtschaft-und-menschenrechte/bergbau-und-rohstoffkonzerne](http://www.askonline.ch/themen/wirtschaft-und-menschenrechte/bergbau-und-rohstoffkonzerne).

<sup>39</sup> Glencore und die Asthma-Toten von Mufulira, srf, 12 March 2014.

<sup>40</sup> Glencore Xstrata Sustainability Report 2013, p. 4

declared Ivan Glasenberg to the press<sup>41</sup>. At the May 2014 AGM, the company also tried to defend its relations with controversial individuals, such as the Israeli businessman Dan Gertler (see chapter 6.5.).

Since then, company managers have had a series of meetings with NGOs<sup>42</sup>. With the assistance of political consultants, Glencore also organises meetings with parliamentarians and authorities in Berne to publicise Glencore's efforts to protect the environment and respect human rights<sup>43</sup>. Glencore also organises public debates to promote understanding of the raw materials sector. At the first of these debates in March 2014, Glencore deplored 'the misunderstandings' about the sector and distributed a document entitled "*Glencore and its Responsibility: Myths and Facts*".



Picture 1: Extract from "Myths and facts" distributed by Glencore at a debate

Glencore talks about holding a "dialogue" with its critics, both individuals and organisations. However, Glencore works hard to belittle its critics and the "myths" they propound. The company rarely addresses the really delicate issues or even recognises them during these dialogues. The criticisms continue and, while making this study, we did not feel that Glencore was willing to enter into a frank discussion with us about the problems we had raised.

In May 2014, Glencore appointed Tony Hayward as chair of the Board of Directors. He had held this post on an interim basis since last year. Hayward used to be head of BP but had to resign from that post because of the oil disaster in the Gulf of Mexico<sup>44</sup>. From the start, he made the serious mistake of trying to minimise the consequences of that particular disaster.

#### 1.4. The Democratic Republic of Congo: a geological scandal

This study looks at Glencore's activities in the Democratic Republic of Congo. The DRC is rich in natural resources. Its subsoil contains vast reserves of minerals, oil and gas. The DRC is the world's leader

<sup>41</sup> Letztlich macht es keine Differenz, ob Ihr Vermögen eine Milliarde beträgt oder sechs, SonntagsZeitung, 5 May 2013.

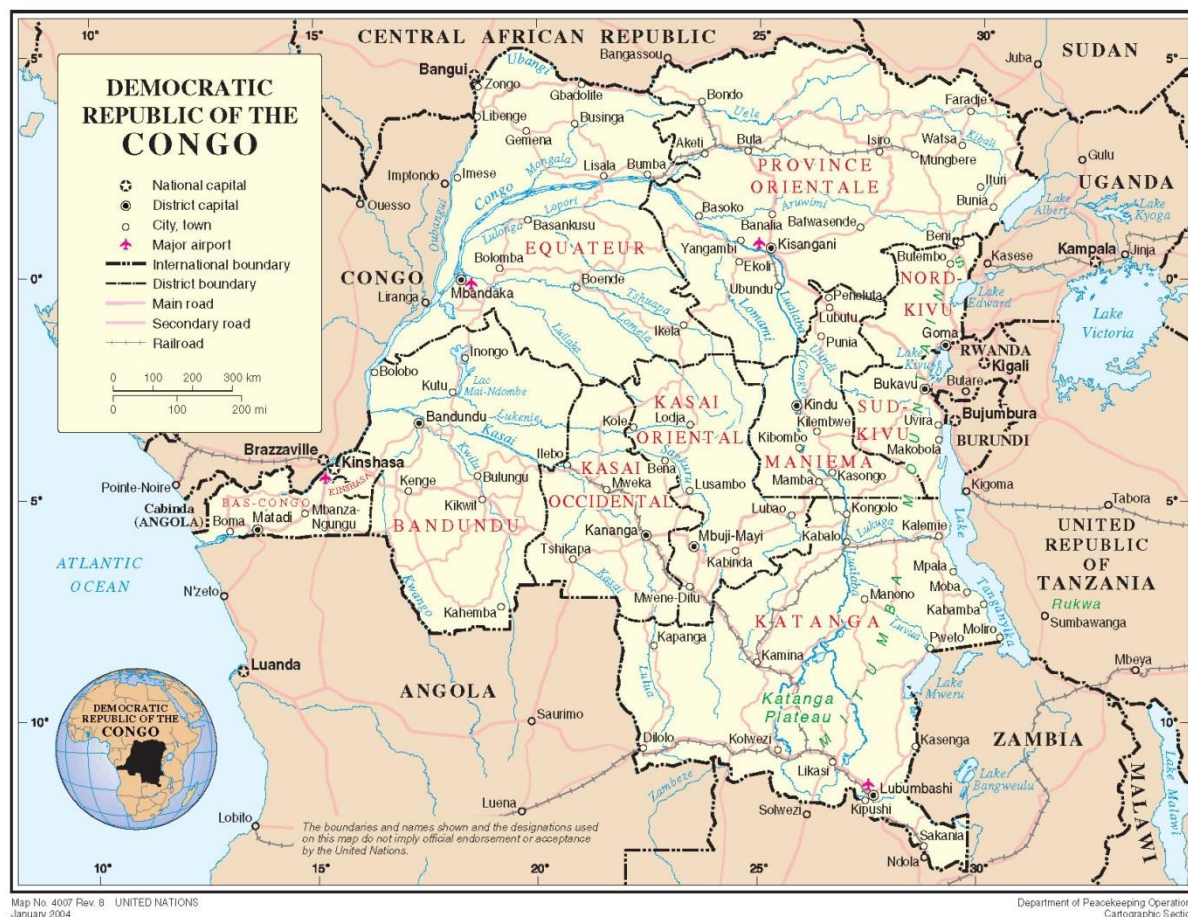
<sup>42</sup> Glasenberg geht in die Charmeoﬀensive, Zentralschweiz am Sonntag, 19 January 2014.

<sup>43</sup> See: Glencore lädt Parlamentarier in Nobelhotel, SonntagsZeitung, 20 January 2013, and: Glencore sucht das Gespräch mit Politik und Bundesbehörden, NZZ, 2014.

<sup>44</sup> See: Glencore macht das Unvorstellbare möglich, Tages Anzeiger, 09 May 2014, and: New Glencore chief Tony Hayward opposed by investors, the Guardian, 15 May 2014.

in terms of cobalt reserves, second in iron and fourth in copper<sup>45</sup>. Many multinational companies have mines in the DRC.

At the same time, the DRC is scandalously poor. It ranks 187<sup>th</sup> and last in the United Nations Development Programme (UNDP) Human Development Index. The poverty rate is about 70% and the country exploits only a tenth of its agricultural potential. The country has experienced bloody wars and suffers everywhere from corruption and bad governance.<sup>46</sup>



Picture 2: Map of the Democratic Republic of Congo

In 2013, the DRC produced 942,000 tonnes of copper, an increase of more than 50% compared to 2012<sup>47</sup>, which is a phenomenal rate of growth. However, the mining sector, mainly copper and cobalt, only contributed 14.5% of the national budget in 2013<sup>48</sup>. In 2012, the corresponding figure was only 9.7%. Before the fall of the dictator Mobutu, the state-owned company Gécamines accounted for about 70% of state revenue. Even though the government plans to increase mining revenue, most of the profits from the country's copper mines currently go to the multinational companies.

<sup>45</sup> Vers une "bonne gouvernance" du secteur minier de la République Démocratique du Congo? Prof. Muhigirwa Rusembuka Ferdinand SJ, 2014.

<sup>46</sup> See for example: Conflicts, Eastern Congo, Enough Projekt: [www.enoughproject.org/conflicts/eastern\\_congo](http://www.enoughproject.org/conflicts/eastern_congo).

<sup>47</sup> DRC copper output rises 52% in 2013 – IMF, Mining Weekly, 26 February 2014.

<sup>48</sup> Congo Prime Minister Urges Diversification as Copper Slumps, Bloomberg, 26 March 2014.



It is estimated that 98% of the gold mined in the conflict-ridden eastern part of the country is illegally exported<sup>49</sup>. Moreover, minerals are not the only natural resources to escape the government's control: it is estimated that 90% of forestry taxes were not collected in 2012<sup>50</sup>.

### 1.5. The DRC is responsible for four-fifths of the cobalt produced by Glencore

In the DRC, Glencore controls mines in Katanga province, in the southeast of the country (see map). The area of Katanga is 496,877 km<sup>2</sup>, about twelve times bigger than Switzerland. According to Katanga's Planning Ministry, 72% of the territory is devoted to mining. The economy is therefore dependent on minerals, yet known reserves are set to be exhausted within the next 20-25 years.

The Glencore mines are near the town of Kolwezi, a region rich in copper and cobalt reserves. However, the region is very poor and average life expectancy is only 46.

Glencore has the following two investments in Katanga (also see chapter 6):

- a) 75.2% of **KATANGA MINING LIMITED** (Yukon, Canada), which in turn owns 75% of **KAMOTO COPPER COMPANY** (KCC). By virtue of a special agreement, Glencore buys 100% of KCC's copper and cobalt production<sup>51</sup>.
- b) 69% of the **MUTANDA** group, product of a merger between **MUTANDA MINING** and **KANSUKI**. Glencore plans to increase its shareholding to 100% by 2018. In this case as well, Glencore buys 100% of the company's copper and cobalt production.

A glance at the production figures of the Glencore subsidiaries shows how important they are:

<b>Copper</b>		2013	2012	Change
	Katanga	136.2	93.0	+46%
	Mutanda	150.6	87.0	+73%
	<b>Total DRC</b>	<b>286.8</b>	<b>180.0</b>	<b>+59%</b>
	Total DRC, as a % of total production	19%	15%	
<b>Cobalt</b>		2013	2012	Change
	Katanga	2.3	2.1	+10%
	Mutanda	13.7	8.5	+61%
	<b>Total DRC</b>	<b>16.0</b>	<b>10.6</b>	<b>+51%</b>
	Total DRC, as a % of total production	82%	76%	

Table 3: Production figures for Glencore subsidiaries in the DRC (in thousands of tonnes and as a proportion of Glencore's total production)<sup>52</sup>

Glencore's copper and cobalt production in the DRC increased more than 50% last year. Katanga Mining and Mutanda together account for close to a fifth of the Glencore group's copper production and more than four-fifths of its cobalt production. These results clearly show their strategic importance for Glencore.

<sup>49</sup> Congo-Kinshasa: Ressources naturelles - L'équivalent en or de 400 millions de dollars US sortis clandestinement de la RDC en 2013, Le Potentiel, 18 January 2014: <http://fr.allafrica.com/stories/201401201975.html>.

<sup>50</sup> En RDC, l'évasion fiscale fait perdre 90% des taxes forestières au peuple congolais en 2012, Global Witness, 28 October 2013.

<sup>51</sup> Katanga Mining Limited, Annual Information Form for the year ended Dec. 31, 2013, p. 7.

<sup>52</sup> Glencore Xstrata, Production Report for the 12 months ended 31 December 2013.



Picture 4: Opencast mine T17 in the KCC concession  
(Photo: Katanga Mining Limited)

## 1.6. Guaranteed rights for another ten years

The Congolese government intends to revise the Mining Code, which dates from 2002. It aims to increase the royalties paid to the government and therefore increase tax receipts from this sector. Detailed negotiations have taken place between the government, civil society and companies and they have reached agreement on many issues, but the sticking point is taxes and duties. At the time of writing this report, the government has yet to publish a bill.

However, the present Mining Code provides for a **ten year** transition period in the event of any legislative changes (stability clause<sup>53</sup>). This clause applies to all rights granted to operators, notably with regard to tax and customs arrangements. It was included to protect the interests of investors. Glencore and all the other companies have already put pressure on the government to comply with the stability clause<sup>54</sup>. We will therefore have to wait until at least 2024 for the new Mining Code to apply to Glencore.

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<sup>53</sup> Mining Code, art. 276.

<sup>54</sup> Congo Government Closer to Deal With Miners on Code Change, Bloomberg, 21 March 2014.

## 2. Glencore's approach to corporate responsibility: What has changed?

In May 2013 Glencore merged with Xstrata and since then the company has been engaged in a lengthy process of developing and rolling out its policies for the Group. This chapter looks at how Glencore's policies on human rights and corporate responsibility have evolved over the past two years.

### 2.1. Rudimentary Beginnings

In 2011-2012, as the previous report by Bread for All and Fastenopfer noted, Glencore's policies on corporate responsibility were relatively few and under-developed. A 2011 comparative survey of 23 mining companies described Glencore's corporate social responsibility (CSR) strategy as 'rudimentary or even non-existent' and ranked 'the No. 1 player in the mining sector' last of all for its reporting on environmental, social and governance issues.<sup>55</sup> In its first sustainability report the company announced the roll-out of the Glencore Corporate Practice (GCP), a corporate sustainability framework, which it said was designed to align with internationally agreed standards:

GCP helps us to achieve responsible, sustainable and successful business conduct and to improve our performance every day. It is adhered to by all, from the highest level of Glencore's management to individual employees in our operations around the world. Its requirements are mandatory and help us meet both our own objectives and the public's expectations.<sup>56</sup>

However, as Bread for All and Fastenopfer<sup>57</sup> noted, on closer examination the GCP was found to be of a general nature and references to key international human rights texts or standards were largely missing. This meant that it was difficult to ascertain whether Glencore was genuinely committed to respecting the human rights and environmental standards set out in a range of international treaties and instruments. Instead, Glencore appeared to be defining its own framework 'using vague words and imprecise concepts'.<sup>58</sup> The human rights references that were mentioned related to a narrow range of prohibitions against forced labour and child labour and included a few labour rights. But the broader social and economic rights, such as the right to water and right to food or the concept of free prior and informed consent (FPIC) were conspicuous by their absence. Nor did Glencore wholeheartedly espouse the Performance Standards of the World Bank's International Finance Corporation (IFC), specifically designed for private sector projects. In 2011 Glencore stated – with a lack of regard for the views of wider stakeholders – that its subsidiaries had embarked on 'a self-assessment exercise' the results of which would be used to define measurable objectives and more detailed comparisons.<sup>59</sup> In terms of its policies and adherence to accepted international standards, including the OECD Guidelines for Multinational Enterprises, Glencore was perceived to be lagging behind other major mining companies operating in the DRC such as Freeport McMoran and First Quantum.

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<sup>55</sup> Novethic and be-linked: The Listed Mining Sector & ESG Risks: Influence of NGOs on the Business and Reputation of Mining Companies, September 2011, pp. 28-29. Available at: [http://www.novethic.com/novethic/v3\\_uk/upload/Mining\\_Sector\\_ESG\\_Risks\\_2011.pdf](http://www.novethic.com/novethic/v3_uk/upload/Mining_Sector_ESG_Risks_2011.pdf).

<sup>56</sup> Glencore Sustainability Report 2010, p. 57.

<sup>57</sup> Bread for All and Fastenopfer, the Swiss Catholic Lenten Fund, Glencore in the Democratic Republic of Congo: profit before human rights and the environment, April 2012, p. 56.

<sup>58</sup> Bread for All and Fastenopfer, the Swiss Catholic Lenten Fund, Glencore in the Democratic Republic of Congo: profit before human rights and the environment, April 2012.

<sup>59</sup> Glencore Sustainability Report 2010, p. 31.



## 2.2. Post-Merger Catch-Up

The 2012 Sustainability Report<sup>60</sup> showed some progress in terms of policies. The aim of the report was to demonstrate how the two companies had performed in general and against specified targets as well as giving an overview of the enlarged group's approach to sustainability which it claimed 'brings together the best from both companies'.<sup>61</sup> The merged company, possibly reflecting the influence of Xstrata on its policies, revealed that it had updated its statement of values<sup>62</sup> and code of conduct. It also stated that it would apply to join the Voluntary Principles on Security and Human Rights (Xstrata had been admitted just before the merger). In addition, a formal group human rights policy was to be developed, which would be aligned with the UN Guiding Principles on Business and Human Rights (endorsed by the Human Rights Council in June 2011).<sup>63</sup> The company's responsibility to be a good corporate citizen and contribute to the socio-economic development of host communities, including through community investment programmes and paying taxes and royalties, was also highlighted:

'Our Code of Conduct requires our businesses to seek out, undertake and contribute to activities and programmes that improve the quality of life for the communities who live near to our operations.'<sup>64</sup>

By the end of 2013, as Glencore's most recent Sustainability Report shows, the GCP has been refined and now represent not only Glencore's commitment to upholding good business practices but also 'to meeting or exceeding applicable laws and other external requirements'. The GCP is supposed to provide all employees 'with clear guidance on the societal, environmental and compliance standards' the group's operations are expected to meet. Glencore, in line with the UN Guiding Principles, also recognises its responsibility to try and ensure that its customers, suppliers, agents, service providers and contractors maintain business practices and workplaces that comply with the GCP.<sup>65</sup>

During 2013 Glencore issued policies on environmental management, community and stakeholder engagement and human rights, the latter a prerequisite for membership of the Voluntary Principles. It has also begun to implement the Voluntary Principles in its operations in the Democratic Republic of Congo (DRC), Bolivia and Colombia. In May 2014 Glencore joined the International Council on Mining and Metals (ICMM), which aims to improve sustainable development performance in the mining and metals industry. Glencore is currently reviewing and strengthening the complaints and grievance mechanisms to protect their stakeholders' right to remedy.

Clearly a great deal of effort has been expended over the past two years – particularly by the Sustainability Department – to update and improve the group's policies and bring them into line with international standards and best practice.

## 2.3. Performance Targets and Problem Areas

Glencore key sustainability targets for 2012 and 2013 include achieving zero fatalities in its operations, supporting community health programmes in areas such as HIV/AIDs and malaria, allocating 1% of Group profits for community investment activities and preventing major environmental incidents. As regards human rights, its main targets are achieving corporate membership of the Volun-

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<sup>60</sup> Glencore Xstrata 2012 Sustainability Report.

<sup>61</sup> Glencore Xstrata 2012 Sustainability Report, p. 3.

<sup>62</sup> Glencore's Values are: Safety, Entrepreneurialism, Simplicity, Responsibility and Openness.

<sup>63</sup> See United Nations Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2011 (UN Guiding Principles): [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>64</sup> Glencore Xstrata 2012 Sustainability Report, p. 4.

<sup>65</sup> Glencore Xstrata 2013 Sustainability Report, p. 13.

tary Principles, and integrating these into their security arrangements. Glencore confirms that it is reviewing its contracts with private security providers and strategies for engagement with public security for operations in the DRC, Bolivia, Peru and Colombia.<sup>66</sup>

As with most such exercises, many of the targets are process orientated. Other targets are not readily measurable or are too general to be verified or meaningful. The main exception is the information on its zero fatalities goal: 26 fatalities were reported during 2013.<sup>67</sup> Despite the serious challenge that artisanal and small-scale mining activities represent in some countries, including the DRC, no overall strategy appears to have been developed and no targets have been set.

During Bread for All, Fastenopfer and RAID's visit to Glencore's mines and installations in the DRC - the Kamoto Copper Company (KCC) and Mutanda Mining (MUMI) – the attitude of staff seemed somewhat defensive. They were anxious that the impact of the companies' operations and activities should be viewed not in the light of actual performance but rather as 'a work in progress' whereby improvements were being brought about in a difficult and complex context.

Throughout your visit, we were frank and open in our description of the current situation, as well as our plans for the future. We also emphasized our interest in a constructive and informed partnership, and requested your feedback on various aspects of our approach to the management of community and environmental issues.<sup>68</sup>

There is little doubt that Glencore has made great strides in integrating many relevant international standards into its policies but questions remain about its capacity and resolve to translate these into effective action in its day-to-day operations. Glencore appears to want to change the public perception of the company as a closed and secretive commodities trader and make a fresh start. Over the past two years it has shown itself much more willing to engage in public debates and enter into more open communication with its critics. This report has highlighted deficiencies in Glencore's approach to corporate responsibility. Bread for All, Fastenopfer and RAID hope that this report will not only help Glencore identify problems besetting its DRC operations but also, and, more importantly, to remedy them.

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<sup>66</sup> Glencore 2013 Sustainability Report, p. 18.

<sup>67</sup> Ibid., p. 16.

<sup>68</sup> Glencore Xstrata Response to Post-Visit Feedback, 31 January 2014.

### 3. Environment

#### 3.1. Management of mining effluent: pollution of water courses and broken promises

##### 3.1.1. Water in Katanga

The Democratic Republic of Congo (DRC) is extremely rich in water “blue gold”: it accounts for 52% of Africa’s surface water reserves and 23% of its water resources.<sup>69</sup> Rainfall is frequent and abundant, particularly between November and March, and many streams feed the country’s rivers.



Picture 5: The River Congo

(Photo: <http://bakuba.eklablog.com/fleuve-congo-c20923131>)

However, the country’s people do not have much of a share in this wealth: in 2010, only 26% of the population (17.6 million out of a total of 67.8 million) had access to safe drinking water,<sup>70</sup> which means that 50 million people face a daily struggle because they do not have access to healthy water. These statistics are well below the averages for sub-Saharan Africa, where about 60% of the population has access to drinking water. They reveal a problem of water governance, management and distribution in the DRC.

The situation in Katanga Province is not much different from that of the country as a whole. The River Luabala, the main source of the River Congo, rises in the heart of the province, a few dozen kilometres from the city of Kolwezi. The region is an important water source, the subsoil is full of caves and subterranean lakes and rivers, but only 29% of the population have access to drinking water.<sup>71</sup>

In the province’s villages and old mining townships, the state-owned water distribution company, REGIDESO, is unable to maintain the water supply infrastructure installed by Gécamines. Along the roads, there is a continuous procession of women, children and young people carrying yellow containers and looking for water, sometimes walking several kilometres. Each container weighs between five and ten kilos. In some villages, residents have to pay in order to fill their containers.

<sup>69</sup> Water issues in the Democratic Republic of the Congo. Challenges and opportunities, p. 9, United Nations Environment Programme, January 2011.

<sup>70</sup> Ibid., p. 26.

<sup>71</sup> République Démocratique du Congo. Plan quinquennal de développement, 2011-2015, p. 20.



Picture 6: Women carrying water in Likasi  
(Photo: C.Peyer/BFA)

However, REGIDESO's governance and funding problems are not the only reasons for the lack of access to drinking water. In Katanga, mining companies are responsible for a major pollution problem. For many years, industrial and artisanal mining concerns have been discharging large quantities of acid, mercury, copper and cobalt into water courses. Industrial accidents are common and many factories do not treat their effluent before discharging it into the rivers. A study by the United Nations Environment Programme (UNEP) revealed the extent of the problem: 'Most mining operations in Katanga are open pit mining causing extensive land and landscape degradation. An environmental sampling study [...] showed that surface water pollution close to tailing and waste sources is extensive, with the main concerns arising from copper and cobalt.'<sup>72</sup> The report went so far as to say that 'pink poisons threaten Katanga's rivers and groundwater'<sup>73</sup>, because of the cobalt, zinc and copper salts that accumulate along the river banks and are washed back into the system during the rainy season. The results of UNEP research, showing high levels of water pollution in Katanga, have been confirmed by several recent scientific studies<sup>74</sup>, which express concern about the dangers this pollution poses to public health. Analysis of the urine of villagers living close to mining sites, conducted in 2009, showed very high levels of heavy metals, especially in children. The concentrations of cobalt were the highest recorded levels in the world<sup>75</sup>. These results are worrying because cobalt poisoning can damage the heart and the thyroid gland, cause lung disease and increase the risk of asthma and allergies.

### 3.1.2. KCC and water pollution in Kolwezi: the situation in April 2012

The Glencore subsidiary, Kamoto Copper Company (KCC), is the largest industrial mining operator in the Kolwezi region. During the five years to 2013, production at the site's two plants, the Kamoto

<sup>72</sup> The Democratic Republic of Congo. Post-Conflict Environmental Assessment. Synthesis for Policy Makers, p. 32, United Nations Environment Programme, October 2011.

<sup>73</sup> Ibid., p. 33.

<sup>74</sup> Concentration of metals in surface water and sediment of Luilu and Musonoie Rivers, Kolwezi-Katanga, DRC, Applied Geochemistry, Emmanuel K. Atibu, Félroian Thevenon, John Poté, October 2013. Economic and Toxicological aspects of copper industry in Katanga, DR Congo, John Ngoy Kalenga, Japanese Journal of Veterinary Research 61 (Supplement), pp. 23-32, 2013.

<sup>75</sup> High Human exposure to cobalt and other metals in Katanga, a mining area of the Democratic Republic of Congo, Lubaba Nkulu Banza, Célestin, Nawrot, T., Haufroid, V., Decréed, S., De Puttere, T., Smolders, E., Ilunga Kabyla, Benjamin, Numbi Luboya, Oscar, Ndala Ilunga, Augustin, Mwanza Mutombo, Alain, Nemery, B., Environmental Research, 2009, 109, pp. 745-752.

concentrator and the Luilu hydro-metallurgical plant, doubled to more than 136,000 tonnes of copper. In order to manufacture copper cathodes for export, the two plants use a complex industrial process that requires the use of various chemical products. Tonnes of oil and acid are used to process the rock to produce copper cathodes, and hundreds of thousands of litres of water containing heavy metals form the effluent discharged from these plants. Management of this waste by KCC is of major significance for the environment and public health in the Kolwezi region.

Despite this issue's importance, the Glencore subsidiary has been slow to take measures to manage its waste responsibly. A study published by Bread for All and Fastenopfer in April 2012<sup>76</sup> showed that the Luilu hydro-metallurgical plant discharged untreated effluent into the river and that KCC failed to comply with any of the environmental standards in force. The samples taken at the time showed an extremely low pH of 1.9. The analyses also showed lead, copper, cobalt, nickel and zinc concentrations well above the permitted levels in the DRC<sup>77</sup>. For example, the copper (2.5 mg/l) and zinc (9.4mg/l) concentrations were eight times higher than levels permitted by DRC mining regulations. Nickel (2.7mg/l) and lead (1.7mg/l) concentrations were respectively five and three times higher than permitted levels.

At the time, Glencore recognised the problem and offered an explanation and a potential solution. First, it stated that it had inherited a pollution problem from Gécamines: 'The Luilu operations have been disposing of untreated waste water into the Luilu River ever since operations began over 50 years ago. KCC is the first and only company to address this issue.'<sup>78</sup> Second, in April 2012, a few days before Bread for All and Fastenopfer published their report and a few days before the BBC broadcast a documentary on the issue, Glencore said it had definitively resolved the problem: 'Glencore agrees that these effluent discharges were not acceptable [...]. Glencore has been working on a complex engineering project, which includes 4,500 metres of intricate steel piping and over 30 specialised pumps, to address this issue [...]. This work has been completed in the past few weeks and all effluent is now delivered to a tailings pond.'<sup>79</sup> The company repeated this statement in its annual sustainability report for 2012: 'Since 2009, Glencore has worked hard to address these legacy issues, including an investment of over \$40 million installing more than 20km of piping infrastructure, a lime plant for neutralisation, a tailings disposal system, specialised pumps and water treatment plants. Through this significant remedial work, all effluent has been fully treated before discharge since April 2012.'<sup>80</sup>

### 3.1.3. KCC and water pollution in Kolwezi: the situation in October 2013

In October 2013, RAID, Bread for All and Fastenopfer undertook a four-point plan to check whether pollution of water sources in Luilu by KCC plants had ceased:

- a visit to the KCC site and installations, including part of the Luilu plant, accompanied by KCC and Glencore representatives;
- a visit to the exterior of the site, including the vicinity of the Luilu hydro-metallurgical plant, accompanied by independent observers;
- interviews with artisanal miners and residents in the vicinity of Luilu;
- scientific analysis of water samples.

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<sup>76</sup> Glencore in the Democratic Republic of Congo: Profit Before Human Rights and the Environment, Chantal Peyer and François Mercier, April 2012.

<sup>77</sup> Ibid., pp. 26-27.

<sup>78</sup> Questionnaire regarding Glencore's investment in the DRC. Answers of Glencore to Bread for All, March 2012.

<sup>79</sup> Glencore's response to up-coming BBC Panorama report, 12 April 2012.

<sup>80</sup> GlencoreXstrata. Sustainability report 2012, p. 44, November 2013.



*Continuing discharge of effluent into the environment*

In various reports and official statements, Glencore has said that 'all effluent is now delivered to a tailings pond'. During our interviews with environmental officials and KCC managers in October 2013, all the company's representatives repeatedly stated that the Luilu plants were operating as closed circuits. They said that all waste was either re-used as part of the plant's production cycle or discharged into the Mupine basin (a closed basin that can hold millions of litres of effluent) and that any continuing pollution of the River Luilu was caused by the activities of other mines and by leaks from various dams, which could introduce traces of heavy metals into the river<sup>81</sup>.



Point where effluent was previously discharged into the River Luilu (photo by Glencore – April 2012).

Photo sent by Glencore in April 2012 to Bread for All and Fastenopfer and international media, indicating that effluent was no longer discharged into the River Luilu via the Albert Canal.

Picture 7: Effluent into the River Luilu

These statements differ from what we discovered in October 2013. When we visited the exterior of the site, accompanied by independent observers, we saw effluent from the Luilu plant being discharged in a torrent from the Albert canal.



Picture 8: KCC plant waste (October 2013)

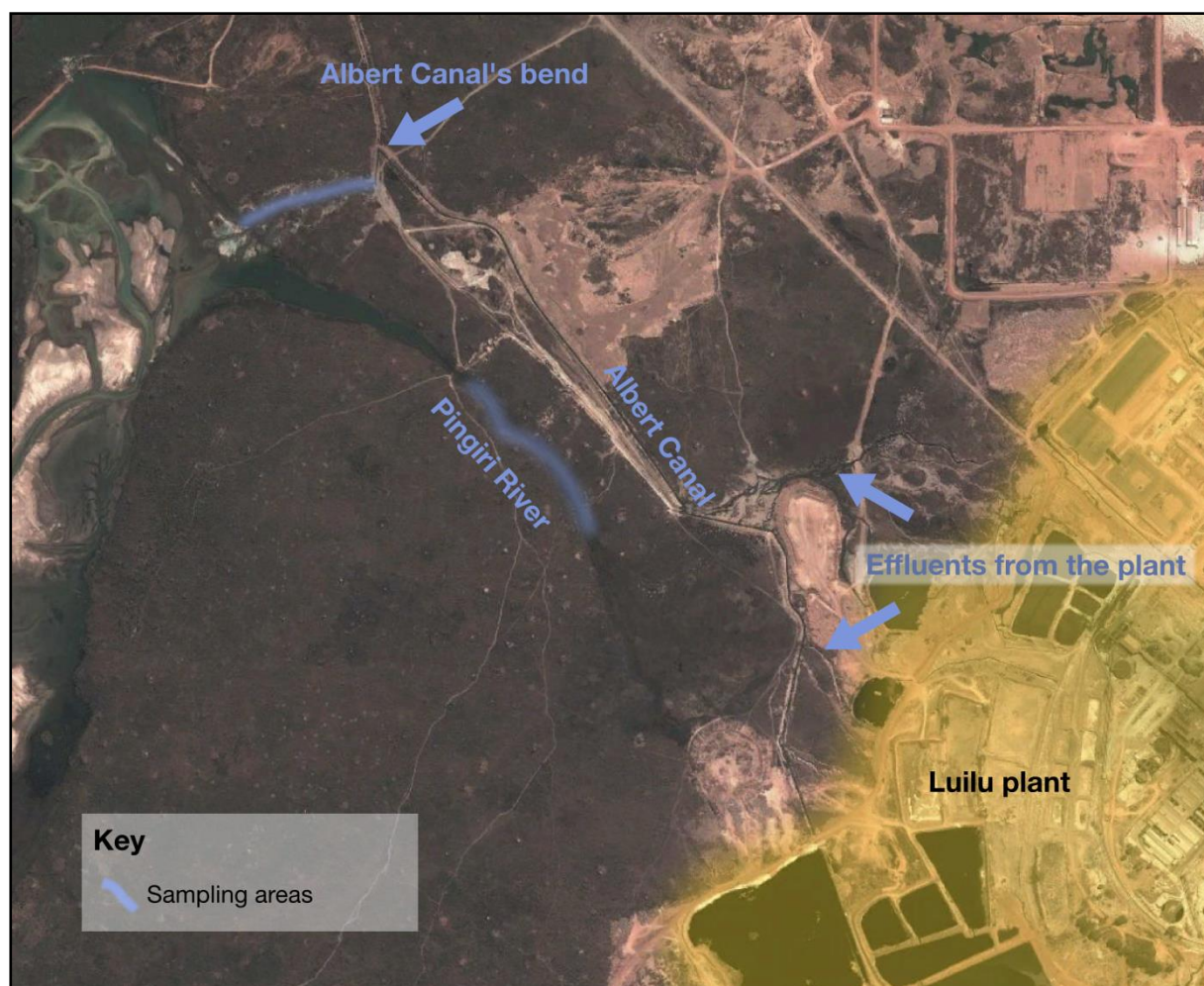


Picture 9: Bend in the Albert Canal, where it has been diverted (October 2013)

<sup>81</sup> Telephone conference with KCC management, November 2013. The CEO referred to pollution caused by Sicomine operations, close to KCC installations. He also emphasised the problem of the PotoPoto dyke, which has leaked several times, causing significant pollution of the river.

When we followed the course of the Albert Canal, we discovered it had been diverted: the channel along which effluent had been discharged into the River Luilu until April 2012 had been blocked and the canal diverted so its contents were discharged into the River Luilu upstream, near the confluence with the River Pingiri.<sup>82</sup> In practice, this means that the KCC plant continues to discharge waste into the River Luilu, only further upstream. The company destroyed the old outlet of the Albert Canal and sent photos to the media in April 2012 showing a dry water course (see photo on the previous page), but in fact the canal had simply been diverted. KCC continues to discharge effluent into the River Luilu.

The continuing discharge of effluent from the plant via the Albert Canal into the River Luilu in October 2013, and the course taken are, moreover, confirmed by satellite images taken in July 2012 and November 2013.



Picture 10: Map of the Luilu plant, Albert canal and Pingiri River  
(Photo: googleearth & M.Butticaz/BFA)

#### *Effluent containing heavy metals*

In October 2013, we took water samples from the Albert Canal, where the water course was diverted (blue line on map: sampling areas – bend in Albert Canal). Other samples were taken from the River Pingiri nearby (blue line on the map: sampling areas - Pingiri river). As the satellite images show, the

<sup>82</sup> Exact GPS locations showing where the water samples were taken in October 2013 and January 2014 are available.

water samples taken can be contaminated only by the Luilu plant, as the water flows directly from the plant.

The collection and analysis of water samples was supervised by Professor Célestin Banza Lubaba Nkulu, toxicology and environment professor at Lubumbashi University. Several water samples were taken at each location chosen for analysis in order to exclude measurement errors. The samples were collected in polystyrene flasks, avoiding all contact with hands, before being transferred with the aid of micropipettes into microtubes and sent to Belgium for analysis at a specialised laboratory<sup>83</sup>.

Results of the analysis (milligrams per litre; values are means of several measurements)

Location	pH	Co	Cu	U	Pb	Cd	As
Albert Canal (where it is diverted)	6.14	53.598	9.927	0.003	0.0033	0.00087	0.0037
River Pingiri	5.2	14.373	6.403	0.0013	0.0037	0.00054	0.0082
Threshold values for waste set by DRC Mining Code <sup>84</sup>	6 - 9		1.5		0.5		0.4
Threshold values for water quality set by the WHO <sup>85</sup>		1	2	0.015	0.01	0.003	0.01

The pH results have significantly improved since April 2012. However, the acid content of the River Pingiri (pH 5.2) is still above the DRC Mining Code threshold for effluent (pH 6 – 9). The analyses show there is no significant contamination from uranium, lead or cadmium. However, concentrations of copper and cobalt in water samples were extremely high. In the case of copper, concentrations in the samples taken from the Albert Canal and the River Pingiri were respectively six times (9.927 mg/l) and four times (6.403 mg/l) higher than the thresholds set by the DRC Mining Code for effluent. They were also above the thresholds set by the World Health Organisation (WHO) for drinking water quality. Cobalt concentrations also gave cause for concern as the results were respectively fifty-three times (53.59 mg/l) and fourteen times (14.37 mg/l) above the WHO thresholds.

The consequences of the contamination of the water by heavy metals are visible to the naked eye: the plants along the entire length of the Albert Canal are literally scorched and the soil is covered in white and blue dust.

<sup>83</sup> Division of Soil and Water Management (Prof. E. Smolders) of the Department of Earth and Environmental Sciences of the University of Leuven (KU Leuven), Belgium.

<sup>84</sup> See: Code minier. Annexe IX. Des directives sur l'étude d'impact environnemental. Article 66, tableau 5. Exigence au point de déversement de l'effluent.

<sup>85</sup> See: <http://www.lenntech.com/applications/drinking/standards/who-s-drinking-water-standards.htm>.





Picture 11: The banks where effluent is discharged from the canal (October 2013) after diversion of the Albert Canal

(Photo: C.Peyer/BFA)



Picture 12: Damage caused by effluent from the Luilu plant after the bend in the Albert Canal (October 2013)

(Photo: C.Peyer/BFA)

#### 3.1.4. KCC and water pollution in Kolwezi: the situation in Januar-March 2014

In January and March, further field research missions discovered that KCC had built two new retention basins in front of the plant. Effluent is now discharged into these basins before being discharged into the River Luilu, via the Albert Canal and other small water courses.

In January 2014, water samples were taken at the outlet of these basins, at the bend in the Albert Canal and in the River Pingiri.

Results of these analyses (milligrams per litre; values are means of several measurements)

Location	pH	Co	Cu	U	Pb	Cd	As
In front of the plant, outlet of the basins	6.14	51.605	15.205	0.0074	0.002	0.0008	0.0105
Albert Canal (where it is diverted)	6.4	38.146	7.104	0.0015	0.0025	0.0006	0.0028
River Pingiri	5.61	13.993	5.433	0.0014	0.0031	0.0003	0.0094
Threshold values for waste set by DRC Mining Code	6 à 9		1.5			0.5	0.4
Threshold values for water quality set by the WHO		1	2	0.015	0.01	0.003	0.01

Analyses showed that the pH value for effluent discharged into the Albert Canal was within acceptable levels, but the pH for the River Pingiri was too low at 5.61. This means there are still discharges of effluent that are too acidic. On the other hand, the analyses did not show contamination by uranium, lead or cadmium. However, despite some sedimentation in the basins, the copper and cobalt concentrations remained extremely high and were well above DRC legal thresholds and WHO recommended thresholds. The copper concentration in the effluent closest to the plant was ten times higher than the threshold set by the DRC Mining Code. At the bend in the Albert Canal, about 400 metres from the plant, the copper concentration was still five times too high (7.1 mg/l). In the River Pingiri, the copper concentration was three times higher than the threshold (5.433mg/l). The samples showed that levels of cobalt were respectively fifty-one, thirty-eight and fourteen times above thresholds set by the WHO for drinking water.

### 3.1.5. Glencore's response

Questioned about the results of our analyses, which showed copper and cobalt concentrations above legal thresholds, Glencore said that it regularly monitors the situation and has not noted the pollution: 'Water monitoring is regulated by mining legislation. We monitor water on a daily, monthly and quarterly basis and we have sampling points within and outside the concession, including several locations for the monitoring of Luilu river. Analyses are reviewed periodically by the DPEM. We cannot comment on the results of the water analysis, as referred to in the questions posed to us by Bread for All, as these have not been shared with us. Analysis undertaken by our laboratory does not indicate a breach of regulatory or international limits with regard to arsenic. It should be noted that arsenic is not used in any process at KCC. We have no indications of a discharge in October 2013.'<sup>86</sup>

The company also explained that it had introduced systems to neutralise and treat acid in 2012: 'Part of Phase IV of the refurbishment of Luilu was the development of the neutralisation system. The project started in August 2011 and ended in February 2012, at early stage of Phase IV. Since then, KCC has expanded neutralisation capacity even further through the construction of a new lime storage facility and lime plant.'

<sup>86</sup> Glencore response to Key Findings and Questions presented by Bread for All, the Swiss Catholic Lenten Fund and RAID on 5 May 2014.



'In line with international mining practice, all waste from the KTC concentrator is settled prior to discharge, while waste from the Luilu plant, which contains traces of heavy metals, is neutralised and seprior to discharge.'<sup>87</sup>

Finally, the company stated that other operators are undoubtedly causing the pollution: 'KCC has implemented several emergency ponds around the concession that we use to prevent discharge in the Luilu river, especially during power cuts from SNEL or plant shutdown. However, it should be noted that KCC is not the only operator in the area, and cannot take responsibility for any discharge that may occur as a result of the operations of other companies.'<sup>88</sup>

### 3.1.6. Contamination of water courses by copper, cobalt and arsenic – consequences for the population

Pollution of the River Luilu, to which Glencore contributes, has many consequences. First, it destroys the river's fauna and flora. Several kilometres of the river banks look like scorched earth. The remains of scorched plants bear witness to the water's toxicity, and grass can no longer grow in the arid soil, contaminated by metals. In the water, blue foam betrays traces of copper, and white salts on the river banks reveal the presence of toxic concentrations.



Picture 13: Traces of copper (October 2013)



Picture 14: Infertile soil on the river banks (Oct. 2013)

(Photo: C.Peyer/BFA)

Second, pollution interferes with the surrounding population's right of access to water. In the city of Luilu, just below the plant, more than 38,000 residents could use the river's water for their daily needs if it were not so polluted and contaminated by heavy metals. Third, pollution has a negative impact on local people's sources of income. There are virtually no viable fields near Luilu and Musonoi, because of the presence of mining companies and their impact.. Using water from the river would contaminate the crops with heavy metals. The raised metal concentration is also a threat to livestock and wildlife. Fourth, and finally, pollution represents a danger to human health. There are direct risks, if the water is consumed. There are indirect risks caused by bio-concentrations in aquatic organisms and bio-accumulation in the food chain. 'The fish in these waters are contaminated with metals, and consuming them over the long term could have serious public health consequences', says toxicology professor, Célestin Banza Lubaba Nkulu<sup>89</sup>. As already highlighted in the introduction, high levels of cobalt in humans could cause heart and thyroid problems and lung disease. A recent study on pollution of the Luilu and Musonoi rivers confirmed that industrial effluent is causing seri-

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> La contamination du réseau hydrologique du District Urbano-rural de Kolwezi par des éléments de trace métalliques, Célestin Banza Lubaba Nkulu, 2014.

ous contamination of water courses and could have a dangerous impact on health: 'The results of this study suggest that the mining effluents being discharged into the rivers and the accumulation of pollutants in sediments might represent a source of toxicity for aquatic living organisms and could pose significant human health risks.'<sup>90</sup>

### 3.1.7. Glencore and pollution of water courses – some concluding remarks

Investigations into environmental issues have revealed a gap between Glencore's claims that pollution of the River Luilu is a legacy of Gécamines and that the matter is now completely resolved and the reality on the ground. Rather than providing a transparent explanation of the measures taken by KCC to deal with the pollution, and of the challenges that remain, company representatives, in both their reports and their discussions with us, continue to paint a picture of an exemplary company that has everything under control. However, this idyllic portrait is contradicted by the facts, as revealed by satellite images and the analysis of water samples.

Glencore has told its investors: 'two of our most important sustainability challenges are protecting maritime and inland waters and maintaining access to high-quality water. We prioritise water reuse or recycling, the efficient use of water, responsible disposal of waste water and maintaining the integrity of any equipment that may pose a hazard to water quality. We also interact closely with local communities regarding their collective interests in water and preserving fresh water sources.'<sup>91</sup> The company also claims to observe the OECD Guidelines for Multinational Enterprises. These guidelines state that: 'Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.'<sup>92</sup>

However, the reality is completely different. KCC investment, notably in acid neutralisation basins and the construction of pipelines to the Mupine basin is not enough. Significant levels of pollution, above legal thresholds and all international standards, continue to occur at the Luilu plant. This was indirectly confirmed by the director of the Katanga office for mining and the environment<sup>93</sup> when explaining he had been told that KCC had built two new watertight basins at the end of 2012 to neutralise liquid acids: 'The acid is neutralised and reused in the plant cycle, but there is a problem related to quantity. There is sometimes too much liquid. The plant produces more waste than it can reuse. Then there is the rainfall. The basins can therefore overflow.' Observations by Bread for All, Fastenopfer and RAID show that the problem is not simply occasional: there is a permanent overflow. This means that Glencore continues to rely on inadequate environmental management solutions. Rather than making investments to stop the pollution once and for all, the company has put in place partial solutions and continues to discharge effluent containing heavy metals into the environment. This is not because of a lack of resources. It is a question of priorities: Glencore continues to make financial savings to the cost of the environment.

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<sup>90</sup> Concentration of metals in surface water and sediment of Luilu and Musonoie Rivers, Kolwezi-Katanga, DRC, Applied Geochemistry, Emmanuel K.Atibu, Florian Thevenon, John Poté, October 2013.

<sup>91</sup> GlencoreXstrata. Sustainability report 2012, p. 41, November 2013.

<sup>92</sup> See: OECD Guidelines for Multinational Enterprises. Chapter VI Environment. Introduction.

<sup>93</sup> Interview with Léon Amisi Satughimbo, director of the Katanga office for mining and the environment, 12 March 2014. Mr Amisi has carried out several audits of KCC for the Ministry of Mines.

## 3.2. MUMI: a concession in a game reserve

### 3.2.1. Game reserves in the DRC

In recent decades, in order to safeguard the fauna and flora that form our planet's rich biodiversity, governments introduced the idea of maintaining protected areas. At the end of the 1980s, scientists observed that 34,000 plant species and 5,200 animal species, including several species of birds, in the world, were at risk of extinction. They also estimated that human activities would result in a dramatic reduction in biodiversity over a relatively short space of time.<sup>94</sup> At the Earth Summit in 1992, Heads of State reached agreement on a certain number of principles for inclusion in a Biodiversity Convention. Among them was a commitment to create protected areas in order to 'promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings'.<sup>95</sup>

There are three types of protected areas in the DRC: national parks, their buffer zones and game reserves. Their management and their special characteristics are defined in various laws, notably the Nature Conservation Act, 1969, which has recently been revised by the DRC parliament,<sup>96</sup> and Law 82-002 regulating game reserves, (1982)<sup>97</sup>. The game reserves were created to protect wildlife. Villagers and other traditional inhabitants are allowed to live within the reserves and to fish and hunt, but no organised sporting or commercial hunting can take place. No new human activity is allowed in the reserves:

Law regulating game reserves. Article 14

All modifications of human activities existing at the time that the present law comes into force shall be forbidden in total or partial reserves, including:

- a) Displacement of settlements
- b) Immigration of population groups or the creation of new settlements
- c) Clearing of woodlands and, in general, all activities that risk disturbing the tranquility, development and use of the fauna.

The clearing of woodlands and the development of large-scale economic activities, including mining, is therefore prohibited in these reserves. This is restated in article 3 of the Mining Code: 'mining or quarrying rights cannot be granted in a protected area and artisanal production is also prohibited.'<sup>98</sup>

There are many game reserves in the DRC. They were all created by national or provincial decrees. A comprehensive list of these reserves was included in article 3 of the Mining Code, after it states the prohibition of mining activities within protected areas:

The present decree considers all the following to be protected areas: national parks, notably Virunga, Garamba, Kundelungu, Maïko, Kahuzi-Biega, Okapi, Mondjo, Upemba and Moanda; the game reserves, notably Azandé, Bili-Uélé et Bomu, Gangala na Bodio, Maïka-Pange, Mondo-Missa, Rubi-Tele, **Basse-Kando**, Bena-Mulundu, Bushimaie, Lubidi-Sapwe, Mbombo-Lumene, Luama, Rutshuru, Sinva-Kibali and Mangai ; the reserves, notably the N'sele presidential park, the reserves of Srua-Kibula, Yangambi, Luki, Lufira, the conservation areas and zoological and botanical gardens of Kinshasa, Kisangani, Lubumbashi, Kisantu, Eala. In the event of a change in national circumstances or needs, a protected area can be declassified using the same procedure for classification set out in the first paragraph above.

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<sup>94</sup> See the website of the Convention on Biodiversity:

<http://www.cbd.int/convention/guide/default.shtml?id=changing>.

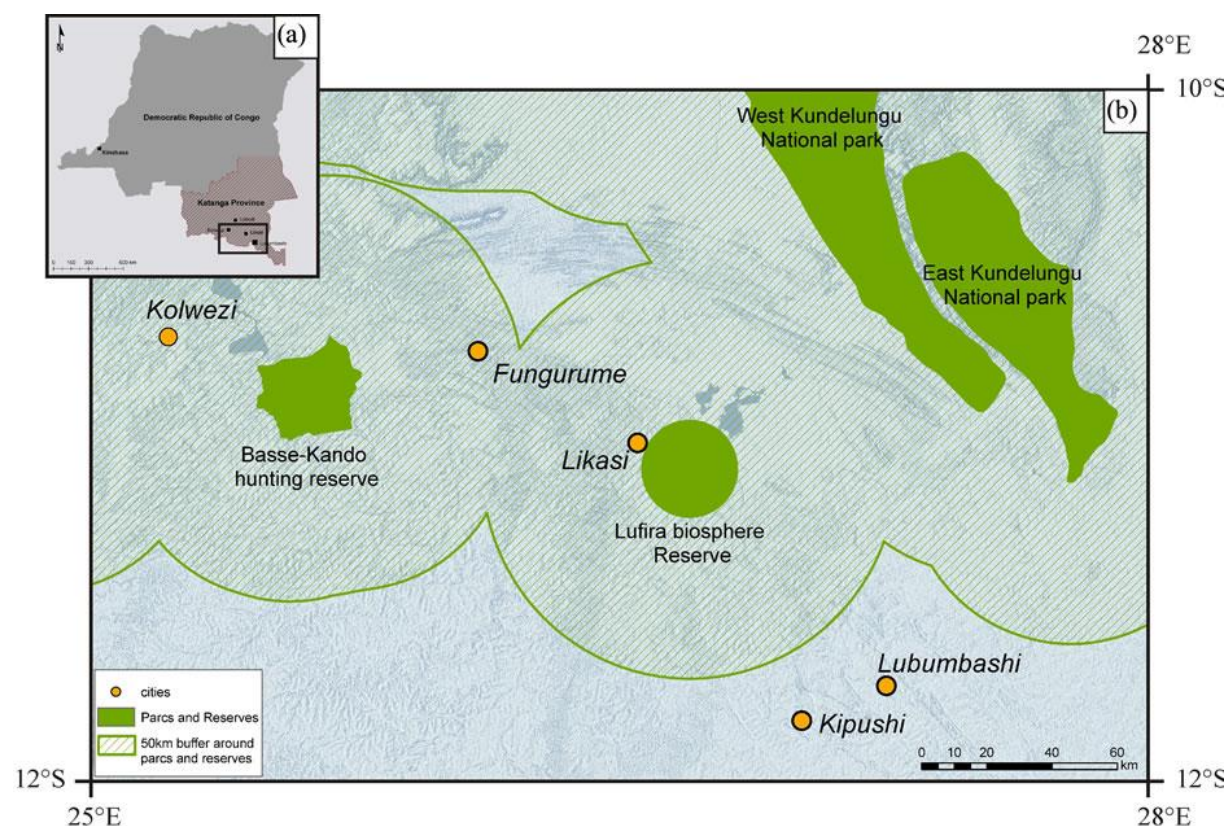
<sup>95</sup> See: Convention on Biological Diversity, article 8 d., United Nations, 1992.

<sup>96</sup> See: <http://www.leganet.cd/Legislation/Tables/droitdelenvironnement.htm>.

<sup>97</sup> See: <http://www.leganet.cd/Legislation/Droit%20economique/Chasse/Loi.82.002.28.05.1982.htm>.

<sup>98</sup> See: Law 007 of 11 July 2002 on the Mining Code. Article 3. Protected Areas. Also see: Law 11/009 of 09 July 2011 on the fundamental principles relating to the protection of the environment. Article 33.

This list includes the Basse-Kando reserve, which was created in 1957 by provincial decree 52/48 of 27 March 1957<sup>99</sup>. Its existence was confirmed by a ministerial decree issued in December 2006<sup>100</sup>. The reasons for the creation of this reserve included the protection of elephants and hippopotamus, which are numerous in this region.



Picture 15: Kolwezi region and location of the Basse-Kando reserve<sup>101</sup>

(Photo: 2013 Laëtitia Dupin et al.)

### 3.2.2. MUMI: a concession in a game reserve

What is the connection between this reserve and Glencore's mining operations in Katanga? The connection is simple: the Mutanda Mining (MUMI) concession is in the middle of the Basse-Kando reserve, as the map below shows. It is therefore in a protected area, in which all new economic activity is prohibited. To put it another way, the concession contravenes DRC law. The perimeter of the MUMI concession is shown in blue on the map below. The perimeter was drawn using GPS coordinates available on the website of the Mining Register (Cadastre Minier – CAMI)<sup>102</sup>. The boundary of the Basse-Kando reserve is shown in red and was drawn using data set out in the provincial decree of 1957 and information provided by the Congolese Institute for Nature Conservation (ICCN) in Kolwezi and Lubumbashi.

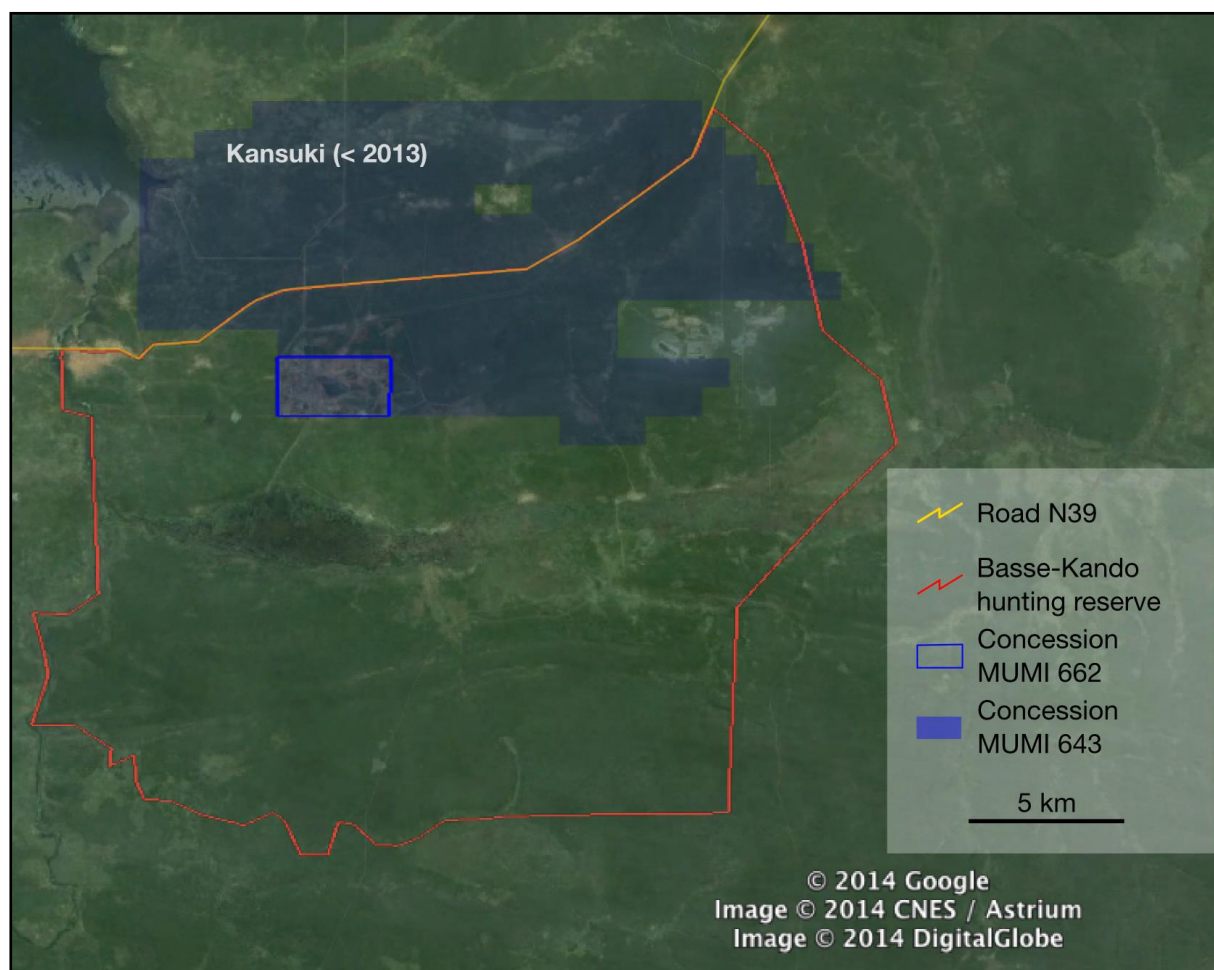
<sup>99</sup> See: Decree 52/48 of 27 March 1957 creating the Basse-Kando reserve.

<sup>100</sup> See: Ministerial Decree 055/CAB/MIN/ECN-EF/2006 of 07/12/2006 amending decree 052/48 of 27 March 1957 creating a game reserve in Kolwezi and Lubudi territories.

<sup>101</sup> Diagram from the article: Land Cover Fragmentation Using Multi-Temporal Remote Sensing on Major Mine Sites in Southern Katanga (Democratic Republic of Congo), Laëtitia Dupin, Collin Nkono Christian Bulet, François Muhashi, Yves Vanbrabant, Royal Institute of Natural Sciences, Brussels, Belgium, Brussels Environment, Brussels, Belgium, BNS/Convention on Biological Diversity, Brussels, Belgium.

<sup>102</sup> See: concession 643 MUMI Sprl: <http://portals.flexicadastre.com/drc/en/>. Ce site, très bien conçu permet d'obtenir les coordonnées GPS précise de chaque concession minière attribuée au Katanga.





Picture 16: Map of the Basse-Kando Hunting Reserve and of the MUMI concession

The map clearly shows that the MUMI concession is cut in two by the national road (yellow). The northern part, outside the boundaries of the reserve, is the old Kansuki Sarl concession, which was merged with MUMI Sarl in 2013<sup>103</sup>. Mining has not begun on this land. The lower part, to the south of the national road, is the historic MUMI concession. The company's main operations have been conducted within the boundary of the MUMI concession 662 (blue), which is in the middle of the reserve. Lorries and bulldozers work 24 hours a day to extract copper from opencast mines. The company has built two hydro-metallurgical plants, a residential area for expats, administrative buildings, a canteen, a sports centre and a hospital. The company has invested millions of dollars to build a mining village in less than five years. However, one problem remains unresolved: the site and all the buildings are illegal under the DRC Mining Code and the law on environmental protection. The situation is grotesque. Moreover, MUMI is not the only company in this situation: other companies, including Chemaf, Somidec, MKM, Gécamines, Comide and Kimin also have concessions in the reserve. However, most of these companies are at the exploration stage. MUMI was the first company to begin industrial operations on a large scale in the protected Basse-Kando reserve.

<sup>103</sup> Glencore Xstrata plc: Merger of Mutanda and Kansuki mining operations, GlencoreXstrata, 25 July 2013 and RD Congo: Glencore Xstrata fusionne les filiales Mutanda Mining et Kansuki, Agence Ecofin, 27 July 2013.



Picture 17: Water pumping station for MUMI plant on the banks of the River Kando  
(Photo: C.Peyer/BFA)

### 3.2.3. Glencore's response

What does the company say about the situation? In April 2012, when Bread for All and Fastenopfer first raised the issue in their report<sup>104</sup>, Glencore said it was not clear whether the MUMI concession was located in the reserve. The company said that the reserve's boundaries were vague and its very existence questionable and that nobody knew exactly where the boundaries were or whether the reserve still existed. This is not the first time this argument has been put forward. CAMI has used the same argument to defend itself from accusations that it wrongly granted concessions in the Basse-Kando reserve and the Ministry of Mines has done the same to explain the confusion surrounding these operations today<sup>105</sup>. However, the March 1957 decree defined the boundaries of the reserve and the December 2006 ministerial decree confirmed its existence. Finally, ICCN maps show the exact boundaries.

MUMI now recognises the reserve's existence and admits that it has mining operations in the area. However, it says that the responsibility for this situation lies with CAMI and the Ministry of Mines, which granted the licences. Company representatives point out that it acted with due diligence to obtain the operating licences and that the Ministry of Mines gave its authorisation. 'We refute that there was any exploitation of ambiguities in the mining law. The mining law is very clear in that the *Cadastre Minier* grants all mining licences in accordance with the laws of the country including the Mining Code. In addition, our operations fall under the Ministerial direction of the Minister of Mines.'<sup>106</sup> MUMI representatives say that any differences of opinion between the Ministry of Mines and the Ministry of the Environment are an internal problem for the Congolese government<sup>107</sup>. The company also states that the administrative authorities responsible for verifying its environmental and social impact studies never raised any issues about the reserve. Finally, the company states that it hopes the revision of the Mining Code will help to clarify the jurisdictions of government agencies and decide which one is responsible for granting concessions and according to what procedures.

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<sup>104</sup> Glencore in the Democratic Republic of Congo: Profit Before Human Rights and the Environment, pp. 31-32, Chantal Peyer and François Mercier, April 2012.

<sup>105</sup> See: L'exploitation minière, une menace pour les aires protégées du Katanga. Cas de Phelps Dodge Congo à la Basse-Kando, p. 16, PREMICONGO, December 2013.

<sup>106</sup> Glencore response to Key Findings and Questions presented by Bread for All, the Swiss Catholic Lenten Fund and RAID, 5 May 2014.

<sup>107</sup> Interview with MUM representatives, 10 October 2013.



### 3.2.4. MUMI: a policy based on *fait accompli* rather than dialogue to clarify the situation

RAID, Fastenopfer and Bread for All believe the situation is more complicated. These non-governmental organisations believe it is unacceptable that CAMI granted licences to operate in this reserve. Especially since the decree issued by the Ministry of the Environment in 2006 was specifically designed to clarify the situation and reaffirm the status of the Basse-Kando reserve. CAMI's policy is also at odds with the Congolese government's aim of increasing the total protected areas from 11% to 15% of national territory. Finally, these non-governmental organisations find it incomprehensible that the Ministry of Mines did not raise this issue when evaluating the environmental impact study presented by MUMI. Nevertheless, MUMI is also responsible. In fact, MUMI managers have known for a long time that the company is operating in a reserve and therefore operating illegally and they have done nothing to clarify the situation. On the contrary, they have taken advantage of incoherence within the Congolese government to establish a long-term presence and have refused to enter into a dialogue with those responsible for protecting the site.

The facts of the matter are these. As long ago as 2006, the ICCN representative responsible for the protection of Basse-Kando notified Groupe Bazano, the first owner of the concession and commercial partner of Glencore in MUMI sprl, that it was infringing Congolese law on protected areas: 'Dear Sir, I have the honour of informing you that during my inspection, conducted in accordance with my jurisdiction, I noted your violation of the Basse-Kando reserve. You have committed the following offences:

1. Occupation of 50 hectares of the reserve without authorisation,
2. Interference with nature in the reserve,
3. Deforestation,
4. Construction of a road within the reserve.<sup>108</sup>

In 2006, Bazano had still not built heavy infrastructure on the site. Operations remained embryonic and artisanal. Practically no deforestation had taken place and practically no infrastructure had been constructed. However, Bazano had not contacted the ICCN to discuss the situation.

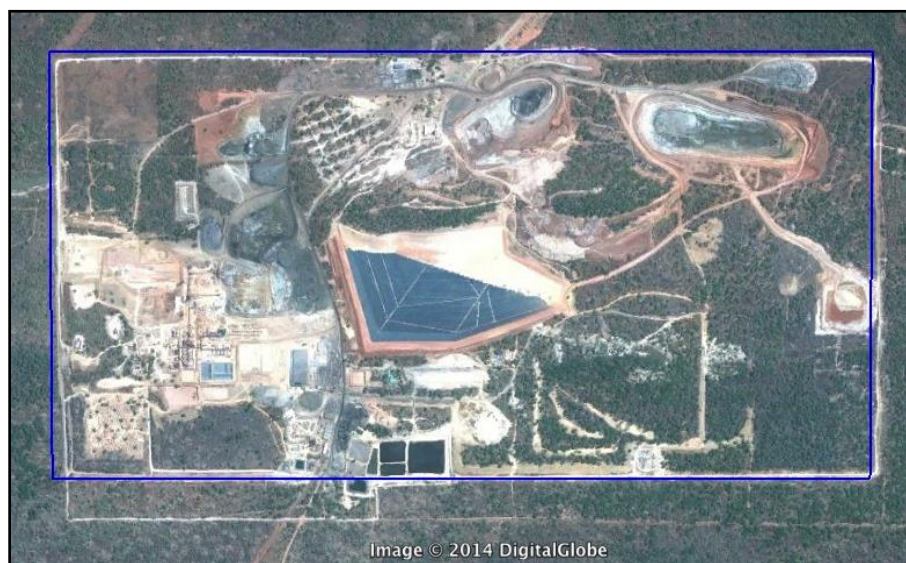


Picture 18: Satellite image of the MUMI site, concession 662, 26 June 2006  
(Photo: googleearth.)

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<sup>108</sup> Letter from the ICCN, the Upemba National Park and the Kando reserve to the Bazano group director, 27 September 2006.

Even though the situation constitutes a legal risk and threatens the security of its operations, Glencore made no attempt to clarify the legal status of the concession when it became the main shareholder in 2008 and therefore responsible for MUMI's operations<sup>109</sup>. The company refers to the policies of CAMI and the Ministry of Mines to substantiate its claim that its operations are legitimate: 'The Mutanda licence was subject to the Mining licence review of 2007 which was concluded in 2008 and our licence was subsequently upheld.'<sup>110</sup> In 2007-2008, the company therefore ignored the dispute with the ICCN and its violations of environmental legislation and continued to develop the site and mining infrastructure. At the end of 2008, the MUMI 662 concession site was practically virgin. Two years later, it was industrialised, with opencast mining, the first hydro-metallurgical plant (2009) and an acid plant (2010).



Picture 19: Satellite image of the MUMI site, concession 662, 9 August 2010  
(Photo: googlearth.)

RAID, Bread for All and Fastenopfer believe that Glencore's conduct is contrary to the OECD Guidelines referred to by Glencore. Chapter 2 of the Guidelines state that companies must: 'Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues'<sup>111</sup>. Fastenopfer, Bread for All and RAID believe that compliance with this article would have required MUMI to desist from continuing its operations in the Basse-Kando reserve as far back as 2006. In any case, the company should at least have entered into an open and constructive dialogue with the actors responsible for protecting the reserve – the ICCN and environmental associations – with a view to reaching a negotiated solution to the problem.

In September 2009, the government and companies received a further warning about the uncertain legal situation of MUMI operations. Two people submitted a complaint to the Supreme Court in Kin-

<sup>109</sup> Glencore became a 50% shareholder of SamRefCongo Sprl, which in turn held 80% of MUMI Sprl shares. The other major shareholder in Samref at that time was Bazano. Glencore and Bazano therefore held a majority of MUMI sprl shares. In addition, Glencore had taken operational control of MUMI. All the industrial developments and all operational decisions regarding the site were therefore the direct results of Glencore actions. See: <http://www.congomines.org/fr/fiche-dinformation-mutanda-ya-mukonkoto-mining-sprl-mumi/>. Also see: Mineral Expert's Report: Mutanda, Golder Associates, May 2011.

<sup>110</sup> Glencore response to Key Findings and Questions presented by Bread for All, the Swiss Catholic Lenten Fund and RAID on 5 May 2014.

<sup>111</sup> OECD Guidelines for Multinational Enterprises. General Principles, article 5  
<http://mneguidelines.oecd.org/text/>.

shasa, seeking the cancellation of mining rights granted in protected areas of Katanga. The complainants pointed out the irregularities that led CAMI to grant licences for operations in protected areas: 'CAMI's granting of mining rights in the protected areas of Kundelungu, Upemba and Basse-Kando violates international and national law on the protection of the environment.' The complainants also accused CAMI of 'acting with regard to geographical areas where it has no authority'.<sup>112</sup> Once again, MUMI has done nothing to clarify the situation. On the contrary, the company has avoided any dialogue. The ICCN invited the company to a meeting in Lubumbashi on 19 August 2009 but it did not attend. The ICCN had taken the trouble to invite all operators with a concession or already active in the protected area in the hope of beginning a 'consultation with a view to obtaining a definitive solution to the occupation of land in Basse-Kando'.<sup>113</sup> Several mining companies attended the meeting, notably SOMIDEC, MKM, Phelps Dodge, Chemaf and Gécamines. However, MUMI stayed at home. 'It is a very stubborn company', said ICCN Katanga officials. 'The other companies are prepared to discuss the situation, but MUMI has always refused to talk to the ICCN.'<sup>114</sup> This account is corroborated by the manager of the Basse-Kando reserve: 'The mining companies are destroying a lot of the forest. They put up checkpoints and ICCN cannot get past. They construct roads and cut down trees without asking us for authorisation. Nor do they consult ICCN when carrying out environmental and social impact studies. I have never been able to visit the company installations, even though I am responsible for protecting the reserve and have thirty staff. Worse still, when we conduct patrols, we are chased away by the mine police, the army and the company's private security forces, even though we have an official mandate to inspect the site.'<sup>115</sup>

Like other companies, MUMI has invested millions of dollars developing its site. In these circumstances, it is practically impossible to turn back the clock and demand that it leave the reserve: 'The government will have to pay an enormous amount in compensation', explained an ICCN official. The policy of *fait accompli*, or scorched earth, has therefore prevailed. Even though their situation remains illegal, the mining companies are sure they will be able to continue operating in the Basse-Kando reserve.

### 3.2.5. The lack of special mitigation measures in the reserve

Another important question connected with the reserve concerns impact mitigation measures. Given that MUMI is mining in a protected area, what special measures is it taking to limit harm to fauna and flora?

MUMI representatives told us that the company does not have a programme of special measures to mitigate its impact on the reserve but that it has integrated environmental issues into its Environmental Impact Assessment (EIA). They say that MUMI does not have a large "ecological footprint". They say that the company has worked with an external expert on a rehabilitation programme that contains measures that go a lot further than mere legal requirements. The company has a reforestation plan for parties operating on the site and a biodiversity programme. MUMI states that it has directives to safeguard animals: any animal found on site must be trapped and released outside the area occupied by the mines<sup>116</sup>. However, a MUMI representative acknowledged that the question of the fauna in the reserve was not specifically addressed in the rehabilitation studies.

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<sup>112</sup> Requête tendant à obtenir annulation des droits miniers et de carrière octroyés dans les zones protégées au Katanga, signed by the complainants Claude Rombaut Lumba and Maître Sabin Mandé, Lubumbashi, 21 September 2009.

<sup>113</sup> Procès verbal de la réunion tenue en date 19 August 2009 entre ICCN et opérateurs miniers, Lubumbashi, 19 August 2009, ICCN and counter-signed by mining representatives.

<sup>114</sup> Interview with ICCN representative in Katanga, 12 March 2014.

<sup>115</sup> Interviews, 10 October 2013 and 9 March 2014.

<sup>116</sup> Interview, 10 October 2013.

The explanations offered by MUMI representatives coincide with Glencore's statements on this issue. In a study conducted by Golder Associates in 2011<sup>117</sup>, not a single line of the analysis on the environmental impact assessment even mentioned the question of the reserve or special measures to mitigate the impact of MUMI's operations on the protected area. The same applies to Glencore's sustainability reports. The 2012 sustainability report, published in November 2013, even listed the names of operations throughout the world that are located close to natural reserves and where the company must take special measures. MUMI is not on this list<sup>118</sup>. The official approach maintained by MUMI and Glencore until the end of 2013 was to ignore the existence of the Basse-Kando reserve. The issue was not addressed anywhere. No particular measures were taken to address the issue. It was only in its most recent sustainability report, published in May 2014, that Glencore finally officially acknowledged the existence of this protected area<sup>119</sup>. This belated acknowledgement is problematic because already some animal species, including some on the list of protected species, have disappeared from the Basse-Kando reserve: 'A few years ago, there were a lot of monkeys in this forest', said a local resident. 'They have all disappeared now, because of the noise of the machines 24 hours a day.' Various reports state that elephants have left the region and found refuge on the other side of the border, in Zambia, and that other protected species are increasingly rare, including blackbuck, lechwe (kind of antelope), aquatic civet and rock hyrax. The number of hippopotamuses has fallen from 400 in 2003 to less than 50 in 2013<sup>120</sup>. PREMICONGO, an environmental organisation in Katanga, concluded that: 'The invasion of Basse-Kando is an ecological disaster.'<sup>121</sup>



Picture 20: Hippopotamuses on the River Kando, in the Basse-Kando reserve  
(Photo: Flickr objectifbrousse and C.Peyer/BFA)

Bread for All, RAID and Fastenopfer believe that MUMI should take special measures to protect the fauna and flora of Basse-Kando. The company should pay compensation for the irreversible damage it has already caused. MUMI should also initiate open and transparent cooperation with the ICCN, at the local and regional levels. Cooperation is a legal requirement, because the ICCN has been appointed by the Congolese government to manage these protected areas.

<sup>117</sup> Mineral Expert's Report: Mutanda, Golder Associates, May 2011.

<sup>118</sup> GlencoreXstrata, Sustainability Report 2012, p. 40.

<sup>119</sup> GlencoreXstrata, Sustainability Report 2013, p. 50.

<sup>120</sup> See: République Démocratique du Congo: déboisement de forêts classées au profit de l'exploitation minière dans la province du Katanga – le cas de la Réserve de la Basse-Kando, Christian Bwemba, WMR Bulletin no 133, 2008 and L'exploitation minière, une menace pour les aires protégées du Katanga. Cas de Phelps Dodge Congo à la Basse-Kando, PREMICONGO, December 2013.

<sup>121</sup> Ibid., pp. 15-17.



### 3.2.6. Pollution in the reserve?

According to various sources of information, it seems that MUMI discharges industrial effluent into the River Kando during the rainy season. During a research mission in October 2013, in the dry season, we observed a small flow of water from the MUMI concession, to the south west of concession 662. We also collected residues of white powder, which seemed to indicate pollution along the banks of the River Luilu.



Picture 21: White deposits and flow of water to the south west of MUMI concession 662

The mine and installations are behind the barbed wire fence. October 2013

(Photo: C.Peyer/BFA)

Analyses of water samples taken at this location did not show worrying levels of acid or concentrations of copper, uranium, cadmium or arsenic above the thresholds set by the Congolese Mining Code and the WHO. However, the levels of cobalt gave cause for concern.

Location	Period	pH	Co (µg / l)	Cu (µg / l)	U (µg / l)	Pb (µg / l)	Cd (µg / l)	As (µg / l)
Next to MUMI installations	October 2013	8,00	8.995	0.099	0.003	0.0007	0.0002	0.0013
	January 2014	7,56	19.916	1.02	0.0057	0.0037	0.0013	0.0016
Threshold values for waste (DRC Mining Code)		6 - 9		1.5			0.5	0.4
Threshold values for water quality (WHO)			1	2	0.015	0.01	0.003	0.01

These observations were confirmed by statements made by the region's customary chief, with whom Bread for All, Fastenopfer and RAID visited the sites in March 2014. The chief and several villagers complained about the discharge of overflows from MUMI operations on to their fields. We were unable to collect and test samples of water in these fields in March 2014, but it is clear that the residents of the villages in the vicinity of the MUMI concession are afraid that the company might be contaminating their land. It is also clear that this issue, combined with a lack of dialogue between the company and local residents, creates a climate of suspicion and mistrust. The ICCN official for the Basse-Kando reserve also said that MUMI discharged effluent into the River Kando: 'There is no doubt that they open the gates in the rainy season or when the retention basins overflow.' Bread for All, Fastenopfer and RAID find this situation difficult to understand. During visits to MUMI's installations in October 2013, we found that MUMI had installed a closed circuit to recover water used in the hydro-metallurgical plants. The retention ponds are modern and protected by plastic lining. Moreover, the company has stated on several occasions that these ponds are designed to retain water even in the rainy season and that they have the capacity to continue to receive effluent for several years. Given the suspicions expressed by the residents of surrounding villages, and given the samples taken by RAID, Bread for All and Fastenopfer in October 2013 and, given the fact that MUMI is occupying a protected nature reserve, it is clear that there is an urgent need for clarification. MUMI should provide the residents concerned with explanations about the specific discharges, and share the results of its own analysis of water samples, in order to clarify whether the discharges pose a threat to the villagers' lands and to the animals on the reserve.

## 4. Security and Human Rights

This chapter begins with a brief summary of the human rights standards and principles that companies are expected to adhere to, including how these inform Glencore's own policy on human rights and the policies and codes of its main security providers, such as G4S. However, at the local level in the DRC there is a blurring of the roles and responsibilities of the police, judicial authorities, the military, local politicians, and the private mining companies and their security providers. A key objective is to unpick this nexus in order to question and pin down corporate responsibility. To this end, the report examines a number of instances where human rights violations have allegedly occurred: the deaths and ill-treatment of individuals after mine security operations; allegations of the excessive use of force by Mine Police at KCC sites; instances of arbitrary arrest and the use of 'holding cells'; the detention of minors; and practices that restrict freedom of movement. Where available, reference is made to Glencore's response to date on specific instances and issues and further questions are put to the companies concerned to provide clarification. The report ends with recommendations arising from an analysis of how Glencore could improve relations with local communities on human rights issues.

### 4.1. Human Rights and Security: international standards and company policy in the DRC context

After many years of neglect and decline, Kolwezi is experiencing a boom in industrial mining spearheaded by the presence in the district of multinational companies such as Glencore, Freeport McMoran, Africa Minerals and Sicomin. Despite the increasing formalisation and industrialisation of the mining sector, the DRC's weak governance continues to present enormous challenges even to those companies attempting to live up to their stated human rights commitments.

#### 4.1.1. International recognition of the responsibility of companies to respect human rights

Under international law, States have a duty to protect human rights from abuse by non-State actors, such as companies. Over the past decade there has also been increasing recognition of the responsibility of companies to respect human rights, particularly as elaborated in the UN "Protect, Respect and Remedy" Framework for Business and Human Rights and the UN Guiding Principles on Business and Human Rights. Over and above the business responsibility to respect, companies must ensure that they do not commit or materially assist with the commission of illegal or criminal acts that lead to human rights abuses abroad.

The UN "Protect, Respect and Remedy" Framework for Business and Human Rights and the UN Guiding Principles on Business and Human Rights (Guiding Principles) confirm that companies have a responsibility to respect all human rights, and a corresponding need to take concrete action to discharge this responsibility. Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.

According to the Guiding Principles, 'The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.' The Guiding Principles further note that: 'Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their oper-



ations. Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.<sup>122</sup>

The DRC has ratified the main human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. The DRC is also a party to the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The DRC has ratified the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of June 1998, and the African Charter on the Rights and Welfare of the Child.

#### 4.1.2. Glencore's policy on human rights

Glencore has a code of conduct and formally adopted a human rights policy in May 2014. These set out the company's fundamental commitment to respect human rights and to uphold the dignity, fundamental freedoms and human rights of its employees, contractors and the communities in which it operates and others affected by its activities. The human rights policy affirms the company's determination to avoid complicity in human rights abuses, and to uphold relevant international standards in particular the Universal Declaration of Human Rights, the International Labour Organisation (ILO) Core Conventions on Labour Standards, the Equator Principles, and the United Nations (UN) Guiding Principles on Business and Human Rights. In 2014 the company formally applied for admission to the Voluntary Principles Initiative.<sup>123</sup> Under the Voluntary Principles security guards should only use force when strictly necessary and to an extent proportionate to the threat. All allegations of human rights abuses should be reported and investigated and the company should press for the proper resolution of the case.

#### 4.1.3. Code of Conduct for Private Security Providers

G4S, the largest private security company providing services to the Kamoto Copper Company (KCC), is a British company which is listed on the London Stock Exchange. G4S runs services in high risk countries around the world through a subsidiary, Global Risk Services, which in 2013 became a founder member of the Association of the International Code of Conduct for Private Security Providers (ICOCA), a compliance and oversight body. The Association is a multi-stakeholder initiative, which sets out principles and standards for private security industry based on international human rights and humanitarian law.<sup>124</sup>

In its Corporate Social Responsibility Report 2013, G4S acknowledges that its employees work in difficult environments dealing with sensitive issues. The company also says that it tries to ensure that employees operate within the law and that they respect the group's standards on human rights, ethics and general conduct. Instances of inappropriate conduct prompt immediate action. G4S also states that the company's human rights framework is being aligned with internationally recognised standards, such as the UN Guiding Principles on Business & Human Rights (2011) and the Voluntary Principles on Security and Human Rights (2000).

Paragraph 37 of the ICOC obliges Member Companies to report, and to require their personnel to report, when they know or have reason to suspect that acts of torture or other cruel, inhuman and degrading treatment or punishment have been committed. Under the Principle 6 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that

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<sup>122</sup> UN Guiding Principle 11.

<sup>123</sup> Glencore Xstrata Sustainability Reports 2012 and 2013.

<sup>124</sup> International Code of Conduct for Private Security Service Providers. See: <http://www.icoc-psp.org/>.



'the term "cruel inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses...'

#### 4.1.4. Human rights, security and realities at the local level

The DRC's record of ratification, the UN Guiding Principles aimed at business responsibilities, Glencore's own policy on human rights, as well as the codes for private security providers, all are confronted by the realities of implementation at the local level. In dispersed mining communities, the influence, responsibilities and activities of officials, law enforcement authorities, private security firms and the mining companies are structured in a way that obscures accountability for human rights violations. A key objective is to unpick this nexus in order to question and pin down corporate responsibility.

Local tiers of government in the DRC have never been elected. The Mayor, who is nominated by the President of the Republic, has a number of responsibilities such as supervising the delivery and quality of local public services; ensuring the implementation of laws, regulations and official government policies; and maintaining public order. The police are under the Mayor's control and, when required, the Mayor can call upon the Congolese Armed Forces for additional support. The media is heavily controlled and reports by local television stations are often censored.<sup>125</sup> Lower ranking officials in the Kolwezi administration such as the *Bourgmestre* (the head or mayor of a Commune) and *Chefs de Cité or quartier* (the heads of a townships or of a particular area within a township), also political appointees, take their instructions from and report to the Mayor. The concentration of power in the Mayor's office means that people who have suffered abuse have nowhere else to turn in seeking a remedy.

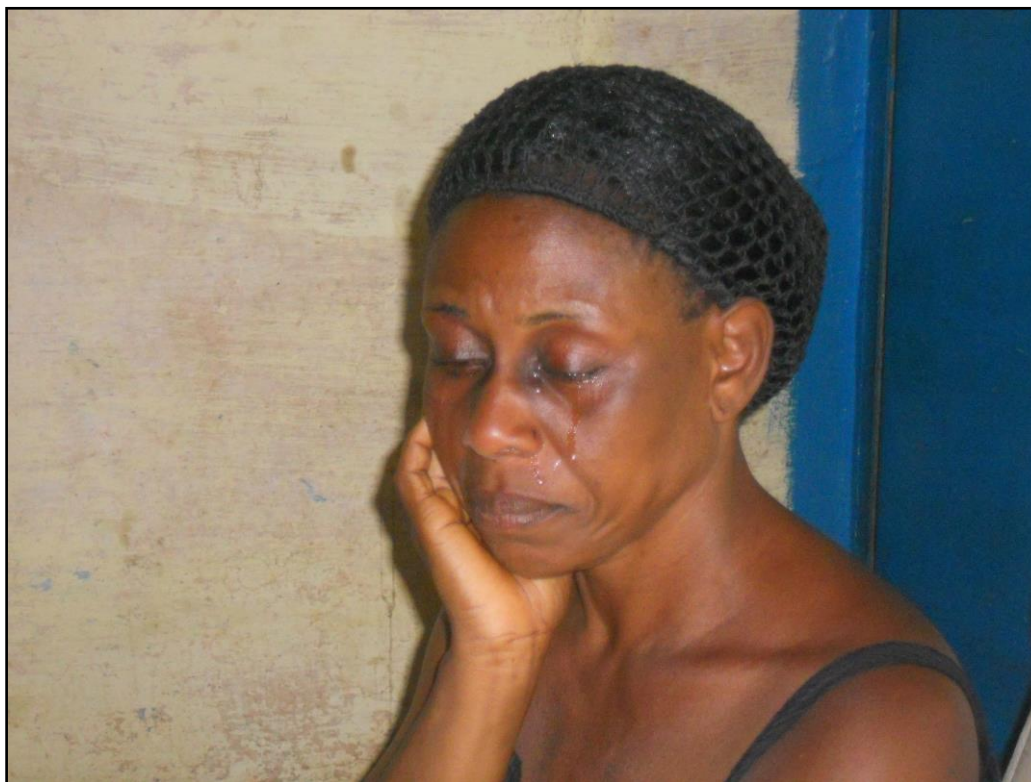
#### Waiting to see the Mayor

In January 2013, Kashana Ngombe, the mother of Isaac Muzala, an artisanal miner killed in suspicious circumstances at the Tilwezembe mine, sat outside the Mayor's office every day for three weeks pleading for the judicial inquiry into her son's death to be reopened. The prosecutor had closed the case in September 2011 after a lawyer, acting for the company operating the site, MISA Mining, gave a relative \$5000 towards the funeral expenses. **In the eyes of the authorities this was deemed sufficient compensation.** Kashana Ngombe recalled how the Mayor had told her at a meeting in February 2013 'that \$5000 was a lot of money and that if it had been her son who had died she would have been satisfied'.<sup>126</sup> (See *intra* for details on KCC's Tilwezembe concession)

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<sup>125</sup> In the case of Isaac Muzala, a local journalist took photographs at the morgue allegedly on the orders of the Mayor. His film was later confiscated. In April 2013, in response to BBC Panorama's report on child miners at Tilwezembe, Kolwezi TV broadcast footage of smiling, well-equipped and uniformed adults whom it claimed were artisanal miners at the mine.

<sup>126</sup> Interview with Kashana Ngombe, 23 March 2013, Lulu, Kolwezi District. For details about the case see Amnesty International 'Profit and Losses' 2013 pp. 11-12 .



Picture 22: Kashana Ngombe, Isaac Muzala's mother, Luilu, March 2013  
(Photo: RAID)

In Katanga, large mining companies have their own internal security guards, as well as private security contractors, who, under Congolese law, are not allowed to be armed. They are supported by a detachment of the Mine Police, a branch of the Congolese Police Force. This arrangement has blurred the important distinction between public and private interests. Mine Police are deployed on all mining sites on behalf of the Congolese State, but they also are paid by mining companies to secure their concessions and installations and are often incorporated into the company's security teams. Not all Mine Police have the authority to make arrests. Employees of some large mining companies (such as KCC) are also judicial police officers (*officiers de police judiciaire*, OPJs), who are given training and are formally appointed by the Chief Public Prosecutor<sup>127</sup>. OPJs have authority to carry out arrests and interrogate suspects before they are brought to the prosecutor's office.<sup>128</sup> This system is a legacy of the era when mining was conducted solely by state mining companies.<sup>129</sup> In this way, responsibility for a key aspect of the criminal justice system has been transferred into private hands.

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<sup>127</sup> Interview with Procureur de la République Phaniel Macaba Mukoko (Chief Public Prosecutor) Kolwezi March 2013.

<sup>128</sup> ORDONNANCE-LOI 82-020 portant Code de l'organisation et de la compétence judiciaires, 31 mars 1982, Art. 5. — *Le commissaire d'État à la Justice peut conférer la qualité d'officier de police judiciaire soit par nomination personnelle, soit par commission générale, à une catégorie d'agents des services publics, des entreprises publiques ou privées. L'arrêté détermine la compétence matérielle et territoriale.* République démocratique du Congo Droit civil et judiciaire ; Les Codes Larcier Edition 2003.

<sup>129</sup> Meike de Goede 'Private and public security in post-war Democratic Republic of Congo': Chapter in *The Private Security Sector in Africa* (ed. Sabelo Gumedze) ISS MONOGRAPH SERIES • No 146, JULY 2008; pp. 35-68.

## 4.2. Violent deaths on KCC concessions and the ongoing conflict with artisanal miners

Mine police deployed to guard KCC's site often use disproportionate force when trying to prevent incursions of artisanal miners (also known as *creuseurs*) onto the concessions. On several occasions, mine police have fired live ammunition in pursuit of artisanal miners resulting in death or serious injury. At KCC, security is provided by its internal security staff, a number of different private security contractors and mine police. In 2013 KCC started implementing the Voluntary Principles on Security and Human Rights as a pilot project.<sup>130</sup>

The Dilala Commune of Kolwezi is most affected by KCC's mining activities, in particular the satellite townships of Liulu, Musonoï and Kapata, which were originally built to house Gecamines [*La Générale des Carrières et des Mines*, the State-owned mining company] workers. They all have high levels of unemployment and poverty. Many young men, and in some areas also women and children, seek to scratch a living by collecting minerals from Gecamines' old waste dumps and disused water-logged pits and ponds that surround Kolwezi. All mining companies in Kolwezi are confronted with the problem of frequent incursions onto their concessions by artisanal miners usually at night or in the early morning. It is common practice for artisanal miners to pay 'a fee' to mine police and security guards to gain access to the sites. Artisanal miners confirmed to us that the mine police warn them when it is safe to enter and when company security inspections are likely to take place. Apart from the risk of injury from landslides or falls, such informal arrangements offer no protection: an unannounced security inspection or a dispute about the fee for the police can result in serious injury or even death.

The cases described below have occurred in the period January 2013 to May 2014. At issue is whether Glencore is able to demonstrate that it has done all it can to ensure such serious instances are investigated by the local authorities? Independent investigation of such instances is crucial if the company is to demonstrate its commitment to accountability and to refute the notion that it is seeking to distance itself from alleged human rights violations. As the case of Eric Mutombo Kasuyi (see below) demonstrates, KCC's response to investigations has at times bordered on the obstructive.

### 4.2.1. The death of Kalala Mbenga

Kalala Mbenga, an artisanal miner from Musonoï, was 23 years old when he died after a dispute with mine police guarding the KOV mine. Information about this case was obtained from interviewing eyewitnesses and the family. On 12 January 2013, Kalala and a group of friends had, with the connivance of mine police, entered KCC's concession. As usual, they gathered minerals in the early morning between 5:00 and 6:30 am. Just as they were leaving the concession, one of the mine policemen claimed he had not been paid enough and shot Kalala point blank in the face. Kalala's companions carried him to the nearby gravel road that connects KCC's various mine sites and installations in order to get him to the nearest hospital. A vehicle belonging to the Forrest Group (one of KCC's contractors) took the injured man to KCC's hospital.

KCC security guards went to the hospital. While Kalala was being examined by KCC medical staff, the road was barred and the Congolese police were called to disperse the crowd that had gathered.

Despite his serious condition Kalala was then moved to Mwangeji Reference Hospital (several kilometres away on the other side of Kolwezi). The family believes that Kalala was moved because KCC security guards were afraid that, if he died at the company's hospital, the local people might react violently.

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<sup>130</sup> Interview KCC October 2013.

When news of Kalala's shooting reached his parents they immediately went to the KCC hospital but their son had already been transferred. According to the family, KCC provided a car to take them to ill-equipped Mwangeji Hospital. But the doctor at Mwangeji had refused to admit Kalala because of his critical condition and he had once again been transferred, this time to the Gecamines hospital.

KCC's head of Security, who was at the hospital, gave the family 45,000 FC (about \$ 40 USD) for drugs and reassured them that the company would pay for the operation. The hospital sent them home to await news. Later that night, agents of the *Agence nationale de renseignements* (ANR, the intelligence service) went to the family home in Musonoï to inform them that Kalala had died and that his body had been taken to the morgue in the Mwangeji Hospital.

KCC sent them provisions for the wake, which included two 50-kilo sacks of flour, soft drinks, a large fish, some oil, money for charcoal and a tent to shelter guests. Morgue officials told the family that they would have to bury Kalala because a power cut meant that the body was decomposing.<sup>131</sup>

On 19 January 2013 Kalala was buried without the family's authorisation and without a death certificate. The family had gone to the Mayor of Kolwezi before the burial. She gave them 120,000 Congolese Francs (about \$125 USD) to buy a coffin and she also promised to pay the hospital bill for the time the body had been stored in the morgue. The family suspects that KCC had given the money to the Mayor. They were told by a policeman on duty at the Mayor's office that KCC's Head of Security had been seen leaving her office just before they arrived.

About a week later, after Kalala had been buried, the family tried unsuccessfully to obtain Kalala's death certificate and medical records from the hospital. A policeman suspected of shooting Kalala has reportedly gone into hiding and the case is not being pursued by the authorities.

### ***Glencore's Response***

KCC's security arrangements were discussed with the company's Head of Security during our visit to DRC in October 2013. . We sought further information about the incident and the circumstances and held a series of meetings with eyewitnesses and with family members. We also visited the place where Kalala had been shot and saw KCC guards patrolling the road.<sup>132</sup>

Bread for All, Fastenopfer and RAID first raised Kalala's case with Glencore in a letter dated January 28<sup>th</sup> 2013. In response to our letter, Glencore undertook a limited inquiry and reported the outcome at a meeting with Glencore staff in the Baar headquarters on 26th April 2013.

Glencore denied that KCC was in any way implicated in the death of Kalala Mbenga, which according to them had occurred outside their concession. The company stated that the assistance that had been provided to the family was a goodwill gesture.

### ***Unanswered questions***

- KCC claims that mixed security teams are deployed to prevent abuse or corruption by guards or police. Why then were the mine police not supervised as they guarded the entrance to the KOV mine?
- Why did KCC refuse admittance to the dying Kalala and instead send him to other much less well-equipped local hospitals? Who made this decision? If this decision was taken on clinical grounds, please can the company provide records to show this?

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<sup>131</sup> Interviews with the family of Kalala Mbenge Musonoi March 2013, October 2013 and March 2014.

<sup>132</sup> Visit to Kolwezi March 2013 and interviews with witnesses at Musonoi October 2013.

- Did KCC mount an internal inquiry into the incident? If so, please can KCC/Glencore provide copies of documentation that relate to any such inquiry?
- What action did Glencore or KCC take to express its concern to the relevant authorities about the conduct of the mine police providing security at the mine? Please can KCC/Glencore provide details of any such contacts and copies of any documentation in which Kalala's case is discussed with the authorities.
- Did KCC introduce changes to its security arrangements or vetting procedures as a result of this incident?
- Has KCC offered appropriate compensation to the family of the deceased? If so, what procedures were followed in agreeing any such compensation?



Picture 23: The uncles of Eric Mutombo Kasuyi (3rd from l and 2nd from r) with CAJJ representatives  
(Photo: C.Peyer/BFA)

#### 4.2.2. The death of Eric Mutombo Kasuyi

On the afternoon of 15 February 2014, Eric Mutombo Kasuyi took a short cut across the KCC concession near to Luilu on his way back to his uncle's house in Sapatelo. He and a friend, John Kanwiel Kabulo, had been to another mining concession (SICOMINES in Kapata) to seek work. As they walked across the concession, they were intercepted by a KCC security patrol in a jeep which was responding to an incursion onto the site by a group of illegal artisanal miners. Mutombo and his friend were chased by the guards and police in riot gear. They ran in different directions, trying to find a place to hide. John Kabulo hid in a pool of stagnant water but was caught by police and two G4S contractors. He alleged that a policeman accompanied by G4S contractors beat him with the butt of a gun. He managed to escape.<sup>133</sup> However, Mutombo, a 23-year old father of two young children, was apprehended. He was taken in the back of the Security Patrol's jeep to the KCC hospital, where he was certified dead.

At about 7 pm that evening, when Mutombo had failed to return home, his relatives started to make inquiries. Kabulo, who was recovering from his ordeal, told them what had happened at KCC. The family started to search for him in police stations. The following morning, acting on a rumour, they

<sup>133</sup> Statement by John Kawiele Kabulo to the Military Prosecutor, 18 February 2014.

found Mutombo's body at the Mwangeji Hospital morgue.<sup>134</sup> Information gathered for this report indicates that Mutombo Kasuyi died on the KCC site after being severely beaten by members of KCC's rapid intervention patrol. The circumstances of Mutombo's death are contested by Glencore.

KCC's Department of Security (DSK) deploys its own internal security guards, mine police and private security contractors such as G4S<sup>135</sup> (a British security company) who have responsibility for different sectors in the concession. The sprawling site is patrolled and is under constant surveillance; CCTV is used. There is a rapid intervention team, which includes KCC staff, mine police and G4S contractors, to deal with incursions by artisanal miners. Operations by the joint Security Patrols are directed by DSK's Dispatch office.<sup>136</sup>

Glencore claims that Mutombo was one of the artisanal miners operating illegally on KCC's site near an area called the Luilu Dam.<sup>137</sup> The company states that although their own security guards and G4S were part of the 12-man patrol dispatched to apprehend the *creuseurs*, it was mine police alone who arrested Mutombo. On 16 February, the Commander in KCC's Department of Security (DSK) in charge of the rapid intervention team, who is not only a KCC staff member but also a judicial police officer (*officier de la police judiciaire*, OPJ), wrote a report to the Public Prosecutor on the circumstances leading to the arrest and death of Mutombo (described as an unknown *creuseur*).<sup>138</sup>

According to the DSK Commander's [judicial police] report, at about 17:00, the patrol under his supervision and acting on instructions from DSK's Dispatch Office, went to intercept a group of *creuseurs* seen in the vicinity of the copper concentrate ponds, near the Luilu refinery. Another senior DSK Commander (in charge of security at the Luilu installations) went by jeep to the septic ponds, where two policemen managed to arrest one of the *creuseurs*. The KCC driver claims that the *creuseur* was 'tired' and unable to walk to the vehicle.<sup>139</sup> According to the statement of one of the Mine Policemen, who denied ill-treating Mutombo, it was the Commander, the DSK driver and two G4S contractors who had to lift the man into the back of the jeep.<sup>140</sup> This suggests that by this time Mutombo was dying.

Mutombo was taken to the DSK/KOV office, purportedly for questioning.<sup>141</sup> The Commander noting that Mutombo was 'very tired', decided not to question him.<sup>142</sup> After receiving authorisation from

<sup>134</sup> Centre d'aide juridico-judiciaire (hereinafter CAJJ) Letter to the, Mayor 3 March 2014.

<sup>135</sup> G4S is active in more than 120 countries, and is the largest employer quoted on the London Stock Exchange with more than 618,000 employees and has a secondary stock exchange listing in Copenhagen. See G4S website: <http://www.g4s.com/>.

<sup>136</sup> Interview with KCC Security Manager Kolwezi 2014.

<sup>137</sup> Letter Glencore Xstrata, 25 March 2014.

<sup>138</sup> Departement de Sécurité Secteur de Kov Procès-Verbal Judiciaire 16 February 2014: *Constat de décès a l'hôpital de KCC d'une personne non identifiée appréhendée à auteur des bassins des usines de Luilu ce samedi 15/02/2014 vers 17h00.*

<sup>139</sup> Statement of Mashid, DSK driver, to the Prosecutor 25 February 2014: '*A+/- 50 mètres de là, j'ai vu les policiers avec un creuseur habillé en culotte avec flash, pieds nus et un sous vêtement de couleur bleue qui déclarait qu'il était fatigué au point de ne pas marcher jusqu'à l'endroit où se trouvait le véhicule dont j'étais le chauffeur.*'

<sup>140</sup> Statement of PMH Tshimboj to the Prosecutor, 6 March 2014:

*'Q. Dans quel état aviez-vous trouvé ce creuseur?*

*R. en bon état et le chauffeur et son commandant avec l'aide de deux éléments G4S l'avait soulevé pour l'embarquer à bord de la Jeep.'*

<sup>141</sup> Statement of Mushid Kayomb Gustave driver to Prosecutor 25 February 2014: '*arrivé au niveau du parking Truck Luilu, le commandant Lukungula et son équipe avait récupéré leur Jeep soit la 476 ils se sont dirigés vers les bassins tandis que nous avons pris la direction des bureaux de fonction( ? unclear) à KOV.'*

<sup>142</sup> DSK/KOV Procès-Verbal Judiciaire 16 February 2014.



the DSK Dispatch office, the Commander took him to the KCC hospital for treatment.<sup>143</sup> On arrival at the hospital, 'after a brief check-up' the doctor declared Mutombo dead.<sup>144</sup> KCC notified the Kolwezi Prosecutor's Office, who sent a duty prosecutor to the site to register the death. According to the DSK Commander of the rapid intervention force in his formal report (written in his capacity as a judicial police officer), the duty Prosecutor arrived at about 19:00 and, in the presence of the KCC doctor, examined the body. The duty Prosecutor took photographs and, according to the DSK report, did not observe any signs of physical abuse or injury. At about 19:35 the duty prosecutor authorised the removal of the body to the morgue at Mwangeji hospital.<sup>145</sup>

### ***KCC persists in contesting the post mortem***

On 20 February, a post mortem examination, carried out at Mwangeji Hospital, concluded that Mutombo had died from multiple trauma – in all probability the result of a beating.<sup>146</sup> KCC contested the result claiming that it did not correspond to the KCC's doctors 'preliminary observations'.<sup>147</sup> However on the death certificate, signed by the KCC doctor, no observations are recorded and the cause of death is 'unknown'.<sup>148</sup> A second examination, paid for by KCC, took place on 27 February 2014 at a different hospital. This examination confirmed that Mutombo had died of internal injuries – he had a collapsed lung and serious tissue damage to one side of his chest.<sup>149</sup> The doctors later confirmed to the family that the injuries were consistent with Mutombo having been beaten.<sup>150</sup> Late in the afternoon of 28 February, KCC claimed that the second examination had been carried out on the wrong body. At KCC's insistence the cadaver had once again to be formally identified. The Prosecutor and the family confirmed that it was Mutombo's body.<sup>151</sup>

### ***Pressure on the Family***

On 17 February 2014 the family filed a complaint with the Military Prosecutor's office against KCC.<sup>152</sup> On 5 March, more than two weeks after the event, Mutombo's family were finally able to bury their relative. According to the family, an intermediary, whom they believed had been sent by KCC, gave them \$ 1500 for the funeral expenses and went with them to buy a coffin.<sup>153</sup>

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<sup>143</sup> Statement of Mushid Kayomb Gustave [DSK] driver to Prosecutor, 25 February 2014:

*'Arrivé au bureau le commandant Kitumbile avait remarqué que le creuseur intercepté était très fatigué, appelons le dispatch qui autorise que le conduisons à l'Hôpital KCC.'*

<sup>144</sup> Statement of Mushid, driver, to Prosecutor 25 February 2014: *'De l'hôpital le médecin nous apprenna après un bref check-up qu'il était déjà décédé.'*

<sup>145</sup> DSK/KOV Procès-Verbal Judiciaire 16 February 2014: *'Celui-ci est arrivé à l'hôpital vers 19H00. En présence du médecin MALALE, il a procédé au contrôle du corps du défunt et aucune blessure ni traces de violence physique n'ont été constatées.'*

<sup>146</sup> Letter from CAJJ to the Mayor of Kolwezi, 3 March 2014.

<sup>147</sup> According to KCC the final results of the examination did not 'correspond to (i) the preliminary observations conducted by the KCC Doctor and (ii) the details of the pictures taken by the Prosecutor himself'. Letter Glencore Xstrata, 25 March 2014.

<sup>148</sup> KCC Hospital Kolwezi Certificat de Décès, *L'homme apporté mort à l'hôpital KCC/Kolwezi Samedi 15 Février 2014 de cause du décès: inconnues.* Dr Alain Malale Kayindi.

<sup>149</sup> Rapport Médico-Légal D'Autopsie requisition order No. RPM 29398/PRO24/ KAT; Services Médicaux du Groupe Ovest, 27 février 2014.

<sup>150</sup> Letter from CAJJ to the Mayor, 3 March 2014.

<sup>151</sup> Letter from CAJJ to the Mayor, 3 March 2014.

<sup>152</sup> RAID and Bread for All interviewed the family in Kolwezi, on 11 March 2014.

<sup>153</sup> Interview with family Kolwezi, 11 March 2014.

Following this, Mutombo's family came under intense pressure to withdraw their complaint. It started shortly after Bread for All, RAID and Fastenopfer issued a press release about the incident.<sup>154</sup> The same intermediary contacted the family on numerous occasions to offer them substantial sums of money in exchange for dropping the case.<sup>155</sup> The pressure intensified after a second press release was issued and the amount of money offered rose from \$10,000 to \$50,000.<sup>156</sup> The intermediary told CAJJ that he worked for an NGO, *Arc en Ciel* – but no such NGO exists. Further inquiries in Kolwezi established that the intermediary in fact works for a local construction company, *Constructions Métalliques et Civiles de Kolwezi* (CMCK), one of KCC's sub-contractors.<sup>157</sup> 'KCC categorically rejects any allegation or rumour of having directly or indirectly encouraged a monetary compensation to the family of Mr. Mutombo.'<sup>158</sup>

### ***Investigation by the authorities***

An investigation into the death had also been opened by Public Prosecutor and KCC gave this as the reason it declined to respond to the summons from the military prosecutor.<sup>159</sup> On 6 March 2014 the public prosecuting service placed two mine police in preventive custody. However the KCC employees were only briefly held for questioning. According to G4S, none of their employees were requested by either the Military Prosecutor or the Public Prosecutor to provide statements.<sup>160</sup> On 6 March two policemen were charged with 'deliberately inflicting blows and injuries' that resulted in 'the involuntary death' of the victim.<sup>161</sup> They are currently on trial. The file has been transferred back to the military prosecutor because, under Congolese law, military courts and tribunals have competence over cases concerning the police.<sup>162</sup>

### ***Glencore's response and KCC's internal investigation***

As had previously been agreed with Glencore, RAID, Bread for All and Fastenopfer did not contact KCC directly about this case, but raised their concerns about the death of Mutombo in a letter to the company headquarters in Baar.<sup>163</sup> According to Glencore, on 3 March, the KCC management team, in compliance with its human rights policy, requested an internal investigation:

The [KCC] Human Rights Commission reviewed all the documents pertinent to the case and conducted hearings of all KCC and G4S employees involved. On 19 March, the Commission came to

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<sup>154</sup> Press Release Bread for All, RAID, Fastenopfer and CAJJ, Violent Deaths on Glencore's Mining Concession, 26 March 2014.

<sup>155</sup> Information from CAJJ (received on 29 March 2014) informing us that Mutombo's uncle had been summoned to return to Kolwezi from his home in Likasi; further reports of pressure on the family were communicated by CAJJ on 1 and 10 April 2014.

<sup>156</sup> Press Release, Bread for All, RAID, Fastenopfer and CAJJ, Death of Mutombo Kasuyi in Democratic Republic of Congo: Family under intense pressure to withdraw legal complaint, 8 April 2014.

<sup>157</sup> Private communication Kolwezi, 25 May 2014.

<sup>158</sup> Glencore Response, 21 May 2014.

<sup>159</sup> Letter from Jean Robert Durand, Manager de la Sécurité KCC to the Premier Substitut de l'Auditeur Militaire de Garnison et Officier du Ministère Public près le Tribunal Militaire de Garnison de Kolwezi-Lualaba 24 février 2014.

<sup>160</sup> Clive van Ryneveld, Regional MD (East Africa) G4S Africa Internal Memorandum dated 6 June 2014.

<sup>161</sup> The arrest warrants for the two policemen, Mujinga Tshimboji and Makombo Mudianga -*Mandat d'arrêt provisoire* - RMP 29.289/PRO24/ KAT 6 mars 2014 – gives the charges against them as: Articles 43 3t 48 of the Code Pénal II: '*coups et blessures volontaires ayant entravés la mort sans l'intention de la donner.*'

<sup>162</sup> Communication from le Procureur de la République Phanael Macaba Mukoko to the Auditeur Militaire; Objet: *Affaire Mujinga Tshimboji et Makombo Mudianga* le 08 mars 2014.

(RMP 29.389/PRO24/KAT/SEC/KOL/2014). Under Art. 106 CJM-2002. Their competence also extends to civilians accused of being 'the perpetrator, co-perpetrator or accomplice' (Art. 79 CJM-2002).

<sup>163</sup> Letter from RAID, Bread for All and Fastenopfer to Glencore, 19 March 2014.

the conclusion that the arrest was undertaken solely by the officers of the Mine Police, with no involvement of KCC or G4S employees, and that no violation of human rights had been perpetrated by KCC or G4S staff.<sup>164</sup>

Glencore states that it has no control over the DRC mine police yet they are in the company's pay and provide security services on KCC's sites.<sup>165</sup> The mine police work in joint teams, whose operations appear to be directed by KCC's Security Department. In the Mutombo case, the patrol was given instructions to intercept the 'creuseurs' by KCC's Security Department's central despatch office. Such instructions must be carefully logged, but the records have not as yet been disclosed to the prosecutor. From the statement of one of the mine policeman it is clear that he considered himself to be subordinate to the DSK Commander. The senior DSK official is described as being in overall command of KCC's Rapid Intervention Force.<sup>166</sup> Only the two senior KCC security guards have the status of judicial police officers (OPJs) with authority to arrest and question suspects on the KCC site. The head of the DSK Rapid Intervention Force had to request authorisation from KCC's Dispatch office to take the victim to the hospital. It is KCC's Department of Security which control the mine site.<sup>167</sup>

### **Obstruction of the Investigation**

We are concerned that KCC appears to have obstructed the investigation into Mutombo's death in a number of ways: i) by failing to cooperate with the investigation of the Military Prosecutor; ii) by failing to produce in a timely fashion relevant documents such as the KCC's doctor's death certificate; iii) by failing to disclose the company's contracts with G4S and the mine police; iv) by trying to discredit the victim as an ex-prisoner, while producing no proof; v) by implying that the victim was in poor health; and, v) by delaying the investigation on spurious grounds - such as KCC's belated questioning of the identity of the victim (after the second autopsy).

### **Discrepancies**

There are a number of inconsistencies, gaps and discrepancies in the DSK (judicial police) report and statements provided by KCC staff to the prosecutor concerning:

- The precise location and exact time of key events.
- Exactly who participated in the operation and who carried out the arrest. The name of one of the policemen, who according to the DSK report arrested Mutombo, is actually that of a G4S contractor. The same DSK report, prepared on 16 February, does not refer to the division of the Rapid Intervention Force into three groups. This is only mentioned by KCC staff in statements taken on 25 February. During cross examination the senior DSK officers initially give conflicting accounts about which of them was with the police who carried out the arrest.
- Claims about the victim. The two DSK Commanders say that Mutombo had told the police, at the time of the arrest, that he had just come out of Dilala prison.<sup>168</sup> Yet the police officer, who carried out the arrest, makes no mention of this in his statement.<sup>169</sup> The family are ad-

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<sup>164</sup> Letter Glencore Xstrata, 25 March 2014.

<sup>165</sup> Glencore Response 21 May 2014: 'KCC has no control or jurisdiction over the DRC Mine Police, and cannot comment on their actions'.

<sup>166</sup> Statement of Mushid, driver, to Prosecutor 25 February 2014: '*Sous la supervision du Commandant Kitumbile nous étions dirigés vers le secteur Lima 17 – c'est là que Kitumbile était resté accompagné des policiers et le G4S.*'

<sup>167</sup> As was apparent during our visit to KCC, everything that occurs on site is carefully controlled by the Department of Security, all personnel on site, including visitors, are obliged to wear badges and all vehicle movements are logged.

<sup>168</sup> DSK/KOV Procès-Verbal Judiciaire 16 February 2014; DSK Lukungula Statement to the Prosecutor 25 February 2014 : '*il avait l'air fatigué et demandait qu'on le libère car il venait de la prison.*'

<sup>169</sup> Statement Tshimboj to the Prosecutor.

amant that Mutombo had never been in prison. Checks at the Dilala prison in Kolwezi, carried out by the *Centre d'aide juridico-judiciaire* (CAJJ), a local human rights organisation appointed on 24 February by the dead man's family, found no evidence of Mutombo ever having been imprisoned. KCC staff also claim that Mutombo told police that he was unwell. Despite being unable to walk and having been lifted into the vehicle, Mutombo was first taken not to the hospital but to the KOV Security office for questioning. The family strenuously deny that Mutombo was in ill-health.

- The state of Mutombo's body and the injuries sustained. The KCC doctor made no observations (or none that have been disclosed as of 6 June 2014) concerning the state of the body, yet this was used as a reason for demanding a second autopsy.

### **Unanswered Questions for Glencore/KCC<sup>170</sup>**

- Were all the G4S guards involved in the security patrol interviewed by the KCC Human Rights Commission? Have all of them provided statements to the Prosecutor? When did KCC become aware that two G4S contractors had fled?
- How could the Commission conclude that solely the mine police were involved in Mutombo's arrest? Did it interview the mine police officers or examine statements made by them? According to Glencore only KCC senior Security staff (OPJs) are permitted to make formal arrests on KCC's site. Yet did the mine police officers in question have the power to arrest Mutombo? Were any other arrests of *creuseurs* made at the time, and if so, how many?
- If the purpose of having joint security teams is to prevent abuse or corruption by mine police and others, why did the KCC security team apparently allow unsupervised mine police to go and apprehend suspected *creuseurs*? Will KCC confirm that make-up of each team in the security patrol, including the team that apprehended Mutombo?
- Did the KCC Security staff or G4S express any misgivings to KCC about the description of Mutombo's arrest given by the mine police?
- What steps did KCC take to ensure that there was no opportunity for KCC employees and other members of the patrol to confer before making their statements to the Prosecutor and to the KCC internal inquiry?
- Given the poor record of the mine police, did KCC's medical staff consider the possibility that Mutombo might have been subjected to ill-treatment?
- Mutombo was lifted into the back of the jeep: was he dying or already dead? In such a state, why was he taken for questioning and not to the hospital? When was it first suspected that he was dead?
- The KCC death certificate makes no observations as regards the state of the body or the cause of death, so on what basis did KCC challenge the results of the first medical examination?
- In its letter of 25 March Glencore says that 'The family had made initial enquiries regarding the death of Mr Mutombo, but no official claim has been lodged'. But was Glencore not aware that the family had filed a complaint with the Military Prosecutor?
- Mutombo's companion, who was also briefly apprehended, stated that he had been beaten by mine police in front of G4S contractors. Did G4S report this to KCC Security? If so, what action did Glencore/KCC take? Has Glencore/KCC taken up this matter with G4S?
- Why did it take until early May before KCC produced a copy of the death certificate, which was first requested on 19 February?
- Has KCC handed over the Despatch centre's log book for the relevant day to the prosecutor?
- Why did it take KCC until 3 March to initiate an internal inquiry? Will KCC publish the findings of the inquiry in full?

<sup>170</sup> Bread for All, RAID and Fastenopfer will publish on their websites any clarification or answer Glencore sends.

- Will Glencore investigate the allegation that an employee of CMCK, one of KCC's sub-contractors, was trying to bribe make payments to the family to get them to withdraw their complaint? If yes, how will the company proceed?
- Will Glencore/KCC disclose the contracts with G4S and the Congolese Police?

We have put a number of questions related to Mutombo's case to G4S.<sup>171</sup>

#### **Questions for G4S**

- Did G4S personnel report any concerns about the circumstances of the death of Mutombo? If so, to whom and when?
- Did G4S personnel report concern about the beating of John Kabulo on 15 February by mine police to KCC, the prosecuting authorities or to the company? If so, to whom and when?
- Have G4S personnel cooperated fully with the investigation in Kolwezi? Have all G4S contractors (four people) who participated in the patrol on 15 February provided statements to the prosecutor (either to the Military Prosecutor or the Public Prosecutor)? If so, on what date?
- What steps are being taken by G4S to investigate the incident?

#### **G4S response<sup>172</sup>**

G4S states that, after receiving our letter, it conducted an investigation with the full cooperation of KCC Mine Management: 'Enquiries found that no member of G4S was involved in or had been present during the incident as described in the letter from RAID.' 'No statement could be found during the enquiry that implicated G4S staff in the incident.' G4S staff had no knowledge of the alleged beating of John Kabulo. G4S personnel who participated in the patrol team on 15 February were interviewed by KCC's internal Human Rights Commission but not by either the Military or Public Prosecutor. The company told us that G4S DRC follows standard and approved regional and local training programs. Additional human rights training is provided by KCC. On 6 June 2014 the military trial of the two police officers opened in Kolwezi and was immediately adjourned. The Military Prosecutor requested that all of the KCC and G4S employees, who were part of the security team, should be heard.<sup>173</sup>

### **4.3. Use of excessive force by mine police guarding KCC's concession**

In December 2013 there were other incidents of excessive use of force on and around KCC's concessions during operations by Mine Police to clear *creuseurs* off KCC's mine sites. Another shooting of a *creuseur* by a Mine Policeman, arising out of a dispute over access to waste dumps, occurred at the T17 mine on the same day. Glencore notes that the deployment of Mine Police officers on site is a requirement of DRC mining regulation and outside of the control of the mining companies.<sup>174</sup>

Kapata, 20 kilometres from Kolwezi is a former Gecamines township. It is surrounded by mines owned by Sicomin, African Minerals and KCC. According to local people, the companies regularly call upon the authorities for help to remove artisanal miners from their sites:<sup>175</sup> mine police, the Presidential Guard and even riot police have been deployed.

<sup>171</sup> Letter to Andy Baker, Regional President – Africa, G4S plc, 30 May 2014.

<sup>172</sup> Clive van Ryneveld, Regional MD (East Africa) G4S Africa Internal Memorandum dated 6 June 2014: 'Brief on death of ERIC MUTOMBO KASUYI on KCC mine (DRC) – FEB 2014'.

<sup>173</sup> Communication CAJJ, 7 June 2014.

<sup>174</sup> Glencore Response, 21 May 2014.

<sup>175</sup> Interviews with residents of Kapata, 10 March 2014.

On 20 December 2013, KCC used local radio and television to warn artisanal miners that they should leave their concession. The artisanal miners were given three days to sell any of the minerals they had extracted and to remove their belongings. A week later, KCC called in the mine police. Around 5am on the morning of 27 December 2013, police opened fire on artisanal miners who had refused to leave the concession. The mine police are not supposed to use live ammunition in such situations.<sup>176</sup> The miners, allegedly in self-defence, threw stones at the police. The situation degenerated when the police still firing pursued the miners into the streets of Kapata, seriously injuring, Makongo Lenge, a passer-by.

#### A stray bullet

Makongo Lenge, a student from Luena, was staying with one of his brothers, Kasongo-Lwendo Joseph, a resident of Kapata. According to his relatives whom we interviewed, he had only recently arrived.<sup>177</sup> He had gone out at about 10 am to meet a friend at a café, when he was hit by a bullet fired by a mine policeman. The bullet entered Lenge's body under his right arm and it exited near the top of his spine. He was taken to a local private health centre, Peniel Centre de Sante, where a nurse recognised him and alerted his family. The family contacted the Chef de quartier who contacted the *bourgmestre* [administrative head of the Commune] of Dilala. The *bourgmestre* requested help from KCC, who sent an ambulance to convey the injured man to hospital. The ambulance was stoned by an angry crowd and turned back, so the family had to take the injured man by taxi to the Gecamines hospital. The family had to pay \$500 for Makongo Lenge's medical treatment. The *bourgmestre* gave them \$50. KCC has not been in contact with them or provided any compensation. Local media, which often comes under pressure from vested local interests, failed to report on the injuries that had occurred as a result of this operation.<sup>178</sup>

#### Angering the 'gate keepers'

On 27 December 2013, at about 8:00 am, 20-year old Numbi Ndala Kaba, was shot and wounded by mine police inside T 17 mine. Numbi Ndala Kaba was among a group of artisanal miners who, in exchange for a fee, were regularly allowed by the police to collect minerals at night from the T 17 waste dumps. On this occasion the *creuseurs* came onto the site in the morning, which angered the police. One of the policemen, who appeared to be drunk, opened fire and shot Numbi in the leg. The injured man was taken in a KCC vehicle to the Mwangeji hospital in Kolwezi. The family were notified and had to pay 350,000 Congolese Francs (approximately 400 US Dollars) for the surgery the injured man needed.<sup>179</sup>

### **Glencore's response**

Glencore confirms that an operation was carried out to clear miners from Mashamba East, near Kapata:

27 December 2013, KCC requested an evacuation of artisanal miners from Mashamba East, part of the KCC concession, due to concern about the miners' safety. The evacuation was conducted in compliance with DRC law, including a formal communication to the local au-

<sup>176</sup> See: PACT Inc. PROMINES Study - Artisanal Mining in the Democratic Republic of Congo, (June 2010). p. 62 A Cadre de Concertation for conflict resolution in the artisanal mining sector of Kolwezi was established under the presidency of the Mayor of Kolwezi. Strategies for reducing violence were adopted.

<sup>177</sup> Interview with family and other witnesses Kapata, 10 March 2014.

<sup>178</sup> Interview with family and other witnesses Kapata, 10 March 2014.

<sup>179</sup> Kolwezi Monitoring Report December 2013.



thorities and the SAESSCAM<sup>180</sup>, the artisanal miners' representative body. SAESSCAM also engaged with the miners to alert them to the operation. The evacuation was conducted peacefully. Mine police was deployed only for access control in that specific occasion and KCC did not receive any complaint regarding any excessive use of force. KCC was neither informed nor involved in any incidents that may have occurred in Kapata, which is located outside of the KCC concession.<sup>181</sup>

#### 4.3.1. Public Security and Glencore's responsibility

The number of serious incidents involving the use of firearms or excessive force over the past 18 months by the mine police should be a matter of the utmost concern to Glencore. But the company's blanket denial of any responsibility for such incidents is wholly inadequate. The shootings indicate that the police are firing live ammunition in a reckless way both on KCC's site and in the surrounding neighbourhoods when in hot pursuit of *creuseurs*, in contravention of international standards and Congolese law. These facts only reinforce the perception that mine police are ill-disciplined and poorly trained. It is hard to accept at face value Glencore's assertion that it is unaware of the incident in Kapata, which was widely known in Kolwezi. KCC has community liaison officers living in all the surrounding areas; such incidents often start on the KCC site and spill over into nearby townships; and when injuries do occur, KCC assistance is sought. KCC ambulances are often called upon to convey the wounded to hospital and all movements by KCC vehicles would be logged. Glencore's narrow territorial focus on whether police violence occurred inside of just beyond the mine boundary to evade responsibility misses the point: where an incident happened is secondary to the fact that it occurred in the first place because of actions, policies or relationships over which the mine company has considerable influence.

The fact that, according to numerous reports, mine police are susceptible to bribes (and connive at the very incursions they are supposed to defend the mine against) demonstrates the urgent need for greater supervision, more training and better incentives, such as improved rates of pay. Some of these measures – with the possible exception of training - could be undertaken relatively easily by Glencore.

In the DRC there is a general problem of impunity for human rights abuses and policemen or other law enforcement officials are almost never prosecuted for misconduct.<sup>182</sup> The scale of the problem with artisanal miners also overwhelms the local justice system. Violent conflict between KCC and artisanal miners is has not diminished. According to G4S on average 20 incidents of a security nature take place on KCC's mining concession every 24 hours and illegal intrusions involving hundreds of people occur each week.<sup>183</sup> The fact that KCC relies so heavily on riot police and security contractors suggests that conflict is never far from the surface. But Glencore appears to have adopted a military-style response, which is only likely to heighten the risk of further human rights violations. Its rapid intervention force includes mine police in full riot gear who are armed and carry tear gas. G4S contractors have wooden truncheons.

A more enlightened, human rights compliant approach is needed. KCC's small-scale community projects do not begin to address the desperate need for alternative sources of employment for the im-

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<sup>180</sup> Service d'Assistance et d'Encadrement d'Artisanal et Small Scale Mining (a government body that oversees small-scale and artisanal mining).

<sup>181</sup> Glencore Response, 21 May 2014.

<sup>182</sup> Report of the United Nations Joint Human Rights Office on the violation of human rights and fundamental freedoms committed during the electoral period in the Democratic Republic of the Congo, as well as on the actions taken by Congolese Authorities in Response to these Violations October 2011 - November 2013.

<sup>183</sup> Clive van Ryneveld, Regional MD (East Africa) G4S Africa Internal Memorandum dated 6 June 2014: Brief on death of ERIC MUTOMBO KASUYI on KCC mine (DRC) – FEB 2014.

poverished inhabitants of the neighbourhoods surrounding the KCC mine and installations. While officially illegal, artisanal mining is broadly accepted by the local authorities and communities as a necessary means of earning a livelihood. Many of those in authority are involved in the minerals trade. Over the past five years, opportunities for artisanal mining have been greatly reduced with the expansion of industrial mining, but to date the Congolese authorities have not begun to address the problem of unemployment, low education attainment and the skills deficit of the population.

#### ***Unanswered Questions for Glencore/KCC<sup>184</sup>***

- What has Glencore done in response to these incidents in which police have fired recklessly at artisanal miners or even at citizens in streets near their sites? Given that allegations have been made that shots have also been fired on the concessions, what has the company done to investigate these claims?
- In the absence of a memorandum of understating (which Glencore's subsidiaries are currently drafting), will Glencore/KCC release any other documents that detail arrangements between the company and law enforcement authorities, including the Mine Police? Will the company also provide details of the magnitude and administration of any contributions it makes to the police and other local authorities?
- Has Glencore/KCC met the Mayor and the Head of Police to discuss the problem about misconduct by mine police?
- Has Glencore/KCC sought the removal of any mine police known to be ill-disciplined?
- What action has Glencore/KCC taken to reduce the likelihood of corruption on the part of the mine police?

#### **4.4. Arbitrary Arrests**

On 21 January 2013, following the death of Kalala Mbenga, there were a number of arrests of young men in Musonoï suspected of being *creuseurs*. The arrests were carried out by the agents of the *Agence National des Renseignements* (ANR), the Congolese intelligence services, who are embedded near all mines in Katanga. According to local human rights observers, these arrests, which took place at about 4 am, were carried out after the KCC Security Manager had asked the *Chef de Quartier* to discourage local men from entering the site to dig for minerals. Most of the men were released soon afterwards, but according to authoritative local sources whom we [the NGO coalition?] interviewed, many were not involved in artisanal mining at all. One person had spent five days in jail. Those arrested had to pay a 'fine' of 500 CFs (about 50 cents US) to obtain their release.

The Kolwezi Chief Public Prosecutor told us that there were many mining-related conflicts, which creates a lot of tension in the area. He explained that there were relatively few instances where people had been prosecuted for the theft of minerals from large mining concession. It is difficult to apply the law in such cases because the minimum fine is US\$5,000 irrespective of the quantity stolen. In his view, this makes the law unenforceable as too many people would end up in prison for this offence.<sup>185</sup>

#### **4.5. Detention of Minors**

On 15 March 2014 nineteen youths (some no more than 12 or 13 years old) were arrested on KCC's concession for trespass and taken to the Parquet in Kolwezi where they were held in the same cells as adult detainees. On 19 March 2014 we wrote to Glencore about the detention of the minors and

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<sup>184</sup> Bread for All, RAID and Fastenopfer will publish on their websites any clarification or answer Glencore sends.

<sup>185</sup> Interview with Procureur de la République Phaniel Macaba Mukoko (Chief Public Prosecutor) Kolwezi March 2013.

urged the company to take all possible measures to ensure that the youths were released into the care of their families without delay.



Picture 24: One of the arrested children (centre) detained in a cell with adults  
(Photo: CAJJ)



Picture 25: The minors were brought before the court after four days' detention by prosecutors in the same conditions as adults  
(Photos: CAJJ)

### ***Glencore's response***

Glencore states:

the KCC Security Department had faced an intrusion of a group of young people, who were found collecting material on the concession. They were not arrested but, in line with procedures, the minors were interviewed. For those unable or unwilling to give information about their identity or families, KCC informed the Prosecutor, who requested their transfer under his jurisdiction. Following this transfer, KCC had no authority over the treatment of this group, as it is in the jurisdiction of the legal authorities.<sup>186</sup>

The procedures described above, whereby KCC's own OPJs questioned the boys and took the decision to hand them over to the Prosecutor (rather than escorting them off the site into proper care), seems little different from placing them under arrest. The youths were only released after four days

<sup>186</sup> Letter GlencoreXstrata 25 March 2014; and Glencore Response, 21 May 2014.

in the custody of the Prosecutor, without charge, after the intervention of CAJJ lawyers, who had been contacted by the boys' distraught parents.

Glencore's attitude suggests that the company considers it is sufficient to follow formal procedures – however flawed – whatever the consequences for the individuals concerned, such as minors, who are particularly vulnerable. The company seems to have paid little attention to the special protection afforded to minors in international law.<sup>187</sup> Under the UN Guiding Principles, Glencore has an obligation to undertake due diligence to ascertain the possible negative impacts its actions.<sup>188</sup> The company should have been aware that Kolwezi does not have a youth custody centre and at the very least could have followed up with the Prosecutor to ensure that the minors were not placed in the same cells as adult prisoners.

The custody of the youths in adult cells also appears to be a breach of the DRC's Child Protection Law<sup>189</sup>, which stipulates that alternatives to detention must be found for those under the age of 18.

#### ***Unanswered Questions for Glencore/KCC<sup>190</sup>***

- How long were the boys held for by KCC Security, before being handed over to the Prosecutor's office? Were those minors who had given details of their identities handed into the care of families or guardians or simply released; how long were this group held by KCC Security?
- Did KCC seek assurances from the Prosecutor as to how the minors would be treated and dealt with before transferring them?
- Will Glencore publish the procedures for detaining and questioning the minors that it refers to in its letter?
- Is Glencore willing to ensure that such procedures are revised to ensure better protection of the rights of those detained on mine concessions?

#### **4.6. Freedom of movement**

The road across KCC's concession that connects the townships of Kapata and Luilu was built by Gecamines and is regarded by local people as a public road. After dusk, residents of Musonoï, Luilu and Kapata are prohibited from using KCC's road which remains open only to company traffic and pedestrians. The road is patrolled by armed mine police and KCC's private security guards. A major source of friction between KCC and the surrounding communities is the inconvenience the closure of the road causes local residents. They also complain of harassment by security patrols even when using the road during the day. Using the road can lead to arrest on charges of trespass (*circulation illicite*) or more seriously the attempted theft of minerals (*tentative de vol simple des substances minérales*).

KCC says it has a policy of 'zero tolerance' for all offences and suspects are immediately taken to the Prosecutor's office in Kolwezi where they may be held while the case is being investigated before being transferred to Dilala prison. Some of those arrested at KCC's sites for trivial offences such as trespass can be held in detention for seven days.<sup>191</sup> According to a list obtained from the Public Prosecutor's office in Kolwezi, in a five-month period from November 2012 to April 2013, there were over 58 arrests at KCC and MUMI. Most of the cases concerned illegal artisanal mining, trespass or minor public disorder offences.

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<sup>187</sup> International Covenant on Civil and Political Rights Article 10 Juvenile offenders shall be segregated from adults.

<sup>188</sup> UN Guiding Principle 15 (b); see also Commentary to Guiding Principles 18 and 20.

<sup>189</sup> Articles 104 and 106 *loi No 09/001 du 10 janvier 2009 portant protection de l'enfant*.

<sup>190</sup> Bread for All, RAID and Fastenopfer will publish on their websites any clarification or answer Glencore sends.

<sup>191</sup> Information from a Kolwezi human rights lawyer May 2014.

### **Glencore's response**

Glencore states:

KCC does not restrict access to pedestrian roads near its concession. These roads are not the property of KCC but of the State. The only roads with no access are mine specific roads that have been developed by KCC since ownership by Glencore. The company denies any allegations of abuse of pedestrians by KCC security personnel.<sup>192</sup>

But this response does not offer a solution to the problem that this is the only road that connects these townships and which provides access to the centre of Kolwezi.

## **4.7. Mutanda Mining**

The security situation at Mutanda Mining (MUMI), which is in an isolated, rural area about 45 km from Kolwezi, is very different from that confronting KCC. From the outside, the site, which is surrounded by a high electric fence with watch towers along its perimeter, resembles a maximum security prison or army camp. We received reports from a range of different sources, including former employees, that between 2009 and 2013, it was common practice for MUMI to use a disused container on its site as a 'cachot' or holding cell. Glencore denies that such a 'cacho' has ever been used at the mine and MUMI Security managers told us that all suspects were taken to the office for questioning. Yet a number of MUMI employees and human rights lawyers we [the NGO coalition?] spoke to confirmed the use of the 'cachot', where suspects were held without access to their families or lawyers, but told us that the container had been shut down shortly before our visit in October 2013. MUMI staff also told us that a new holding centre has been constructed on site. Holding centres are supposed to be regularly inspected by the Prosecutor's office and the maximum amount of time suspects may be held in such conditions before being transferred to the prosecuting authorities in Kolwezi is 48 hours.<sup>193</sup> At MUMI this time-limit has been exceeded.

In early April 2013, we received a report that a woman, working as a secretary at MUMI in the stores department, had been arrested on suspicion of theft. She was allegedly held for seven days in the 'cachot' at MUMI. Her alleged male accomplices (also employees), were taken to the premises of the *Agence National des Renseignements* in Lualaba where they were held for 4 days and allegedly subjected to torture. On 9 April 2013, the men were transferred to the prosecutor's office in Kolwezi. We have been unable to interview the detainees but we were informed that none of the accused (including the woman) was prosecuted and all have since been released.<sup>194</sup>

We were also given examples of other cases that had occurred in 2009, but we have been unable to verify all these allegations. MUMI's OPJs operate under the supervision and authority of the Public Prosecutor's office and should not under any circumstances transfer detainees to the custody of ANR, which according to the UN has an appalling human rights record.<sup>195</sup>

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<sup>192</sup> Glencore Response, 21 May 2014.

<sup>193</sup> Interview with the Chief Public Prosecutor, Kolwezi March 2013. See also Constitution de la République démocratique du Congo, Article 18: 'La garde à vue ne peut excéder quarante-huit heures. A l'expiration de ce délai, la personne gardée à vue doit être relâchée ou mise à la disposition de l'autorité judiciaire compétente.': <http://www.katanga.gouv.cd/files/pdf/constitution.pdf>.

<sup>194</sup> Interviews in Kolwezi with human rights lawyers and MUMI employees October 2013.

<sup>195</sup> Report of the United Nations Joint Human Rights Office on the violation of human rights and fundamental freedoms committed during the electoral period in the Democratic Republic of the Congo, as well as on the actions taken by Congolese Authorities in Response to these Violations October 2011 - November 2013.



During our visit to MUMI we observed, apart from mine police and private security contractors, a detachment of the Congolese Armed Forces based inside the mine perimeter, which is most unusual. Given the record of the Congolese army and the high risk of human rights violations they represent, leading international mining companies we interviewed told us that they avoid having soldiers permanently on site.<sup>196</sup> Only in the case of serious disturbances or riots, can mining companies make a special request for military intervention through the Governor of the Province.

### **Glencore's response**

Glencore states:

MUMI operates in line with DRC requirements for holding suspects. All suspects are transferred to Kolwezi, where their cases are investigated by the Prosecutor in accordance with DRC regulation. All hearings and transfers are supervised by the OPJs, who report in this capacity to the Prosecutor, in accordance with DRC regulation. MUMI does not employ any members of Agence Nationale de Renseignement (ANR).<sup>197</sup>

Glencore claims the presence of the army at MUMI is legally required to supervise the storage of explosive and blasting material.<sup>198</sup> But there is no such requirement in either the Mining Code or Mining Regulations.<sup>199</sup>

### **Unanswered Questions for Glencore/MUMI<sup>200</sup>**

- Has the company investigated the detention of the female secretary allegedly detained in the 'cachot' for seven days? Has the company investigated the transfer of her alleged male accomplices to the ANR?
- Whilst MUMI may not directly employ members of the ANR, what is the company's relationship with Congolese intelligence? How many ANR members or army personnel are on site at MUMI? How are they accommodated and provisioned? Does the company make a contribution to the ANR or armed forces? Will Glencore/MUMI release details of any arrangements it has with the ANR or army?
- Will the company provide a copy of the legal provision that requires it to have an army presence on site?

## **4.8. Tilwezembe – continuing human rights abuses**

Tilwezembe, which is about 30 km to the east of Kolwezi, is part of the KOV concession, formerly owned by the DRC Copper and Cobalt Project (DCP). DCP recommenced industrial mining there in 2007 but after DCP's 2008 merger with the Kamoto Copper Company (KCC) these operations ceased. Tilwezembe, which remains part of KCC's concession, is described in Glencore's technical documents as 'dormant', meaning there is no industrial production at the mine.<sup>201</sup> Although KCC does not maintain a presence at Tilwezembe the company made clear to RAID, Bread for All and Fastenopfer that it

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<sup>196</sup> This approach dates in particular from the 2004 Kilwa massacre, which involved the Congolese army and took place near Anvil Mining's Dikulushi mine.

<sup>197</sup> Glencore Response, 21 May 2014.

<sup>198</sup> Glencore Response, 21 May 2014.

<sup>199</sup> Article 211 Mining Code: *De l'usage des produits explosifs* ; Article 17 : *De l'utilisation d'explosifs* and Article 92 : *Des mesures de sécurité classiques, ANNEXE VIII Décret N°038/2003 du 26 mars 2003 portant Règlement Minier.*

<sup>200</sup> Bread for All, RAID and Fastenopfer will publish on their websites any clarification or answer Glencore/MUMI sends.

<sup>201</sup> SRK Consulting KML – Independent Technical Report.

has no intention of ceding its rights to the concession because it may contain important mineral reserves.<sup>202</sup> Tilwezembe has three large open pits which have been worked by artisanal miners for the past four years. During 2012 and 2013 there were credible reports from Bread for All, Fastenopfer and Amnesty International as well as the BBC about serious human rights abuses at the Tilwezembe, including exploitative and harmful labour conditions, hazardous child labour, and the ill-treatment of artisanal miners.<sup>203</sup> At that time over 1500 artisanal miners worked on the concession. In 2012 in a response to the BBC, Ivan Glasenberg, Glencore's Chief Executive, denied that the company profited from child labour or that it had any involvement in artisanal mining at Tilwezembe:

'Katanga holds the concession for Tilwezembe and at some point in the future plans to mine there. However in mid-2010 Tilwezembe was invaded by hundreds of artisanal miners overnight. We are not involved at all in the mining activity currently going on there. We are in dialogue with the Government on how best to handle the situation at Tilwezembe and have asked the authorities for help to remove these artisanal miners. However we are proceeding with extreme caution as we are aware that previous attempts by other companies to remove artisanal miners elsewhere have resulted in violence and even fatalities.'<sup>204</sup>

Interviews with artisanal miners confirmed that when they arrived on the site in about July 2010 they were able to mine 'independently' for a short time, selling minerals to whichever trading house offered the highest price. But towards the end of 2010 the site was taken over by a trader, MISA Mining. Artisanal miners were then forced to sell their produce to MISA Mining.<sup>205</sup> According to Amnesty International: 'The appalling conditions at Tilwezembe occurred when Misa Mining was the corporate operator on site buying ore from the artisanal miners working there.'<sup>206</sup> At that time the *Coopérative Minière Maadini kwa Kilimo* (CMKK), an artisanal miners cooperative - widely reported to be linked to the Mayor of Kolwezi - worked with MISA Mining at Tilwezembe. Misa Mining denied all of Amnesty International's allegations.<sup>207</sup>

The only evidence Glencore has provided of its efforts to distance itself from artisanal mining activities at Tilwezembe is a letter, which a former Manager Director of KCC had sent to the Provincial Ministry of Mines in October 2010, expressing the company's opposition to the nomination of MISA Mining as the site operator.<sup>208</sup>

In March 2014, the official of the *Service d'Assistance et d'Encadrement d'Artisanal et Small Scale Mining* (SAESSCAM), the government entity that provides technical support and advice to artisanal miners, confirmed that Tilwezembe is still active but that the number of artisanal miners working there has dropped to about 300 people. According to the *Association des Exploitants Miniers et Artisanaux du Katanga* (EMAK), the official association of artisanal miners in Katanga, Tilwezembe continues to be controlled by the same entities as before, although MISA Mining now operates under the name of Compagnie Mining Dilala (CMD).

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<sup>202</sup> Interview with KCC October 2013.

<sup>203</sup> Bread for All and the Swiss Catholic Lenten Fund, *Glencore in the Democratic Republic of Congo: profit before human rights and the environment*, April 2012, pp. 13 and 19. BBC Panorama, *Billionaires behaving badly?* 16 April 2013; and Amnesty International, *Profit and Losses*, 2013 pp. 9-15.

<sup>204</sup> Glencore International Plc, *Glencore Response to Upcoming BBC Panorama Broadcast*, 16 April 2012.

<sup>205</sup> RAID interviews with creuseurs Lualaba and Tilwezembe, October 2011.

<sup>206</sup> Amnesty International 'Profit and Losses' 2013 p. 13-15 reported that a 29-year-old artisanal miner, Isaac Mukeba Muzala, who worked at Tilwezembe, had died in suspicious circumstances in September 2011. An investigation opened into his death has never been concluded. Muzala, had been accused of trying to steal minerals from the site and had been killed allegedly by security guards and mine police on the site.

<sup>207</sup> Réponse de Misa Mining au sujet du rapport d'Amnesty International sur l'exploitation minière en RDC 23 mai 2013 published on the Business and Human Rights Resource Centre's website, July 2013.

<sup>208</sup> Chantel Peyer and François Mercier, *Glencore in the Democratic Republic of Congo: Profit before Human Rights and the Environment* 2012; Bread for All and Catholic Lenten Fund, p. 14.

Information gathered for this report indicate that human rights abuses continue to occur at Tilwezembe. Artisanal miners interviewed in May 2014 by our Congolese partners said that they are still subjected to abuse by '*mobiles*' – young miners who have been selected to work as security guards - and mine police. They claim that *creuseurs* are frequently beaten by the *mobiles* and that 'suspects', depending on the problem are either detained for several days in one of two old containers on site before being transferred to the prosecutor's office in Kolwezi or forced to pay 'fines' imposed by the Mine Police.<sup>209</sup>

### **Glencore's response**

We asked Glencore whether it had taken any action in response to the well-documented human rights abuses that had occurred at its concession and whether KCC had raised its concern with the Congolese authorities about CMD and CMKK continuing to operate its concession.

As stated previously, the Tilwezembe concession was illegally seized by artisanal miners. The situation at the concession is extremely volatile, and KCC restricts its employees from travelling to the site out of concern for their safety. KCC continues to engage with the DRC government for a peaceful resolution to this issue.<sup>210</sup>

But even if it is true that KCC staff are unable to visit the site, it is not clear why Glencore has been unable to provide any evidence that it has taken other actions to convey its concern to the authorities about the reported abuses at Tilwezembe. Glencore seems to want to have it both ways: insisting that abuses occurring *outside* its concession are not its responsibility and refusing to take responsibility when, as with Tilwezembe, they take place *inside*. Furthermore, under the UN Guiding Principles business enterprises are required to seek to:

Prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by the business relationships even if they have not contributed to those impacts<sup>211</sup>

### **Unanswered Questions for Glencore<sup>212</sup>**

- Glencore/KCC indicate when and to which Congolese authority it last raised its concerns about the situation at Tilwezembe?
- Did Glencore/KCC in view of the serious human rights abuses reported by NGOs and the BCC formally request the authorities to investigate these allegations?
- Has Glencore/KCC in its 'engagement with the DRC government' at any point called for the removal of Compagnie Mining Dilala and CMKK from its site or sought clarification about the legality of their operations? If not, are CMD and CMKK operating with KCC's approval?
- What is Glencore/KCC's strategic approach towards the issue of artisanal miners?
- Can Glencore/KCC explain why it has adopted a different approach to artisanal miners at Tilwezembe? In other parts of its concession (such as Mashamba East, Liulu, KOV and T 17) mine police and security patrols are routinely deployed to remove artisanal miners?

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<sup>209</sup> Interviews at Tilwezembe, 24 May 2014.

<sup>210</sup> Glencore Response, 21 May 2014.

<sup>211</sup> UN Guiding Principle 13 (b).

<sup>212</sup> Bread for All, RAID and Fastenopfer will publish on their websites any clarification or answer Glencore sends.

## 4.9. Conclusions

There is a pattern of failure by the Kolwezi authorities to investigate violent or suspicious deaths of artisanal miners, as the cases of Isaac Mukala and Kalala Mbenga show. Mine police and private security often give misleading or incomplete accounts of the circumstances in which such deaths have occurred. In some cases they have tried to conceal the identity of the dead person and fail to notify the relatives. Families are discouraged by the authorities from taking action; and although they are legally required for burial, death certificates are often not released. There is a complete lack of transparency about the way grieving families are offered small amounts of compensation either through the Mayor's office or by mysterious intermediaries.

### 4.9.1. Responsibility of the DRC authorities

Under Congolese law the police and security forces are required only to use force when strictly necessary and solely to achieve a legitimate end. As provided for by international standards, recourse to force, and in particular to firearms, must be proportionate and in accordance with the principle of "a graduated response". If recourse to force is found to be necessary to uphold public order, it must meet these criteria.<sup>213</sup>

The limitations of the DRC in terms of training and resources available, which would enable the prosecution services to undertake adequate forensic investigations into serious crimes, is well known.<sup>214</sup> Reports by the United Nations and the International Commission of Jurists have noted that, while in theory there are some avenues of redress available to victims of corporate abuses under Congolese law, the prospect of successful outcomes is always limited. Barriers to justice include manifold weaknesses of the organisation of the judiciary, its lack of independence and the enormous disparity in wealth, information and resources, between the various levels of government and the companies, as compared with the individuals and communities, who have suffered human rights abuses as a result of corporate actions.<sup>215</sup>

### 4.9.2. Glencore's responsibilities

Glencore intends to take steps to improve its approach to security and human rights, however serious problems remain. The passive acceptance by Glencore and its subsidiaries of the flawed procedures of the DRC authorities or turning a blind eye to abuses perpetrated by the mine police and others deployed to secure their sites, is not compatible with the UN Guiding Principles. It is disappointing that Glencore's default position when questioned about these incidents has been to issue a blanket denial or even threaten legal action. The company suggested that the press release concerning the death of Mutombo on KCC's concession was 'in line with the currently fashionable bashing of multinational commodity trading companies'.<sup>216</sup> The cases in this chapter illustrate serious shortcomings in Glencore's responses and efforts to fulfil their human rights responsibilities in Katanga Province.

Glencore continues to rely on the Congolese police as an integral part of its security system. They are supposed to follow national and international standards which say that lethal force must only be

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<sup>213</sup> See Articles 8 and 9 of Organic Law No 11/013 governing the organisation and operation of the PNC, promulgated on 11 August 2011.

<sup>214</sup> International Legal Assistance Consortium and International Bar Association Human Rights Institute Report (herein after IBAHRI and ILAC) Rebuilding Courts and Trust: an assessment of the needs of the justice system in the DRC August 2009.

<sup>215</sup> United Nations Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010; see also International Commission of Jurists 'Access to Justice: Human Rights Abuses Involving Corporations – The Democratic Republic of the Congo', Geneva, 2012.

<sup>216</sup> Letter to RAID from Michael Fahrback, Head of Sustainability, Glencore International AG 27 March 2014.

used to protect life and only as a last resort. Until Glencore improves its relations with local communities and puts in place a security strategy that is compliant with international standards, these incidents are likely to continue to occur. Some human rights violations appear to arise from a misconceived desire on the part of some local authorities to help the company officials resolve the problem of artisanal mining. Relying on police who all too readily use live ammunition to protect the mine is not the solution.<sup>217</sup> It is incumbent on Glencore to make clear that abuses are not appropriate and to ensure that security staff are not unwittingly encouraging such actions. During our visit to KCC and MUMI it was explained that a new Security Manual is in preparation which will formalise the rules for the use of force and define the different roles and responsibilities of the security guards and private contractors. The company says that any guards who use excessive force are disciplined. KCC's Security Manager stressed the importance of proper supervision.

Glencore is currently seeking admission into the Voluntary Principles on Security and Human Rights Initiative. The Voluntary Principles are supposed to guide companies in maintaining the safety and security of their operations within a framework that encourages respect for human rights. In applying the Voluntary Principles, it is argued, extractives companies have the opportunity to encourage high standards of conduct by security forces, and to have a positive impact on local governance, peace and stability in the countries in which they operate. The Voluntary Principles recognise that, although governments have the primary role of maintaining law and order, security and respect for human rights, it is in the companies' interest to ensure public security providers act in a manner consistent with the protection and promotion of human rights.

We are pleased to learn that KCC and MUMI are, however belatedly, in the process of drafting a Memorandum of Understanding with the Mine Police, which will address material and financial assistance, as well as stipulate expected standards of conduct.<sup>218</sup>

The UN Guiding Principles emphasise the importance of not undermining the State's abilities to meet their own human rights obligations including by actions that might weaken the integrity of judicial processes.<sup>219</sup> The critical issue is the manner in which Glencore responds to human rights violations by the Congolese public law enforcement bodies. The company needs to reflect whether it is acting in a way that encourages a full investigation of human rights violations and the prosecution of those accused or whether it is more concerned about shielding the company or its employees from potential claims and adverse publicity. It is troubling that OPJs, who are company employees, not only directly participate in security operations but also have sole authority to arrest and question suspects within the precincts of the concessions. This presents a disturbing conflict of interest and the OPJ system is open to abuse or the perception of abuse.

Glencore has not developed a credible mechanism for redressing harm that its operations may have caused or contributed to. According to the Guiding Principles 'Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.'<sup>220</sup>

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<sup>217</sup> The Commentary to Guiding Principle 13 states: 'For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business.'

operations, products or services.

<sup>218</sup> Glencore Response, 21 May 2014.

<sup>219</sup> UN Guiding Principle 11.

<sup>220</sup> UN Guiding Principle 22.



## 5. Glencore and the local communities: a top-down approach that brings little benefits to communities

### 5.1. KCC and MUMI consultation and complaints procedures for communities

In a description of its relations with local communities, Glencore states: 'We are committed to building constructive and transparent dialogue with the local communities, in accordance with international standards. Through all our activities, we seek to ensure that communities are fully informed about our work, and are given sufficient time to reach decisions. Throughout our engagement with communities, we seek to ensure we consult all affected stakeholders, as well as NGOs and associations with proven expertise in ESIA (environmental and social impact assessments), consultation processes and community development.'<sup>221</sup> Glencore has two procedures for dealing with local communities:

- five-yearly (minimum) consultations that form part of ESIA;
- company requests and complaints procedures.

As part of their research, RAID, Bread for All and Fastenopfer tried to assess whether these consultation and complaints procedures allow for the open and effective participation of local communities and to what extent they conform with the international standards quoted by Glencore, notably the UN Guiding Principles on Business and Human Rights<sup>222</sup> and the Performance Standards of the International Finance Corporation (IFC) Standard on Environmental and Social Sustainability<sup>223</sup>.

#### 5.1.1. Participation and transparency during the preparation of environmental and social impact assessments: more progress needed

DRC legislation requires companies to conduct environmental and social impacts assessments (ESIA) every five years. These assessments should include a baseline study and describe the environmental and social impacts of the project. For example, companies must assess the extent of any pollution from their installations and whether how this might affect soil fertility and human health. With regard to social aspects, companies must be aware of the traditions of local villagers in order to be able to assess the negative impact that the arrival of a significant number of employees from outside the area may have. They also need to be aware of local sources of income in order to understand the impact caused by mining infrastructure (closure of access roads to villages, fencing, etc.).

Glencore conducted an ESIA for its two subsidiaries, Mutanda Mining (MUMI) and Kamoto Copper Company, in 2008 and 2009 respectively. The company began preparing new ESIA in 2013. The two subsidiaries commissioned SRK Consulting to consult local communities. Glencore<sup>224</sup> informed us that consultations with stakeholders were organised in two stages:

- a meeting in May 2013 to assess company activities and discuss the expectations and priorities of participants during the next few years;

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<sup>221</sup> Letter to Bread for All, RAID and Fastenopfer, 31 January 2014.

<sup>222</sup> See: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations, Protect, Respect and Remedy Framework, A/HRC/17/31, 21 March 2011. See: UN Guiding Principles 18, 20 and 31.

<sup>223</sup> International Finance Corporation Performance Standard on Environmental and Social Sustainability. (PS 1§ 25-36): Assessment and Management of Environmental and Social Risks and Impacts, 2012.

<sup>224</sup> Interview with KCC/MUMI social affairs official, 7 October 2013.

- a second meeting scheduled for November 2013, did not take place. The aim was to present a new environmental and social management plan for 2014-2018, answer questions and discuss comments.

*Stakeholder participation: a top-down approach*

We asked Glencore for a list of participants who had been invited to the consultations, but the company refused our request. This contrasts with the practice of other companies, which not only publish lists of all participants that attend consultations, but also publish detailed minutes of such meetings on their websites.<sup>225</sup> We did a survey to find out who had participated in the ESIA consultations organised by KCC and MUMI. We questioned dozens of residents<sup>226</sup> in Musonoi, Lulu, Kapata, Kaindo, Kapaso and Kaminaindo, which are the main townships and villages located close to the KCC and MUMI concessions, but nobody we spoke to had seen notices or received letters inviting them to attend and none of them knew anyone in their community who had attended. We also questioned representatives of local and regional communities and non-governmental organisations attending a workshop on the mining industry in Kolwezi, organised by the authors of this report, in March 2014<sup>227</sup>. Only three out of the 60 participants, two of whom were customary chiefs, had been invited to the consultation<sup>228</sup>. None of the non-governmental organisations (NGOs) based in Kolwezi who had written letters, published reports or carried out investigations into KCC (for example, the Episcopal Commission for Natural Resources, ASIBOG, ACIDH, POM, World Vision, etc.) had been invited to participate.



Picture 26: Participants at the workshop organised by CERN, Bread for All and Fastenopfer, March 2014, Kolwezi  
(Photo: C.Peyer/BFA)

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<sup>225</sup> For example: Rio Tinto in Guinea. The company set up a website dedicated to environmental and social impact assessments. All consultations were announced on the website, which also published the minutes and a list of participants. A summary of information provided and details of all questions asked was published and accessible to all. See: [http://www.riotintosimandou.com/FRA/seia/924\\_principaux\\_documents.asp](http://www.riotintosimandou.com/FRA/seia/924_principaux_documents.asp).

<sup>226</sup> We put these questions to around 60 people in different villages and towns.

<sup>227</sup> *Appui au Renforcement de la participation citoyenne dans la gestion des ressources naturelles, atelier organisé par la CERN, Fastenopfer et Bread for All, 7-9 March 2014, Kolwezi.*

<sup>228</sup> A fourth participant attended in his capacity as a journalist and not as a representative of civil society. We did not therefore include him.

The companies did not even invite the Congolese Institute for Nature Conservation (ICCN), which is officially responsible for the Basse-Kando reserve where MUMI is located. Questioned on this subject, Glencore responded: 'Throughout our engagement with communities, we seek to ensure we consult all affected stakeholders, as well as NGOs and associations with proven expertise in ESIA, consultation processes and community development. Throughout this process, we also focus on NGOs and associations that operate in proximity to our operations and can therefore directly relate to affected communities; for this reason, we have not engaged with the ICCN, which is based in Kinshasa. Please do note, however, that the Ministry of Environment was represented by the local official office, and that we consulted the scientific community of Kolwezi.'<sup>229</sup> This response is typical of the selective approach used by MUMI and KCC. In fact, the ICCN official responsible for the Basse-Kando reserve is based in Kolwezi and not Kinshasa. She and her 30 staff patrol the reserve every day, around the MUMI concession. The ICCN knows every part of the forest and river and each village near the MUMI concession and is well placed to provide detailed information to MUMI<sup>230</sup>.

It seems, therefore, that the people most affected by KCC and MUMI's activities were excluded from the consultations. In the main it was representatives of the political and administrative establishment, together with a few academics and customary chiefs who were invited to a formal consultation on the ESIA. This top-down approach does not conform to the requirements of the Congolese Mining Code<sup>231</sup>, which calls for the active participation of affected populations.

Article 451 of the Mining Code:

'Public consultation during the preparation of environmental impact assessments for projects must allow the active participation of local populations affected by the mining or quarrying project in the preparation of the environmental impact assessment for the project. [...] Applicants for a mining or quarrying exploration license must have good relations with all communities directly affected by their projects and must undertake the following measures:

- a) get to know the populations concerned, their main activities, their social and cultural values;
- b) inform the local populations of the schedule for the exploration work and of the negative and positive impacts of the exploration work;
- c) consult the affected populations about their program of mitigation and rehabilitation measures;
- d) compensate people affected by the exploration work.'

Neither does this approach comply with the IFC requirements, which state that procedures should to be open to all with priority given to people most affected by company activities<sup>232</sup>.

### *Not enough transparency*

Glencore's discourse on transparency is contradictory. In 2012, when we asked about the distribution of KCC's ESIA to the communities, the company told us: 'The environmental impact assessment was sent to participants of the consultation and made accessible to local communities.'<sup>233</sup> However, in June 2013, when we tried to obtain copies of the ESIA's for KCC and MUMI (or at least consult them) during our field research, the company said: 'These are confidential, in accordance with our agree-

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<sup>229</sup> GlencoreXstrata letter to Bread for All, RAID and Fastenopfer, 31 January 2014.

<sup>230</sup> The ICCN representative in Kolwezi and the provincial ICCN official in Lubumbashi have written to MUMI several times, so the company cannot say it does not know of their existence.

<sup>231</sup> See: Regulation 38/003 of 26 March 2003 on the Mining Code, articles 451-452, 477-480. Also see Law 007/2002 of 11 July 2002 on the Mining Code, articles 69, 203-204 and appendix IX.

<sup>232</sup> International Finance Corporation Standards on Environmental and Social Sustainability. Standard 1: Assessment and Management of Environmental and Social Risks and Impacts, point 30.

<sup>233</sup> Questionnaire regarding Glencore investment in the Democratic Republic of the Congo, February 2012.

ment with the Congolese government.<sup>234</sup> However, directors at the Ministry of Mines in Kinshasa told RAID and Bread for All that they were in favor of transparency and that they had no objection to the publication of the ESIA<sup>235</sup>. Finally, in March 2014, when we asked Glencore whether at least a summary of the ESIA had been distributed to the communities, it replied that the document was being translated. The result is that, as of mid-March 2014, no representative of the communities had received either a copy or a summary of the ESIA prepared by KCC and MUMI.

KCC and MUMI do however provide the information required by law to the Congolese authorities. For example, they submit a copy of the ESIA to the Ministry of Mines in Kinshasa and every year provide a list of community projects to the local authorities, which includes details of the budget allocations. However, the companies are reluctant to provide information to the communities themselves: there is no website, no noticeboard and no written documents available to inform the villages and townships about KCC and MUMI activities and projects. Local residents are unaware of company strategies, or even of their positive contribution to the area.

This lack of transparency is misguided because residents are unaware when KCC or MUMI have funded the repair of a road, school or hospital. It is also an infringement of Congolese law because the Mining Code stipulates that companies must provide affected communities with a summary of the ESIA:

Article 451 Mining Code: 'The representative of the mining company responsible for public relations with local populations must provide a written summary of the project's environmental impact assessment as soon as possible to the Territory Administrator and to representatives of each affected community in the local language, providing a summary of the program of exploration work, negative and positive effects of the project and proposed rehabilitation measures.'

This lack of transparency also contrasts with the IFC's recommendations, which states that consultations should:

- be based on prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to Affected Communities.<sup>236</sup>
- allow affected communities to understand the risks and impacts to which they might be exposed and relevant mitigation measures.<sup>237</sup>

Finally, despite Glencore's claims, this lack of transparency contrasts with good practice in the sector. For example, Tenke Fungurume Mining (TFM), another mining company operating in Katanga, has posted its entire environmental and social impact assessment on its website<sup>238</sup>. A 900-page dossier details the risks posed by production, TFM's plan to minimize these risks and proposed community projects. A summary of this analysis is also available in French and Swahili. The KCC website carries no precise and detailed information for communities. It only publishes documents for shareholders and investors. Financial analyses and technical reports are the only documents to contain precise information<sup>239</sup>. Documents under the heading "Social Responsibility" are of a general nature and

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<sup>234</sup> Bread for All/RAID/Fastenopfer Research Mission in the Democratic Republic of Congo- Autumn 2013. Memorandum of Understanding.

<sup>235</sup> Interview, 4 March 2014.

<sup>236</sup> International Finance Corporation Standards on Environmental and Social Sustainability. Standard 1: Assessment and Management of Environmental and Social Risks and Impacts, article 30, 2012 Edition.

<sup>237</sup> Ibid., article 29.

<sup>238</sup> See: <http://www.fcx.com/operations/AfricaTenke.htm>.

<sup>239</sup> See: [www.katangamining.com](http://www.katangamining.com).

unsuitable for local actors. The same is true of the Glencore website. On Glencore's website, the operations map devotes only three lines to a description of MUMI<sup>240</sup>. MUMI does not even have a website.

### 5.1.2. Communication and complaints procedures

#### *The procedure described by KCC and MUMI*

Between 2011 and 2012, KCC's social affairs department grew significantly, from 17 staff in 2011<sup>241</sup> to a team of 34 in 2012<sup>242</sup>. The company also recruited a regional coordinator, who was made responsible for supervising all KCC and MUMI social policies and ensuring a consistent approach. KCC's social department was divided into two main units:

- Social and community projects unit: responsible for identifying and supporting local groups, cooperatives and economic development projects. Projects include poultry rearing, agriculture, fish farming and market gardening.
- Public and community relations unit: responsible for maintaining contact with the villages and towns impacted by KCC projects. The unit has a liaison officer for each town or village. According to Glencore: 'Community Liaison Officers form a core component of our community engagement strategy. Each officer plans weekly meetings and consultations with the reference community (i.e. committees, associations and cooperatives, vulnerable groups, etc...) with the aim to report and address community concerns and requests to senior management. In 2013, 900 meetings were held with the local community representatives to address complaints and requests. These included meetings with community committees, associations, populations living in specific sections of the community, customary and local authorities, as well as open information sessions.'<sup>243</sup> KCC staff explained that each town or village should also have its own freely-elected committee to facilitate contact with the company.

In its relations with the communities, Glencore distinguishes between complaints and requests. 'All exchanges with the community are documented and classified as follows', the company explained:

- a) 'Complaints: concerns raised with regard to the negative impacts directly linked to our operations and exploitation, such as dust, noise, odor, traffic, incidents involving company vehicles and communities, etc.
- b) Requests: issues and concerns not directly linked to our operations, such as requests for social assistance, water supply, rehabilitation and construction of education and health facilities, etc.

All exchanges are documented, reported to senior management and addressed.'<sup>244</sup>

Communities can therefore make complaints when company activities have a negative impact on them and they can communicate their development needs by making requests. KCC does not see the subject matter of requests as being a company responsibility but rather as a contribution the company might make to promote local development.

MUMI operates in a similar way to KCC, but the social development team is smaller. It comprises a liaison officer and an agronomist, who are responsible for supporting community projects. MUMI

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<sup>240</sup> See: <http://www.glencorexstrata.com/our-business/operations-map/>.

<sup>241</sup> Annual Information Form for the year ended December 31 2011, p. 15, Katanga Mining Limited, March 2012.

<sup>242</sup> Annual Information Form for the year ended December 31 2012, p. 10, Katanga Mining Limited, March 2013.

<sup>243</sup> Glencore response to Key Findings and Questions, presented by Bread for All, the Swiss Catholic Lenten Fund and RAID on 5 May 2014.

<sup>244</sup> Glencore response to Key Findings and Questions, presented by Bread for All, the Swiss Catholic Lenten Fund and RAID on 5 May 2014.



depends mainly, if not exclusively, on customary chiefs for its relations with villagers. MUMI says that local villages do not have elected committees responsible for handling relations with the company.

#### *KCC complaints procedures – field observations*

Investigations revealed a gap between what Glencore says and what really happens. Bread for All, RAID and Fastenopfer found no trace of any elected village committee responsible for relations with KCC in the towns and villages close to the KCC and MUMI concessions. Our researchers also discovered that hardly any people in the local communities knew the names of KCC liaison officers. The few contacts that KCC has in the communities seem to act more like enforcement officers than mediators.

For example, Musonoi is a sizeable township and greatly affected by KCC activities. Originally built to house Gécamines workers, it now has more than 39,000 inhabitants. The township's houses are surrounded by mines: the T 17 opencast mine on one side, the KOV mine on the other and old spoil heaps scattered around. Every explosion in the mines is felt by residents, who have learned to live with the associated vibrations and mineral dust emissions.



Picture 27: Musonoi seen from the sky  
(Photo: googlearth.)

We talked to dozens of Musonoi residents and asked them:

- whether they knew a KCC liaison officer;
- whether they knew the procedure for making a complaint to KCC;
- whether there was an elected citizens committee responsible for discussions with the company.

All the people we interviewed either did not know the KCC liaison officer or did not know his or her name. Neither did they have any knowledge of a local committee responsible for channeling complaints and proposing projects. Even the town's priest had never had any contact with company representatives. 'However, if there are any residents' meetings happening, I am the first to know. There are only three meeting rooms in Musonoi. One of them is my parish room. My congregation tells me if there are going to be any meetings. No, the town has never had a committee responsible for discussing problems with KCC. And the liaison officer has never visited me in my parish.'<sup>245</sup>

In Musonoi, the people we spoke to, gave two examples to show how KCC fails to respond to their concerns, even when the company's actions have a negative impact on the community. On 20 September 2013, KCC staff warned the population to evacuate their homes because there was going to be a major explosion sometime after 1pm and that there was a risk of damage to the town. Families had to spend hours at the Gecamines sports stadium for safety. According to witnesses, the explosion took place around 3pm. 'The dust cloud lasted for at least ten minutes, it was enormous. People in the town had sore eyes, sore throats. It left a revolting taste in the mouth. In one neighborhood, part of the roof of one house collapsed and corrugated iron sheets fell into the house.'<sup>246</sup> However, after the explosion, no KCC representative came to check the situation and take note of any damage. No KCC representative came to offer assistance to the family whose house was partly destroyed by the explosions.



Picture 28: Football pitch and crack in houses in Musonoi

(Photo: C.Peyer/BFA)

Another example concerned the local radio station "Emergence"<sup>247</sup>, which broadcasts from Musonoi. In 2007, Radio Emergence had a 375 watt transmitter and was able to broadcast programs for 100 km around. It employed up to 15 staff and had a team of 40 volunteers. However, since 2010, the spoil heaps from mine T17, which is owned by KCC, have become so high that broadcasting is difficult. The radio waves are blocked by the amount of mining waste left there by KCC. The radio station has written to KCC many times to complain about the situation and to ask for the spoil heaps to be removed. However, the company has never replied and has never come to see the situation for itself or proposed a solution. Radio Emergence is practically no longer able to broadcast<sup>248</sup> and has lost its local sponsors.

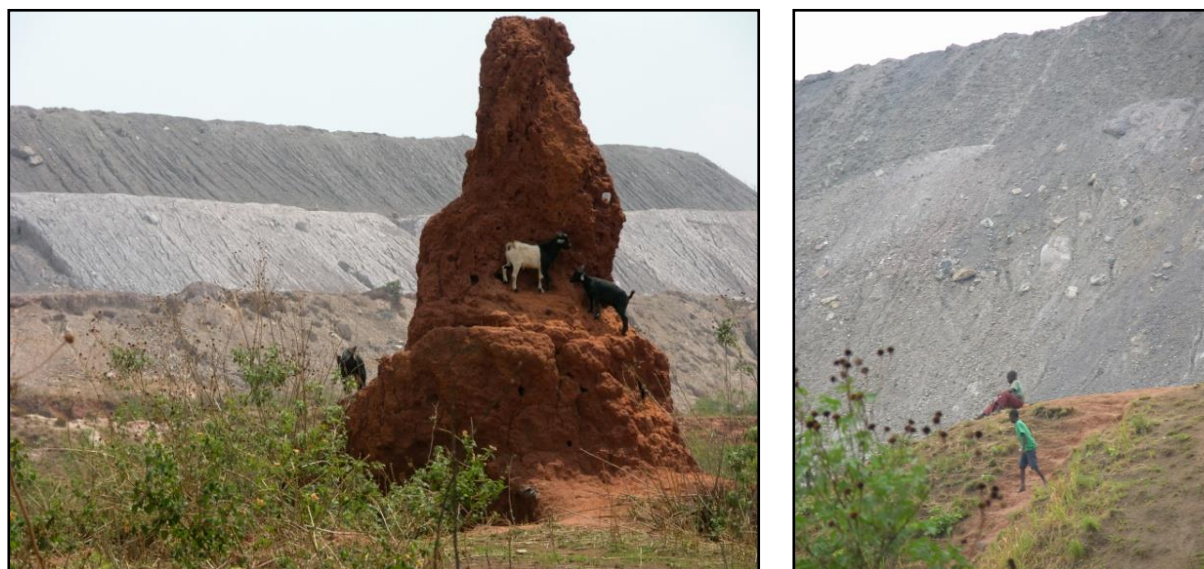
<sup>245</sup> Interview, 6 October 2013.

<sup>246</sup> Interview, 6 March 2014.

<sup>247</sup> Interview, 12 October 2013 and 7 March 2014.

<sup>248</sup> Radio émergence broadcasts can only be received in Musonoi, Kapata and Kanina.





Picture 29: Spoil heaps at the T17 mine in Musonoi  
(Photo: C.Peyer/BFA)

The situation is almost the same in the town of Luilu. We interviewed dozens of residents of the town between July 2012 in October 2013. None of them knew KCC had a liaison officer and were therefore unable to name him and neither were they aware of the existence of a citizens committee responsible for representing the town with regard to KCC. When we gave the liaison officer's name, one person said: 'Oh yes, of course we know him. We know he works for KCC, but we did not know that it was his job to come and ask us if we had any grievances.' This person went on to confirm: 'No, he has never come to see as to ask us questions and find out what our problems are.'<sup>249</sup>. In fact, the overwhelming majority of people who knew the liaison officer, because he was their neighbor, or they knew somebody who knew him, did not know what his job was.

#### *MUMI complaints procedures – field observations*

The situation is a bit different in the villages close to the MUMI site. In these small villages of between 500 and 3000 people, customary chiefs play an important role and MUMI's contacts with the communities are almost exclusively through them. This was also noted in the report produced by Golder 'Associate in 2011: 'There is no formal complaints procedure. Neither is any systematic record kept of complaints and measures taken in response. However, complaints are addressed at regular meetings with the customary Chief.'<sup>250</sup>

This system puts the chiefs into a delicate position. They are caught in a "sandwich" between the company and the villagers. Once a month, MUMI's social affairs official visits them for discussions. He also hands over a "salary" of \$250 dollars per month. For what work, for what activity? The company will give no details. US\$250 is a lot of money in the DRC. It is the equivalent of a project coordinator's monthly salary and several times more than a teacher's monthly wage. This money is handed over in cash, without a signature or receipt. This is bad practice and not transparent. At these meetings with the MUMI official, the customary chiefs explain their grievances, put forward requests and ask questions but they are not satisfied with the company's response: 'We talk, but nothing changes, said one customary Chief. 'The social affairs official always says that decisions are taken higher up and that there is nothing he can do about it.'<sup>251</sup> Another local chief also expressed his frustration: 'MUMI has made various promises and signed a contract in 2011. But it did nothing. People are very annoyed.'

<sup>249</sup> Interviews, 12 October 2013.

<sup>250</sup> Mineral Expert's report : Mutanda, p. 117, Golder Associates, 4 May 2011.

<sup>251</sup> Interview, 11 March 2014.

He added: 'So far, I have always tried to calm the villagers down when they get angry. Even when they want to sabotage MUMI installations. But one day they will explode. And people could get killed.'<sup>252</sup>

These accounts show the extent to which MUMI's lack of communication and transparency towards the communities constitutes a source of tension. The fact is that the villagers do not feel that the company takes their interests into account. Some villages such as Kapaso, a close to the MUMI concession, on the banks of the River Kando, have never been visited by a company representative. The station where MUMI pumps water from the river for use in its installations is located just a few dozen meters from the village. However, no company representative has ever visited Kapaso to check whether residents have any complaints or requests. 'No MUMI representative has ever been here', explained the village chief. 'Only a Mr Lenge came, in 2011. He came to have a look at the river, because the river level had fallen. He wanted to check whether there was enough water in the river Kando to supply the MUMI plant. We never saw him again.'<sup>253</sup>



Picture 30: The village of Kapaso, near the MUMI concession  
(Photo: C.Peyer/BFA)

#### *Glencore complaints procedures and international standards*

Our field observations and the examples of Musonoi, Lulu and Kapaso mentioned above show that the communities located close to the KCC and MUMI concessions are unaware of Glencore's complaints procedures and, in general, do not feel they are listened to.

Bread for All, Fastenopfer and RAID believe that Glencore's procedures in the DRC do not meet the requirements of a credible and transparent non-judicial procedure as defined by the UN Guiding Principles which state:

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

<sup>252</sup> Interviews, 11 March 2014.

<sup>253</sup> Interview, 5 October 2013.

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances<sup>254</sup>.

KCC's and MUMI's complaints and request procedures are not accessible or transparent and are not based on dialogue.

## 5.2. Budgets and community projects

### 5.2.1. Large budgets – failure to prioritise local communities

Glencore affirms, in its sustainability report, that it wants to allocate 1% of group profits to investment in communities<sup>255</sup>. In 2012, that amounted to a global figure of more than \$200 million allocated by the company to projects in countries where it conducts mining operations<sup>256</sup>. In 2011, this amount was \$140 million for Glencore alone<sup>257</sup>. In that same year, Glencore says it spent \$16.7 million in the DRC<sup>258</sup>. These are large sums of money. But where does the money go and precisely what type of project does the company fund? Glencore has provided us with a table of expenditure on these projects. Analysis of this expenditure raises a certain number of questions<sup>259</sup>.

#### *Funding for infrastructure that benefits the company*

Various KCC and MUMI projects seem to be more directed at supporting Glencore's investments than responding to the needs of the communities. In its 2011 sustainability report, Glencore affirmed: 'These two operations [KCC and MUMI] have made significant investments in the surrounding areas through their community projects, totalling over US\$16.7 million in 2011'<sup>260</sup>. However, if we look closely at community spending in 2011, we can see that:

- about \$10 million was spent on national infrastructure. Included in this category were road maintenance and the construction of the Lualaba bridge, which is used to transport KCC's and MUMI's minerals.
- \$4.8 million was used to fund repairs to Kolwezi airport, which allowed Glencore to start direct flights between Kolwezi and Johannesburg for expatriate staff.

Out of \$16.7 million spent in 2011 on social expenditure, about \$15 million was invested in large infrastructure projects, which directly benefited Glencore subsidiaries. It would be more honest to present these items of expenditure as infrastructure and not as spending on communities.

With large sums invested in major infrastructure projects, the money remaining for the communities affected by KCC operations was minimal in 2011. Projects that in 2011 could conceivably be of direct benefit to the communities (Musonoi, Lulu, Kapata, etc.) affected by KCC activities were:

- support for agricultural associations (\$3,786)
- manual pumps (\$117,609)
- Kapata pump maintenance (\$9,217)
- anti-malaria campaign (\$129,222)

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<sup>226</sup> UN Guiding Principle 31 (a), (b), (e) and (h).

<sup>255</sup> GlencoreXstrata, Sustainability Report 2012, p. 17, November 2013.

<sup>256</sup> Ibid., CEO Statement, p. 4.

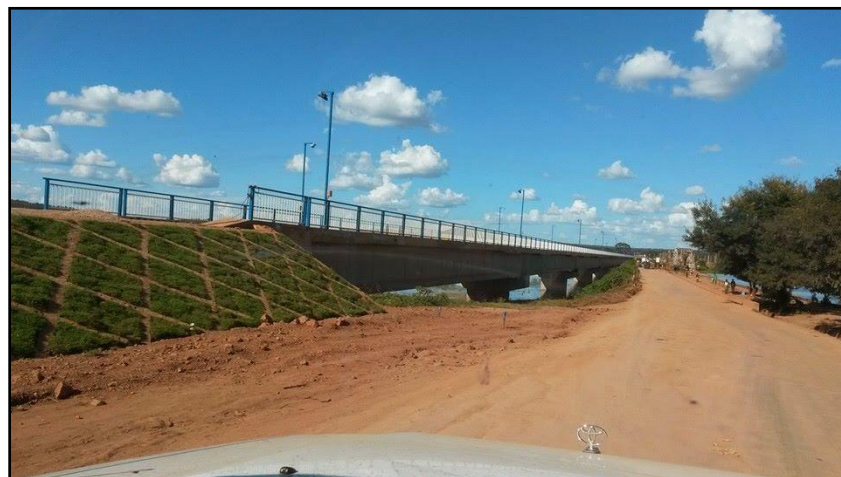
<sup>257</sup> Glencore, Sustainability Report 2011, p. 49.

<sup>258</sup> Ibid., p. 58.

<sup>259</sup> Glencore was transparent enough to show us details of its spending on community projects between 2009 and 2012 (10 October 2013).

<sup>260</sup> Glencore. Sustainability Report 2011, p. 58.





Picture 31: The new Lualaba bridge

The situation was almost the same in 2012. The company funded major national infrastructure projects: \$1.16 million was used to repair the airport and \$1 million on water infrastructure in Pweto. However, only small sums were spent on communities. Musonoi, Luilu and Kapata therefore seem to be completely marginal in Glencore's social funding plans. It is not surprising then that the dominant feeling in these communities is that the company is not interested in them: 'The companies never respond to the needs of the communities and their development', explained one Luilu resident. 'When the mining companies build roads, what roads are these? They are roads that are for their own benefit.'<sup>261</sup>

#### *Glencore's response*

Questioned on this issue, Glencore replied: 'Throughout its operations, Glencore invests in infrastructure projects that support socio-economic growth of the local communities in which we operated, as well as identify projects that have a direct impact on immediate communities. Projects are targeted to improve both the living conditions and livelihoods of the local communities by providing infrastructure which will provide sustainable support to these communities. These include public roads, airports and other large-scale projects that benefit the local population and promote trade and other development. To date, the following projects have been supported by KCC and MUMI:

- Education: fourteen primary schools, four technical institutes and one university
- Healthcare: fifteen health centres and five hospitals
- Transport: construction of Kolwezi airport, paving of local roads and construction of the bridge over Lualaba River
- Sustainable livelihoods: 30 local agriculture cooperatives and support to small entrepreneurs and local procurement (cleaning campaign, reforestation campaign, wood recycling)

These projects provide basic services for the whole population of Kolwezi, i.e. approximately one million people.'<sup>262</sup>

#### *Surprising level of investment in Pweto*

Another question raised by our analysis of the budget concerned the validity or criteria for some costly projects. Why did Glencore fund expensive hospitals and water supply systems in Pweto, on the other side of Katanga, and in Kisangani, on the other side of the DRC, when the needs of the communities in the area surrounding its mines are enormous and unsatisfied? Pweto is more than

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<sup>261</sup> Interview, 7 March 2014.

<sup>262</sup> Glencore response to Key Findings and Questions, presented by Bread for All, the Swiss Catholic Lenten Fund and RAID on 5 May 2014.

900 km from Kolwezi. It is the home town of a key figure in Congolese political life. Augustin Katumba Mwanke, who died in a plane crash in February 2012, was the “*éminence grise*” and backroom advisor to President Joseph Kabila. In 2009, American diplomats said he was: ‘the only point of access to the head of state, even though he held no official post’.<sup>263</sup> Katumba Mwanke played a decisive role in concluding most mining contracts in the DRC between 2006 and 2012: ‘Katumba was the key figure for most of Katanga’s copper mines [...] and he developed close relations with the biggest investors in the country’, commented an expert, on his death<sup>264</sup>. Katumba Mwanke was also a close friend of the Israeli businessman, Dan Gertler, a business partner of Glencore and a KCC and MUMI shareholder.

On the face of it, Pweto is a town like any other, without any particular link to KCC and MUMI. However, Pweto was one of the major beneficiaries of KCC’s social investments. In fact, Glencore funded a hospital in Pweto in 2010-2011, which cost about \$5 million: ‘Construction of the hospital in Pweto was completed in March 2012. It is a specialized unit, with 75 beds. It has three operation theatres, an ultramodern 16 Slice CT scanner and a diagnostic unit. The hospital has two dialysis machines and cost a total of \$4.9 million.’<sup>265</sup> In 2012 KCC also spent \$1 million to help REGIDESO, the national water distribution company, pay for water supply systems in Pweto. Even in the town itself, questions were raised about these investments. Why should KCC spend \$1 million on the water supply system in Pweto, 900 km from Kolwezi, but fail to respond to the needs of Musonoi or Lulu, two towns impacted by its activities and where water courses are polluted by its operations?

### 5.2.2. The misrepresentation of certain development projects

Another problem brought to light by Fastenopfer, RAID and Bread for All’s investigation concerns the fact that failed projects continue to be depicted as exemplary projects on the Internet and national Congolese television and in company sustainability reports. We would like to emphasize that the social projects initiated by KCC and MUMI are important for the people that live in surrounding villages and towns. During their on-site visit in October 2013, RAID, Fastenopfer and Bread for All visited a number of them, among which the two on-site hospitals at KCC and MUMI, which provide free health care to the companies’ employees and their immediate families. These hospitals are an important contribution to staff welfare. The company also supports community health centers in Kando and Lualaba which are a significant contribution to tackling childhood diseases and improving the quality of life in the villages around MUMI’s concession<sup>266</sup>. MUMI has also opened and equipped a school in Kando, which has enrolled several dozen children giving them access to education. KCC supports several agriculture and farming projects in the area. The company also provides medicine and includes doctors and nurses from the Kolwezi hospitals and health centres in training, particularly in relation to HIV/AIDs.

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<sup>263</sup> See: Kabila perd son éminence grise, *l’Express*, 13 February 2012; RDC Congo : Augustin Katumba Mwanke. L’homme qui murmurait à l’oreille de Kabila, *Jeune Afrique*, 27 February 2012; and Devenir riche dans un Congo appauvri, *MO Magazine*, 11 February 2013.

<sup>264</sup> Death of Kabila mine adviser may cause Congo power struggle, Michael J. Kavanagh, *Bloomberg*, 13 February 2012.

<sup>265</sup> Dan Gertler dans le social au Katanga, *le Potentiel*, 22 July 2013. Also see: Glencore, Sustainability Report 2011, p. 58.

<sup>266</sup> Glencore, Sustainability Report 2011, p. 40.



Picture 32: School and health centre funded by Glencore in the DRC

(Photo: KML)

These projects are important, but the misleading statements imparted about some of them damage the overall credibility of the company's efforts. The most striking example in this respect is the fish farming project at Kando. The initial idea was as follows: MUMI built six fish-farming ponds in Kando. Modern and well-equipped, these ponds were to contribute by reducing the level of fishing in the River Kando and therefore renewing river fish stocks. A henhouse was built over each pool. The fish feed on hen droppings. On Congolese national television in March 2014, KCC and MUMI broadcast more than 20 minutes of promotional information about their activities. In the promotional film, MUMI's social affairs official explained that the fish farming project would help in the fight against hunger in the village. He explained<sup>267</sup> that the project would be managed by a village cooperative. The fish would provide an alternative source of income which could be reinvested in other projects for the village.



Picture 33: Fish farming ponds at Kando

(Photo: C.Peyer/BFA)

However, this bears no resemblance to the real situation at the project. We visited the Kando fish farm three times<sup>268</sup>. We discovered that it is now staffed by six MUMI employees, three responsible for feeding the fish and three security guards. The fish farmed in the ponds are delivered to the company canteen. It is therefore the expatriate employees who eat the fish. The villagers have never eaten or sold a single fish from these ponds. And no village cooperative draws an income from the project. Worse still, according to many of the statements we collected, the villagers worked without

<sup>267</sup> Film broadcast on Congolese national television on 11 March 2014. We were given the same description of how the project operates in an interview with MUMI's social responsibility staff in October 2013.

<sup>268</sup> The research missions took place in August 2013, October 2013 and March 2014.

pay for several months to build the ponds and the accompanying access road in the hope that they would be employed by MUMI. The project has become a source of tension in the village and residents are angry with the company, which has not kept its promise. Bread for All, Raid and Fastenopfer believe that to promote this project on the television as a model cooperative, when it does not constitute a source of income for the villagers' amounts to a serious misrepresentation of the facts.

### 5.3. Lack of a rights-based approach

Glencore lacks a rights-based approach in the DRC. Accepting that the local population has rights would mean that the company would have to accept some responsibility towards them. That also means accepting that there is a conflict of interest and disagreement and that this should form the starting point for a participatory and transparent dialogue aimed at identifying lasting solutions. Glencore's subsidiaries do not seem fully prepared for such an approach. They seem to think that from the moment they were granted a concession, the land belonged to them and that they have the right to take whatever decisions are convenient to them. This approach does not see the local communities as actors who should be listened to, who can put forward demands and with whom it is necessary to negotiate, but rather as problems that need to be managed. This approach expropriates the future of these communities. It does not take into account their right to participate in decisions on issues that concern them. By way of example, we analyse this approach in critical areas: the right to water, the right to a livelihood and the right to housing.

#### 5.3.1. The right to water: refusal to take responsibility

Luilu has more than 38,500 inhabitants. In Luilu, people live in two-roomed brick houses, built by Gécamines for its workers. The dirt tracks are full of potholes, making circulation almost impossible. In Luilu, there is no electricity and poverty is endemic: about 75% of the population is unemployed and most young men are artisanal miners and collect minerals in the surrounding concessions. Water has been an enormous problem for the past ten years. The water from the River Luilu has been heavily polluted by the mining companies, especially KCC, for it to be fit for human consumption. Even the fish cannot survive. People have to dig more than 200m to reach the water table and to find water that is fit to drink. Water at a depth of 10-30 meters below the surface was declared unfit as far back as the 1970s. Gécamines, the state-owned enterprise that owned the Kamoto mine at that time, therefore dug a well several kilometers outside the town in order to provide a supply of drinking water<sup>269</sup>. However, the pipes were vandalised, destroyed and stolen more than eight years ago and not a single drop of clean water has flowed into the town since then. KCC, which took over the Gécamines installations, refused to accept any responsibility for dealing with this problem. However, residents contacted the firm many times, as can be seen from reading copies of the many letters written to the company between 2006 and 2013<sup>270</sup>. It is true that some tankers supplied the township with drinking water in spring 2012, soon after the publication of Bread for All and Fastenopfer's second report on Glencore in the DRC. However, local residents say this operation did not last for more than three or four weeks. So nothing has changed.

The consequences of this lack of water for the population are disastrous: most residents use water from small wells they dig in their garden and so diseases spread: 'The water is dirty', says Mama Nathalie<sup>271</sup>. 'Before using it, we have to filter it twice. We put it in a bucket and wait three hours. Then we transfer it to another bucket and repeat the operation. This leaves a brown and red deposit at the bottom of the bucket. The water can be used after another three hours, but it remains dirty,

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<sup>269</sup> The TW3 well was dug close to the KOV open-cast mine. See "Glencore in the Democratic Republic of Congo: profits before human rights and the environment", pp. 49-52, Chantal Peyer and François Mercier, April 2012.

<sup>270</sup> See: Glencore in the DRC, profits before human rights and the environment, pp. 52-53, 2012.

<sup>271</sup> False name. Interview, 12 October 2013.



especially in the dry season. Mosquitoes lay their eggs in the standing water and this spreads disease.' This account is corroborated by the many women we interviewed in Luilu: 'Water-borne diseases are endemic and are an enormous problem. Local people attribute urinary infections which are widespread to the poor quality of the water... In the event of infection (urinary), medical expenses can rise to more than 20,000 Congolese francs (about 19 Swiss francs). That represents between 9 and 12 days of work for my husband. You can see how difficult the situation is'<sup>272</sup>, explained Mama Magui. 'In addition, the infection can return after three month [...]'. Other problems found in Luilu were diarrhoea, especially among children, and dehydration.



Picture 34: Water is drawn from a private well in Luilu  
(Photo: C.Peyer/BFA)



Picture 35: The colour of the water drawn from the well  
(Photo: C.Peyer/BFA)

Glencore says that it considers the question of water in Luilu as a community request. That means that it does not accept responsibility for providing access to water in Luilu, but see its rather as a possible development project, among others. Bread for All, Fastenopfer and RAID do not share this

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<sup>272</sup>The consultation costs about 5,000 francs. Laboratory fees are about 9,000 francs and medicines about 6,500 francs. Medicines are effective for three months. Urinary infections often become chronic and can reappear after this length of time, especially in the event of repeated contact of the genital organs with dirty water.



view. For many years, the company has discharged practically pure acid into the River Luilu and continues today to discharge effluent with a copper and cobalt concentration above legal thresholds into the river (see chapter 3). KCC operations have therefore contributed to the pollution of the natural source of drinking water and the company, has had a negative impact on residents' right to water. To re-establish a reliable source of clean water and mitigate the negative impact, the company should have worked with REGIDESO (the State water utility) to renovate water installations in Luilu a long time ago. While it is true that Gécamines also polluted the river, it did at least provide alternative water supplies, using a pump and by maintaining pipes that brought water to township.

#### *Glencore's response to the situation in Luilu*

Glencore states that:

In accordance with DRC regulation, water supply and delivery is the responsibility of the State, and managed by state entities REGIDESO and SNEL. Glencore recognises the constraints faced by these organisations, and seeks to assist in water delivery, as well as supplementing existing programs with its own projects.

*State-managed water supply:* investments in water supply infrastructure are decided and managed through the Kolwezi committee for water supply. This committee is chaired by the mayor and involves several partners, including GCM, REGIDESO, SNEL and KCC. The goal of this committee is to progressively extend the access to potable water to the population of Kolwezi and support the improvement of REGIDESO management and ownership of the infrastructure.

In the past 3 years the committee focused its financial and technical resources on the Mutoshi project, under which four industrial wells are developed to supply water to the entire upper section of Kolwezi. In 2013, the committee has started assessing the feasibility of a water supply project for the community of Luilu<sup>273</sup>.

The company therefore transfers responsibility to the water committee and, especially to REGIDESO, which, as everyone knows, is not very efficient and lacks resources<sup>274</sup>. Fastenopfer, RAID and Bread for All welcome the decision finally taken by the water committee to begin a water supply project for Luilu. However, we will wait to see if there are practical results. And we believe that KCC should have addressed this problem and provided REGIDESO with the necessary funding a long time ago.

#### *Access to water in Musonoi*

Gécamines used to supply water for free in Musonoi in the 1980s. After the mines privatisation there was a lack of clarity about the transfer of responsibilities to the local authorities and REGIDESO, for basic services and amenities. But the Kolwezi authorities and REGIDESO have limited resources to replace, upgrade or maintain the pipes or to invest in new pumps and water tanks. It is hard to accept that the needs of Musonoi, 80 per cent of whose population does not have adequate access to clean water, have not been considered a priority by the authorities or Glencore/KCC. After the breakdown of the last remaining pump serving Musonoi in November 2011, local women barricaded the road to the mine for three days to demand action. This led to a meeting with the authorities and KCC and a temporary solution was found. Water from a pump (P26), which supplies Kolwezi town is diverted and piped to Musonoi in the evening, from 6 pm to 6 am<sup>275</sup>.

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<sup>273</sup> Glencore response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID on 5 May 2014.

<sup>274</sup> See: Water issues in the Democratic Republic of Congo. Challenges and opportunities, United Nations Environment Program, January 2011 and The Democratic Republic of Congo. Post-Conflict Environmental Assessment. Synthesis Report for Policy Makers, United Nations Environment Program, October 2011.

<sup>275</sup> Chantal Peyer and François Mercier, Glencore in the Democratic Republic of the Congo: Profit Before Human Rights and the Environment, Bread for All and Swiss Catholic Lenten Fund 2012, pp. 46-49.

In April 2012 Glencore told Bread for All and the Catholic Lenten Fund: 'The supply of water to these communities has always been the responsibility of *Gécamines* and the local water utility, but it is very much our concern. The current situation is the result of years of neglect of infrastructure and a growing population. As a responsible corporate citizen we are keen to play a part in resolving this long-standing and difficult problem.' In more concrete terms, Glencore also said: 'In order to assist the Musonoi township, KCC will install several water tanks in Musonoi during 2012.'<sup>276</sup> The company gave this public undertaking that KCC would install several water tanks in Musonoi during 2012, but this has not happened and water is still only available in one or two areas during the night.

KCC now claims that the water shortage at Musonoi is a problem for the local authorities and REGIDESO to resolve: 'Water supply at Musonoi is ensured by a pump managed by Gecamines in accordance with REGIDESO. While KCC has no control over the use of this pump, we have, on request, provided technical and financial assistance for its maintenance.'<sup>277</sup> It makes no mention of the fact that the shortage is in part due to the extraction of water by the mine for its operations and another is the damage caused by KCC's predecessor, DCP, to a pump which put it out of action. It is ironic that dewatering of the Kamoto underground mine is a necessity for KCC, and the clean water is discharged into the heavily polluted Musonoi and Liulu rivers. The Musonoi Committee has proposed that KCC should capture this water and channel it for the benefit of the community. It is unclear why this solution has not been adopted.



Picture 36: In Musonoi, water is only available between 6pm and 6am and only in some neighbourhoods  
(Photo: C.Peyer/BFA)

Local people told us that it would resolve a lot of difficulties if KCC would arrange to supply clean water to the area near the St Jean Parish Church which is a long way from the water outlet. The lack of water during the day creates problems particularly at the local school. Teachers have to store water and remember to fill jerry cans in the evening – the only time when water is available from a gushing pipe in the township.

As regards people's access to water, the corporate responsibility to respect human rights requires companies to act with due diligence to avoid such negative impacts. KCC is aware of the gravity and scale of the water shortage in Luilu and Musonoi and its own activities have contributed to the problems. But the company has failed to take effective remedial measures of its own and claims to be waiting for the authorities to act. In so doing, and in turning a blind eye to the inertia and lack of re-

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<sup>276</sup> Chantal Peyer and François Mercier 2012, *ibid*.

<sup>277</sup> Glencore response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID on 5 May 2014.

sources of the Kolwezi authorities, Glencore is failing to comply with its responsibilities under the UN Guiding Principles<sup>278</sup>:

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

### 5.3.2. The right to a livelihood: MUMI decisions have a negative impact on the right to a livelihood

Glencore's Code of Conduct states: 'Respecting human rights is fundamental to all our activities. This means acting reasonably to avoid infringing on the rights of others and addressing any potential adverse impacts of our operations.'<sup>279</sup> The company also says: 'Wherever we operate, we engage with local communities and seek to understand the social, cultural, environmental and economic implications of our activities. We act in accordance with international standards with regard to the human rights of these communities. This includes acknowledging the unique relationship of indigenous peoples with the environment in which they live.'<sup>280</sup> However, on the ground, the company does not put these principles into practice. Glencore subsidiaries take decisions that have a negative impact on the right of neighboring communities to development and their right to a livelihood. The company takes these decisions unilaterally, without consultation, without providing prior information to these communities, and takes no mitigation measures. These failings are evident in the treatment of roads and access roads around MUMI'S mines and installations.

*Example 1: closure of the road connecting the villages of Kapaso, Riando and Kando to Kisenda.*

The villages of Kapaso, Riando, Kando and Kisenda are extremely poor. They do not appear on any maps, have not been included in any census or considered by any official development plan. They have no electricity supply, no concrete access roads, and no shop. In Kapaso, children have to walk 7 km to go to the nearest school. In Rianda, women must cycle 9 km to give birth at a health centre. In Kisenda, the children study in what used to be the waiting room of an old railway station.

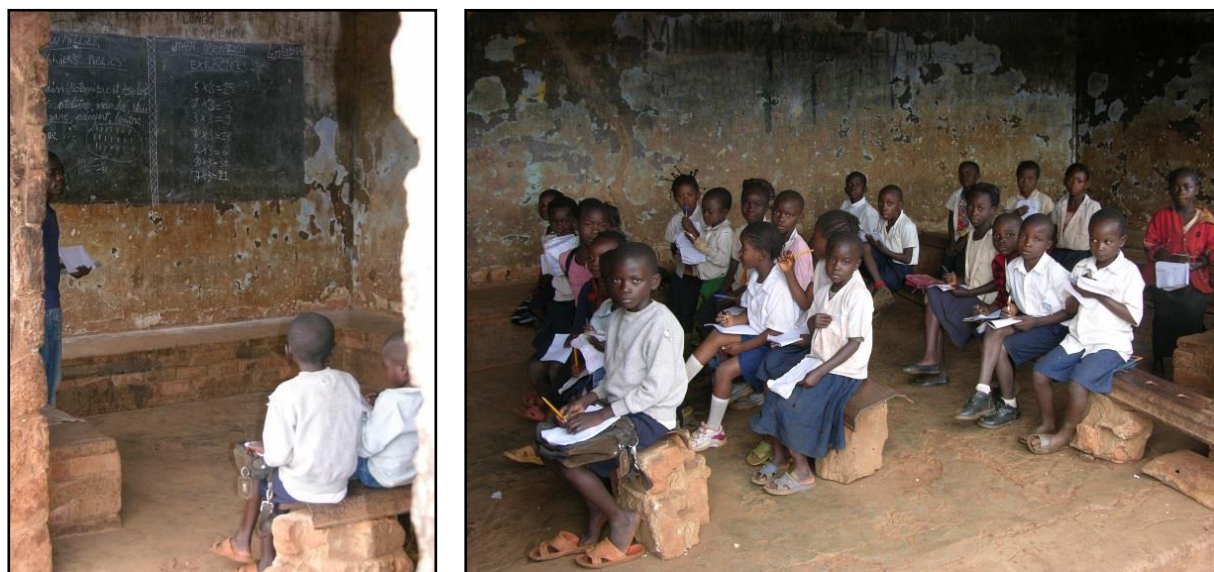
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<sup>278</sup> UN Guiding Principle 13.

<sup>279</sup> GlencoreXstrata, Code of Conduct. Human Rights, p. 16, 2013.

See: <http://www.glencore.com/assets/Uploads/other/Code-Of-Conduct-English.pdf>.

<sup>280</sup> Ibid.



Picture 37: School in a railway hall in Kisenda  
(Photo: C.Peyer/BFA)

The main sources of income in these villages are agriculture (maize and manioc), the sale of firewood, livestock and fishing. In order to sell these products, villagers must use National Road No 1, which connects Likasi to Kolwezi and which is used by thousands of trucks and cars every day. Three years ago, MUMI closed the road that directly connected these villages to National Road No 1. The company put up barbed wire fences around its installations and failed to offer a viable alternative for residents of Kapaso and Kando. The result was that, instead of a 5km journey either on foot or bicycle, they now have to travel 15 km to sell their produce. This detour represents an enormous handicap, further isolates the villages and accentuates their poverty. It has become practically impossible for them to sell their maize and manioc.



Picture 38: Road closure  
(Photo: C.Peyer/BFA)

At the time it closed the perimeter of the mines, the company also blocked access to cultivable land: 'The closure means that we can no longer get to our traditional manioc and maize fields', explained a Kapaso elder. 'We have to cross the river in our canoes to plant on the other side of the River Kando. This is dangerous, because of the hippopotami.'<sup>281</sup> According to the customary chief, MUMI closed this access road without warning or consulting the population. The chief went to complain to the

<sup>281</sup> Interview, 5 October 2013.



company's social affairs official. The latter said that the company could no longer allow people to pass through its property for security reasons. He promised that another road would be constructed for local people. That was three years ago, but nothing has been done.

*Example 2: closure of the road from Mawazaminda to Musenga on the Kansuki (MUMI) concession*

The situation is the same on the other side of the national road, towards the villages of Mwazaminda, Kasala, Kababela, Kalala, Kiave, Kabatanda, Mushita and Musenga. The same poverty, the same isolation and the same lack of infrastructure. And the same MUMI policy. Two years ago, the company closed the only access road to these villages. A checkpoint guarded by two company security guards now prevents vehicles from reaching these villages. Only cyclists and pedestrians are allowed to pass. Even motorbikes are forbidden. However, production has still not started on this side of the MUMI concession. Behind the barrier, there are no lorries, opencast mine or costly plants to protect, only the silence of the trees, plants and mineral deposits under the earth. MUMI has closed a road even though it does not use it for its operations. The customary chief cannot understand the situation: 'MUMI could have put barbed wire fences around the main mineral deposits, without closing the road. We cannot understand why it has acted in this way.'<sup>282</sup>

The consequences for the villages are disastrous: 'Many people used to come from Lualaba to cultivate the fields. They no longer can, because they would have to walk. It is nearly 18 kilometres to Kiave', explained a local resident. 'People can no longer sell their vegetables or fish on the road. In addition, we are unable to transport anything heavy to the village, because the only authorized form of transport is a bicycle.'<sup>283</sup>



Picture 39: Customary chief in front of closed road at the Kansuki concession  
(Photo: C.Peyer/BFA)

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<sup>282</sup> Interview, 11 March 2014.

<sup>283</sup> Interview, 11 March 2014.



Again, neither the residents nor the local chief were contacted by the company prior to closure of the road. Residents faced a *fait accompli*. 'I went to see the social affairs official', explained the customary chief. 'He said it was a high-level decision and he could do nothing about it.'<sup>284</sup>

Fastenopfer, RAID and Bread for All believe these decisions by MUMI are unacceptable. If closure of the road is indispensable for MUMI activities, the company should have at least consulted the population and assessed its impact on the daily lives of residents. The company should also have introduced measures to mitigate the impact, for example, by introducing a bus service on the main road, as was done, for example, by Tenke Fungurume Mining. MUMI's actions not only contravened Glencore's own Code of Conduct, but also the Universal Declaration of Human Rights, Article 25 of which stipulates that: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services.'<sup>285</sup>

Questioned on this issue, Glencore recognised that the current situation is not satisfactory, but said it had tried to minimise the negative impact:

'Some of the roads used by communities are within the MUMI concession. As our operations expanded further onto the MUMI concessions, we needed to ensure the safety of pedestrians and avoid any possible incident due to the circulation of trucks and other vehicles. We have already built alternative roads [i.e. the road that forces villagers to walk 15 km rather than 5 km] and we are currently in the process of assessing the feasibility of additional measures (i.e. shorter routes, transport, etc.).

We have ensured that surrounding communities continue to have access to timely medical care. Medical facilities have been installed by MUMI on both sides of the National road and we developed a partnership with Lualaba Health zone to assist in particular cases and emergencies. It should be noted that all healthcare available in the area has been funded and supported by MUMI, as pre-existing infrastructure was inadequate.'<sup>286</sup>

### 5.3.3. The right to housing: Secret Plans for the Relocation of Musonoi Residents

KCC and the previous title holder, the DRC Copper and Cobalt Project (DCP) have long been aware of the need for a resettlement program at Musonoi because of the township's proximity to mining operations and ore bodies. According to various technical reports the question has not been *if* resettlement would take place, but rather *when* and how many people would need to be relocated. With relocation seen as being inevitable, neither KCC, Gecamines nor the Congolese government has been prepared to rehabilitate the road and basic infrastructure such as the water supply. Musonoi feels like a condemned town: as a local priest told us 'This place has no future' ('*Ce cité n'est pas pour l'avenir*'). KCC and the Kolwezi authorities have kept the people living in Musonoi completely in the dark about their intentions.

Musonoi, which has a population of about 40, 000 people<sup>287</sup>, is eight kilometres to the south of Kolwezi. It is one of the oldest of several housing townships (*cités*) built for Gecamines' workers and their families in the district. The only way to reach Kolwezi from Musonoi is to use a pot-holed dirt road that crosses KCC's concession, which during the rainy season is virtually impassable for local

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<sup>284</sup> Interview, 8 March 2014.

<sup>285</sup> Universal Declaration of Human Rights. Article 25: <http://www.un.org/en/documents/udhr/>.

<sup>286</sup> Glencore response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID on 5 May 2014.

<sup>287</sup> Source Bureau du quartier Musonoie, 2013.

buses and taxis. After dusk Musonoi is cut off: KCC's road is closed to non-company traffic and pedestrians and is patrolled by armed mine police and KCC's private security guards.

Musonoi is a run-down and disadvantaged part of Kolwezi. Houses there, particularly those closest to the T17 open pit mine, are in an extreme state of disrepair, the walls have gaping fissures as a result of the blasting. This was fully described in Bread for All and Fastenopfer's 2012 report but since then no action has been taken. The report recommended that KCC should meet the inhabitants, carry out a precise assessment of the impact of the blasting on houses and set up a compensation procedure<sup>288</sup>. Some residents own their homes bought under a Gecamines' scheme allowing employees to acquire their house in *lieu* of salary arrears<sup>289</sup>. Glencore claims that the problems in Musonoi are the result of years of neglect of infrastructure and a growing population. But this ignores the impact that KCC's own activities have had on the quality of life of the residents of Musonoi and the responsibility KCC has towards this township which historically has such close ties to the exploitation of the mine.



Picture 40: Musonoi: in some parts of the township, mainly the parts which were supposed to be relocated, houses are in a very poor state

(Photo: C.Peyer/BFA)

### *Stop-Go Resettlement Plans*

One reason for the company's unwillingness to spend money on rehabilitating the fabric of the buildings, constructing schools or upgrading the local infrastructure in Musonoi may be due to the fact that resettlement of most if not all of the residents has long been considered inevitable. This was clearly stated in a 2006 Technical Report<sup>290</sup>:

As the pit expands it will ultimately be necessary to relocate a section of the Musonoi Village.

[...] The Musonoi Villagers are already aware of this probability although no details have yet been communicated. Due process will be followed and suitable negotiations will be entered into well in advance of any pending move. The mine will ensure that adequate compensatory measures are provided.

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<sup>288</sup> Chantal Peyer and François Mercier, Glencore in the Democratic Republic of the Congo: Profit Before Human Rights and the Environment, Bread for All and Swiss Catholic Lenten Fund 2012, p. 52.

<sup>289</sup> LocationVente Maison LVM (Gecamines House Lease Purchase Scheme) ran from 1983 to 2008.

<sup>290</sup> Technical Report SRK Consulting 26 June 2006 Global Enterprises Corporate Limited, p. 247.

In 2009, following the merger with Katanga Mining, the need for relocation was reiterated in another study<sup>291</sup>:

The development and expansion of the KOV pit and associated activities and infrastructure will result in a combination of impacts including elevated noise levels, increased risk of traffic related accidents, blasting and vibrations and increased levels of dust. While mitigation of individual impacts may be possible to some extent, the combination of impacts will more appropriately be resolved through the resettlement of the entire Musonoi Village, which has an estimated population of up to 30 000 people.

In March 2009 Katanga Mining had earmarked \$58 million US dollars of capital expenditure for the relocation of Musonoi village. A framework resettlement action plan had also been prepared. According to the 2009 Technical Report<sup>292</sup>:

The resettlement process is expected to take a minimum of five years to implement. While no requirement to resettle the village has been communicated to residents, it is expected that the villagers are already aware and/or expect to be resettled. Based on the current information available, it is understood that KML is committed to following due process and entering into suitable negotiations with the affected community well in advance of any impending move.

But in September 2009 the plan was abruptly suspended. Katanga Mining announced that it was accelerating its development plan in order to increase production through the refurbishment of existing facilities and infrastructure at the Kamoto concentrator and the Luilu refinery. It reassured shareholders that the accelerated development plan was to be funded out of 'existing cash balances'. KML cut the capital expenditure allocated to the relocation of the Musonoi village because it was 'assessing the potential to mine the Kamoto East orebody from underground'.<sup>293</sup> But Glencore failed to mention the fact that work on T 17 mine would also accelerate and that it would entail blasting.



Picture 41: Musonoi, main road  
(Photo: C.Peyer/BFA)

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<sup>291</sup> SRK Consulting, An Independent Technical Report on the Material Assets of Katanga Mining Limited, Katanga Province, Democratic Republic of Congo ("DRC") 17 March 2009, pp. 185-186:  
<http://www.katangamining.com/~media/Files/K/Katanga-mining-v2/operations/reportsoperational/techreport-mar09.pdf>.

<sup>292</sup> SRK Consulting KML – Independent Technical Report March 2009, pp. 185-186.

<sup>293</sup> Bloomberg, Katanga Announces Accelerated Development Plan, 9 August 2009:  
<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTkEDGdU8HVQ>.

It is hard to see the overall neglect of Musonoi, the suspension of the resettlement program and the disregard for the standard of living of its population as anything but part of Glencore's cost cutting approach. This was the case in 2009 and it remains true in 2014. In March 2014 Ivan Glasenberg during a presentation of Glencore Xstrata's first consolidated results made clear his view that the only concern of mine managers should be 'to get products to the gate as cheaply as possible'. Not only does the population live in precarious conditions in a degraded environment but also under a cloud of uncertainty about its future. Attracting new investment is impossible when a portion of the village may at any moment be demolished. During a visit to Musonoi in October 2013 we were shown round the site of a new school which local people are constructing out of salvaged materials. They told us that KCC does not provide them with any funds or support.

We are concerned that the resettlement issue was not discussed with us during our on site visit to KCC. It is of major importance and, as was admitted during our subsequent telephone discussion with Glencore following the on-site visit<sup>294</sup>, preparations for the resettlement of households in Musonoi living closest to the mine are long overdue. Glencore however continues to give evasive or ambiguous responses to our questions about its plans for Musonoi. In October 2013 we asked Glencore whether KCC intended to resettle those people living in homes closest to the mines at Musonoi, which had been most affected by blasting and what plans they had for consulting the local population. They informed us that they were in 'the early stages of developing a strategy' but that they did not have a set date for relocation.<sup>295</sup>

Then in January 2014, Glencore stated that the blasting is 'within legal limits' and that 'the expansion of the mine will proceed in the opposite direction from Musonoi, and the reserve will be approached underground.' The company said it had engaged RePlan, an international agency specialising in resettlement, to monitor all impacts on the Musonoi community.<sup>296</sup> We asked to meet the RePlan team in Kolwelzi in March 2014 but Glencore said that it would not be possible. We did however meet the *Chef de Quartier* (a nominated local government official), who has held this position at Musonoi for the past three years. According to the Chief, KCC's Community Liaison Officer had informed him that people living in the area close to the Nyoka segment, which has a rich ore seam, would have to move.<sup>297</sup> The geological department, he said, has already identified (*cibl *) homes and a school nearest to the Kov mine for relocation. The *Chef de Quartier* said that KCC had warned him to keep this information to himself because 'this is a secret, if people know too much, it will cause tension and they might make a fuss'. But, as the previous Technical Reports showed and our own interviews confirm, there is a general expectation within the community about the prospect of resettlement.

According to Glencore it never disclosed the 2009 Resettlement Action Plan, based on the original plan for an open cast mine, because it might have caused confusion. Glencore says that it does not wish to raise expectations by entering prematurely into dialogue:<sup>298</sup>

In line with DRC mining legislation, following the completion of the ESIA review, we will conduct a second round of consultations to inform affected communities of operational impacts and prevention and mitigation measures.<sup>299</sup>

In other words it is only when Glencore has decided on the mitigation measures that it is prepared to undertake, will the information be conveyed to local people as a *fait accompli*. Glencore clearly does

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<sup>294</sup> Teleconference with Glencore and KCC, 23 October 2013.

<sup>295</sup> Teleconference with Glencore and KCC, 23 October 2013.

<sup>296</sup> Letter from Anna Krutikov, GlencoreXstrata, 31 January 2014.

<sup>297</sup> Despite being eligible, about 140 employees were excluded from the Gecamines Scheme because their properties were close to the Nyoka segment. They were promised that they would be resettled.

<sup>298</sup> Meeting with Glencore in Berne, 12 May 2014.

<sup>299</sup> Glencore Response, 21 May 2014.

not envisage their participation in shaping the appropriate measures to be taken. Under the Congolese Mining Code and Regulations the views of affected stakeholders are supposed to be taken into account *during* the preparation of ESIA.<sup>300</sup>

#### *International Standards*

The World Bank Group's International Finance Corporation (IFC) has developed Performance Standards for large scale projects involving the private sector, which have been adopted by some other mining companies in Katanga. Glencore has assured us that they will comply in full with the relevant IFC Performance Standard on Land Acquisition and Involuntary Resettlement (Performance Standard 5, PS 5). Under PS 5 the company is required to offer displaced persons and communities compensation for loss of assets at full replacement cost and other assistance to help them improve or at least restore their standards of living or livelihoods. Standards for compensation are supposed to be transparent and consistent within the project. The company should also provide opportunities to displaced persons and communities to derive appropriate development benefits from the project. Sharing information about environmental, health and safety consequences with the local community is a key requirement of all international standards including the IFC Performance Standards and the OECD Guidelines for Multinational Enterprises. In fact according to the IFC, PS 5 cannot be implemented without also implementing PS 1 (**Assessment and Management of Environmental and Social Risks and Impacts**) which provides for consultation with affected stakeholders and disclosure of relevant information.<sup>301</sup>

Under the ICESCR the right to adequate housing requires that the authorities provide an opportunity for genuine consultation with those affected and adequate and reasonable notice for affected persons prior to the scheduled date of eviction. They should also be given information on the proposed evictions. The obligation to respect the right to adequate housing means that governments must abstain from carrying out or otherwise advocating the forced or arbitrary eviction of persons and groups.

The UN Special Rapporteur on housing has also developed guidance regarding resettlements due to development-related projects that address the rights of affected populations.<sup>302</sup>

#### *Company's Responsibility*

Glencore claims to be committed to ensuring that KCC will follow the IFC's Performance Standard on Resettlement. But KCC has failed to consult the affected community or to provide them with information about its Resettlement Action Plan. Even in the recent consultation on KCC's new environmental and social impact assessment, the people of Musonoi were not included neither were their key representatives such as the *Chef de quartier*, local clergy and NGOs. KCC has a duty to open consultations about its intentions. If KCC believes that it is no longer necessary to relocate everyone from Musonoi, people have a right to be informed and they are entitled to compensation for the

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<sup>300</sup> L'article 451 du Règlement minier du 26 mars 2003 énonce que 'La consultation du public au cours de l'élaboration de l'Etude d'Impact Environnemental du projet doit permettre la participation active des populations locales affectées par le projet de mines ou de carrières à l'élaboration de l'Etude d'Impact Environnemental du projet...'

<sup>301</sup> IFC Performance Standard 5: 'The implementation of the actions necessary to meet the requirements of this Performance Standard is managed through the client's Environmental and Social Management System, the elements of which are outlined in Performance Standard 1.' January 2012.

<sup>302</sup> UN Human Rights Council, Basic principles and guidelines on development-based evictions and displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, A/HRC/4/18 and Commission on Human Rights, Comprehensive Human Rights Guidelines On Development-Based Displacement, adopted by the Expert Seminar on the Practice of Forced Evictions Geneva, 11-13 June 1997, E/CN.4/Sub.2/1997/7:

[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1997.7.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1997.7.En?Opendocument).



terrible conditions that they have had to endure for many years, such as the impact of 'planning blight', and the dilapidated state of the houses and infrastructure. This is provided for under the Congolese Mining Code for those with surface rights.<sup>303</sup> Glencore has an obligation to inform the affected community about their plans. However, from the discussions with the *Chef de Quartier* and Glencore it would appear that resettlement has not been ruled and that KCC is deliberately keeping its plans secret.

Clearly before the blasting and drilling at T17 commenced those people living closest to the pit should have been relocated for their health and safety. Instead Glencore, abandoning its responsibility towards the local community, appears to have reallocated the funds in order to cover the cost of KCC's accelerated production plan. According to Glencore, KCC operates in line with DRC and international standards: 'we monitor our performance through seismographs, set up in different locations within and nearby our concession. Blasting sessions and vibrations reports are periodically reviewed by competent local bodies from the Ministry of Mines.'<sup>304</sup> Glencore also claims to monitor dust levels<sup>305</sup>. Officials at the Ministry of Mines responsible for conducting regular environmental audits told us that KCC had not provided them with any information about airborne emissions<sup>306</sup>.

KCC has not disclosed for how long it has been monitoring dust and vibration levels. Obviously readings taken after the blasting at T17 has ceased will be much lower than previous levels when it was being mine above ground. People should receive back-dated compensation for the noise, disruption and discomfort and dust pollution that they have suffered over the past four years. KCC has not informed us about any attempt to monitor the impact on the health of the local population, in particular children.

KCC needs to give an assurance that it will resettle and fully compensate all of the occupants of the houses that have been earmarked for relocation, even if technically Gecamines is still the owner. The NGOs are concerned that KCC may consider that only Gecamines should be compensated and the long-term residents might be forcibly evicted. The IFC recognises that 'While some people do not have rights over the land they occupy, this Performance Standard requires that non-land assets be retained, replaced, or compensated for; relocation take place with security of tenure; and lost livelihoods be restored'<sup>307</sup>. Glencore cannot base its mitigation efforts mainly on the DRC's weak and out-dated laws. As the UN Guiding Principles make clear, global standards of expected conduct for business enterprises go far beyond formal compliance with national laws and regulations<sup>308</sup>. Neither is it acceptable for its mitigation efforts be limited to the impact of KCC's future operations and ignore the negative repercussions of its activities over the preceding four years.

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<sup>303</sup> Mining Code Article 281.

<sup>304</sup> Glencore Response 21 May 2014.

<sup>305</sup> Letter from Anna Krutikov, GlencoreXstrata 31 January 2014.

<sup>306</sup> Interview with Jacques Ramazani, Director, Direction de Protection de l'environnement minier, Kinshasa 4 March 2014.

<sup>307</sup> IFC Performance Standard 5.

<sup>308</sup> UN Guiding Principle 11.

## 6. Taxation and finance

### 6.1. Glencore's taxation and financial arrangements in the DRC

Tax evasion and avoidance are responsible for enormous losses of capital in Africa, exacerbating the continent's poverty. Tax evasion-related capital flight accounts for much greater economic losses than that related to criminal activities or corruption. For poor countries, taxes have the potential to provide a more stable and large source of finance than development aid.

Sophisticated strategies allow multinational companies to "optimise" their tax burden and move profits to tax havens or non-transparent jurisdictions. One commonly-used option consists of over-invoicing for imports and under-invoicing for exports to reduce company profits in a given country. Granting licences or loans to companies in the same group can also reduce the profits of a subsidiary and correspondingly increase those of another subsidiary registered in a tax haven. It is difficult to establish – in the absence of lengthy and costly legal proceedings – whether such practices are legal or illegal.

Glencore has been accused of aggressive tax planning in a number of countries. In 2011, the Zambian tax office commissioned an audit of a Glencore subsidiary. The audit report established that the subsidiary had artificially increased its operational costs, under-reported its production and priced its products at below market level in order to reduce its profits and avoid paying tax to the Zambian tax authorities.<sup>309</sup> However, Glencore disputes the conclusions reached by the auditors.<sup>310</sup> In 2012, Glencore subsidiaries in Colombia were alleged to have arranged their affairs in order to avoid paying half of the royalties due to the state.<sup>311</sup>

In response to this and other cases, the British Parliament asked Glencore and a few other companies to appear before its International Development Committee in April 2012 for an inquiry into tax in developing countries.<sup>312</sup>

Glencore says it pays all taxes and duties required by Democratic Republic of Congo (DRC) tax legislation.<sup>313</sup> It also states that all transactions are conducted in accordance with commercial principles. In the course of our research, we consulted various documents about Glencore subsidiaries in the DRC, notably their financial statements. Drawing on these different sources of information, we arrived at the following conclusions:

- Glencore subsidiaries transfer a substantial proportion of profits abroad. This practice, commonly used by many multinational companies, is not illegal, but is a way of avoiding payment of taxes on profits and dividends to the DRC state. There is no transparency on this transfer of profits.
- There are massive disparities and a lack of transparency regarding the amounts declared by these companies under the EITI, the information stated in their accounts and our own calculations. Glencore subsidiaries have undergone several tax reassessments and had to pay fines

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<sup>309</sup> See: Glencore, *Steueroptimierung in Sambia [Tax optimisation in Zambia]*, Alliance Sud, 3 April 2014: <http://alliancesud.ch/de/ep/steuerpolitik/glencore-steuroptimierung-in-sambia>.

<sup>310</sup> Glencore denies allegations over copper mine tax, *The Guardian*, 17 April 2011.

<sup>311</sup> *Glencore vermeidet durch juristische Tricks die Bezahlung von fast 100 Millionen USD Royalties* [Glencore uses legal tricks to avoid paying close to 100m US\$ in royalties], Arbeitsgruppe Schweiz-Kolumbien [Task Force Switzerland Colombia], 29 March 2012.

<sup>312</sup> See: [www.publications.parliament.uk/pa/cm201213/cmselect/cmintdev/130/120424.htm](http://www.publications.parliament.uk/pa/cm201213/cmselect/cmintdev/130/120424.htm), consulted on 9 May 2014.

<sup>313</sup> Glencore's response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID, 21 May 2014.

to the tax authorities. Only an audit of Glencore subsidiaries will be able to determine whether the amounts paid are correct.

- Finally, the acquisition of shares in mining concessions in the DRC by Glencore involved controversial deals, in particular in collaboration with the Israeli businessman Dan Gertler, a close associate of President Kabila. According to the Africa Progress Panel, the lack of proper competitive tendering and valuation of assets resulted in an enormous loss to the DRC state.

These points are set out in detail below.

With regard to corporate responsibility, Glencore makes much of its work on behalf of local communities (see Chapter 5) and the jobs it has created (about 10,000) in the Kolwezi region. Although this may be a positive contribution, it distracts attention from the company's foremost social responsibility to pay its fair share of taxes, so that the government can spend for the good of the population under democratic control.

## 6.2. KCC/KML: a structure based on tax havens

Glencore controls KCC through a 75% shareholding in Katanga Mining Limited (KML). The structure of the KML group is as follows (situation at the end of December 2013):<sup>314</sup>

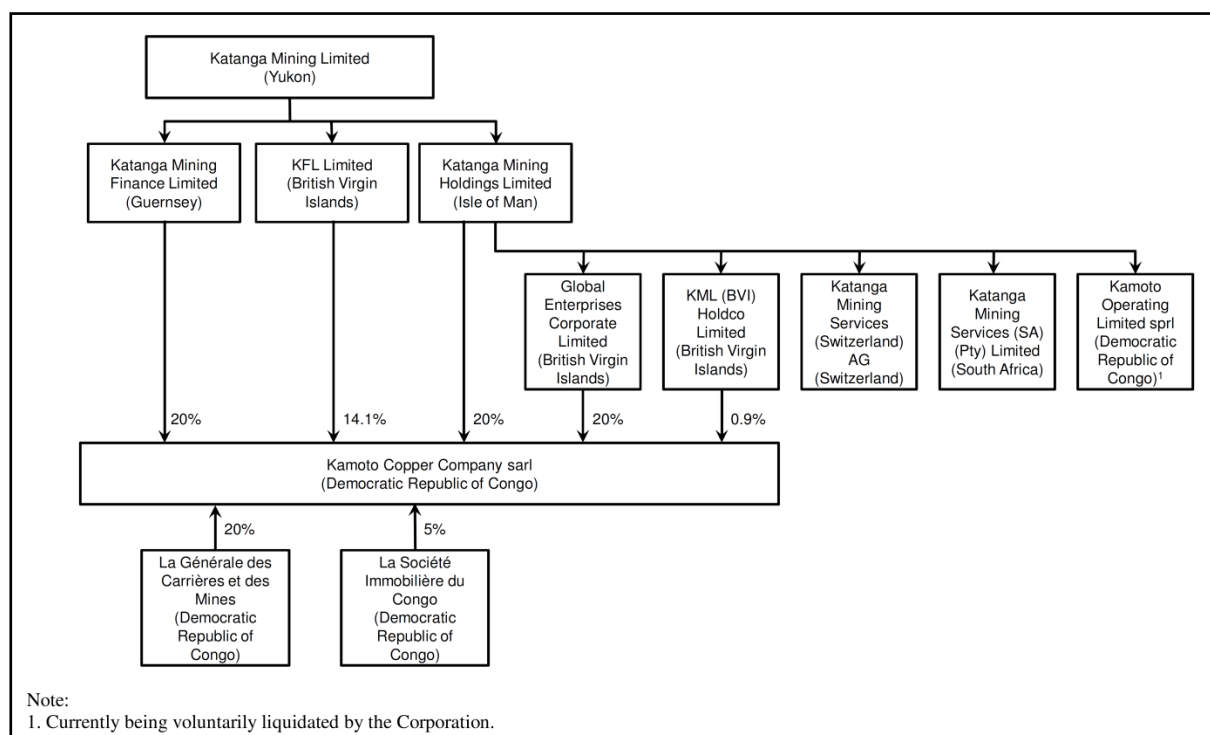


Diagram 42: The KCC/KML group

The KCC/KML group relies heavily on tax havens. KCC is 75% owned by five companies that are all registered in jurisdictions of secretive nature and a zero or very low rate of taxation: Guernsey, the British Virgin Islands (BVI) and the Isle of Man. The BVI, in particular, is the world centre for secret offshore finance and letterbox companies. The country registers 459,000 active companies for a population of only 32,000.<sup>315</sup> In 2013, this tiny country attracted direct foreign investment of US\$ 92 billion, that is more than India and Brazil combined.

<sup>314</sup> Katanga Mining Limited, Annual Information Form for the year ended Dec. 31, 2013.

<sup>315</sup> Financial Secrecy Index, British Virgin Islands, Tax Justice Network, Nov. 2013.

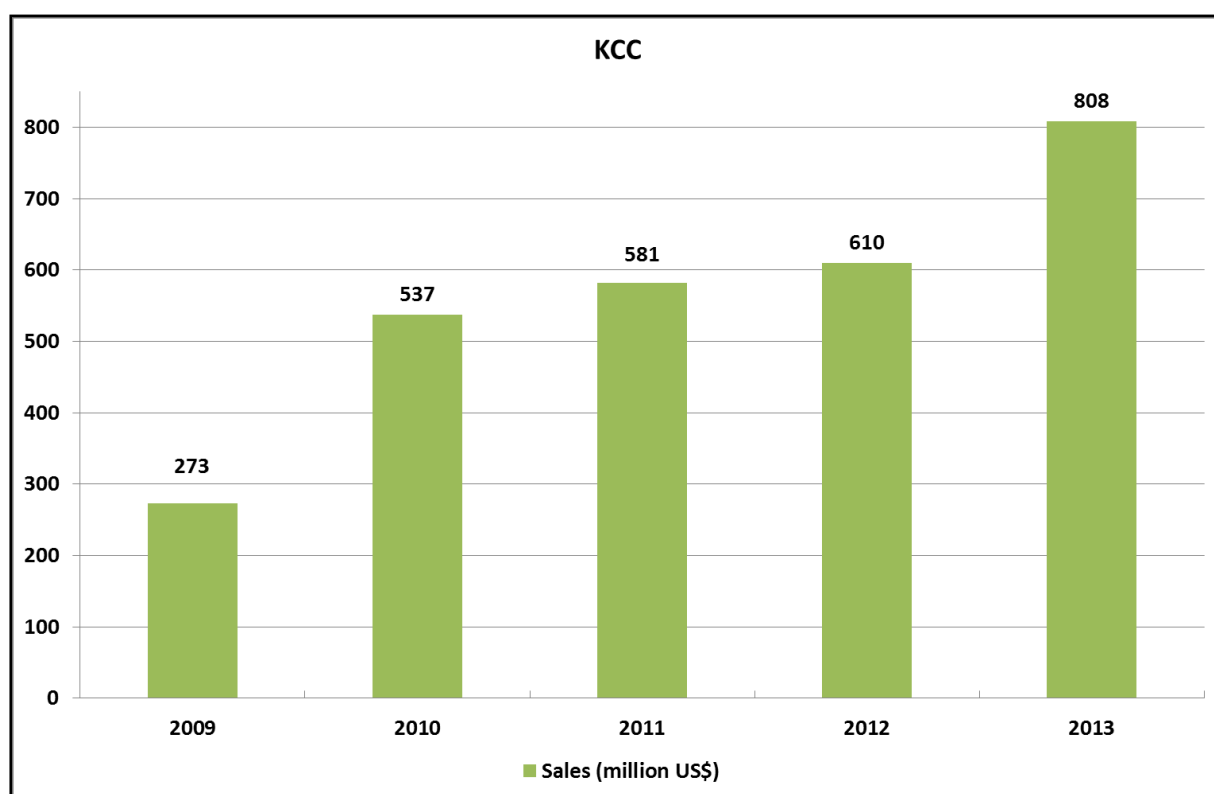
The five offshore companies that own KCC are owned directly or indirectly by Katanga Mining Limited (KML), which therefore owns KCC. The remaining 25% of its capital is held by Gécamines and SIMCO, two DRC state-owned companies.

KML is registered in Yukon Territory, Canada. This country's legislation allows companies to repatriate dividends and profits at zero tax from some jurisdictions where very low taxation rates apply. A few years ago, the headquarters of 75% of the world's mining companies were located in Canada.<sup>316</sup>

Glencore employs two KML directors. Glencore has exclusive rights to the purchase of minerals produced by its two subsidiaries in the DRC in accordance with a special commercial agreement (off-take agreement). This contract is published on the internet, but the commercial terms are kept secret.

### 6.3. Transfer of profits abroad and tax avoidance

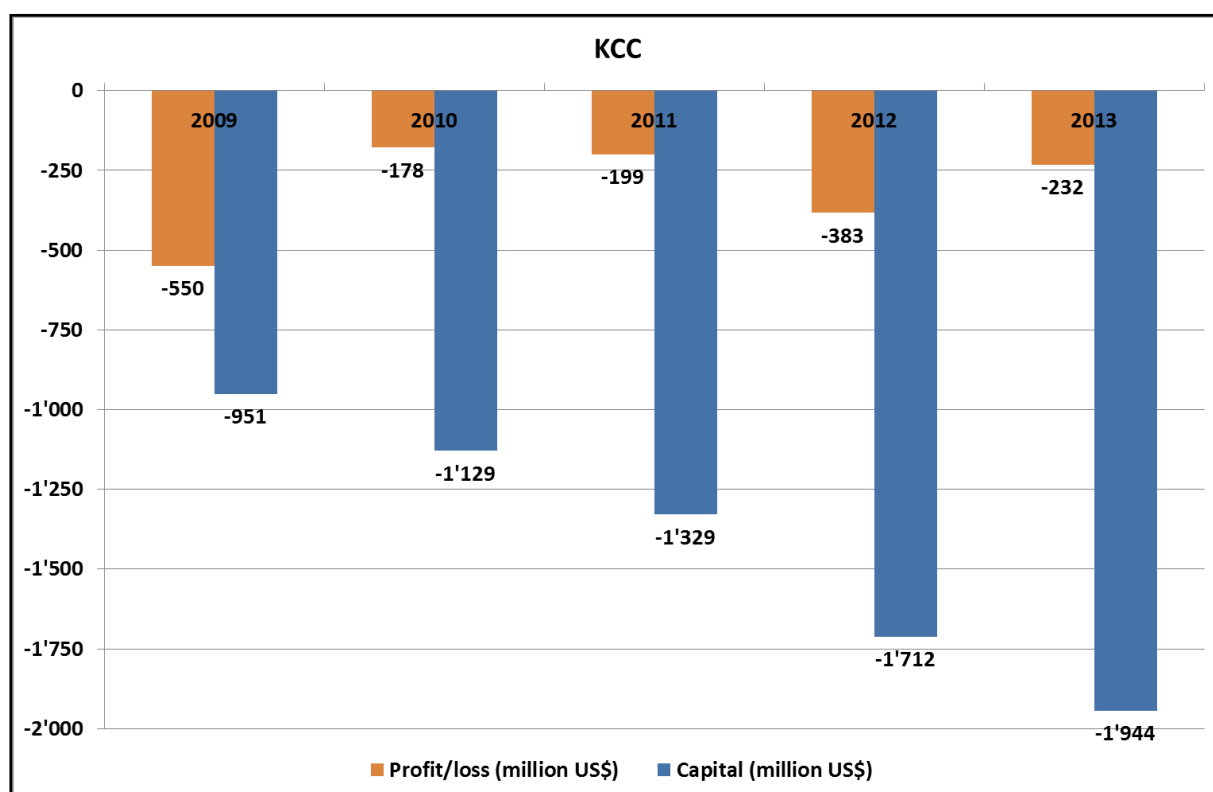
KCC began to sell its products in 2008, achieving a turnover of US\$ 210 million in that year. Since then, production has rapidly increased. In five years, sales have almost quadrupled and reached US\$ 808 million in 2013 (see graph 43).



Graph 43: KCC sales

Despite this growth, KCC has systematically declared losses since 2008. Because of the accumulated losses, the company has lost all its capital of US\$ 100 million. At the end of 2013, its capital (negative) dropped to almost US\$ -2 billion (see graph 40). How can a profit-maximising investor be interested in such a loss-making scheme?

<sup>316</sup> In 2009, according to the Canadian government; figures quoted by the Financial Secrecy Index, Canada, Tax Justice Network, Nov. 2013.



Graph 44: KCC profit/loss and capital (million US\$)

Such a situation would normally threaten the survival of a company, which would have to be either dissolved or recapitalised. Auditors of the company regularly pointed this out:

- In 2011, the auditor noted that *'in accordance with DRC company law and article 50 of the company's articles of incorporation, the board of directors is bound to report the situation to the company's annual general meeting, which must decide between dissolution of the company or its immediate recapitalisation'*.<sup>317</sup>
- In 2013, the auditor drew attention to the *'going concern concept despite the recurrent losses declared by KCC'*.<sup>318</sup>

We have found no record to show that the company has addressed this question. On the contrary, it seems that the company is not aimed at making profit.

These losses contrast with the consolidated results declared by KML. The heading "segmented information"<sup>319</sup> in its financial statements gives the corresponding financial information about its mining operations in the DRC:

*'The Company has one operating segment being its mining operations in the DRC. The operating segment comprises the mining, processing and selling of copper and cobalt. The corporate activities comprise the management of cash and cash equivalents, logistics and general corporate activities conducted in Canada, Switzerland and South Africa.'*

The net income/loss figures for its mining operations in the DRC show that the company sustained losses in 2008 and 2009 as a result of the investments it made. It was almost profitable in 2010 (see

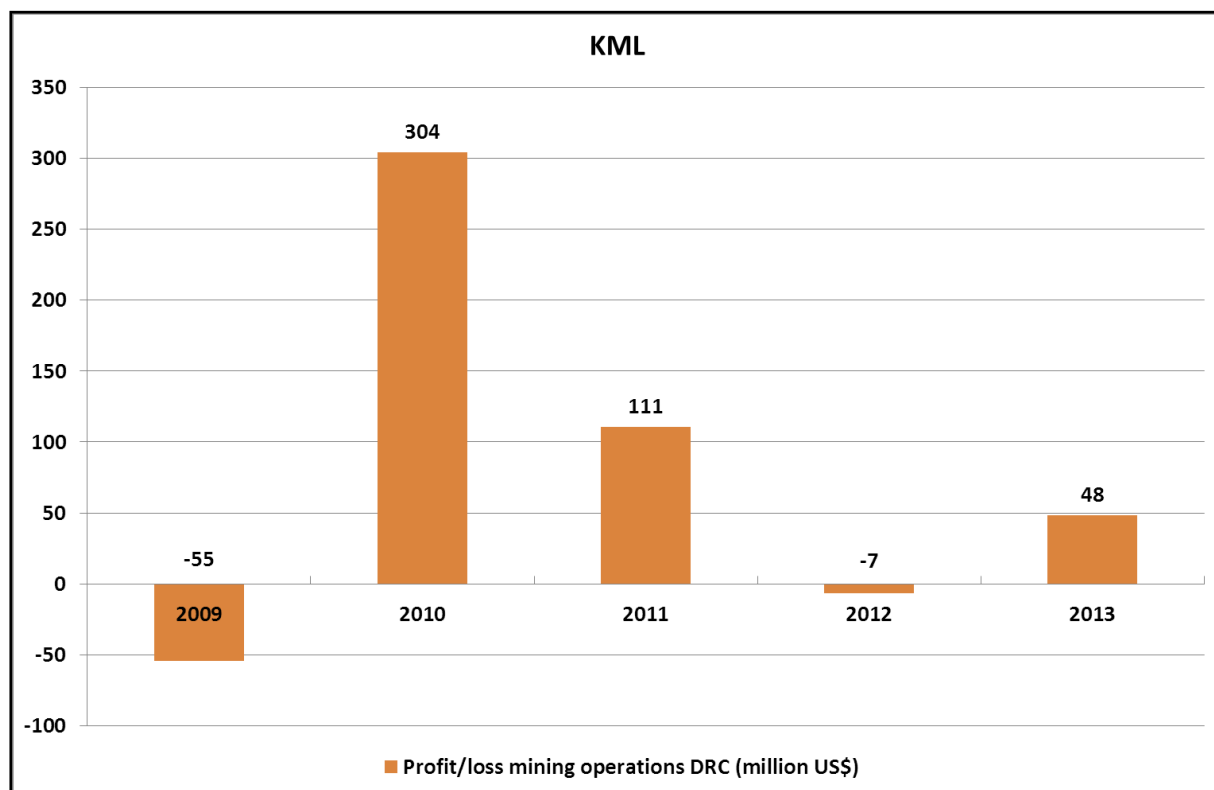
<sup>317</sup> KCC, Audit report of financial statements at 31 December 2011, p. 4.

<sup>318</sup> KCC, General report of the auditor on the annual financial statements at 31 December 2013, p. 3.

<sup>319</sup> See the point "Segmented information, Mining operations in the DRC" in the financial statements of KML.



graph 45). In 2012, KML made a small loss (US\$ -6.5 million), but the company underwent two tax reassessments and fines totalling US\$ 23.7 million (see section on tax penalties), without which results would have been positive. KML explains that losses in 2012 were also due to the fall in the price of copper.<sup>320</sup> However, the figures show that 2010 marked a turning point in the profitability of its operations.



Graph 45: Profit/loss mining operations of KML in the DRC

The regular losses declared by KCC – while KML recorded profits – can probably be explained in several ways, as outlined below.

- a) KCC made large interest payments to its parent companies, owned by KML, and the company became increasingly indebted to those companies. At the end of 2013, long term loans from group companies (Katanga Mining Finance Ltd, Katanga Mining Holdings Ltd, Global Enterprises Corporate Ltd, KML BVI Hodco) rose to US\$ 2.9 billion (see diagram 42). The size of these loans increased continually (2012: US\$ 2.6 billion) and it seems likely that it forms part of a tax avoidance strategy. Moreover, Glencore confirms that future investment will always take the form of loans: 'KCC is currently undergoing a significant capital expansion program which has led Glencore to invest a further \$2 billion **in loans** [emphasis added] to KCC to increase its production up to 300ktpa of copper cathode.'<sup>321</sup>

<sup>320</sup> KML, Management's Discussion and Analysis KML for the three and twelve months ended December 31, 2012 and 2011.

<sup>321</sup> Glencore's response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID, 21 May 2014.

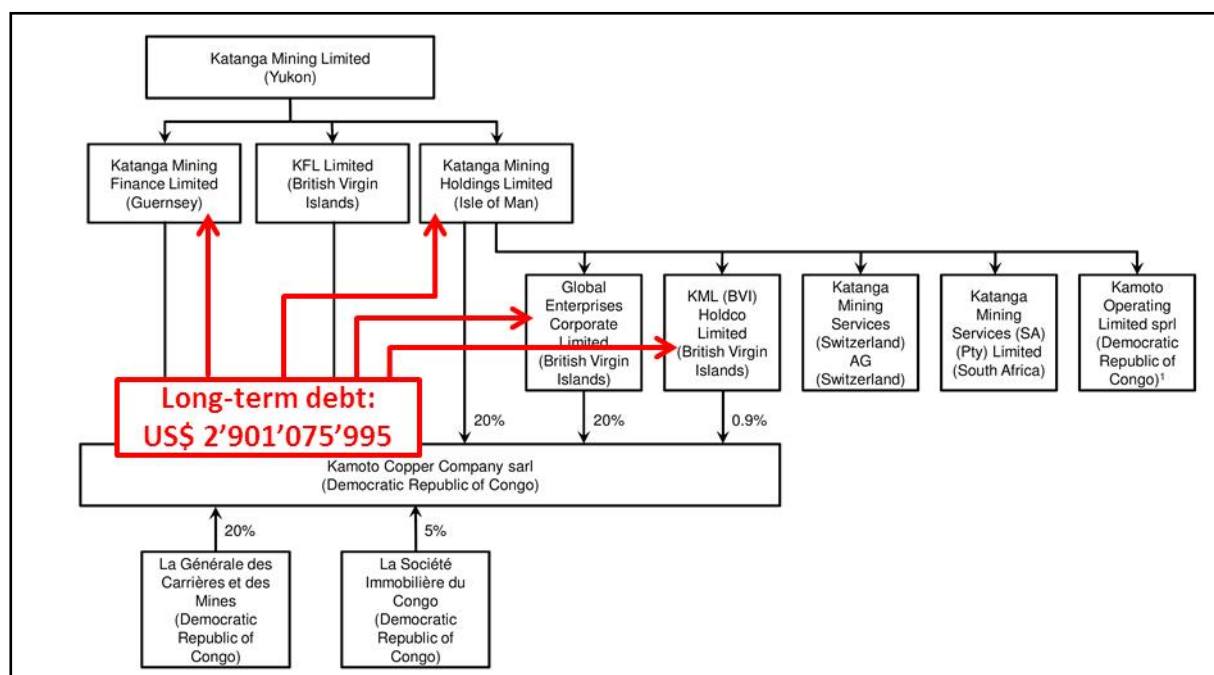


Diagram 46: KCC's long term debt to KML group companies (December 2013)

At the level of KML's consolidated financial statements, interest payments between group companies are netted off and disappear. At the level of KCC however, the interest paid to group companies explain most of the losses, as shown by the following table, which is based on KCC's accounts:

	2009	2010	2011	2012	2013
Profit/loss (million US\$)	-549.7	-178.5	-199.4	-383.1	-232.4
Interest payments to parent companies (million US\$)	121.6	190.1	208.0	263.2	318.0

It is noteworthy that in the DRC, mining companies are exempt from the 'contribution mobilière' (tax on interest paid to affiliated companies overseas),<sup>322</sup> on condition that the borrowing conditions are as beneficial as or better than for unaffiliated financial backers. As regards KCC, it is difficult to establish that borrowing conditions between Glencore subsidiaries were as beneficial as or better than the conditions subsidiaries could have obtained from unaffiliated financial backers. Nevertheless, the State passed a type of exemption which clearly encourages the transfer of profits overseas, engendering a huge loss of earnings for the state.

- b) Secondly, it seems that KCC made substantial payments for services rendered by group companies.

The financial statements show significant payments entered in the accounts as "other services", particularly for "mining contractors", without more detail being provided about the latter. In 2012 and 2013, costs for services from these mining contractors rose to over US\$ 100 million annually. Many costs (labelled as 'others') are not detailed either. Moreover, KCC hires equipment at several million a year in leasing costs, but provides no breakdown of these.

<sup>322</sup> Mining Code, art. 246.

Glencore states that the mining contractors are either affiliated companies, or local companies such as Forrest Group.<sup>323</sup> Nevertheless, in the absence of details provided in the accounts of KCC, it may be that many of these "other services" are actually intended to transfer profits to group companies.

- c) Thirdly, sometimes mining companies exaggerate investments made or make value adjustments of their assets that are too substantial in order to reduce their taxable profits.

On 31 Dec. 2011, the KCC auditor stated that he was unable to verify the accuracy of the depreciation provision for the year or of cumulative depreciation since the company did not provide the necessary information. The auditor also was not able to decide on the physical existence of assets since the company did not audit them.<sup>324</sup>

In 2012, the DRC Ministry of Finances authorised an audit company to investigate and certify the assets of KCC<sup>325</sup> as part of a series of audits of mining companies in which Gécamines holds stakes. However, this was not done for KCC. In his report the auditor states: 'the management of KCC did not allow us access to the information and opposed our work'.<sup>326</sup> For its part, Glencore confirms<sup>327</sup> that a request for a delay was made, adding that the auditors were then allowed access in July 2013. Glencore is said to have seen the draft project, but the final audit has not been published yet.

Until this final report is published, we shall not be able to confirm whether expenses or depreciations in the accounts of KCC are incorrect. It is therefore important that this audit is made accessible for civil society scrutiny.

The losses systematically declared by KCC have led the chairman of the board of directors of Gécamines, Albert Yuma, to state in October 2013 to the press: 'The value today of KCC is now negative.'<sup>328</sup> He considers that its stake in KCC is not "strategic".

In a meeting with the financial director of KCC,<sup>329</sup> the latter explained that the persistent deficits of KCC were due to the poor quality of the minerals produced at the Luilu factory because it did not have the latest technology. This had a negative influence on the sales price on the market. Hence, in his view, the minerals were only sold at between US\$ 3,000 and US\$ 4,000 a tonne.

This argument does not seem very plausible if one examines the profits recorded by KML and the fact that in 2013 KCC sold copper at around US\$ 7,000 a tonne.<sup>330</sup>

KCC is not on the radar for investors. Only the accounts of KML are published (since KML is a listed company). While the mining operations are profitable, KCC does not make profit and the company avoids paying tax on net profit: according to the DRC mining code, a loss-making company only pays 1% of its turnover instead of 30% of its profit.<sup>331</sup>

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<sup>323</sup> Glencore's response to Key Findings and Questions presented by Bread for All, Fastenopfer, and RAID, 21 May 2014.

<sup>324</sup> KCC, Audit report for financial statements at 31 December 2011, p. 4.

<sup>325</sup> BDO, Investigation and certification mission for assets of mining companies TFM and KCC, May 2012.

<sup>326</sup> Ibid., p. 6.

<sup>327</sup> Glencore's response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID, 21 May 2014.

<sup>328</sup> Gécamines of Congo Studies Selling Stake in Glencore Mine, Bloomberg, 7 October 2013.

<sup>329</sup> Meeting between the team researching this report and KCC in October 2013 in Kolwezi.

<sup>330</sup> 1<sup>st</sup> quarter: US\$ 7,363, 2<sup>nd</sup> quarter: US\$ 6,592, 3<sup>rd</sup> quarter: US\$ 7,253, 4<sup>th</sup> quarter: US\$ 7,165. Calculations according to the data of: Katanga Mining Limited, Management's Discussion and Analysis for the three months and years ended December 31, 2013 and 2012.

<sup>331</sup> Mining Code, art. 247.

The articles of incorporation of KCC<sup>332</sup> provide that profit net of tax should initially be allocated to setting up a legal reserve up to 10% of the share capital, or US\$ 10 million. KCC has thus avoided putting funds aside for this. The articles of incorporation then provide that 75% of the profits should be used to refund loans contracted and 25% be distributed as a dividend to shareholders. This profit allocation has been confirmed since the beginning by KML and will continue to apply until a production threshold of 150,000 tonnes of copper a year<sup>333</sup> has been reached. In declaring losses, KCC therefore avoids paying dividends to the DRC state in proportion to capital shares (i.e. 25%/75%). If the company had been profit-making, it would have been reasonable to suppose that the dividends would have been paid since annual production remains below the qualifying threshold.<sup>334</sup> With respect to KML (consolidated), there was never any payment of dividends and there is no intention of making any.<sup>335</sup>

Hence, KCC has avoided paying substantial taxes and dividends for 2010, 2011 and 2013, where operations are clearly profitable. This implies that the DRC state has lost a lot of money.

Table 47 below estimates the amounts the company has avoided paying to the DRC government, calculated on the basis of profits/losses declared for mining operations in the DRC with respect to KML, data on the allocation of profit to KCC and the stake of Gécamines/SIMCO in KCC (25%):

USD	2009	2010	2011	2012	2013
Sales	273,051,882	536,993,343	581,499,195	610,145,182	808,058,005
Profit/Loss	-549,679,433	-178,468,101	-199,412,031	-383,068,223	-232,366,186
<b>Income tax paid</b>	<b>291,173</b>	<b>545,379</b>	<b>602,005</b>	<b>636,287</b>	<b>1,109,130</b>
"Real" profit/loss from mining operations in the DRC	-54,581,000	304,483,000	110,578,000	-6,550,000	48,257,000
"Real" profit/loss after constitution of legal reserve	-54,581,000	294,483,000	110,578,000	-6,550,000	48,257,000
<b>Income tax paid, in % of real profit/loss</b>	<b>(negative)</b>	<b>0.2%</b>	<b>0.5%</b>	<b>(negative)</b>	<b>2.3%</b>
Basis of calculation for income tax, according to real profit/loss	1‰ of sales	30% of profit	30% of profit	1‰ of sales	30% of profit
<b>Income tax due, based on real profit/loss</b>	<b>291,173</b>	<b>88,344,900</b>	<b>33,173,400</b>	<b>636,287</b>	<b>14,477,100</b>
<b>Unpaid income tax</b>	-	<b>87,799,521</b>	<b>32,571,395</b>	-	<b>13,367,970</b>
Real profit/loss, after tax	-54,581,000	206,683,479	78,006,605	-6,550,000	34,889,030
25% of real profit/loss (after tax)	(negative)	51,670,870	19,501,651	(negative)	8,722,258
<b>Max. dividends which could have been paid to Gécamines</b>	-	<b>12,917,717</b>	<b>4,875,413</b>	-	<b>2,180,564</b>
<b>Total loss for the Congolese State</b>	-	<b>100,717,238</b>	<b>37,446,808</b>	-	<b>15,548,534</b>
<b>Total loss 2009-2013 (cumulated)</b>					<b>153,712,581</b>

Table 47: Taxes and dividends KCC has avoided paying

<sup>332</sup> KCC, modified and coordinated articles of incorporation, July 2009, art. 48.

<sup>333</sup> Katanga Mining Limited, Annual Information Form for the year ended Dec. 31, 2009, p. 41.

<sup>334</sup> Production reached 136,192 tonnes in 2013; source: Katanga Mining Limited, Management's Discussion and Analysis for the three months and years ended December 31, 2013 and 2012, p. 2.

<sup>335</sup> Katanga Mining Limited, Annual Information Form for the year ended Dec. 31, 2013, p. 24.

On the basis of the above scenarios, it can be seen that over five years, the loss of earnings to the DRC state amounts to over **US\$ 153.7 million**. In comparison, Swiss development aid to the DRC during the same period (2009-2013) came to around CHF 54 million, i.e. around **US\$ 58 million** only.<sup>336</sup> This is barely a third of the revenue lost to the DRC government due to the tax avoidance strategies of KCC.

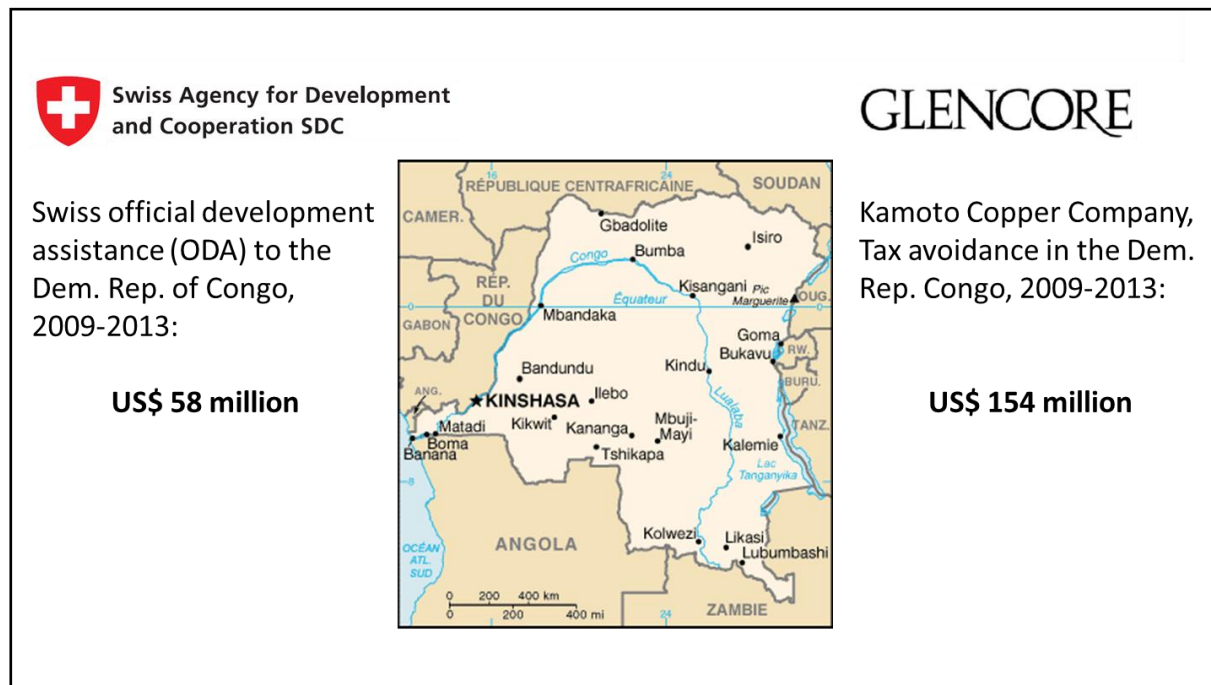


Diagram 48: Comparison between Swiss development aid to the DRC and tax avoidance by KCC

It is noteworthy that under DRC law, KCC can carry forward losses incurred for up to five years and deduct them from profits when calculating tax.<sup>337</sup> In 2013, KCC made use of this provision. In fact, some accounting categories were not recognised for tax purposes<sup>338</sup> and auditors noted a “tax benefit” of US\$ 197,137,026.<sup>339</sup> KCC then carried forward all its 2008 losses and part of those from 2009 to reduce the 2013 tax benefit to zero. Hence, it could be argued that by applying this provision, KCC would perhaps have paid less tax on profits and dividends, maybe none at all. Nevertheless, this provision only applies to the five years following a loss and not to the lifespan of a company. A profit-making company will sooner or later end up paying tax on profits and dividends.

#### 6.4. Tax paid and sincerity of EITI declarations

The subsidiaries of Glencore are subject to fees, duties, levies and direct and indirect taxes to the DRC state. These payments are collected either directly by government agencies responsible for collecting this revenue, or indirectly by the parastatal Gécamines, which transfers part of this revenue to the state.

<sup>336</sup> Source: Annual international cooperation reports of Switzerland 2009-2012. Since the 2013 report is not yet available, the amount was extrapolated according to the average of previous years. The amount in dollars is calculated by applying the exchange rate on 30 June of each year. The amount indicated does not include humanitarian aid.

<sup>337</sup> Mining Code, art. 251.

<sup>338</sup> This probably largely involves provisions. See Decree-Law no. 13/008 of 23 February 2013 amending and completing certain provisions of Decree-Law no. 69/009 of 10 February 1969 relating to scheduled income tax, art. 46.

<sup>339</sup> KCC, General Report of the auditor on the annual financial statements at 31 December 2013, note 36.



The principal fiscal and parafiscal obligations relating to KCC are as follows<sup>340</sup>:

1	Tax on profits	30% of the profit if is positive or 1% of the turnover in case of loss
2	Tax on domestic turnover	18% of provision of services in the country
3	Tax on movable property	10% on the interest of borrowed capital (for mining companies: exemption for loans from foreign sources)
4	"pas-de-porte" (entry premium for access to a mining site)	US\$ 10,000,000 p.a.
5	Annual surface rights	US\$ 424.78 per mining plot (1 plot = 84,955 ha) when the concession is exploited
6	Mining fee (tax on sales)	2% of sales less transport, analysis, insurance and marketing costs
7	Customs duties for importation ( Droits de douanes a l'importation - DDI)	2% to 5 % <sup>341</sup>
8	Fees and costs for export service	1% of the value of FOB exports
9	Royalties	2.5%, less leasing charges <sup>342</sup>
10	Leasing charges for equipment	US\$ 1.8 million per annum, deductible from the amount of royalties to be paid (see above)
11	Tax on road transport infrastructure (provincial revenue)	US\$ 50 per exported tonne
12	Tax on the export of concentrates	US\$ 60/100 per tonne of concentrate exported
13	Fines and penalties in the event of false declarations	On a case-by-case basis

In the context of the DRC Extractive Industries Transparency Initiative, mining companies and the DRC state are obliged to declare the amounts respectively paid and received under various taxes, fees and royalties. It should be noted that Glencore supports the principle of the EITI. The last two available EITI reports relate to 2010 and 2011.

If one compares the amounts that KCC declares it paid to the state under the EITI and the estimates for amounts due and amounts stated in the accounts of KCC, wide disparities can be observed:

- a) Mining fees: according to DRC regulation, calculations for determining the fee take into account the value of sales made, less deductible costs (transport, laboratory analysis etc.), to which a tax rate of 2% is applied for non-ferrous metals. The deductible costs should represent a maximum 15% of turnover.<sup>343</sup> Applying these provisions to sales of KCC for 2010 and 2011, KCC should have paid at least US\$ 9,128,887 in 2010 and US\$ 9,885,486 in 2011. The figures declared in the EITI are completely different however: US\$ 6,869,312 in 2010 and US\$ 13,234,958 in 2011.

According to a DRC report by the NGO, ACIDH<sup>344</sup>, many mining companies do not comply with the threshold of deductible costs so as to reduce the basis of the mining fee. In this report, KCC and MUMI (Mutanda Mining) were listed among the companies that infringed DRC

<sup>340</sup> Data based on the Mining Code, Mining Regulations and agreements linking KCC with the DRC state.

<sup>341</sup> Equipment imported before effective exploitation of the mine recorded is subject to an entry fee of 2%, while that exported from the date when effective exploitation started is subject to 5% (Mining Code, art. 232).

<sup>342</sup> According to art. 6.10 (a) of the joint venture convention amended, consolidated and reformulated between Gécamines, KFL (formerly KinRoss-Forest Limited) and Global Enterprise Corporation on 27 July 2009, once a sum of US\$ 450,000 a quarter has been deducted for leasing.

<sup>343</sup> A decree of the Minister for Mines in 2009 fixes the acceptable threshold of deductible costs at 15% of the sales price. The management of KCC confirmed this rate at a meeting.

<sup>344</sup> ACIDH (*Action Contre l'Impunité pour les Droits Humains – Action Against Impunity of Human Rights Abuses*), Transparency in mining revenue in DRC: Case of a Province in Katanga, Oct. 2012.

regulations on deductible costs in 2010. These fees varied between 10-62% for KCC and 30-77% for MUMI instead of the maximum of 15%.

- b) Entry premium: according to the agreements between KCC and Gécamines, as well as the financial statements of KML,<sup>345</sup> KCC should have paid US\$ 10 million in 2010 and the same again in 2011. In the EITI, KCC declared paying US\$ 20 million in 2010. In 2011, KCC declared paying US\$ 10 million, but another amount of US\$ 10 million can be noted in the "Advances to be claimed on Tax". It is not clear what amount was actually paid as entry premium for these two years.

The entry premium amounts are not included in the KCC accounts. It is, however, likely that they were paid by KFL Limited and GEC (Global Enterprises Corporate), as provided for in the joint-venture convention of July 2009 regarding KCC.<sup>346</sup>

- c) Royalties: KCC is obliged to pay 2.5% of its sales as royalties. A maximum US\$ 450,000 a quarter (US\$ 1.8 million per annum) is deducted from this sum as a leasing charge. Applying these provisions to sales of KCC, KCC should have paid US\$ 11,624,834 in 2010 and US\$ 12,737,480 in 2011. These amounts do not correspond at all to the declaration in the EITI (US\$ 7,712,791 in 2010 and US\$ 20,990,890 in 2011). Moreover, the amounts of the leasing charge do not correspond either. It is, however, noteworthy that the amounts due for royalties are close to the amounts mentioned as a "Gécamines fee" in the accounts of KCC, although no explanation accompanies the entry.
- d) Tax on road transport infrastructure: KCC exported a total of 75,684.66 tonnes of minerals<sup>347</sup> in 2010 and assuming US\$ 50 per tonne of minerals exported, arrives at a charge of US\$ 3,784,233 for 2010. The EITI does not mention anything, but the government declares that it received \$US 2,902,783. In 2011, the amount declared in the EITI (US\$ 13,843,630) does not seem to correlate with the amount due for this year.
- e) Customs duty for imports, tax on movable property and costs and services rendered for export: substantial amounts (several million US\$) were declared in the EITI while they do not appear at all in the accounts of KCC. It is possible that they were paid by other companies in the group: this should be clarified by Glencore.
- f) Exceptional tax on the income of expatriates and tax on domestic turnover: the amounts differ substantially between the declarations of the EITI and what can be found under the corresponding entries in the accounts. Again, Glencore should clarify whether such sums are paid by other companies in the group.
- g) Finally, in 2013, in its financial statements, KCC paid US\$ 18,751,379 as "other taxes and fees". There are no details on these taxes and fees in the financial statements. It remains to be seen whether the EITI report for 2013 will provide a corresponding figure and more details.

Taking all the discrepancies and omissions into account, it is very difficult to know exactly what KCC paid overall and if this corresponds to the amounts really due. Several receipts at the EITI have not been found, either from the DRC state or from KCC.

With regard to MUMI, significant discrepancies in 2010 can be noted, for example:

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<sup>345</sup> See the notes to the KML financial statements.

<sup>346</sup> Joint venture convention amended, consolidated and reformulated relating to the exploitation of mines of KCC, July 2009, p. 7.

<sup>347</sup> All minerals included, according to the statistics of the Provincial Division of Katanga.

- a) Mining fees: in the absence of details on sales figures for ores sold, we assumed the FOB value<sup>348</sup> declared in the 2010 EITI report of US\$ 314,107,524. Once 15% is deducted for deductible costs (as a maximum), the mining fee (2%) should amount to US\$ 5,339,828. In the EITI, MUMI declares that it paid US\$ 3,620,402 only, i.e. a difference of US\$ 1,719,426 to the detriment of the state. Moreover, the FOB value is below the price of ores on the international market, which means that the fee calculated above is an underestimate.
- b) Royalties: MUMI should pay 2.5% of turnover as royalties.<sup>349</sup> By using the FOB sales above as a basis, one obtains US\$ 7,852,688. However, MUMI declared an amount of US\$ 3,343,826 in the 2010 EITI report, i.e. a difference of US\$ 4,508,862 to the detriment of the state.
- c) Provincial tax on concentrates: the tax is US\$ 60 per tonne of exported concentrated products. MUMI produced 136,086.42 tonnes of concentrate of cobalt and copper in 2010, i.e. an amount due of US\$ 8,165,185. By comparing this figure to the amount declared by MUMI in the 2010 EITI report, i.e. US\$ 6,514,777, one can see a difference of at least US\$ 1,650,408 to the detriment of the state.

Overall, it can be noted that there are wide discrepancies between the figures declared and the figures due or accounted in the companies. However, we were unable to access some data, particularly the accounts of MUMI.

When looking at the penalties paid to the tax authorities (see point 6.8), there is reason to question the declarations made by Glencore's subsidiaries. Only a special audit would be able to determine if the taxes paid were correct and if accounting items are over- or underestimated. Moreover, Glencore seems not to be opposed to this proposal:

'We are still open to any discussions regarding these discrepancies and would be happy to show proof of all payments to KPMG to resolve any outstanding issues.'<sup>350</sup>

In any case, taxes and fees paid contrast strongly with the declaration of KML which at the start of the project stated:

'Katanga expects that at full production capacity, taxes and transfers to government from the combined KCC DCP operations will be of the order of **US\$ 400 million** per annum.'<sup>351</sup>

In 2013, the total taxes and transfers paid to the government by KCC and MUMI were US\$ 282 million according to Glencore.<sup>352</sup> It should be noted that KCC represents a little more than half of the production of two entities, and therefore it can be estimated that currently KCC probably does not pay more than **US\$ 140 million** per annum to the state.

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<sup>348</sup> "Free on board": value of merchandise for export once loaded on the boat, without transport and other fees

<sup>349</sup> Mutanda Mining Sprl, Company formation contract, Supplementary clause no. 3 of 06 January 2009, art. 10

c).

<sup>350</sup> Glencore's response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID, 21 May 2014.

<sup>351</sup> Katanga Mining Limited, Annual Information Form for the year ended December 31, 2008, p. 14.

<sup>352</sup> Glencore's response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID, 21 May 2014.

## 6.5. The MUMI-KANSUKI merger: opaque transactions and questionable practices

The gradual acquisition of the capital of the Mutanda and Kansuki concessions by Glencore was surrounded by secret and questionable transactions. Several reports have been written on this subject, including a critique by the Africa Progress Panel lead by former UN Secretary General Kofi Annan and former IMF Director Michel Camdessus among other personalities.<sup>353</sup> Recent events in 2013 seem to confirm Glencore's intentions without providing answers on the doubts one may have on these matters.

Since 2006, 80% of Kansuki Sprl, the owner of the mining rights on the Kansuki concession, has belonged to the Fleurette group, which is linked to the controversial Israeli businessman Dan Gertler, and 20% to Gécamines. Following the revision of mining contracts carried out in 2008 by the DRC, the stake was adjusted, 75% going to Fleurette and 25% to Gécamines.<sup>354</sup> In July 2010, the share capital of Kansuki was allocated to Kansuki Investments sprl, which was created for this purpose. Half of these shares were resold just after to Glencore, giving Glencore an indirect interest of 37.5% in Kansuki. The other half of the capital of Kansuki Investments was then sold to Bazano, another mining group (at an unknown date).

In March 2011, the 25% of the capital still held by Gécamines was sold to the Fleurette group through an offshore company (Biko Investment Ltd). The sales price of these shares was set at US\$ 17 million.<sup>355</sup> According to various commercial evaluations, these shares were, however, worth around US\$ 133 million<sup>356</sup>. The price was considerably underestimated and the DRC state lost around **US\$ 116 million** in this transaction.

With regard to the Mutanda concession, from 2007 Glencore held 50% of the capital of Samref Congo Sprl which in turn owned 80% of the shares of Mutanda Mining Sprl (MUMI), the owner of the mining rights to the Mutanda concession. The other 50% of Samref Congo belonged to High Grade Minerals SA (HGM), a company in the Bazano group. The remaining 20% of MUMI were held by Gécamines.

In March 2011, the shares of Gécamines in MUMI (20%) were resold to an offshore company in the Fleurette group (Rowny Assets) for US\$ 120 million. Credible alternative evaluations suggest, however, that these shares should have been worth around US\$ 634 million, i.e. a loss of earnings of **US\$ 514 million** to the DRC state<sup>357</sup>.

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<sup>353</sup> See our previous report: *Glencore in Rép. Dém. du Congo, le profit au detriment des droits humains et de l'environnement* [Glencore in DRC, profit to the detriment of human rights and the environment], Bread for all/Swiss Catholic Lenten Fund, April 2012, as well as: Africa Progress Report 2013, Equity in Extractives, Africa Progress Panel, May 2013 and also: Secrecy Surrounding Glencore's business deals in the Dem. Rep. of Congo, Global Witness, 9 May 2012.

<sup>354</sup> See response of D. Gertler to Global Witness:

<http://www.globalwitness.org/sites/default/files/library/Responses%20by%20Dan%20Gertler%20to%20Global%20Witness.pdf>, and

<http://www.globalwitness.org/sites/default/files/library/Additional%20responses%20by%20Dan%20Gertler%20to%20Global%20Witness.pdf>.

<sup>355</sup> Share transfer contract between Générale des Carrières et des Mines Sarl and Biko Invest Corp., 28 March 2011.

<sup>356</sup> See the 2013 report of Africa Progress Panel.

<sup>357</sup> See the 2013 report of Africa Progress Panel.

In May 2012, Glencore increased its stake in MUMI by acquiring shares from HGM/Bazano. Glencore hence purchased around 20% of the capital of MUMI for US\$ 480 million,<sup>358</sup> i.e. four times the amount paid a year earlier by the Fleurette group for practically the same share of capital.

In July 2013, MUMI absorbed Kansuki and issued new shares.<sup>359</sup> Once the merger was complete, Glencore owned (indirectly) 54.5% of the capital of the new company (Mutanda). In December 2013, Glencore then bought out the shares of HGM for US\$ 430 million, according to an agreement already provided for in 2012. Finally, Glencore mentions that it has the right to purchase – and Rowny the right to sell – the remaining rights in two tranches by 2018 at fair market value. It is therefore likely that Glencore will acquire all the capital of the new company Mutanda by this date.

Glencore's increasing stake in Mutanda Mining and Kansuki is summarised in table 45 below.

Date	MUMI	KANSUKI
From 2007	<b>Glencore: 40%</b> , Bazano: 40% Gécamines: 20%	Fleurette: 80% Gécamines: 20%
From 2008		Fleurette: 75% Gécamines: 25%
August 2010		<b>Glencore: 37.5%</b> , Fleurette 37.5% Gécamines: 25%
March 2011	<b>Glencore: 40%</b> , Bazano: 40% Fleurette: 20%	<b>Glencore: 37.5%</b> , Bazano: 37.5% Fleurette: 25%
May 2012	<b>Glencore: 60%</b> , Bazano: 20% Fleurette: 20%	
Jul. 2013	MUMI – KANSUKI merger <b>Glencore: 54.5%</b> , Bazano: 14.5% Fleurette: 31%	
Dec. 2013	<b>Glencore: 69%</b> Fleurette: 31%	
By Jul. 2018:	<b>Glencore: 100%?</b>	

Table 49: Successive buyout by Glencore of the capital of MUMI and Kansuki Mining

These different transactions for the benefit of Glencore raise a number of questions:

- a) Sales of shares of Gécamines in MUMI and Kansuki were substantially undervalued. The evaluations mentioned above suggest that that DRC state lost close to **US\$ 630 million** in these transactions. Gécamines, however, claims that the price was correctly evaluated.<sup>360</sup>
- b) The sales of shares in Gécamines were carried out in secret and did not undergo a public tender. They are part of a series of questionable and secret sales of Gécamines, all carried out by offshore companies without any real activity and for which the losses to the DRC state are estimated at US\$ 1,355 million.<sup>361</sup> In all these transactions, Dan Gertler, who is a close associate of President Kabila, seems to play the role of intermediary: companies he controls made or could potentially make considerable profits from the onward sale of assets.
- c) In the sales of Gécamines' shares in MUMI and Kansuki, Glencore and its associates had a right of pre-emption to the shares likely to be transferred. This means that Gécamines had first to offer these shares to Glencore and its associates. Glencore has several times stated that it did not wish to make use of this right and make a competitive bid. Glencore mentioned two arguments: on the one hand, the company preferred to invest in existing assets

<sup>358</sup> Increase of indirect equity interest in Mutanda, Glencore, Press Release, 22 May 2012.

<sup>359</sup> Merger of Mutanda and Kansuki mining operations, Glencore Xstrata, Press Release, 25 July 2013.

<sup>360</sup> See in particular: Response of Gécamines Sarl to the IMF questionnaire on the sales of shares in MUMI Sprl, Sep. 2011.

<sup>361</sup> See the 2013 report of the Africa Progress Panel, p. 101.



(new construction and equipment); on the other, Glencore held back on new commitments because of the uncertainty linked to the presidential elections of 2011. However, these arguments are difficult to accept in view of the derisory price at which the shares were sold. Moreover, in 2011 Glencore had already announced its intention to become the majority owner: 'Discussions with respect to a potential combination of the Mutanda and Kansuki operations are ongoing with a view to ultimately obtaining a majority stake in the merged entity.'<sup>362</sup> Finally, the political uncertainty in the DRC is ongoing and did not end with the 2011 elections.

Glencore has had a successive acquisition strategy for the capital of Mutanda/Kansuki for several years. It is therefore more than surprising to see that Glencore did not seize the opportunity to use its pre-emptive rights to purchase the shares sold in 2011 when it always intended to acquire Mutanda/Kansuki. By allowing Fleurette to purchase them at a low price, Glencore had and will have to repurchase them at a much higher price.

We should also note that the merger between MUMI and Kansuki was to the detriment of the DRC state. In fact, Kansuki was a project in the process of development which has received significant investments in recent years. The absorption of Kansuki by Mutanda led to the transfer of redeemable research and development expenses of Kansuki in the liabilities of Mutanda, which could in principle be carried forward without limit over time to subsequent years of Mutanda.<sup>363</sup> Although this is not illegal, the time when the profits of Mutanda are submitted for tax on profits will thus be delayed.

## 6.6. Acquisition of shares in KCC blocked after media revelations

In July 2013, rumours were circulating concerning negotiations between Dan Gertler and Gécamines relating to KCC, which, in many respects, paralleled the acquisitions of the capital of Mutanda and Kansuki described above. In October 2013, Gécamines confirmed that it was in negotiations with the Fleurette group for the sale of shares (25%) in KCC. Gécamines stated that there was a call for tenders in which 13 other companies participated, but no other name than that of Fleurette was disclosed. Shortly afterwards, while negotiations were progressing, the Ministry of Mines indicated that it had never been informed about the tendering process.<sup>364</sup> Glencore again had pre-emptive rights. Questioned by the press, Glencore refused to comment. Finally, after these discussions were revealed by the media and Congolese civil society,<sup>365</sup> at the end of 2013, the prime minister prohibited the transfer of assets belonging to the DRC state while the government was being restructured.

Between 2007 and 2010, it should be noted that Dan Gertler had already assisted Glencore in acquiring shares in what would become KCC in the context of a bitter power struggle. According to the British NGO Global Witness, the transactions allowing Glencore to hold stakes in KCC at the time had been conducted in the greatest secrecy.<sup>366</sup> They are also said to have enriched Dan Gertler to the tune of at least US\$ 67 million. Dan Gertler was also implicated in several other suspicious transactions, including one with mining group ENRC that is currently the subject of an investigation by the UK Serious Fraud Office.<sup>367</sup>

It should also be noted that in 2013 KCC made a charge to provisions of US\$ 285 million for claims on mineral reserves granted to Gécamines in the past. According to KCC's joint venture convention of

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<sup>362</sup> Glencore, Preliminary Results 2011, p. 18.

<sup>363</sup> Mining Code, art. 252.

<sup>364</sup> Gécamines didn't tell government of KCC Gertler deal, Bloomberg, 18 October 2013.

<sup>365</sup> Stance of NGO on the sale of shares of Gécamines in KCC and the creation of a subsidiary of Gécamines to Mauritius, PCQVP, POM, 24 October 2013.

<sup>366</sup> See the study of Global Witness: Glencore and the Gatekeeper, May 2014.

<sup>367</sup> *Ibid.*, p. 1. See also response of D. Gertler to Global Witness in footnote 354.

July 2009,<sup>368</sup> Gécamines is obliged to compensate KCC by July 2015 for the Mashamba West and Dikulwe deposits which had been released for "reasons of state" (these probably relate to deposits resold to Chinese companies). By this date, Gécamines is supposed to provide the equivalent of the mineral contained in these deposits, i.e. pay the sum of US\$ 285 million as compensation.

In 2013, i.e. nearly two years before the maturity of the debt, KCC completely amortised the amount due, as if Gécamines would never pay off its debt. The joint venture convention provides that if Gécamines cannot pay the amount due, the amount can be deducted from dividends and royalties to be paid. So there was no reason to write off these debts as losses. It therefore seems that there were compensations for this amount one way or another by the DRC state, without these transactions being made public.

## 6.7. Fines and tax adjustments

The DRC's tax system is based on self-assessment. Mining companies are obliged to declare exported ores to the customs authorities, which then calculates the taxes and fees due.

Companies are liable for fines and penalties when false declarations or concealments are detected in declarations. Common customs legislation provides for fines between 1 and 10 times the value of unpaid fees.<sup>369</sup>

The self-assessment tax system involves enormous risks and weaknesses. The tax authorities do not have the resources to check the veracity of a declaration made by a taxpayer. For the export of minerals for example, the Directorate General of Customs and Exercise (DGDA) does not have a laboratory. So it is left to the exporting company to test the content of ores. Hence, there is a great risk that declarations of companies do not reflect the true value of ores.

With regard to KCC, the company has regularly paid substantial tax penalties for incorrect declarations. Financial statements indicate that KCC paid **US\$ 44.0 million** in fines and penalties over the last 5 years:

	2009	2010	2011	2012	2013	TOTAL
<b>Tax penalties (US\$)</b>	992,926	2,078,520	8,731,242	28,781,253	3,434,132	<b>44,018,073</b>

In 2012 in particular, KCC had to pay two substantial fines:

- a) The first (US\$ 14.5 million) concerns the export of copper. According to a well-informed anonymous source, KCC declared the export of a batch of copper nodules (with low copper content) with a market value of US\$ 1,400 a tonne, without indicating the content. Following doubts expressed by the customs authorities, a laboratory analysis was carried out which showed that this material contained copper cathodes with a 99% content, worth US\$ 8,000 a tonne. The customs authorities concluded that this was fraud and instituted legal proceedings against KCC. The company had to pay a fine of US\$ 14.5 million. In its 2013 report, KML states that the items were nodules and that their value had to be clarified with the tax authorities. There is, however, a contradiction in the statements of Glencore. In KML's 2013 annual report, the company states that exports were halted following the inspection:

<sup>368</sup> Joint venture convention amended, consolidated and reformulated relating to the exploitation KCC mines, July 2009, art. 6.14.

<sup>369</sup> Decree-Law no. 10/002 of 20 August 2010 relating to the Customs Code, art. 386.

'In addition, to ensure that these penalties did not reoccur, the Company did not export copper nodules until clarification on the value for customs duty purposes was obtained.<sup>370</sup> However, in its response to us, Glencore explained that the export continued despite the uncertainty about the law (code) to be applied:

'All discussions were minuted with the tax authorities and it was agreed that pending a technical review by a competent authority, KCC would continue to export nodules under one of the codes and that in the event that an alternative code was required; KCC would make the necessary declaration adjustment. Subsequent to the technical review, the adjustment was required and the tax authorities levied penalties on the transactions.'<sup>371</sup>

There is a lack of clarity over whether and, if so, for how long, KCC's exports were stopped and therefore whether the Congolese State received the correct amount of export taxes.

- b) In the second case (US\$ 9.2 million), the Directorate General of Tax considered that KCC was also liable for tax on exceptional remuneration of expatriates for the staff of affiliated foreign companies. In fact, a significant number of expatriates work on the project. According to an anonymous source, several expatriates of KCC were in the past declared to be working for another company in the group overseas, instead of KCC, to avoid paying income tax on expatriates. It seems that this situation has now been rectified, following the intervention of the customs authorities. Questioned on this score, Glencore explained that some expatriates were previously employed under a law on foreign technical assistance and that in 2012/2013, it was decided that all expatriates would be registered as personnel of KCC.<sup>372</sup>

In 2013, another case of a tax suit concerning Glencore emerges from an investigative mission requested by the Public Prosecutor to the Directorate General of Customs and Excise (DGDA) in Lubumbashi.<sup>373</sup> This mission was intended to "verify acts of corruption, extortion and fraud by the customs authorities" concerning exports and imports of the province, particularly mining companies.

The mission delivered its report in November 2013. It cites 279 litigation cases concerning unpaid taxes and fees. The amounts to be recovered by the tax authorities totalled US\$ 3.7 billion. For lack of resources, the mission was only able to examine 25 of 279 litigation cases. Of these, the investigators, in agreement with a technical sub-commission of the DGDA, concluded that 11 companies committed violations of customs legislation, including MUMI:

Table breaking down the fees due to the treasury and fines from the 11 offenders			
N°	Offenders	Fees due (US\$)	Fine (US\$)
...	...	...	...
07	MUTANDA MINING	6,745,014	34,462,886
...	...	...	...

(Extract of the report of the judicial investigation mission to DGDA)

<sup>370</sup> Katanga Mining Limited, Management's Discussion and Analysis for the three and twelve months ended December 31, 2013 and 2012, p. 5.

<sup>371</sup> Glencore's response to Key Findings and Questions presented by Bread for All, the Fastenopfer and RAID, 21 May 2014.

<sup>372</sup> Glencore's response to Key Findings and Questions presented by Bread for All, Fastenopfer and RAID, 21 May 2014.

<sup>373</sup> Judicial investigation mission report to the Katanga DGDA to Lubumbashi execution by R.I. N° 4379/D023/461 8/PGR/NYS/2013 and collective mission order N° 079/D.001/PRS/MAG/2013 of 22 August 2013 of the public prosecutor, Nov. 2013.

According to this report, MUMI is therefore liable for **US\$ 41.2 million** in total as fees and fines due to DGDA. Glencore disputed this decision and declared to the press that the report was incorrect.<sup>374</sup> According to Glencore, the mission never contacted MUMI. However, during the procedure, the prosecutor noted on 14.10.2013:

'Despite correspondence n°DP/KAT/DIR09325 and DP/KAT/DIR/09326 of 15 July 2013 of the Provisional Department of DGDA/KATANGA, as well as several official communiqués and invitations of the Mixed Commission, in accordance with the statutory measures provided for Decree-Law no. 10/002 of 20 August 2010 relating to the Customs Code, some companies have still shown no sign of complying with the various invitations and formal notices to regularise their situation with the tax and customs authorities, particularly: [...] MUTANDA MINING.'

In an official statement of the DGDA, MUMI was formally notified in October 2013 to pay the sum in dispute, otherwise exports of MUMI would be bonded. For the moment, it does not seem that this formal notice has had any follow-up and MUMI continues to export.

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<sup>374</sup> DRC owed \$3.7 bn in tax by mining firms, disputed report claims, The Guardian, 31 January 2014.

## 7. Conclusion and Recommendations

### 7.1. Conclusion

Since 2012, and particularly since the merger with Xstrata, Glencore has improved its corporate social responsibility policies: its Sustainability Report is more detailed; it has adopted a human rights policy (May 2014); it has applied for admission to the Voluntary Principles on Security and Human Rights; and it has joined the International Council on Mining and Metals (ICMM). However, according to our research, very little has changed on the ground in the Democratic Republic of Congo (DRC) and Glencore's environmental, social and human rights performance falls far short of the international standards it subscribes to. In a number of areas, Glencore makes do with half-measures and fails to deal with problems in a transparent and effective way.

- Pollution of the Luilu River. KCC has invested in acid neutralisation systems and pipes to channel some of its effluent to an old quarry (Mupine), but the hydro-metallurgical plant continues to discharge effluent that is highly contaminated with copper and cobalt into the Luilu River. Contrary to the information Glencore has given to investors and the media, the problem of pollution of the Luilu River has not been corrected.
- Basse-Kando Game Reserve. Glencore has finally recognised that MUMI's installations are located within the Basse-Kando Game Reserve, but the company denies any responsibility for this situation and has refused to enter into an open and transparent dialogue with stakeholders, including the Congolese Institute for Nature Conservation (ICCN) and the Ministry of the Environment.
- Security and human rights. Glencore continues to rely on police who all too readily use live ammunition and excessive force to protect the mines. Over the past 18 months there have been a number of people killed or seriously injured on or near the KCC concession. These cases are not adequately investigated by the authorities and the victims and families do not receive compensation. The practice whereby Glencore's own security staff carry out the functions of judicial police at KCC and MUMI is open to abuse or the perception of abuse. Glencore appears to have adopted a military-style approach to protect its assets from incursions by artisanal miners which heightens the risk of human rights violations.
- Communities. Glencore and its subsidiaries in the DRC have recruited staff to improve company relations with local communities, but the approach, which is not based on respect for human rights, has not significantly changed. Relations with affected communities still fail to promote genuine participation and the company lacks transparency and accountability. Glencore does not take adequate measures to mitigate the impact of its operations on local communities: by, for example, providing clean water to Luilu and Musonoi; keeping open access roads that villagers near MUMI depend on; and resettling Musonoi residents who have been most affected by dust and blasting at the KCC open cast mine.
- Dialogue with non-governmental organisations (NGOs). Glencore has allowed RAID, Bread for All and Fastenopfer to visit its sites and installations in the DRC for the first time. We were able to have extensive interviews and discussions with KCC and MUMI management and with Glencore representatives in Switzerland. However, Glencore has at the same time tried to exert pressure on the NGOs and has even threatened to take legal action not only against Bread for All and RAID in March 2014, but also against another coalition of Swiss NGOs in February 2014. In our view Glencore used this threat of legal action to try and deflect criticism. This strategy is incompatible with having a constructive engagement with NGOs.
- Taxation. There has been no significant progress in this area. Glencore's investments in community development and infrastructure projects should not hide the fact that the company "optimises" its tax liability by transferring profits to tax havens. In the case of KCC alone, this practice is estimated to have cost the DRC government more than US\$150 million since 2009. It is astonishing that the DRC government, which is, moreover, an indirect share-



holder in KCC, should tolerate such a situation. In addition to its lack of transparency with regard to payment of taxes and other duties, Glencore allowed the Israeli businessman, Dan Gertler, to make colossal profits, to the detriment of the DRC, by acquiring mining concessions which Glencore intends to buy later.

It is clear to, Fastenopfer, RAID and Bread for All that Glencore has not yet made respect for human rights and the environment a priority. These issues remain of marginal importance in the decision-making process of the Zug-based company. It continues to place the maximisation of profits and the minimisation of its tax payments above respect for human rights and the environment.

There are striking discrepancies between the statements made to investors in sustainability reports and the real situation on the ground. For example, Glencore accelerated the development of its mining operations in the DRC in 2009. The investments necessary to speed up the increase in production required economies elsewhere. Glencore's subsidiary, KCC, therefore suspended its plan to relocate residents of Musonoi, at an estimated cost of US\$ 58 million, and did not introduce measures to stop pollution of the Luilu River, even though its own technical reports clearly mentioned this option.

Another example: in September 2013, the CEO, Ivan Glasenberg, surprised investors by stating that savings resulting from the merger with Xstrata would be 400% greater than expected: US\$ 2 billion instead of US\$ 500 million. The announcement increased the share price by 3%: 'We are managers', said the CEO, 'but we are also major shareholders'<sup>375</sup>. Six months later, the group announced payment of an 11.1 cent per share dividend, which represented a 4.8% increase compared to the previous year. Ivan Glasenberg received US\$ 182 million from the various dividends paid in 2013. However, the company still did not make the investments necessary to improve the situation in the DRC.

## 7.2. Recommendations

### 7.2.1. To Glencore

#### *Environment*

KCC should take immediate measures to stop pollution of the Luilu River by the Luilu hydro-metallurgical plant.

KCC, and other mining companies should help to set up a fund to pay for decontamination of the banks of the Luilu River, to conduct research into the impact of the pollution on the health of local communities and to compensate the affected people.

MUMI should contact the Congolese Institute for Nature Conservation (ICCN) in Lubumbashi and participate in establishing a round table involving all actors (Ministers of Mines and the Environment, ICCN, NGOs, community representatives, mining companies) to address the issues raised by the presence of mining operations in the game reserve.

#### *Security and human rights*

In the interest of accountability Glencore should address all the additional questions raised in the report concerning security and human rights.

Glencore should ensure that KCC cooperates fully with official investigations into criminal actions committed at its mine site.

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<sup>375</sup> Muryel Jacques, Glencore Xstrata, fer de lance de l'austérité minière, Les Echos.fr, 17 September 2013.

Glencore should undertake a human rights impact assessment of its operations at KCC and MUMI – including consulting local people and civil society groups – to ascertain the negative impacts of their operations.

Glencore should disclose KCC and MUMI's Memorandum of Understanding with the Mine Police, Congolese Armed Forces and other official entities, including the Congolese *Agence nationale de renseignements* (ANR, the intelligence service). It should detail all payments made to Mine Police and the Congolese Armed Forces and other law enforcement entities.

Glencore should disclose the Security Manuals for KCC and MUMI.

Glencore should put in place an artisanal mining and security strategy in consultation with other stakeholders, including governments and civil society representatives.

Glencore should set up a credible mechanism, in consultation with other stakeholders, including governments and civil society representatives, for redressing harm that its operations may have caused or contributed to.

Glencore should request the immediate removal of *Compagnie Mining Dilala* and *Coopérative Minière Maadini kwa Kilimo* from its Tilwezembe concession. It should call for and co-operate with an investigation into human rights abuses that have taken place at the site.

To G4S (*Security and human rights*)

In the interest of accountability G4S should address all the additional questions raised in the report concerning its activities.

G4S should cooperate fully with official investigations into criminal actions committed at the KCC mine site.

G4S should require its employees to report all incidents involving fatalities and serious injuries of suspects on sites where it provides security, irrespective of whether G4S is perceived to have been directly implicated in the incident.

G4S that as a member of the ICOC Association, the compliance and oversight body of the International Code of Conduct for Private Security Providers, it is required to report, and to require their personnel to report, when they know or have reason to suspect that acts of torture or other cruel, inhuman and degrading treatment or punishment have been committed.

*Communities*

KCC and MUMI should make public their Environmental and Social Impact Assessments (ESIAs). These should be available on a website and at the KCC and MUMI offices. The companies should distribute summaries in local languages to villages and towns affected by their activities.

KCC and MUMI should use a more inclusive, participatory and transparent process when preparing their ESIs. This process should:

- c) facilitate the participation of any interested person or organisation and prioritise local NGOs and the representatives of directly-affected communities;
- d) be based on the prior dissemination and circulation of relevant, transparent, objective and useful information that is easily accessible, translated into one or more indigenous languages and presented in a culturally acceptable format that the affected communities will be able to understand;
- e) be described in publicly available and easily accessible reports.

KCC and MUMI should display the name, telephone number and other contact information of their liaison officers and staff responsible for sustainability in front of the company offices and in each town and village affected by their activities.

KCC and MUMI should adopt a rights-based approach to local communities, that is, one that assesses the impact of every decision and activity on the human rights of the surrounding population.

In order to reduce their negative impact on human rights, KCC and MUMI should:

- prioritise the provision of access to water in the towns of Musonoi and Luilu;
- build alternative roads and introduce bus services for communities who have been deprived of their access roads by MUMI;
- establish an open and transparent consultation process with the residents of Musonoi to discuss the resettlement issue.

### 7.2.2. To the Swiss Government

#### *Environment and human rights*

Bread for All and Fastenopfer, members of the Rights Without Borders campaign, call on the Swiss Government to ensure that companies based in Switzerland respect and ensure respect for human rights and environmental standards abroad as well as at home. To this end, the NGOs request the Swiss authorities to introduce legislation:

- requiring Swiss multinationals to take due diligence measures to prevent their foreign subsidiaries and suppliers contributing to human rights violations and degrading the environment;
- enabling people who suffer harm as a result of the activities of Swiss multinationals, their subsidiaries and suppliers, to seek judicial remedy in Switzerland and obtain fair compensation.

#### *Taxation*

Switzerland should support international efforts to make it mandatory for companies to adopt country-by-country reporting of the accounts of their subsidiaries so that any transfer of profits between subsidiaries is clearly evident;

Switzerland should actively participate in efforts, notably by the OECD, to combat Base Erosion and Profit Shifting (BEPS) so that profits are taxed where the economic activity concerned takes place and aggressive tax planning is prevented;

Switzerland should end tax privileges for “letter-box” companies, which conduct most of their economic activity outside Switzerland (through holdings and ‘domicile’ companies).

### 7.2.3. To the British Government

The UK Government should remove practical and procedural barriers to seeking judicial remedy in British courts for legitimate cases involving business-related human rights abuses abroad.

The UK Government should make human rights due diligence mandatory for extractive industry companies, operating in conflict-affected countries. Human rights due diligence should be a listing requirement for the London Stock Exchange and for admission to the Alternative Investment Market (the junior exchange).

The UK Government, as Chair of the Voluntary Principles on Security and Human Rights, should undertake a review of some practices by extractive industry companies - such as company security staff carrying out the functions of judicial police – to examine whether they weaken rather than strengthen the rule of law in host countries or interfere with criminal investigations.

The UK Government, with respect to the recent EU Directive (adopted on 15 April 2014) on disclosure of non-financial and diversity information, should include an explicit provision for companies operating in conflict-affected countries to disclose details of all human rights incidents occurring at or near their sites. The EU Directive requires listed companies to disclose information on policies, risks and outcomes as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their board of directors in their annual management reports.

UK aid should be used more effectively to reduce conflict between mining companies and artisanal miners, protect human rights, and help improve living standards of the population in mining areas. The UK is the second biggest donor nation to the DRC. In 2010-11, UK bilateral aid to the DRC came to £133 million. The main involvement with the DRC's natural resource sector by the UK's Department for International Development (DFID) is through a project called Promines, to which the UK has contributed \$42 million (£27 million) and the World Bank \$50 million. Promines is a technical assistance program to the mining sector which aims to improve transparency and increase the socio-economic benefits from artisanal and industrial mining. But it is overly technocratic and has failed to make an impact on poverty.

#### 7.2.4. To the DRC Government

##### *Environment and human rights*

The DRC Government should move to enact without further delay the amendments to the Mining Code (which is being revised), giving greater recognition to and protection of the rights of communities living in mining areas. Bread for All, RAID and Fastenopfer support the proposals made by Congolese civil society - *La Plateforme des Organisations de la société civile intervenant dans le secteur au Katanga* (POM) including:

- Making publication of Environmental and Social Impact Assessments and Management Plans obligatory. They should be posted on the website of the Ministry of Mines and on company websites and copies should be provided to affected communities and civil society groups in the local language as well as in French.
- The audits of mines and mineral processing operations conducted by the Ministry of Mines should be publicly available.
- In the event that expropriation of agricultural land or resettlement cannot be avoided, this should be carried out in accordance with the DRC's international human rights obligations. Those physically or economically displaced must receive fair compensation which may also require amendments to land law (*loi foncière*).
- The right to collective redress should also be guaranteed for communities affected by mining activities.

The DRC Government should set up a multi-stakeholder dialogue with the participation of the Ministers of Mines and the Environment, ICCN, NGOs, community representatives, and mining companies) to discuss the issues raised by the presence of mining operations in the Game Reserve.

##### *Security and Human Rights*

The DRC authorities should launch a full criminal investigation into the serious injuries and deaths on and around KCC's sites including those of Isaac Mukeba Muzala and Kalala Mbenge.

The DRC authorities should justify the presence of the Congolese Armed Forces inside the MUMI concession and disclose the underlying agreement with Glencore/MUMI for this arrangement.

The DRC authorities should develop a transparent system and policy governing the payment of police and military by private firms.

The DRC authorities - with help from international donors – should provide greater training to police and judicial authorities in mining areas to enhance their capacity and improve their procedures; greater resources should be given to the police and prosecutors to enable more effective criminal investigations.

The DRC authorities should instruct all police operating at mine sites to ensure that policing activity is consistent with international human rights law and standards. Anyone detained at a mine site on suspicion of having committed a criminal offence should be informed of their rights and taken before a judge within the 48 hour timeframe stipulated by law.

The DRC Government should promote observance of applicable international law enforcement principles, particularly those reflected in the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms, to prevent casualties emanating from disputes over the companies' operations

#### *Taxation*

The DRC Government should conduct a special audit of the subsidiaries of Glencore (and other mining companies) to check that payments made to the Government are correct and have not been under-estimated.

The DRC Government should actively intervene in mining companies in which Gécamines or the state has shareholdings to prevent the transfer of profits.

The DRC Government should respect its good governance agreements with international institutions and, in particular, publish all mining contracts when concessions change hands. The Government should guarantee that mining rights will be allocated solely on the basis of open and competitive tenders.