

**Pole Institute**

**Institut Interculturel dans la Région des Grands Lacs**



## **BLOOD MINERALS**

**The Criminalization of the Mining Industry in Eastern DRC**

**Goma  
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## INTRODUCTION

The socio-economic consequences of persistent conflict and state failure in Eastern Congo and the search for ways in which the Congolese can reappropriate their own destiny have always been at the heart of the work of Pole Institute. Partly triggered by Pole Institute's research on the mineral trade, much international discussion has arisen in recent years about reordering the Eastern Congolese economy in order to make it less conflict-prone. While recognising the good intentions behind these efforts, we are convinced that sustainable and sensible solutions can only be found by those directly concerned. For this, local actors and stakeholders need to come together in an atmosphere of trust and mutual respect in order to arrive at a common understanding of the problem with a view to working out solutions. To this end, in 2010 Pole Institute has set up a Round Table around the mineral economy of Eastern Congo, uniting public and private decision makers, state representatives, enterprises, mining cooperatives and civil society organisations. The first meeting of this Round Table in March 2010 gave rise to a series of written papers which are collected in this volume. They will serve as the basis for further discussion.

### *1. The Minerals of North Kivu: A Blessing or a Curse?*

In this first article Onesphore SEMATUMBA (Director of information at Pole Institute) describes the decline and deterioration of the mining sector in Eastern DRC and the way that a blessing (in terms of mineral abundance) has turned into a curse (the blood minerals over which many wars have been fought and countless civilian lives lost and societal life and structures destroyed). A sick mining industry has replaced a previously healthy and thriving agricultural and pastoral way of life. Sematumba asks: is it possible to decriminalize the mining industry and return to it some measure of national and international respectability, accountability and dignity?

### *2. A Congo without the Congolese*

This is the illustrative phrase that Aloys TEGERA (Director of research at Pole Institute) uses in the second article in this dossier to highlight the flaws in what would otherwise be laudable efforts by the international community (e.g. Germany, the United Kingdom, Europe, Asia, the World Bank) to render the minerals of the DRC 'clean' and conflict-free. These efforts, Tegera argues, are largely ineffectual in a bankrupt Congo in which the State has ceased to exist in many parts of the country. In order to rehabilitate and decriminalize the mining industry which, according to Tegera, generates more than two-thirds of the revenue of North Kivu, it is necessary to, in the first place, work towards the re-establishment of the Congolese state. Any efforts by the international community to re-organize and legislate for the Congolese mining industry without taking this fundamental step into account risk failure, "unless, of course, the various lobbies have in mind a Congo without the Congolese, which would clearly be absurd".

### *3. A state within a state*

"Bisie is a state within a state. There is no authority, either at the territorial level, or that of the province, and much less on the national level, that is able to control what goes on in this region". Primo Pascal RUDAHIGWA journalist and vice-president of Pole Institute, gives an account of life in Bisie, a mining settlement in the deep jungle of Walikale Territory in eastern DRC in which cassiterite is produced under extremely primitive and inhuman conditions. Rudahigwa's description of this source of cassiterite paints a vivid picture of heavy military involvement (both government army and rebel groups) and of human misery. Those who

benefit from the mineral produced in Bisie (which resembles “an immense refugee camp”) are not the local inhabitants but the military and mining companies and traders based outside the region, with no interest in investing in local communities. This, for Rudahigwa, is “one more example of bad governance: those in power do nothing for the people who produce the minerals”.

#### *4. Absence of proportion*

In this fourth article of the dossier Emmanuel NDIMUBANZI NGOROBA (member of Pole Institute and the Manager of the Provincial Division of Mines, North Kivu) considers the legislative instruments in place to regulate the mining industry in the DRC, and he finds that this legislation riddled with internal contradictions and incoherence. Ndimubanzi paints a picture of a largely ineffectual body of legislation as legal texts are both in outright contradiction with each other as well as with the reality of the situation on the ground. Having highlighted the problems created by contradictory legislation governing the mining sector, he proposes that similar types of legislation governing other industries be critically reviewed, especially legislation governing the agricultural industry, the environment, land and forests.

#### *5. Bringing the Congolese people back in*

This pregnant phrase by Dominic JOHNSON (a journalist and researcher, member of Pole Institute) is at the heart of the fifth and last article in this dossier: “Bringing local people back in is therefore the key to the success of reform programmes for the mineral trade in Eastern Congo”. Johnson analyses the efforts of foreign governments, NGOs, the United Nations and international regulatory frameworks (American, British, German and others) to sanitize the mining industry of the DRC. A glaring lacuna in all these efforts is the lack of involvement of the Congolese people in seeking solutions to problems that face them in their own country, and Johnson argues that unless the Congolese people are brought “back in”, all these international efforts will remain, for their originators, an exercise in creating the DRC after their own image. Johnson argues that because of this failure to include the Congolese people in crucial debate on ‘their’ issues, the international community has made a serious error of judgment in not recognizing that the situation in the east of the DRC goes beyond just a presumed squabble over minerals and raises fundamental questions of the structuring of state power which have to be taken into account by anyone hoping to work with the Congolese state in order to reform the Congolese mining sector.

# THE MINES OF EASTERN DRC: IS DE-CRIMINALIZATION POSSIBLE?

*Onesphore Sematumba*  
*11 March 2010*

## **1. The creation of a standing committee for issues affecting the mining industry**

After a series of studies on the problems facing the mining industry in the DRC, Pole Institute convened a meeting on Thursday 9<sup>th</sup> March 2010 at Goma, with representatives of those engaged in the mining industry, co-operatives of miners, traditional chiefs as well as representatives of the public services and some of Pole Institute's partners from South Kivu and Ituri. The purpose of this meeting was to create an awareness of the actual state of affairs in the affected areas, and to work out strategies towards a possible rehabilitation and restructuring of the mining industry. In other words, the aim was to put initiate a process that, in the final analysis, would contribute towards the de-criminalization of national resources so that they can truly benefit the Congolese people.

By the end of the day's session the establishment of a standing consultative body had unanimously been adopted by the participants as a basic starting point. This body would include representatives from the local communities, the public service, the private sector and Pole Institute and its partners involved in these issues. The mandate of this body would revolve around three principal aspects:

- An analysis of the issues at stake
- Drawing up proposals and recommendations
- The establishment of a lobbying group

## **2. The Decline in Output**

When one thinks of mining in eastern DRC one automatically thinks of Bisie, the site from which is extracted almost 80% of the cassiterite exported from the province of North Kivu to the countries that use this mineral which has become strategic on account of the development in technology. But Bisie itself is a conglomeration of shacks and similar structures lost in the middle of nowhere, a 'primitive' town of less than 13 000 people (miners, artisans, sellers of beer, owners of restaurants, prostitutes, etc.); a town in which the pace of life is set by the constant movement up and down the mining pits, under the watchful eye of armed men whose identity varies according to changes in local, provincial or national affairs.

It is from there that the precious cassiterite comes, mined bucketful by bucketful, under the dim light of pathetic pocket torches. It is then transported on men's backs (and at times also of women) to Njingala, the closest business centre, over an eight-hour's walk away, and after four barriers or check points the cassiterite follows its tortuous and long route to Walikale, from where it is flown in small planes from Goma, before it lands in the foundries of far away Belgium, Thailand or Malaysia.

But what remains in Bisie itself? What dividends do the local people gain from the exploitation of the underground resources of their land?

Nothing much!

As in all the artisanal mining sites in the DRC, misery is the daily lot of these new ‘damned of the earth’, commonly referred to as ‘miners’. To make matters worse, according to the statistics of the provincial Division of Mines of North Kivu the chart recording output at Bisie shows that production has been in free fall for the last three years. In fact, production has progressively decreased from 20 tonnes a day in 2008 to 15 tonnes in 2009, and to 3.5 tonnes in 2010. “The site at Bisie will no longer be operational in the next 10 to 20 years”, so estimates the Manager of the Division of Mines of North Kivu.

But apart from the state of the mine itself, there are other fundamental considerations in the actual mining process that are at the heart of this decline in output. Some of these are, for example the lack of equipment for pumping and draining out underground water, the absence of a ventilation system, as well as the lack of electricity. By improving the working conditions of the miners, production would also be improved at the mine in Bisie.

But with the culture of stealing and graft that is so strongly rooted in the country, who would think of investing here? During the dictatorship of Mobutu and under the different regimes that followed we participated in the cannibalization of the mining companies which contributed to the enrichment of the people in power. Nothing remains of GECAMINES in Katanga but a skeleton that has been picked clean. As for MIBA that used to be the jewel of the diamond industry in Kasai, it has completely been stripped of its possessions and assets. Who is going to concern themselves with Bisie and its much more inferior infrastructure?

### **3. The Mines of North Kivu: A Blessing or a Curse?**

The province of North Kivu is not strictly speaking a region with a mining industry like Kasai and Katanga which we have referred to briefly. North Kivu was above all famous, until only recently, for the fertility of its land and for the prosperity of its agricultural and pastoral activities.

The mining industry was essentially localized at sites like Lueshe where the SOMIKUVU company extracted pyrochlore, or it was informal and scattered, like the mining and trading in gold in the territory of Lubero in the north. Only a small section of the population was involved in the mining industry since Mobutu’s rule had all but criminalized the entire industry to a point that the possession of a single gram of gold or of any other mineral was a cause for serious trouble if the security agents caught the unfortunate landlord.

From the beginning of the 1990’s the province of North Kivu entered a cycle of insecurity which started with bloody inter-ethnic conflicts in the territories of Masisi and Rutshuru, and which culminated in the successive wars of 1996 which ended with the fall of Mobutu, and that of 1998. The agricultural industry took a severe blow, with the destruction of farms and the displacement of the population that was forced to abandon agricultural activity and lived like assistants in the camps.

It was also during this period that deposits of coltan were discovered in the territory of Masisi, resulting in the boom in this mineral that took place in 2000. The repercussion on the incomes from domestic work were real, even if the context of war obliged the majority to invest in more secure towns like Goma, where entire communities left the land because of the attraction of coltan.

However, it is not as if the civilian population benefitted much from the mining industry that arose from the timely discovery of coltan that compensated for the decline of the agricultural sector. The different rebel groups that swarmed in eastern DRC, the regular armed forces (FARDC), the armed foreign groups (FDLR, ADF-NALU) all benefitted equally, either directly by getting involved in the process, from the extraction of the coltan to its sale, or indirectly through charging taxes on the movement of the mineral in territories under their control, or a combination of both.

This involvement of armed men and groups in the mining industry, suspected as they were by all of grave violations of human rights (massacres, rape, looting, etc.) is the reason behind the listing of minerals from eastern DRC on an index, and the almost general stigmatization of workers in this industry.

Different reports of NGO's and the United Nations experts have also denounced the people, the enterprises and other structures that finance the war by maintaining trade relations or alliances with the suspected armed groups.

The main direction taken by the recommendations contained in these foreign reports, which mostly denounce the mining industry, is that they support a downright systematic embargo on mineral resources from eastern DRC.

This criminalization of the mining industry of North Kivu and the placing of a ban on its international trade is not without consequences for both the local and the national economy. In fact, in spite of the crises and the conflicts that this province has been through and still continues to experience, the minerals contributed almost two-thirds of the income for 2006 before the combined effects of the global economic crisis, the lobbying for an embargo, and the contradictions in the Congolese legislation reduced these gains to almost nothing.

Some trading firms have thrown in the towel, while others struggle on in one way or another. Consequently the production of cassiterite fell from 733.4 tonnes in January 2009 to 395.5 tonnes in January 2010. A gloomy outlook has set in, and money no longer circulates in Goma or in Bisie as it did not so long ago.

We are thus looking at a mining industry that has emerged as a substitute for the agricultural sector, and which needs to show itself as being above reproach and prove that each load of minerals exported is conflict-free if it is to trade competitively on the world market. Some initiatives have been taken in this regard by local workers in the industry through the FEC ( Fédération des entrepreneurs du Congo), as well as through regional organizations like CIGRL and financial backers like GTZ in order to give assurance on matters of accountability and transparency in the flow of minerals from eastern DRC. John, who is a worker in the industry, declares with some bitterness: "Some progress is indicated (made) every day; we are determined to find solutions to all these problems but our efforts are not taken into account by the NGO's." He further adds that "It is not as if the reality on the ground is static; it is in fact dynamic." Accountability is now evident from the dealer to the end user wherever he might be, from Njingala to Brussels, Beijing or Kuala Lumpur. In the meantime, however, a dark shadow hangs over the mining pits of Njingala.

# **BLOOD MINERALS**

## **The Criminalization of an Economic Sector in Eastern DRC**

*Aloys Tegera*  
*March 2010*

The reports of non-governmental organizations (NGO's)<sup>1</sup> as well as those of the panels of experts of the United Nations<sup>2</sup> are almost unanimous in demanding that the artisanal extraction of minerals in eastern DRC<sup>3</sup> be placed under strict supervision, if not totally boycotted by the western consumers of the finished products of the companies using these minerals.<sup>4</sup> The arguments put forward in these reports, that there is a close connection between the violence and suffering of the civilian population living in the mining zones in eastern DRC and the control exercised in these areas by different armed groups, are certainly valid.

During the years of the Congolese rebellion between 1996 and 2003 the Lusaka Accord of July 1999 allowed the different rebel groups that had divided the country between themselves to effectively constitute themselves as "States", with the right to maximize their profits in the territories under their control. The coltan boom between 1998 and 2001, or that of cassiterite in the years that followed, without a doubt constituted the nerve centre of the war for the different rebels groups.

The control of the mines such as those of Bisie in the territory of Walikale by the 85<sup>th</sup> Brigade of FARDC in collaboration with the FDLR between 2006 and February 2009 is a good example that more than amply shows how the armed men exploit the artisanal extraction of minerals. The mines have become a source of wealth, profiting the commissioned officers of both FARDC and other armed groups to the extent that it has become difficult to imagine how these armed men can ever be made to abandon such a lucrative industry, especially in the context of a bankrupt Congo where the State has ceased to exist in many parts of the Republic. The inaccessibility and isolation of mining zones such as Mwenga in South Kivu or Bisie in the territory of Walikale in North Kivu exacerbate this absence of the State.<sup>5</sup>

### **1. Mineral Exports: A Major Source of Revenue for the Province.**

However, beyond the possibility or even the impossibility of an international intervention to render the minerals of eastern DRC 'clean' for use, in other words conflict-free, it is important to emphasize that the criminalization of the mining industry underestimates the fact that more

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1 Global Witness, "Face a un fusil, que peut-on faire?", July 2009; The Enough Project, "Digging In: Recent Developments on Conflict Minerals", January 2010.

2 Final Report of the Group of Experts on the DRC, S/2008/773, 10 December 2008.

3 Center on International Cooperation, "Independent Oversight for mining in the Eastern Congo". A Proposal for a Third Party Monitoring & Enforcement Mechanism, Concept Note, January 2010.

4 PRENDERGAST, John, "A light at the end of the tunnel in Congo", February 26, 2010. The author finds that one of the signs of hope in the extraction of minerals in eastern DRC is that western consumers of the finished products such as electrical appliances, mobile telephones and gold jewellery increasingly demand that these products be certified as having no connection with zones of conflict in the DRC.

5 The absence of a Congolese state capable of imposing order and the rule of law is constantly deplored by all. This absence of a state that is truly Congolese has contributed to the emergence of a multitude of individuals and departments acting "on behalf of the state" who have privatized the duties of the state and are the source of all manner of inconvenience and illegal taxes.

than two-thirds of the revenue of a province like North Kivu depends on mineral exports.

The dilemma becomes even greater when the mining industry is criminalized without offering an alternative to a possible boycott of these minerals. The paralyzing effect that this would have on the economy of the eastern DRC would be such that the civilian population that survives thanks to both the formal and informal trade made possible by, among others, the circulation of millions of US dollars generated by this same mining industry would suffer even more. The absence of this currency on the market would have dire consequences for the local economy as a whole, where the Congolese Franc has devalued at a very rapid rate, resulting in a steep rise in the cost of fuel and other basic necessities. This vicious circle has become a real trap that the international lobbyists calling for a boycott of minerals from the eastern DRC have to take into account. It would be irresponsible to simply call for a boycott without offering any concrete proposal for the injection of new life into the local economy, or some other alternative measures.

The following table, shows the importance of the mining industry to the local economy.

Statistics of registered official exports of cassiterite and coltan in North Kivu:

<b>Year</b>	<b>Cassiterite (in tonnes)</b>	<b>Coltan (in tonnes)</b>	<b>Value in USD/cassiterite and Coltan</b>
2003	938.0	26.0	815,400.00
2004	4,672.0	42.0	3,821,600.00
2005	3,599.0	26.0	6,774,200.00
2006	2,904.0	39.0	7,190,100.00
2007	10,175.0	74.0	28,098,181.39
2008	13,311.0	85.0	83,240,574.57
2009	10,543.0	280.0	79,514,538.31

Source: North Kivu Division of Mines.

It is evident from this Table that the measures put in place for a greater control of the minerals exported since February 2007, notably the recording of all exports before the closure of the border at 18:00, contributed to the increase in income from the exports.

In 2009, despite the impact of the global financial crisis and the opening of the border post ('La Corniche') between Goma and Gisenyi until midnight, in force since June 2009 for pedestrians and passenger cars but not for goods trucks and other heavy traffic, the record of exported minerals does not vary much from the report of the previous year (2008), as the table below shows. Official exports of cassiterite in 2009 in North Kivu:

<b>Month</b>	<b>Cassiterite (in tonnes)</b>	<b>Generated State Revenues in USD<sup>6</sup></b>
January	733.4	156,170.00
February	719.0	153,104.00
March	1,009	214,856.00
April	799.0	170,139.00

6 These revenues concern the export taxation, common interest tax paid to the local administrative entities of the province (EAD), taxes paid to government agencies (CEEC, OCC, OGEFREM, OFIDA, CTCPM and the Supervising Commission). They do not include territorial tax, income tax, and export authorization tax estimated at \$63,000.00.

May	790.4	168,308.00
June	963.8	205,231.00
July	665.5	141,711.00
August	910.0	193,775.00
September	1,002.0	213,366.00
October	1,174.0	249,991.00
November	898.6	191,348.00
December	878.7	187,110.00
Total	10,543.0	2,245,109.00

Source: North Kivu Division of Mines.

Upon seeing figures like these, all observers naturally ask why the Congolese government, which is after all the primary beneficiary of the mining industry, does not put any effort into decriminalizing it, thus ensuring that there is greater accountability and transparency from the point of the artisanal extraction of the minerals to the point of exit at the customs office OFIDA.

## 2. Attempts to render the minerals of Kivu conflict-free

There are of course a number of initiatives that have been started in an effort to render the minerals of Kivu conflict-free. The most noteworthy is the project to assist in the creation and development of a system of recording and certification of mineral substances, a system that was conceived in the context of German-Congolese co-operation. The Federal Bureau of Geo-Sciences and Natural Resources of the Federal Republic of Germany (BGR) represents the German party tasked with realizing the project. Their Congolese partners are the Ministry of Mines and its departments: CTCPM, CEEC, SAESSCAM, and CAMI. The BGR is known to have created a system of certification called the Certified Trading Chains (CTC) all along the supply chain, from the mining pits all the way to the end user or final consumer. It is this CTC system that the Germans, in collaboration with their Congolese partners, hope to make operational with two goals in view: on the one hand to improve transparency and accountability in the mining industry and, on the other hand, to see to it that the State's profits from mineral exports contribute to economic and social development as well as to the reduction of poverty.<sup>7</sup> Quite an undertaking!

A second initiative is that of ITRI (Tin Supply Chain Initiative), an English enterprise representing the interests of companies involved in the trade and processing of cassiterite in Europe, Asia and elsewhere in the world. The reports by some organizations such as Global Witness or the panel of experts of the United Nations denouncing the Congolese mining industry have succeeded in demanding that there be greater transparency on the part of European companies importing cassiterite originating from eastern DRC. In collaboration with the trading firms operating in eastern DRC, ITRI has, since July 2009, put in place a system of bringing better consistency and clarity to export documents and forms. It is a matter of ensuring that every trading firm is legally established, and that the awarding of export permits is done in accordance with current Congolese mining legislation. Above all, it ensures that the goods exported are not in any way linked to the activities of the armed groups. ITRI also intends to put in place a system that will account for trade in Congolese minerals from February 2010, starting from the mines themselves to the exporting firms, and

<sup>7</sup> BGR, "Rapport du groupe de travail sur la certification de substances minérales, dites minerais de conflit (or, cassitérite, coltan et wolframite)", Kinshasa, 22 February 2010.

all the way to the end user.<sup>8</sup>

Lastly, the World Bank and the Department for International Development (DFID), in partnership with a department of the Congolese Ministry of Mines (PROMINES) intend to improve the situation in the artisanal extraction of cassiterite through various means such as: increasing production and accessibility to the market; improving the working conditions of miners; reducing the impact of mining activities on the environment; ensuring that the profits from taxes contribute to the integration of mining into the formal economy; and improving the living conditions of the local population.<sup>9</sup> It is also important to note briefly the efforts of the Congolese government in collaboration with the United Nations Mission to Congo (MONUC), to create “Trading Centres” in order to have efficient control over the supply chain of minerals.

All these initiatives have, however, to face a basic problem. The values which motivate the various national or international lobbyists, such as the inalienability of human rights (the civilian victims attributed to armed groups, the enslavement of miners and their inhuman working conditions, the impunity, and the absence of social dividends), the political climate (the management of natural resources, taking into account also the environmental as well as the social impact), and lastly the economic liberalization (the market, rather than the armed groups, regulating the trade), can hardly succeed in raising the level of responsibility of a Congolese state that is no longer seen to exist in much of the public sector and in many areas of the country.<sup>10</sup> The question that arises is: Without a Congolese state capable of playing its role in controlling and running affairs, how can the minerals of Kivu be de-criminalized?

It is imperative that the various people and organizations of good will who are determined to ensure that the minerals of Kivu are ‘clean’ or conflict-free first work towards a definition of the basics necessary for the re-establishment of the Congolese state. Only when this is in place will the control of the mining industry be possible. The various initiatives will not be effective unless this basic condition is met.

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8 ITRI, “Information note on progress with the ITRI Tin Supply Chain Initiative (iTSCi)”, January 2010.

9 ITRI, *op. cit.*, p.4.

10 The replacement of the 85<sup>th</sup> Brigade under Colonel Samy Matumo by the 212<sup>th</sup> Brigade commanded by Lieutenant Colonel Mboneza has convinced neither the national nor the international lobbyists who see behind this move a ploy to extend the power of the ex-CNDP rebels to the mining zones in which they were previously not present. Any military or police force that controls these mining zones unquestionably runs the risk of perpetuating the same evil practices. Unless, of course, the various lobbies have in mind a Congo without the Congolese. Which would clearly be absurd.

## SEVENTY-TWO HOURS AT THE MINING SITES OF BISIE

*Primo Pascal Rudahigwa*  
*Bisie, 10 January 2010*

It was in 2002, at the height of the rebellion by the RCD (Rassemblement Congolais pour la Démocratie) that the deposit of cassiterite in Bisie was made by a group of hunters of Lugu II, in the locality of Wassa in the territory of Walikale in North Kivu. Since that time, the mining camp of Bisie has progressively gained in local, national, regional and international importance due to both the quality and the abundance of the cassiterite in its deposit.

In 2006 Bisie already produced on average 30 tonnes of unprocessed cassiterite per day (cf. *Regards croisés* no. 19 of Pole Institute). This is what drew the attention of journalists and researchers who came to Bisie from all the corners of the globe. From the 16<sup>th</sup> to the 18<sup>th</sup> of January 2010 two French reporters (Christophe Boltanski and Patrick Robert) and myself (Primo Pascal Rudahigwa, journalist and researcher at Pole Institute) descended on Bisie to familiarize ourselves with the reality on the ground.

### ***From Goma to Bisie via the landing strip of Kilambo: A journey into the unknown***

Since the territory of Walikale is completely isolated, the only means of getting there is on board small cargo planes that transport cassiterite. When leaving Goma, these small planes carry a cargo of various items: petrol, soap, salt, vegetable oil, etc.) and return with plus or minus 2 tonnes of cassiterite. There is no flight available for passengers.

In order to reach the landing strip at Kilambo, one has to get to the place where these small planes are parked and catch the first available flight and travel perched on the cargo. No small cargo plane leaves Goma unless there are 1,800 kgs of cassiterite to be brought back. Twenty-five minutes are all that it takes to reach the dense equatorial forest on a tarred road constructed in 1998 by a Chinese company.

There is neither a control tower nor a system of communication available at Kilambo to forecast the weather, or to direct the movement of the planes. The transport and communication officers block the road for a stretch of 2 kms when they see a plane approaching. To take off, the planes are manually pushed and turned around like wheelbarrows in order to take their position for departure.

### ***From Njingala to Bisie: An Arduous Journey***

One could easily hire a taxi (motorbike or car) between Kilambo and Njingala which are about 40 kms apart. But the 50 kms that separate Njingala from Bisie have to be done on foot, for the simple reason that there is no road connecting the two. For those familiar with walking through the forest, the route is covered in about five hours. But for the rest it is an ordeal that involves going over many hills before descending on the other side and wading across streams and marshes through the dense forest. For the uninitiated this is a walk of between eight and ten hours through the forest. Along the route there are eight small villages constructed from canvas like temporary shelters whose very names seem to express their transitoriness; *Chini Ya Kilima* (Bottom of the Hill), *Makauchu* (Plastic), *Mafilifili*, *Kanyama* (Small Piece of Meat), *Majiwemajiwe* (Loose Stones), *Kwa Pasteur* (Pasteur's), *Kobe*

(Tortoise), and *Biruwe*.

The soldiers of the 212<sup>th</sup> Brigade commanded by Colonel MbonezaYousoufou, a former officer of CNDP who has been integrated into FARDC, are stationed at Mafilifili, Kanyama and Kobe where they have erected barriers to control the travellers from whom they demand between 300 and 500 Congolese Francs before they allow them to pass through.

All along the route there is heavy human traffic, the comings and goings of porters and couriers who, depending on the direction they are going in, carry various goods to Bisie, or cassiterite to Njingala. All pass the night on the road, exhausted from the heavy burdens that they carry on their heads. Some of them have been doing this heavy job for more than five years.

There are some small restaurants scattered in the villages already mentioned, serving rice on plates made from manioc leaves, each plate costing 1,500 Congolese Francs (about \$1.50).

There is no source of clean water throughout the long trip. One quenches one's thirst by drinking directly from the streams, which are fortunately numerous in the forest. Those with delicate stomachs have to provide mineral water for themselves, but this is quite an additional weight to carry on a journey that is so long and difficult.

### ***Bisie: A Different World***

Upon entering the camp commonly known as "Ma Rougé" one is bombarded by an intense noise, a mixture of the racket made by humans and the deafening music blaring from the video cinemas and cafes and bars. One is literally overcome by the din. One might think it was a large open air market. And that, in fact, is what Bisie is: a huge African market in the open. But before one can enter into the camp, one has, as it were, to give the password. There is a barrier, the last on this route, that must first be negotiated. Officials from nine departments are stationed here: the army, the national police, the police of the mines, the department of information, immigration officials, officials from SAESCAM, officials of the mines, and officials representing the territory.

It takes a lot of time to be registered by all these officials, as well as to pay 2,000 Congolese Francs (almost \$2) if one is a dealer or a seller of produce of one kind or another, before one enters the immense and forbidding area that is Bisie.

The site resembles an immense refugee camp, like those familiar in the region, with all the corrupt activities that generally characterize dangerous towns in which one negotiates one's survival with care. There is too much of everything, many goods and a lot of merchandise on display, a lot of restaurants, places of entertainment, hair salons, churches (especially those called Revival Churches), and four hotels which are in reality nothing more than houses of ill repute. Bisie lives at a completely infernal pace. Night and day are alike: people drink, dance, eat and do much more. That is the general atmosphere of Bisie.

The 'liberated women', as prostitutes are called in the area, hang about the alleys and lanes; bare chested young men walk hurriedly in all directions carrying their hammers and chisels; the police and the soldiers are very much in evidence: with guns slung over their shoulders, often sloppily dressed in civilian clothes or military uniforms, they make the law here.

## **A high concentration of people without basic amenities or infrastructure**

According to the Territorial official based at Bisie, Mr. Sylvain Balengesila Nuru, the camp is home to about 13 000 people, of whom 40% are Bashi from South Kivu, 20% of those who speak Lingala come from Kisangani in the Eastern Province, 10% of those who speak Swahili come from Lubutu in Maniema, and 30% of the rest come from Kinshasa, Goma and Walikale. According to the same source, women and children make up 30% and 5% of the population respectively.

Surprisingly, with such a high concentration of inhabitants, Bisie has no amenities. The people generally relieve themselves in the forest. There is no longer a hospital in the camp, but there are three clinics that still function. In case of a medical or health emergency the sick person is carried on a friend's or relative's back to Njingala, from where they are transferred to a hospital in Walikale or Lubutu.

### ***Two working sites***

In Bisie the miners are split between two faces of the hill, namely site 15 and site 45. The latter, which is also the bigger of the two, has seven productive tunnels in which each miner spends on average five to six shifts. At site 15 four tunnels are being worked simultaneously, and some hard work has been undertaken in order to create others. According to information gathered from the miners, the length of each of the tunnels varies between 100 and 600 metres. The main problem is the water that floods the pits because there are not enough motor pumps to drain them. This problem is almost two weeks old and, as the managers (the representatives of the dealers based in Njingala) explained, this has led to a drop in the rate of production.

However, in spite of this difficulty, the daily production is currently estimated to be 10 tonnes. As a result the miners are in debt to the managers and to the suppliers while they wait for the situation to improve. A miner found at site 45 told us that he owes \$2000 but he is not worried because as soon as production improves he will be able to pay his debt within two weeks. Currently the price of cassiterite in Bisie varies between \$3.70 and \$4.00 according to the content of the mineral.

### ***Who are the artisanal miners?***

According to the officials of COMIMPA (Coopérative Minière de Mpama-Bisie) and COCABI (Coopérative des Creuseurs Artisanaux de Bisie) there are about 2 000 miners in Bisie, young men ranging in age from 19 to 35 years who work day and night. They make an agreement with the owners of the PITS (the managers, the soldiers and the traditional leaders) to divide the production in half.

But the Second Lieutenant Mwarabu, whom we met on the premises, gave a less flattering image of the miners. According to this official, they are mostly those demobilized from the military, those who have escaped from prison, armed robbers and criminals of all sorts, deserters from the army, and armed groups who are not afraid to go into the tunnels and remain there for more than 48 hours at a stretch. It is difficult to determine their exact number because the co-operatives that are supposed to supervise them are not themselves present at the work site. Likewise the private landowners use a good number of these young men for

their own gain but hide their identities.

Inside the pits there are three categories of workers:

The so-called 'owls' who are experts in detecting and extracting the cassiterite;

The excavators who shore up the interior of the pits to prevent them from caving in;

The couriers who shuttle between the tunnels and the outside.

A courageous and tough-looking 'owl' from site 45 declared that he could easily work for four days without coming out of the tunnel, and that he could produce 300 kgs of cassiterite per day. For his pay, he gets 50% of the quantity of cassiterite he has mined. This gives him the income for food rations, for beer and for women. According to him, it is not possible to save any money because of the debts he owes. He has been mining in Bisie since 2002.

Another important category of workers in the mines of Bisie is that of the couriers. They transport goods and other accessories from Njingala to Bisie, and on their return they bring back some cassiterite. For each trip from Bisie to Njingala and back they receive just \$20 as payment and 3 000 Congolese Francs (about \$3) for their rations during the journey.

A courier who has been at this profession for five years told us that he earned \$40 per week as he needed to rest for three days; two days on the journey to, and another two days on the journey back, but the \$40 is not enough for him to regain the energy lost during the trips. He also informed us that some couriers die from fatigue during the journey. He said that they do this exacting work because there is no other job for them to do. If the load is stolen during the transportation, as happens at times, the unfortunate courier is forced by the owner to pay the value of the lost contents. Bisie has about 600 active couriers.

### **The presence of soldiers in Bisie**

Bisie is under the control of a battalion commanded by Captain Serushago, a former soldier of CNDP already integrated into FARDC, seconded by First Lieutenant Mbua Mapasi of the former 2<sup>nd</sup> Brigade of FARDC. But many other soldiers coming from the 8<sup>th</sup> military region in Goma commute to Bisie for a fixed period of time in order to make some money for themselves.

Some soldiers of the 85<sup>th</sup> Brigade of Colonel Samy remained at Bisie in order to continue mining in the pits of their commander. There are altogether six soldiers under the orders of Lieutenant Héritier. They depend neither on the commander in Bisie nor on the commander of the 212<sup>th</sup> Brigade. There are also some former Mai Mai under the command of Colonel Samy still stationed in Kamituga in South Kivu where he commands an entire Brigade.

The managers and other participants engaged in the mining industry are not happy with the interference of the soldiers in the mining and transportation of cassiterite. These soldiers are stationed at the two mining sites: the 15<sup>th</sup> site is under Second Lieutenant Mwarabu who, together with his men, constitute the law of the place; and at the 45<sup>th</sup> site the orders are given by First Lieutenant Mbua Mapasi with a squadron around him.

In addition to their own pits, the soldiers are stationed at the entrance of each tunnel where they deduct 1 kg from each load of 50 kgs. They justify this on the grounds that it is the share that they are entitled to as soldiers.

### ***The harassment between Bisie and Njingala***

The officials of COMIMPA and COCABI deplore the harassment that the couriers and dealers are subjected to between Bisie and Njingala. In total five check points have been set up on the path between the two centres for the illegal deduction of taxes and the so-called soldiers' share.

At the exit of Bisie there is a systematic control at the barrier at 05:00 every morning and all the departments present in the camp register the quantities of minerals that are taken out. For every load of 50 kgms \$5 is charged by the various officials who then share it among themselves. When the minerals arrive at Njingala other branches of the same departments as those stationed at Bisie do the same at the last barrier which leads to the camp.

The co-operatives COMIMPA and COCABI equally deplore the involvement of SAESCAM which, instead of supervising the miners at the mining sites, rather encourage the harassment by the officials and the soldiers.

### ***Who benefits from the minerals of Bisie?***

The deplorable conditions under which the miners, the couriers and the native inhabitants of this region live are a clear indication that the minerals do not profit those who live on this rich land. The prohibitive cost of living in the area (one measure of manioc flour costs \$2 there) makes it very difficult for those who live there to develop themselves.

The lack of supervision of the miners and the conditions under which they live and work compromises their health due to their exposure to inclement weather and to an environment that is not worthy of human habitation. The pits themselves are in constant danger of caving in because of the water that is not regularly pumped out of them due to a lack of the right equipment.

Those who benefit from the minerals of Bisie live elsewhere. They themselves are not from the territory of Walikale because when one considers the huge volume of cassiterite that has left Bisie from the time it was discovered to the present day, there is no tangible and lasting investment to be seen in the region. The proof is seen in that the planes that transport the minerals still land on the road because there is no landing strip for them to use. Moreover, the dealers do not invest in the region and no mining company has put in place any projects to develop the area for the benefit of the local communities.

The business centres at Njingala and Mubi, through which all the cassiterite passes, do not show any signs of development either. IN FACT, the majority of dealers are agents of the trading firms which deal in minerals in Bukavu and Goma. These trading firms do not invest in the territory of Walikale. This is one more example of bad governance; those in power do nothing for the people that produce the minerals so that they may also prosper and benefit from them.

Bisie is a state within a state. There is no authority, either at the territorial level, or that of the province, and much less on the national level, that is able to control what goes on in this region.

# DISSONANCE BETWEEN THE LEGISLATION GOVERNING THE MINING INDUSTRY AND THE REALITY ON THE GROUND

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*North Kivu*  
*Goma, 16 April 2010.*

## A BRIEF HISTORICAL OVERVIEW

It is common knowledge that mining in North Kivu is mainly artisanal. Artisanal mining first appeared in the Democratic Republic of Congo in the early 1970's.

Before this time the law strictly prohibited all possession of mining concessions. The policy of Zairianisation of 1973 actually encouraged fraudulent practices to which those in political power closed their eyes. This was partly due to the fact that this worked to the detriment of colonial companies, as well as to the fact that it was popular with the members of the *mouvement populaire pour la revolution*, the only political party, and with its founder and president, MOBUTU.

Ordinance No. 82/09 of 05 November 1982 initiated the legal establishment of artisanal networks and authorized the introduction of trading firms. The said ordinance forbade, in much the same way that the Mining Code would later do, mining in the concessions. But this ordinance was, at least on this point, already in dissonance with the reality on the ground. Indeed, in the case of Kivu, SOMINKI<sup>11</sup> no longer had the ability to enforce this ban because it had already lost its relevance. And so began the systematic theft of the nation's mineral resources.

The administrative authorities and those of law enforcement had a personal interest in protecting these illicit activities. Those of Katanga (previously Shaba) were called "operation machine gun". The difficulties of SOMINKI were compounded, and the final blow came with the tin crisis of October 1985 following the bankruptcy and collapse of ITC<sup>12</sup>. As a result SOMINKI abandoned some of its distant and inaccessible concessions<sup>13</sup> that were difficult to control. And it was mainly on these concessions that artisanal mining established itself.

It was during this state of confusion and national decline that the alliance des Forces Démocratiques pour la Libération du Congo-Zaïre (AFDL) launched its war in 1996.

## THE NEW MINING CODE

Regulation No. 007/2002 of 11 July 2002 containing the Mining Code and the protocol for its

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11 Société Minière et Industrielle du Kivu, which was created from an amalgamation of nine mining companies of Kivu : Symétain, Cobelmin, M.G.L., Kivumines, Miluba, Minerga, Kinorétain, Kundamines and Phibraki after an agreement of collaboration signed in 1973 between their mother companies.

12 International Tin Council, which maintained a stock regulator of tin for artificially support its operations.

13 Cf. the letter SAM/7AF/au/85/no. 088789 of 20/12/1985 of Mr. MARIO FIOCCHI, ADG of SOMINKI to the Commissioner of State for Mines and Energy.

application contained in Decree 038/2003 of 26 March 2003 were, in our opinion, promulgated in a context completely unrelated to the concrete reality on the ground on two levels. In the first place the country is divided, and the central government controls but a small and unstable part of it, and although there was a pan-Congolese dialogue that resulted in the Sun City accords, it is probable that there prevailed among the legislators an unrealistic concern for centralization in order to curb some real or imaginary separatist tendencies.

From the outset, the experts of the World Bank played a decisive role in drafting the new code which reflected a liberal orientation linked to the double concern for good governance as well as the protection of the environment. With regard to the latter aspect, the measures relating to the environment appeared to some observers to be too unrealistic to be applied meaningfully.

Reflecting on the procedure of granting mining rights as prescribed by the new code, professor Roland POURTIER made the observation in June 2004 that the code “does not sufficiently take into account the uniqueness of a post-conflict DRC as it faces up to an as yet uncertain future”.

## **EXAMPLES FROM SPECIFIC CONTEXTS**

The problematic relationship between units of legislation relating to land, mining, forestry and traditional rights

Before presenting some situational cases, it is important to emphasize from the start that the way the various pieces of legislation relate to each other is quite problematic. This is especially so with regard to legislation relating to mining, forestry, the environment and the land.

With regard to the last aspect, there is an ambiguity between modern land rights and traditional land rights. It is known, for example, that the Bbami (traditional chiefs) base their authority on the power they have over their land, and it is very difficult, if not altogether impossible, to get that idea out of their minds.

Another example is the provision of the Mining Code on the compensation of the occupants of the land. Article 281 stipulates that “all occupation of the land preventing the legal inhabitants from the use of the soil, and all modifications rendering the land unsuitable for farming activity by the rightful occupants shall, upon the request and convenience of said occupants, oblige the holders of mining and/or quarrying permits to pay a just compensation in accordance with either the rate of interest or the value of the land at the time of its occupation plus half of the said value”.

It is not just the value of the land at the time of its occupation (to which 50% is added) that is to a large extent unrealistic, and therefore unacceptable, especially if it is applied after many years of occupation, but in some cases the peasant owners have been known to overestimate the value of their land (by up to a thousand times!)<sup>14</sup>, especially if they know that the land is rich in mineral resources.

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14 See the compensation of MHI in *Permis d'Exploitation* no. 4731 in Masisi.

## **Some examples from an artisanal environment**

### ***The situation of the artisanal miners***

After the Mining Code, those engaged in artisanal mining, commonly referred to as ‘miners’; were no longer able to carry out their activities inside the zones of artisanal exploitation (*Zones d’Exploitation Artisanale - ZEA*). Following the procedure<sup>15</sup> determined by the Mining Code, the Mining Registry started, from 2003, to award mining permits to those in the area who had already been engaged in artisanal mining for many years. It was not until 2008 that the first Zones of Artisanal Exploitation were first introduced in North Kivu, even though many conflicts already existed between the holders of mining permits and the artisanal miners.

### ***The situation of the dealers***

Two cases merit mentioning as examples:

The dealers pay a little over \$600 per turnover of cassiterite (that is to say for a load of 1,800 kgs per plane). This is the result of the application of too many legal decrees, one of which is the Civil Aviation Decree of 1955. According to the officials of DGI, if all the heavy taxes were levied on their operations, the total payable by DGI alone would increase to \$375 per turnover instead of the current \$50. This would result in the dealers having to pay, in total, close to \$1000 per turnover to the various state departments.

The provincial decree of the governor of the province of Katanga (no. 2009/0035/KATANGA of 09 October 2009) stipulating the charges to be applied to the cassiterite and its couriers in transit through his province to other provinces, subjected all movement of cassiterite to a payment of an administrative fee of \$5 per kilogram, which is 100% of the equivalent charged in North Katanga (Manono, Kongolo, etc.). This is in spite of the fact that by virtue of Decree 038/2003 of 26 March 2003 which contains a regulation on payments for minerals, the tax to be levied by the EAD of the province on mineral transactions is 1% of the value of the minerals.

It goes without saying that the provincial decree just mentioned is equivalent to an embargo that frustrates the traders of north and South Kivu and all those affected by it and who have seen tonnes of their minerals blocked in north Katanga. Thus a section of the Congolese people find themselves prevented from carrying out their business in one of the provinces of their own country.

### ***The situation regarding the trading firms***

In this case also we will consider just a few cases as examples:

Many trading firms, the majority of which grant loans to some dealers, have also been prejudiced by the above-mentioned provincial decree of Katanga.

The same trading firms continue to pay twice for the same service, one time to cec and another time to occ. Indeed, these two departments, by virtue of the respective decrees that

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15 It should be noted here that the Mining Code has a fixed deadline in the granting of permits, mainly on a first-come-first-served basis, with fixed deadlines for extension.

created them,<sup>16</sup> compel each trading firm to pay \$140 to have their merchandise analyzed, in addition to the share which they receive from the tax charged on exports. The share that goes to OCC has changed a lot in the last few years, usually as a result of the protests of the traders and others from the business sector.

The provincial edict of North Kivu (No. 004 of 25 May 2009) fixed the tax on produce at 3% of the trade value, even though, as already indicated above, the mining regulation in its article 537 fixed the rate at 1%. But taxation at the rate of 3% proved to be too much for the trading firms, and this led to the closure of some of them. However a compromise was reached, and since may 2009 the traders have been paying a deposit of 1% in the expectation that the edict might be corrected by the competent authority, which in this case is the Provincial Assembly of North Kivu.

## **The situation in the commercial mining industry**

### ***Minimum financial requirement***

According to article 58 of the Mining Code (paragraph 1), "...the minimum financial capacity required is equal to ten times the total sum of annual fees payable in the last year of the period of the validity of the prospecting permit applied for".

Yet the DSA rate of the last year of the first period of the prospecting permit (that is to say the fourth year) is \$26.34 per square metre according to Article 395 of Decree 038<sup>17</sup>.

This means that the required minimum financial capacity for a holding of ten square metres is \$2,634, an amount that would not be sufficient to cover the cost of a trip for three people from Kinshasa to Walikale and back, including the expenses for their stay during an initial exploration of the land so as to lodge an appeal for the development of the site.

### ***Contradictions in legislation***

Article 11, paragraph (b) of Decree No. 036/2003 of 24 March 2003 which led to the creation of the CEEC vs Article 234 of the Mining Code and the first article of the Ministerial Regulation No. 003/CAB/MIN/FINANCES/2009 of 24 January 2009 which created a single agency for collecting taxes and the means of determining the charges and costs for services rendered for exporting mineral products.

The Mining Code, in Article 234, which in paragraph 1 completely exempts the holder of a mining permit from all regulations relating to exports, stipulates in paragraph 3 that "the charges and costs paid for services rendered for the export of market produce or for the temporary export of goods for processing, may not exceed 1% of their value". However, in keeping with another legal text, the one that led to the creation of CEEC, this department forces the holders of mining permits to pay 2% of the value of exports in the form of an income tax (Decree 036, Article 11, Paragraph b). This is in spite of the fact that Decree 003

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16 OCC (Office Congolaise du Contrôle) – Ordinance of 1978.

CEEC (Centre d’Evaluation, d’Expertise et des substance minerals precieuses et semi-precieuses) – Decree 036/2003 of 24 March 2003.

17 1 pit = 84,955 ha, according to Article 39 of Decree038! This would give a pit of around 921 metres wide.

which we have already mentioned above makes reference to Article 234 of the Mining Code, which sets the income tax at a rate of 1% and also indicates the departments to which this tax is paid, namely CEEC, OCC, OGEFREM and OFIDA<sup>18</sup>.

#### Contradictions between the 2010 National Budget and the Provincial Decree of North Kivu

Some taxes are repeated in these two legal documents. On the one hand, this leads to a conflict between the agents of DGRAD and those of DGR-NK<sup>19</sup>, while, on the other, it places the bookkeepers in a difficult position.

#### The excavation of quarries

According to Decree 038, Article 39, paragraph 4, the 'pit' which is the unit of land spread over a surface area of 84,955 hectares, is a block measuring 921 metres from end to end. The reality on the ground, at least in North Kivu, the most densely populated province of the DRC, is that there is no amount of building materials that can cover such a surface. It is therefore necessary to make provision for the smaller units, which may be up to 800 times smaller (25m x 25m), and determine a mining tax relative to their size.

It should be noted that the same absence of proportion is also found in legislation relating to fines for certain infringements. For example, the Mining Code prescribes in Article 303 the same penalty for illegal possession of mineral substances, without taking into account the weight of the those minerals, whether it is 50 kgs or 10 tonnes.

### CONCLUSION

We are grateful to Pole Institute for having pointed out the discrepancy between the legislation governing the mining industry and the reality of the situation on the ground.

There is, however, no doubt that this is not just a problem affecting the mining industry only. From here it is urgent that the reflection be extended to other areas, particularly the agricultural sector, especially at this time when the Agricultural Code is constantly mentioned as being in the process of being drafted by Parliament, especially since this code will affect the great majority of the population of the DRC which lives from agriculture. It would also be interesting to analyze the relationship between the various legislations governing different sectors, such as the land, mines, the environment, forests, etc.

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18 Office des Douanes et Accises, which eventually became the Direction Generale des Douanes et Accises (DGDA).

19 Direction Générale des Recettes du Nord-Kivu, created by the Provincial Decree No. 01/090/CAB/GP-NK/2009 of 29 October 2009.

# **WHO'S IN CHARGE?**

## **Putting the Mineral Trade in Eastern DRC under International Control: An Overview**

*Dominic Johnson  
Pole Institute  
August 2010*

### *Introduction*

In recent years, international debate on the ongoing crisis in the East of the Democratic Republic of the Congo has concentrated on the presumed link between the continuation of conflict and the continuation of mineral exports. Drawing on the analysis that the Second Congo war of 1998-2003 was largely financed through misappropriation of revenues from natural resource exploitation, a direct link is drawn between the fact that the mineral trade in the Kivus still largely escapes central government authority and the fact that the population of the Kivus is still suffering under numerous armed groups, both governmental and non-governmental. Attempts are made to link the location of mines with the activities of armed groups, or even mining to sexual violence, and it is suggested that using mobile phones fuels the war in the DRC because phones contain components made using Congolese raw materials.

It is presumed that insecurity could lessen if armed actors had less access to funds deriving from the natural resource trade, and that thus proper regulation of this trade is a factor of peace-building. Given the lamentable record of the Congolese authorities in ensuring the rule of law, it is the business parties themselves who are asked to commit to regulation, the oversight of which lies not with the DRC but with the international community.

International efforts to turn this thinking into regulatory systems adapted to the complex Congolese situation have begun to take effect in the current year 2010. This paper attempts to trace the genesis and evolution of these efforts and give an overview of the thinking and wider issues involved. It is argued that important aspects of the regulatory model now emerging are partly based on an erroneous and outdated analysis of the conflict dynamics in Eastern Congo and that this is likely to weaken its effectiveness on the ground. The error consists in regarding competition around minerals as the main reason for conflicts in Eastern Congo and the establishment of government authority as the main mechanism for ending such competition and thereby the conflicts themselves. Reforms centred around strengthening the rôle of the state in Eastern Congo rather than the people will, we contend, exacerbate conflict instead of ending it, even if they succeed in curbing the excesses deriving from mineral trade.

### *The new US legislation on „conflict minerals“ from the DRC*

On 21 July 2010, US President Barack Obama signed into law a major piece of legislation aiming to cut the link between mineral trade and persistent conflict in Eastern DRC. The „conflict minerals“ legislation is contained in Chapter XV (Miscellaneous Provisions) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, a monster of more than 2300 pages passed by the US Senate on 15 July after a similar vote of the House of Representatives

on 30 June<sup>20</sup>.

Here are the main provision of the relevant Section 1502:

1. „It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein“.
2. Within 270 days, any person or enterprise required to register with the Securities and Exchange Commission (SEC) will be obliged to „disclose annually“ whether „conflict minerals“ used by it „did originate in the Democratic Republic of the Congo or an adjoining country“. If they did, a report is required including „a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report“, „a description of the products manufactured or contracted to be manufactured that are not DRC conflict free“, and „the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the effort to determine the mine or location of origin with the greatest possible specificity“.
3. Within 180 days, the State Department and USAID must submit „a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products“. This strategy is to include measures to „monitor and stop commercial activities... that contribute to the activities of armed groups and human rights violations in the Democratic Republic of the Congo“ and to „develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving the natural resources of the Democratic Republic of the Congo to reduce exploitation by armed groups and promote local and regional development“.
4. Also within 180 days „a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries“ is to be produced, to be updated at least every 180 days.
5. A product can be certified as „DRC conflict free“ „if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country“. An „armed Group“ is „an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices“. The term „Conflict Minerals“ refers to „columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives, or any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country“. „Under the control of armed groups“ refers to areas in which armed groups „physically control mines or force labor of civilians to mine, transport, or sell conflict minerals; tax, extort, or control any part of trade routes for conflict minerals, including the entire trade route from a Conflict Zone Mine to the point of export... or... trading facilities, in whole or in part, including the point of export from the Democratic Republic of the Congo or an adjoining country“.

This legislation is the fruit of intense lobbying by international and especially American

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<sup>20</sup> The full text of the „Dodd-Frank Wall Street Reform and Consumer Protection Act“ is published by the US Government on [www.gpo.gov/fdsys/search/pagedetails.action?granuleId=&packageId=BILLS-111hr4173ENR](http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=&packageId=BILLS-111hr4173ENR)

NGOs aiming to suppress Congolese „blood minerals“ whose trade supposedly makes war crimes in DRC possible<sup>21</sup> .

These NGOs were of course very pleased with their „victory“ in Congress and made this sentiment public on 16 July. According to Global Witness, the „landmark reforms“, which also include requirements of transparency and payments disclosure in all extractive industries, are „a huge victory for corporate accountability“ which will promote „responsible trading practices“. John Prendergast, founder of the „Enough“ campaign, called the law a „huge victory“ with which „the world moved a step closer to ensuring that the supply chains for our laptops and cell phones do not finance violence in eastern Congo“.

Economic operators on the ground are more circumspect. John Kanyoni, an established mineral trader in Goma and president of the Association of Comptoirs in North Kivu, said in a letter to the Economic Section of the US embassy in Kinshasa on 16 July that he was „totally shocked“. The measures passed by Congress, he continued, were „in fact an embargo on materials from the Great Lakes Region... and even the whole African continent... Asking all the manufacturers to track every piece of metal in every single item they make is a gentle way of just telling them: Don't buy from DRC and adjoining countries, which is an embargo de facto“. With the „unilateral US action“, Congress was making existing and quite advanced international initiatives for transparency and due diligence in the Congolese mineral trade „of no consequence“. „The consequence of the US regulations will be that thousands of Congolese will be jobless and might most probably join the armed groups.. We keep busy thousands of people without a chance of getting jobs.“<sup>22</sup>

Industry scepticism is already apparent. The American Jewellers' Association said on 15 July that the new legislation was a „nightmare“ and „impractical“ because the means of verifying the exact source of every mineral did not exist – unless one only used products from specific mines, not mixed with any other produce from other sources. Other reports indicate that the electronic industry is already looking at alternative mineral supplies. It must be stressed that the new legislation does not just affect the DRC, but all „adjoining countries“ too: Angola, Zambia, Tanzania, Burundi, Rwanda, Uganda, Sudan, the Central African Republic, the Republic of Congo (Brazzaville) – half the African continent, and a very mineral-rich region. „The new law is likely to raise tantalum oxide prices“, an industry newsletter reported on 26 July<sup>23</sup>. It quoted the Australian tantalum and niobium mining firm Globe Metals & mining: „The ‘conflict minerals’ provisions have major implications for the tantalum industry and are likely to further constrain the already tight supply of raw material throughout the entire supply chain“. At the same time, „it was likely that the safest and easiest course for major consumer electronics brands like Apple, Intel, Sony, Nokia and Research in Motion would be to not source tantalum from the Congo area.“

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21 For a classic exposition of this approach see the special page of the US „Enough Project“ [www.enoughproject.org/conflict-minerals](http://www.enoughproject.org/conflict-minerals), which features prominently the memorable quote of US Secretary of State Hilary Clinton during her visit to Goma in August 2009: „Every time someone uses a certain type of cell phone, they are using minerals that come right out of eastern Congo. What does that do for the people that I saw on the way from the airport into the city? Nothing. It helps them in no way.“ It also contains the following analysis by „Enough“ founder John Prendergast: „The time has come to expose a sinister reality: Our insatiable demand for electronics products such as cell phones and laptops is helping fuel waves of sexual violence in a place that most of us will never go, affecting people most of us will never meet.“

22 Letter from John Kanyoni to the US Embassy Kinshasa, 16 July 2010

23 „Obama Wants Global Mining Transparency Standard“, Resource Investor, 26 July 2010

If this is so, the new law could actually backfire: By simultaneously raising prices and forcing sellers to look for new markets, it would give a major boost to smuggling and thus to the part of the Eastern Congolese mineral trade that most directly benefits armed actors.

### *„New Wars“ and „Blood Diamonds“: A New Paradigm for African Conflicts*

The origins of the political debate around „conflict minerals“ lie in the discussions around „resource wars“ and „conflict finance“ through „illegal“ natural resource exploitation arising from the changing nature of war in the 1990s. Protracted conflicts in ex-Yugoslavia and parts of Africa which were neither exclusively internal nor exclusively inter-state conflicts gave rise to the notion of „new wars“ in which, contrary to classical „old“ wars, the belligerents were not necessarily standing armies, the victims were mostly civilians and the control of economic resources was as important as the control of territory and political power<sup>24</sup>. While ex-Yugoslavia subsequently became a theatre of military intervention, the civil war of Angola became an experiment in a new kind of political intervention: the imposition of UN economic sanctions, an instrument hitherto used only against governments or against the arms trade, on specific commodities traded by rebels.

In Angola, and also in Sierra Leone, rebel movements in the 1990s used neighbouring countries – in these cases Zaire/DR Congo and Liberia - as military and economic bases. Zaire was allied with the UNITA rebels until 1997, and even afterwards UNITA continued to smuggle diamonds via what was now the Democratic Republic of Congo. In June 1998, the UN Security Council banned Angolan diamond exports outside the government certificate-of-origin process and also imposed financial sanctions on UNITA<sup>25</sup>.

A Panel of Experts was subsequently formed to monitor these sanctions, and a similar regime was imposed on the Sierra Leonean RUF rebels in 2000<sup>26</sup>. The UN Angola panel reported in March 2000 that illicit diamond exports by UNITA were continuing, with the complicity of companies and governments worldwide. The so-called „Fowler Report“ led to further UN measures and provided the basis for the discussions which eventually led to the Kimberley Process Certification Scheme (KPCS) for diamonds – a self-regulation scheme under which only such diamonds may be legally traded that are issued with a governmental certificate of origin. This began to be discussed in May 2000, was agreed in 2002, came into force in 2003 and since then has remained the reference point for all further debate about global regulation of the natural resource trade, especially concerning Africa<sup>27</sup>.

While the measures against UNITA and RUF were being taken in the years 1998-2000, the DR Congo was the scene of an armed conflict pitting the government of Laurent-Désiré Kabila with direct support from Angola, Zimbabwe, Namibia and Rwandan Hutu fighters against rebels in the East with direct support from Rwanda and Uganda. „Africa's First World

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24 For the classic exposition of this concept see: Mary Kaldor, „New & Old Wars: Organized Violence in a Global Era“, 1999

25 UNSC Resolution 1173, 12 June 1998; UNSC Resolution 1176, 24 June 1998. UNITA had already been subject to an arms embargo and petroleum sanctions since 1993 and a travel ban since 1997.

26 UNSC Resolution 1306, 5 July 2000. RUF had already been subject to an arms embargo and travel ban since 1997.

27 For details on the Kimberley Process see the official website [www.kimberleyprocess.com](http://www.kimberleyprocess.com).

War“, as the conflict was termed in the US, sucked in half of Africa and dwarfed the Angolan and Sierra Leonean conflicts in size and international repercussions. All sides in the conflict happily traded natural resources under their control against military support. The government gave Zimbabwe a privileged position in copper and cobalt mining in Katanga as well as diamond mining in Kasai and tacitly let Angola exploit offshore oil reserves in territorial waters which the DR Congo later considered its own. On the rebel side Uganda exploited the gold of Ituri and the forests of Northern Congo, while Rwanda profited from the trade with coltan and other minerals from Kivu and Eastern Congo generally.

No sanctions comparable to those against UNITA or RUF were ever placed on any of the DR Congo's belligerents, as for all interested parties Congo's war was „too big to fail“. Given the internationalised nature of the Congo war, sanctions would have had automatic international repercussions: they would have turned the sanction victim's foreign military allies into sanctions busters, a trigger for intensified regional conflict. Furthermore, the internationally supported DRC peace process instigated with the Lusaka Accord of July/August 1999 placed all belligerents on an equal footing with a view to getting them to talk to each other in an Inter-Congolese Dialogue; this precluded putting any of them under embargo.

Failing any actual punitive measures, the international community contented itself with observing the situation, in a dilemma similar to the original mandate of the MONUC peacekeeping force. In June 2000 the UN Security Council, bypassing a formal vote but acting on behalf of the Secretary General, formed an „Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic Congo“ which published four reports between January 2001 and October 2002. They detailed the patterns and actors of natural resource exports on all sides, principally that of the rebels in the East, and suggesting sanctions, initially against governments and later only against specific individuals considered to be part of „elite networks“ profiting from the war<sup>28</sup>.

In its final report of 16 October 2002, the Panel stated that it had surveyed 17 „end-user countries“ of DRC minerals „in an effort to determine what measures might be taken at the end of the commercial chain to control the trade in resources of the Democratic Republic of the Congo and sever its links to the armed conflict“ with a view to „identify measures or practices that would eliminate the costs in war and human lives that occur in the course of extracting and commercializing resources from the Democratic Republic of the Congo“<sup>29</sup>. In an Annex, the report named 85 companies in ten OECD member countries which were accused of having breached the OECD Guidelines on Multinational Enterprises<sup>30</sup>. „Countries which are signatories to those Guidelines and other countries are morally obliged to ensure that their business enterprises adhere to and act on the Guidelines“, the report stated in its conclusions and recommendations and proposed a monitoring process to follow this up<sup>31</sup>.

This subsequently became the basis for all subsequent discussions about what should be done about „conflict finance“ in the Congo. However, it presumed a truly extraordinary, very partial analysis of the causes and dynamics of conflict in the DRC: namely that because armed

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28 UN Security Council Presidential Statement, 2 June 2000. The reports and other documents can most easily be accessed on: [www.globalsecurity.org/military/world/war/congo.htm](http://www.globalsecurity.org/military/world/war/congo.htm).

29 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/1146, 16 October 2002, §141

30 op.cit., Annex III

31 op.cit., §177 and §186

actors use money deriving from natural resources, they are fighting over natural resources; that conflict continues because someone buys natural resources from local belligerents and thus funnels money into the DRC conflict; that this prolongs the conflict in a way which otherwise would not be possible. The logical consequence of this is clearly absurd: that belligerents in the DRC wage war and terrorise the population because they have access to export revenues, and conversely that if they had no money there would be peace.

### *Congo Good, Companies Bad: The UN Analysis during the DRC Transition*

In the euphoria following the formal end of the second Congo war with the Pretoria Agreement of 17 December 2002 and the formation of an all-party transitional government in Kinshasa in summer 2003, these reports and analyses were initially set aside. The priority now was the establishment of a stable political order in the DRC. UN Security Council resolution 1457 on 24 January 2003 renewed the natural resource panel's mandate not for further investigations but for follow-up work. The follow-up work proved controversial and came to a dead end: the follow-up report of October 2003 was never published in its entirety, in many areas there had been no progress at all, but in reaction the UN Security Council simply demanded that governments now conduct their own investigations using the OECD National Contact Points<sup>32</sup>.

For the duration of the transition in the DR Congo, the debate about conflict finance was once again split up: the UN concentrated on arms flows, while economic issues were dealt with purely retrospectively on an OECD level and through investigations in the DRC itself, for example the Lutundula Commission which looked into contracts entered into on behalf of the Congolese state during the war<sup>33</sup>.

The international expectation in 2003 and subsequent years appeared to be that with the transition and especially with elections, state authority was re-emerging in the Congo, that improper use of natural resource revenues would then disappear, that conflict was therefore due to disappear too and that the only obstacle to peace and democracy was the persistence of „negative forces“. In July 2003, UN Security Council resolution 1493 imposed an arms embargo on „all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive agreement“<sup>34</sup>. In March 2004 a Group of Experts was set up to „gather and analyse information“ about „flows of arms and related material“ in violation of resolution 1493<sup>35</sup>.

This new Group of Experts, successor to the Panel of Experts, exists to this day with varying membership and mandate and has understood its task in a wide sense, looking not just at arms flows but also at possible conflict finance in the DR Congo. This in itself is a tacit admission that the optimism of 2003-06 was misguided – an admission which gradually became officially recognised by the international community following the failure of security sector

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32 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2003/1027, 15 October 2003; UN Security Council Presidential Statement, 19 November 2003. The OECD summarised its response in a „Public Statement“ in January 2004: [www.oecd.org/document/6/0,3343,en\\_2649\\_34889\\_27217798\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/6/0,3343,en_2649_34889_27217798_1_1_1_1,00.html).

33 The Lutundula report was only ever published unofficially: [www.freewebs.com/congo-kinshasa](http://www.freewebs.com/congo-kinshasa)

34 UN Resolution 1493 of 28 July 2003

35 UN Resolution 1533 of 12 March 2004

reform in the Congo after the 2006 elections, the success of the CNDP rebellion in North Kivu in 2008 and the strengthening of the Rwandan FDLR militia in North and South Kivu.

In 2009, following a wide-ranging report exposing particularly the international support networks of the FDLR, the Group of Experts' mandate was extended to the production of „recommendations for the exercise of due diligence by the importers, processing industries and consumers of mineral products regarding the purchase, sourcing (including steps to be taken to ascertain the origin of mineral products), acquisition and processing of mineral products from the Democratic Republic of the Congo“<sup>36</sup>. This extension of the mandate brought the debate back to where it was 2002: outside economic agents buying Congolese natural resources were held responsible or at least co-responsible for continuing conflict in the DRC because they bring in money without which belligerents would be powerless.

However, this time the debate was more focused than in 2002, a lot of work having been carried out in the meantime following the OECD investigations. According to the Panel's follow-up 2003 report, 48 of the cases named in the 2002 report had by then been „resolved“, two were „resolved subject to NCP monitoring compliance“, 11 were „unresolved cases referred to NCP“, 29 were “pending“ and 33 were in „parties that did not react to the panel's report“<sup>37</sup>.

The most significant case, whose consequences were to shape the subsequent debate, was one of those that the UN Panel had classified as „resolved“: that of Afrimex (UK) Ltd, the British arm of the Congolese trading firm Kotecha, one of the best-known wholesalers in Bukavu. Afrimex was one of the 85 international firms named in the 2002 UN Panel report, but in the 2003 report its case was listed as „resolved“. However, in February 2007 the UK organisation „Global Witness“ filed a complaint with the British OECD National Contact Point, alleging that Afrimex's trade in „resources controlled by rebel groups“ during the 1998-2003 war and even after „enabled the RCD-Goma to finance its crippling occupation of North and South Kivu“, because Afrimex paid taxes „to RCD-Goma officials and not to the national government of the DRC“. As possible breaches of OECD guidelines, Global Witness listed amongst other things that „Afrimex paid taxes to an armed group that was engaged in an armed conflict against the Congolese government“ and that „Afrimex recognised the authority of an armed rebel group and financed the group through tax payments to the detriment of the national unity of the country“<sup>38</sup>.

The political implication of this charge is a bombshell: if the Global Witness position is followed through, no legal economic activity can possibly take place in rebel areas at all; traders operating in Eastern Congo during the war should instead have withheld their taxes or sent them to the opposing warring party in Kinshasa; and the main criterion of proper business behaviour is whether an enterprise pays taxes to the government, regardless of the behaviour or even existence of this government. The Global Witness complaint betrays an extraordinary and possibly deliberate misreading of Congolese history and politics and an astounding disregard for what is necessary to ensure survival in a zone of protracted conflict.

In the ensuing exchange with the UK NCP, Afrimex denied the Global Witness allegations,

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36 UN Resolution 1896 of 30 November 2009. All reports of the Group of Experts and related materials can be accessed on [www.un.org/sc/committees/1533/index.shtml](http://www.un.org/sc/committees/1533/index.shtml)

37 Final Report S/2003/1027, Annex I

38 Global Witness: Complaint to the UK National Contact Point, 20 February 2007

saying that Afrimex and Kotecha are independent of each other; that Afrimex neither pays taxes nor is liable for taxation in the DRC; and that Kotecha does not own the minerals it trades. However, it did not counter the basic analysis behind the complaint. In its decision issued in August 2008, the UK NCP took a median position, accepting some of Afrimex's argument but upholding the substance of Global Witness' complaint. Thus the NCP found that taxes were not paid by Afrimex but by its associate and supplier SOCOMI, but: „Afrimex failed to apply sufficient pressure on an associated company (SOCOMI) to cease trading in minerals during a period when taxes and licence fees were paid to RCD-Goma. These taxes and licence fees were used to fund the continuation of the war“<sup>39</sup>.

Afrimex, the NCP concluded, „applied insufficient due diligence on the supply chain and this remains the case. The UK NCP expects UK business to respect human rights and to take steps to ensure it does not contribute to human rights abuses. Afrimex did not take steps to influence the supply chain and to explore options with its suppliers exploring measures to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety“<sup>40</sup>. Thus Afrimex breached Chapters II.1 and II.2 of the OECD Guidelines<sup>41</sup>, as well as others.

This interpretation is open to dispute even within the context of the OECD Guidelines. It can be argued that if Afrimex had instead incited its local Congolese partners and suppliers to withhold taxes in Eastern DRC – where, it should be remembered, provincial and local administrations remained in place during the RCD rebellion – this could be interpreted as a breach of Guideline II („Enterprises should take fully into account established policies in the countries in which they operate“) and II.11 („Abstain from any improper involvement in local politics“). This argument was however neither pursued by Afrimex nor considered by the NCP.

The NCP decision against Afrimex, while having no consequences in law, defined what the concept of „due diligence“ could mean for companies acquiring minerals originating from a Congolese war zone: an obligation or rather an expectation that one should be aware of the origin, the conditions of production and the conditions of sale, taxation and commercialisation, and that companies should, if necessary, either change these conditions or withdraw. As the classic definition of „due diligence“ in this context states: „Due diligence can be defined as a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.“<sup>42</sup>

For the population of Eastern Congo as well as for the companies concerned this creates difficulties. It means that compliance with local laws and regulations is no longer sufficient, unless one considers that such compliance by itself constitutes adherence to OECD standards, a consideration which clearly does not apply in the DRC. There must therefore be compliance

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39 Final Assessment by the UK NCP for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008, §39. [www.berr.gov.uk/files/file47555.doc](http://www.berr.gov.uk/files/file47555.doc)

40 op.cit., §62.

41 OECD Guidelines: „Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

- II.1 Contribute to economic, social and environmental progress with a view to achieving sustainable development

- II.2 Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments“ (op.cit., §13)

42 John Ruggie, in: op.cit, §77

with international standards separate from both national law and local arrangements – standards whose legitimacy is presupposed as absolute and about which there need be neither consultation nor information on the ground. This creates huge political problems.

A lot of effort has since been put into working out international standards for Eastern Congo's mineral trade and the mechanisms of monitoring or enforcing compliance. An in-built tension has resulted between the DRC government's wish to reorganise the Congolese mineral sector with minimal outside interference and the international community's wish to trade with Congolese minerals in a way compatible with international „due diligence“ standards. Local requirements and priorities are in danger of remaining unheard.

### *Government-Based Approaches: EITI and Certification*

To understand the further developments in the „due diligence“ debate, it is necessary briefly to return to the general debate on natural resources and conflict beyond the DR Congo. Following the initiation of the Kimberley Process for diamonds as a reaction to UNITA's „blood diamonds“ in Angola, attention shifted to the other side of Angolan „conflict finance“: the oil revenues of the government<sup>43</sup>. This, together with older corruption scandals about oil-for-arms in French-speaking countries of Central Africa and the international outcry about environmental destruction and repression in Nigeria's oil areas in the late 1990s, focused the debate on oil as the most lucrative resource in African conflict areas. In 2002, a coalition of international non-governmental organisations supported by the Open Society Institute founded the „Publish What You Pay“ (PWYP) campaign to force companies active in natural resource extraction to disclose their payments to governments<sup>44</sup>.

In reaction, governments rallied to the rival „Extractive Industries Transparency Initiative“ (EITI), a public-private initiative developed by the British government under Tony Blair, announced by Blair at a UN summit in 2002 and endorsed by the World Bank in 2003. EITI, which the DR Congo joined in 2005 during the transition, „supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining“<sup>45</sup>.

While PWYP supports mandatory disclosure of payments, EITI is based on voluntary disclosure. EITI monitoring mechanisms have however proved more effective than initially supposed in uncovering revenue flows from natural resource extraction and disclosing anomalies. EITI meetings in the DRC have served to bring the concerns of civil society to the attention of governments and firms, and the first of several annual EITI reports for the DRC, covering the year 2007 and published in 2009, has made clear the extent of misreporting and embezzlement in the Congolese natural resource sector<sup>46</sup>.

One interesting finding, contradicting standard assumptions about corruption in the DRC, is that receipts declared by revenue collection services are often higher than payments declared by firms. This raises important questions about the real direction of money flows and about

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43 Global Witness, „A Crude Awakening“, London, December 1999

44 [www.publishwhatyoupay.org](http://www.publishwhatyoupay.org)

45 „What is the EITI?“ on the official website [www.eiti.org](http://www.eiti.org)

46 PriceWaterhouseCoopers: RDC/ITIE: Rapport du Conciliateur Indépendant, Exercice 2007, 22 décembre 2009. In the possession of the author

the real basis of supposed „public revenue maximisation“ in the Congo. The 2007 report limits itself to copper and cobalt from Katanga and oil from Bas-Congo, but there is little reason to suppose that the situation is any better in Eastern DRC.

The EITI process is an important step forward in the discussions about the role multinational enterprises could and should play in resource-rich conflict zones. If all regular money flows are monitored and verified, then irregular payments ones can be identified and stopped. But there has to be someone to do so. If DRC statistics cannot be trusted and if neither firms nor public services declare money flows correctly, the hurdle for proper monitoring of any „due diligence“ process in the mineral sector becomes impossibly high: in effect foreign buyers of Congolese minerals have to do it themselves and thus assume functions of state sovereignty. The anomalies pointed out in the EITI DRC report will have to be addressed if any framework of transparency and „due diligence“ in the DRC is to work.

These questions have exercised international diplomacy at the highest level. On 8 June 2006, after consultations begun in 2004, the OECD Council adopted the „OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones“ as a way of making the OECD Guidelines relevant to „zones where authorities are unable or unwilling to assume their responsibilities“<sup>47</sup>. According to this, companies working in zones of „heightened risk“ must exercise „heightened care“ because they cannot count on public authorities to enforce their or business partners' compliance with the law. Amongst the main obligations for private business the Risk Awareness Tool identifies „obeying the law and observing international instruments“, „heightened managerial care“, „knowing clients and business partners“, „speaking out about wrongdoing“ and exercising „a broadened view of self-interest“<sup>48</sup>. In a nutshell the basic principles of „due diligence“ were thus defined. The later OECD Afrimex decision has to be seen against this light.

At the G8 summit in Heiligendamm (Germany) on 6-8 June 2007, the German presidency placed the subject of transparency in natural resources on the agenda. The final communiqué devoted an entire section to „Responsibility for Raw Materials: Transparency and Sustainable Growth“. It backed a German proposal to host an international conference on „transparency in the extractive sector“ and gave „encouragement“ to „the development of a consolidated set of principles and guidelines that apply to the international mining sector in developing countries“ as well as to the development of certification systems and the furthering of EITI<sup>49</sup>.

This decision was taken in the context of the Chinese boom and the consequent surge in demand for raw materials, leading to massive price rises and putting all proponents of socially and environmentally responsible natural resource extraction in the G8 countries on the back foot. But Germany also had a particular interest in this issue as far as the DR Congo was concerned. German firms were among the most important buyers of Eastern Congolese minerals during the Congo war. „Somikivu“ (Société Minière du Kivu), the majority German-owned operator of the Lueshe niobium mine in North Kivu, was the only industrial mining site in RCD rebel territory during the war; the Lueshe mine was operated from 2000 to 2004

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47 OECD Risk Awareness Tool, OECD, June 2006

48 Chapter headings of the OECD Risk Awareness Tool

49 Growth and Responsibility in the World Economy. G8 Summit Declaration (7 June 2007), §80-87.

Available in English on the official website: [www.g-8.de/Content/EN/Artikel/\\_\\_\\_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,templateId=raw,property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng.pdf](http://www.g-8.de/Content/EN/Artikel/___g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,templateId=raw,property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng.pdf)

by the German geologist Karl-Heinz Albers on behalf of the majority owner GfE (Gesellschaft für Elektrometallurgie). Albers was also involved in coltan exports from North Kivu, with the German Bayer subsidiary H.C.Starck, a world leader in the manufacture of tantalum capacitors, as an important buyer of Congolese coltan<sup>50</sup>. An international outcry forced H.C.Starck to withdraw from Central Africa in 2002. Since then, heated technical discussions had been taking place in Germany on how to develop systems of proof of origin for Central African tantalum, so that products originating from countries other than the DRC and therefore „clean“, such as tantalum from Mozambique which was also for a time being offered by Albers, could be distinguished from „suspect“ Congolese ones. This was the embryo of a certification process for Eastern Congolese tantalite and niobite.

The international conference on transparency in the extractive sector, promised at the G8 summit of 2007, took place in Berlin in December 2007 and gave the German Federal Institute of Geosciences and Raw Materials (BGR) the opportunity to present its work to the public. The central element was a plan to implement a pilot project for a Certified Trading Chain (CTC) in mineral production – in Rwanda, not in the DRC.

„By implementing the exemplary pilot project in Rwanda, the aim is to enhance regional stability and peace building“, the BGR concept note says<sup>51</sup>. „The objectives of the pilot project are: to prepare a scheme based on a verifiable system of social and environmental standards for an objective appraisal of mineral production with particular focus on Rwanda; to apply this scheme to a tin/coltan mining site cooperating with and engaging artisanal and small-scale mining; to establish a process of multi-stakeholder dialogue including civil society organisations, branches of government and private sector operators to review the designed scheme... The analytical traceability of a mining product can be integrated as a supplementary element of verification investigated by a German research program on analytical fingerprinting of tantalite minerals“.

The context of the Rwanda pilot project was presented as that of ongoing privatisation of the Rwandan mining industry which made it all the more necessary to design common standards for private investors based on the OECD guidelines and on Rwandan legislation. Foremost amongst these standards were „complete environmental risk assessment“, „protective and production services for artisanal workers“ and „adherence to certification standards“<sup>52</sup>.

The supplementary project of a fingerprint for coltan, already initiated by BGR in 2006, was presented in very ambitious terms, serving to distinguish Central African columbite-tantalite from that of other African countries such as Mozambique, Ethiopia or Nigeria, but also to distinguish between different Central African coltan deposits, eg Gatumba (Rwanda) and Shabunda (DR Congo)<sup>53</sup>.

The fingerprint has been found to work, but it is extremely expensive and cumbersome to manage as it can only properly be undertaken at the BGR's seat in Hanover, Germany, and

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50 For details of this see: Dominic Johnson, „Deutsche Unternehmen in der Demokratischen Republik Kongo“, Ökumenisches Netz Zentralafrika, Berlin 2007

51 This and the following: BGR: Certified Trading Chains in Mineral Production, concept note, October 2007. [www.bgr-bund.de](http://www.bgr-bund.de)

52 Jim Freedman: Pilot Project on Certification of Minerals Produced in Rwanda. Presentation to the Berlin Conference on Transparency in the Extractive Sector, 14 December 2007

53 Frank Melcher: Certification as Proof of Origin: Coltan. Presentation to the Berlin Conference on Transparency in the Extractive Sector, 14 December 2007

requires several years' training. Examining a single mineral sample takes three days, and to be of use the process requires the prior constitution of a complete database of all existing coltan deposits in the region. A simpler version is being developed for use in the DRC itself, but it will only serve to examine the tantalum content of a coltan sample in order to allow an exporter to observe the legal standard of a minimum 65% ore content, not to serve as a proof of origin.<sup>54</sup>

The German combination of CTC and fingerprint work has led many African observers to assume that German certification projects are exclusively designed for coltan. However, the CTC concept in itself is not specific to particular commodities, and the fingerprinting approach, especially the simplified version apparently being developed for the DRC, does not require a Certified Trading Chain. In practice the two approaches will probably remain separate.

The CTC pilot was initiated in Rwanda in 2008. It covers the tin/coltan mines of Gatumba, Nemba and Rutsiro and the wolframite mines of Gifurwe and Kayonza, and the firms initially concerned are Natural Resources Development, a subsidiary of H.C.Starck; Gatumba Mining Concession, a joint venture of the Rwandan government and the South African mining firm Kivu Resources which also owns important mineral concessions in Eastern DRC; and Eurotrade International, a firm also active in mineral trading in Eastern DRC.<sup>55</sup>

While critics claim that these firms are using the Rwandan CTC to whitewash illegally imported Congolese minerals, it seems more reasonable to suppose that they are trying to keep a „clean“ foothold in the region. According to the Rwandan government, „the exemplary implementation of certification creates islands where mineral resources are legally produced and traded in a transparent fashion. Certification successively transforms current informal mining into a regulated one... For international investors, the option of certification opens the door to produce or buy mineral resources in Central Africa without the risk of losing their reputation.“<sup>56</sup>.

By initiating CTC first, Rwanda gains a comparative advantage over its Congolese neighbour which remains under international suspicion. In the wake of the 2008 Afrimex decision and the debates initiated by the 2007 G8 Summit declaration, international campaigns had stepped up the pressure on purchasers of minerals from the DR Congo to disclose the sourcing of their minerals and to accept responsibility for the conditions under which these minerals are produced and traded. This was an important move away from earlier demands that no minerals from Eastern Congo should enter the international market at all. Instead, buyers were asked to make sure that their purchases do not fund armed groups. The more detailed the information, the easier it is to distinguish between „clean“ and „dirty“ minerals.

The extension of the German CTC concept from Rwanda into the DR Congo was agreed between the German and Congolese governments in April 2008, signed in December 2008 and is due to begin in the course of 2010. It was presented to stakeholders in Kinshasa and Bukavu at two separate conferences co-hosted with the Congolese Ministry of Mines on 11-

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54 Information from BGR

55 Michael Biryabarema, Gudrun Franken: Pilot Project on Mineral Certification in Rwanda, undated BGR presentation, 2009

56 Rwanda Geology & Mines Authority: „Pilot Project on Mineral Certification in Rwanda“, undated paper, [www.ogmr.minirena.gov.rw](http://www.ogmr.minirena.gov.rw)

12 February and 12-13 March 2010. At these meetings, BGR presented its ideas for a CTC pilot in South Kivu along the lines already tested in Rwanda. With German government finance of €3.2m over three years, the BGR project „Transparency and Control in the Raw Materials Sector“ together with the GTZ project „Control in the Mining Sector“ sets out a certification process for the entire chain of mineral production and trade in Eastern Congo within the framework defined by the International Conference for the Great Lakes Region in 2006.

Mineral products for exports will be certified according to five standards<sup>57</sup>: transparency of origin; working conditions in the mines; security and links with armed groups; social development in the mining area; social and environmental conditions. Minerals must be traceable along the trading chain, with independently verifiable packaging, loading and transport at all levels. The Congolese provincial mining divisions verify that traders adhere to the rules; the provincial offices of the small-scale and artisanal mining agency SAESSCAM register the mineral volumes concerned; the provincial offices of the certification agency CEEC deliver certificates. The Ministry of Mines will create 3.300 jobs for this; it hopes that the Germans will pay. The BGR objective is that within 12 years „mineral raw materials are exploited and commercialised in conformity with the law and all taxes and charges due are paid“<sup>58</sup>

A large number of pilot mines were identified where samples will be collected and preliminary work started. Four are in South Kivu: Nyabibwe, Lulingu, Misisi and Mukungwe; four in North Kivu: Bisie, Ngubwa, Mumba and Manguredjipa. Not all of these are actually accessible and some, eg Bisie and Nyabibwe, are objects of competing exploration rights claims from different sides. At the time of writing, the gold mine of Mukungwe had been visited by a BGR team and visits were being planned to Nyabibwe. A BGR office is being set up in Bukavu<sup>59</sup>. The trading chain is supposed to work via the trading centres (centres de négoce) already being set up by the provincial governments of North and South Kivu, where the mineral trade will be centralised and certificates and permits issued in a standardised fashion. In Bukavu it was announced that „centres de négoce“ would be instituted in Baraka, Mugogo, Mwenga-centre, Shabunda-centre and Mukubi for South Kivu; and in Isanga, Rubaya and Itebero for North Kivu.

Congolese observers at the Bukavu conference voiced scepticism that the pilot projects could be brought to work smoothly within the three-year timeframe envisaged. Recruiting and training the required SAESSCAM agents and other public servants would realistically take ten years, one mused; another feared that pilot mines would attract all kinds of shady buyers who would try and whitewash their wares through certification. The assumption that one could trust SAESSCAM, CEEC and other public agencies to implement the certification process properly without fraud or corruption was questioned.

The general point was raised at the margins of the conference that in the absence of a proper system of artisanal mining zones it is impossible to set up legal artisanal mines which can be certified anyway. Further it was pointed out that without a resolution of the numerous unresolved conflicts about ownership of land and mineral exploration rights in the Kivus it is

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57 BGR presentations to the BGR/GTZ conference on certification in Bukavu, 12 March 2010

58 BGR Concept Note: „Rapport du groupe de travail sur la certification des substances minérales, dites minerais de conflit“, Kinshasa, 22 February 2010

59 Information from BGR

impossible to set up a legally watertight mining regime in which ownership of mineral products is beyond dispute<sup>60</sup>.

These criticisms all point to one major shortcoming of the certification model: the disregard for existing legal and administrative requirements for mining in the DRC and the absence of systematic harmonisation between certification rules and Congolese law. It is simply assumed that the certification rules will become law anyway. This disregard should not even be seen as a deliberate omission. It is a consequence of ignorance, a flaw in the analysis which arises from a set of simplistic assumptions:

- that the problem in Eastern Congo is one of legitimate „government“ versus illegitimate „rebels“;
- that strengthening the legitimate „government“ is a step towards peace;
- that insecurity means the absence of order and that the imposition of order creates security;
- that the link between minerals and conflict is due to a lack of rules;
- and that with the imposition of rules for the mineral trade, conflict will cease.

### *Do-It-Yourself: „Due Diligence“ and Industry Self-Regulation*

This analytical flaw runs through all further international reform efforts for the Eastern Congolese mineral trade. Thus in February 2008, the UN Group of Experts on the DRC reported that „the exploitation of mineral deposits“ was an important source of finance for the FDLR militia in Eastern Congo, but „even in areas with a strong rebel presence, not all the mineral deposits are controlled by illegal armed groups“<sup>61</sup>. This statement was in itself perfectly correct and innocuous, but its consequence was not. The report proceeded to outline what was to become the basis of all international efforts in subsequent years, and this passage deserves to be quoted at length:

„The Group considers that individuals and entities buying mineral output from areas of the eastern part of the Democratic Republic of the Congo with a strong rebel presence are violating the sanctions regime when they do not exercise due diligence to ensure their mineral purchases do not provide assistance to illegal armed groups. The Group further considers that due diligence entails the following steps. First, companies buying from areas at risk in the eastern part of the Democratic Republic of the Congo determine the precise identity of the deposits from which the minerals they intend to purchase have been mined, rather than simply the territory of origin, as currently registered by CEEC. Second, once the precise identities of the mineral deposits are known, purchasers establish whether or not these deposits are controlled and/or taxed by illegal armed groups. Third, purchasers refuse to buy minerals known to originate – or suspected to originate – from deposits controlled/taxed by these armed groups. Purchasers similarly exercise due diligence by refusing to purchase mineral output known or suspected to have been taxed by illegal armed groups en route to comptoirs. Failure to follow these steps constitutes a lack of due diligence, and in the Groups's view puts purchasers in violation of the arms embargo for provision of assistance to armed groups.“<sup>62</sup>

This approach was further developed in the Group of Expert's Final Report of November 2008

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60 Interviews at the Bukavu conference, 12 March 2010

61 UN Group of Experts Report, 13 February 2008, S/2008/43, §81 and §83

62 op.cit., §84-85

which recommended, further to due diligence, „a map of mineral rich zones and armed groups“, and in the subsequent UN Security Resolution 1857 which broadened existing sanctions relating to the DRC to „individuals or entities supporting the illegal armed groups... through illicit trade of natural resources“ and encouraged member states to ensure the exercise of due diligence by companies.<sup>63</sup>

The novelty of this approach was twofold. One: the idea that a boycott or sanctions would be useful was now definitely dead and buried. Instead, purchases from Eastern Congo should be selective. This was a major advance from the 2002 discussion. Two: all the onus of selection was placed on international purchasers, not on Congolese traders or sellers. Responsibility for „due diligence“ lay with the buyer, the seller being presumably untrustworthy unless thoroughly vetted. This approach reduces transparency to a one-way street, or rather a two-way mirror: the buyer can see everything about the seller, but the seller can only see himself. Removing all responsibility from the Congolese side strips the Congolese side of all power and means of control. Congolese traders are supposed to disclose all their activities and interests to international clients who themselves are under no disclosure obligation in return.

The hard work of devising a set of rules for the Eastern Congolese mineral trade while keeping Congolese involvement to a minimum has led to a myriad of international initiatives whose principal task is to liaise among themselves. Thus BGR is now working closely with the International Conference on the Great Lakes (ICGLR) and with ITRI, the self-regulation body of the international tin industry which is setting up its own „due diligence“ process, evidently driven by self-interest just as the international diamond industry was when it set up the Kimberley Process in order to react to Angolan sanctions. Other players involved include the OECD, the Global E-Sustainability Initiative of the electronics industry (GESI), and the EU Task Force on Natural Resources in the DRC. This has been busy working out a programme of action with the DRC government to codify the necessary legal steps for „due diligence“ to work, and commissioning independent research organisations such as IPIS in Belgium to conduct a detailed mapping of all mining sites in Eastern Congo. More and more firms in the international electronics industry are rallying to one or several of these and other such initiatives.

ITRI, spurred into action by the UN reports and resolutions of 2008, has begun devising the most complete set of regulations for Eastern Congolese mineral trading to date. An ITRI policy discussion paper on „due diligence“ drafted in February 2009 set out initial steps „towards achieving our long term aim of ensuring the adoption and application of appropriate human rights, health and safety and environmental standards“<sup>64</sup>. The first would be to assemble as much information as possible; the second, similar to the German CTC programme: „In stable regions, with good governance, realistic mining regulations and a reasonable level of enforcement the opportunity will exist to attempt to verify the location of cassiterite sources and, following that, to develop standards and indicators which can be used to improve the environmental and social performance of ASMs, possibly through additional financial reward“. This concept of „fair trade“ applied to Congolese minerals „can only be taken with strong support from the supply chain“.

This was then developed into the „ITRI Tin Supply Chain Initiative“ (ITSCI) consisting of

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63 UN Security Council Resolution 1857, 22 December 2008

64 Towards a Responsible Cassiterite Supply Chain: Improved due diligence and steps towards voluntary industry declarations or audited certification. ITRI confidential discussion document, 10 February 2009

three phases:

„due diligence on formalised end of supply chain“ starting in July 2009;

„traceability and verification of mineral supply back to mine site“ starting in 2010 and extending the documentation of phase one back to the mine using certificates of origin;

and „a comprehensive due diligence system covering traceability and business ethics“ starting in 2010/11 and extending certification to standards similar to those of the German CTC system.

The results of Phase One appear to have been positive. According to the North Kivu section of the Congolese employers' federation FEC, Phase One has led to „a paper chain to ensure that each comptoir is legally established, meaning that it has all necessary documents and that its work follows the spirit and the letter of the Mining Code; a financial chain to ensure that comptoirs do not directly or indirectly finance armed groups; and repatriation, verifying that each comptoir repatriates 100% of its foreign exchange after export“<sup>65</sup>.

An expanded ITRI policy paper of October 2009, following the conclusion of Phase One of ITSCI, set out the next steps for Phase Two: „independent tracking of the mineral flow“ within the DRC, to be carried out by SAESSCAM and thus requiring this body's strengthening; and a more practical system of certification along the trading chain using a „code tracking system“ which can be easily verified all along the trading chain<sup>66</sup>. FEC points out that Phase Two implies the establishment of „trading centres“ („centres de négoce“) at which controls and documentation will be centralised and where certificates will be issued. To start Phase Two, ITRI in March 2010 announced „the immediate initiation of a pilot trial which will begin to track minerals and provide verifiable provenance information from individual mine sites in Eastern DRC“<sup>67</sup>.

ITRI has quickly gathered a lot of support. The Global E-Sustainability Initiative, bringing together leading companies in the telecommunications sector, announced its support for ITSCI in September 2009<sup>68</sup>, followed by the international tantalum-using industry organised in the Belgium-based Tantalum-Niobium International Study Center<sup>69</sup> and the European Steel Industry<sup>70</sup>. During a meeting in the US on 17 November 2009, these bodies formally decided to join international certification efforts: „Participants reached an agreement to develop a process certifying smelters who obtain tantalum through responsible sources. Participants also agreed to pilot a procurement process used by smelters down to the miners to ensure materials that the smelters purchase originate from socially and environmentally responsible mines“<sup>71</sup>. A „smelter verification working group“ involving twelve smelters has been set up and the NGO „Resolve“ has been commissioned to map the supply chain for tin, tantalum and cobalt.

The DRC government is also in favour. In October 2009, ITSCI met with strong approval at a meeting between ITRI and the government in Kinshasa: „The Democratic Republic of Congo supports the ITRI proposals... and is going to integrate them in the stabilisation plan already

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65 FEC presentation at EU Task Force meeting with the DRC government, Kinshasa 22 January 2010

66 ITRI Tin Supply Chain Initiative ITSCI: A Phased and Constructive Approach Towards Improved Due Diligence, Governance and Traceability. Discussion Paper Version 2, October 2009

67 ITRI Press Release, 19 March 2010

68 EICC/GESI Press Release, 16 September 2009

69 Letter from Tantalum-Niobium International Study Center to ITRI, 1 October 2009

70 Letter from APEAL (Association of European Producers of Steel for Packaging) to ITRI, 23 October 2009

71 EICC/GESI Press Release, 2 December 2009

operational on the ground.<sup>72</sup> The DRC government committed to a plan of action at a meeting with the EU Task Force in Kinshasa on 22-23 January 2010. Regarding Eastern Congo, many details are already present in the Stabilisation and Reconstruction Plan for Eastern DRC (Starec) adopted by the government and MONUC in March 2009 and which includes an economic element, „combining the struggle against illegal exploitation of natural resources and the harmonisation of cross-border regional economic relations in the framework of formal and controlled circuits“<sup>73</sup>.

The DRC „Promines“ project of the Ministry of Mines with help from the World Bank serves to orient government policy to develop the necessary rules and institutions. Promines (Programme intégré et multisectoriel de développement du secteur minier en RDC) was launched in 2009 as a way of realising the DRC government's objective to achieve rapid economic growth through a relaunch of mining on the basis of EITI and „the optimisation of activities along the entire management chain of extractive industry: access to resources, control of operation, collection of revenues, improved economic governance and revenue sharing, and efficient use of resources“<sup>74</sup>. Promines includes a reorganisation of artisanal and small-scale mining, an objective which has been DRC government policy since the DRC got a new Mining Code in 2002 but which has never been realised. The three complementary strands of „supply chain responsibility“, „government engagement“ and „development and capacity building“ are recognised to be interdependent and are to be developed concurrently<sup>75</sup>.

A further governmental level of coordination is being provided by the International Conference on the Great Lakes (ICGLR) which already on 30 November 2006 adopted a „Protocol Against the Illegal Exploitation of Natural Resources“<sup>76</sup> and which has set up a „Steering Committee on the Fight Against Illegal Exploitation of Natural Resources“, supported by Germany; this Steering Committee met in Bujumbura (Burundi) in April 2010 and essentially validated existing certification efforts. ICGLR now plans to organise third-party audits and set up a regional database; further steps are due to be discussed in Kinshasa in November 2010. The ICGLR work does not add new elements but it provides the required inter-governmental framework for cross-border implementation.

Complementary to all this, the OECD, basing itself on its own work in developing the „Risk Awareness Tool“, is contemplating a pilot project in the DRC on „Promoting Responsible Investment through Enhanced Due Diligence“ which „looks to provide practical due diligence guidelines to companies that supply from or engage in mining in conflict or fragile areas“. While the ITRI work principally addresses concerns of buyers, OECD as an inter-governmental body looks at wider political concerns and could, it is hoped, play a role in „consolidating existing standards“, „identifying legitimate tools for due diligence“ and relaying debate between industry and the UN Group of Experts<sup>77</sup>. An OECD expert meeting

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72 DRC Ministry of Mines Press Release, 8 October 2009

73 Starec, March 2009

74 Concept note for DRC Government/World Bank „validation workshop“ for Promines, Kinshasa, 18-23 March 2009, quoted in: *Le Potentiel*, 31 March 2009

75 This is how Promines was presented to an international meeting in Washington in May 2010. See BSR: *Conflict Minerals and the Democratic Republic of Congo: Supply Chain, Government and Capacity Building. An Overview for Participants in the DRC Conflict Minerals Forum*, May 2010

76 Available on [www.icglr.org](http://www.icglr.org)

77 OECD Pilot Project in the Mining Sector: Private Sector Consultation Summary Report, 8 December 2009

in April 2010 discussed draft due diligence guidelines<sup>78</sup>.

Much of this is being driven forward by pressure from faith-based investors in the US who are also strongly pushing the Conflict Minerals Act in Congress. In May 2010, a high-level meeting between industry representatives and the US State Department discussed „steps that can be taken to ensure that supply chains do not contain conflict minerals that have fueled the ongoing conflict in the eastern DRC“ as „part of a larger process initiated by the Department of State and other agencies to support multilateral due diligence guidelines that reduce illicit exploitation of natural resources and promote legitimate and responsible sourcing from the DRC“<sup>79</sup>.

Slowly, the various concepts and approaches are coming together. „Due diligence“ provides companies with minimum standards to follow; certification provides the DRC government with a way of controlling their implementation; „centres de négoce“ are the places where this is put into practice. There is a fundamental optimism at the heart of this approach which is welcome, but this optimism has not yet met its reality test.

### *Boycott, Policing, Regulation*

International pressure groups which lobby for more international engagement against mass displacement, sexual violence and human rights violations in Eastern Congo do not share this optimism. While „due diligence“ and „certification“ schemes are evolving, international organisations are racking up their own pressure, arguing that as long as the situation on the ground remains catastrophic, companies should keep their hands off the Congo unless and until the new sets of rules are actually in place.

In April 2009, the „Congo Conflict Minerals Act“ was introduced into the US Congress to require companies active in mineral purchases in Eastern Congo to exercise due diligence or face punishment<sup>80</sup>. This was the origin of the legislation finally passed in June/July 2010. Discussions about this have accompanied all further developments and given a clear signal that industry self-regulation is not seen as sufficient.

In May 2009, the Belgian trading firm Traxys, named in the 2008 UN Group of Experts report as having bought minerals from Eastern Congo originating in FDLR zones, suspended all DRC purchases and blamed the UN Group of Experts: „Traxys requested specific solutions, remedies, and/or preventative steps that would allow it to continue its legitimate and law abiding commercial transactions in the Congo without the implication of wrongdoing. No recommended course of action was forthcoming. As such, Traxys determined that irrespective of any possible measures it could take, it would not be able to allay the concerns of this UN delegation to its satisfaction. Traxys subsequently announced its decision to suspend mineral sourcing activities in the eastern Congo.“<sup>81</sup>

Following the beginning of Phase One of the ITRI plan ITSCI, a second major buyer also

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78 OECD: Corporate Due Diligence Guidelines for the Supply Chain of Conflict Minerals: Outcomes of the Second Expert Meeting of the OECD-hosted Working Group. Paris, 28 April 2010

79 US State Department Press Release, 14 May 2010

80 Details on [www.enoughproject.org](http://www.enoughproject.org) (see Note 1)

81 Traxys Press Release, 11 May 2009

pulled out of Eastern Congo: Thaisarco, the Thailand-based tin smelting subsidiary of the UK-based multinational AMC: „Despite significant progress towards implementation of the next stage of this initiative, negative campaigning from advocacy groups and adverse coverage in sections of the international media is undermining the credibility of the process. Although acting entirely lawfully, the threat of misleading and bad publicity remains for anyone who participates in the DRC tin trade. These pressures have led Thaisarco to suspend its purchases from the DRC. It is not alone in this respect.“<sup>82</sup>

These developments threatened to cause the entire tin export industry of Eastern DRC to collapse. This may have spurred the DRC government to seek more active cooperation with „due diligence“ and certification efforts than before. In its declaration announcing its support for ITSCI, the government said: „The Ministry of Mines and ITRI will be working together to correct the weaknesses in the traceability of the supply chain and to defend the interests of the Democratic Republic of Congo with respect to cassiterite to ensure that the products mined in the East of Congo are not subject to an embargo“<sup>83</sup>. Traxys and Thaisarco were „requested“ to resume their purchases, foreign investors were „invited“ to invest in mineral production.

However, international pressure amplified. In December 2009, a conference in New York on „combating the militarization of mining in the DR Congo“, organised by the „Center for International Cooperation“ with support from the Open Society Institute and the German mission at the United Nations, discussed extraordinarily wide-ranging alternative ideas for international policing of Eastern Congolese mining: „complementary policies to an international certification scheme such as a policing mechanism with the capacity to conduct spot checks at mines and with middlemen“<sup>84</sup>.

This was presented as an alternative to DRC governmental supervision which was unreliable and as a complement to industrial self-regulation which was untrustworthy. „The monitoring currently carried out by the Congolese government can easily be manipulated and tampered with... Due diligence is a good idea in theory, but very difficult to implement given the corrupt administrative apparatus it would have to rely on and the security situation in the mining areas“<sup>85</sup>. The conference agreed that while due diligence „should be undertaken immediately by companies“ and the more complex certification schemes „are important goals“ it was important further to establish „an international monitoring mechanism... with Security Council backing“ and „a robust third party oversight mechanism, which would be officially mandated by the Congolese government and the Security Council, but independently funded“, in order to work out a „sanctioning mechanism“, „provide spot checks“ and conduct „targeted“ mapping<sup>86</sup>.

There followed a Concept Note on „Independent Oversight for Mining in the Eastern Congo“ - a mechanism which, mandated by the Congolese government and working with it, would „provide a definition of illegal trade in minerals“ and „ascertain which traders are violating this norm.“ The DRC government would then „designate an institution that would be charged with sanctioning individuals who violate this norm, including government officials and army

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82 AMC Press Release, 18 September 2009

83 DRC Ministry of Mines Press Release, 8 October 2009

84 CIC: Combating the Militarization of Mining in the DR Congo. A Technical Workshop & Conference, 2-3 December 2009

85 *ibid.*

86 CIC Technical Workshop Highlights, 3-4 December 2009

commanders... an independent magistrate, special court or review board are possible arrangements“. This institution, funded by international donors, would include a „mapping cell“, receive and process „intelligence“, work with the UN Joint Human Rights Office and „be led by approximately fifteen international and Congolese thematic experts“<sup>87</sup>.

It is unclear how such a mechanism, effectively placing the Eastern Congolese mining sector under international trusteeship, could escape the scepticism being levelled against existing due diligence and certification programmes. The direction of the debate has also fuelled nationalist Congolese suspicion that a foreign take-over of DRC mining is imminent. „The mining war has begun“ (La guerre du contrôle des puits miniers a commencé) the leading Kinshasa daily *Le Potentiel* titled on its front page on 18 February 2010, pointing to reports by Global Witness and ICG as well as UN resolutions as a sign that „those who in the past supported armed groups and initiated war in Kivu... are organised and will put up fierce resistance if you want to take the cheese out of their mouth“<sup>88</sup>.

In January 2010, investors in the US electronics industry issued a joint call for a complete boycott of Congolese minerals: „A coalition of 59 investors, representing almost \$200 billion in assets under management, have today issued an Investor Statement requesting that companies in the electronics and other industries ensure that minerals from the Democratic Republic of the Congo (DRC) do not enter their supply chains and the consumer products they manufacture“<sup>89</sup>. There followed a period of intense lobbying to get the proposed Conflict Minerals legislation through Congress.

In this context, proposals to place Congolese mining under international supervision of some kind represented a compromise between existing practices and calls for a complete stop to the Eastern Congolese mineral trade. This was a result of extensive and often heated debate between the various organisations involved, with those most active in the DRC arguing most strongly against a shutdown of Congolese mining.

At the OECD expert meeting of April 2010 on draft due diligence guidelines, it was noted that there could be a contradiction between the development of common standards and the effective treatment of local conflict situations and specific local conditions<sup>90</sup>. Another important counterpoint to the „oversight mechanism“ analysis is the work of the UK-based Resource Consulting Services which stresses the need to encourage a proper Congolese lead in mineral trade reform<sup>91</sup>. Arguing that „military control of the trade in minerals is another symptom of general insecurity in Eastern DRC, rather than the principal cause of insecurity and of sexual violence as some mistakenly stipulate“, and that therefore „interventions in the mineral trade are by themselves not an appropriate response to address the insecurity crisis in Eastern DRC“, the RCS consultants suggest that the various international reform initiatives currently at work can only succeed in combination with „larger governance reform processes“. Strengthening those parts of the DRC administration interested in governance reform, co-ordinating the various international initiatives under the Thematic Group on

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87 Jason Stearns & Steve Hege: Independent Oversight for Mining in the Eastern Congo? A Proposal for a Third Party Monitoring & Enforcement Mechanism. CIC Concept Note, January 2010

88 *Le Potentiel*, 18 February 2010: „Terrorisme, banditisme, pillage des ressources: La 'guerre du contrôle des puits miniers' a commencé“

89 „Investors Urge Companies to Keep Minerals from War-Torn Congo Out of Supply Chains“, Sustainability Investment News, 14 January 2010

90 See Note 43

91 Resource Consulting Services, „Promoting Legal Mineral Trade in Africa's Great Lakes Region: A Policy Guide“, London, May 2010

Mining set up to run the Promines programme while at the same time giving local civil society „a seat at the table“ and implementing revenue transparency at the export stage are among the key recommendations.<sup>92</sup>

Further debate on these issues took place under the coordination of the organisation „As You Sow“<sup>93</sup> which organised lobbying with Congress and attempted to bring NGOs together to find a common and workable position. In May 2010, a DRC Conflict Minerals Forum in Washington brought together 35 industry representatives, 45 NGO representatives, a dozen investor organisations and ten representatives from government entities. The meeting came to the conclusion that „gaps appear to exist in current efforts“ and „a holistic approach is needed that includes efforts in supply chain, diplomacy and support for local development“<sup>94</sup>.

Specifically, the meeting recommended:

„efforts extending beyond the supply chain“, that is to reduce conflict as such, strengthen the Congolese government, civil society and the local economy;

addressing „weaknesses“ in „supply chain efforts“ by moving beyond the electronics and tin industries, strengthening „local monitoring“ and addressing tungsten and gold.

And: „It is critical that ongoing efforts take into account the perspective of local stakeholders within the DRC“.

As a result of this meeting, a series of working groups has been set up which will also now discuss on how to implement the new US legislation. It is likely that the US State Department will finance a permanent US NGO presence in Eastern Congo, presumably Goma, in order to help draw up the required strategy. It remains to be seen to what extent local Congolese stakeholders will be involved not just in the work on the ground, but also in the conceptual debate on the international level.

### *Conclusion: Bringing the Congolese back in*

In order to analyse the potential impact of the various international initiatives described, it is important to note the progress that has already been made. Since 2006/07, when the problems of the Eastern Congolese mineral trade beyond the notion of „conflict finance“ began to be put on the table<sup>95</sup>, many of the most obvious anomalies have been reduced or eliminated: incoherent and discrepant statistics, shoddy paperwork, levy of illegal taxes and charges at the border by unauthorised services, informal border crossings on private land, smuggling in the night, deliberate underreporting on the level of comptoirs and points of exports. Today, registered cassiterite and coltan exports are close to known mining capacity and fraudulent exports are a fraction of what they were.

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92 Op. cit., §24-54

93 „As You Sow“ ([www.asyousow.org](http://www.asyousow.org)) was founded in 1992 to „promote corporate environmental and social responsibility through shareholder advocacy, grantmaking, and innovative legal strategies“, according to its own website. Its DRC work is more recent. In January 2010, its website published a statement calling for a boycott of Congolese minerals:

94 This and the following from: Democratic Republic of Congo Conflict Minerals Forum, May 12-13 2010, Forum Notes (circulated after the meeting)

95 For example in the Pole Institute report „Rules for Sale“ (Goma, 2007) and the associated programme „Trading for Peace“ of DfID

This is definitely progress, yet Eastern Congo has not found peace. This suggests either that progress has not gone far enough or that in fact conflict is due to other things than the mineral trade and that therefore the underlying analysis is incorrect. Both of these suggestions contain part of the truth.

Progress has not gone far enough in the sense that illegal empires of armed actors controlling key sectors of the Eastern Congolese economy remain in place, for example around the FDLR, the gold and charcoal trade, and also parts of the cassiterite trade from Bisie. All militarised actors in the Kivus, including parts of the FARDC, remain involved in economic activities outside their remit and retain the capacity to defend economic interests with military force. This goes far beyond mineral exports. It concerns every sector of the economy – petroleum imports, cattle ranching, farming, service delivery, markets, and the capacity to raise revenue.

The division between „state“ and „non-state“ actors, between „legal“ and „illegal“ action is increasingly blurred. Given that the Congolese state throughout its history has been at the service of private profit and not of the general interest, this should come as no surprise and should not be regarded as a consequence of conflict. Rather, conflict should be regarded as a consequence of this inbuilt ambivalence of state power in the DRC. This underlines the flaw in the underlying analysis identified earlier in this paper: that the problems of Eastern Congo could be solved by strengthening the government side in the conflict and by allowing this side to impose „order“, and that a new set of rules for the mineral trade will bring peace where before there was war.

It is increasingly clear that strengthening the « authority of the state“ in Eastern Congo does not automatically reduce conflict, disorder and insecurity. It can even increase it if the forces acting on behalf of the „state“ use it to further their own interests and seek an administrative solution to conflicts they have been unable to win on the battlefield. This holds regardless of whether any of the parties to the conflict enjoy popular legitimacy or on the contrary should be sent to the ICC in The Hague.

State authority in the Kivus has often thrived on disorder, using the conscious division of the population and the pitting of one community against another as an instrument of power. Even today the government and FARDC rely heavily for their authority on local militarised interests and on allowing their local allies and representatives to use violence. The state can thus be an agent of instability, and in recent years many non-state armed actors have found that it is quite easy to establish a „half-in, half-out“ relationship with state institutions. In effect, the Congolese government administration in the East repeatedly works as a „state for sale“, where the cloak of legitimacy is conferred on the highest bidder, though not necessarily for any prolonged period of time.

It is therefore perfectly possible, under the certification and due diligence schemes now on the table, to claim to have solved a decades-old conflict about control of a mineral-rich region and the control of the trade of its produce without addressing any of the issues involved, without resolving conflict on the ground and without contributing to peace and human security in a manner visible to the local population. One party can easily bribe itself into a government-backed traceability and certification scheme and then collaborate with „due diligence“ processes by pointing out that it has government backing and collaborates with FARDC while the opposing party lays an illegal claim and collaborates with rebel militia. This opposing

party will then be legally excluded from trade. But this kind of situation is more likely to exacerbate conflict in the medium term. And what the local population actually thinks is irrelevant.

Furthermore, the legacy of the flawed analysis that „illegal exploitation“ of natural resources lies at the heart of the Congolese conflict continues to obscure simple truths. Belligerents may use natural resource revenues in order to wage war, but this does not mean they wage war in order to use natural resource revenues. The fact that conflict continues and that the mineral trade continues does not mean that if the mineral trade stops, conflict also stops; the opposite suggestion would be equally absurd. It is therefore unrealistic to assume that mineral trade reform can by itself bring peace. Mineral trade reform is important in its own right, but one should be modest about its impact on the wider society and abandon inflated expectations.

Mining conflicts in the Kivus are generally linked to older conflicts about land ownership, as land was an object of contention long before minerals became economically relevant. When mining begins on a piece of land whose control is already contested, conflict may exacerbate as the land is suddenly much more valuable. If then various levels of government decide to grant exploration permits to mineral companies on such land, conflict will degenerate even further. The ensuing power struggle can then be carried out on several levels: before the courts; through lobbying with various state institutions; through de facto control; through military force. It may appear on the surface to be a conflict about minerals, but it is in reality much more, and it is insoluble by reforming the mineral trade alone.

Ongoing conflicts about control and ownership of the mines of Bisie (North Kivu) and Nyabibwe (South Kivu), which regularly degenerate into violence and are inextricable on a strictly judicial basis, prove the point<sup>96</sup>. On 12 August 2009, scores of people died in Bisie as a group of armed men headed by a trader with Mai-Mai and FDLR links, who apparently had debts to settle and had unsuccessfully offered his services to various mining companies, attacked civilians<sup>97</sup>. On 29 July 2010, fighting broke out in one of the Nyabibwe mines as armed men in the service of a local landowner who claims ownership of the mines tried to expel artisanal miners<sup>98</sup>. Bisie and Nyabibwe are two of the prime areas in which the various international efforts at trade regulations are most likely to be tested.

It may even be the prospect of reform that in itself that generates new conflict, as there is much to be gained by obtaining sole control of these areas in time for greeting the international monitors, observers, consultants and regulators.

Even the modest direct impact of mineral trade reform is unlikely to be achieved if traceability, due diligence and certification schemes are not set up together with the local population and do not win local understanding and backing. The concentration of economic and political power in the hands of the few is one of the underlying long term reasons for the persistence of conflict not just in Eastern Congo, but in the DRC as a whole. Most people in Eastern DRC's mining areas are disempowered in every sense of the word, yet in the end it is they who have to be able to implement these schemes in their everyday survival economy. If

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96 See eg „Soixante-douze heures dans le carré minier de Bisie“, Pole Institute, January 2010

97 For the official account of this attack see „Massacre des populations civiles à Walikale par la coalition Mai-Mai-FDLR“, Goma, 13 August 2009, on the North Kivu Provincial Government website [www.provincenordkivu.org](http://www.provincenordkivu.org)

98 Personal communication, 30 July 2010

complicated new rules are only accessible to, and understood and implemented by, a small and wealthy elite, this will exacerbate social tension and conflict by conferring international recognition onto this elite to the exclusion of everyone else.

The key to economic and political renewal in Eastern Congo lies in the lessening of popular dependence on the select few with access to money, machine guns and ministers. Reform programmes conceived outside the country can only legitimately claim support on the ground if they contribute to this goal. Bringing local people back in is therefore the key to the success of reform programmes for the mineral trade in Eastern Congo.

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