

# Access to Justice: Human Rights Abuses Involving Corporations

DEMOCRATIC REPUBLIC OF THE CONGO



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Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. It is also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

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The mechanisms within the legal system of the Democratic Republic of the Congo designed to provide legal remedies for victims of human rights abuse are generally ineffective. The Constitution formally guarantees a range of human rights, while criminal law, civil law, and labour regulations extend to the conduct of business entities. In addition, the Mining Code provides for a compensation procedure as between individuals and corporations. Nevertheless, access to justice remains largely out of reach for most victims of corporate human rights abuse. Political control of the judiciary typically undermines the proper application of the law. The costs of proceedings are often prohibitive for claimants and inflated by a corrupt administration. Further, customary justice and the prevalence of amicable settlements often replace full and fair judicially-determined remedies. The study provides a number of recommendations aimed to facilitate access to justice, including legislative reform, the strengthening of the judiciary, the establishment of an international civil society network in support of Congolese rights defenders, and the exploration of non-judicial mechanisms to complement the judicial process.



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Involving Corporations**

**The Democratic Republic of the Congo**

**A Project of the International Commission of Jurists**

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# Access to Justice:

## Human Rights Abuses Involving Corporations

The Democratic Republic of the Congo

A Project of the International Commission of Jurists



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COMMISSION  
OF JURISTS

This study was researched and drafted by Carlos Lopez (International Commission of Jurists) and Patricia Feeny (Director of Rights and Accountability in Development- RAID). Antonietta Elia, Alec Milne, and Emilia Richards provided research assistance. Indra Pillay did the editing and Adam Wolstenholme assisted in the review. Jan Borgen did the final review. This study is part of the larger ICJ project on Access to Justice and Legal Remedies in cases of human rights abuse involving companies under the direction of Carlos Lopez.

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## Introduction

This report addresses the question of human rights abuses committed in the Democratic Republic of the Congo (DRC), by or with the participation or collaboration of business corporations and the remedies available to the victims. It draws a map of legislation and practice as well as the practical obstacles that hinder the effectiveness of those remedies. It highlights problems that are usually neglected in other analyses which focus on the dramatic scale of human rights violations that are committed by the armed forces, police, and armed rebel groups, particularly in the Eastern part of the country.

Access to justice and the availability of effective legal remedies are crucial to the general protection of human rights, and also in addressing violations by businesses. They are also essential to the work of judges and lawyers who promote the Rule of Law and protect human rights. Nevertheless, access to justice is hindered by a number of obstacles both general and unique to corporate human rights abuses. Scrutiny of national law and practices in this area will assist the international community in discovering new ways of addressing the challenge of corporate human rights abuse.

To contribute to an understanding of the problem and to assist in the formulation of a new agenda to strengthen access to legal remedies for business abuses, the International Commission of Jurists (ICJ) has undertaken a project on Access to Justice for victims of corporate human rights abuse. This project has produced a series of country studies on Brazil, Colombia, the People's Republic of China, India, the Netherlands, Nigeria, the Philippines, Poland and South Africa, along with surveys from additional countries. The present study is the latest of these country studies.

The research for this country study has primarily been undertaken in Kinshasa and Katanga. Lubumbashi, the capital of the Province of Katanga, is the DRC's main economic centre. Being a copper and cobalt mining area, a great number of international and Congolese companies are based in the province and their activities have given rise to numerous problems and complaints, though most have not been brought before the courts.

The main sources of information for the study were the review of national legislation and literature and interviews with members of the legal profession practising in the DRC; in Kinshasa, Lubumbashi, Kolwezi and Likasi; these included judges, military and civilian prosecutors, and lawyers. Human rights organisations, workers, affected communities and unsuccessful claimants were also interviewed, and the views of several companies were taken into account.

While the main legal texts are available online<sup>1</sup> and are accessible for most practicing lawyers, the raft of relevant ministerial decrees (*arrêtés*) is slowly making its way into the legal domain and becoming more accessible. There is a lack of legal tradition and continuity as decisions are not systematically published and disseminated, meaning that jurisprudence is not accessible to lawyers and judges. Decisions of the Supreme Court used to be published on a regular basis but publication is now done sporadically. Some decisions have now been posted on the Ministry of Justice's website.<sup>2</sup>

This report has been written against the social and political backdrop of a country in transition, a country with severe institutional and Rule of Law deficits and the legacy of armed conflict (which is still ongoing in certain regions) and in the midst of exuberant natural wealth. The DRC is a country with vast natural resources, in particular minerals and forests, which have been the object of illegal or unregulated exploitation for the most part of the DRC's existence as an independent country and have undeniable links with the generation and perpetration of armed conflict and the committing of serious human rights violations in that context by all participants. The United Nations Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003, published in August 2010 and presented to the United Nations Human Rights Council, starts, in the chapter relating to "Acts of violence linked to natural resource exploitation", as follows:

*'It would be impossible to produce an inventory of the most serious violations of human rights and international humanitarian law committed within the DRC between March 1993 and June 2003 without considering, however briefly, the role of natural resource exploitation in the perpetration of these crimes.'*<sup>3</sup>

Indeed, no enquiry about the Rule of Law, human rights and the judiciary in the DRC can ignore the recent past of armed conflict, and the political and institutional crisis that has left its mark on existing laws and institutions and influences the process of change. Against this background, an element that stands out in the context of the research that gave rise to the present report is the sheer scale of human rights abuses committed in the country, and the links of economic activity

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1. Some of the most complete compilations of laws can be found at <http://www.leganet.cd/legislation.htm>, and also at <http://congolegal.com>. All the main Congolese laws have been compiled and published as *Codes Larciens de la République Démocratique du Congo; Larcier & Afrique Éditions, Belgique, 2010, 9 vols.*
  2. International Legal Assistance Consortium and International Bar Association Human Rights Institute Report (hereinafter IBAHRI and ILAC), *Rebuilding Courts and Trust: an assessment of the needs of the justice system in the DRC*, August 2009, p. 24.
  3. *United Nations Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, para. 726, p. 349.

and business enterprises with many of those abuses. Several reports by United Nations bodies, non-governmental organisations and academics have highlighted the modalities in which the illegal exploitation and trade on natural resources have helped the perpetuation of armed conflict and abuses in the DRC. In this context, this report evokes the fact that many cases have not been properly investigated and those who suffered abuse have not yet found redress.

The DRC is also a country where peace and democracy are relatively new and still in consolidation. The 2002 Agreement at Sun City, South Africa, between the main Congolese warring groups and the DRC Government and the separate agreements signed with Rwanda and Uganda marked the end of the so-called “Second Congolese war”. These agreements were followed by the 2003 “All Inclusive agreement on the Transitional Government”, the appointment of a transitional Government and an interim Constitution. The elections of 2005 and the subsequent entry into force, in 2006, of the newly approved Constitution completed the institutional framework for the transition. Still, armed conflict and political unrest have continued in some parts of the country.

This report examines the existing legal obligations and liabilities of companies under existing Congolese law, the remedies available to victims of corporate actions, and the obstacles preventing individuals and communities from obtaining an effective remedy or even from seeking such a remedy in a court of law or other bodies. It concludes with recommendations for legal and institutional reforms.

## 1. Legal Liability of Corporations under National Law

The DRC is a civil law country and the main features of its legal system are still primarily based on Belgian law. Customary law is an important source of law in the DRC, where the majority of people still live in rural areas, and serves to settle most disputes in the country. The various local customary laws, though gradually losing their force, and in theory in the process of being superseded by magistrates' courts, govern both individual social and communal rights as well as property rights, especially inheritance and land tenure in the various traditional communities in the country.<sup>4</sup>

The sources of the Congolese legal system include, apart from the Constitution and laws, international treaties, administrative regulations, and custom. Court decisions are binding only in the instant case and for the parties to the dispute and they do not constitute legal precedent.<sup>5</sup>

### 1.1 International and Regional Human Rights Treaties

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

At a regional level the DRC has ratified the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of June 1998, and the African Charter on the Rights and Welfare of the Child. It has also ratified or acceded to the four 1949 Geneva Conventions on the protection of victims or armed conflicts, their additional Protocols I and II, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and the Rome Statute of the International Criminal Court. A table of treaties

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4. An act of 1978 was supposed to ensure that magistrate courts (*Tribunaux de Paix*) would gradually replace customary courts. The report of IBAHRI and ILAC (p. 25) explains that an ordinance of 1982 (*Ordonnance Loi No 82-020 portant code de l'organisation et de la compétence judiciaires, 31 Mars 1982*) provides for the continuation of the customary law system in the interim.
  5. Dunia Zongwe, Francois Butedi and Clement Phebe, "The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview". Updated version 2010, available at: [http://www.nyulawglobal.org/globalex/Democratic\\_Republic\\_Congo1.htm](http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.htm)



signed or ratified by the DRC is offered in Annex 1. In addition, the DRC is bound by customary international law.

The DRC is party to the Cotonou Agreement, which governs relations between the European Union and developing countries in Africa, the Caribbean and the Pacific. The agreement creates obligations for States party to it to adhere to the Rule of Law and respect fundamental human rights.

Article 215 of the Constitution provides: “Duly concluded international treaties and agreements shall have, following publication, higher authority than laws...”. This provision confirms the monist nature of the Congolese legal system.<sup>6</sup> Article 153 (4) requires judges to directly apply international treaties: “The courts and tribunals, both civil and military, shall apply duly ratified international treaties, laws and regulatory acts, provided they are in accordance with the laws and with custom and are not contrary to public order or good morals”. A joint reading of these two provisions would require judges and magistrates to apply international treaties over domestic law in the case of conflict. However, save in exceptional situations, the judge would be able to read international standards into the domestic law through interpretation.

As a general rule, with the important exception of the Rome Statute (discussed below), DRC courts have been reluctant to directly rely on international law in the absence of implementing legislation.<sup>7</sup> Moreover, judges, lawyers and the general population have only a limited knowledge of international legal concepts; as a result they are not generally, relied upon during court proceedings.

## 1.2 The Constitution

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On 18 February 2006 a new Constitution, ratified by the Congolese people in a referendum held in December 2005, came into effect. The Constitution marks the entry of the DRC into a democratic era where respect for the Rule of Law and respect and promotion of human rights would be the fundamental parameters of social and political life.

The Constitution guarantees respect for fundamental human rights, including equality before the law (Article 12), the right to be heard and represented before a court of law (Article 19), freedom of expression (Article 23) and freedom of information (Article 24). The Constitution also enshrines social and economic rights including the right to health and food security (Article 47), the right to a healthy environment (Article 53); the right to compensation and/or remedy for pollution or destruction resulting from economic activity (Article 54). A number of

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6. Democratic Republic of the Congo, Ministry of Human Rights, “Eighth, Ninth and Tenth Periodic reports to the African Commission on Human and Peoples Rights”, p. 30-31, (June 2007).

7. UN Mapping report, para. 889 p. 410, suggests that only in a few cases have military tribunals applied international criminal law.

provisions address the behaviour of economic actors and are especially relevant to corporations operating in the extractive sector. Article 55, for example provides that transport, import, stockpiling and dumping is under the jurisdiction of the State and that dumping toxic waste or other pollutants is a punishable offence. Article 56 provides that any agreement or arrangement, which deprives the nation, natural or legal persons of all or part of their means of existence, extracted from their own or natural resources, without prejudice to international provisions on economic crimes, constitutes the crime of *pillage* and is punishable by law.

The Constitution affirms these norms are binding both for the State and for private persons.<sup>8</sup> This provision may also be interpreted as providing for business enterprises' to respect constitutional rights, although there is no known jurisprudence in this sense. The Congolese Constitution provides for a clear separation of powers and the independence of the judiciary (Article 149).

However, the Constitution itself does not provide for specific remedies that people can invoke in protection of their human rights. Remedies thus are left to ordinary legislation in the absence of which, Constitutional norms, though invoked by human rights advocates, may not directly be protected by the courts. Nevertheless, this is a potentially crucial avenue to which lawyers, judges, Congolese civil society and the international community should give much more attention.

### 1.3 Economic law and company law

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The legal concepts governing companies in the DRC can be found in a series of Decrees and ordinances compiled in the Civil Code and the commercial code. The fundamental norm dates back to 1887 and was enacted as a Royal Decree by the Belgian King. A number of decrees and laws focussing on aspects of business in the DRC have come afterwards but have not totally replaced the structure and fundamental concepts laid out by this old norm.

Under Congolese law a company is based on “a contract by which two or several persons agree to do something together with a view to sharing the resulting profits”.<sup>9</sup> It is a requirement that in order to carry out their business activities, foreign investors set up a Congolese entity.<sup>10</sup> There are various types of companies, the most significant being the private limited liability companies, (*société privée*

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8. Article 60, ‘*Le respect des droits de l’homme et des libertés fondamentales consacrés dans la constitution s’impose aux pouvoirs publics et à toute personne.*’

9. Décret du 27 février 1887, arrêté royal du 22 juin 1926, Décret du 24 mars 1956, Code Civil Livre III (articles 446.1 à 446.6). Article 446.1 of the CCL III: “*un contrat par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun en vue de partager le bénéfice qui pourra en résulter.*”

10. Loi N° 004/2002 du 21 février 2002 portant Code des investissements, Article 8. The Mining Code Article 23 (b) confirms that foreign companies must set up a Congolese subsidiary. Foreign companies and scientific entities may obtain mine licences for the purposes of research.

à responsabilité limitée, SPRL) and public limited liability companies (*société par actions à responsabilité limitée, SARL*). A SARL must have a minimum of seven shareholders and must obtain authorisation from the President. Most of the joint ventures between international mining companies and state-owned enterprises, like *La Générale des Carrières et des Mines (Gécamines)* are ‘*sociétés mixtes*’, but are treated in the same way as SARLs. By law companies have a legal personality that is distinct from that of their members or shareholders.<sup>11</sup> The law accepts now that even a single individual setting up a company is legally separate from the individual fully owning it.

Company directors have the power to manage the company and can be held personally liable for a failure to fulfil their fiduciary legal obligations and for any wrongful acts committed under their management.<sup>12</sup>

In April 2009, some of the Congo’s main parastatal companies, including *Gecamines* (the copper and cobalt conglomerate), were transformed into commercial entities or public establishments (*société commerciale* or *établissement public*), where the state holds shares and keeps the ultimate control (akin to a veto power), but this measure will not give rise to the creation of a new legal person nor generally alter existing contractual agreements.<sup>13</sup> The degree of control that the DRC State can legally exert over these kinds of corporations is crucial for the attribution of legal responsibilities.

The Investment Code<sup>14</sup> sets out the general obligations of foreign investors and specifies the incentives available to them. Performance requirements agreed upon initially with the Congolese Agency for Investment Promotion (*Agence Nationale pour la Promotion des Investissements, ANAPI*) include a timeframe for investment, the use of Congolese accounting procedures and periodic authorised audits, the protection of the environment, periodic progress reports to ANAPI, and the adherence to international and local norms applicable to goods and services.<sup>15</sup> The investment code provides for equal treatment between foreign and

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11. Article 1 of the decree of 27 February 1887: “L’article 1er du décret du 27 février 1887 reconnaît aux sociétés une personnalité juridique distincte de celle des associés”.

12. *Ibid.*

13. Décret N° 091/12 du 24/04/2009, *Etablissant la Liste des Entreprises Publiques Transformées en Sociétés Commerciales, Etablissements Publics et Services Publics*.

14. Loi N° 004/2002 du 21 février 2002 portant Code des investissements at [http://www.anapi.org/nouv\\_code\\_invest-2.pdf](http://www.anapi.org/nouv_code_invest-2.pdf)

15. “Toute entreprise est tenue au respect des obligations générales suivantes – tenir une comptabilité régulière conforme au Plan Comptable Général Congolais; – accepter tout contrôle de l’administration compétente; – assurer la formation et la promotion du personnel conformément au programme agréé; – respecter la réglementation en matière de change et de protection de l’environnement et de la conservation de la nature; – transmettre semestriellement à ANAPI, les données significatives relatives au degré de réalisation de l’investissement et de l’exploitation pendant que l’entreprise est sous le Régime du Code ; – respecter la réglementation en vigueur en matière d’emploi, notamment à compétence égale employer en priorité les nationaux ; – se conformer aux normes de qualité nationales et internationales applicables aux biens et services produit.” Code des Investissements, Article 31.

Congolese individuals and companies,<sup>16</sup> but in practice, foreign workers are taxed more heavily on their income. Investors also have the duty to provide technical and managerial training for Congolese nationals. Some economic activities are governed by specific laws, such as the Mining Code.

In December 2009, the Congolese parliament approved the DRC's accession to the Organization for the Harmonization of Business Law in Africa (*Organisation pour l'Harmonisation du Droit des Affaires en Afrique* – OHADA). The objective of OHADA is to simplify business legislation by providing a modern body of laws widely applicable across the Member States. OHADA is designed to encourage the free flow of investments, cross-border trade, legal certainty and readily available jurisprudence, political stability, economic growth and regional economic integration, to the benefit of both the international investors and Member States. The Uniform Acts do not provide for corporate criminal liability.<sup>17</sup> The DRC will have to implement changes to its existing legislation and accounting plan (*le "Plan Comptable Général Congolais"*) to comply with OHADA's accounting rules.<sup>18</sup>

The Mining Code, Mining Regulations and the Forest Code (discussed below) set out more detailed obligations for companies and operators in the extractive sector.

## 1.4 Labour Code

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The DRC's labour legislation was modernised by the adoption of the October 2002 Labour Code,<sup>19</sup> which takes into account a series of International Labour Organisation's conventions and recommendations. The Code provides for the control of labour practices and governs recruitment, contracts, the employment of women and children, and general working conditions. The Code also provides for equal pay for equal work without regard to origin, sex, or age. It prohibits the worst forms of child labour and sets the minimum age for work at 16 years. Employers must cover medical and accident expenses. Larger firms are required to have medical staff and facilities on site, with the obligations increasing with the

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16. Articles 23 and 24.

17. On October 17 1993, 16 African States signed a treaty known as the *Organisation pour l'Harmonisation du Droit des Affaires en Afrique* (Organization for the Harmonization of Commercial Law in Africa; The OHADA Treaty). The Treaty left open the possibility of other African countries becoming members, as the central concept of the Treaty is the promotion of African economic integration. OHADA does not however provide companies with criminal responsibility: "A la différence de certaines législations pénales, l'Acte uniforme n'a pas consacré la responsabilité pénale des personnes morales." Commentary, OHADA, "Dispositions Pénales, Acte uniforme du 17 avril 1997 relatif au droit des sociétés commerciales et du groupement d'intérêt économique", p.535, (2002).

18. CGAP (Consultative Group to Assist the Poor) 2007, "Policy Diagnostic on Access to Finance in the Democratic Republic of Congo (DRC)". Available at: [http://www.cgap.org/gm/document-1.9.5070/diagnostic\\_Congo.pdf](http://www.cgap.org/gm/document-1.9.5070/diagnostic_Congo.pdf)

19. Loi N° 015/2002 du 16 octobre 2002 portant Code du Travail, Available at: [http://www.anapi.org/code\\_travail-2.pdf](http://www.anapi.org/code_travail-2.pdf)

number of employees. Employers must provide family allowances based on the number of children, and paid holidays and annual vacations, based on the years of service. Employers must also provide daily transportation for their workers or pay an allowance in areas served by public transportation. The Ministry of Labour must grant permission for staff reductions.

## 1.5 Criminal law

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Congolese criminal law, which is mainly set out in the 1941 Criminal Codes, can be divided into two parts: the ordinary Criminal Code and the Military Criminal Code. The scope of application of each of these codes has been, and continues to be, problematic. The Code of Criminal Procedure and the Code for the Military Criminal Procedure, respectively, provide the rules of application of the ordinary and the military criminal provisions.

### 1.5.1 Criminal Code

It is generally understood that the ordinary Criminal Code,<sup>20</sup> other than in relation to specific provisions relating to economic crimes, does not establish criminal liability for legal persons. However, company directors are responsible for the way in which they discharge their obligations and the faults committed under their management. They can also in relation to company liabilities be held singly or jointly responsible if, for example, they have compromised the financial situation of the company by failing to maintain proper accounts, or if they have been found guilty of offences like fraud or embezzlement.

Therefore, legal persons, through their senior managers, may be held liable for criminal acts carried out by their representatives or employees, on behalf of the company. Certain conduct (recklessness or culpable negligence) may give rise to both criminal and civil liability, in which cases the law makes a link in relation to the outcomes of the respective proceedings: if the person is acquitted from criminal liability, the same person may not be sued for civil responsibility<sup>21</sup>

The DRC was rated as the tenth most corrupt country out of 180 countries on Transparency International's 2008 Corruption Perception Index.<sup>22</sup> Bribery is illegal

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20. Code Pénal Congolais, Décret du 30 janvier tel que modifié et complété à ce jour, Journal Officiel N° Spécial 30, novembre 2004.

21. Marcellin Rae, *Des engagements qui se forment sans convention*, Société d'Etudes Juridiques du Katanga, Lubumbashi, 2e édition revue et augmentée, 1967. "La responsabilité aquilienne existe lorsque la loi oblige une personne à réparer le dommage qu'elle a causé à autrui en dehors de toute relation contractuelle. Dans le cas où l'infraction est constituée par l'imprudence ou le défaut de prévoyance ou de précaution, il y a identité entre la faute civile et la faute pénale ; en pareil cas, l'acquiescement du prévenu implique nécessairement l'absence de toute faute légère et rend irrecevable l'action intentée au civil." p. 31.

22. Transparency International *Global Corruption Report 2009: Corruption and the Private Sector* (GCR). Available at: [http://www.transparency.org/publications/gcr/gcr\\_2009#6.1](http://www.transparency.org/publications/gcr/gcr_2009#6.1)

in the DRC and in principle should be investigated and prosecuted. The law calls for imprisonment and fines for both parties to the bribery no matter what the circumstances.<sup>23</sup>

### 1.5.2 Military Criminal Code

Both the Military Criminal Code and the Military Criminal Procedural Code (Military Judicial Code) are relatively recent texts (2002),<sup>24</sup> but they need further amendments to make them consistent with the DRC's international obligations and human rights standards. The DRC military justice system is expressly organised by the 2006 Constitution.<sup>25</sup> Although Article 156 of the 2006 Constitution expressly limits the jurisdiction of military courts to members of the Congolese armed forces and the police, the 2002 Military Judicial Code and Military Criminal Codes have not yet been harmonised with the Constitution.

Only military courts and tribunals have jurisdiction to try crimes under international law (as defined in the Military Criminal Code). Although they have jurisdiction over crimes of a "military nature" (Article 76 of the Military Judicial Code-MJC), the fact that crimes under international law (crimes against humanity, war crimes, genocide and other crimes such as torture) are defined only in the Military Code (due to a change in the passing of the new law implementing the Rome Statute for the International Criminal Court in the DRC), gives military courts automatic jurisdiction over those crimes.

Article 73 of the MJC says "The Military Courts and tribunals shall have full jurisdiction to try individuals...", excluding therefore juristic entities. Their jurisdiction extends to soldiers in the Congolese armed forces and "similar" (police, civilians employed by the armed forces, and Ministry of defense and intelligence agencies, Article 108 MJC). Article 112 (7) extends that jurisdiction to, *inter alia*, "Those who, even if not part of the army, provoke, engage or assist one or more soldiers or similar to commit a crime that is against the law or military regulations" and "commit crimes against the army, the National Police Force, national Service, their equipment, premises....". Article 111 further extends a military court's jurisdiction over those who "having belonged to old armies, rebel groups, insurrectional groups or armed militias, commit crimes of (...) embezzlement of any objects dedicated to the army or belonging to either the State or the military", "pillage" and those who "commit crimes with weapons of war" (*armes de guerre*).<sup>26</sup> In certain cases these crimes encompass also crimes of an economic nature that may not be clearly related to the military.

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23. Article 147 Criminal Code.

24. Military Judicial Code, Law No. 023/2002 of 18 November 2002, and Military Criminal Code, Law No. 024/2002 of 18 November 2002.

25. Article 153 of the 2006 Constitution.

26. Articles 111 and 112, *Loi N° 23/2002 du 18 novembre 2002 portant Code Judiciaire Militaire*.

In times of war, economic crimes can also be construed as war crimes. Article 173 of the Military Criminal Code understands a “war crime” as any “crime committed during war and not justified by the laws and customs of war”. However, some Congolese commentators are of the opinion that economic crimes, whether in peace-time or during a war, should not be of the competence of civil courts. Economic crimes should not be confused with war crimes in order to give jurisdiction to the military, unless the complicity of an economic actor with the enemy can be upheld.<sup>27</sup> The international community has repeatedly expressed concern that civilians are routinely tried for common crimes before military jurisdictions. Although such practice is grounded in Congolese law, it contradicts international principles according to which military courts should not try civilians.<sup>28</sup>

## 1.6 Civil law

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The right to reparation is clearly recognised in Congolese law. Article 258 of the Congolese civil code states the principle that “any act whatsoever that causes harm to another obliges the person by whose offence the harm was caused to make amends for this harm”. This provision is the basis for civil liability also of legal persons in the DRC for negligent harm.

DRC law also contemplates a form of strict civil liability in the form of vicarious liability. Article 259 of the Civil code states: “A person is responsible not only for the harm caused by his/her own action, but also the harm caused by acts committed by persons answerable to him/her, or matters that are within his/her responsibility”. Apart from legal persons in relation to their employees or subordinates this provision would be applicable to responsibilities of the State or its departments in relation with their employees and subordinates.

## 1.7 Liability under the Mining Code

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A key piece of legislation is the Mining Code (Law No 007/2002 of July 11 2002). The Code sets out in detail the way in which mining projects of any type may be undertaken. The Mining Code is supported by Mining Regulations (Decree No 028/2003 of March 2003), which enact the rules for the implementation of the provisions of the Code.

The Mining Code provides that only DRC entities can hold exploitation rights. Before a new exploitation permit is granted, a company must be incorporated in the DRC, and an undertaking given to transfer 5 per cent of the share capital of

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27. *Ibid* p.164.

28. United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), “The Human Rights Situation in the Democratic Republic of the Congo: for the period January to June 2006”, July 2006. Available at: <http://monuc.unmissions.org/LinkClick.aspx?fileticket=wtFw3QXSGIU%3D&tabid=4135&mid=3999>

the company to the State. Exploitation permits are valid for 30 years, renewable for 15-year periods until the end of the mine's life.

Any foreign national, including any legal entity governed by laws other than the DRC, is required to elect domicile with an authorised mining or quarry agent located in the DRC and must act through this intermediary. The mining or quarry agent will act on behalf, and in the name, of the foreign national or foreign legal entity with the mining authorities.

The Mining Code provides a legal framework for the establishment of environmental practices in mining companies in the DRC. An environmental study is required prior to undertaking mining operations (Mining Code, Article 204 and Mining Regulations, Article 450). When a permit has been obtained following the conversion of a pre-existing mining right (i.e. before the 2002 Mining Code entered into force), the Mining Regulations require the holder to submit for approval to the Department in charge of the Protection of the Mining Environment (DPEM) an environmental adjustment plan (*Plan d'Ajustement Environnemental* – PAR). The Mining Code requires mining companies to submit environmental impact assessments (*Etude d'Impact Environnemental*, EIE) and environmental management plans (*Plan de Gestion Environnementale du Projet*, PGEP), but these rules are easily circumvented and these documents are not usually available to the public, even though local communities are supposed to be consulted.<sup>29</sup> Research conducted in Katanga reveals that consultations in the context of impact assessments are, with a few exceptions, cursory – if they happen at all. The environmental impact study and the environmental management plan must be updated if a renewal of a mining licence is sought. The Mining Code provides for a biennial environmental audit. If a company does not pass this audit, it may lose its permit. According to the Mining Code, upon closure of the mine, shafts must be filled, covered or enclosed. Furthermore, a certificate confirming compliance with environmental obligations under the terms of the environmental impact study and environmental management plan must be obtained.

The most likely cause of action in relation to the Mining Code would relate to physical or economic displacement, loss or destruction of crops, environmental pollution, a reduction in access to water and contamination of water sources. Despite numerous examples of such problems in Katanga, there are no known examples of affected communities having attempted to bring an action before a court of law, seeking remedy from a mining company.

## **1.8 Liability under the Forest Code**

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The DRC government launched a priority reform agenda in 2002, encapsulated in a new Forest Code. The Code enables forest lands to be designated for particular

29. Code Minier Article 69F and Règlement Minier Article 451.



uses, encourages public participation in decision-making, maintains traditional user rights, introduces a fairer allocation process, aims for the proceeds of forest exploitation to be shared more equitably and promotes sustainable forest management through the use of management plans. However, illegal logging remains a significant concern within the DRC. Many logging companies obtained contracts during the war or in the period of the subsequent interim government, which was plagued by corruption. A review of 156 logging permits ended in January 2009, but according to Greenpeace many permits remained unchanged.<sup>30</sup>

The Forest Code sets general principles. Article 15 provides for prior consultations with local people before a forest is designated for conservation or production. Article 84 states: “Forest concession contracts shall be preceded by a public inquiry (...). The inquiry aims to establish any rights third parties might have on the forest to be granted for the purposes of compensation, if any.” According to Article 44: “Populations neighbouring a forest concession shall continue to exercise their traditional users’ rights on said concession insofar as it is compatible with forestry exploitation, with the exclusion of agriculture. The concession holder shall not claim any sort of compensation following the exercise of such rights”. In the case of indigenous peoples, Article 84 calls for inquiries to determine any “third party” rights that might be compensated.

Article 89 makes the ‘*cahier de charge*’ (social contracts with local communities) mandatory. Logging companies may be required to build facilities directly for the community. These could include roads, bridges, schools, health clinics, or others facilities. In principle, as noted by the World Bank’s Inspection Panel, “private companies should pay their taxes and fees and government should provide these services. In DRC at present, government capacity to do so is very limited, so that the social contracts are one way for communities to receive benefits.”<sup>31</sup> In several articles the Forest Code refers to a system of consultation including Provincial Forest Advisory Councils and regular public information on forest allocations and concessions. It refers numerous times to including the private sector, local communities and NGOs in consultations. It also refers explicitly to conservation concessions, biological prospecting, tourism, and environmental services. Under Article 115, a concession holder has the obligation to exploit the forest in the 18 months after the signing of the contract. Article 116 addresses the case in which the concession holder does not use his concession and states that if the concession is not used for two years then it goes back to the government. Article 117 deals with the case in which the concession stops. Article 118 addresses the case of non-payment or insolvency of the concession holder.

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30. Greenpeace, *Forest Reform in the DRC Leaving People Out*, July 2010. Available at: <http://www.illegal-logging.info/uploads/CongoForestReform.pdf>

31. *Inspection Panel Investigation Report: Democratic Republic of Congo*, August 31, 2007. Available at: <http://www.illegal-logging.info/uploads/WB%20DRC%20report.pdf>

## **1.9 Framework Law on the Protection of the Environment 2011**

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In July 2011, the government, after reviewing the Law on Nature Conservation, which dated back to 1969, passed a new framework law on the protection of the environment (*Loi No 11/009 Portant Principes Fondamentaux Relatifs a la Protection de l'Environnement*) which is intended to bring the national legal framework into line with principles such as sustainable development, public access to information and participation in decisions relating to the environment.

The law recognises the right of everyone to a healthy environment and the right to legal protection of that right (Article 46). It likewise recognises the right of everyone to air that does not harm health (Article 47). It establishes the responsibility of local governments to reduce green-house gas emissions and prohibits the dumping of toxic waste, all activity that increases pollution, risk of soil erosion and degradation. It also provides for the adoption of waste management, chemical products and similar substances.

Article 21 of the law provides that all projects of development, infrastructure or industrial, oil or mining exploitation, should be preceded by an environmental and social impact assessment and a management plan, which will have to be approved by the public authority before the project is allowed to move on. The ministry in charge of the environment has the right to carry out auditing and inspections of activities that present risks to the environment and the population, as well as to prescribe remedial measures.

## 2. Legal Remedies for Corporate Human Rights Abuses

In any system of remedies, the judiciary plays an important role. In the DRC, the judicial system is undergoing a process of restructuring in compliance with the mandate given by the 2006 Constitution. Under the Constitution, three broadly defined jurisdictions co-exist: the ordinary jurisdiction (civil and criminal as well as labour matters<sup>32</sup>), the administrative jurisdiction and the military jurisdiction. A *Conseil d'Etat* sits at the apex of the administrative justice system, while the Supreme Court will become a *Cour de Cassation* that would hear appeals from the ordinary courts and tribunals and the military justice. The Constitutional Court would hear appeals relating to jurisdiction from both the *Conseil d'Etat* and the *Cour de Cassation*. The system designed by the Constitution is complex and costly to implement and therefore is likely to take a relatively long time to come into being. In the meantime, pursuant to Article 223 of the Constitution, the current Supreme Court plays the role of Constitutional court and *Conseil d'Etat*.

### 2.1 Constitutional remedies

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The Constitution itself does not provide for special redress procedures that victims of a violation of constitutional rights may use. The long and comprehensive catalogue of rights enshrined in the Constitution can only be enforced through procedures defined under ordinary legislation. However, the Constitution establishes a Constitutional court, separate from the Supreme Court of Justice, and provides for a “right to petition” the public authorities.

Under the Constitution individuals or communities may seek a remedy by petitioning the Congolese Government. The petitioners may not be prosecuted as a result of taking such action.<sup>33</sup> In principle, individuals or communities may petition national or regional authorities to take action to curb business activities that harm human rights and the environment, although these strategies rarely bear fruit, but the redress may be limited to declaratory relief or suspension or cancellation of the company’s operation (which could be challenged in court). As an instance where the guarantees proclaimed by the Constitution are disregarded, in September 2006 when 29 villagers and local human rights activists in Bumba sent a petition to the government complaining of abusive logging by SIFORCO,

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32. A 2002 law also creates labour courts within the *Tribunal de Grande Instance*, Loi N° 016/2002 du 16 octobre 2002 portant creation, organisation et fonctionnement des tribunaux du travail.

33. “Tout Congolais a le droit d’adresser individuellement ou collectivement une pétition à l’autorité publique qui y répond dans les trois mois. Nul ne peut faire l’objet d’incrimination, sous quelque forme que ce soit, pour avoir pris pareille initiative.” Constitution, Article 27.

the company reportedly filed a libel suit against the petitioners.<sup>34</sup> The group had alleged that foreign logging companies, with the collusion of the local authorities, had failed to protect the rights of the indigenous population and had violated the Constitution and the Forest Code.<sup>35</sup>

In most instances, abuses by corporations occur in the context of the different codes and therefore require governmental administrative action. There are few examples of instances where the Government of the DRC was prepared to intervene to protect the rights of weak victims. However, the Congolese government has cancelled mine, oil and logging licences for alleged non-compliance with performance requirements; while some of these decisions have been well-founded, other cancellations appear to have been a pretext to further the private economic interests of the political elite.

The Constitution also created a new Constitutional court separate from the Supreme Court of Justice. The implementing law to make this court operative has been under discussion for a long time and at the time of writing (2011) there were no clear signs that the law would be passed any time soon. In the meantime, the Supreme Court has assumed the functions of a constitutional court, but its track record is criticised. The Supreme Court concentrates jurisdiction in all domains: administrative, civil and criminal matters and constitutional matters. However, it lacks an internal structure with specialised chambers on each domain. When a case relating to constitutional matters come for their decision, it is decided by the same judges who deal with, for instance, civil and commercial matters.<sup>36</sup>

The Supreme Court (sitting as Constitutional Court for the time being) may be seized with challenges to laws or acts that are inconsistent with the Constitution. Although this is not akin to direct protection of rights, a law, regulation or administrative act that infringes constitutional rights may be declared “unconstitutional” and abrogated. A measure of indirect relief may be granted to the victims in this way.

The jurisprudence of the Supreme Court confirms a trend since 2003 that a broad legal standing to any individual in the DRC to bring a petition to the court alleging inconsistency of a law or act with the Constitution. The court has confirmed that

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34. *Bumba Civil Society Organisations v. SIFORCO and Trans-M (Province of Equateur), Pétition Ouverte Adressée Au Gouvernement de la RDC Par les Participants Au Séminaire de la Formation Sur les Droits de l'Homme Organisé a Bumba le 12 septembre 2006 par l'Organisation les Voix de Sans Voix Pour les Droits de l'Homme (VSV)*, 14 septembre 2006.

35. R.P. 101/C.D. After three years, according to Greenpeace, SIFORCO (Société industrielle et forestière du Congo) tried to reach an out-of-court settlement. The libel suit has not been formally dropped.

36. Balingene Kahombo, *La cour supreme de justice, cour constitutionnelle transitoire*. Available at: <http://www.la-constitution-en-afrique.org/article-la-cour-supreme-de-justice-a-t-elle-demerite-66284374.html>, accessed on 14 July 2011.

the right to seize the court does not belong only to the General Advocate but to anyone with a legitimate claim.<sup>37</sup>

## 2.2 Civil remedies

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The basis of claims for damages resulting from a corporate action are provided for by Articles 258 – 262, Book III of the Civil Code, which allow third parties who have suffered damages to obtain compensation. Article 258 states: “Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer” (any conduct that causes damage to another person generates the obligation for the individual responsible for the act, to repair the damage). It is up to the individual or individuals to seek compensation before the courts. Individuals may also constitute themselves as *partie civile* in a criminal prosecution brought forward by the State but thereby forfeit the right to pursue a claim for compensation through a civil law procedure. There are no known examples of claimants attempting to sue a foreign parent company for damages in a Congolese court.

A civil action may be exercised in conjunction with public prosecution. In the DRC as in other jurisdictions, the concept of vicarious liability applies as the company or employer is held liable because of an act committed by its employee or agent in the course and scope of his or her duties (Articles 259 and 260 of Civil code).<sup>38</sup> This concept has been flexibly interpreted in the DRC where a decision of the Military Court of Katanga in the *Ankoro Trial*, found the State liable under articles 258 and 260 of the Civil Code for acts committed by soldiers of the Congolese

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37. Arrêt R.CONST.112/TSR du 05 février 2010.

38. DÉCRET du 30 juillet 1888 – Des contrats ou des obligations conventionnelles. (B.O., 1888, p. 109). Available at: <http://www.leganet.cd/Legislation/Droit%20obligations-contrats/Decret.30.07.1988.obl.htm#TIICII>

Article 259. – Chacun est responsable du dommage qu’il a causé, non seulement par son fait, mais encore par sa négligence ou par son imprudence.

Article 260. – On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde.

Le père, et la mère après le décès du mari, sont responsables du dommage causé par leurs enfants, habitant avec eux.

Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.

Les instituteurs et les artisans, du dommage causé par leurs élèves et apprentis pendant le temps qu’ils sont sous leur surveillance.

La responsabilité ci-dessus a lieu, à moins que le père et mère, instituteurs et artisans ne prouvent qu’ils n’ont pu empêcher le fait qui donne lieu à cette responsabilité.

Article 261. – Le propriétaire d’un animal, ou celui qui s’en sert, pendant qu’il est à son usage, est responsable du dommage que l’animal lui a causé, soit que l’animal fût sous sa garde, soit qu’il fût égaré ou échappé.

Article 262. – Le propriétaire d’un bâtiment est responsable du dommage causé par sa ruine lorsqu’elle est arrivée par une suite du défaut d’entretien ou par le vice de sa construction.

Armed Forces. The soldiers, though not their commanding officers, were found guilty of setting fire to buildings and of killing and injuring people not engaged in hostilities. The Military Court considered the soldiers to be “full time employees of the State, acting in its name and on its behalf.” The Court also recognised the armed militias, who fought with the regular army, as State employees whose acts therefore also engaged the responsibility of the State.<sup>39</sup>

With respect to these militias, it should be stressed that the provision of weapons and munitions to them was considered by the Court as another element of proof attesting to the control that the Congolese State exercised over them. Therefore the Court ruled that the State should pay compensation to the victims.<sup>40</sup> The application of this rule, in particular the reasoning based on the notion of “control”, to cases in the field of company activity may be possible in situations where the State controls the company.

### 2.3 Labour law

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The employer, or the employee as the case may be, wishing to bring a complaint must notify the Labour Inspector and first seek to resolve the dispute through mediation. Only if that first step fails, can the matter be referred to the Court. The competent tribunal to deal with disputes arising from labour contracts is the Industrial Tribunal. However, in Lubumbashi as in other parts of the DRC, these tribunals have not yet been set up and employment disputes are heard by the civil court, the *Tribunal de Grande Instance*.<sup>41</sup>

Labour disputes, particularly abusive dismissal, are the cases most often brought to the attention of civil courts in Katanga.<sup>42</sup> However, most cases are settled through negotiations that sometimes bring about results that are not fully consistent with justice and human rights protection values.

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39. CM du Katanga, *Affaire Ankoro* 20 décembre 2004, RP 01/2003 et RP 02/2004. Soldiers of the 95th brigade of the Congolese Armed Forces (*Forces Armées Congolaises* –FAC – which later became the FARDC), who had been accused of murder, pillage and other crimes, were convicted on lesser charges and were given lenient sentences. The military prosecutor rejected calls for their commanding officers to be charged with war crimes, despite the fact that they had authorised sustained rocket attacks, and the indiscriminate bombardment of the village of Ankoro, over a period of 10 days in November 2002. These actions resulted in the deaths of 300 people and the destruction of over 7000 homes. See ASF: 2009 p. 98. See also ASADHO/Katanga, *Rapport sur le procès de Ankoro* “Lutte contre l’impunité: Mots vains pour le gouvernement de la RDC”, February 2005.

40. Avocats Sans Frontières, *L’application du Statut du Rome de la Cour Pénale Internationale par les juridictions de la République Démocratique du Congo*, Mars 2009 p. 99.

41. Labour Code, Articles 298 to 302.

42. Labour Code, Article 63: *La résiliation sans motif valable du contrat à durée indéterminée donne droit, pour le travailleur, à une réintégration. A défaut de celle-ci, le travailleur a droit à des dommages intérêts fixés par le Tribunal du travail calculés en tenant compte notamment de la nature des services engagés, de l’ancienneté du travailleur dans l’entreprise, de son âge et des droits acquis à quelque titre que ce soit.*

Health and safety standards in many mining companies are generally regarded as inadequate and the behaviour of a number of managers and supervisors (both Congolese and foreign) may amount to gross negligence. Abusive treatment of Congolese workers ranges from verbal aggression, to bullying, to beatings, and in some cases extreme physical harm. Local work-inspectors, police and even magistrates would not usually encourage Congolese employees to prosecute a company or foreign staff even for flagrant violations of workers' rights and Congolese law.<sup>43</sup> As a result, workers do not generally trust the police or judiciary to uphold their interests, and would not in any event report incidents of abuse. While disputes over non-payment of the minimum wage or other benefits involving private individuals and domestic staff are often resolved by the labour courts, this does not appear to be the case with disputes involving workers in Chinese smelters and processing plants. Workers interviewed for a 2009 RAID study complained that they felt powerless and explained that lawyers were unwilling to take on cases *pro bono*.<sup>44</sup>

## 2.4 Mining law

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The Mining Code provides that titleholders of mining concessions who displace traditional occupants of the land or undertake actions which result in people being deprived of the use of the land (for a range of activities including farming or small-scale mining), must pay fair compensation to such occupants. Traditional occupants may, with the agreement of the titleholder, continue to farm inside the concession provided that it does not impede mining operations and on condition that such occupants do not erect any new structures. Disputes arising between mining companies and occupants or users of land concerning the amount of compensation are supposed to be resolved through a conciliation process. If after three months the matter has not been resolved, then the competent court will decide on the indemnity.<sup>45</sup>

According to the 1973 Land Law, the State is the single sole owner of the soil and subsoil of which it has exclusive, inalienable and imprescriptible ownership.<sup>46</sup> All land in the DRC is vested in the State and is formally controlled by the Cadastral Department. As regards the mining sector, use of the land is granted by the State in terms of concessions.<sup>47</sup> A system of expropriation for public use was established

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43. See RAID (Rights and Accountability in Development), *Chinese Mining Operations in Katanga, Democratic Republic of the Congo* (September 2009), Case of Ephrado Kabanga, CDM Parquet de Grande Instance Lubumbashi: RMP/33562/Lul and Case Study: Ilunga Mutumbo Franck, Lida Mining.

44. *Ibid* p. 17.

45. Code Minier 2002, Article 281 *De l'indemnisation des occupants du sol*.

46. Loi N° 73-021, *portant régime général des biens du régime foncier et immobilier, et du régime de sûreté*. It was modified and supplemented by Loi N° 80-008 of 18 July 1980. These texts have been consolidated into the *Code Civil Tome I Droit des Biens*.

47. Civil Code Tome I, *Droit des Biens*. Articles 85, 86 and 87 concern indemnisation in the case of expropriation. Article 86 states that: "*En cas d'éviction totale, le concessionnaire a le droit demander contre*

by law as set out in Act No 77-001 of 22 February 1977. Some land is managed by traditional leaders, and this role is officially recognised. *Chefs de Terre* allocate and authorise the use of small parcels of land, and may delegate their authority to *Chefs de Village* for smaller agricultural plots. *Chefs de Terre* and *Chefs de Village* informally receive an annual fee from the people to whom land is allocated. *Chefs de Terre* may temporarily authorise use of large areas, but a formal authorisation will then have to be granted at a higher administrative level.

There is considerable ambiguity about the legal entitlements to the communal land of traditional communities.<sup>48</sup> The land tenure law of 1973 brought all land back into the State domain (*Droit des Biens*, Article 53.). However, it promised to settle the question of land in relation to indigenous communities (traditional communities) by means of a presidential ordinance. This has not been forthcoming.<sup>49</sup> As industrial-scale mining in Katanga increases, the availability of replacement land available to traditional and other displaced communities is diminishing. Valuation procedures and compensation rates are agreed between the mining company and the *Department de l'Agriculture* and the *Inspection de l'Agriculture*. Such rates are set at very low levels. The rates for lost or damaged crops are calculated on the basis of an evaluation of the number of work-days needed for a peasant farmer to establish and maintain the crop. It is then left to a judge to decide the final level of compensation.<sup>50</sup> This is already a source of considerable friction.

On 24 November 2009 the homes of some 500 families in the village of Kawama located about 20 kilometres outside of Lubumbashi were reportedly demolished without prior warning. The operation, allegedly carried out by the mining company *Compagnie Minière du Sud Katanga (CMSK)* with the support of the police and military, had been authorised by the Minister of the Interior of the Province. CMSK had alleged that minerals had been stolen from its concession by artisanal miners living in Kawama, and which it was trying to recover. In the operation the homes and belongings of long-term residents, most of whom were engaged in agriculture, were destroyed. In August 2010 villagers told RAID during a visit to the

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*l'Etat la restitution du prix de la concession, diminuée de 1/20 par tranche de cinq années de jouissance révolues depuis la conclusion du contrat*". Those with concessions granted in perpetuity, have a right to full enjoyment of their land and assets. Article 96 states that "*Le titulaire de la concession perpétuelle à la pleine jouissance du fonds. Il est propriétaire de tout ce qui s'y incorpore aussi longtemps que dure son droit de jouissance sur le fonds.*" A title held in perpetuity may be sold (Article 100, *Le concessionnaire perpétuel peut aliéner son droit en tout ou en partie*), but it may be expropriated in certain circumstances, including on the grounds of 'public utility' (Article 101 *la concession perpétuelle ne peut prendre fin que pour l'une des causes ci-après : (1) l'expropriation pour cause d'utilité publique.*)

48. Nobirabo Musafiriri, *The dispossession of indigenous land rights in the DRC: a history and future prospects*, Forests People Programme, September 2008 p. 7.

49. *Ibid.*

50. Code Civil, Tome I, *Droit des Biens*, Article 166 "*En vue de sauvegarder les droits immobiliers des populations rurales, toutes transactions sur les terres rurales seront soumises à la procédure d'enquêtes préalables, prévu par la présente loi.*"



site that they had still not received any compensation and that they were living in temporary, precarious accommodation. Additional information dated October 2011 says that compensation had not been provided as yet. Some artisanal miners however had been given a payment by CMSK as an incentive to stop their illegal mining activities in the area.<sup>51</sup>

There are few known cases where the public administrative authorities have intervened to uphold complaints by aggrieved individuals or communities. In those cases where the authorities have taken decisive action against mining companies, usually on the grounds of breaches of environmental regulations, companies have been made to shut down their operations temporarily while the problem is remedied and/or a small fine is paid.<sup>52</sup> In a few cases tougher measures have been taken, but in the view of informed observers only because of the existence of other conflicting, commercial interests involving members of the political establishment. In 2006, the Indian-owned mineral processing company, SOMIKA, for example, was reportedly forced to close down its operations and undergo an environmental audit by an international consultancy entity after public disquiet that its operation was polluting the Lubumbashi water supply.<sup>53</sup> It was not however required to relocate its plant despite a recommendation to that effect in the environmental audit report.

Article 83 of the Mining Code clearly states that mineral processing plants must comply with the environmental protection regulations.<sup>54</sup> The Directorate for the Protection of the Mining Environment (DPEM) within the Ministry of Mines is responsible for all aspects relating to protection of the environment. The Directorate ensures the implementation of, and compliance with, relevant regulations by mining companies. According to the World Bank, “Mine inspection services (through the Directorate of Mines) in the provinces are wholly inadequate to perform their mandated function of monitoring production, health, safety and environmental protection issues at industrial and artisanal mining sites.”<sup>55</sup> There are very few inspections and officials often turn a blind eye to non-compliance.<sup>56</sup>

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51. ACIDH, “La Malédiction des Richesses Minières Frappe Les Habitants du Village Kawama 30 novembre 2009”, *Press Release*. In August 2010 RAID visited Kawama and interviewed the chief and residents whose houses had been demolished.

52. The Provincial Directorate of the Ministry of Mines (DPEM) shut down COTA Mining’s cobalt drying plant near Lubumbashi in December 2007 because a pool of acid was in danger of leaking into a stream. The plant was supposed to stay shut until further notice. But in March 2008, the Governor of Katanga, Moïse Katumbi, overruled the DPEM and gave COTA Mining permission to resume its operations. Rights and Accountability in Development, *Chinese Mining Operations in Katanga*; 2009 p. 19.

53. Lettre N<sup>o</sup> CAB.MIN/MINES/01/1733/04 du 14 décembre 2004.

54. Article 83: Des usines de traitement ou de transformation, L’implantation et le fonctionnement d’une usine de traitement ou de transformation des substances minérales sont soumis à la réglementation en matière de protection de l’environnement prévue par le présent Code et par la législation particulière sur l’environnement.

55. World Bank, ‘Growth with Governance in the Mining Sector’, May 2008.

56. *Ibid.*

There are only about 40 junior officials in the Ministry of Mines, who on the basis of a three-week environmental training course, are responsible for enforcing the environmental regulations throughout the entire country.

A new law on hydrocarbons is currently being drafted.<sup>57</sup>

## 2.5 Forest Code

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A new Forest Code was adopted in 2002, but the implementing decrees have taken a long time to be prepared. This leaves the sector open to a considerable degree of legal uncertainty, and creates the potential for unsustainable and inequitable practices.

During the past years the reality of log extraction in the field has had little to do with the legal framework developed in Kinshasa. According to the World Bank's Inspection Panel, international logging companies, nearly all with previous experience in the DRC or Central Africa, have moved into areas where logging appears to be profitable. Some of them have "legal" contracts and some do not.<sup>58</sup>

A review of logging concessions aimed at cleaning-up corruption in that sector of activity resulted in the cancellation of approximately two-thirds of over 150 timber logging contracts. Although NGOs argued that in some cases the companies concerned were able to remove felled timber even after the cancellation of their permits.<sup>59</sup>

In relation to the forest sector, there is widespread awareness that the DRC lacks basic institutional, technical and field capacity to address social, environmental and other issues relating to logging in its forests. The Inspection Panel observed, for example, that local authorities have little or no resources to check operations in the field, monitor log transport and, more generally, the operations of concession companies.<sup>60</sup>

Local communities have been approached by logging companies with proposals to sign provisional 'social investment agreements' (*cahiers des charges*). These are required for official 25-year concession contracts. The most likely causes of action concern the alleged encroachment and abusive logging in forest areas considered to belong to Pygmies or settled communities under customary law;

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57. It will replace the former joint legislation pertaining to the oil and mining sector: OL N°81-013 du 02 avril 1981, *Portant Législation Générale sur les Mines et les Hydrocarbures*.

58. World Bank Inspection Panel Report 2007, para. 207.

59. In June 2009, the logging company Trans M Bois was able to remove timber from a property for which the logging permit had been withdrawn, GA 033/05, after the issuing of a derogation ordinance dated 11 May 2009. Greenpeace Open Letter to Mr Jose Endundo Bononge, Minister of the Environment, Nature Conservation and Tourism, Kinshasa 23 July 2009. Available at: <http://www.greenpeace.org/international>

60. *Ibid.*

ill-treatment of workers and failure by companies to fulfil their obligations set out in the social contracts.

## **2.6 Framework Law on the Protection of the Environment 2011**

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Chapter 7 of the Framework Law (Articles 68 to 70) contains a regime of civil liability applicable to both physical and legal persons. It provides for civil liability for activities that cause environmental and health damage in violation of the law. This provision is an additional cause of action to the ordinary general civil liability provisions of the Civil Code, and would seem to contain a regime of strict liability since it does not contemplate fault as a requirement for liability to arise. The person would be jointly and separately responsible for the payment of fines and related costs “unless the person can prove that it was impossible for him/her to impede the commission of the infraction” (Article 69). The law also provides for a longer period during which a civil claim for compensation may be lodged: ten years since the event took place or five years since the plaintiff had knowledge or should have had knowledge of the damage. These provisions substantially lengthen the period of time usually available for civil claims.

The Framework law also contains a number of provisions relating to sanctions and penalties, including criminal and administrative sanctions. Administrative sanctions may be imposed by the public officers in charge of environmental matters. Variable prison sentences can be imposed against persons who import dangerous or radioactive waste into the country, pollute or degrade the soil, sea and river waters, and air. Fines may be imposed in the same cases, and additionally, to sanction a person who inserts incorrect or erroneous information in an environmental impact assessment. The law does not provide for the specific procedural avenues to trigger, intervene in, or challenge any of these measures. This may be the subject of forthcoming legislation in implementation of the law.

## **2.7 Criminal law and Military Criminal law**

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The Criminal Code prescribes prison, forced labour, fines, confiscation and other sanctions (including the death penalty – Article 5). The victim may also be a part of the criminal proceedings as a *partie civile*. The victim may benefit from restitution and/or payment of damages determined by the court.

Economic crimes do sometimes get prosecuted. In 2009 employees of Tenke Fungurume Mining (which is over 57 per cent owned by the US mining company, Freeport McMoRan) were prosecuted for allegedly having facilitated the crime of embezzlement (*détournement des fonds*), by failing to obtain proper work permits for foreign consultants and temporary workers.<sup>61</sup> The defendants, who included

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61. “[E]n substituant les ordres de mission à la carte de Travail provoque l’infraction de détournement commis par le prévenu, SAIDI HAMICI [Directeur de la DGM Katanga].” R.P. 577/RMP Arrêt de la Cour d’Appel du 09

TFM's senior financial officer, Mr Dirk van Hooymissen, a Belgian national, were held in pre-trial detention in Makala prison, Kinshasa, for two months. On 8 October 2009, at a hearing by the Court of Appeal, the head of the *Direction Générale de Migration* (DGM, Immigration Service) in Katanga Province was found guilty of embezzlement of public funds and sentenced to five years' imprisonment. According to the Court of Appeal in 2009, 9,921 'ordres de mission' had been issued and two payments of \$1,517,744 and \$ 817,445 had been made by TFM into a bank account in Lubumbashi. The TFM employees were acquitted. The company, which was not charged, had earlier been obliged to pay a fine of \$16 million for breaches of immigration rules concerning temporary work permits.<sup>62</sup>

Penalties under the Military Criminal Code are similar to those prescribed in the Criminal Code, as well as some additional sanctions proper to the military establishment (e.g. demotion, see Article 26).

Given the monistic nature of the Congolese legal system, the Rome Statute for the International Criminal Court is already part of domestic law even in the absence of implementing law. The Constitution provides in Article 215 that courts can apply ratified international instruments as long as these are not contrary to law and custom.<sup>63</sup> However, the prosecution of legal entities is not contemplated under the Rome Statute. Since 2006, military courts with the encouragement of the international community and the United Nations have started to apply the Rome Statute directly.<sup>64</sup>

At the present time only military courts are competent to try cases relating to international crimes. The *Kilwa trial*<sup>65</sup> is the only prosecution that has taken place in the DRC in which a company and its employees were indicted for international crimes. The case illustrates the vicissitudes and obstacles that victims of human rights violations in the DRC confront at every stage in trying to seek a remedy. The

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octobre 2009. See Franz Wild, 'Congo's Immigration Denies Knowledge of Freeport Visa Scam', September 15, 2009, Bloomberg: "Francois Saidi, the immigration head for the southern Katanga province, where Freeport's mine is based, and three employees of the company pleaded not guilty on Sept. 11 to charges of embezzlement and complicity to embezzle. On Sept. 11 Saidi told the court that the immigration department's top national officials were aware of the issuing of illegal work and travel documents for Freeport employees, and received a share of the money generated."

62. "TFM, S.a.r.l, opérait en violation permanente de la loi relative à la police des étrangers." R.P. 577/RMP Arrêt de la Cour d'Appel 09 octobre 2009. According to the *Direction Générale des Recettes Administratives, Judiciaires, Domaniales et de la Participation* (DGRAD), the company owed the DRC a total of \$74,701,487.

63. "Les traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de son application par l'autre partie". Article 215 de la Constitution de la République Démocratique du Congo du 18 février 2006.

64. See *Avocats Sans Frontières, L'application du Statut de Rome de la Cour Pénale Internationale par les juridictions de la République Démocratique du Congo*, Mars 2009; éditeur Francesca Boniotti. For a full discussion of the applicable substantive law concerning war crimes and crimes against humanity see the UN Mapping Report paragraphs 799-819.

65. CM du Katanga, *Affaire Kilwa*, 28 juin 2007, RP 010/2006.

personal jurisdiction of the military courts and tribunals in the DRC in contravention of international principles extends to “defendants not forming part of the army”, competence also extends to “the perpetrator, co-perpetrator or accomplice” (Art. 79 CJM-2002).

Article 166 of the military judicial code of 1972 confirms that there is no statute of limitations for the prosecution of war crimes or crimes against humanity.<sup>66</sup>

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66. The UN Mapping Report para. 818 observes: “In fact, Article 166 of the CPM-2002 classifies crimes against humanity as those which international law stipulates as being war crimes, namely “the serious crimes listed hereinafter and harming, by action or by omission, the people and property protected by the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977” and proposes a list of eighteen prohibited acts reflecting certain rules of customary international law in this area, as codified in Article 8 of the Rome Statute of the ICC, which deals with war crimes. This confusion, which creates a source of legal uncertainty, has frequently been criticised by recent Congolese case law in this regard.”

### 3. Obstacles to Accessing Justice

In the DRC, the obstacles to victims of human rights violations in accessing justice and obtaining reparation are severe; and general impunity for the perpetrators of violations, including the most serious ones, is pervasive.<sup>67</sup> A number of issues and problems add up to this general situation when the violations occur in the context of the exploitation of natural resources and the activities of public and private companies, and contribute to draw up a situation where victims face a denial of justice in their own country.

Among the existing usual, ordinary or structural problems in the DRC's justice system, are the lack of sufficient financial and human resources and equipment, deficient infrastructure, deficiencies in the training and technical knowledge on the part of judges, prosecutors and lawyers, continued political interference in the judiciary, corruption, a pervasive lack of enforcement of court decisions, and the often unclear interaction between customary justice mechanisms and the judiciary system.<sup>68</sup> These problems are exacerbated in a context where economic actors, many of them associated with foreign companies, carry out their activities, sometimes in challenging scenarios, where armed conflict is still present or its legacy endures. Some of these problems, more specific to the access to remedies in the context of economic activities resulting in human rights abuses, will be outlined below.

#### 3.1 The link between the illegal exploitation of the DRC's natural resources and human rights abuses: the accountability gap

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An analysis and understanding of the reality and problems of justice and reparations in the DRC cannot overlook the role of the exploitation of natural resources in the generation and perpetration of armed conflict in the various regions of the country and in the perpetration of serious human rights violations, in certain cases amounting to crimes under international law. The links between illegal exploitation of the enormous natural wealth of the DRC (through mining and forest exploitations) and the fuelling of armed conflict in the DRC and in the whole region has been the object of study and discussion at both academic and political levels. It is also a subject that remains high on the agenda for the United Nations political and security organs, in particular the Security Council, and regional bodies. But while the many studies and reports published since 2000 have highlighted the links, mostly from an economic perspective, between the exploitation of natural resources and serious human rights and humanitarian law violations, an in-depth analysis of the implications, including the legal ones, of this linkage is still to

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67. Association Africaine de défense de droits de l'homme/Katanga (ASADHO/Katanga): 'La justice désarticulée au Katanga. Rapport sur l'administration de la Justice 2003-2004', Lubumbashi, décembre 2004.

68. See generally, ILAC/IBAHRI report p. 19 ff; UN Mapping Report, Section III, Chapter III p. 411.

be done. The nature of the present study, with its time and resource constraints, does not permit such an in-depth analysis here, an analysis which may be done in the near future.

Among the first reports that highlighted the links between illegal exploitation of resources, armed conflict and human rights and humanitarian law violations are the ones prepared by the United Nations Expert Panel on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo. This Expert Panel was originally set up at the request of the Security Council in June 2000,<sup>69</sup> in the midst of the armed conflict in the DRC and the humanitarian crisis. Its mandate was successively renewed until October 2003, a lapse of time during which it submitted three reports and two interim reports.<sup>70</sup> The Expert Panel acted as a fact-finding body and not as a judicial one. It visited the DRC and other countries, carried out interviews, heard witness testimony and collected information from a wide range of official and unofficial sources. Its reports highlighted the extent of involvement of foreign countries, armed groups and business corporations in the “plunder” of the DRC’s natural resources and documented those instances.<sup>71</sup>

Although the Expert Panel did not have the explicit mandate to investigate and document human rights abuses, in practice its work provided important documentation about specific instances of corporate involvement in serious human rights abuses (i.e. the use of forced and child labour, population forced displacement, killings, torture and rape) committed by the parties in the conflict and associates. The Panel asserted that the conflict continued not for political or security reasons but for access and control of valuable mineral resources. The Panel found that Ugandan and Rwandan armies and their armed Congolese allies engaged in a systematic “looting” of the country’s resources. Most importantly, the Panel found that a number of businesses and corporations have been involved in the illegal exploitation of the DRC’s resources in a direct or indirect way and so have contributed to fuelling the ongoing armed conflict.

In its 2002 report, the Panel named some 29 companies who were in its opinion associated with “elite networks” in the DRC and, in Annex III, listed 85 companies deemed to have breached the OECD Guidelines. This report was followed by a

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69. *Statement of the President of the Security Council*, UN doc. S/PRST/2000/20, 2 June 2000.

70. See generally Asimina-Manto Papaioannou: “*The illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses*”, In: De Schutter, Oliver (ed.) *Transnational Corporations and Human Rights*, Hart Publ., Oxford and Portland-Oregon, 2006 at p. 263.

71. UN Security Council Expert Panel Reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, Reports S/2001/49 16 January 2001, S/2001/357 12 April 2001, S/2002/565 22 May 2002, S/2002/1146 16 October 2002, S/2003/1027 23 October 2003. Also, Addenda to the UN Security Council Expert Panel Reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2001/1072 13 November 2001; S/2003/1146/Add.1 20 June 2003.

resolution by the Security Council calling for individuals, companies and States named by the Panel to submit their reactions and for the Panel to further review relevant data and information in order to verify and/or update its findings and/or clear parties named. Subsequently the Panel received submissions and met with interested parties, including companies. The reactions received were published in an Addendum to the 2003 final report.<sup>72</sup> The final report of the Panel was dedicated to providing a review of its previous conclusions. It re-categorised the companies into five groups: (I) cases “resolved”, (II) “resolved cases subject to NCP [National Contact Point established under the OECD Guidelines for Multinational Enterprises] monitoring compliance, (III) “unresolved cases referred to NCP for updating or investigation”, (IV) “pending cases with governments” who have committed to carry out investigations, (V) “parties that did not react to the Panel’s Report”.

Although the Panel did not have a judicial mandate, it had to look at instances of “illegal” exploitation of natural resources. In this context, it adopted broadly defined standards of “illegality” as well as a standard of proof, both of which were criticised by concerned companies and commentators.<sup>73</sup> The Panel was accused of conflating categories of law and mere recommendations into its understanding of compliance with the law. Companies also argued that they were not granted the right to defend themselves (they could react only when their name was published in the list), that their rights had been abused (including privacy, dignity, honour, reputation and fair trial), that the Panel did not respect procedural rules of fairness and due process that require the hearing of both parties, and were allegedly not accessible to the concerned companies and used evidence that the concerned companies could not see or challenge. The Panel’s final conclusions and its categorisation of companies into five groups, with the majority of companies now in the Category I “Resolved” drew criticism from NGOs alleging a lack of transparency and consistency.<sup>74</sup>

The Panel’s analysis, findings and recommendations marked the first time the link between armed conflict and exploitation of natural resources, with its implications for human rights, was highlighted so prominently, and remedial actions taken or recommended. Sadly, the events after the Panel ceased to exist show how little was done to act upon those findings, and both the OECD NCP system and the national governments to which the cases of corporate involvement were referred, took timid action in dealing with the cases. Even today, the victims of

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72. Addendum, UN doc. S/2002/1146/Add 1, 20 June 2003.

73. Report of the Panel, S/2001/357 12, April 2001, para. 15; see also Kuuya, V. “The Illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo”, without date. Available at: <http://www.business-humanrights.org/Documents/Vuyelwa-Kuuya-on-UN-Expert-Panel-DRC-Nov-2008.doc>, accessed 20 July 2011.

74. See RAID, *Unanswered Questions : Companies, conflict and the Democratic Republic of Congo*, Oxford, June 2004. Available at: [http://raid-uk.org/docs/UN\\_Panel\\_DRC/Unanswered\\_Questions\\_ES.pdf](http://raid-uk.org/docs/UN_Panel_DRC/Unanswered_Questions_ES.pdf), accessed 21 July 2011.



abuse during the years investigated by the Panel (children and women forced to work or enslaved, raped or tortured, as well as forcefully displaced or deprived of their means of subsistence) have been unable to find justice and reparation.

### **NCP action in respect to the cases referred by the UN Expert Panel in 2003**

The OECD National Contact Point (NCP) system in very rare cases has taken meaningful action to effectively tackle cases of corporate “breach” of the OECD Guidelines. The UN Expert Panel referred cases concerning the United Kingdom, Belgium, the Netherlands, Austria, the United States of America and Canada, but only a few of them seem to have taken meaningful action. One of those cases concerns the United Kingdom NCP. In 2004, the NCP found DAS Air, a UK-based air cargo company, in breach of the OECD Guidelines for its part in transporting minerals from rebel-held areas of the Eastern DRC. The NGO Rights and Accountability in Development (RAID), which had brought a complaint against the company, hailed the action as an important precedent.

The UN Panel report 2001 had reported that DAS Air transported coltan (columbo-tantalite used in the manufacture of electronic equipment) from the Congolese towns of Bukavu and Goma to Europe via Kigali (the Rwandan capital).

The UK NCP rejected DAS Air’s argument denying that it knew the coltan came from rebel areas:

*DAS Air did not try to establish the source of the minerals they were transporting from Kigali and Entebbe, stating they were unaware of the potential for the minerals to be sourced from the conflict zone in Eastern DRC. The NCP finds it difficult to accept that an airline with a significant presence in Africa including a base in Entebbe would not have been aware of the conflict and the potential for the minerals to be sourced from Eastern DRC.*

The cases of three other British companies, De Beers, Avient Limited and Oryx Natural Resources, forwarded by the UN Panel to the British Government in 2003 met a different fate. All of these companies were exonerated.

Source: RAID, *Government Condemns British Aviation Company for Fueling Congo’s War*, Oxford, Monday 21 July 2008 available at [http://raid-uk.org/docs/DAS/DAS\\_Press\\_Release\\_final.doc](http://raid-uk.org/docs/DAS/DAS_Press_Release_final.doc), accessed 20 July 2011.

The UN Expert Panel reports 2001-2003 were not the final attempt to clarify the links between exploitation of natural resources, armed conflict and human rights abuses. Successive mission reports by UN Panels, experts, the UN Mission in the DRC (MONUC, now United Nations Stabilisation Mission-MONUSCO), and the Office of the High Commissioner for Human Rights, as well as non-governmental organisations and regional bodies, have shed additional clarity about the specific links of the illegal, and/or unregulated, exploitation of the DRC's natural resources, and serious violations of human rights and humanitarian law in the country. The 2010 reports of the Group of Experts<sup>75</sup> appointed by the Security Council and the Report of the UN Mapping Exercise<sup>76</sup> are the latest attempts by United Nations organs to tackle the issues in a more effective way.

In its 2010 final report, the Group of Experts appointed by the Security Council with the mandate to monitor the arms embargo and investigate natural resource trade as a source of finance for armed groups, confirmed the involvement of the national Congolese army in the natural resources trade and as an important cause of insecurity and conflict. It also confirmed the existing competition between factions of the Congolese army, in alliance with irregular national and foreign groups, for control of areas rich in resources; and that the integration of former rebel armies into the Congolese army was awarded in 2009 with the control of the minerals trade in large areas and that the commanders of this group were directly involved in the minerals trade. Other reports of the UN field presence in the DRC, cited by the NGO Global Witness, refer to incidents of mass rape, kidnapping and forced labour committed by rebel forces acting in Walikale (North Kivu) in their attempt to regain control of mining areas.<sup>77</sup>

In reaction to the final reports and recommendations by its Group of Experts the Security Council adopted in November 2010 a resolution (S/RES/1952) endorsing standards of due diligence to prevent “illegal armed groups”, “criminal networks” and “perpetrators of serious violations of international humanitarian law and human rights abuses” from benefiting from the minerals trade and purchases by companies. These due diligence standards adopted by the Security Council as well as those equivalent standards adopted by the OECD in the same year<sup>78</sup>

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75. Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2010/596, 29 November 2010; Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2009/603 23 November 2009. See also the reports for previous years: Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2008/773 12 December 2008.

76. *Democratic Republic Of The Congo, 1993–2003, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010.

77. Global Witness, “The Hill Belongs to them: The need for international action on Congo’s conflict minerals trade”, p. 9-10, (December 2010), citing reports by MONUSCO/UNHCHR “Rapport préliminaire de a mission d’enquête du Bureau Conjoint des Nations Unies aux Droits de l’Homme sus les viols massifs et autres violations des droits de l’Homme commis par une coalition de groupes armés sur l’axe Kibua-Mpofi, en territoire Walikale, province du Nord-Kivu, du 30 juillet au 2 aout 2010”, (24 September 2010).

78. Organisation for Economic Co-operation and Development Guidelines for weak governance zones.

will undoubtedly have an impact on a company's conduct, but do not contain mechanisms for monitoring compliance, and it is unclear how the standards will be implemented beyond the reliance on the good will of companies. Further, these documents on due diligence standards do not provide a mechanism of redress for those whose rights have already been affected.

The UN Mapping Report contained a chapter with one of the most focussed accounts of the links between serious violations in the DRC and the exploitation of natural resources. The Mapping report relied on a series of periodic reports and monitoring activities carried out by the United Nations Mission in the DRC-MONUC and other previously available reports, and organised the conclusions in three broad areas:<sup>79</sup>

- a) Violations occurred in the context of the struggle to “gain access to and control the richest areas of the country, along with the roads, border posts and trading centres”.
- b) The abuses committed by armed groups during their long term occupation of the economically rich area, including the use of forced and child labour, killings, sexual abuses, torture and forced displacement of civilians.
- c) The profits generated from the exploitation of natural resources “fuelled and helped fund the conflicts, which were themselves a source and cause of the most serious violations of human rights and international humanitarian law”.

The Mapping report concluded that the impunity of crimes committed in this context “reflects the broader absence of justice for violations of human rights and international humanitarian law throughout the country.”<sup>80</sup> It cited the difficulties in proving the legal liability of companies even in cases of complicity with international crimes, the political interference in the justice system and a general climate of impunity. Despite the encouraging ruling of the International Court of Justice holding Uganda responsible for violations of its international law obligations,<sup>81</sup> the UN mapping report concluded: “The abundance of natural resources in the DRC and the absence of regulation and responsibility in this sector have created a particular dynamic that has clearly contributed directly to widespread violations of human rights and international humanitarian law.”<sup>82</sup>

Sadly, again, the Mapping report could not go beyond the review carried out in one chapter (section III, Chapter III). Therefore, the report ends with no recommendations for justice and accountability for economic actors and associates who took

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79. UN Mapping report at para. 727, p. 349.

80. UN Mapping report at para. 777, p. 366.

81. International Commission of Jurists, “Armed activities on the territory of the Congo”, *DRC v. Uganda*, 19 (December 2005).

82. UN Mapping report at para. 780, p. 367.

part in the illegal exploitation of natural resources, contributing to fuelling the conflict and the serious abuses in the DRC. There is a need for a detailed analysis of these issues.

In June 2011, the DRC Government tabled before the National Assembly two bills: one creates specialised chambers within national tribunals and the second will provide for better protection of human rights defenders.<sup>83</sup>

### **Afrimex: An instance before the UK National Contact Point**

During the first Congolese war, the territory of the Eastern provinces, rich in minerals, was under the control of an armed rebel group, the *Rassemblement Congolais pour la Démocratie-Goma* (RCD-Goma). Afrimex, a British company, carried out economic activities related to the trade of minerals in this part of the country. In 2007 the ONG Global Witness introduced a complaint to the OECD-National Contact Point in the United Kingdom against Afrimex for its activities in DRC.

Global Witness submitted that Afrimex’s trading activities in coltan and cassiterite during the DRC’s conflict breached the OECD Guidelines, contributed by doing so to the internal conflict and to the serious human rights abuses against the local population. Afrimex was accused of breaching, *inter alia*, the following OECD Guidelines:

- Paragraph II.2, for paying “taxes to an armed group that was engaged in an armed conflict against the Congolese Government and had a well-documented record of committing serious human rights abuses against the civilian population in eastern DRC. (...)”.
- Paragraph II.10, for not supplying proof that it “[...] had encouraged its suppliers to apply principles compatible with the OECD Guidelines or that it conducted due diligence to ensure that its suppliers were complying with the OECD Guidelines. [...]”.
- Paragraph II.11, for “contributing to support an armed opposition group in the DRC”.
- Paragraphs IV.1.b, IV.1.c, IV.4.b, for carrying out “unacceptable health and safety practices, including life-threatening conditions, use of forced labour and child labour [...]”.

83. RDC: *un projet de loi pour sanctionner les plus graves violations des droits de l'homme*. Available at: <http://radiookapi.net/actualite/2011/06/14/rdc-un-projet-de-loi-pour-sanctionner-les-plus-graves-violations-des-droits-de-l%E2%80%99homme/>, accessed 21 July 2011.

Global Witness argued that economic actors have the responsibility to adopt practices which do not fuel human rights violations and the use of violence against unarmed civilians. The responsibility for ensuring that they do so rests with governments, who should investigate allegations of breaches by companies from their country and hold these companies to account.

In its final statement in the case of 28 August 2008, the UK NCP “accepts that Afrimex did not pay taxes to RCD-Goma as it did not accrue a tax liability in DRC. However, the NCP recognises that Afrimex did not take steps to influence its associated company [...]” (§ 59 of the statement). It concluded that Afrimex failed to meet the following requirements of the OECD Guidelines for Multinational Enterprises (§§ 59, 61, 62):

- II.1 “Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.
- II.2 “Contribute to economic, social and environmental progress with a view of achieving sustainable development”.
- II.10 “Encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines”.

The UK NCP, consequently, recommended to Afrimex “to consider the potential implications of their activities” and to “take proactive steps to understand how their existing and proposed activities affect human rights in DRC [and that this] impact assessment should make explicit references to internationally recognised human rights” (§ 65).

Source: OECD Watch at [http://oecdwatch.org/cases/Case\\_114](http://oecdwatch.org/cases/Case_114)

### **3.2 Structural obstacles to justice in the DRC**

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The main obstacles to justice in cases of serious violations of human rights and a company’s involvement thereof in the DRC, are related to the lack of independence of the Congolese justice system and its lack of capability to deal with cases of an economic nature, many times involving a transnational link.

### 3.2.1 Lack of independence of the courts and political interference

Article 151 of the 2006 Constitution provides for an independent judiciary. In reality, however, the executive power continues to issue instructions to judges and sometimes refuses the enforcement of court decisions.

Government interference with the independence of the courts was all too apparent when on 9 February 2008 President Joseph Kabila issued a number of decrees ordering the retirement of some judges and the appointment of replacements. Under the Congolese Constitution,<sup>84</sup> the competent body for proposing nominations, removals, transfers and retirement of judges is “*le conseil supérieur de la magistrature*” (the Higher Judicial Council). The restructuring was justified on the grounds of “urgency” and the fact that it would have been impossible to convene the Council. Under the Constitution it is only Council members (all judges) who have the competence to make recommendations about judicial appointments.

The scarcity of resources allocated to the judiciary entails inadequate payment for magistrates and judges in disregard to the Constitutional and other legal provisions that call for the restoration of the social and professional status of magistrates. The judiciary budget still represents only a tiny fraction of the national budget. This situation provides a fertile ground where corrupt practices are legitimised on the grounds of necessity.

The culture of corruption appears to be present at all levels of the judiciary and is one of the main problems in access to a remedy.<sup>85</sup> It may occur at any level of the judicial process and has a serious impact on access to justice for Congolese citizens.

A two-track justice system has been said to exist in the DRC: swift justice for the rich and powerful who can buy or influence judges’ decisions, and dilatory justice for the poor, who are the victims of decisions bought by the rich or of political interference.<sup>86</sup> This has an enormous impact on the ability of ordinary Congolese people to obtain justice in courts due to the widespread poverty and the exposure of the justice system to economic and military power.

For example, the poor, in order to obtain free legal aid, must present a certificate of indigence. Poverty prevents people from travelling to the competent courts and prosecution offices and from covering other court fees payable by the parties, including enforcement fees. The *pro bono* legal aid system under which the court

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84. Article 150, indent 4 and Article 152, indents 3 and 4, of the Constitution.

85. IBAHRI and ILAC: 2009; p. 21.

86. General Assembly of the United Nations (UNGA), *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leadro Despouy* (11 April 2008), UN Doc. A/HRC/8/4/Add.2, para. 62. Also paragraph 34 “Justice is for sale for those who can afford it.”

assigns a lawyer is in many cases inoperative, thus effectively denying victims the right to a defence in court.

Judges complain of being subject to arbitrary disciplinary rules and measures, and dismissal and transfer in breach of their guaranteed tenure terms. The economically powerful often use their influence to exert pressure and intimidate judges and prosecutors who take their work seriously and investigate instances of abuse involving economic actors.

### 3.2.2 The Kilwa case: an example of political interference in the military justice system

The exclusive jurisdiction of Congolese military courts over cases relating to international crimes and even its extended jurisdiction over civilians in a number of cases is a permanent problem. Military justice in the DRC is subject to ordinary rules of hierarchy and discipline within the military establishment that does not allow military judges and prosecutors to act with effectiveness, independence and impartiality. Military judges and prosecutors are said to be less accessible to people and frequently they are accused of unwillingness to cooperate with civil authorities in tackling sensitive cases.

The Kilwa case, which started before a military court in December 2006, concerns a military incident in October 2004 in which a number of combatants and civilians were killed in the context of an attack by Government forces to recover the Kilwa town from the hands of rebel forces. Anvil Mining Congo, a subsidiary of the Australian/Canadian mining company Anvil Mining, was accused of having assisted in the alleged massacre of civilians by supplying logistical support and transport. Anvil Mining stated that the authorities requisitioned its transport and equipment and that it had no choice in the matter.<sup>87</sup> Although the facts of the case are still under dispute, including before courts of justice, several actors of high reputation have investigated the incident and issued authoritative reports.

The United Nations' Mapping Report<sup>88</sup> provides a brief account of the facts as follows:

*867. The Kilwa case once again began with a MONUC investigation mission, which learnt that over 100 people had been killed during a FARDC counter-offensive carried out on 15 October 2004 with the aim of recapturing the town of Kilwa, which had fallen into the hands of a*

87. See RAID, Global Witness, l'Association africaine de Défense des droits de l'Homme (ASADHO) and Action Contre l'Impunité pour les Droits Humains (ACIDH) *Kilwa Trial: a Denial of Justice: A Chronology October 2004 – July 2007*; 17 July 2007. Available at: [http://raid-uk.org/docs/Kilwa\\_Trial/Kilwa-chron-EN-170707.pdf](http://raid-uk.org/docs/Kilwa_Trial/Kilwa-chron-EN-170707.pdf)

88. *Democratic Republic Of The Congo, 1993–2003, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010.

*rebel group. The MONUC report states that the evidence confirms that at least 73 people died, of whom 26 were victims of summary execution. MONUC demanded that those responsible for these crimes be brought to justice, and informed the Government of the identity of the presumed perpetrators. The military justice system, however, took no action. Only in July 2005, following a documentary about this massacre that was broadcast on an Australian TV channel, did international pressure increase, which removed the previous obstacles to an investigation by the military prosecution department. MONUC arranged for the military prosecution personnel to be moved to Kilwa so that the evidence of the many victims could be heard. In January 2006, the tribunal asked the regional military commander to have 12 soldiers suspected of committing crimes during these events appear in court. Further pressure by NGOs and MONUC was required before the military authorities finally agreed, in October 2006, to hand over seven of their personnel who were charged with “war crimes” in line with article 8 of the Rome Statute of the ICC, including Colonel Adémar Ilunga who had commanded the counter-offensive in Kilwa. Three employees of the mining company Anvil Mining Congo were also accused of complicity, and in particular of providing transport for the military personnel involved in these events. (footnotes omitted)*

The military tribunal acquitted five of the seven military personnel but convicted the remaining two on charges relating to several murders committed in Pweto. The court ruled *inter alia* that the majority of those who had died had been members of a rebel group killed in confrontations with the Congolese Armed Forces. The court did not accept that the military had carried out extrajudicial executions or that some of the victims had been buried in unmarked graves in the village of Nsensele. The court ruled that the site indicated by numerous witnesses and UN human rights investigators was a cemetery, not a mass grave, and that Anvil Mining’s vehicles and logistical support had been requisitioned.<sup>89</sup> The Court decided that it was not for Anvil Mining defendants and the company, Anvil Mining Congo, to decide when to withdraw its vehicles. In the court’s view it was a matter for the Commanding Officer to assess when the vehicles should be returned – which would be dependent on the accomplishment of the mission and the security situation.<sup>90</sup> The court acquitted for lack of sufficient evidence the three employees of Anvil Mining who were on trial, and found the initial charges against Anvil Mining Congo unfounded. The Commanding Officer of the 62nd Brigade, Colonel Ademar Ilunga, which led the attack over Kilwa, and another soldier were

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89. See the High Military Court’s account cited in: *Association Canadienne contre l’Impunité (A.C.C.I.) c. Anvil Mining Limited*, Judgement Cour supérieure (Recours collectif), Province de Québec, N° 500-06-000530-101, 27 avril 2011, at 2.

90. CM du Katanga JUDGMENT R.P. N° 010/200 ; p. 27.



convicted for the torture and murder of two students from the garrison town of Pweto and sentenced to life imprisonment.

The ruling shows lapses in the conceptualisation and interpretation of the law by the DRC courts. The issue of whether a company *per se* might be held criminally responsible for complicity in crimes against humanity or war crimes under Congolese law was sidestepped when the military prosecutor, at the opening of the trial without explanation, dropped the charges against the company's Congolese subsidiary, Anvil Mining Congo. Although not stated at the time, the military prosecutor subsequently justified this decision on the grounds that it was not compatible with a prosecution under the Rome Statute.<sup>91</sup>

The prosecution's case against Anvil Mining and its employees did not turn on the existence of a conflict or a valid requisition order, but on their failure to demand the return of the company's vehicles once it had become apparent that they were being used in the commission of serious crimes and human rights violations.<sup>92</sup> The three Anvil employees were accused of having "voluntarily failed to withdraw the vehicles placed at the disposal of the 62nd Brigade in the context of the counter-offensive of [15-18] October 2004 to recapture the town of Kilwa" and of having "knowingly facilitated the commission of war crimes by Ilunga Ademar and his men".<sup>93</sup>

The United Nations and several non-governmental organisations highlighted procedural deficiencies and inconsistencies of the whole trial with international standards. The court did not hear crucial evidence from key individuals, as not all the prosecution witnesses attended the hearings. Several witnesses and victims who were supposed to appear and were cited in the indictment were not summoned to appear in court. According to information collected by the MONUC Division of Human Rights, other witnesses were afraid of reprisals and decided to hide, not to appear in court or to leave Kilwa to avoid having to testify.<sup>94</sup> It has been alleged that it took several months, and numerous requests, before the victims' lawyers were able to have access to the written judgement.

If cases are submitted to military courts, victims can be a civil party in the case at any time, from the point at which the case is referred to the court until the proceedings finish, via a declaration to the clerk or in the hearing, and the applicant should receive formal acknowledgement of this.<sup>95</sup> The Court declared the civil action, seeking compensation for the victims, as unfounded, presumably on the

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91. Personal interview with the Military Prosecutor, Kinshasa July 2009.

92. *Ibid.*

93. See Annex X for the indictment ("*Décision de renvoi*") and an extract from the Kilwa verdict (CM du Katanga Judgment R.P. N° 010/2006, rendered on 28 June 2007 on the events of KILWA 2004) p. 7.

94. *Kilwa Trial: a Denial of Justice* p. 22.

95. See Article 226 of the law dated 18 November 2002 concerning the Code of Military Justice.

basis of the acquittal in criminal proceedings. On the basis of Article 77 of the Military Judicial Code, the lawyers had filed a civil action for \$3, 690, 000 in damages from the Congolese State and the Anvil Mining Company as provided for in Article 260, paragraph 3 of the Civil Code, Book III.

Louise Arbour, the United Nations High Commissioner for Human Rights, issued a statement expressing her disquiet about the verdict of the Military Court,<sup>96</sup> and Leandro Despouy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, wrote to the Congolese Government to express concern about impunity and increasing interference in the independence of the military courts.<sup>97</sup> He referred to the *Kilwa trial* and the acquittal of all the accused, “despite the weight of evidence, including eye-witness testimony, which indicated clear responsibilities for the tragic events”.

The victims’ lawyers highlighted a number of concerns about irregularities in the appeal proceedings, which opened in Lubumbashi on 5 December 2007.<sup>98</sup> The Court summarily rejected the appeals lodged by all the *parties civiles* and upheld the acquittal of the three Anvil Mining employees in a hearing on 21 December 2007 that lasted just a few minutes. On 2 January 2008 an application for the removal (*récusation*) of the Appeal Court judges was lodged by a relative of two of the victims. The High Military Court rejected the application by the *parties civiles* for the removal of the judges and fined the applicant 40,000 Congolese Francs (US \$72.73) for presenting a vexatious and frivolous complaint against the judges.<sup>99</sup> Non-governmental organisations concluded that the decisions of the military Court of Appeal appeared to be the culmination of a pattern of political interference and irregularities designed to protect those responsible for the military action and its consequence in Kilwa.<sup>100</sup>

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96. Office of the High Commissioner for Human Rights, “High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo,” (4 July 2007). “I am concerned at the court’s conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations.” Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/9828B052BBC32B08C125730E004019C4?opendocument>

97. Letter from Leandro Despouy, *Rapporteur spécial sur l’indépendance des juges et des avocats*, to M. Antoine Mindua Kesia-Mbe, *Ambassadeur extraordinaire et plénipotentiaire, Représentant permanent de la République Démocratique du Congo auprès de l’Office des Nations Unies à Genève*, 26 Septembre 2007 : “Récemment une tendance négative semble avoir émergé concernant la lutte contre l’impunité et l’indépendance du pouvoir judiciaire militaire...”.

98. ASADHO, Letter to the First President of the High Military Court in Kinshasa, (29 January 2008).

99. ASADHO, *Press Release No 004/AC/AS/AM/FD/2008*, (31 January 2008). The *parties civiles* (as victims) were not properly summoned before the start of the appeal proceedings.

100. RAID and Global Witness, “Military Court of appeal succumbs to political interference in Kilwa trial”, *Press Release*, (21 December 2007).

The UN Mapping Report concludes:

*778. The Kilwa case demonstrates the difficulty in proving the legal responsibility of private companies in the perpetration of serious human rights abuses and violations of international humanitarian law, even when they supply arms or logistical support to armed groups. This case also shows that political interference and a lack of impartiality are all the more striking when economic interests are at stake. (...) The case could have set an important precedent in terms of corporate accountability. Instead, all the defendants were acquitted of the charges relating to the events in Kilwa, in a trial by a military court that the United Nations regarded as a failure to meet international standards of fairness. (footnotes omitted)*

*869. The judicial decisions made during the Kilwa case are an illustration of the lack of impartiality and independence within the military justice system. The Court has clearly demonstrated its bias in favour of the accused, exonerating Colonel Adémar of most of the murder charges made by the military prosecutor, either against him personally or against him as the commander of the perpetrators of these murders. No reference was made in the judgement to international law as it pertains to war crimes. Throughout this case, political interference, a lack of co-operation on the part of the military authorities and many irregularities were observed. (footnotes omitted)*

### 3.2.3 Corruption

Low remunerations and the absence of appropriate facilities and infrastructure for the work of judges and prosecutors sometimes drive some of them to accept bribes and/or undue “support” (in the form of transport and communication facilities provided by one of the parties to the dispute). Widespread corruption is also at the basis of the low level of public confidence that the Congolese judiciary enjoys.

The absence of an effective oversight and disciplinary body was cited as a key factor for this state of affairs in 2009.<sup>101</sup> The *Conseil supérieur de la magistrature* now in function decided in May 2011 to review the cases of judges sanctioned by the disciplinary commission and also of those benefitting from amnesty provisions. It also decided to prepare a more realistic budget for 2012.

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101. ILAC/IBAHRI Report Op. Cit. p. 21.

### **3.2.4 Lack of capacity, equipment and training**

There are too few judges for the population and needs of the DRC. Recent efforts to recruit more judges have been dwarfed by limited budgets, lack of clarity in the procedures and the absence of a system of professional training of future judges.

Judges and other members of the judiciary continue to face a shortage of opportunities for professional training. Prosecutors and the police are unable to conduct investigations that meet standards. Faulty investigations often lead to acquittals in the court system, resulting in the impunity of perpetrators. The insufficient training and knowledge of the law, as well as comparative and international law, prevent judges from taking effective and reasoned decisions in keeping with international standards and to innovate in the application of national law. Most of the training for judges continues to be done by non-governmental organisations. However, specialised knowledge of the law and procedures to deal with cases involving corporate abuses affecting human rights is almost non-existent.

Insufficient legal education and training, including on techniques of litigation, defence or advocacy, or even investigation and case preparation, also hinders the whole legal community and the bar's ability to act efficiently. This would in part explain why there are no known court cases for civil remedies against corporations deemed to be at fault. However, administrative procedures in the context of mining and forest legislation seem to be used more frequently, while the potential of the Constitutional justice (exercised for the time being by the Supreme Court) continues to be unexplored.

### **3.2.5 Ignorance of the law**

In most cases people are unaware even of the possibility of bringing an action in Court and are only familiar with customary justice as a means of settling disputes. The problem is compounded by an ignorance of the law on the part of some court officers or even certain judges.

There is restricted access to legal information in the DRC, and in general, information systems are not reliable. Effectively, with the exception of practising lawyers, very few people are able to access legal information readily or ascertain which laws have come into force and which ones have been repealed. In addition, most printed and online information is infrequently published and updated.

When a new law is published in the Official Gazette, anyone who wishes to obtain a copy, including magistrates, will need to pay for it. The Official Gazette is also published irregularly. Sometimes magistrates, particularly those in remote areas, are not even informed of the entry into force of a new law.

The Directorate for the Protection of the Mining Environment (DPEM) approves the environmental assessments and management plans and audits implementation.<sup>102</sup> But knowledge about the law and its requirements is deficient. In August 2010, for example, a group of Congolese NGOs interviewed the *bourgmestre* (the local administrative official) in a residential area in Lubumbashi where an Indian-owned company, CHEMAF, has a mineral-processing factory. The factory has been the subject of numerous complaints by local residents for many years about levels of pollution. The *bourgmestre* told the NGOs that he did not have a copy of the Mining Code and was unaware that companies were required by law to conduct an environmental impact assessment and to produce an environmental management plan.<sup>103</sup>

### 3.2.6 Lack of transparency and unwillingness of the public administration to take action

A government review of 61 mining contracts signed between 1997 and 2002 between DRC public enterprises and private companies, was conducted through *arrêtes*, decrees and instructions especially enacted or issued for such purpose. The review process was generally plagued by numerous delays and a lack of transparency. As a result of such review, a number of mining contracts were cancelled, including that of the Canadian company First Quantum Minerals, for its Kingamyambo Musonoi Tailings Project (KMT)<sup>104</sup> for which project a liquidator was recently appointed. In August 2010, the Arbitration Tribunal issued interim measures restraining the Congolese authorities from executing the decision of the Kinshasa Court of Appeal (RCA 27.068/27.069), cancelling KMT's mine licence and prohibiting the transfer of the concession to a third party.<sup>105</sup>

For these reasons, communities who suffer negative environmental impacts as a result of mining activities face formidable obstacles to obtain redress. The *Chef de groupement* N'guba, for example, has struggled to obtain redress from Boss Mining (then owned by the AIM-listed Central African Mining and Exploration Company, CAMEC). In January 2009, Boss Mining allegedly dumped acid and copper residues in the Dikuluwe river in Kolwezi District, Katanga. When the river later flooded, it contaminated the soil, damaging the N'guba's community's crops. Boss

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102. RAID, *Chinese Mining Operators in Katanga*, September 2009.

103. Interview with Bourgmestre, 21 August 2010, conducted by the *Collectif des ONGs pour les droits humains dans l'exploitation des ressources naturelles en RDC*.

104. In August 2009 First Quantum Minerals's contract for KMT was cancelled by the Ministry of Mines. The joint venture agreement with Gecamines was formally cancelled by a decision of the *Tribunal de Grande Instance de la Gombe* on 28 October 2009 (RC 102.447/102.512/102.513). See First Quantum Minerals Ltd News release: "First Quantum Announces Commencement of International Arbitration Regarding the Cancellation of the Kolwezi Project", February 1, 2010.

105. Arbitrage CCI N° 16918/ND Congo Mineral Developments Limited (Iles Vierges Britanniques), Industrial Development Corporation of South Africa Limited (Afrique du Sud), la Societe Financiere Internationale (Etats Unis) c/ République Démocratique du Congo et la Générale des Carrières et Des Mines. Ordonnance de Procédure N° 1 (19 août 2010).

Mining denied any responsibility. Despite having written to all relevant authorities, including the Mayor of Kolwezi and to the Traditional Chief, as of September 2009, no action had been taken to resolve the matter.<sup>106</sup>

### 3.3 Access to Courts and Legal Representation

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#### 3.3.1 Legal standing

As stated above, the Supreme Court has adopted a good practice by adopting a broad meaning of legal standing in cases concerning challenges to laws and acts for inconsistency with the constitution. This means that in practice, anyone may have recourse to the Supreme Court on these grounds, however, the relief that the court may provide is only declaratory. Damages or other forms of remedy are not provided, and the process is not an adversarial one.

In the context of criminal proceedings, the victims may be party as *partie civile*. As such, they may request the judge the determination of compensation in their favour. However, if the accused is acquitted from criminal charges he/she will also be absolved from civil liability.

In the context of civil remedies, it is not clear that DRC law allows for some sort of class action, but nothing in the law prevents civil associations with legal status from filing a civil suit for damages. Following the practice of other civil law jurisdictions, DRC tribunals may also not have impediments to dealing with suits that have the same underlying facts, and similar legal points, in one single proceeding. Labour Tribunals have the jurisdiction to deal with collective labour disputes: between one or several employers on one side, and a number of their employees, if the “nature of the dispute is such to compromise the normal functioning of the enterprise and social peace” (Article 16).<sup>107</sup>

#### 3.3.2 Pro Bono Legal Assistance

Free legal aid offices for indigents (*bureaux de consultation gratuite*) are supposed to be available but the system does not function.<sup>108</sup> In order to obtain legal aid, individuals need to obtain a certificate of indigence issued by the municipality, something which can take a long time. Such certificates should be issued free of charge, but local authorities arbitrarily demand payment of \$15 to \$30.<sup>109</sup> Local human rights NGOs offer some help, usually with the support of law students,

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106. Letter No 536/1880/013/BR-CH/gpt-N’g-ba/2009 dated 15 June 2009. In September 2009, RAID visited Nguba and interviewed the chief and local farmers.

107. Loi portant création, organisation et fonctionnement des tribunaux du travail – 16 octobre 2002 (Loi n° 016-2002).

108. Established by *Ordonnance-loi 79-028*. According to IBAHRI and ILAC: 2009; p.34 “Bars do not receive any funding to administer legal aid or to give a minimum fee to lawyers handling cases”.

109. *Ibid* p. 21.

but they lack the experience and resources to sustain a legal action against a company.

### 3.3.3 Access to Information and Information Gathering

The lack of investigative capacity is an obstacle to a functioning criminal justice system. There also appears to be a lack of knowledge among the judicial police of how to conduct a criminal investigation. Furthermore, technical equipment or facilities, such as forensic laboratories, which are needed for qualitative criminal investigations, were not available anywhere in the DRC until very recently, and are not in general use.<sup>110</sup>

## 3.4 Obstacles during and after the court proceedings

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### 3.4.1 Costs

In the absence of legal aid, the costs involved in trying to obtain a remedy are beyond the means of ordinary Congolese. The official fees are published by the Treasury's *Direction Générale des Recettes Administratives, Judiciaires, Domaniales et de la Participation* (DGRAD). There are numerous official and unofficial fees to be met, such as preliminary fees to be paid to a lawyer, which can be between \$50 and \$100. Court's fees are fixed by law, but in the old currency (Zairois), which means in effect that claimants are charged whatever the judges decide is appropriate.<sup>111</sup> Victims have also to make numerous unofficial payments to officials in order to obtain essential documents to enable their case to proceed. A report by a labour inspector, for example, is in theory free, but the victims must pay an additional charge to get a typed copy (*dactylographie*). Prosecutors also demand payment for opening an investigation (around 3000 Congolese Francs). Experienced lawyers will also find ways of complicating the procedures in order to raise the costs, making it harder for the weaker party to pursue the claim.

### 3.4.2 Enforcing Judgments

According to the Special Rapporteur on the Independence of Judges and Lawyers in the vast majority of cases, court decisions are not enforced.<sup>112</sup> The principal cause is the costs of enforcement (*frais de justice*). The law provides that convictions handed down in criminal indemnification actions shall be enforced only if the claimant has sufficient resources to pay the registrar proportional fees in cash or in securities (ranging between six percent and 15 percent of the damages

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110. France has just financed the creation of a technical and scientific laboratory located in the school for police officers in Kinshasa, which was inaugurated on 15 June 2009. IBAHRI and ILAC:2009; p. 23.

111. *Des Frais de Justice Code de Procédure Civile Titre IV, articles 144 – 158.*

112. Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, supra no 2 at Paragraph 52. According to IBAHRI and ILAC: 2009 only approximately 30 percent of judgments made are enforced.

awarded).<sup>113</sup> These costs are dues payable to the registrar's office, and also cover the costs of transportation, all of which are required to be paid in advance. These costs are supposed to be waived *en cas d'indigence*, but as a general rule, it seems that no account is taken of the poverty of the parties, and so they are effectively denied the compensation to which they are entitled.<sup>114</sup>

### 3.4.3 Witness Protection and Reprisals

During the Kilwa trial, many witnesses and the families of victims were put under pressure not to testify. Several times during the trial, the Kunda family<sup>115</sup> reported that unknown assailants had come to their home in Lubumbashi and banged on the door and roof in an effort to scare them. The absence of any witness protection mechanism in the DRC is a major obstacle to redress.

The intimidation did not cease with the end of the legal proceedings. On 1 April 2008, in disregard of the right to freedom of movement and of the victims' rights to receive assistance, the Governor of Katanga province, Moïse Katumbi, and the provincial Interior Minister, Dikanga Kazadi, prohibited lawyers and members of Congolese human rights NGOs from flying to Kilwa.<sup>116</sup> The following day, two members of the human rights team reportedly received anonymous death threats, warning them to stop their work on the Kilwa case. They had to go into hiding for their own safety.<sup>117</sup>

Attempts to challenge companies or expose illegal activities by the extractive companies have, in many instances, put witnesses and activists at risk. Golden Misabiko, head of the ASADHO/Katanga, a human rights organisation, was arrested by the National Intelligence Agency (ANR), in July 2009, after his organisation published a report alleging that government security officials were involved in illegal mining of highly radioactive uranium and other minerals from the Shinkolobwe mine, Katanga province. The report also criticised the lack of transparency surrounding an agreement between the Congolese government and the French company, AREVA, for the exploitation of uranium.<sup>118</sup>

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113. Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, *supra* no 2 at paragraph 53.

114. IBAHRI and ILAC: 2009; p. 23. See also ACIDH, Haki Za Binadamu et RADHOSI, *La justice face a ses problèmes pour protéger nos droits : Recherches sur des problèmes majeurs de la justices dans les provinces du Katanga, du Maniema et du Sud Kivu*, Juillet 2009, published by USAID and Global Rights. p. 29.

115. Pierre Kunda Musopelo had been tortured while in detention in Kilwa. Dorcas, his 24-year-old daughter, who was seven months pregnant at the time, suffered a miscarriage and subsequently died after being gang-raped by soldiers.

116. ACIDH, ASADHO, Global Witness and RAID press release: "Human rights defenders prevented from meeting victims of Kilwa massacre", 3 April 2008.

117. Amnesty International Urgent Action (AI Index: AFR 62/002/2008) UA 89/08, "Death threats/ Fear for safety", 4 April 2008.

118. ASADHO/Katanga *Mine uranifère de Shinkolobwe: D'une exploitation artisanale illicite à l'accord entre la RD Congo et le groupe nucléaire français AREVA*, Lubumbashi, juillet 2009.



According to reports by Greenpeace and other NGOs, the military or police are frequently called in by logging companies to deal with local critics, sometimes with tragic results.

*On the 26th of January, 2010 twenty-seven villagers from the province of Bandundu in the Democratic Republic of the Congo staged a sit-in protest against the operations of the Société de Développement Forestier or Sodefor – a subsidiary of Liechtenstein-based industrial logging company Norsudtimber (NST). NST subsidiaries hold logging permits that cover over 7 million hectares of the Congo’s rainforest [NB: that is an area twice the size of Belgium]. The villagers were detained by police for their protest – where they say they were beaten, whipped, confined in a container and – after transfer to the district capital, Inongo – detained in inhumane conditions in a police holding cell and in the central prison.<sup>119</sup>*

Another instance concerns allegations of abuse and intimidation of local individuals and communities raised against SIFORCO (*Société Industrielle et Forestière du Congo* SCARL) – a DRC subsidiary of Swiss-based DANZER. SIFORCO is said to hold eight forest titles, covering a total surface area of more than two million hectares.

The organisation Greenpeace<sup>120</sup> reported that on 2nd May 2011, “about 60 navy and national police officers were deployed to Bosanga [Yalisika community, territory of Bumba, Mongala district, Equateur Province]. [...] this joint force, transported in a SIFORCO truck driven by a SIFORCO employee, instigated a wave of violence against the community”. This allegedly included the rape of women and children, severe beatings, search, and the confiscation and/or destruction and burning of private property.

It was reported that after being beaten, “Mr. Frédéric Moloma Tuka, was left in front of his house, unable to stand because of the injuries received. After the security forces left the village, he was taken to the medical post in Magbokpale, but could not receive treatment because the nurse had also been beaten and arrested. Mr. Moloma Tuka died on the night of 2nd May.”

16 people were reportedly arrested, including the community chief as well as the nurse, the individual most able to provide medical assistance to victims; they were transported in the SIFORCO truck to Bumba prison. They were released on 6 May on an order issued by the public prosecutor's office at Lisala court, far from

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119. Greenpeace, *Forest Reform in the DRC Leaving People Out*, July 2010. One protester, 72-year-old Georges Nkaka, died the day after his release from jail. Available at: [http://www.illegal-logging.info/item\\_single.php?it\\_id=961&it=document](http://www.illegal-logging.info/item_single.php?it_id=961&it=document)

120. <http://www.greenpeace.org/africa/Global/africa/publications/SIFORCO%20Summary%20of%20Case.pdf>

their village and with no means of subsistence. At no time were they shown any official document related to their arrest.

Witnesses would have indicated that police and navy officers were commissioned by and received money from SIFORCO.

Greenpeace states that this “punitive expedition” was mounted as a reprisal against villagers of the Yalisika group, which includes the Bosanga community, for having protested on 20 April against SIFORCO’s failure to meet commitments made in 2005, and revised in 2009, to invest in social infrastructures (schools, medical post, roads).

### **3.4.4 Customary Law and Settlements**

Informal settlement based on customary justice is still very common, although it is prohibited in criminal cases. Although one of the reasons for resorting to this system is ignorance of written law and the competent jurisdictions, people often choose customary justice even when they are aware of the formal justice system. They often have misgivings about the formal justice system, having observed the corruption among judges and court officers, political interference and inefficiency in the entire system, and the resulting impunity that prevails in the vast majority of cases. People thus have more confidence in the customary justice system, which is more familiar, easier to understand and easily accessible. However, it can give rise to unfair and even inadmissible settlements.

The failure to recognise customary land use is one of the main causes of conflict in forest areas between logging companies and the local population, and leading to human rights violations. Pygmy groups have been managing the forests in a customary manner. However, at the regional or state level, their customary land use system has not been formally recognised, and there is no statutory right given to it. In the areas where Pygmy People are found, there are also agricultural villagers who use the forest for hunting, fishing and other procurement activities. In such areas, customary rights to the forests are usually overlapping.

The Act of 1978 was supposed to ensure that magistrates courts (*Tribunaux de Paix*) should gradually replace customary justice. But only 53 of an anticipated 180 have been set up so far (only 45 of which are actually functioning). As a result, the recourse to customary justice, which provides little guarantee of independence or professionalism, is widespread.

## Conclusions and Recommendations

### Conclusions

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Overall, while in theory there are some avenues of redress available to victims of corporate abuses, particularly in Congolese civil law and labour law, the prospect of successful outcomes is always limited because of the manifold weaknesses of the organisation of the judiciary, its lack of independence and the enormous disparity in wealth, information and resources, between the various levels of government and the companies, as compared with the individuals and communities, who have suffered human rights abuses as a result of corporate actions. The unstable political situation of the country, with some regions still in the midst of armed conflict, and economically rich areas under the control of rebels or the military, put both plaintiffs and members of the judiciary at risk.

There is general agreement that the Congolese judicial system is dysfunctional; being crippled by a lack of resources and subjected to constant political interference. While in theory the legal system in the DRC offers individuals and communities a range of guarantees and protections, in reality there is little prospect that victims of human rights violations related to corporate activities will have access to a remedy. The main perpetrators of human rights violations in the DRC are members of the Congolese Army, Police and Security Forces and armed rebel groups such as the *Forces Démocratiques de Libération du Rwanda* and the Lord's Resistance Army. However, UN studies and NGO reports have shown how the activities of private companies have both directly and indirectly contributed to armed conflict and human rights violations. The UN Mapping Report is highly critical of the role played by companies related to the extractive industry:

*The abundance of natural resources in the DRC and the absence of regulation and responsibility in this sector has created a particular dynamic that has clearly contributed directly to widespread violations of human rights and international humanitarian law.<sup>121</sup>*

The UN acknowledges that the impunity of crimes committed in the context of natural resource exploitation in the DRC is a reflection of the broader absence of justice for violations of human rights and international humanitarian law.<sup>122</sup> But the UN is emphatic that the illicit exploitation of natural resources in the DRC and the accompanying serious violations of human rights and international

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121. UN Mapping Report, para. 780. A draft version ended with the following phrase that was deleted in the final published version: “[...] and to their perpetuation and that both domestic and foreign state-owned or private companies bear some responsibility for these crimes having been committed.” Former para. 776.

122. *Ibid* para. 777.

humanitarian law, could not have taken place on such a large scale had there not been customers willing to trade in these resources.<sup>123</sup>

Despite the evidence of corporate wrongdoing and/or complicity with State and armed groups' violations of human rights and humanitarian law, there is no judicial forum for these economic actors to be held legally accountable within the DRC, the prospects for such a forum seem somewhat remote given the incipient state of the judicial and legal system reforms in the country. Although labour and civil courts exist and theoretically provide avenues of redress, a combination of economic, social, political and security reasons make difficulties for those who have a claim to push it forward until obtaining satisfaction.

Procedural hurdles that in other countries in ordinary circumstances are among the main obstacles, have a diminished role given the fact that the very court system is still dysfunctional, unstable and at permanent risk. However, this does not mean that all attention and work on procedures is futile but only that those efforts may take time to bear fruit.

While action by the various administrative departments in charge of mining, forest conservation, and environmental protection, seem to have some impact in certain circumstances, they only happen rarely and are not consistent over time. The increased number of new laws, or amended laws such as the Framework law on the environment, bring along basic improvements that need to be followed by further legislative or regulatory action and strong enforcement by administrative and judicial mechanisms. While the judiciary is still in a process of reform and capacity building, the action of administrative departments in the areas of labour, and environmental protection can bring about concrete results and changes. Unfortunately, the public administration of the DRC also suffers from chronic underfunding and precarious infrastructure and human resources. In a very vast country such as the DRC, the size of the State administration is visibly diminished and limited to the main urban conglomerates and areas where there is no political or military conflict. However, *ad hoc* action does contribute to successful systemic changes.

## Recommendations

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### 1. Legislative Measures

Reforms to the Congo's legal system are urgently required to make possible an improved access to justice for the victims of corporate involvement in human

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123. *Ibid* para. 773. The earlier leaked version of the Mapping Report also considered that corporate entities such as multinationals, could be ordered to pay compensation to the victims of crimes for which they were found criminally responsible by a competent court. It may even be possible to consider prosecution of some companies, whether or not they are linked to serious violations of human rights, which illegally exploited the DRC's natural resources, with a view to obtaining compensation that would be channeled into a trust fund for victims or a reparations mechanism. *Ibid* former para. 1119 and 1120.

rights abuses. In its 2009 concluding observations released at the end of their review of the DRC's periodic report, the UN Committee on Economic, Social and Cultural Rights stated its concern at the impunity that perpetrators, including foreign enterprises, of human rights abuses and illegal exploitation of natural resources enjoy in the DRC, and regarded it as a major obstacle to the realisation of economic, social and cultural rights in the country. It recommended the Government take immediate measures, including legislative measures, to establish and guarantee effective internal remedies for all social and economic rights.<sup>124</sup>

Five years after the 2006 Constitution was promulgated, the reform of the judicial system into three jurisdictional orders has still not been put in place. Enabling legislation should be promulgated to give effect to Constitutional guarantees so that individuals or groups have the possibility of recourse to the judiciary for the protection of their rights guaranteed under the Constitution. This should include the possibility of claiming judicial protection when private persons, including legal entities, infringe constitutional rights.

The bill to implement the Rome Statute, which contains provisions granting exclusive jurisdiction to civilian courts and for tribunals to try crimes and other serious violations of human rights under international law, should be adopted and implemented as soon as possible. Other bills that have been tabled by the government before the National Assembly concerning the protection of human rights defenders and the establishment of a system of hybrid courts to deal with crimes under international law should be considered as a priority and passed without delay.

The adoption of the Framework Law on the protection of the environment and health is a positive step that needs to be followed up by more legislation and regulation to implement the law.

The revision of the Mining Code (due in 2012), and the current drafting of a new Hydrocarbons Law provide an opportunity for Congolese lawyers to review the obligations on the companies, particularly as regards disclosure of financial and environmental information to affected communities by *inter alia*, making their environmental impact assessments and environmental management plans publicly available, for by example posting them online. The new environment law (Article 8) provides for disclosure of information about the environment, but the modalities for the release of such information should be defined by law or regulation as soon as possible. Article 21 states that environmental impact assessments are the 'property of the State', and defers decisions about public consideration to a future decision by a Council of Ministers.

The Mining Code could adopt the Forest Code provision for a social contract (*cahier des charges*), which would specify the agreed measures to be undertaken by the

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124. Concluding Observations, Democratic Republic of the Congo E/C.12/COD/CO/4.

company to the benefit of the community. The social contract should be the subject of prior negotiation with the Chief and community representatives and should be published. Reforms to the Mining Code should include provision for prior and informed consent of local communities before exploration and exploitation of resources in their lands and /or territory takes place.

Implementing legislation for the Forest Code should be adopted and include specific references to community mapping and the full disclosure of logging information (maps, timber volumes, taxes and facilitation payments, lists of company shareholders, the value of wood throughout the chain of custody etc.). Such measures should help empower local people and reduce conflict.

Congolese bar associations should establish a network or Commission to review the obligations of companies under Congolese law, which could then make recommendations to the Congolese National Assembly and the DRC Government.

## **2. Strengthening the Independence of the Judiciary**

This is fundamental but will require not just increased funding but also political reform to enhance a culture of respect for the Rule of Law and the independence of the judiciary. Judges, prosecutors and other officials who attempt to take action in favour of weaker parties are often removed or forced to drop the proceedings. Judges, unless they are given a clear signal to proceed, are unlikely to take on a powerful company, especially one which is favoured or protected by powerful political interests. The difficulty of access to the judicial system and lack of remedy can foment conflict. Serious clashes and deaths resulting from attempts by mining companies to curb artisanal mining could have been avoided if resort to a Court had been an option. Bar associations, experienced lawyers and judges should develop or participate in training programmes or exchange visits to encourage Congolese judges to examine cases involving corporate actions resulting in human rights abuses.

Congolese lawyers when litigating cases should start invoking international human rights standards to which the DRC is a party. This would help to disseminate knowledge and understanding of such instruments to the judiciary and Congolese civil society.

## **3. International Advocacy Network to Support Legal Action**

An international network should be established to advise Congolese human rights organisations and lawyers about available domestic and international legal remedies against corporate actions resulting in human rights abuses. In the absence of any immediate improvement in the availability of legal aid in the Congo, funds should be set up to help bring test cases before the Congolese courts.

Consideration should be given to the study of options at the international and regional levels to hold accountable corporate entities that have been involved in serious human rights abuses in the DRC, when an effective forum is not available in the country.

#### **4. Community Relations**

In the case of physical displacement, loss of crops or land, the level of compensation rates is extremely low and is largely determined by the companies. Traditional chiefs and local authorities, who are often in receipt of payments or other benefits from the companies, encourage communities to accept the offers. Family, clan and ethnic loyalties mean that victims will often be pressurised by local politicians or traditional chiefs not to protest or to accept grossly inadequate settlements. Even when a company may wish to deal fairly with claimants, it will be hard to ensure that compensation actually reaches the intended beneficiaries.

Local chiefs and communities should benefit from properly qualified legal advisers to be able to negotiate with companies as regards the terms and conditions of displacement and resettlement.

In the case of traditional (and indigenous) communities the principle of free, prior and informed consent should be respected.

Generally the rates of compensation for victims of human rights abuses related to company activities fixed by decree are too low and should be radically overhauled. Compensation levels, paid to displaced communities should include compensation for the loss of natural resources. Their customary land rights should also be recognised in the written law and provided with better protection.

#### **5. Reparations**

Consideration should be given to establishing legal liability for corporate entities in human rights related cases and to the need to make natural persons as well as corporate entities liable to pay compensation to the victims of crimes for which they are found criminally responsible by a competent court.

A trust fund to which companies that have regularly purchased minerals from the Eastern DRC without conducting due diligence may contribute should be considered as an option. The fund would provide support to the Congolese victims of the business-related human rights abuses.

#### **6. Non-Judicial Grievance Mechanisms**

In a legal environment like the one prevailing in the Congo, the OECD Guidelines for Multinational Enterprises is a potential avenue for bringing abusive behaviour by companies to the attention of home Governments. The balance of National Contact Points (NCPs) effectiveness in bringing about redress in cases of abuse

is far from positive, but changes may be operated to improve their capacity to promote dialogue, negotiation and agreements among the parties. It is also an option for NCPs to act more as remedial mechanisms: this would require them to act with more independence and improve their investigative and fact-finding capacities to conduct impartial assessments of instances of non-compliance with the Guidelines and make determinations of fact. NCPs must have the means to follow-up agreements from mediated outcomes or recommendations from final statements. There should be consequences for companies that are found to be in breach of the Guidelines and who refuse to modify abusive behaviour in line with NCP recommendations. Consideration may be given to the option of making such companies ineligible for State subsidies or credit guarantees or face other administrative or financial penalties.

In some circumstances, company-based grievance mechanisms, though they have inherent limitations, may help resolve local disputes. But they should be implemented according to the principles outlined by Professor Ruggie for effective non-judicial grievance mechanisms which are: legitimacy; accessibility; predictability; equitability for the parties involved; transparency and compatibility with internationally recognised human rights.<sup>125</sup>

However such mechanisms should not prevent individuals from pursuing legal action.

## **7. An Independent Assessment Body for the Mining Sector**

An independent assessment body, composed of representatives of private industry, the Congolese government, the state-owned mining company Gécamines, trade organisations and NGOs, could be set up to act as a credible assessor for disputes related to human rights violations. An industry ombudsman type of body might be funded by mining companies, but such funds should be managed by a board of trustees in accordance with an approved budget.

## **8. International justice**

Many foreign companies are viewed as being above the law in the DRC and out of reach for the local justice system. Victims of corporate abuses as a rule do not have enough assistance or independent advice. There is a need for research and dissemination of information among Congolese lawyers and human rights organisations about the possibility of claims in other jurisdictions.

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125. J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative to the United Nations Secretary General on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008, para. 92. Available at: <http://www.business-humanrights.org/Links/Repository/965591>



The International Criminal Court can encourage and advise the prosecution service of home governments to investigate alleged international crimes and prosecute where there is sufficient evidence.

## **9. Public education and Training**

Increased efforts should be made to disseminate information to lawyers and Congolese civil society organisations about the range of domestic and international remedies available to counter corporate actions resulting in human rights abuses. High-level workshops involving international legal experts would be an important means of sharing experience and developing the capacity of Congolese lawyers. Training in basic legal rights for Congolese civil society is a priority. Pertinent laws and regulations should be translated into relevant local languages.

## Annex 1

The main human rights conventions ratified by the DRC and directly applicable in domestic law:

| <b>Human Rights Convention or Treaty</b>   | <b>Ratification/<br/>Accession</b> |
|--|------------------------------------|
| International Covenant on Civil and Political Rights   | 01-11-1976                         |
| Optional Protocol to the International Covenant on Civil and Political Rights  | 01-11-1976                         |
| International Covenant on Economic, Social and Cultural Rights   | 01-11-1976                         |
| Convention on the Rights of the Child  | 27-09-1990                         |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict                  | 11-11-2001                         |
| Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography | 11-11-2001                         |
| Convention on the Elimination of All Forms of Discrimination against Women   | 17-10-1986                         |
| Convention relating to the Status of Refugees  | 07-07-1965                         |
| Protocol relating to the Status of Refugees  | 04-10-1967                         |
| Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment   | 18-03-1996                         |
| International Convention on the Suppression and Punishment of the Crime of Apartheid   | 11-07-1978                         |
| International Convention on the Elimination of All Forms of Racial Discrimination  | 21-08-1976                         |
| Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others                   | 31-05-1972                         |
| OUA Convention governing the specific aspects of refugee problems in Africa  | 20-06-1974                         |
| African Charter on Human and Peoples' Rights   | 20-07-1987                         |

| <b>Human Rights Convention or Treaty</b>   | <b>Ratification/<br/>Accession</b> |
|--|------------------------------------|
| Ouagadougou Protocol creating an African Court on Human and Peoples' Rights, June 1998 | 28-03-2001                         |
| African Charter on the Rights and Welfare of the Child                                 | 29-03-2001                         |

The main humanitarian law conventions ratified by the DRC and directly applicable within the Congolese legal order are as follows:

| <b>International Humanitarian Law Convention or Treaty</b>   | <b>Ratification/<br/>Accession</b> |
|--|------------------------------------|
| The 1949 Geneva Conventions on the protection of victims of armed conflicts  | 24-02-1961                         |
| Additional Protocol I and Declaration in accordance with Article 90 of Additional Protocol I                         | 03-06-1982 /<br>12-12-2002         |
| Additional Protocol II (1977) to the four Geneva Conventions of 1949   | 12-12-2002                         |
| The Hague Convention of 1954   | 18-04-1961                         |
| Additional Protocol to the Hague Convention of 1954 (Protection of cultural property in the event of armed conflict) | 03-06-1982                         |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict      | 11-11-2001                         |
| Convention on the Prevention and Punishment of the Crime of Genocide   | 31-05-1962                         |
| Rome Statute of the International Criminal Court (signed on 8 September 2000)  | 11-04-2002                         |

**Source:**

United Nations: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (June 2010 – presented to the Human Rights Council 6 September 2010).

## Bibliography

### Legislation

---

*Les Codes Larciens – République Démocratique du Congo; Larcier & Afrique Éditions, Belgique, 2010, 9 vols.*

### Books and Articles

---

JP Colin. *Supplément quinquennal au Répertoire général de la jurisprudence congolaise (1935-1939)*, Revue juridique du Congo belge, Elisabethville, 1940.

JP Colin. *Répertoire général de la jurisprudence (1890-1934)*, Revue juridique du Congo belge, Elisabethville, 1936.

Katuala Kaba-Kashaka. *Jurisprudences des cours et tribunaux, 1975-1987*, Service de documentation et d'études, Kinshasa, 1992.

Dipunda Kabuinji Mpumbuambuji. *Répertoire général de la jurisprudence de la Cour Suprême de Justice, C.P.D.Z., Kinshasa, 1990.*

Balingene Kahombo, *La cour supreme de justice, cour constitutionnelle transitoire.* Available at: <http://www.la-constitution-en-afrique.org/article-la-cour-supreme-de-justice-a-t-elle-demerite-66284374.html>, accessed on 14 July 2011.

Rémy Kashama Tshikondo. *Chroniques judiciaires: Analyse de quelques affaires portées devant les cours et tribunaux congolais*, Presses Universitaires de Lubumbashi, Lubumbashi, 2001.

V. Kuuya. "The Illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo", without date. Available at: <http://www.business-humanrights.org/Documents/Vuyelwa-Kuuya-on-UN-Expert-Panel-DRC-Nov-2008.doc>, accessed 20 July 2011.

Roger Masamba Makela. *Droit économique congolais*, Bryulant-Academia SA, Louvain-La-Neuve, 2006.

Ministère de la Justice et Droits Humains, "Mot d'Ouverture du Dialogue Des Juristes Sur L'implication des Entités Commerciales Dans Les Violations des Droits Humains et l'Accès a La Justice En République Démocratique du Congo", délivré par Monsieur Lukunda Richard, conseiller en charge des Droits Humains,

Dimanche 22 août 2010.

R. Mushigo-A-Gazanga Gingombe. *Les principes généraux du droit et leurs applications devant la Cour suprême de Justice du Congo*, Academia-Bruylant, Louvain-la-neuve, 2002.

Nobirabo Musafiri, *The dispossession of indigenous land rights in the DRC: a history and future prospects*, Forests People Programme, September 2008.

Asimina-Manto Papaioannou. “*The illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses*”. In: De Schutter, Oliver (ed.) *Transnational Corporations and Human Rights*, Hart Publ., Oxford and Portland-Oregon, 2006, p. 263.

Johan Pauwels. *L’adaptation du droit africain par voie jurisprudentielle expériences et projets au Congo*, Office national de la recherche et du développement, Kinshasa, 1971.

Marcellin Rae. *Des engagements qui se forment sans convention*, Société d’Etudes Juridiques du Katanga, Lubumbashi, 2e édition revue et augmentée, 1967.

A. Sohier. *Répertoire général de la jurisprudence*, Revue juridique du Congo belge, Elisabethville, 1951.

Dunia Zongwe, Francois Butedi and Clement Phebe. *The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview*, December 2007. Available at: [http://www.nyulawglobal.org/globalex/Democratic\\_Republic\\_Congo.htm](http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo.htm)

## Reports

---

### United Nations

MONUC, *The Human Rights Situation in the Democratic Republic of the Congo: for the period January to June 2006*, July 2006. Available at: <http://monuc.unmissions.org/LinkClick.aspx?fileticket=wtFw3QXSGIU%3D&tabid=4135&mid=3999>

*National Report Submitted In Accordance With Paragraph 15 (A) Of The Annex To Human Rights Council Resolution 5/1\* Democratic Republic Of The Congo*, UN Doc. A/HRC/WG.6/6/COD/1, 3 September 2009. Available at: [Http://Lib.Ohchr.Org/Hrbodies/UPR/Documents/Session6/CD/A\\_HRC\\_WG6\\_6\\_COD\\_1\\_E.Pdf](Http://Lib.Ohchr.Org/Hrbodies/UPR/Documents/Session6/CD/A_HRC_WG6_6_COD_1_E.Pdf)

Office of the United Nations High Commissioner for Human Rights, *Democratic Republic of the Congo, 1993–2003 : Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*. (June 2010 – Advance draft).

Office of the High Commissioner for Human Rights, “*High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo*,” (4 July 2007). Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/9828B052BBC32Bo8C125730E004019C4?opendocument>

Office of the United Nations High Commissioner for Human Rights, *Democratic Republic of the Congo: Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010. (presented to the Human Rights Council on 6 September 2010)

Office of the United Nations High Commissioner for Human Rights, Concluding Observations, Democratic Republic of the Congo E/C.12/COD/CO/4. Available at: <http://www2.ohchr.org/english/bodies/cescr/cescrs43.htm>

*Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leadro Despouy*, UN Doc. A/HRC/8/4/Add.2, 11 April 2008.

*Statement of the President of the Security Council*, UN doc S/PRST/2000/20, 2 June 2000.

## **World Bank Group**

Inspection Panel Investigation Report, “Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC)”, August 31, 2007.

Available at: <http://www.illegal-logging.info/uploads/WB%20DRC%20report.pdf>

World Bank, “Democratic Republic of Congo: Growth with Governance in the Mining Sector” Report No. 43402-ZR, May 2008. Available at: <http://www.congomines.org/wp-content/uploads/2011/10/BanqueMondiale-2008-GrowthWithGovernance.pdf>, accessed in December 2011

## **Non-Governmental Organisations**

ACIDH, Haki Za Binadamu et RADHOSI, *La justice face a ses problèmes pour protéger nos droits : Recherches sur des problèmes majeurs de la justices dans les provinces du Katanga, du Maniema et du Sud Kivu* (Juillet 2009).

ACIDH, “La Malédiction des Richesses Minières Frappe Les Habitants du Village Kawama 30 novembre 2009”, *Press Release*.

ASADHO, *Letter to the First President of the High Military Court in Kinshasa*, (29 January 2008).

ASADHO, *Press Release No 004/AC/AS/AM/FD/2008*, (31 January 2008).

Association Africaine de défense de droits de l'homme-ASADHO/Katanga

*La justice désarticulée au Katanga. Rapport sur l'administration de la Justice 2003-2004*; Lubumbashi, décembre 2004.

Association Africaine de défense de droits de l'homme-ASADHO/Katanga, *Rapport sur le procès de Ankoro "Lutte contre l'impunité: Mots vains pour le gouvernement de la RDC"*, Lubumbashi, février 2005.

Association Africaine de défense de droits de l'homme-ASADHO/Katanga, *Mine uranifère de Shinkolobwe : D'une exploitation artisanale illicite à l'accord entre la RD Congo et le groupe nucléaire français AREVA*, Lubumbashi, Juillet 2009.

Association Africaine de défense de droits de l'homme-ASADHO *Les Conditions de travail des congolais au sein de l'entreprise chinoise CREC sont inacceptables*, January 2010.

Association Canadienne contre l'Impunité (A.C.C.I.) *c. Anvil Mining Limited*, Judgement Cour supérieure (Recours collectif), Province de Québec, No. 500-06-000530-101, 27 avril 2011, at 2.

Avocats Sans Frontières, *L'application du Statut du Rome de la Cour Pénale Internationale par les juridictions de la République Démocratique du Congo*, éditeur Francesca Boniotti, Mars 2009

CGAP, *Policy Diagnostic on Access to Finance in the Democratic Republic of Congo (DRC)*, 2007. Available at: [http://www.cgap.org/gm/document-1.9.5070/diagnostic\\_Congo.pdf](http://www.cgap.org/gm/document-1.9.5070/diagnostic_Congo.pdf)

Democratic Republic of the Congo, Ministry of Human Rights, *"Eighth, Ninth and Tenth Periodic reports to the African Commission on Human and Peoples Rights"*, p. 30-31, (June 2007).

Global Witness, "The Hill Belongs to them: The need for international action on Congo's conflict minerals trade", p. 9-10, (December 2010)

Greenpeace, *Forest Reform in the DRC Leaving People Out*, July 2010.

Available at: <http://www.illegal-logging.info/uploads/CongoForestReform.pdf>

International Commission of Jurists, "Armed activities on the territory of the Congo", *DRC v. Uganda*, 19 (December 2005).

International Legal Assistance Consortium and International Bar Association Human Rights Institute Report (IBAHRI and ILAC), *Rebuilding Courts and Trust: an assessment of the needs of the justice system in the DRC*, August 2009.

MONUSCO/UNHCHR “Rapport préliminaire de a mission d’enquête du Bureau Conjoint des Nations Unies aux Droits de l’Homme sus les viols massifs et autres violations des droits de l’Homme commis par une coalition de groupes armés sur l’axe Kibua-Mpofi, en territoire Walikale, province du Nord-Kivu, du 30 juillet au 2 aout 2010”, (24 September 2010).

OHADA, “Dispositions Pénales, Acte uniforme du 17 avril 1997 relatif au droit des sociétés commerciales et du groupement d’intérêt économique”, p.535, (2002).

Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Abuses of Human Rights*, November 2008. See in particular the section dealing with The Democratic Republic of the Congo pp. 47-64.

Rights and Accountability in Development-RAID), *Unanswered Questions: Companies, conflict and the DRC*, Oxford, June 2004.

RAID, Global Witness, ACIDH and ASADHO, *Kilwa Trial: a Denial of Justice*, July 2007. Available at: [http://raid-uk.org/docs/Kilwa\\_Trial/Kilwa-chron-EN-170707.pdf](http://raid-uk.org/docs/Kilwa_Trial/Kilwa-chron-EN-170707.pdf)

RAID and Global Witness, “Military Court of appeal succumbs to political interference in Kilwa trial”, *Press Release*, (21 December 2007).

RAID, *Chinese Mining Operations in Katanga, Democratic Republic of the Congo* September 2009.

RDC: *un projet de loi pour sanctionner les plus graves violations des droits de l’homme*. Available at: <http://radiokapi.net/actualite/2011/06/14/rdc-un-projet-de-loi-pour-sanctionner-les-plus-graves-violations-des-droits-de-l%E2%80%99homme/>, accessed 21 July 2011.

## Online sources

<http://www.congorama.com/business/statuts.htm>

<http://www.legalnet.cd/legislation.htm>

<http://congolegal.com>