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“CONFLICT-FREE” GOVERNANCE OF MINERAL EXTRACTION— IS IT COMPATIBLE WITH THE REGULATORY PLURALISM IN DR CONGO?

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Abstract

This paper explores the relation between transnational governance initiatives for “conflict-free” certification in the eastern provinces of the Democratic Republic of the Congo and the regulatory pluralism one finds on the ground. The author scrutinizes efforts in certifying artisanal gold mining in the DRC’s South Kivu province by analyzing how three different gold mining sites are governed. The “conflict-free” initiative is faced with a mostly ‘informal’ artisanal mining sector, as it is usually referred to. The author introduces the idea of a mode of governing that follows the principle of “débrouillardise”, which combines different rule systems and state and non-state regulators. As some state institutions partly register and tax miners and traders, and collaborate with customary authorities, and sometimes military units, this can be considered a de facto formalization. The paper argues that “conflict-free” governance will need to improvise via ad hoc agreements on the legal status of mining sites between state authorities, economic actors and international monitors. The declaration as legal will provide for a semblance of a “conflict-free” status and of a unitary state system of rule, while in practice, the plurality of regulatory authority will not be reversed.

Key words: “Conflict free” certification, conflict minerals, regulatory pluralism, transnational governance, Democratic Republic of Congo, gold

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What is the value of a piece of gold? The use value of minerals such as gold from the Democratic Republic of the Congo (DRC) is determined by its usage on an international scale. While gold is used for jewellery, some industrial purposes like dental fillings and electronics, and as a store of value, Congolese stakeholders can merely draw monetary value from the trade in minerals that are beneath their soil. Today, the international value of gold from the DRC is also determined by the armed conflicts that occur in extraction sites. This is due to a whole array of international initiatives taken to end the trade in so-called conflict minerals from DRC, following the civil war in 1998 to 2003 whose ramifications continue to structure local realities in eastern DRC. While UN reports were calling for sanctions against companies directly complicit in war crimes in the DRC already back in 2003, the 2010 Dodd-Frank-Act, a law regulating the US stock exchange, obliges all companies listed on US stock exchanges to publicly report on whether they procure or use minerals (gold, tantalum, tungsten, cassiterite) from the DRC or its neighbouring countries (United Nations Security Council, 2003; Government of the United States, 2010). Consumers in Western countries were made aware of “blood in their mobile” and Western companies stopped buying minerals from the Great Lakes region, causing prices for some minerals in the Kivu provinces to drop drastically (United Nations Group of Experts on DR Congo, 2011; Manhart & Schleicher, 2013, p. 4).

The bottom line of the transnational struggle around minerals from eastern DRC is how territories that contain mineral resources ought to be governed. It is transnational in nature, because not only inter-governmental institutions but also non-governmental organizations, companies and Congolese state and non-state actors are actively involved in this debate and the concurrent practices. In March 2011, the government of the DRC declared the certification (as “conflict-free”) of minerals originating from its eastern provinces a legal requirement (Ministère

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des Mines, 2011c). This action reflected an increasing pressure by international actors on the Congolese government to act upon a situation in its eastern provinces where minerals are partially traded or taxed by non-state armed groups or the military.

This paper is concerned with transnational governance initiatives and their relation to the regulatory pluralism one finds on the ground in the DRC. In eastern DRC, minerals are generally viewed as a resource, but there is no social consensus on whether it should be stabilized as a national resource to be administered by the Congolese nation-state or by other competing power holders. Instead, different attempts at regulating mineral extraction co-exist. That means political authority, i.e. the ability to subject something or somebody to the operation of a system of meaning, institutionalization and power (Latham, 2003 quoted in: Raeymaekers, Menkhaus & Vlassenroot, 2008, p. 13), is fragmented. Due to the experience of the civil war, this is not surprising: in times of crisis, more militarized forms of social control take hold and patterns of political authority are renegotiated, which leads to a reconfiguration of interests and modes of regulation (Raeymaekers et al., 2008, p. 14).

The question arising from that is: How is a “conflict free” certification scheme implemented in a context of regulatory pluralism? The paper will seek to answer this question by scrutinizing efforts to certify artisanal gold mining in the DRC’s South Kivu province. It takes a look at three different gold mining sites in South Kivu which I visited in late 2011.

Multiple systems of rule

How to conceptualize multiple systems of rule? What is meant by regulatory pluralism? A first entry point is provided by the “state-in-society approach” of Migdal (Migdal, 2001). To Migdal, “there is no uncontested universal code—in law, religion, or any other institution—in

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any society for guiding people’s lives” (ibid., p. 11). Different groupings in society strive for political control and domination, using different modes of sanctioning and rewarding. “States are no different from any other formal organization or informal groupings in this regard. Their laws and regulations must contend with other, different types of sanctioned behavior” (ibid., p. 12). Moreover, within the realm of the state, multiple public authorities exist. The idea of the state may be homologous, but the practices of the state can be contradictory (ibid., p. 16).

Linked to political authority is the attempt to regulate. Through regulation, authorities take control over the possibilities of access to power, wealth and rights (Roitman, 2005). Fragmented political authority implies a multiplicity of regulatory systems. Roitman delineates how “military–commercial networks” prevail over unregulated commercial and financial exchanges in the border regions of the Chad Basin (ibid., p. 204). However, she underlines that “the pluralisation of regulatory authority in the Chad Basin is not [...] indicative of the demise of state sovereignty or the emergence of alternative sovereigns to the state” (ibid., p. 200). As it is the state itself who grants civil servants opportunities for private appropriation to replace their salary, the “state is at the very heart of the proliferation of unregulated economic exchanges as well as the pluralisation of regulatory authority” (ibid., p. 204). Interestingly, the term regulatory pluralism is also used in literature on environmental regulation, where it takes on a positive, normative connotation of how things ought to be regulated efficiently:

The term ‘smart regulation’ is used to include an emerging form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control which seek to harness not just government but also business and third parties. [...] The central argument is that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation....this means a far more imaginative, flexible, and pluralistic approach to environmental regulation than has so far been adopted in most jurisdictions. [...] Thus for regulatory pluralists, environmental policy-making involves governments harnessing the capacities of markets, civil society and other institutions to accomplish its policy goals

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more effectively, with greater social acceptance and at less cost to the state (Gunningham, 2007, pp. 6–7).

What does regulatory pluralism look like in the DRC? James Putzel describes “institutional multiplicity” in Africa as four competing rule systems providing distinct normative frameworks and incentive structures: First, the rule system adopted by the state (statutory law), second, the one which evolved over time by older communities (customary traditions), third, rule systems that communities or groups have devised for survival, and fourth, those hatched by non-state centres of power (warlords, bosses, criminal gangs.). One could add a fifth one, the rule system of foreign development agencies or NGOs (quoted in: Raeymaekers et al., 2008, p. 15).

When trying to imagine what a “conflict-free” mineral extraction would look like in this set-up, it will be difficult to ascribe only one of these rule systems to it. It would rather be a state rule system (as exemplified by the governmental decree to introduce “conflict-free” certification), but complemented by a rule system of foreign agencies, customary and “survival” forms of rule, as long as they do not include non-state armed groups or the military.

Yet in the DRC, to neatly separate the survival rule system from the one led by criminals is challenging. This is because in the DRC survival depends on an informal economy and cross-border trade which relies on networks one could be inclined to term “criminal”. State officers profit from the illegal trade by accepting bribes and high-ranking military personnel are involved in the illegal trading networks (Pole Institute, 2007, 2010; De Koning, 2010; UNODC, 2011). Equally, it would be difficult to clearly separate the customary and statutory system of rule from the rule of warlords, for customary rulers are known to have supported “auto-defence” armed groups called “Mai-Mai”, while state authorities at the national, provincial and local level used armed groups to maintain influence (Verweijen, 2012, p. 18, 28).

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We know that different systems of rule may contradict each other, as is sometimes the case with statutory and customary law, or with state authorities and armed groups. One example for this in the DRC are mining concessions, where state authorities provide mining companies with licenses for exploration or exploitation, areas where artisanal miners have been digging before, with the endorsement of customary authorities. Artisanal miners seeking to be legalized are now faced with the reality that most of the mining sites are already covered by industrial mining concessions (Kamundala, 2012, p. 14). At the same time, we observe that representatives of different rule systems often collide in practice, as for example customs officers at Congolese borders who let minerals be smuggled to neighbouring countries by taking a bribe from actors representing criminal or military networks (Pole Institute, 2007). In addition, we see that ruling elites straddle different rule systems, such as customary chiefs who run for elections of representative assemblies (Verweijen, 2012, p. 28).

Hence, it would be wrong to think in terms of multiple systems of rule that co-exist more or less independently from each other. For the purpose of this paper, it does not make sense to rely on a definition of institutional plurality which is actor-centred. Rather, different kinds of actors are involved in the effort of establishing “clean” supply chains of minerals from the DRC. Instead of looking at the “conflict free” undertaking as one distinct system of rule, it is warranted to think of it as a mode of governing, which links different systems of rule.

I currently see three **modes of governing mineral extraction** that are pursued by different but overlapping coalitions of actors in relation to minerals from the Kivus. Not only do they provide distinct normative frameworks, they also define access to resources and the administration of these access rights.

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The concept of modes of governing is not an ideal type as the institutional multiplicity conceptualized by James Putzel. The idea of modes of governing mineral extraction is influenced by the politics of “social practices”. According to a theory of social practices (Andreas Reckwitz, 2003), people are driven by routines. Their knowledge is socially determined and practical. This means it is more important to know *how* to do things than to know *what* the truth is or the rules are. In this understanding, ideas and practices are one. Such a theory of social practices is useful to capture the fuzzy reality of governing mineral extraction in eastern DRC. In practice, it may be more important to a Congolese civil servant to know how to navigate the Congolese political system and the intricacies of the mining sector than to know the formal rules. Normative frameworks that guide the modes of governance do exist, namely in the sense of “practical knowledge”, which has grown historically and is socially determined. The historical record of practical knowledge implies that the practical knowledge of Congolese actors must be different from those of international stakeholders who were socialized in a different context. To be socially determined also means that a Congolese public servant will act differently from, for instance, a German civil servant. Conversely it means that routines in Congolese state administrative offices may not differ substantially from customary systems of rule.

Modes of governing in South Kivu's mineral sector

In South Kivu's mineral sector, one can distinguish and describe three modes of governing, which different actor coalitions ascribe to and promote. The most prominent mode is

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that of “*débrouillardise*”¹, second comes what I call “statutory semblance” and third, the “conflict-free” mode of governing.

The mode of “**débrouillardise**” encompasses ‘informal’ artisanal exploitation of both alluvial and primary gold. The term ‘informal’ is often used in the context of artisanal mining to refer to those operations that do not have an explicit written authorization to extract the minerals, which are either not in contravention of explicit prohibitions (e.g. not in protected areas or within the parameters of active legal concessions) or which are still unregulated by state laws. In the DRC, in most cases, it would be more correct to call artisanal gold mining ‘illegal’ because most of artisanal mining areas are covered by industrial concessions. On the other hand, proponents of artisanal mining argue that in areas of large mining concessions which are not exploited, this should not be considered illegal as mining corporations ought not to be granted such large concession areas in the first place (the purpose being to develop a country's mineral potential) (Hruschka, 2013). Such an argument, however, blurs the line between legality and justice. To maintain clarity, artisanal mining in concession areas should be called illegal, while scrutinizing the legality of large mining concessions at the same time. The challenge remains to take into consideration customary property rights of artisanal miners who have worked in an area for a long time following customary rules before concessions are given out by state institutions².

Artisanal mining in the DRC is mostly done manually, but can include basic mechanization tools needed for the extraction and treatment of primary gold ores, such as explosives, grinding

¹ The French term *débrouillardise* is often associated with the informal economy and the marginalized, a way of getting through - *se débrouiller*”. At the same time, the English translation contains notions such as ingenuity and resourcefulness, which refer to the creative and inventive spirit that is often needed to cope with the hazards of the informal economy.

² The Property Rights and Artisanal Diamond Development Program (PRADD) of USAID in the Central African Republic, Liberia and Côte d'Ivoire addresses this challenge (<http://www.tetrattechintdev.com/>).

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machines, water pumps and oxygen pumps. Explosives are used to advance more quickly towards the gold artery in mountainous terrain, grinding machines serve to crush gold-containing ores, water pumps empty tunnels filled with river or underground water, and oxygen pumps provide life-saving oxygen to workers digging deep underground.

Why is most of the artisanal mining “informal”? The Congolese mining law only allows large-scale and small-scale (*petite mine*) mining ventures to acquire exploration and exploitation licenses. Artisanal miners are merely allowed to extract minerals in areas that are not due for industrial exploitation and that are officially designated “artisanal mining zones” (Geenen, forthcoming, p.6). As there were only a handful of declared artisanal mining zones in South Kivu and none of them was operational in 2011, artisanal miners operated outside the legal domain.

Since artisanal mining in the Kivus mostly operates outside the legal sphere, other rules apply. Artisanal mining operations are partially ruled by customary law, and, paradoxically, captured by state institutions through the registration and ‘taxation’ of individual traders and miners who can be both investors (pit managers or “*PDG*”) and diggers (the workers). Taxation here refers to the levying of various fees, no corporate investment taxes in the proper sense. Directly involved in this are the local units of the state apparatus ruling the mining sector, the *Service des mines* (under the Ministry of Mines) and SAESSCAM, a government body meant to register and technically accompany miners. The regional and national institutions (Provincial and National Ministry of Mines) may be more indirectly involved, particularly through personal contacts between mining authorities (but also politicians) and local investors (civil or military).

Artisanal mining sites are co-governed by customary authorities, armed groups or military units and civil state institutions. The “*débrouillardise*” implies a great deal of complicity

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and overlap between state and non-state forms of political power. The exact mode of governing, including the set-up of actors exerting control, differs from mining site to mining site, which will become evident in the examples below. The mode of governing is thus very flexible, adapting to local circumstances around the mining sites.

This mode of governing is by no means unique to the Democratic Republic of the Congo. Janet Roitman (2005) succinctly describes such governing practices in her account of transnational unregulated trading networks across the borders of Chad, Cameroon and the Central African Republic:

In an unregulated market town, [...] a Cameroonian customs unit [...] managed to take in 20 million in F CFA each year through sales of market duties and licenses.[...] This formalization of once unregulated activity has not displaced unofficial regulators who still [...] collect ‘entry and exit’ duties in the market. [...] But this does not necessarily mean rendering ‘legal’ unregulated traffic. The state can offer a legal structure for these activities without altering the fact that they are either formally illegal or based on fraud. (p.166)

Her conclusion is important, for it underlines that the state participates in the taxation of unregulated (in the sense of not being regulated by the state) economic exchange, without rendering it legal. One might follow Roitman in calling such practices “formalization”. As a consequence, most artisanal extraction and trading activities in eastern DRC may no longer be called ‘informal’ but rather ‘formalized’ as a large (unaccounted for) quantity of such activities are taxed by state institutions who distribute miners’ and traders’ cards.

The meanings of local livelihoods and survival dominate the normative framework of this mode of governing. Greed or profit-maximization (by armed actors and businessmen) is only a minor part of the norms, as “the majority of those involved in the trade in precious minerals continue to be motivated by coping and survival” (Larmer, Laudati & Clark, 2013, p. 6). At the same time, the bullying and harassment of miners by various kinds of authorities points to a

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practice of rule by force that dominates this mode of governing. Complaints by the general population about these exactions, which are locally known as “*tracasseries*”, are also an essential part of the normative structuring of this mode of governing, as a stark contrast to the meaning of local livelihood. Many mining sites continue to be militarized³ and those that are not, are never far from positions of army units or armed groups who exact levies from miners and traders.

The mode of “**statutory semblance**” refers to 'legal' large-scale or small-scale (*petite mine*) exploration and exploitation.

The normative framework is that of a national mining economy that feeds into the growth of the national Gross Domestic Product (GDP) and increases state revenues from mining. According to statutory principles, this mode of governing is supposed to be universal and static in its application to different mining sites in the national territory of the DRC. In practice, however, the governance of the specific concession areas only resembles a statutory framework. The only larger gold mining company that currently extracts gold in South Kivu, Banro, acquired its concessions under dubious circumstances at the outset of the first civil war in the DRC and had its concessions (partly) confirmed after the second civil war by current President Joseph Kabila in an out-of-court agreement, which does not follow the Congolese mining law but the convention approved by the president (cf. Article 340 of the 2002 Mining Code; Geenen, 2011a). Exploration and exploitation agreements are signed under secretive circumstances and leave room in the process for the personal enrichment of high-ranking politicians and officials in the administration. This is the way that between 2010 and 2012, mining deals with the DRC

³ Defined “as the process of the increasing imprint of armed actors and violent modes of regulation, action and thinking on various arenas of society” (Verweijen, 2012, p. 1).

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government cost the state of DRC 1.36 billion of US-Dollars in lost revenues through asset under pricing (Africa Progress Panel, 2013, p. 56).

According to this mode of governing, the mining sites are not only governed by state institutions, as statutory law would have it, but also by the mining companies, customary authorities and, to a lesser degree, non-state armed groups and the military. Taking the example of Banro again, the company was part of a mixed mission with state institutions in late 2011 that sought to determine which artisanal mining sites in South Kivu were within the perimeters of Banro's concession areas and which not. Having to rely on technical equipment held by Banro, the areas that were outside of its parameters were identified⁴. The concession area of Banro around Luvindja in Walungu territory was cleared of armed groups that controlled the area in 2005 by the help of military units (Geenen & Hönke, 2013, p. 7). Customary authorities were crucial in negotiating a deal with Banro on the compensation of artisanal miners and development projects for the community. The way the widow of the deceased customary representative of the community was co-opted in the provincial assembly through close relations with the Congolese president and flown in from Europe to take up her post, shows just how permeable the line is between “customary” and “state” authorities (ibid.).

The mode of “**conflict free**” refers to the legal exploitation and trading of minerals which are free of involvement of non-state armed groups and the military. While industrial mining was certainly not immune against the financing of armed groups in the Congo wars, it is not explicitly excluded from the attempts to establish “conflict-free” mineral supply chains. Yet efforts to establish clear supply chains within the DRC focus on the artisanal mining sector. Industrial companies like Banro do not use intermediates to have their gold smelted and

⁴ Interview with SAESSCAM, 13 September 2011.

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exported and therefore did not seem open in 2011 to take part in “conflict-free” certification efforts.⁵

Attempts at “conflict-free” certification are driven by international actors, such as governmental agencies (e.g. BGR), non-governmental organizations (e.g. PACT, PAC), and corporate associations (e.g. ITRI), by state institutions (mostly national and regional) and national NGOs (Pole Institute, 2010, pp. 10–12). As the national certification system in the DRC is the local application of transnational reform initiatives, it takes on various forms and consists of a range of different elements. The “Due Diligence Guidance on responsible sourcing of minerals from conflict-affected and high-risk areas” by the UN Group of Experts on the DRC and by the OECD, is supposed to serve as the overall framework of these different initiatives (Manhart & Schleicher, 2013). In addition, the different elements of the national certification scheme are supposed to fit the regional certification mechanism of the International Conference of the Great Lakes Region (ICGLR). The Congolese certification scheme for mining sites compliance follows the system of “certified trading chains” developed by the Federal Bureau of Geo-Sciences and Natural Resources of the Federal Republic of Germany (BGR), with mandatory and voluntary progress criteria (Pole Institute, 2010, p. 10). The tracing of supply chains can follow the paper-based BGR system of certified trading chains, which has developed a chemical fingerprint to double-check the origins of the minerals (for tantalum, cassiterite and wolframite) (BGR, 2012). The institute of the international tin industry has developed a bagging and tagging system (iTSCi) to trace minerals from mining site to point of export. As to the qualification and certification of mining sites as “conflict-free”, first a qualification exercise is

⁵ Interview with BGR, 27 September 2011.

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undertaken by a mission of the Congolese government, which should be followed by an independent yearly audit (ICGLR, 2010, p.12).

In June 2013, two mining sites in eastern DRC were certified as “conflict-free” by the regional standards of the ICGLR. According to the ICGLR regional certification mechanism, mining sites are “conflict-free” when they are free of illegal armed group or military involvement and of the worst forms of child labour and human rights abuse (ICGLR & PAC, 2012). In DRC, this boiled down to mines in which no armed groups, military, children and women were present.⁶ A precondition to being certified as “conflict-free” is the legality of the mining venture (Ministère des Mines, 2011b, p. 31). To achieve legal status, the Congolese government demanded all miners to organise themselves as cooperatives (Ministère des Mines, 2011c).

It may be crucial to consider how the normative framework of “conflict-free” is understood by different stakeholders, Congolese and international who coalesce to achieve this kind of governance. The most obvious case to exemplify different understandings is that of “children” and “women” not allowed to work in the mines. Whereas the BGR referred to international standards which completely forbid the work of children, local NGOs involved in the process referred to local practices of child labour and argued that only dangerous work should be forbidden. As to women not allowed to work in the mines, the view of various stakeholders involved in the “conflict-free” initiatives ranged from “all women” to “only pregnant women”.⁷

In line with the variety of actors involved in the “conflict-free” minerals initiative championing different tracing systems, the implementation of the “conflict free” certification

⁶ Interviews with BGR, 5 September 2011, and with BEST, 6 September 2011.

⁷ Interviews with BEST, 6 September 2011; Multi-stakeholder workshop with mining authorities, traders, miners, and non-governmental organizations, 14 September 2011.

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scheme is varied and patchy. Particularly the infrastructure to trace the trading of artisanally mined minerals does hardly exist. In South Kivu, only two trading centres have been built—in Mugogo and Baraka—which were supposed to offer a safe place to market minerals at fairer prices according to an idea promoted by MONUSCO (IPIS, 2012, p. 21)—clearly insufficient for the whole of Kivu. Nyabibwe, one of the two certified sites, has established a separate trading chain, a so-called closed pipe system. A whistleblowing mechanism is being installed on a regional level to report non-compliant behavior. Local *Comités de suivis* made up of local state institutions and civil society groups collect information on what is happening in the mines and along the trading chains and report it to state authorities for them to follow-up on that.

Three mining sites

In the following, I will describe and interpret how three artisanal gold mining sites in South Kivu are governed according to the principle of “*débrouillardise*”. My analysis is based on a desk study and interview material from a research visit I undertook in South Kivu, DRC, in 2011 with a colleague and partners from local NGOs, to mining sites in the administrative territories Walungu and Mwenga as well as the territory of Southern Fizi.⁸ It should be highlighted that my analysis only applies up to this time period, unless otherwise noted.

All mines were situated in government-controlled territory, i.e. where military was stationed nearby. In areas controlled by non-state armed groups, such as the Forces Démocratiques pour la Libération du Rwanda (FDLR) or Mai-Mai militia groups, the positions military actors held in governing the mining sites would be held by these armed groups. Since

⁸ The research visit over several weeks in September and October 2011 took place in the framework of a research project on the possibilities of certification of artisanal mining. It included 50 interviews and informal conversations with a wide range of stakeholders in the Kivu's mining sector and was complemented by a visit of Bukavu in September 2012.

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the beginning of the M23 rebellion in North Kivu in April 2012, the FDLR and some Mai-Mai groups such as the Raia Mutomboki in South Kivu have taken advantage of the fact that forces of the Congolese army (FARDC) are bound in North Kivu to increase their control over gold mining areas, e.g. in Walungu territory (Global Witness, 2013, p. 2).

The first two sites I am introducing here, near the villages of Nyamurhale and Mukungwe, both located in Walungu territory, are similar in the sense that they are both underground pits, i.e. primary deposits of gold. The mining sites visited in Mukera, Fizi territory, on the other hand, are alluvial, open pit sites.

The mining sites at Mukungwe are an interesting case, for Mukungwe was chosen as a pilot site for the national certification system. So far, nothing has moved in that direction because the mine is highly disputed. Mukungwe is part of the concession area acquired by the Canadian company Banro.⁹ It could therefore be governed according to the principle of “statutory semblance”, but it has of yet not been possible to establish the semblance of formal mining activities. In practice, the mining sites at Mukungwe are governed by two local families, in alliance with different alternating military units. The families have disputed their claims to the gold reserves ever since, referring to their customary rights to the land and backing up their claims by militia groups. During the second civil war, the family of Kurhenga Muzimu supported the militia group *Mudundu 40*, whereas the family of Chunu had its own called *Matonge*. After the war, both families tried to back up their claims to the gold mines by

⁹ Even this fact was disputed by the local civil society in an open letter of March 2012: <<http://kivumining.org/2012/05/29/civil-society-rejects-validity-of-banro-led-mission-to-demarcate-limits-to-mining-concession-at-mukungwe/>>.

acquiring mining titles from state authorities. Since then, they have been building alliances with influential military commanders, ousting each other in turn.¹⁰

In 2011, the mining site was run by an “Administrative Committee”, organized by one family clan and associated miners. While the Committee tries to resemble as much as possible an official body, with president, vice-president and various sub-committees, its main function, is the collection of taxes from all economic activities that take place in the mine: of miners, the owners of treatment units, gold buyers, shopkeepers, market vendors, bar owners, and prostitutes. The revenues are shared with the units of the Congolese army (FARDC) that are stationed in the mine. In addition, the military commanders extract money from individual pit managers and diggers by force, descending down to the pits.¹¹

As at most artisanal mining sites in eastern DRC, in each pit there is a group of diggers who work under the supervision of one or several managers (“*PDG*”). The workers are not paid any wages, but receive a portion of the gold gravel extracted in the pit, which they have to share among themselves (this can be between 10 and 30 percent of the gold produced). The workers try to organize themselves collectively, together with the *PDGs*, in committees and cooperatives. One cooperative has been trying to establish itself in Mukungwe for several years now. The miners also formed a committee, which was meant to represent them, but also settle disputes among themselves.¹² In the face of customary authorities who are backed up by military force, such efforts at self-organization are necessarily fraught with difficulties.

¹⁰ The two families had settled for a shared rule in 2012, but in 2013 clashes between them were reported again. In August 2013, the government decreed an interdiction of all artisanal mining in that zone (Radio Okapi, 11 September 2013: <http://radiookapi.net/economie/2013/09/11/sud-kivu-lexploitation-artisanale-interdite-dans-le-site-de-mukungwe/>).

¹¹ Interviews at the mining site “*Maroc*” near Mukungwe, September 2011.

¹² Interviews at the mining site “*Maroc*” near Mukungwe, September 2011.

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In the case of Mukungwe, both customary and military agents physically controlled the mine and taxed the miners and were thus actively co-governing the mining site. State agents were mostly sidelined, but some state agents like the Administrator of Walungu Territory have tried to play a mediating role between Banro, the miners, the customary authorities and military units.¹³ In addition, a local NGO working to support the artisanal miners in improving their living conditions, has initiated round tables with the various stakeholders to ease tensions and come to an amicable solution to the problem of how Mukungwe ought to be governed.

The second mining site described here is the one near the village of Nyamurhale. An investigation team consisting of the mining authorities, Banro and MONUSCO identified Nyamurhale in late 2011 as one of two mining sites in Walungu territory (South Kivu) which are not covered by the concession held by Banro.¹⁴ Gold gravel is extracted from a hilltop and later crushed, grinded and washed at a water source further down the hill.

Nyamurhale was not militarized like Mukungwe, but governed by customary authorities. The statement of interview partners in 2011: „La colline est pour le *Mwami*“ („The hill belongs to the *Mwami*“) reflects the local understanding of who has the right to the land (including the underground resources) and the right to administer it. Accordingly, the *Mwami* or *Chef de groupement*,¹⁵ gave permission to start a new pit. The *Mwami* had two representatives at the mining site who collected taxes.¹⁶

¹³ Interviews at the mining site “*Maroc*” near Mukungwe, September 2011; Interview with Administrator of Walungu Territory, September 2011

¹⁴ Interview with SAESSCAM, 13 September 2011.

¹⁵ A *groupement* is an administrative unit between the village and territory level. The function of the *Mwami* was instituted by the Belgian colonial authorities, replacing several traditional chiefs in one area. The *Mwami* was made head of administrative units then called *chefferies-secteur*, in turn subdivided in *groupements* and *localités* (Verweijen, 2012, p. 6). A *groupement* is an administrative unit between the village and territory level.

¹⁶ Interviews with miners and representatives of *Mwami* at mining site in Nyamurhale, September 2011.

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The military was not stationed in the mine as in Mukungwe, but, according to miners in Nyamurhale, soldiers from a brigade that is stationed in the nearby town Burhale came and forced diggers to work several hours a week for them. From the interviews, the relation of customary to state authorities did not become very clear. Obviously, the diggers also paid the *Division des Mines* (Mining authority) and SAESSCAM, which means that the state authorities had access to the mining site.¹⁷

The miners had formed two committees, one for the pits in the hill (“*Comité de carrière*”) and one for the treatment centre down-the-hill, which not only included miners but also traders. The Committee on the hill said it defended the rights of the diggers, resolved conflicts and was the contact point for the (customary) “authorities”. The purpose of the Committees remained vague and ambiguous. The Committee on the hill was elected in the presence of the *Chef de groupement*, with a three-year mandate. Both president and vice-president were pit managers.

The fact that there was no administrative committee like in Mukungwe, but merely two representatives of the customary authorities, shows that the governance by customary authorities was less comprehensive and intrusive. However, one can say that the miners' committees formed part of the governance by customary authorities, for they were contact point for the “authorities” and the elections were overseen by the *Chef de groupement*. Arguably, through them, the customary authorities were better able to control the mining site and the miners.

The mining sites at Mukera, Fizi Territory, are situated outside the village, as in Nyamurhale. Alluvial gold is washed out of open pits along the river Angute¹⁸ in rapidly shifting pits and groups of workers. Various regulatory authorities were present in Mukera in 2011: the

¹⁷ Interviews with miners and representatives of *Mwami* at the mining site in Nyamurhale, September 2011.

¹⁸ The river Angute flows into the river Mukera, which is a tributary to the river Mutambala which flows into lake Tanganyika (bordering Burundi, Tansania and Zambia).

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mining authority (with its own office), a local *chef de police* (with its own office), the village chief, the Congolese secret service (ANR), and military units. Both the mining authority and the village chief (supposedly representing the *Chef de groupement*) physically checked on the mining sites to control miners’ registration cards and collect illegal fees. Sometimes they were accompanied by the local policeman who could lock them up in case they did not have valid papers or were not prepared to bribe.¹⁹

Customary and civil state authorities thus actively co-governed the mining sites at Mukera and collaborated closely. Their governance was intrusive, their regime rigid. Mine workers were hardly permitted to talk to us in the presence of the mining authorities and police. In contrast, the military units stationed in Mukera were not directly positioned in the mines sites. They were reported to occasionally erect barriers at the entry points of the mining sites only and to force miners to pay random amounts of “duties”. A division of labour between the military and the mining division seemed to have been in place, for the mining division was reported to collect fees on behalf of the military.²⁰

The mining authority also used the forms of self-organization of miners for governing the mining site. The pit managers and diggers were organized in so-called cells. The cell chiefs were supposed to mediate between the miners and the mining agents. Yet, they were also responsible for coordinating the collection of levies by the mining authority. Some miners made clear that in their opinion the cells had been installed by the mining authority for that purpose. These miners were very hostile towards the customary and the state authorities; even towards a miners’ association (ACAF) which later developed into a cooperative.²¹

¹⁹ Interviews with miners, state and customary authorities in Mukera, September 2011.

²⁰ Interviews with miners, state and customary authorities in Mukera, September 2011.

²¹ Interviews with miners and mining authorities in Mukera, September 2011.

Research undertaken in the same area by other scholars has revealed that the president of ACAF (Association des Creuseurs Artisanaux de Fizi) was a close friend of the Mai-Mai-leader Yakutumba. The *chef de localité* of Mukera, too, was suspected of having supported the Mai Mai during hostilities that took place in Mukera in December 2009. He received a number of death threats, which forced him to flee to Baraka.²² More hidden links of customary authorities with armed groups thus do appear to exist. However, the latter were not involved in the active governing of the mining site in 2011.

The state mining division not only collaborated with unofficial regulatory authorities—the village chief and his entourage—to collect duties, but also in the distribution of land for mining. Obviously, the local mining division is not legally empowered to hand out mining concessions, thus circumventing the official mining cadastre. Yet in practice, this is what it did, thereby providing the extraction practices with the semblance of legality. The Mining Division reported itself that, when gold was found on land around the village, it divided the land into three zones, one of which would belong to the original land owner, one to the lucky finder of the gold and the third to the authorities²³. A mining officer based in a town nearby admitted that it would need a prospection permit to do so, but that “because we do not have the documents, we leave them free access”²⁴ (cf. Verweijen, 2012). By distributing land in a completely informal way, the local mining authority incidentally gained control of land titling.

At the same time, the semblance of legality of the mining activities was kept intact, which confirms Roitman’s conclusion that the “pluralisation of regulatory authority” (Roitman, 2005) does not imply the demise of state sovereignty, but that the state is at the very heart of the

²² Personal interviews with miners, state and customary authorities in Mukera, September 2011. I communication with conflict researcher, September 2013.

²³ It did not become clear from the interviews to which authorities he was referring to.

²⁴ Interview with *chef de police* in Mukera and with mining authority in Fizi Territory, September 2011.

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proliferation of this same pluralisation. State agents collaborate with unofficial regulators to collect levies they would otherwise not have access to.

Transforming the mode of “*débrouillardise*” into “conflict – free”?

Is this mode of governing, the “*débrouillardise*”, hostile, favourable or indifferent to current projects of “conflict-free” minerals? And is the “conflict-free” mode of governing the right approach to changing things to the better?

Starting with the second question, one could expect that many miners and traders involved in the artisanal mining economy would benefit from a “conflict-free” mode of governing, because one part of the daily “*tracasseries*” they endure—the exactions by military and armed groups—would stop. So at least, there is some convergence between actors involved in the “*débrouillardise*” and actors vying for “conflict-free” minerals in the conception of the *status quo* as being a burden that needs change to the better. However, the other part of the “*tracasseries*”—illegal taxation by civil state and customary authorities—would not be directly addressed by “conflict-free” certification.

As to the first question, one reason to think that the mode of the “*débrouillardise*” is favourable to projects of “conflict-free” minerals is its very flexible character. It can relatively easily be changed by influential actors, such as the Minister of Mines, by declaring a mining site legal, as was done in the case of the Kalimbi mine in Nyabibwe, which now is certified as “conflict-free”. The downside of it is that this change can also be easily reversed or endangered: in the case of Nyabibwe, it was reported that some military actors were able to commercialize parts of the mine’s production in parallel to the tagged and certified minerals (Global Witness, 2013, p. 8; Pact Institute, 2013, p. 6). This relates to the fact that non-state armed groups and the

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military rule by force whereas actors coalescing to achieve “conflict-free” governance mainly use the power of discourse, through mechanisms like the *Comité de Suivi* as part of a whistle-blowing mechanism. They have no other means of forcing state bodies like the judiciary to take action against the perpetrators of smuggling, of exaction of taxes or human rights abuses (Global Witness, 2013, p. 8).

This power imbalance between different official and unofficial regulators is one reason why the practical translation into a “conflict-free” mode of governing is fraught with difficulties. As the mode of “*débrouillardise*” is dominated by a rule of force rather than a rule of law, it contravenes efforts of “conflict-free” governance. In addition, the fact that civil state and non-state regulatory authorities actively collaborate with military units or armed groups runs counter to the idea of a clear separation of “forces of evil” and “forces of good”. In the same way that elites in South Kivu are straddling customary and state systems of rule, some also travel the boundary between civil and military systems of rule (Verweijen 2012).

Another aspect that makes the mode of “*débrouillardise*” ill-suited to the “conflict-free” initiative is that the latter requires a mine to be legal. As was noted earlier, this currently excludes most of artisanal mining sites in the Kivus. Consequently, this may mean that the “conflict-free” initiative will not be able to turn things to the better in the Kivu’s artisanal mining sector. Implicitly, the “conflict-free” certification initiative favours industrial and small-scale mines which hold concession titles. It would be wrong to expect that their legal status is less ambiguous than that of artisanal miners who pay for registration cards but do not work in legally declared artisanal mining zones. The mode of governing of industrial mining concessions is rather one of “statutory semblance”, as outlined above. It equally involves arrangements out of state law and the collusion of state and non-state regulators.

Conclusion

The “conflict-free” initiative is faced with an artisanal mining sector which is governed by the dominant mode of “*débrouillardise*”. Under this mode, artisanal miners operate outside the legal framework because the state hardly provides for the legally required artisanal mining zones and most of the gold mining areas are covered by industrial mining concessions. This status of “unregulated” mining, however, takes place in a context of regulatory pluralism, which some state institutions themselves condone. They partly register and tax miners and traders, thereby collaborating with customary authorities and sometimes military units who appear as competing regulatory authorities. One can consider this as a kind of formalization, which is not recognized by the state authorities. There is only a very fine line between such implicit formalization practices and explicit legalization, which is required by the “conflict-free” mode of governing. What is needed is the act by state authorities to declare the mining practices legal, i.e. by announcing an official agreement between holders of mining licenses and artisanal miners in one area.

“Conflict-free” governance will thus need to improvise via *ad hoc* agreements on the legal status of mining sites between state authorities, economic actors and international monitors. The declaration of artisanal and small-scale mines as legal by the mining authorities in the running up to certification will most probably lead to islands of “conflict-free” governance which will look like a mode of “conflict-free semblance”. As argued above, the *de facto* formalization of artisanal mining through the registration and taxation of ‘informal’ miners by state authorities is not far from such a legalization procedure in practice. The declaration as legal merely serves to uphold the semblance of a unitary state system of rule, while in practice, the plurality of regulatory authority will not be reversed. The term “semblance” mainly refers to a

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false impression of legality, as if following a regulatory monopoly of the state. As to the quality of “conflict-free”, “semblance” does not suggest that no mine can effectively manage to ban connections to military or armed groups. It highlights the very fragile character of such a “conflict-free” status, which only represents a certain moment in time, where a mine is qualified as “conflict-free”. The persistent practices of “*débrouillardise*” can easily reverse such a status.

Bibliography

- Africa Progress Panel (2013). Equity in Extractives. Stewarding Africa's natural resources for all. Africa Progress Report 2013, Available at <<http://www.africaprogresspanel.org/en/publications/africa-progress-report-2013/apr-documents/>>.
- BGR (2012). BGR Support for Mineral Certification in the African Great Lakes Region. Hannover: Federal Institute for Geosciences and Natural Resources (BGR), 2012.
- De Koning, R. (2010). “The Bukavu-Uvira-Bujumbura Gold Triangle”. In Jeroen Cuvelier (ed.), The complexity of resource governance in a context of state fragility: The case of eastern DRC (pp. 32-40). Antwerp: IPIS.
- Democratic Republic of the Congo (2002). Law No. 007/2002 of July 11, 2002 relating to the Mining Code. Journal Officiel n° spécial du 15 juillet 2002.
- Geenen, S. & Hönke, J. (2013). Land grabbing by mining companies: Local contentions and state reconfiguration in South Kivu (DRC). Paper presented during the 5th European Conference on African Studies: "African Dynamics in a Multipolar World", June 2013.
- Geenen, S. (2011a). Constraints, opportunities and hope: Artisanal gold mining and trade in South Kivu (DRC). In Ansoms, A. & Marysse, S. (eds.). Natural Resources and local livelihoods in the Great Lakes Region of Africa. A political economy perspective. Palgrave Macmillan.
- Geenen, S. (2011b). Relations and regulations in local gold trade networks in South Kivu, Democratic Republic of Congo. *Journal of Eastern African Studies*, Vol. 5, No. 3, pp. 427-446.
- Geenen, S. & Claessens, K. (2012). De l'autre côté de la colline. Le contrôle contesté de Mukungwe au Sud-Kivu. In Reyntjens, F., Vandeginste, S. & Verpoorten, M. (eds.) *L'Afrique des Grands Lacs. Annuaire 2011-2012*. Paris: L'Harmattan, pp.181-203.

- Government of the United States. (2010). Dodd-Frank Wall Street Reform and Consumer Protection Act. Public law 111-203. Available at: <<http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>>.
- Gunningham, N. (2007). Regulatory reform beyond command and control. Paper presented on Earth System Governance: Theories and Strategies for Sustainability at the Amsterdam Conference on the Human Dimensions of Global Environmental Change, 24-26 May 2007.
- Hruschka, F. (2013). “Illegal Mining”... a factual or conceptual threat?, ASM-PACE Programme, Guest Blog Series, 26 April 2013, Available at <<http://www.asm-pace.org/blog/item/6-illegal-mining-factual-conceptual-threat.html>>.
- ICGLR & PAC (2012). Briefing Note on the ICGLR Regional Certification Mechanism. International Conference on the Great Lakes Region and Partnership Africa Canada, June.
- International Peace Information Service (2012). The formalization of artisanal mining in the Democratic Republic of the Congo and Rwanda. Report, Center for International Forestry Research: Indonesia, December.
- Kamundala Byemba, G. (2013). Exploitation minière industrielle et artisanale au Sud-Kivu. Possibilités d’une cohabitation pacifique ? Antwerp: International Peace Information Service, December.
- Larmer, M., Laudati, A. & Clark, J. F. (2013). Neither war nor peace in the Democratic Republic of Congo (DRC): profiting and coping amid violence and disorder. *Review of African Political Economy*, 40 (135), pp. 1–12.
- Manhart, A. & Schleicher, T.(2013). Conflict Minerals - An evaluation of the Dodd-Frank Act and other resource-related measures. Freiburg: Öko-Institut e.V., August.
- Migdal, J.S. (2001). *State in Society. Studying how states and societies transform and constitute one another*. Cambridge: Cambridge University Press.
- Ministère des Mines. Gouvernement de la République Démocratique du Congo. (2011a). Manuel de Certification des Minerais de la Filière Aurifère en RD Congo. Principes, Lignes Directrices et Standards, Version 0 du 23 février. Available at <http://bgrkin.net/attachments/section/1/08042011%20WS%20CTC%20_Manuel%20de%20certification%20%20RD%20Congo_Aurif%C3%A8re_New1.pdf>.
- Ministère des Mines. Gouvernement de la République Démocratique du Congo. (2011b). Manuel de Certification des Minerais de la Filière Stannifère en RD Congo. Principes, Lignes Directrices et Standards, Version 0 du 22 février 2011. Available at <http://www.bgr.bund.de/EN/Themen/Zusammenarbeit/TechnZusammenarb/Downloads/kongo_manual_3T.pdf?__blob=publicationFile&v=1>.

Conflict-free” governance of mineral extraction—is it compatible with the regulatory pluralism in DR Congo?

Ministère des Mines. Gouvernement de la République Démocratique du Congo. (2011c). Acte d’engagement, 1 March.

OECD-Organisation for Economic Co-operation and Development. (2012). Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Final draft Supplement on Gold, v. 3.0. Available via <<http://www.oecd.org/dataoecd/54/39/49187571.pdf>>.

Pact Institute (2013). Status Report iTSCi South Kivu Field Operations October 2012 to June 2013. ITRI.

Pole Institute (2010). Blood Minerals. The criminalization of the mining industry in Eastern DRC. Goma: Pole Institute, August.

Raeymaekers, T., Menkhaus, K. & Vlassenroot, K. (2008). State and non-state regulation in African protracted crises: governance without government? *Afrika Focus*, 21 (2), pp. 7–21.

Reckwitz, A. (2003): Grundelemente einer Theorie sozialer Praktiken. Eine sozialtheoretische Perspektive. *Zeitschrift für Soziologie*, 32 (4), pp. 282–301.

Roitman, J. (2005): Fiscal disobedience. An anthropology of economic regulation in Central Africa. Princeton and Oxford: Princeton University Press.

Tegera, A. & Johnson, D. (2007). Rules for Sale: Formal and informal cross-border trade in Eastern DRC. A Pole Institut Report. Regards croisés. *Revue Trimestrielle* No 19 bis. Goma: Pole Institute, May.

United Nations Group of Experts on DR Congo. (2011). Report of the Group of Experts on the Democratic Republic of the Congo. S/2011/738, 2 December. Available at <http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738>.

United Nations Security Council. (2003). Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo addressed to the Secretary-General. S/2003/1027, 15 October.

UNODC-United Nations Office of Drugs and Crime (2011). *Criminalité organisée et instabilité en Afrique Centrale. Une évaluation des menaces*. Wien: UNODC. Available at <http://www.unodc.org/documents/data-and-analysis/Studies/BOOK_Central_Africa_Report_French_web.pdf>.

Verweijen, J. (2012). From Simba rebellion to Simba’s militia: the historical development of the discourse and practice of *autodéfense* in Fizi/Uvira, eastern DRC. Paper for the Conference on Paramilitaries, Civil Militias and Civil Defense Forces, Yale University, 19-20 October.