

In search of clean water: human rights and the mining industry in Katanga, DRC

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Editorial

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Front Cover image: Boy running to gather water for the day, Democratic Republic of the Congo. (IPIS 2013)

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Executive Summary

Today, around 1,8 billion people in the world do not have access to safe water. In the Democratic Republic of the Congo, the most water-rich country in Africa, 51 million people lack access to potable water; only 26% of the population has access to safe drinking water. This is one of the lowest access rates in the world.

In the Katanga province, rich in cobalt and copper, some industrial mining companies operate provoking significant pollution of water sources, seriously affecting the local population. Although there is a lack of comprehensive data available, several studies conducted by local civil society show environmental, health and socio-economic negative effects.

As a State party to the International Covenant on Economic, Social and Cultural rights, the DRC has the obligation to respect, protect and fulfil the human right to safe drinking water of its population. The Congolese government has to take effective measures to combat water pollution by industrial mining companies, following the work made at the African Human Rights System in relation to natural resources governance and human rights.

This report begins by setting out the context in the Katanga province and providing an overview of the human right to water. It then assesses, firstly, whether mining companies comply with the national mining regulations, stressing also the importance of the UN Guiding Principles on Business and Human Rights and taking the concept of human rights due diligence as a benchmark; secondly, the performance of the DRC vis-a-vis its international human rights obligations, emphasising the participation of state-owned companies in the mining sector; and lastly, the role of the home States of the polluting companies and their extraterritorial obligations regarding the protection of the human right to water in the DRC.

The Congolese legislation regulating the mining sector is fairly developed and obliges companies to make sure that they do not pollute water sources as part of their operations. Although the law could be improved to include human rights due diligence (a concept embedded in the UN Guiding Principles on Business and Human Rights) as a requirement to protect the right to water from corporate abuses, the core problem lies in the implementation and enforcement of the law.

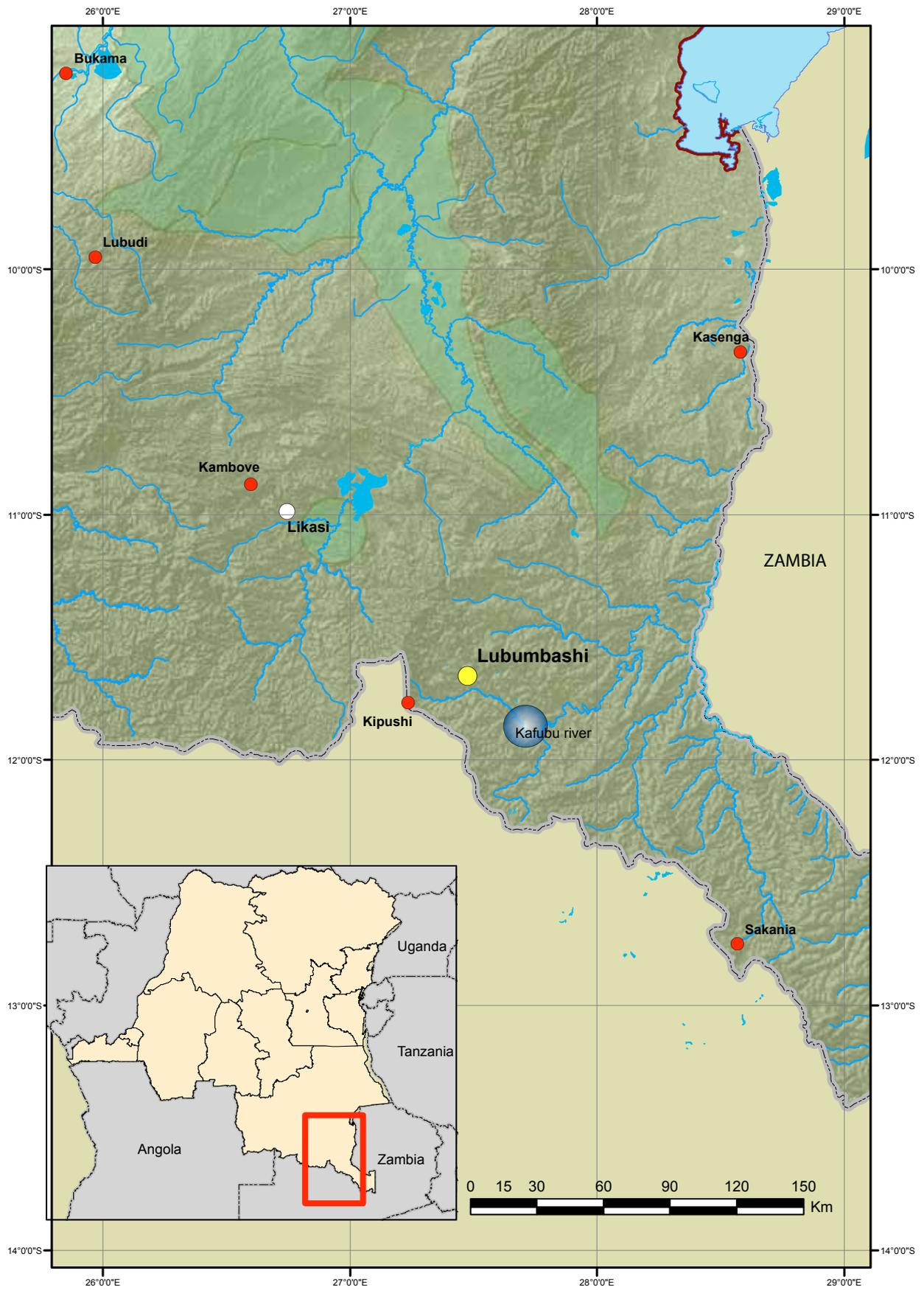
The Congolese State fails to provide adequate protection for the human right to water of its citizens. The lack of law enforcement, the structural corruption, the insufficient capacity of public officials or the fundamental problems in the justice system are some of the causes leading to the negative situation regarding the right to water in the Katanga province and the impunity in which many mining companies operate.

The Congolese State participates actively in the mining sector in Katanga through the state-owned company Gecamines or by being a required shareholder in the entities conducting their operations in Katanga. The State has to take into consideration its human rights obligations also when participating in the mining industry and use its prominent position to make sure it fulfils its responsibilities regarding the right to water.

Many foreign companies carry out their mining operations in the DRC through subsidiaries that are sometimes involved in human rights abuses. Considering that the Congolese government is often not able or willing to protect the human rights of those within its jurisdiction, an additional possibility is to examine the extraterritorial human rights obligations of the home States of these foreign companies. These obligations are outlined in the Maastricht Principles, a document taking forward the growing view that States should protect the human right to water from the abuses made by companies, also outside their territory.

Table of Contents

General background: the water crisis	6
Introduction: the focus of the report	6
Katanga province: mining and water pollution	8
1. Actors in the mining sector: public and private companies	8
2. Water pollution by the industrial mining sector	10
The human right to water. States' legal obligations under international law	12
1. The recognition of the human right to safe drinking water	12
Recognition at the international level	12
Recognition at the regional level: The African Human Rights System	13
Nature, content and scope	14
2. The relation between the human right to water and other human rights	16
Mining companies: the responsibility to respect the human right to water	18
1. Obligations under national law	18
2. Human rights due diligence: an overview from the UN Guiding Principles perspective	18
3. Additional measures that mining companies should take to respect the human right to water	20
Water pollution and governance	22
1. Legislation and governance in the water and mining sectors	22
The water sector	22
The mining sector	23
2. Institutional framework	24
3. Judicial framework	25
4. The State as an economic actor	26
The State's responsibilities and Gecamines	26
The State as a shareholder in mining companies	27
The role of foreign states: extraterritorial human rights obligations	28
Conclusions	30
Recommendations	31
List of acronyms	33



General background: the water crisis

Today, around 1,8 billion people in the world do not have access to safe water and 2.5 billion lack improved sanitation.¹

The consequences of these facts are as alarming as they are ignored by the general public. Every year, around 2 million people die due to diarrhoeal diseases, most of them children less than 5 years old. Today, 5,500 people will die because they do not have adequate access to water and sanitation. That means 4 people per minute.²The vast majority of these deaths occur in developing countries.³

In the Democratic Republic of the Congo (DRC), the most water-rich country in Africa, 51 million people lack access to potable water. Despite possessing approximately 52% of Africa's surface water reserves, only 26% of the population in the DRC has access to safe drinking water. This is one of the lowest access rates in the world.⁴

The lack of access to safe drinking water is also a key element that feeds negative dynamics, undermining development and tending to perpetuate poverty. For example, in sub-Saharan Africa, 40 billion hours are spent each year collecting water, which is equivalent to a year's worth of labour by the entire workforce in France.⁵ Also, children lose 443 million school days each year worldwide due to water-related diseases; that time is equivalent to an entire school year for all seven-year-old children in Ethiopia.⁶

The problems that cause this situation vary from country to country. However, the World Health Organisation (WHO) lists as the main ones: the lack of priority given to the sector; lack of financial resources; lack of sustainability of water supply and sanitation services; poor hygiene behaviours and inadequate sanitation in public places including hospitals, health centres and schools.⁷

The United Nations (UN) Special Rapporteur on the human right to safe drinking water and sanitation highlighted the serious negative effects that water pollution provoked by extractive industries can have on the health of affected communities.⁸ She stressed that "the mining sector poses particular challenges"⁹ The deficient management of the hazardous substances and waste created by extractive industries makes water the most affected resource by this sector.¹⁰

Introduction: the focus of the report

The focus of this report will be on one of the causes contributing to the water crisis in a concrete geographical area: water pollution in the Katanga province in the Democratic Republic of the Congo. In the province, significant pollution of water sources by mining companies can be found, seriously affecting the local population. In the meantime, a combination of factors can be detected: lack of enforcement of regulation, structural corruption, influence peddling, conflicts of interests, lack of compliance by the mining sector and, in the end, a *de facto* impunity vis-a-vis the polluting companies that leaves the main problem unresolved.

¹ UN Special Rapporteur on the human right to safe drinking water and sanitation, A/HRC/24/44, 11 July 2013, §2.

According to UNICEF and the World Health Organization, an improved sanitation facility is defined as one that hygienically separates human excreta from human contact. The Special Rapporteur on the human right to water highlights a broader understanding including the treatment of wastewater, stressing the links between sanitation and the right to health.

² World Health Organization. *Water supply, sanitation and hygiene development*, available at http://www.who.int/water_sanitation_health/hygiene/en/ (Last accessed 21/11/2013)

³ World Health Organisation. *Safer Water, Better Health: Costs, benefits and Sustainability of interventions to protect*, 2008.

⁴ United Nations Environment Programme, *The Democratic Republic of the Congo. Post-Conflict Environmental Assessment. Synthesis for Policy Makers*, 2011, p. 41; United Nations Environment Programme, *Water Issues in the Democratic Republic of the Congo: Challenges and Opportunities*, 2011, p. 9.

⁵ United Nations Development Programme, *Resource guide on gender and climate change*, 2009 p.32.

⁶ Human Development Report 2006 Published for the United Nations Development Programme (UNDP), *Beyond scarcity: Power, poverty and the global water crisis*, 2006, p. 22.

⁷ World Health Organization. *Water supply, sanitation and hygiene development*. Available at http://www.who.int/water_sanitation_health/hygiene/en/ (Last accessed on 21 November 2013)

⁸ UN Special Rapporteur on the human right to safe drinking water and sanitation, A/68/264, 5 August 2013, §37

⁹ Ibid. §39

¹⁰ Ibid.

The mineral resources in the province and the industrial mining sector are together seen as the ladder to development; but in reality however, it has not lead to an improvement in the living conditions of the local population. Moreover, mining companies negatively affect the human rights of the population, such as the right to water or health and impede improvements in relation with the right to education or to a healthy environment.

Using the human right to water as a reference and tool throughout most of the analysis, this report will examine the obligations of the main actors in this problematic scenario: the Congolese State; the mining companies operating in the area and the home States of some of those enterprises.

In analysing these obligations, different instruments will be used. International human rights law and Congolese legal provisions are most relevant for the DRC State. National law applicable to companies will be the basis to analyse their performance, using the UN Guiding Principles on Business and Human Rights as a central benchmark. The role of home States of the mining companies will be analysed by using the Maastricht Principles on Extraterritorial Obligations in relation to Economic Social and Cultural Rights.

The first part of the report will look at the Katanga province, offering an overview of the mining activities carried out in the area; the different actors involved in the sector, private and state-owned companies; and the situation in relation to the lack of access to water. The analysis will then focus on the negative impacts of industrial mining activities on the access to safe drinking water by the local population, on their socio-economic condition and on the environment.

Then, the report will briefly examine the status and content of the right to safe drinking water as an international human rights law obligation. In particular, the analysis will focus on what specific obligations flow from this right with regard to the DRC. The intrinsic link between the enjoyment of the human right to safe drinking water and other human rights, such as the right to health, the right to education or the right to life will be explained.

The analysis will move on to the responsibilities resting with the companies operating in the Katanga province to respect the national law that protects Congolese citizens from water pollution. This section will analyse whether companies operating in the DRC respect the Congolese legal provisions that regulate the activities of the mining industry. In a second instance, the recent developments made at the international level regarding the responsibility of private companies to respect human rights will be analysed, using the UN Guiding Principles on Business and Human Rights and the concept of due diligence as central benchmarks.

The following chapter will then assess the performance of the Congolese State regarding its obligations under international human rights law in relation with the human right to water. In this section, the report will explore the actions taken by the Congolese government to protect the human right to water of the communities affected by water pollution. In order to examine the level of compliance afforded by the DRC to the right to water, the analysis will focus on the domestic laws and policies enacted, which aim to prevent companies from polluting water and ensure communities access to safe drinking water. The relevant institutional framework and the judiciary will be also addressed. Special attention will be given to the participation of State-owned companies in the mining sector and the entailing responsibilities of the Congolese State.

The last section will also include an analysis of State extraterritorial obligations in relation with the right to water arising from the activities conducted by, for example, Belgian mining companies in the DRC.

In the final part, conclusions and recommendations will be given. Recommendations are seen not only as key objectives for policy makers, but also as goals and targets for civil society in designing their advocacy and lobbying strategy for achieving tangible changes on the ground. They are similarly targeted to the companies interested in understanding the different values at stake and reducing their impact on human rights as well as their potential legal liability.

Katanga province: mining and water pollution

The importance of the mining sector in the Congolese economy has increased in recent years. In 2008, it represented 13% of the GDP. In 2013, it has doubled and it accounts for around 28%¹¹.

The southern province of Katanga, with almost the identical size of Spain, is a province rich in mineral resources. The copper belt that runs through Katanga and Zambia contains 34% of the world's cobalt and 10% of the world's copper.¹² Cobalt is used in a wide range of technological products and consumer electronics.¹³ In the last decade, the worldwide demand of cobalt has tripled and, in 2010, Katanga provided half of the global primary production of this mineral, transforming the province into a relevant mining area in the world.¹⁴

However, the population benefits little from mining activities. The DRC ranks 186th out of 187 countries analysed in the Human Development Index Ranking for 2013.¹⁵ In Katanga, nearly 70% of the people live in poverty and 80% do not have access to drinking water or electricity.¹⁶

Moreover, the local population is often exposed to water pollution provoked by some of these companies, compromising not only the development of their communities but also their health, their rights to live in a healthy environment or to education.

In the last ten years, the Congolese government has liberalised the mining sector and taken measures to attract foreign investment, especially through the enactment of the Mining Code in 2002. As a result, many multinational companies established themselves in the Katanga province and started the exploitation of its vast resources.

At the moment, more than 360 mining companies extract or produce cobalt and copper in Katanga. These operations are often carried out through collaboration in the form of joint ventures between private companies and Gecamines, the state-owned mining company, which operated as a monopoly before the liberalisation of the sector.¹⁷

Therefore, two kinds of actors can be found in the mining sector in Katanga: enterprises that are effectively state-owned and private companies. This fact is essential to delineate the responsibilities deriving from the corresponding legal obligations for both the Congolese State and private companies. Often, these actors work together creating mixed entities, owned by both.

1. Actors in the mining sector: public and private companies

The Congolese state plays a strategic role in the sector through two different mechanisms:

- By being a minor shareholder in the companies involved in industrial mining projects and
- Through the activities of the state-owned company Gecamines.

Regarding the first mechanism and according to article 71 of the Mining Code, companies applying for the permits to carry out mining exploitation have to transfer 5% of the registered capital to the Congolese government in the form of shares. These shares are free of charge and cannot be diluted.¹⁸

¹¹ Engineering and Mining Journal, Global Business Report, *Mining in Democratic Republic of Congo A Journey to Africa's Mineral Heartland*, January 2013.

¹² Infomine, *Mining in the Democratic Republic of the Congo*, available at <http://www.infomine.com/countries/congodrc.asp> (Last accessed 21/11/2013)

¹³ Resource Investor. *Congo and Cobalt Critical*, available at <http://www.resourceinvestor.com/2012/12/26/congo-cobalt-critical> (Last accessed 21/11/2013)

¹⁴ Institute for Applied Ecology, *Social impacts of artisanal cobalt mining in Katanga*, Democratic Republic of Congo, November 2011.

¹⁵ United Nations Development Programme, *Human Development Report 2013*. Democratic Republic of Congo, 2013.

¹⁶ United Nations Development Programme, *Province du Katanga profil résumé pauvreté et conditions de vie des ménages*, March 2009, p. 5.

¹⁷ Extractive Industries Transparency Initiative, *Rapport de Validation. Comité Exécutif de l'Initiative pour la Transparence des Industries Extractives*, February 2013.

¹⁸ Article 71 Mining Code. LAW No. 007/2002 of JULY 11, 2002 RELATING TO THE MINING CODE. Des conditions de l'octroi du Permis d'Exploitation. "d) céder à l'Etat 5% des parts du capital social de la société requérante. Ces parts sont libres de

Usually the exploitation is executed through entities created for only one specific project. Even if it was carried out together with a state-owned company, such as Gecamines, the investor has to still comply with this requirement.¹⁹ In this way, the Congolese State is always a shareholder in the industrial mining operations carried out in Katanga.

It is noteworthy that a new Mining Code was being drafted at the moment of writing. The DRC Minister of Mines circulated a draft law in February 2013. One of the proposed amendments was to increase the compulsory participation of the State in the applying local company from 5% to 35%, and increasing 5% each time the permit is renewed.²⁰ Should this provision be included in the final version of the new Mining Code, the role of the Congolese government in the mining sector would increase substantially.²¹

Gecamines (Générale des Carrières et des Mines) operates in the Katanga province. It was founded in the early twentieth century and played an extensive role throughout the colonial period until today. Currently, Gecamines exploits copper, cobalt and zinc in Katanga, in a concession of around 20,000 km², equivalent to two thirds of the territory of Belgium.²²

Until the mid-eighties, Gecamines ranked among the world's five major copper and cobalt producers, with a turnover of about 1 billion USD and 33.000 workers.²³ In its glory days, between 1967 and 1985, Gecamines accounted for up to 20 to 30 % of the national treasury and for up to 70 to 85 % of the country's hard currencies.²⁴

However, from the end of the 80s and during the 90s, Gecamines suffered a significant decline in its activities and production capacity. A combination of general and financial mismanagement; corruption; lack of investment in renewing the actives of the company and the general political perturbations in the country turned Gecamines into a company unable to carry out their operations without the collaboration of a foreign investor.²⁵

Nowadays, they carry out their exploitation in association with foreign companies. Since 2000, around thirty exploitation agreements between Gecamines and foreign enterprises have been signed.²⁶ The legal status of the collaboration varies from case to case: sometimes these are just formal collaborations between Gecamines and foreign companies, in other cases new entities owned by the foreign and the state-company are created for a concrete mining project.²⁷

Nevertheless, it can be said that most of the industrial mining exploitation currently taking place in Katanga involves the participation of Gecamines. It is also noteworthy that there are plans to expand its activities during the coming years in an attempt to bring the company back to the levels of production of the 1980s. If the plans succeed, the role of Gecamines will become even more influential.²⁸

toutes charges et non diluables.

¹⁹ Rocky Mountain Mineral Law Foundation 57th Institute 2011. *Chapter 9: Mining in the Democratic Republic of Congo*. June 2011, p.39

²⁰ McGuireWoods, *Current DR Congo Mining Code under Revision*, May 30, 2013. Last Accessed 9 August 2013 <https://www.mcguirewoods.com/Client-Resources/Alerts/2013/5/Current-DR-Congo-Mining-Code-Being-Revised.aspx>

²¹ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, Principle 4

²² For a brief overview, see: Gecamines. *Presentation Historique*. Last accessed 9 August 2013 <http://www.gecamines.cd/historique.php>

²³ IPIS, Didier Verbruggen. *The State vs. the People. Governance, mining and the transitional regime in the Democratic Republic of Congo*, March 2006, p. 31

²⁴ Ibid. p. 32

²⁵ Institut Supérieur d'Etudes Sociales. Joseph KUMWIMBA MUSAO. *La problématique de l'exploitation minière artisanale dans la province du Katanga (cas du district de Kolwezi)*. For a historical background of Gecamines, see: Global Witness. *Same Old Story: A background study on natural resources in the Democratic Republic of Congo*, June 2004; Global Witness, *Rush and Ruin The Devastating Mineral Trade in Southern Katanga, DRC*. September 2004.

²⁶ Liste des partenariats de la Gecamines. Congo Mines. The Carter Center. Last Accessed 9 August 2013. <http://www.congomines.org/wp-content/uploads/2012/04/GCM-2011-Liste-Partenariats-en-cours.pdf>

²⁷ Radio Okapi. RDC: la Gecamines initie un audit financier des ses joint-ventures, 23 September 2011, available at <http://radiookapi.net/economie/2011/09/23/rdc-la-gecamines-initie-audit-financier-des-ses-joint-ventures/#more-102783>; see also Gecamines. *Partenariats*, last accessed 9 August 2013. <http://www.gecamines.cd/parteneriat.php>

²⁸ Reuters. Congo's neglected State miner hankers for past glory. February 22 2013. Last accessed 9 August 2013. <http://www.reuters.com/article/2013/02/22/drcongo-mining-gecamines-idUSL6N0BL2XZ20130222>

2. Water pollution by the industrial mining sector

To evaluate the magnitude and impact of water pollution in the DRC in general and in the Katanga province in particular is not an easy task. The Congolese government has not implemented a national water quality-monitoring programme that would allow to perform water quality studies, evaluate the actual status of water quality throughout the country and to examine future trends. Most of the studies carried out in this regard are made by academics or NGOs as part of wider projects.²⁹

Several case studies have been made in recent times to analyse the effects of water pollution in different areas of the Katanga province. They show a pattern indicating that mining companies are causing water pollution that significantly affects local communities across the province. These polluting activities contribute to an environmental harm that could be irreversible.³⁰ As expressed by the UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, this type of pollution not only contaminates the water reservoirs of the population living in the vicinity, but potentially also those of communities living hundreds of kilometres downstream.³¹

However, the studies only reflect the situation in specific areas, leaving a significant part of the province and problems undocumented. The limited resources available for NGOs and the lack of analysis performed by the Congolese government do not permit a full representation and understanding of the exact dimensions of the situation. A wide range of issues highlighted by local civil society, such as foetus malformation or diseases affecting the nervous system, all provoked by the pollution present in the air, soil, water and food chain, nevertheless, indicate the serious environmental problems affecting the local population.³²

A large part of the local communities' subsistence in Katanga depends on agriculture, horticulture, fishing, fish farming and livestock farming. Therefore, apart from harming the health of these communities, water pollution also compromises their economic activity and development. An estimated 159,620 jobs are created directly and indirectly by the horticulture activities carried out along the Kafubu River, ranging from horticulturists to retailers who sell their products in Lubumbashi.³³

Considering the limited information available, the analysis will be carried out and based on the research made by civil society and academic institutions in recent years.

Some of the reports are based on observation and analysis of the consequences in the communities evidently affected by water pollution; others use a quantitative methodology to measure the presence of chemical substances in the water in the vicinity of the communities and whether water is fit for human consumption according to the WHO guidelines. The reports document environmental, health and socio-economic negative effects among others.

Between April 2010 and the same month in 2011, field studies were done with the aim to create a report³⁴ analysing the situation in several villages in Katanga. In Kakanda, Mitoni Mbili, Tshamilemba Camp, Luano and Kawama in the Ruashi district, mining companies in the area polluted the water sources in the vicinity, affecting the local population. The companies involved were Boss Mining Ltd; Chemicals

²⁹ United Nations Environment Programme, 2011, op. cit. p.57

³⁰ Interview with Professor Arthur Kaniki Tshamala, Doctor in Science. Radio Okapi 26/10/2010 Available at <http://radiookapi.net/emissions-2/invite-du-jour/2010/10/26/arthur-kaniki-s%E2%80%99exprime-sur-la-protection-de-l%E2%80%99environnement-dans-les-zones-minieres/>.

³¹ Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, A/HRC/21/48, 2 July 2012 §39.

³² For a general overview, listen to the interview with Jean De dieu Minengu, director of CADD (Centre d'assistance des communautés de base pour le développement durable) on 11/01/2013 in Radio Okapi, available in French at <http://radiookapi.net/regions/national/2013/01/11/pollution-du-sol-des-cours-deau-suite-lexploitation-miniere-en-congo/>

³³ Estimations by the FAO office in Lubumbashi. *Plateforme des Organisations pour la promotion et la défense des droits économiques, sociaux et culturels. La pollution de la rivière Kafubu*. July 2011, p. 50.

³⁴ SOMO Centre for Research on Multinational Corporations. *Unheard Voices Mining activities in the Katanga province and impact on local communities*. December 2011.

of Africa (Chemaf Ltd.), a subsidiary of Shalina Resources Ltd and Ruashi Mining Ltd, a subsidiary of Metorex Group.³⁵

Between January and May 2011, another study was conducted in Tshamilemba Camp, Kapemba municipality and Kabetsha District, less than 10 kilometres away from the city of Lubumbashi, where Chemaf Ltd. and Ruashi Mining Ltd conduct their operations.³⁶ Water samples from different points were collected and analysed in order to check whether they met the standards for human consumption according to the WHO standards.

The results showed how the water in the area is affected by the activities of these companies and that traces of dangerous chemical elements are beyond the accepted limits established by the WHO. The study also showed how heavy metals had entered the food chain, detecting dangerous levels of metal concentration in soil and vegetables grown in the area.³⁷

One of the most comprehensive studies about water pollution in the Katanga province was executed in July 2011 by a local NGO. It documented a peak in water pollution the 11th of May 2011 in the Kafubu River that caused serious environmental harm to both plant and animal life in an area of approximately 200km along the river. This provoked cases of intoxication and skin diseases and had a negative impact on the livelihoods of local communities.³⁸ Further studies on the concrete effects on people's health are necessary to assess the extent of the impact.

The report accuses CHEMAF; EXACO; GECAMINES and Compangnie Miniere du Sud Katanga (CMSK) of polluting the Kafubu River and its affluents. It also makes reference to chemical analysis showing levels of chemical substances in the water beyond the limits established by the WHO in Lubumbashi and in concrete areas in Kimilolo, Kipushi, Likasi and Kabonve. And also in the rivers: Kamoto; Luilu; Musonoi; Msesa and Mura; Kakanda and the affluent of Kafubu, Kamalengha; Kipushi; Kamalondo; Buluo; Mura; Panda; Likasi; Kakontwe and Kulumaziba.³⁹

³⁵ Ibid.

³⁶ Lubumbashi is the second biggest city in the DRC, with approximately 1,7 million inhabitants,

³⁷ For more details on the points where these samples were taken and which elements were beyond the WHO guidelines, see: University of Lubumbashi, Faculte de Medicine. *Rapport de l'enquete sur la pollution chimique dans les quartiers Tshamilemba et Kabecha de la ville de Lubumbashi*. Octobre 2012, p. 9-15.

³⁸ *Plateforme des Organisations pour la promotion et la defense des droits économiques, sociaux et culturels. La pollution de la rivière Kafubu*, 2011.

³⁹ Ibid. p. 74-75

The human right to water. States' legal obligations under international law

Before entering into further analysis of the problems related to water pollution in the Katanga province, it is necessary to establish the framework within which the rest of the report will be placed. This section describes the different instruments from which legal obligations emanate for the actors likely to be involved in water pollution in the mining sector.

Firstly, the State's legal obligations deriving from international human rights law will be presented. The analysis will focus on the recognition of the human right to water at the international and regional level, its content and the subsequent legal implications for the DRC. Special focus is given to the latest developments in the African human rights system, where special attention is given to the right to water and its relation with extractive industries.

1. The recognition of the human right to safe drinking water

Water is not merely a commodity. The human right to water is widely recognised at the international, regional and national levels in the Congolese constitution. While it is explicitly mentioned in several international covenants, its broadest application derives from the International Covenant on Economic, Social and Cultural Rights (ICESCR), as part of the right to an adequate standard of living. This treaty is one of the most widely recognised treaties, with 160 State parties by August 2013, including the DRC.⁴⁰ The ICESCR is legally binding for these countries.

The Constitution of the DRC also recognises the right to safe drinking water as a fundamental human right in article 48.⁴¹

Recognition at the international level

The International Covenant on Economic, Social and Cultural Rights was signed and ratified by the DRC in November 1976. In so doing, the DRC agreed to respect, protect and promote the rights contained within the ICESCR. Failure to comply with certain provisions, will trigger international responsibility of the Congolese State and require the damages caused to be repaired.

The right to water is not explicitly referred to in the text of the treaty. In 2002, however, the Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts monitoring the implementation of the Covenant by its States parties and interpreting its provisions, confirmed through General Comment no.15 that the human right to water is included in the right to an adequate standard of living, recognised in Article 11.⁴²

This confirmed what experts had claimed for long time, that the right to water clearly is essential for securing an adequate standard of living, that it is one of the fundamental conditions for survival and therefore contained in Article 11 of the ICESCR.⁴³

The right to water has been recognised in a wide range of international soft law instruments but also in international treaties, which are legally binding.⁴⁴ For instance, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), focus especially on the rights of women and children. Both conventions also entail specific obligations

⁴⁰ For a full status of ratification, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3&chapter=4&lang=en

⁴¹ Constitution of the Democratic Republic of Congo, 2006, Article 48: "Le droit à un logement décent, le droit d'accès à l'eau potable et à l'énergie électrique sont garantis. La loi fixe les modalités d'exercice de ces droits."

⁴² Committee on Economic, Social and Cultural Rights. General Comment no.15, 20 January 2003, UN Doc. E/C.12/2002/11, the Committee also recognised that the right to water is inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1)

⁴³ Ibid.

⁴⁴ For a comprehensive view at the different international instruments in place, see WaterLex Legal Database on the Human Right to Water and Sanitation. Available at <http://www.waterlex.org/waterlex-legal-database/index.php?r=site/index>

for States parties such as the DRC with regard to access to safe drinking water and sanitation.⁴⁵

Additionally, the UN General Assembly adopted a resolution in August 2010, recognising “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”.⁴⁶ In September 2010, the Human Rights Council reaffirmed that access to water and sanitation is a human right. By consensus, it was restated that the right to water and sanitation is derived from the right to an adequate standard of living.⁴⁷

As a result, the DRC has the obligation, under international law, to respect, protect and fulfil the human right to water. These categories of responsibilities entail concrete measures that the government of the DRC has to implement. They are briefly outlined in Box 1, further described throughout the report and synthesised in the recommendations section.

Box 1. State’s obligations emanating from the human right to water

1. Obligation to respect, which “requires States to refrain from interfering directly or indirectly with the enjoyment of the right to water”.
2. Obligation to protect, which “requires States to prevent third parties from interfering with the right to water”. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
3. Obligation to fulfil, which “requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realise the right to water.”

Source: UN CESCR General Comment n.15 and UN Guiding Principles on Business and Human Rights.

Recognition at the regional level: The African Human Rights System

The African human rights system possesses a strong framework for protection of the human right to water. Significantly, as it will be demonstrated below, it explicitly addresses the State’s human rights obligations in relation with natural resources governance for the protection of the human right to water, among others. It also builds links between the realisation of the right to water and the adoption of national strategies regarding water resources management.⁴⁸

The African Charter of Human and People’s Rights (ACHPR or African Charter), to which the DRC is a state party, implicitly recognises the human right to water.⁴⁹

The African Commission on Human and People’s rights (ACoHPR) adopted the 2011 Implementation Guidelines on economic, social and cultural rights (The Guidelines) at the occasion of the 30th Anniversary of the African Charter. In this document, the Commission clarifies and develops the State’s obligations regarding economic, social and cultural rights and thus the right to water. The content related to the right to water in the Guidelines is mainly based on previous documents drafted at the international level, such as the CESCR General Comment no.15 on the right to water. Additionally, this right is also recognised in the Protocol on the Rights of Women to the African Charter.⁵⁰

Although this report will focus predominantly on the right to water as described by the CESCR, different elements of the Guidelines are pertinent for this report and worth mentioning. For example, the Guidelines push for a decentralised management of water at the local level and the participation of citizens in shaping water policies. For that purpose, the State must increase the funds allocated for the improvement of local water supply management and invest in infrastructure for those lacking access to

⁴⁵ See Article 14(2)(h) CEDAW and Article 24(2)(c) CRC.

⁴⁶ Resolution A/RES/64/292 adopted by the UN General Assembly, 3 August 2010.

⁴⁷ Human Rights Council Resolution A/HRC/15/L.14, 24 September 2010.

⁴⁸ African Commission on Human and People’s rights, *Principles and Guidelines on the Implementation of Economic Social and Cultural Rights in the African Charter on Human and People’s Rights*, 2010, p. 51. For more information on Water Resources Management and Human Rights, see Water Governance Facility (2012), *Human rights-based approaches and managing water resources: Exploring the potential for enhancing development outcomes*, WGF Report No. 1, SIWI, Stockholm.

⁴⁹ African (Banjul) Charter of Human and People’s Rights, 1981, Articles 16 and 18.

⁵⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Article 15 a)

water.⁵¹ They also remind States of the obligation to protect water resources from contamination and to carry out “strict controls of the use and pollution of water resources for [...] extractive industries in rural areas.”⁵²

For these reason, the State should give priority to report on legislative and other measures taken to ensure, among others, access to minimum essential amounts of safe water; physical accessibility to water facilities; and, significantly relevant for this report, on measures to protect natural water resources from contamination, especially that caused by extractive industries in rural areas.⁵³

Of further relevance to this report is the Working Group on Extractive Industries, Environment and Human Rights Violations, which was established in 2011 to examine the impact of extractive industries on human rights and, among other responsibilities, to perform research, formulate recommendations or inform the African Commission on the possible liability of private actors.⁵⁴

a) Natural resources governance and human rights

Aware of the urgency to move faster, in 2012, the ACoHPR adopted a resolution on a Human Rights-Based Approach to Natural Resources Governance. The document restates the obligation of the State to act in conformity with international human rights law in the managing natural resources in the country. It calls for the participation of local communities in decisions related to natural resources governance and asks governments to seriously commit to end corruption at all levels of decision-making.

Notably, the resolution asks States to ensure that human rights are respected “in all matters of natural resources exploration, extraction, toxic waste management, development, management and governance, in international cooperation, investment agreements and trade regulation.”⁵⁵

Therefore, the ACoHPR asks States to develop clear legal frameworks for sustainable development,

Box 2: Human rights criteria for the Human Right to Water

Availability: The human right to water means water must be available in sufficient quantities for personal and domestic uses. 50 to 100 litres per person per day is the adequate quantity of water to meet health requirements (WHO)

Quality: Water must be safe for consumption and other uses and not threaten human health. The World Health Organization (WHO) publishes Water Quality Guidelines that constitute international standards for ensuring drinking water supply.

Acceptability: Water and sanitation facilities and services must be culturally and socially acceptable.

Physical Accessibility: Water and sanitation services must be accessible to everyone in the household or its vicinity on a continuous basis, as well as in schools, health-care facilities and other public institutions and places. Physical security must not be threatened during access to facilities. There is no physical access when you have to travel a distance of more than 1 km or when it takes more than 30 minutes return trip (WHO).

Affordability: Access to sanitation and water facilities and services must be done at a price that is affordable for all people. Access to sanitation and water must not compromise the ability to pay other essential necessities guaranteed by human rights, such as food, housing and health care.

Source: WateLex, Integrating the Human Right to Water and Sanitation in Development Practice

⁵¹ African Commission on Human and People's rights, 2010, op. cit. p.52

⁵² Ibid.

⁵³ African Commission on Human and People's rights , *The State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter*, 2012, I iii) c) p.8

⁵⁴ For more information, see: African Commission on Human and People's rights , *Working Group on Extractive Industries, Environment and Human Rights Violations* www.achpr.org/mechanisms/extractive-industries/ (last accessed 25/11/2013)

⁵⁵ African Commission on Human and People's rights , *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, 2012, available at <http://www.achpr.org/sessions/51st/resolutions/224/> (last accessed 25/11/2013)

having human rights as a prerequisite and to avoid negative impacts on natural resources such as water. It calls for regional efforts to promote natural resources legislation that follows a human rights based approach grounded on community participation, transparency and respect for human rights.⁵⁶

In relation to the investors and industries working on the extractive sector, the ACoHPR calls on States to make sure that they are legally accountable for their actions provoking human rights abuses. In particular, States must set up independent monitoring and accountability mechanisms and ensure that independent social and human rights impact assessments are conducted to protect the human rights of the local population.⁵⁷

Nature, content and scope

The human right to water provides, as described in Box 2, that everyone has the human right to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.⁵⁸

However, the nature of the obligations that the DRC has as State party to the ICESCR is peculiar and needs a brief explanation. ICESCR establishes the obligation to achieve progressively the full realisation of the right to water. This means, as described in Box 3, that the time that a given country may need to ensure the right to water to everyone is dependent on its resource constraints.⁵⁹

Nevertheless, States parties have the immediate obligation to satisfy, at the very least, minimum essential levels of the right to water. Those levels are core obligations, explained in Box 4, that all State parties are obliged to meet regardless of their financial constraints.⁶⁰

The DRC, as a State party to the ICESCR, therefore has the obligation to “ensure access to the minimum essential amount of water that is sufficient and **safe** for personal and domestic uses.”⁶¹

For the purpose of this report focusing on water pollution, only one element of the core obligations will be stressed: water quality. It means that water must be “safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health.”⁶²

The quality requirement will be complied with, when the elements in the water that are known to be dangerous to health are within the limits established by the WHO.⁶³ Instances where individuals’ drinking water is found to be unsafe, will amount to a violation of the human right to water and trigger international responsibility of the State party under the ICESCR.

Box 3: Progressive Realisation of the Right to Water

In General Comment No. 15, the Committee on Economic, Social and Cultural Rights stressed that, under the Covenant, States have the obligation to achieve progressively the full realization of the right to water.

In other words, the Covenant acknowledges that States have resource constraints and that it may take time to ensure the right to water to everyone. Some components of the right to water are, therefore, deemed subject to progressive realization.

While not all aspects of the right to water can or may be realized immediately, general comment No. 15 stresses that States must, at a minimum, show that they are making every possible effort, within available resources, to better protect and promote this right.

Source: UN Office of the High Commissioner for Human Rights. Fact Sheet. The Right to Water.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Committee on Economic, Social and Cultural Rights, 2003, op. cit. §37 a)

⁵⁹ UN Office of the High Commissioner for Human Rights. *Fact Sheet. The Right to Water*, p. 25

⁶⁰ UN Office of the High Commissioner for Human Rights. *Fact Sheet. The Right to Water*, p. 26

⁶¹ Committee on Economic, Social and Cultural Rights, 2003, op. cit. §12

⁶² Ibid.

⁶³ Ibid.

Where a violation of an international human rights obligation has taken place, the State is obliged to cease the violating act, if it is continuing; to offer full reparation for the harm done, whether material or moral; and to offer guarantees of non-repetition.⁶⁴

Box 4: Core State Obligations in relation with the right to water

The UN Committee on Economic Social and Cultural Rights recognised that State parties to the ICECSR have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant.

In relation with the right to water, the Committee established a number of obligations that are not to be satisfied progressively but that are of immediate effect:

1. To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease.
2. To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups.
3. To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
4. To ensure personal security is not threatened when having to physically access to water;
5. To ensure equitable distribution of all available water facilities and services;
6. To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
7. To monitor the extent of the realization, or the non-realization, of the right to water;
8. To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;
9. To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation;

Source: UN Committee on Economic, Social and Cultural Rights. General Comment no.15

2. The relation between the human right to water and other human rights

It is crucial to emphasise that access to safe drinking water is a precondition for the enjoyment of other human rights. There are clear links between this and other recognised human rights, such as the right to education, housing, health or life.⁶⁵ In relation with industrial water pollution, like the one analysed in this report, the UN Special Rapporteur stressed that heavy metals can enter the food chain, endangering the human right to food and to health.⁶⁶

⁶⁴ Articles 30 and 31 of the International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001.

⁶⁵ UN Office of the High Commissioner for Human Rights. *Fact Sheet. The Right to Water*. p.12

⁶⁶ UN Special Rapporteur on the human right to safe drinking water and sanitation, A/68/264, 5 August 2013, §37

For example, many children, especially girls, have to spend considerable time everyday gathering water for their family and cannot go to school. In many countries, girls are not sent to school because there are no separate sanitation facilities. Also, children lose 443 million school days each year worldwide due to water-related diseases. Women and children do most of the water collecting from distant water points, and suffer severe health implications related to the heavy burden and contact diseases as a consequence.⁶⁷

There is also a clear relation between the human right to water and the right to a general satisfactory environment, expressly recognised in the ACHPR in Article 24 for the favourable development of all peoples.

The negative effects on right-holders are thus extensive. An action harming the human right to water of an individual intrinsically affects other human rights. This interdependence has to be taken into consideration when designing an appropriate policy and legal framework for the protection and enjoyment of the human right to water.

⁶⁷ UN Office of the High Commissioner for Human Rights. *Fact Sheet. The Right to Water*, p.12

Mining companies: the responsibility to respect the human right to water

Companies are not bound directly by international treaties. Signatory States are the subjects of those legal obligations. Thus, it is part of the Congolese State's obligations to ensure that companies respect the human right to water and that act in compliance with national law. In this section, the relevant regulatory provisions at the national level will be examined.⁶⁸

Furthermore, there is an increasing recognition by both companies and governments that business enterprises have a responsibility to respect human rights. The most relevant representation of this understanding, though not a legally binding instrument, are the UN Guiding Principles on Business and Human Rights. In the following sections, they will be used to further analyse the protection of the human right to water through the exercise of due diligence by mining companies.⁶⁹

1. Obligations under national law

Mining companies that conduct their operations in the DRC are subject to the Congolese national laws regulating mining activities. The 2002 Mining Code, the 2003 Mining Regulation and the Annex IX on the elaboration of the Environmental Impact Study and the Environmental Management Plan are among the most important legal instruments for the protection of the right to water from the activities of the mining industry.

The mining regulations oblige companies, in order to receive a permission to start operations, to carry out an Environmental Impact Study (EIS) analysing the potential impact of the mining activities in the environment.⁷⁰ It must include a description of the ecosystem before the start of operations, including underground and surface water, and the aspects that might be affected in a qualitative or quantitative manner.⁷¹ One of the goals of the environmental impact study is to "reduce to an acceptable level the harmful effects of the mining [...] operation on the [...] sources of water and rivers".⁷²

In addition, the EIS must describe the verified effective measures planned by the company for the protection of the environment, the elimination or the reduction of potential pollution and the rehabilitation of the affected sites in case of pollution.⁷³

Together with the EIS, mining companies have to submit an Environmental Management Plan of the Project (EMPP), which, according to the Mining Code, contains "environmental specifications of the project consisting of a programme for the implementation and monitoring of measures contained in the EIS in order to eliminate, reduce and possibly offset the damaging consequences of the project on the environment".⁷⁴

According to the mining regulation, local communities must actively participate in the design of the EIS and the company must take into consideration their concerns, questions and reactions. The company representative should inform the local community as quickly as possible about the negative impacts of the project and the proposed rehabilitation measures. The company is also required to compensate the population for the harms resulting from the mining activities.⁷⁵

⁶⁸ Institute for Human Rights and Business. *More than a resource: Water, Business and Human Rights*. 2011. p. 3

⁶⁹ Ibid.

⁷⁰ Defined in the Mining Code as a "a priori scientific analysis of the foreseeable potential effects a given activity will have on the environment, as well as the analysis of the acceptable levels thereof and the mitigating measures to be taken to ensure the conservation of the environment, subject to the best technology available, at a viable economic cost".

⁷¹ Mining Code, 2002, op.cit. Article 204..

⁷² Mining Regulation. DECREE NO 038 / 2003_OF 26 March 2003. Article 452

⁷³ Mining Code, 2002, op. cit. Article 204.

⁷⁴ Mining Code, 2002, op. cit. Article 1.

⁷⁵ Mining Regulation, 2003, Article 451 and Article 280 Mining Code.

2. Human rights due diligence: an overview from the UN Guiding Principles perspective

Mining companies in the Katanga province benefit from a general lack of enforcement of the law. However, by not respecting the legal provisions regulating mining activities and preventing water pollution, they are exposed to major risks that could entail adverse economic consequences for them.

A legal procedure, such as the one taking place at the moment of writing in the courts of Kipushi, could lead to major sanctions, including the obligation to compensate the affected communities and pay for the environmental restoration works. This can potentially compromise the viability of a project or a company.

In order to limit such risk, companies should conduct what in the United Nations Guiding Principles on Business and Human Rights has been called “human rights due diligence.”⁷⁶ By doing so, companies reduce their liability risks, they are more protected from mismanagement claims and, above all, contribute to prevention of human rights abuses.

The Guiding Principles, as expressed in Box 5, offer indications on how companies should identify, prevent and mitigate adverse human rights impacts resulting from their activities. To conduct due diligence means to take every reasonable step to avoid involvement with a human rights abuse.⁷⁷ By exercising human rights due diligence, as described in Box 6, companies should be able to identify, prevent, mitigate and account for the harms caused to human rights.”⁷⁸

In the context of ensuring the human right to water and more specifically, water quality, “due diligence” would involve that companies have to take appropriate measures to effectively avoid water pollution. Some of these reasonable steps to avoid damages to the human right to water are described in the Congolese legislation. It can be said that, formally, the Congolese legislation makes clear provision requiring mining companies to carry out due diligence, despite not being framed in human rights terms. Some of the main elements can be found in the national law, in implementing the EIA and EMPP: assessing actual and potential impacts; acting upon the findings; tracking responses, and communicating how impacts are addressed.

The Mining Regulation, which explains the terms of enforcement of the Mining Code, provides that mining companies are responsible for the environmental damages provoked by their activities insofar they do

Box 5: The UN Guiding Principles on Business and Human Rights (UNGPs)

The UNGPs define what companies and governments should do to avoid and address possible negative human rights impacts by business.

The Principles rest on three pillars:

- State’s duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication.
- Corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.
- Need for greater access by victims to effective remedy, both judicial and non-judicial.

Source: SOMO, How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy.

⁷⁶ Here on, “Guiding Principles” and simply “due diligence”

⁷⁷ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*. 2011, Principle 17

⁷⁸ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011, op. cit. Principle 15

not observe their EMPP or the provisions in the mining regulation.⁷⁹ Furthermore, the Congolese law recognises that legal responsibility can also be incurred through negligence or imprudence through actions or inactions.⁸⁰

National legislation also recognises the individual responsibility for damages to environment and health in violating the directive describing how the EMPP should be designed.⁸¹ The EMPP contains some of the steps recommended by the Guiding Principles to “identify and assess the nature of the actual and potential adverse human rights impacts”⁸² that a mining company can be involved in.

It is also useful to list some examples to see what kinds of measures are expected from mining companies to avoid contributing to abuses to the human right to water. Annex IX of the Mining Code provides technical guidance on how to follow the procedures that should form part of the EMPP.

For instance, mining companies are expected to take effective measures to protect water sources in the perimeter where they operate. That includes surface water, groundwater, aquifers or lakes. Companies must monitor their activities to ensure they do not affect the quality of these sources and that their preventive measures are effectively working.⁸³

It is also forbidden to discharge wastewater or other contaminating substances resulting from mining activities into any stream, river or lake or anywhere less than 100 metres away from a water source. Companies are required to store and treat these substances to eliminate any risk of pollution and not to use water sources to dilute the wastes.⁸⁴ They must also put in place a system to separate and isolate waste or contaminated water, reducing the risk of polluting safe water sources.⁸⁵

In conclusion, many more examples could be given on how the Congolese law requires companies to take every reasonable step to avoid being involved in abuses of the human right to water and therefore to perform due diligence.

Box 6: Human Rights Due Diligence for Businesses

Due diligence is understood as a business process through which enterprises actively identify, prevent, mitigate and account for how they address and manage their potential and actual adverse human rights impacts. The process should include assessing actual and potential impacts throughout their business operations, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Due diligence implies more than just an assessment of risks for the company; the purpose is to understand and address risks and abuses that the company’s activities pose to rights holders, including in its supply chain and through its other business relationships.

Source: SOMO, How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy.

⁷⁹ Mining Regulation, 2003 op. cit. Article 405

⁸⁰ Article 259 Code Civil de la République Démocratique du Congo.

⁸¹ Article 68. Loi n°11/009 du 09 Juillet 2011 portant principes fondamentaux relatifs à la protection de l’environnement, J.O. Numéro Spécial. 16 Juillet 2011

⁸² Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011, op. cit. Principle 18

⁸³ Annex IX. De l’élaboration de l’étude d’impact environnemental et du plan de gestion environnemental du project, Article 30 and 54, available at http://mines-rdc.cd/fr/documents/Annexe_IX.pdf (last accessed 25/11/2013)

⁸⁴ Ibid. Article 55

⁸⁵ For more technical details, see Ibid. Article 56

3. Additional measures that mining companies should take to respect the human right to water

It should be underlined that an indispensable part of effectively undertaking human rights due diligence is to take additional steps to internalize the findings from the impact assessments across relevant internal functions and processes in the company.⁸⁶

The Guiding Principles describe how this internalization can be done. An effective integration requires that mining companies assign the responsibility for addressing these impacts to employees at the appropriate level and function within the enterprise.⁸⁷

However, the lessons learnt from the impact assessments can only be useful to prevent new damages or stop the ones happening if they are effectively integrated into the pertinent parts of the company. For that, the company needs to allocate budget, adapt its decision-making and supervision processes to allow responding to negative human rights impacts.⁸⁸

Also, the company needs to know if the measures taken to address a negative impact on the right to water are actually working. This requires them to track the effectiveness of their responses using qualitative and quantitative indicators and to continue consulting with the affected communities and other stakeholders, such as civil society organisations. This procedure should become part of the reporting system that already exists in the company.⁸⁹

An additional measure to ensure transparency and accountability of mining companies towards their stakeholders is to communicate their findings and the way they address their human rights impacts. In this way, investors, the local population, the media or interested actors can be adequately informed about this continuous process that is human rights due diligence.⁹⁰

When, as a result of the company's due diligence process or other means, a mining company identifies that it has caused a negative impact on the human right to water, it should engage in the remediation process individually or in cooperation with other actors. Depending on the context, this process can take place through judicial, administrative or other mechanisms specifically created to deal with adverse human rights impacts.⁹¹

⁸⁶ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011, op. cit. Principle 19

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid. Principle 20

⁹⁰ Ibid. Principle 21

⁹¹ Ibid. Principle 22, for more information about these mechanism, see principles 25 to 31

Water pollution and governance

Once the human right to water, its elements and obligations emanating from it have been established, there is a clear basis to analyse the performance of the Congolese State regarding its international human rights obligations. In order to do that, the analysis focuses on the context of water pollution and the actions of the Congolese government regarding its obligation to respect, protect and fulfil the human right to water.

As shown in previous sections, there is evidence that mining companies cause water pollution with the potential to have serious negative effects on the right to water and other human rights of local communities. It can also harm their health, the environment and the economic development of the population.

However, the Congolese government cannot just observe the situation. As a State party to the ICESCR, it has the obligation to protect the enjoyment of the human right to water from the actions of private companies and, as emphasised above, ensure access to safe drinking water. These obligations also emanate from the ACHPR in the form specified by the ACoHPR Working Group on Extractive Industries, analysed in previous sections.

In this regard, the Congolese government has to take necessary and effective measures to combat water pollution by third parties as part of its duty to protect.⁹² Through effective policies, legislation and regulation, the State has the obligation to take appropriate steps to prevent water pollution; to investigate and punish the actors responsible for the harm done; to put an end to pollution happening in the Katanga province and to take measures to repair the harm done.⁹³ If the Congolese government does not do so, it is in violation of its international obligations regarding the human right to water.

In the following sections it will be shown how the Congolese State does not comply with its international legal obligations regarding the human right to water.

1. Legislation and governance in the water and mining sectors

The water sector

At the moment, around a dozen ordinances and decrees regulate the water sector. The regulations are, however, outdated and not effective.⁹⁴ According to the United Nations Environment Programme, the laws are “based on a partial subsector approach, mainly focused on protection of water sources from contamination, drinking water supply and the management of user rights.”⁹⁵ More importantly, “they do not provide a coherent legal framework for organising a multi-stakeholder water sector.”⁹⁶

As already mentioned, the lack of data gathered by the Congolese government in relation to water pollution does not allow for adequate planning, monitoring and accountability.⁹⁷ If water quality is not adequately tested, the DRC cannot be in compliance with its obligations under international law.

It is worth analysing a draft Water Code that is planned to provide a new regulatory framework to the sector. However, it was supposed to be sent to parliament for approval already in 2011 but is still pending.⁹⁸

Despite the optimism about this draft Code, it is decisive to underline that it needs further regulations for the effective implementation of all the provisions. And, unfortunately, it would not be the first time in which an ambitious code is enacted without the regulations to put it in practice.

⁹² Committee on Economic, Social and Cultural Rights, 2003, op. cit. § 23

⁹³ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011, op. cit.

⁹⁴ United Nations Environment Programme, 2011, op. cit. p.21

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ UN Special Rapporteur on the human right to safe drinking water and sanitation, A/68/264, 5 August 2013, § 78

⁹⁸ United Nations Environment Programme, 2011, op. cit. p.4

And even if those additional provisions are created, it should be recalled that the implementation of such an ambitious reform must be realistic. The effective realisation and application of the new Water Code would need a considerable amount of resources and institutional capacity. The problems of governance in the DRC and the security situation should not be overlooked.⁹⁹

a) The Draft Water Law

The draft Water Code deals with key topics for the protection of the human right to water from the activities of mining companies. The new Code will regulate the protection of all types of water sources.¹⁰⁰

It is to be seen if some of the final provisions are restrictive and whether they are compatible with the State obligations arising from the human right to water, recognised in the Congolese Constitution, and the requirements established by the CDESCR at the international level.

It is interesting to note that the new Code recognises the population's right to be informed and to participate in the management, protection and development of water resources. Unlike the previous regulation, the population affected by water management or water planning will now have the right to participate through different committees at the national, provincial and local level. This is a positive step towards ensuring a human rights approach in implementing a water policy.

The competences established in the new Code will be based on the principle of subsidiarity, where local authorities make the decisions related to the use and management of water, unless they clash with questions of national interest. In that case, it is understood that the competence will fall upon national authorities.

This last provision is seen as going against the decentralisation approach expected to be taken in the organisation of the country. It is argued that the competence should be based, instead, on the principle of proximity, by which the local authorities are fully responsible for the management, usage and protection of water resources.

Regarding the protection of water resources and the preservation of water quality, the new Code will impose a perimeter of protection for all water sources. This physical limit will be equally applicable to mining enterprises, thereby formally protecting water from potential pollution, preserving the ecosystem and the biodiversity of the area.

The Code will also follow the polluter-pays principles, by which those responsible for pollution must pay compensation for the damage caused. It is expected that this approach will be further developed in more specific regulations.

According to the draft Code, both national NGOs working in the field of environmental protection and associations representing local communities will be able to manage the public water service and initiate a judicial action in cases of a breach of law. This provision aims to encourage the participation of local communities in protecting their common interest.

In this same spirit, individuals are to have the ability to monitor and control water quantity and quality. Together with the State, users are to supervise these matters and inform the competent authorities where they detect an incident that could affect public health. It is also interesting to emphasise that the inspectors competent to monitor the water management will no longer be appointed by the provincial government but by the entity in charge of the water management.

The mining sector

As analysed in previous sections, the mining sector and specifically its *de facto* relation with the right to water is regulated in the Mining Code, the Mining Regulation and the Appendix on how to implement the EIS and the EMPP.

Although these regulations could still be improved and made more effective, the problem of water pollution and the related harm to the human right to water does not lie in the lack of regulation but rather in its deficient implementation and enforcement. Therefore, not only companies are responsible

⁹⁹ Ibid. p.5

¹⁰⁰ Including rivers and its natural watercourses, streams, lakes, rainwater, underground water, aquifers, wetlands etc.

for the harm provoked by polluting water and not respecting the law; by not enforcing the laws that *de facto* require mining companies to respect human rights, the Congolese government is also responsible and is not meeting its duty to protect the right to water. Many examples can be given.

For instance, according to the Mining Regulation, once the mining activities have started, and every two years thereafter, companies are obliged to conduct an independent audit evaluating the environmental impact and the mitigation measures put in place in order to ensure that companies operate in compliance with their environmental obligations.¹⁰¹

However, in practicality, mining companies often do not respect the provisions mentioned above. They do not consult or inform the local population about the risks of the project and they do not make the environmental impact studies publicly available for stakeholders, despite their legal obligation to do so.¹⁰² Moreover, as underlined by local civil society, when harm is done as a result of their activities, mining companies usually do not fulfil their obligation to compensate the communities.¹⁰³

Also, the government approves the project regardless of the lack of public consultation and, even when the project is ongoing, they do not check whether the activities are in compliance with the conditions set out in the environmental impact study.¹⁰⁴ In that way, the EIS risks becoming just a formal document drafted by companies without the necessary field analysis or monitoring and not applied while conducting operations.

Local civil society highlights local authorities as the only ones making an effort to monitor the compliance of mining companies with the EIS and the EMPP. However, they often do not even have access to these documents. In the meantime, provincial and national authorities do not take action, feeding the impunity dynamics and failing to comply with the State's duty to protect.¹⁰⁵

An additional element to introduce in the analysis is whether the current mining legislation should add a provision obliging companies to undertake also a human rights impact assessment (HRIA). In the case of the DRC, the necessity is clear: the EIA and the EMPP do not include explicit reference to the human right to water thus lacking sufficient human rights content, where the policies and actions of mining companies are evaluated considering its effects on the rights of the affected individuals.¹⁰⁶

As stressed by the UN Special Rapporteur on the human right to water and sanitation, the Congolese State must consider the possibility of adopting and implementing legislation to oblige mining companies to carry out a human rights impact assessment as part of their operations. This would be a step forward by the DRC towards being in compliance with its international obligations emanating from the human right to water.¹⁰⁷ This decision would also be in line with the ACoHPR resolution on a human rights approach to governance of natural resources, analysed in previous sections, that calls States, in order to ensure respect for human rights, to be certain that social and human rights assessments are elaborated.

2. Institutional framework

In order to make legislation effective and ensure the fulfilment of the right to water, the State needs an administrative structure that monitors the implementation of the requirements established by law. For example, authorities need control mechanisms in place to ensure that water is not being polluted. Further, as part of the obligation to protect, they must carry out water quality monitoring in different

¹⁰¹ Mining Regulation, 2003, op. cit. Article 459 and respecting the recommendations made in the UN Guiding Principles on Business and Human Rights on how to conduct human rights due diligence.

¹⁰² The Carter Center, *Les Investissements Miniers en République Démocratique du Congo: Développement ou Appauvrissement des Communautés Locales?*, Octobre 2012, p. 41.

¹⁰³ Mining Code, 2002, op. cit. Article 280 ; IPIS interview with representative of affected local community and their legal representative, Lubumbashi, January 2013.

¹⁰⁴ The Carter Center, 2012, op. cit. p. 41.

¹⁰⁵ Ibid. p.45

¹⁰⁶ Institute for Human Rights and Business, 2011, op.cit. p.24 ; for more information on human rights due diligence in practice, see Institute for Human Rights and Business, *The "State of Play" of Human Rights Due Diligence. Anticipating the next five years*, 2011.

¹⁰⁷ The Special Rapporteur encourages States in this regard in relation to non-state water service providers at Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation A/HRC/15/31, 29 June 2010, p.15.

areas of the province or control the activities of mining companies making sure they comply with the national law.

Also, the administration can have a role to play when providing remedies for individuals negatively affected by water pollution. Non-judicial mechanism can be used as a complement to courts to punish and fine polluting mining companies or provide compensation for the harms done to the local population in a polluted area.¹⁰⁸

In the DRC, the competence to control, monitor or report activities that negatively affect the right to water rests with the Department on the Protection of the Mining Environment, which is within the Ministry of Mines, at the national level.¹⁰⁹

The centralisation of supervisory powers has proved to be problematic, as the evaluation, approval and monitoring of the EIA will be made 1500km away from where the actual harm can happen. In practicality, this means that, very often, national and provincial authorities do not react to complaints made by local authorities reporting water pollution at the local level.¹¹⁰

Governance of the water sector in the DRC is structurally weak, with dozens of regulatory laws and overlapping institutions with conflicting mandates. The management of the water sector depends on seven different ministries and the areas of responsibility are not clearly defined, which has led to institutional competition and lack of coordination.¹¹¹ However, at the moment, big efforts are being made, with international support, to implement a deep institutional reform of the water sector.¹¹²

There are other factors explaining the lack of reaction to the serious harm to the right to water provoked by mining companies. A central one is the combined lack of resources and competence of public officials responsible for the control of pollution. Sometimes, government officials at the local, provincial and national level do not even know or ignore that they have legal responsibilities regarding the protection of human rights of the population.¹¹³ In other cases, they lack the technical equipment or expertise to evaluate the environmental harm done.¹¹⁴

Furthermore, public entities in charge of evaluating the social or environmental impact of mining activities in the province lack the technical capacity to carry out their work up to their responsibility. For instance, the public officials in charge of environmental protection, from the *Division de protection de l'environnement minier*, are not able to develop their work when a specific case demands it.¹¹⁵

Moreover, the widespread corruption in the public sector at all levels, together with the general use of influence peddling in politics and business in the DRC¹¹⁶ constitute serious obstacles that impede a process leading to compliance of mining companies with national law. The consequence is, that despite the apparent efforts of the Congolese government to combat corruption, impunity for companies polluting water in the Katanga province remains.

3. Judicial framework

Courts are crucial instruments in protecting the rights of the population. In a case of unlawful water pollution by mining companies, they would be supposed to allow victims to have access to an effective remedy where they can have their complaints heard; to get compensation for the harm suffered and to receive guarantees that companies will not pollute water again.¹¹⁷

¹⁰⁸ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011, op. cit. Principles 25 and 27.

¹⁰⁹ Mining Code, 2002, op. cit. Article 15.

¹¹⁰ The Carter Center, 2012, op. cit. p.25.

¹¹¹ United Nations Environment Programme, 2011, p.21-22

¹¹² For more information, see: GIZ. *Support to the water sector reform in DRC*. Available at <http://www.giz.de/en/worldwide/19928.html> (last accessed 25/11/2013).

¹¹³ The Carter Center, 2012, op. cit. p.25-26

¹¹⁴ Ibid. p.26

¹¹⁵ Ibid. p.41

¹¹⁶ Freedom House, *Countries at the Crossroads 2012 - Democratic Republic of the Congo*, 20 September 2012, available at: <http://www.unhcr.org/refworld/docid/505c1733c.html> (last accessed 25/11/2013)

¹¹⁷ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other

However, in the DRC, it is very difficult for victims to find justice or reparations in the justice system. Local civil society brings attention to the fact that access to justice rather depends on having the right political relations, belonging to the ethnic or tribal group that possesses more power or having the adequate financial means.¹¹⁸

In a system where promotions depend on political and ethnic belonging, the performance of the judiciary is affected by the political and military influence on their independence. As a result, allegations against powerful actors, such as political and administrative authorities; security services; public companies officials or mining companies are not seriously investigated. In those cases where an official procedure starts, it is often characterised by minor formalities that do not lead to a further investigation or progress in the case.¹¹⁹

The judiciary also lacks sufficient resources to conduct effective investigations. Judges and judicial personnel in general carry out their work in precarious conditions, with reduced salaries that sometimes are not paid regularly.¹²⁰ They also lack the capacity to deal with complex and very technical cases that require specialisation and means to carry out extensive investigations on, for example, the actions of mining companies and their influence in the environment.

Also, another factor to consider is the corruption among the judiciary. Very often, judicial decisions are made according to the interests of one of the parties over the other.¹²¹

Despite this, at the moment of writing, an important case was being discussed in the courts of Kipushi, where the representatives of local communities affected by polluting activities in the Kafubu River filed a complaint seeking compensation for the harms suffered. Those alleged to be responsible for the harm caused are Gecamines, CMSK and the Congolese government.¹²²

From the procedural documents IPIS had access to, the court will be dealing with sensitive issues at the core of the problem of water pollution in the province: the role of the government protecting the rights of the population; the lack of preventive and due diligence measures taken by companies and lack of reparation provided to the victims, among others.

Despite the general concerns related to the Congolese justice system, the representatives expressed their hope that this decision could be a fundamental precedent, creating favourable jurisprudence that could be applied in similar cases across the country.

4. The State as an economic actor

As mentioned in previous sections, the Congolese State holds an important role in the mining sector. The State has to take into consideration its human rights obligations also when participating in the mining industry through Gecamines, a state-owned company, and as a mandatory shareholder in mining companies.

The State's responsibilities and Gecamines

It should be stressed, as Professor John Ruggie stated at the beginning of his mandate as Special Representative for the UN in Business and Human Rights, that "the State itself may be held responsible under international law for the internationally wrongful acts of its State Owned Enterprises if they can be considered State organs or are acting on behalf, or under the orders, of the State".¹²³

business enterprises, 2011, op. cit. Principles 25 and 26

¹¹⁸ Association Congolese pour l'Accès à la Justice. *Annual Report 2012*. "La Justice est privatisée en RDC" and more generally: Amnesty International. *Amnesty International Annual Report 2013*.

¹¹⁹ Association Congolese pour l'Accès à la Justice. *Annual Report 2012*. "La Justice est privatisée en RDC".

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² IPIS interview with the legal representative of the alleged victims, Lubumbashi, January 2013.

¹²³ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. UN Doc A/HRC/8/5, 7 April 2008, § 32

In a recent case involving Gecamines in Jersey¹²⁴, a British Crown dependency, the judgement in one of the instances established, in relation to Gecamines' constitutional position, that "the exceptional degree of power accorded to the State over the affairs of Gecamines, at all levels, was such that the company was no more, in truth, than an arm of the State with responsibility for operations in a sector of vital importance to the national economy."¹²⁵

It also established that there were occasions "on which the [the government of the] DRC had for its own use taken or used assets belonging to Gecamines without compensation."¹²⁶ Although the highest court did not accept these conclusions for the purposes of the case,¹²⁷ they are relevant for this report, as they factually show the interconnection and degree of control that the government exercises on Gecamines.

Following the logic of the UN Guiding Principles, given the degree of control by the Government over Gecamines, and although it is a legal entity formally separated from the State, the human rights abuses resulting from its activities or participation in joint mining exploitations may entail a violation of the State's own international law obligations.¹²⁸ By controlling Gecamines, the State is well positioned to ensure respect for the human right to water and the implementation of the provisions regulating mining exploitation in the projects where Gecamines takes part.¹²⁹

Usually, when operating through a joint-venture with a foreign investor, a part of the board in the new company is appointed by Gecamines. It can range from 20-40% of the board membership.¹³⁰ In this way, and through its managerial power within the company, the State could ensure both that human rights due diligence is fully implemented and that the right to water of the population affected by mining activities in the Katanga province is respected through the activities in which Gecamines participates.

Therefore, the obligation of the Congolese government in relation to the right to water is reinforced by the fact that it has a considerable control over the state-owned company Gecamines, which is a central actor in the province. The State can use this situation to make sure it fulfils its obligations regarding the right to water.

The State as a shareholder in mining companies

As described in previous sections, the Congolese State is always a shareholder in the entities undertaking industrial mining operations in Katanga. The mining code establishes that 5% of the capital of the applying society has to be transferred to the Congolese government in the form of shares.

As a shareholder in those companies, the State has the opportunity to influence the way mining exploitation is performed in the Katanga province. As mentioned above, the Congolese State has the responsibility to protect the human right to water of the population from the abuses made by private mining companies. As a shareholder, the State can push the company to respect the human right to water; to comply with the Mining Code and Mining Ruling and to make human rights due diligence an inherent part in the company's daily operations.

Furthermore, as mentioned above, a reform of the mining code might take place, increasing the participation of the government from 5% to up to 35%. In case this provision is included in the final version of the new Mining Code, it would reinforce the responsibility and the capability of the Congolese government to protect the right to water through its participation in the exploiting companies.

¹²⁴ FG Hemisphere Associates LLC v. The Democratic Republic of Congo and La Generale des Carrieres et des Mines, Royal Court (Samedi Division) Jersey, 27th October 2010.

¹²⁵ Ibid. §69. For more information see §63-69.

¹²⁶ La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC, Court of Appeal of Jersey. 17 July 2012, §2.

¹²⁷ This case deals with the question whether Gecamines, as a state-owned company, is liable for the debts of the DRC. Although the final ruling establishes that Gecamines is not liable for the DRC's debts and that its separate corporate status should be respected for these purposes, IPIS finds that the facts proving the degree of control and the functional links between Gecamines and the government are useful for the purposes of reinforcing the human rights responsibilities of the State.

¹²⁸ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011, op. cit. Principle 4.

¹²⁹ Ibid.

¹³⁰ Rocky Mountain Mineral Law Foundation 57th Institute 2011, *Chapter 9: Mining in the Democratic Republic of Congo*, June 2011, p.52

The role of foreign states: extraterritorial Human Rights obligations

Many foreign companies carry out their mining operations in the DRC. As it will be shown below, there are cases where the involvement of foreign companies through their subsidiaries in human rights abuses has been documented. Despite the human rights obligations of the Congolese State, it must be considered that it is often not able or willing to protect the human rights of its nationals. An additional possibility is therefore to examine the home States of these foreign companies.

With this goal in mind, the UN Guiding Principles establish that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”¹³¹ They underline the fact that international law does not force States to regulate the extraterritorial activities of companies domiciled in their territory but also does not prohibit them from doing so, thus allowing States to regulate extraterritorially where there is a jurisdictional basis.¹³²

In a more progressive manner, the Maastricht Principles shine light upon the content of extraterritorial State obligations to realise economic, social and cultural rights such as the right to water. They gather an interpretation of international law that does not allow impunity for the human rights abuses committed by multinational enterprises. The Special Rapporteur on the human right to safe drinking water and sanitation embraced the Maastricht Principles by stating that they “underscore the States’ obligation to avoid causing harm extraterritorially and to protect human rights extraterritorially.”¹³³ Subsequently, this “translates into an obligation to regulate non-States actors accordingly.”¹³⁴

The Maastricht Principles

In September 2011, the Maastricht Principles on Extra-Territorial Obligations of States in the area of Economic, Social and Cultural Rights were adopted as an outcome of the research and deliberations of 40 leading experts in international law and human rights. Based on existing international law, the Principles detail the obligations that States have beyond its own territory regarding ESCR.

In practicality, multinational corporations that operate in different countries are formally organised in a complex manner. In order to minimise the risk of economic or legal liability for the whole corporation, it is the usual practise to establish different legal entities under the laws of the different States where they operate. However, it has been traditionally controversial whether States can regulate the conduct of legal persons incorporated under the laws of another country although they are managed, controlled, or owned by entities with the same nationality as the State concerned.¹³⁵

An illustrative example can be found in a case currently before the High Court in Kipushi and mentioned in previous sections in relation with the alleged unlawful pollution of the Kafubu River in 2011. Here, the petitioners claim responsibility of a company called CMSK (Compagnie Minière du Sud-Katanga). This company is a joint venture between Gecamines (40%) and Entreprises du Groupe Malta Forrest (EGMF) (60%).¹³⁶ EGMF is a Congolese subsidiary of Groupe Forrest International (GFI). GFI is based in Belgium and therefore subject to its national law.¹³⁷

¹³¹ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011, op. cit. Principle 2.

¹³² Ibid.

¹³³ UN Office of the High Commissioner for Human Rights. *Human rights beyond borders: UN experts call on world governments to be guided by the Maastricht Principles*. Second Anniversary of the Maastricht Principles on Extraterritorial Obligations of States, 28 September 2013. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13792&LangID=E> (last accessed 25/11/2013)

¹³⁴ Ibid.

¹³⁵ Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, Ian Seidermanf. *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. Human Rights Quarterly 34 (2012) 1084–1169, p.1139.

¹³⁶ Congo Mines. The Carter Center. *Fiche d’information – Compagnie minière du Sud Katanga Sprl (CMSK)*, available at <http://www.congomines.org/fr/fiche-dinformation-compagnie-miniére-du-sud-katanga-sprl-cmsk/> (last accessed 25/11/2013)

¹³⁷ Structure Entreprise General Malta Forrest. Groupe Forrest International, available at <http://www.forrestgroup.com/en/>

Under Principle 25 of the Maastricht Principles, as part of the general State obligation to protect, all States must take measures to ensure that business enterprises that they are in a position to regulate do not impair the enjoyment of the right to water in the DRC.¹³⁸ States must adopt and enforce measures with regards to corporations, its parent or controlling company, when it has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned.¹³⁹

As such, the commentary to the Principles highlights that, in accordance with this duty, the corporate veil separating GFI (established in Belgium) and its subsidiary EGMF (established in the DRC) into two legal entities “may be lifted to prevent the misuse of the privileges of legal personality”.¹⁴⁰ Thus the fact that GFI and EGMF are two separate legal entities cannot impede that the Belgium parent company responds for the alleged abuses committed by its subsidiary in the DRC.

Principle 25 says that states “must adopt and enforce measures to protect [the right to water] through legal and other means, including diplomatic means.”¹⁴¹ In the current illustrative example, Belgium could enforce measures to ensure that GFI does not impair the enjoyment of the right to water in the DRC through the actions of its subsidiary EGMF. These measures could be of an administrative nature, like for example forcing Belgium-based companies to undertake and report on human rights due diligence during their own operations and those of their subsidiaries. Requirements could also be stricter, like applying substantial fines to those that do not comply with the provisions of the UNGPs establishing the corporate responsibility to respect human rights and conduct due diligence.

As shown above, there is a growing view that States should protect the human right to water from the abuses made by companies, also outside their territory. Foreign mining companies operating in the DRC and unlawfully polluting water can be held accountable in their country of origin, even if they operate through the use of Congolese subsidiaries. In that way, the current situation of impunity could be substantially reduced and further pollution prevented.

[egmf.html](#) (last accessed 25/11/2013)

¹³⁸ Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, Ian Seidermanf, 2012, op. cit. Principle 24.

¹³⁹ Ibid. Principle 25.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

Conclusions

Many mining companies are exploiting the mineral-rich province of Katanga. However, the local population have benefited little from this industrial activity. The DRC is still at the 186th position out of 187 countries analysed in the UN Human Development Index Ranking for 2013 and 74% of the population does not have access to safe drinking water.

In turn, they often suffer the negative consequences. Water is being polluted by industrial mining companies in the Katanga province. The magnitude and importance of the phenomenon is difficult to assess due to the lack of data. However, evidence suggests that there are structural abuses to the human right to water of the local population. Additionally, this has negative consequences for their right to health, to education or to live in a healthy environment.

The Congolese State fails to provide adequate protection for the human right to water of its citizens. The lack of law enforcement, the structural corruption, the insufficient capacity of public officials or the fundamental problems in the justice system are some of the causes leading to the negative situation regarding the right to water in the Katanga province and the impunity in which many mining companies operate.

Mining companies in the Katanga province benefit from general lack of implementation of the relevant regulations. The legal instruments regulating their activities are fairly well developed. However, they are not enforced. Some mining companies do not respect the Mining Code or the Mining Ruling while conducting their operations and, as a result, water is being polluted with adverse consequences for the human rights of the local population. The implementation of human rights due diligence, by which mining companies identify, prevent, mitigate and account for their adverse impact on the right to water, can constitute a mechanism to address the problem of water pollution in the province.

More importantly, the Congolese State participates actively in the mining sector through the state-owned company Gecamines or by being a required shareholder in the entities conducting their operations in Katanga. The obligations of the Congolese government regarding the right to water are reinforced by these facts. The State should use its position to make sure it fulfils its international legal obligations.

Finally, the role of the States in which some of the polluting companies are based should not be overlooked. There is a growing view that States should protect the human right to water from the abuses made by companies, also outside their territory. The example of the Belgium based Groupe Forrest International was given to bring attention to the capability of the Belgian State to protect the right to water in the Katanga province.

Recommendations

To the Congolese Government:

1. Influence peddling and conflicts of interest are behind most of the corruption practices that critically undermine the effectiveness of any supervisory activity on polluting activities by industrial mining companies. The Government should make sure that:
 - a. There is a clear separation between the institutions in charge of granting the necessary permits for mining companies to start operations and supervising their compliance with the relevant provisions for the protection of the right to water.
 - b. The prohibition on civil servants' participation in the mining sector is expanded. All civil servants (including the judiciary) should be prohibited from owning shares in mining companies and other sub-contracting firms within the sector or being part of their managing bodies.
2. The lack of implementation and enforcement of current regulations is worrisome. Supervisory institutions lack the capacity and the means to carry out an effective role of control of the mining sector in relation with polluting activities. The Government should make sure that:
 - a. There is a sufficient allocation of funds for supervisory and monitoring bodies to have the technical capacities to conduct the relevant analyses. For example, having the necessary vehicles to visit a village in order to take water samples, analyse them in a laboratory and check if they comply with the WHO requirements on water quality.
 - b. The implementation of the Environmental Impact Assessment and Environment Management Plan are not only formally supervised but also checked on the ground with periodical reviews.
 - c. The new water code to be approved is properly implemented; that companies are held responsible following the pollute-payer principle established in the draft law and that local populations are also compensated for the harm suffered.
 - d. There is participation of local population and civil society in all processes from the concession of the mining permit to water and environment protection and management.
 - e. The companies in which the State is a shareholder or those which are state-owned respect national law and conduct human rights due diligence to avoid being involved in water pollution.
3. Together with the EIA and the EMPP, a Human Rights Impact Assessment (HRIA) should be also included as a previous requirement for industrial mining companies to receive the necessary permissions to start their exploitation activities:
 - a. The government should make sure that the HRIA includes the potential impacts on the surrounding local population where the mining activities are to be conducted. The analysis should be focused on the different human rights that can be potentially affected and, especially issues related to health. Human rights due diligence, as describe in this report, should be the central element in the HRIA.
 - b. All impact assessments must examine existing natural resources in the area, cumulative impacts of projects and socioeconomic linkages to environmental issues. Impact assessments should be ongoing to effectively monitor the evolving impacts of extractive operations, and they should be carried out by competent, independent third parties.
 - c. Transparency, maximum disclosure and the establishment of permanent spaces for consultation with local communities and civil society should be the principles informing the process of elaboration, publications and monitoring of the EIA, EMPP and HRIA. The government should force companies to follow these principles to make these three tools effective.
4. The judiciary lacks the capacity and resources to conduct complex investigations that require very technical expertise and specialisation. Corruption practices are significant also in the judiciary. The government should make sure that:

- a. Personnel carrying out investigations on pollution practices by industrial mining companies have the capacity to conduct them with the sufficient guarantees so they can be used in a judicial proceeding.
- b. Profound measures are taken to avoid the corruption of the judiciary and the justice system in general. Salaries should be paid in time and be competitive. Measures to avoid conflict of interests should be also taken.

To industrial mining companies:

1. To conduct human rights due diligence as described in the report and embrace the UN Guiding Principles on Business and Human Rights to avoid taking part in human rights abuses and, from the perspective of the company, avoid potential legal and economic liability that could substantially undermine the results of a given project.
2. To comply with the national law establishing that local population should be consulted when designing the EIA and the EMPP.
3. To comply with the national law establishing that the EIA and the EMP should be publicly available for the local communities affected by the law. Companies should make it public also on their website and by other means.
4. In general, to comply with the provisions established in the Mining Code, Mining Ruling and the Annex expanding the technical details on the obligations related to the EIA and EMP in order to avoid water pollution and being part in human rights abuses.
5. To adhere to the “polluter pays principle” by providing compensation for the project’s negative impacts to the right to health, to the environment or socio-economic conditions.

To the home governments of companies operating in Katanga:

1. To engage with the companies based in the territory to tackle the actions raised in this report regarding water pollution causing or contributing to human rights abuses.
2. Provide guidance to companies on how to ensure their operations are in line with the responsibility to respect human rights as outlined in the UN Guiding Principles on Business and Human Rights.
3. To conduct legal reforms to require companies headquartered in the country to carry out adequate human rights due diligence in relation to their operations in Katanga. Such a requirement should be in line with the provisions in the UN Guiding Principles.

To the European Union, in the process of launching a provision on non-financial reporting targeted at European companies:

1. Require all large companies that operate in the EU to report on the social, human rights and environmental impacts and risks across their operations. Having the UNGPs as a standard for human rights risks and impacts.
2. Introduce effective monitoring and enforcement measures to ensure full, accurate and credible disclosure, allowing the participation of stakeholders in challenging the information provided.

List of acronyms

DRC:	Democratic Republic of the Congo
WHO:	World Health Organisation
UN:	United Nations
UNGPs:	The UN Guiding Principles on Business and Human Rights
Gecamines :	Générale des Carrières et des Mines
Chemaf:	Chemicals of Africa (Ltd.)
CMSK:	Compangnie Miniere du Sud Katanga
ICESCR:	International Covenant on Economic, Social and Cultural Rights
CESCR:	UN Committee on Economic, Social and Cultural Rights
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CRC:	Convention on the Rights of the Child
ACHPR:	African Charter of Human and People's Rights
ACoHPR:	African Commission on Human and People's rights
EIS:	Environmental Impact Study
EMPP:	Environmental Management Plan of the Project
HRIA:	Human rights impact assessment
ESCR:	Economic, Social and Cultural rights
EGMF:	Entreprises du Groupe Malta Forrest
GFI:	Groupe Forrest International