Mining Law and Environmental Issues in Africa. A Comparative Analysis of an Evolving Integration in Republic of Congo (RC) and Democratic Republic of Congo (DRC)

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Abstract

This article provides an analysis of the legal frameworks of the Republic of Congo (RC) and the Democratic Republic of Congo (DRC) on the subject matter of mining, and specifically the way the integration of environmental concerns has evolved. The comparative perspective of two African countries highlights in fact the challenges that face both countries, and the pathway they respectively use to frame and try to give a significant meaning or an effective sense to the protection purported. In this regard, it is demonstrated that the realm of mining operations is in essence a sphere of risk, either operational or accidental, but the evolution of the legal frameworks shows an equivocal development and many differences above some common and visible aspects.

Africa, representing more than 30% of the world's reserves of non-energy mineral raw materials—including bauxite, copper, cobalt, chromite, etc.—produces a wide array of ores and metals. However, despite the recognition of the potential contribution of the mining sector to the development of African economies, it is observed that many African countries still struggle to reap real benefits from mining.[1] Beyond the economic aspect alone, mining has negative social and environmental externalities. In this respect, the adoption of an African mining vision in 2009, within the African Union (AU) framework, attempted to pave the way for a new approach, but mostly insisted on implementing public policies susceptible to nudge a sustainable and development-oriented mining resources' extraction in Africa.[2] Such a continental mechanism applies to the Republic of the Congo (RC) and the Democratic Republic of the Congo (DRC). Two-member states of the African Union—and most specifically—two countries whose subsoil is filled with mining resources, indeed called upon to implement the AU vision. DRC—for instance—with its surface area of 2,345,409 km², in addition to its population of nearly 80 million inhabitants, is a geolog-

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1 Louis Maréchal, *Le secteur minier est-il porteur de développement en Afrique?* Politique Etrangere, 85 (2, 2013).
2 African Union, *African Mining Vision* (Feb. 2009) at http://www.africaminingvision.org/amv_resources/AMV/Africa%20Mining%20Vision%20french.pdf (20 Aug. 2020).

ical area having reams of mining resources,[3] including more than 1100 minerals and precious metals listed likely to ensure national economic and social progress.[4]

Unlike DRC, it is worth noting that RC is a sparsely populated country, with a population of 5.2 million inhabitants covering an area of 342,000 km². Strongly bonded historically, socio-culturally and geographically, DRC and RC are two countries straddling the equator, and—by nature—generously endowed with abundant raw materials, not to mention the Congo River common to both states. With regard to mining, one of the major differences between the two countries is that DRC has experienced a remarkable boom in the mining sector, whereas the immense reserves of RC—proven by feasibility studies—remain mostly unexploited.[5] It is common ground that both DRC and RC are acutely dependent on raw materials. Such a situation makes it quite difficult to stave off policy issues when it comes to analysing the legal implications of the subject matter.

One cannot fathom mining issues in Africa from the unique perspective of legal analysis. The issue is fundamentally political. If we were to guess, we would say that it is a matter of common sense. Mining has to do with the spoliation of African states subsoil, new forms of colonisation—either directly or by proxies—, and relentless tutelage of African people. The ruthless—but also leading—question is always: how come that African countries are still unable to sort out the managementof their resources or underdevelopment?[6] Is this the natural resources curse? The answer is obviously to find in history and the new forms its continuity has taken in this day and age. One has also to consider that history had been so deeply skimmed over by the doxa, the 'scientific subjectivity' of European historians. Yet, African countries are now on the verge of enacting their fifth generation of reform, which implies the adoption of the fifth generation of mining codes.[7]

It is relevant to note that the world was literally stirred up at the time African countries tried to enact the second generation of mining codes with

3 Robert Giraudon, *Un scandale géologique?* Afrique Contemporaine 44 (183, 1997).
4 In this country, cobalt, coltan and germanium, for example, have been declared "strategic" minerals. It should be noted that a strategic substance, within the meaning of Article 1, point 48 quater of the Mining Code 2018, is 'any mineral substance which, depending on the international economic situation at the time, at the Government's discretion, is of particular interest in view of its critical nature and geostrategic context. These three minerals are used in high-technology industrial sectors: information and communication technologies, renewable energies and the military sector.
5 In 2016, mining agreements have been concluded with a view to actually launching activities in Congo-Brazzaville by the companies for subsidiaries of major international groups. However, mining production remains very marginal and for several decades has been exclusively artisanal even. It was with the adoption of the Mining Code in 2005 that mining research in polymetals, potash and iron was relaunched.
See UNCTAD, *Strengthening Development Links in ECCAS, a rich mining region, National Evaluation Report.* The Context of the Republic of Congo for the Implementation of Project 1415P (23, March 2017).
6 *See* Aubin Nzaou-Kongo, L'exploitation des hydrocarbures et la protection de l'environnement en République du Congo. Essai sur la complexité de leurs rapports à la lumière du droit international, 51-55 (2018) Ph.D. thesis collection (on file with University of Lyon 3 Library System).
7 *Id.*

the incorporation of the principle of sovereignty over natural resources.[8] Suffice it to say that mining reforms have not been able to gut the monopoly of Europeans grasp on African mineral resources?[9] Or should one recall that the attempt by African countries to cease colonial mining concessions, which have naturally been superseded by an unremitting dynamic of mining reforms initiated by international organizations, mining codes written by foreign experts or law firms, etc.[10]

This caveat was—from the outset—necessary when it comes to dealing with our subject matter, while many reforms of mining codes are underway in most African countries. It dawned on us that one has to settle this issue beforehand and bear it in mind when further developments will unfold.

As regards DRC—for example—the recent promulgation of a new mining code on 9 March 2018 will have brought to light the major differences between the State and foreign multinationals regarding the new mining regulatory framework. The initiative to revise the Mining Code in DRC has been displayed as part of a reform process aimed at strengthening governance in the management of natural resources in order to enable the State to benefit more from the exploitation of these resources. In RC—nevertheless—the Mining Code, established by the Act of 11 April 2005—still into force—was politically deemed—at the time of its enforcement—to meet the objective of attractiveness. Since then, it is not quite difficult to see that it has not prevented the country's resources to be ripped off and has regularly been pinged by civil society actors for the weakness of its provisions, and its overall ineffectiveness. This raises the issue of whether a new mining normative framework would suffice to resolve all the problems of application of the standard in the mining sectors of both countries.[11]

For the purposes of this analysis, national legal frameworks refer to national legal instruments, namely all legal and regulatory legal statutes applicable to the mining sector. The Constitution, the reference norm to which infra-constitutional norms must comply, by virtue of the hierarchy of norms, cannot be excluded from this framework.[12] Presented from this perspective, our study should focus on the analysis of the mining codes as well as, incidentally, the mining regulatory instruments that integrate environmental concerns. In addition, whether it is admitted that both countries are plainly dependent on natural resources,[13] it is uncommon to find

8 *See* Aubin Nzaou-Kongo, *Economic Sovereignty and Oil and Gas Law. Essays on the Normative Interactions between International Law and Constitutional Law*, *in* Liber Amicorum Professor Stephen Zamora (Houston, University of Houston Press, 2020) (Forthcoming 2021).

9 *Id.*

10 *See* Aubin Nzaou-Kongo, L'exploitation des hydrocarbures et la protection de l'environnement en République du Congo, *supra* note 6, at 54.

11 Forum pour la gouvernance et les droits de l'Homme (FGDH), *Analyse de la législation minière de la république du Congo : Quelle place pour les communautés et l'environnement?* 4 Fiche d'analyse (9, 2019).

12 Aubin Nzaou, *La Constitutionnalisation du Droit de l'Environnement en République du Congo*, 228 Droit de l'environnement, 391-396 (2014).

13 *See* Aubin Nzaou-Kongo, *Economic Sovereignty and Oil and Gas Law. Essays on the Normative Interactions between International Law and Constitutional Law*, *in* Liber Amicorum Professor Stephen Zamora, *supra* note 8.

obvious references to legislative mining policies as a bedrock a national development policy.[14]

The analysis of the legal frameworks in RC and DRC must be taken from a comparative perspective between the two countries of the South whose challenges—all things considered—are more or less the same. However, research as to mining fails to underline the relevance of the proximity between both countries, which implies proximity in challenges, issues, legal implementation, even cultural issues relating to the mist of customary law in mining legislation. The study of the issue of the mining legal frameworks in both Congo states—in the light of environmental issues—is of definite interest insofar as it does not address the economic and financial aspects that are more prominent in the legal literature. Moreover, it makes it possible to compare the textual consecration of environmental guarantees in the mining sector with observed practice. While DRC is in the process of applying its new mining code, RC is in the process of revising its own. Therefore, it seems that dogma alone would not be sufficient to account for realities that can only be judiciously apprehended in the light of legal sociology. With the benefit of these observations, such a study should enable us to see to what extent the mining legal frameworks of the two countries contribute to the objective of integrating environmental concerns into the exploitation of mines. In order to provide a better account of the mining legal frameworks in both Congo, it will be useful to review their evolution, before analysing in turn the extent to which environmental concerns are taken into account in these frameworks, as well as their scope.

I. Evolution of the Mining Legal Frameworks in Drc and Rc

A better understanding of the mining regulations adopted by DRC and RC in the 21st century is inconceivable without a prior analysis of what these regulations were during the previous century. Independent both in 1960, following the great wave of African decolonization, DRC and RC are two French-speaking countries that did not experience the same European colonizer. While Belgium subdued and harnessed DRC on the one side of the banks of the Congo River, France subjugated and took over RC on the other side of the banks of Congo River. The evolution of the mining legal frameworks in both countries does not have the same trajectory[15] or contours, we will then try to navigate it from a threefold phase perspective.

For the sake of our analysis, 1960 will be used as a benchmark of the mining legal framework for RC, whereas for DRC we will refer to both the Kingship of Leopold II and of Belgium.

14 Marie Mazalto, *La réforme du secteur minier en République démocratique du congo : enjeux de gouvernance et perspectives de reconstruction*, 227 Afrique Contemporaine, 74 (3, 2008).
See also https://openknowledge.worldbank.org/handle/10986/13243?locale-attribute=-fr accessed 15 Aug. 2019.

15 Benjamin Boumakani et Aubin Nzaou, *Les nouveaux aspects de la protection de l'environnement dans les codes des hydrocarbures des pays d'Afrique subsaharienne*, *in* Droit, Humanité et Environnement Mélanges en l'honneur de Stéphane Doumbé-Billé, 569 (Bruylant ed) (2020).

A. Recent Developments in the Mining Legal Framework in Rc

There is every reason to place these lines prima facie in a historical perspective which, from our point of view, seems the most appropriate as an account more or less close to the development of what is today known as mining law in the Congo. Three historical moments are characteristic of the history of mining law: the pre-colonial period, the colonial period, and the post-colonial period.[16] Congolese mining law was originally a customary law[17] whose emergence must be linked to the pre-colonial Congo, through the body of rules governing the use of mines and metallurgy, in particular the working of iron ore, the exploitation of copper deposits, and the extraction of gold.[18] However, the colonial period was marked by a series of instruments that should be briefly recalled here.

One should recall that colonial mining law was sketched out in a variety of statutes and regulations including the decree of 6 July 1899 regulating the search for and exploitation of mines in the colonies or protectorate countries of continental Africa, other than Algeria and Tunisia; the decree of 4 August 1901 regulating the search for and exploitation of gold and precious metals in the beds of rivers and streams, in the colonies and protectorate countries of continental Africa, other than Algeria and Tunisia; and the decree of 4 August 1901 regulating the search for and exploitation of gold and precious metals in the beds of rivers and streams, in the colonies and protectorate countries of continental Africa, other than Algeria and Tunisia; the decree of 19 March 1905 relating to the application in the colony of the Ivory Coast; the decree of 7 July 1899, regulating the research and exploitation of mines in the colonies and protectorate countries of continental Africa other than Algeria and Tunisia; finally, the circular of 1 April 1902 relating to the application of the decrees of 6 July 1899 and 4 August 1901 regulating the research or exploitation of mines in continental Africa.

These instruments will be replaced by a post-colonial legal framework from 1962, two years after the country's independence. The appearance of the first mining code in RC took place in a context marked by the opening up of the country to foreign investment expressed by its first president, then prime minister, Abbé Fulbert YOULOU, in a speech delivered in 1958:

> "We are ready to formulate all the guarantees so that public and private capital can be invested without fear and with the greatest confidence, without which it is not possible to conceive of setting up major energy sources and processing plants."[19]

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16 *See* Aubin Nzaou-Kongo, L'exploitation des hydrocarbures et la protection de l'environnement en République du Congo, *supra* note 6, at 111-113.
17 *Id.*.
18 Gamal Mokhtar, Histoire Generale de l'Afrique. Afrique ancienne, 503 (vol 2, 1st edn, Présence africaine/Edicef/Unesco, 1987).
19 Patrice Itoua, Le Cinquantenaire Economique du Congo-Brazzaville, Fonctionnariat et Entreprenariat, 29 (L'Harmattan, 2011).

In the mining sector, the opening up to foreign investment will result in the adoption of the law of 16 June 1962 on the Mining Code, amended by the law of 29 September 1962. This first code had been adopted with the aim of governing mining activities and defining the supervisory regime for the public administration and then the mining police. After the 1962 Act, the 1965 mining law was added to that of 1962. Thus, the principle of the integral and unconditional sovereignty of the State was adopted, affirmed through article 1 of the law of 12 August 1965 supplementing the provisions of the Mining Code, which states that: "mines are the exclusive property of the Congolese State." This is a concept that reinforces the adoption of the planned economy chosen by the Congo, which will result, in particular, in the creation of public enterprises, within the framework of the solid mining sub-sector, such as the Société congolaise de recheche et d'exploitation minière (SOCOREM), and the appearance of joint ventures (SAgip Uranium/State, SNEA Uranium/State, etc.).

The Act of 7 July 1982 on the Mining Code established the principle of full and unconditional sovereignty of the State inaugurated by the law of 1965. With this law, no exploitation of mineral substances can be carried out without the intervention of the State or national companies. Concessions are comparable to land ownership for a period of 50 years. Two main implications will be attached to these provisions, the possibility for the State to lose direct holdings in mining and the display of State action through the powers to grant and control mining titles with a wide range of accompanying measures. This period will be marked by the end of mining activity in the solid mining sector. Only a few rare companies, SOCOREM and BRGM, for example, will escape this.

From 2005 onwards, the mining policy that will be implemented in RC is intended to be attractive. After this brief overview of the evolution of mining regulations in RC, we will look at what it has been like in the DRC.

B. Characteristic Periods in the Evolution of the Mining Legal Framework in Drc

Drawing on the analysis of Richard Mugisa Lirigo,[20] we can consider the evolution of the mining legal framework, better known as mining regulation, in DRC from three major periods in the country's history: the period of the independent state of Congo 'EIC' (1885-1908), the so-called Congo-Belgium (1908-1960) and finally that of the independent Congo (from 1960 to the present day).

The period of the independent state of the Congo (EIC) is characterized by the fact that the King of the Belgians, Leopold II, made the Congo his personal possession following the Berlin Conference in 1885.

20 Richard Mugisa Lirigo, *Révision du Code minier en RDC : Vers une Fiscalité Com pétitive ou Dissuasive?* International Journal of Innovation and Scientific Research, 258-263 (Vol. 40, 2018).

It was in this capacity that the General Administrator resident in the Congo notified all the powers on 1 July 1885 of the creation of the Independent State of the Congo (EIC). From then on, the new State questioned the rights acquired by third parties by granting itself a monopoly on land and prohibiting its occupation in the absence of any title. In reality, the will of the Belgian sovereign to control the natural resources of this country will require normative action.

Thus, the principle will be established of separating the soil and the mines, which are State property, and imposing restrictions on the occupier of the land who could not engage in the exploitation of the mines found underground. This logic is clearly enshrined in article 5 of the decree of 30 April 1887, which stated that:

> "No one may, without an authorization given by the Governor General or by the official designated by him, exploit mines and quarries on land whose ownership has not been legally recognized, under penalty of a fine."[21]

During this period, a number of enactments relating to mining was promulgated. However, one cannot remain silent about the Royal Decree of 8 June 1888, which for a long time remained a reference instrument for which mineral wealth became State property and land ownership did not confer any rights over the mineral wealth of the subsoil. And as such, mining could only take place under a special concession granted by the government.[22] The so-called Belgian-Congo period is marked simply by the fact that DRC will change its status: from EIC, it will integrate the reduced group of Belgian colonies. During this period, the colonial power adopted the decree of 16 December 1910, modified and completed by the decree of 16 April 1919. The weakness of this decree lies in the fact that it only regulated mining exploration and exploitation in Katanga. For its part, the decree of 24 September 1937 would regulate mining rights throughout the national territory by establishing the difference between ownership of the land and ownership of the mineral wealth it contains.

From 30 June 1960, Congo-Belgium became a sovereign state under the name of the Republic of Congo.[23] At that time, the Ordinance-Law of 7 July 1966, known as the Bakajika Act, while being a land law, laid the real foundation of the current mining legislation by repealing all previous legislative or regulatory instruments relating to the exploitation and management of the Congolese soil or subsoil and re-establishing the Congolese State's right to sovereign disposal of its soil and subsoil.

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21 *See* the 1982 Mining Code Act, art. 5.
22 Richard Mugisa Lirigo, *Révision du Code minier en RDC : Vers une Fiscalité Compétitive ou Dissuasive? supra* note 16, *id.*
23 The former Moyen-Congo, which also became independent in the same year, will also be called the Republic of Congo. To distinguish them, each country will be given the name of its capital. The former Middle Congo will be called Congo-Brazzaville and the former Congo-Belgian will be called Congo-Kinshasa.

Following the decree of 1937, the Ordinance-Law of 3 May 1967 on general legislation on mines and hydrocarbons enshrined the promulgation of the first mining legislation of the independent Congo. The latter was repealed by the Ordinance-Law of 2 April 1981 on General Legislation on Mines and Hydrocarbons, which retains the main lines of the 1967 Act. It should be noted that the mining legislation promulgated since 1967 was not an incentive, but rather a deterrent, to foreign investment. The orientation adopted by these laws resulted in a decline in national mining production and consequently in a decrease in its contribution to the financing of public expenditure. This is evidenced by the fact that the period 1937-1966 saw a larger volume of investment and mine production than the period 1967-1996.[24] Thus, 48 mining companies were operational during the first period, compared with 38 during the second and 7 in the post-1997 period.

In order to reverse this situation, DRC is going to set up a new incentive mining legislation, initiated by international financial institutions, namely the World Bank and International Monetary Fund.[25] The law of 11 July 2002 on DRC's mining code includes a total of 344 articles divided into 17 titles. The Mining Code reaffirms the principle of state ownership of mineral substances on the surface of the ground or contained in the subsoil or in watercourses.[26] This code repealed the Ordinance-Law of 2 April 1981.

II. The Varying Degrees of Environmental Concerns in the Mining Regulations in Rc and Drc

On the one hand, in RC, the 2005 Mining Code is the reference legal instrument regulating mining activity.[27] As a liberal-inspired piece of legislation, the code is clearly oriented towards the development of the mining sector and the attractiveness of foreign investment, without neglecting, however, the role of the state. It can be noted from this instrument that research and mining activities are the responsibility of the private sector, while geological reconnaissance and mapping work of general interest are the responsibility of the State.[28] On the other hand, the new Mining Code of DRC is established by the Law of 9 March 2018 amending and supplementing the Law of 11 July 2002 on the Mining Code.

Through this mining Act, the main role of the State is to promote and regulate the development of the mining sector. It ensures the development of mineral substances, exercises its ownership over mining resources; but, in turn, it calls upon private initiative and undertakes soil or subsoil investigation activities for the purpose of improving geological knowledge andinformation, or for scientific purposes throughout the national territo-

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24 This period was governed by the Mining Act of 1981.
25 Marie Mazalto, *La réforme du secteur minier en République démocratique du congo : enjeux de gouvernance et perspectives de reconstruction*, *supra* note 13, at 7.
26 *See* Act No. 18/001 of 09 March 2018 amending and supplementing Act No. 007/2002 of 11 July 2002.
27 *See* Act No. 4-2005 of 11 April 2005.
28 *See* the 2005 Mining Act, arts. 7-8.

ry.[29]

After these general observations on the 2005 and 2018 Mining Codes, we will be led to analyse the issue of environmental protection in the 2005 Mining Code of Congo-Brazzaville, then in the recent DRC Mining Code of 2018.

A. The Predominance of Investment Promotion and Economics in RC

The issue of environmental protection is a crucial aspect of mining and industrial activity.[30] Yet, environmental issues are cross-cutting so that one cannot just spin out, regardlessof the sector concerned, some references to statutes.[31] A combined analysis of the provisions on the environment contained in the Mining Code and those contained in the Environmental Protection Act will therefore be compelling.

The Act of 23 April 1991 is a general guideline statute that serves as a reference for all other sectoral laws on the subject. With regard to mining, the environmental protection Act makes impact assessment mandatory for the implementation of any mining project. This is one of its inputs that should be valued.[32] Any assessment of this nature must take into account both environmental problems and the social concerns of neighbouring populations. It should be noted that the 2005 Mining Code was presented by its drafters as strengthening measures to protect the environment and manage impacts on the sustainable development in RC. But what is the real situation?

The Mining Code subjects the holder of the mining title to certain obligations regarding respect for the environment. The preliminary impact study, it may be recalled, is provided for in the Environmental Protection Act of 23 April 1991 in the following terms:

> "All economic development projects [...] must include an environmental impact assessment."[33]

It is generally admitted that the impact assessment is a:

> "systematic process for identifying, forecasting, evaluating and reducing the physical, ecological, aesthetic and social effects prior to the implementation of a project for the development of a work, equipment, installation or location of an industrial, agricultural or other unit and making it possible to assess its direct or indirect

29 *See* the 2005 Mining Act, art. 8 at Chapter II entitled "The role of the State and the distribution of power".
30 *See* Aubin Nzaou-Kongo, L'exploitation des hydrocarbures et la protection de l'environnement en République du Congo, *supra* note 6, at 203.
31 Benjamin Boumakani et Aubin Nzaou, *Les nouveaux aspects de la protection de l'environnement dans les codes des hydrocarbures des pays d'Afrique subsaharienne*, *supra* note 15.
32 *See* Aubin Nzaou, *L'Ambivalence du Droit de l'Environnement en République du Congo*, 3 Revue Juridique et Politique des Etats Francophones, 425 (2016).
33 *See* the 1991 Environmental Protection Act, art. 2.

consequences on the environment."[34]

In RC, the impact assessment is made compulsory for any socio-economic development project by the decree of 7 June 1986.[35] This latter decree was replaced by the decree of 20 November 2009 setting the scope, content, and procedures of the environmental and social impact study and notice.[36] It should be noted that failure to comply with the obligation to carry out the impact study exposes the offender to a minmum fine of 1 to 5 million CFA francs.[37] In addition to the obligation to carry out an impact assessment, the 2005 Act requires the mining operator to assume the post-mining risks through the restoration of the environment to which the law refers in Title 2 of its third chapter entitled "Land rehabilitation."[38]

The mining operator is required to rehabilitate the surface of the soil[39] or other areas whose integrity has been substantially affected by his research work or the operation of mines or quarries.[40] To this end, he shall in particular draw up a soil rehabilitation or development plan. Similarly, it must, as far as possible, "restore forests or other areas whose integrity has been damaged by its mining activities."[41] Furthermore, as stated in article 132 of the 2005 Act, in the context of research or exploitation of a mine or quarry, any operator is required to act in compliance with the obligations relating to:

- the safety and health of personnel and populations;
- the protection of the environment;
- the conservation of the mine;
- the conservation of buildings, the safety of the soil, and the solidity of dwellings;
- conservation of communication routes;
- protection of water sources;
- site rehabilitation.[42]

The Mining Code is complemented by other statutes and regulations[43] for the simple reason that it alone could not cover all the environmental concerns related to the mining sector.[44]

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34 *See* Emmanuel Kam Yogo, Manuel Judiciaire de Droit de l'Environnement en Afrique, 227 (IFDD, 2018).
35 *See* Aubin Nzaou, L'Ambivalence du Droit de l'Environnement en République du Congo, *supra* note 30.
36 *Id.*
37 *See* the 1991 Environmental Protection Act, art. 68.
38 *Id.*
39 *Id.*
40 *See* the 2005 Mining Act, art. 128.
41 *See* the 2005 Mining Act, art. 129.
42 *See* the 2005 Mining Act, art. 132.
43 *See* Act NO. 24-2010 of 30 December 2010 setting the rates and rules for the collection of duties on mining titles.
44 *See* Decree No. 2007-274 of 21 May 2007 setting the conditions for prospecting, research and exploitation of mineral substances and those for exercising administrative supervision; also Decree No. 2007-293 of 31 May 2007 setting the technical rules for operating geomaterial quarries; finally, Decree No. 2008-338 of 22 September 2008 creating and organizing the office for expertise, evaluation and certification of precious mineral substances.

B. The Reforming Logic of the Mining Code in DRC

Understanding the logic behind the promulgation of the Mining Code of 9 March 2018 is not an arduous task. It can be done very quickly with the help of its very expressive explanatory memorandum in this regard. Beyond the analyses and assumptions recorded, the new Code, which has been at the heart of many impassioned debates among political leaders, business leaders and members of civil society, finds its deep motivations through an excerpt from this statement, as follows:

> "... On the one hand, to increase the level of control over the management of the State's mining domain, mining titles and quarries, to redefine the elements relating to the social and environmental responsibility of mining companies with regard to the communities affected by their projects, and to balance the tax regime, customs and foreign exchange in the framework of the partnership between the State and mining operators and, on the other hand, the legislative need to bring the Mining Code into line with the changing political-administrative context, marked by the advent of a new Constitution in 2006 involving new stakeholders in the management of the Code."

On reading this excerpt, it can be noted that the legislator's intention for 2018 was not unrelated to that of contributing to the improvement of environmental protection.

From an environmental standpoint, the 2018 Mining Code goes a little further than the 2002 Mining Code. Without adopting an original approach, namely opting for a title or a chapter devoted to environmental protection, the new DRC Mining Code contains many scattered provisions relating to environmental protection. Among these provisions are those that have been described as innovations: the replacement of the environmental notice by the environmental certificate and the introduction of the environmental certificate for obtaining an exploitation permit.[45] Legal tools such as certification[46] and the *in situ* environmental audit carried out to verify compliance with the environmental protection obligations undertaken by the assignor in the approved Environmental and Social Management Plan (ESMP).

With this new code, environmental risks that previously were not taken into account by the mining operator should now be taken into account. There is, for example, an obligation to ensure the protection and restoration of the environment after mining operations. In addition to

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45 It is an administrative document issued by the Congolese Environment Agency at the end of the environmental and social appraisal certifying that the execution of the project and the operation of the work comply with the principles of environmental and social protection. *See* in this sense Mining Code, art. 1st.

46 Within the meaning of Article 1st §9(c), it refers to "a set of mechanisms, procedures and processes to establish the nature, physical and/or chemical characteristics, origin and legal and lawful provenance of mineral substances, in accordance with relevant national, regional and international standards, taking into account both tracking and traceability of mineral substances throughout the supply chain."

this obligation, there is the traditional obligation to carry out the Environmental and Social Impact Assessment (ESIA),[47] which is well reflected in the 2018 Mining Code. The environmental and social impact assessment is accompanied by a project environmental management plan (PGEP). To avoid overlapping incompatible uses and ensure environmental protection, Article 6 of the 2018 Mining Code prohibits mining activities in areas reserved for protected areas or in prohibited zones.[48]

Thus, according to the 2018 Mining Code, before beginning mining research work or quarry products, the holder of a research permit may not initiate ground work without first obtaining the approval of his Mitigation and Rehabilitation Plan (RAP).[49] The licensee has an obligation to develop and obtain approval of its RAP for the proposed activity.[50] As part of the mining operation, the permit holder must "use the water and timber resources within the mine boundary for mining purposes in accordance with the standards set out in the ESIA and the ESMP."[51]

With regard to industrial liability, the Mining Code states that any operator is liable for damage caused to persons, property, and the environment as a result of its mining activities, even in the absence of any fault or negligence. This strict liability is intended to protect human beings, property, and the environment from damage in consideration of the potentially dangerous nature of industrial mining activities. While there is no statute of limitations on the right to claim compensation for such damage,[52] the mining operator is exempt from liability only if he proves that the damage was caused by a cause unrelated to his mining activity.[53]

The liability of the mining operator also extends to damage caused to persons and the environment as a result of direct or indirect contamination resulting from his mining activities, namely pollution of water, soil, atmosphere, causing damage to man, fauna and flora, etc.[54] Moreover, it should be noted that diseases attributable to mining activity provided for in a mining regulation will have to be repaired by any mining operator.[55] While Article 56 of DRC Constitution[56] generally referred to the offence of

47 For the purposes of the new Code, it is a systematic process for identifying, predicting, evaluating and reducing the physical, ecological, aesthetic and social effects, prior to the development, construction, equipment, installation or siting of a permanent mining or quarrying operation or processing entity, and making it possible to assess its direct or indirect consequences on the environment.
48 *See* the 2018 Mining Act, art. 6 §§ 1, 2, 3, 4 and 5.
49 *Id.*
50 *See* the 2018 Mining Act, art. 64 bis, Chapter II "Mining," Title III "Mining Rights."
51 *Id.*
52 *See* the 2018 Mining Act, art. 285 qinquies. There is no statute of limitations on claims for compensation for damage caused to man and the environment by mining activity.
53 *See* the 2018 Mining Act, art. 285 bis and 285 ter, at Title XI: "Relations between holders of mining and/or quarry rights among themselves and with the occupants of the land," at Chapter III: "The industrial responsibility of the holder."
54 *See* the 2018 Mining Act, art. 285 ter.
55 *See* the 2018 Mining Act, art. 285 quarter.
56 Stated as follows: "Any act, agreement, convention, arrangement or other action which has the effect of depriving the nation, natural or legal persons of all or part of their own means of subsistence derived from their natural resources or wealth, without prejudice to the international provisions on economic crimes, shall be established as an offence of pillage punishable by law."

pillaging national wealth as early as 2006, Article 311 ter of the 2018 Mining Code provides for the punishment of fraud and the pillaging of natural resources, with the expected details of the penalties to be imposed on any perpetrator[57] of the offence in question.[58]

To push this analysis any further, one should hasten to delve into at least some specific considerations.

III. The Reduced Scope in Practice of Environmental Concerns in the Mining Regulation

After an analysis of the content of the Mining Codes in DRC and RC in relation to the issue of environmental protection, it is clear that the Mining Code of DRC is slightly further ahead than that of RC on this specific issue. This code clearly distances itself from that of RC, no doubt because of a clear generational difference between the two codes. Although DRC Mining Code was promulgated on 9 March 2018, it should be said that it is part of the fourth generation of African Mining Codes that are more in line with sustainable development objectives. The 2005 Code, still in force, deserves to be updated, as confirmed by the revision process already underway.[59]

In this respect, the criticisms or advances that could be put forward in the framework of the completed revision process of DRC Mining Code should help to correct the ongoing revision process in RC. Generally speaking, a comparison of the statutes with mining practice reveals the recurrence of environmental violations illustrating the weak effectiveness of mining regulations affecting the environment. While we are aware of the limited progress made in implementing the new mining provisions relating to the environment in DRC, this aspect should not be considered an obstacle to an analysis of mining practice in this country. This implies that the entire period prior to the promulgation of the new 2018 Code should enable us to better understand the behaviour of mining actors operating in DRC. As for RC, our analysis should not be subject to the same constraint because the statute has overcome the trial of time. Apart from the low effectiveness of the environmental provisions contained in the two national codes, we will have to look at the shortcomings and difficulties linked to the implementation of the environmental protection provisions contained in both codes.

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57 *See* the 2018 Mining Act.

58 Formulated as follows: "Is punishable by a penalty of penal servitude for ten to twenty years and a fine of the equivalent in Congolese francs of 250,000 to 500,000 USD, whoever has, by any act whatsoever, any agreement, convention, arrangement or any other fact, the consequence of which is to deprive the nation, natural or legal persons of all or part of their own means of subsistence derived from their mineral resources or wealth, in addition to the confiscation of property and assets resulting from the offence, shall be liable to a penalty of penal servitude for ten to twenty years.

59 This review process lasted six years. It was on 20 January 2011 that the President of the Republic, in his inaugural speech for his second term of office, raised the option, in his inaugural speech, of revising the mining code to make it "more balanced." In February 2012, a commission responsible for revising the mining code was set up.

A. The Low Effectiveness of the Environmental Protection Provisions within Congolese Mining Codes

The analysis of the application of mining regulations in its environmental protection aspects in the two Congo reveals a problem of the effectiveness of standards with regard to measures to mitigate, reduce or compensate for environmental and social impacts. This observation, which can be established from the study of DRC and RC, can also be applied to other Central African countries such as the Republic of Cameroon.[60]

On the question of the effectiveness of environmental standards applicable in the mining sector in RC, we learned from the Ministry of the Environment officials that certain mining exploration activities are not subject to the prior completion of an environmental and social impact assessment (ESIA) because of the lack of knowledge by many companies of the legal requirements in this area, particularly the 1991 Act. Such an obligation makes any implementation of an economic development project subject to the completion of an impact assessment. However, the trend observed shows that, since companies are aware that financial penalties are generally lower than the gains they expect, they often contravene the regulations.

In RC—in the first place—even though mining production remains essentially artisanal, there has been a remarkable boom in mining activity since 2006, with a peak in 2012 in a sector of the national economy where investment is falling significantly. However, the apparent inertia in the mining sector should not lead one to believe that damage or harm to the environment has not been recorded. It can be noted—for instance—that mining operations, especially in the northern part of the country, have been responsible for the destruction of the livelihoods of local communities and indigenous peoples. In the villages of Elogo 1 and 2, without being exhaustive, there have been cases of destruction of village crops, cassava retting ponds, disruption of drinking water access points, without any compensation being paid.

In 2016, the company Maud Congo came to exploit gold, in a semi-industrial way,[61] in the forest area near the village, with an exploitation permit granted by the Ministry of Mines and Geology.[62] It should be noted that the mining activities undertaken by Maud Congo have had many harmful impacts on the environment and local populations. Apart from

60 From a comparative law perspective, notes Marcel Zemengue, in Cameroon, "permits for the exploitation of certain minerals such as uranium are granted even though there is no standard for the management of radioactive waste nor a standard defining the ceiling of permitted emissions; permits are granted in areas with fragile ecosystems; permits are granted in densely populated areas."
See Marcel Zemengue, *Promotion of a sustainable mining sector in Cameroon : Une réglementation embryonnaire et peu efficace* in Un Secteur Minier Responsable : une Dynamique Sectorielle Emergente en Afrique Francophone, Point de Répère, 10 (Vol. 27, IFDD, 2017).

61 Term defined according to the size of the machines.

62 Until 2015, the inhabitants of Elogo 2, a village located in the sub-prefecture of Souanké, in the Sangha region, exploited, in small quantities, gold from the land near their village.

the deforestation and the drying up of the river due to the dumping of fuel into the river that crosses Souanké, Maud Congo has been responsible for the arrival of mosquitoes that were not present in this area.[63] In November 2016, a suspension was pronounced against all semi-industrial operating permits for "non-declaration of production and destruction of the environment," by a ministerial instruction. The latter also stated that the operation could resume as soon as the company had drawn up a set of specifications, in consultation with the population, and carried out an environmental impact assessment.

Despite Maud Congo's failure to comply with its environmental obligations in relation to mining six months later, mining continued at Elogo as if nothing had happened. The mining management, without refuting the absence of an impact assessment, contended that it was the inhabitants who were blocking the writing of the specifications, which were supposed to allow the exploitation. Yet, such a reading of the facts has been contested by the populations who feel powerless because of the presence of the army in the area accompanying these mining operators. In the light of this affair, it may be noted that Maud Congo is part of companies that do not comply with their environmental lawful constraints. Also, it should be considered that they do not adhere to the corporate social responsibility (CSR) approach,[64] since many of Maud Congo's products are not declared to the competent national authorities in other regions.[65]

It should be noted that, with respect to mining, most mining permits overlap particularly with protected areas and forest concessions.[66] The main consequence of this phenomenon of overlapping use is deforestation due to mining. It is to be feared that this phenomenon will take on greater proportions when mining production takes off. Again, deforestation linked to mining activity is mainly observed in three (3) departments: Niari, Sangha, and Cuvette-ouest. In the last department mentioned above, more specifically, in the Kellé District, it was noted that a Chinese company, named Agil Congo, which mines gold there, was put on notice because of significant environmental damage caused by its activity. In Kellé, Agil Congo allegedly committed several violations of the RC's Mining Code, such as the destruction of ecosystems, the lack of environmental and social impact assessment prior to the implementation of any mining project, and the pollution of rivers.[67]

As one villager reported to the Minister of Tourism and Environment:

63 What has favoured the arrival of mosquitoes in this area is the fact that the machines used by these mining operators dig deep holes in which the water stagnates after the rains.
64 According to the Mining Vision for Africa, corporate social responsibility strategies should be seen as complementary to (and not a substitute for) the responsibilities of the state to provide basic infrastructure and other public goods to its citizens through local institutions and authorities.
65 https://observers.france24.com/fr/20180518-nord-congo-brazzaville-or-exploitation-elogo-sangha accessed 19 Aug. 2019.
66 *Id.*
67 https://lesechos-congobrazza.com/environnement/5638-congo-exploitation-illegale-et-scandaleuse-de-l-or-a-kelle accessed 12 Aug. 2019.

> "There are 32 gold mining sites. The rivers have become mudflats. If you go to one of the sites, you will see the damage."[68]

After indicating that "the place where we are is polluted..."[69] the Minister of Environment and Tourism issued a formal notice to Agil Congo, in accordance with Article 45 of the 1991 Act on environmental protection.[70] Beyond the measures recommended in situ by the Minister, such as site restoration and environmental audit, this situation illustrates the low effectiveness of the rules designed to respect environmental obligations, specifically the obligation to carry out an environmental impact assessment, which remains a key step before any mining operation is launched. Thus, it must be considered that the exploitation of mining resources, in defiance of national mining regulations, in both Congolese localities, could only develop with the complacency of the local authorities and those of the Ministry of Mines and Geology.

Similarly, in DRC, it can be observed that the environmental obligations in the mining sector, prescribed in the 2002 Mining Code, have been tested with the practice of so-called "Chinese contracts." It should be noted that—on 28 April 2008—the government of DRC signed a mining agreement with a group of Chinese companies, named respectively China Railway Group Limited and Sinohydro Corporation for the industrial exploitation of Congolese mining resources, in violation of the mining law. Generally speaking, the problem with mining conventions in terms of environmental obligations is that they are not governed by the 2002 Mining Code. It is contended that—governed by the provisions contained in their agreement—these secret agreements, like the "Chinese contracts," suggest that little consideration is given to environmental issues. To be convinced of this, it can be noted that Chinese companies in Katanga have not been concerned about carrying out the required assessment, namely environmental impact assessment and the project's environmental management plan, or even less about publishing them.

It is clear that for a sustainable management of natural resources, the Congolese state should only conclude these agreements that derogate from ordinary law in the mining sector by subjecting them to transparency andrespect for environmental obligations.[71]

It should be noted that, apart from the absence of assessment required

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68 *See* 'Congo-Brazzaville : d'importants dégâts environnementaux causés par des Chinois au nord.'
https://fr.africanews.com/2019/01/25/congo-brazzaville-d-importants-degats-environnementaux-causes-par-des-chinois// accessed 02 Feb. 2019.

69 *Id.*

70 Legal terms are asserted as follows: "When an installation in one of the two categories of classified activities is operated without the authorisation required by this Act, the Minister responsible for the Environment shall give the operator formal notice to either stop its operation or to regularise its situation by submitting an application for authorisation as soon as possible."

71 Avocats Verts, Analyse de la législation environnementale et sociale du secteur minier en RDC, 70 (Oct. 2010).

for the implementation of mining activities in DRC, there is also the scarcity or non-existence of documents concerning environmental risks and impacts. A study conducted in 2015 by civil society organizations indicates that out of 17 mining projects examined, only two had an environmental impact assessment published on the internet, namely TFM and Ashanti Goldfields Kilo. Two others were performed and available from local authorities.[72] In other words, although environmental impact assessments are in most cases carried out, there are serious shortcomings both in their preparation and in their monitoring by the authorities.[73]

B. Shortcomings and Difficulties in the Implementation of the Environmental Protection Provisions in Congolese Mining Codes

The environmental problems arising from mining are many and varied. This means that a variety of solutions using specific skills and technologies often non-existent in most cases in developing countries need to be mobilized. Bearing this in mind, it can be argued that the technical capacities of mining companies are very decisive in addressing the environmental risks generated by mining operations. As set above, the mining statutes and regulations—in both states—provide for the consideration of environmental aspects in the development of any mining activity or project. However—in practice—it has been observed that the national geological services have neither the means nor the specialists capable of dealing with all the aspects related to the assessment, oversight, and monitoring of environmental protection in mining activities. Consequently, it turns out that beyond the provisions enshrined in statutes, basic actions—on the ground—should be taken to maintain a healthy environment in the territories of the two countries.

Although RC has a Mining Code that is presented as attractive, with enormous potential, the mining sector makes a very small contribution to state revenues. Undoubtedly, mining and its real impact as it appears in RC must benefit people in the political realm and multinational corporations, at least off the books.

It is clear that although the economic and financial situation of the mining sector in RC is not the most brilliant, the provisions of its 2005 Mining Code, which should be attached to the third generation, are no longer adapted to the requirements of environmental protection, which is part of

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72 The study Who Seeks Doesn't Find. Transparency of mining projects in the Democratic Republic of Congo (2015). This study is the result of collaboration among various civil society organizations: the Association Africaine de Défense des Droits de l'Homme (Kinshasa), the Cadre de Concertation de la Société Civile sur les Ressources Naturelles en Ituri (Province Orientale), the Maison des Mines du Kivu (Kivus and Manie ma), and the Plateforme des Organisations de la Société Civile intervenant dans le Secteur Minier (Katanga), under the coordination and with the technical support of the Carter Center.
www.congomines.org/system/attachments/assets /000/000/718/original/Index_Transparence_-_Quui_cherche_ne_trouve_pas_2015-01-19_PDF.pdf?143687990 accessed 16 Sept. 2019.

73 Laure Malchair, *Les Etudes d'Impact Environnemental en RD.Congo: Outil Pour Qui, Pour Quoi*, Analyse, Commission Justice et paix, 5 (Apr. 2016).

"the perspective of reconciling the protection of the global environment and the promotion of economic development."[74]

The obvious absence of reference to sustainability undoubtedly reflects a vision purely oriented towards the promotion of private investment and the search for economic and financial profits. This logic, which is still dominant, can be explained by the recurrence of environmental damage caused by mining activity. It can be noted that even in DRC, this logic seems to be the same since repeated damage to the environment is noted in the context of mining.

In both countries, it can be observed that the institutions in charge of environmental protection or more specifically mining issues at both national and local levels, namely the Ministry of Mines or General Directorates of Mines, do not effectively control mining activities. The monitoring of such activities should be strengthened in order to prevent and reduce the negative impacts of mining activity. There is a need—on the one hand—for resources and—on the other hand—a commitment to ethics and accountability of the managers in charge of these issues. In both countries, it is well known that most economic sectors are affected by the phenomenon of corruption, which is undeniably favoured by the absence of sanctions against the perpetrators of corrupt transactions, despite legal provisions.

While non-compliance with environmental obligations in the mining sector, in the event of imminent danger, is noted and notified to the mining operator by inspectors and agents of the Directorate for the Protection of the Mining Environment in collaboration with the Congolese Environment Agency, the absence of an institution in charge of the mining environment in RC is noteworthy. Consequently, one can only agree especially with the observations made regarding the insufficiency of equipment and appropriate materials for the administration and the aging professional.[75]

Another difficulty—related to the implementation of the content of the environmental provisions of the national mining codes—is either the numerous references they made to different instruments, or the lack of direct connection between environmental and mining acts. In DRC and RC, the practice shows that the codes applied often refer to regulatory instruments and conventions. This phenomenon, although advantageous in terms of flexibility, is not without drawbacks. In this sense,[76] it contributes to the complexity and esotericism of the rules of mining law, whose provi-

74 Stéphane Doumbé-Billé, *Droit International et Développement Durable in* Liber Amicorum A. Kiss, Les Hommes et L'environnement, 245 (Frison Roche, 1998).

75 *See* Comité national d'organisation du Cinquantenaire de l'indépendance, Bilan (1960-2010) et Perspectives de Développement Economique, Social et Culturel de la République du Congo, 149 (Brazzaville, Presses de l'imprimerie du Journal officiel, juin, 2011).

76 U. F. Opo, *Négociation des contrats: le cadre légal, réglementaire et institutionnel in* Améliorer les Effets Structurants du Secteur des Ressources Minérales dans les Pays de la Communauté Economique d'Afrique Centrale, Conférence des Nations Unies sur le Commerce et le Développement, Atelier national Brazzaville, République du Congo, (26-27 September 2016)
https://unctad.org › Presentation › Congo_270916_N5_Urbain_Fiacre_Opo, accessed 25 Feb. 2019.

sions sometimes lack clarity.

At the end of this analysis of mining legal frameworks, it is clear that mining regulations in both countries were—until the end of the 20th century—safeguarding economic interests, guided by the logic of attracting foreign investment.[77] This logic, which would outwardly be very profitable for the state, is not always so and has contributed to a twofold situation. It has cost money to both countries as well as it has jeopardized the natural environment as one can imagine.[78] While the contribution of the mining industry to the economy of DRC remains important, the fact remains that as far as RC is concerned, this contribution has to be improved.[79] This implies, beyond simple normative reforms, concrete actions aimed at improving the attractiveness of the mining sector.[80] In truth and all things considered, the reforming experiences of DRC, whose potential and attractiveness throughout the world remain difficult to compare, should inspire the Congolese national authorities engaged in the process of revising a Mining Code considered unfavourable to the requirements of environmental protection and foster the conciliation of both economic and environmental considerations.[81]

DRC's new Mining Code, which seems to raise hopes, is considered to be the result of a balanced approach that will benefit both the investor and the state.[82] This legitimate ambition, on behalf of the State's sovereignty over its natural resources, presupposes that the gains generated by natural resources really benefit the people. It is only on this condition that reforming states will be credible. In order to establish this credibility, the mere adoption of statutes does not prove sufficient, but—above all—those states still have their own independence and people's dignity to uphold. This is still not utterly vindicated. As such, it is very difficult to implement statutes without allocating financial, technical, and human resources in a sector where the State—as with most natural resources—is simply limited to the so-called "gathering" economy.

In order to find some consistency, both states should adopt—at a large scale—either energy or mining policies. Those public policies would first determine the scope and objectives applicable to the mining sector, which would yearly be checked by the parliament and support the inducement of accountability.[83] Secondly, mining policies have to be incorporated into the so-called economic national policy to make sense.[84]

77 *See* Aubin Nzaou-Kongo, L'exploitation des hydrocarbures et la protection de l'environnement en République du Congo, *supra* note 6, at 390.
78 *Id.*
79 *Id.*
80 *Id.*
81 *See* Aubin Nzaou-Kongo, *Economic Sovereignty and Oil and Gas Law. Essays on the Normative Interactions between International Law and Constitutional Law*, *supra* note 8.
82 Georges Abi-Saab, *La souveraineté permanente dans les ressources naturelles*, *in* Droit international. Bilan et perspectives 639 (Paris, Pedone ed., 1991).
83 *See* Aubin Nzaou-Kongo, L'exploitation des hydrocarbures et la protection de l'environnement en République du Congo, *supra* note 6, at 390.
84 *Id.* at 399-407.

This should spare them from the inconsistencies and sometimes even contradictions observed between sectoral and general instruments applicable in the mining sector. Greater predictability and institutional strengthening are useful ingredients for achieving the objectives of the robust exploitation of mining resources. Taking into account the economic difficulties experienced by the two countries in mobilising capital, the contribution of foreign investment must always be expected and be subject to precise national normative requirements, but also an environment from the point of view of infrastructure, security, and qualification of executives that meets the expectations of investors so that the attractiveness of these countries is no longer limited simply to the granting of tax and customs advantages whose scope remains debatable.