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The Legal Justifications for a
People-Based Approach to the Control of
Mineral Resources in the Democratic
Republic of the Congo

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THE LEGAL JUSTIFICATIONS FOR A PEOPLE-BASED APPROACH TO THE CONTROL OF MINERAL RESOURCES IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Dunia P. Zongwe *

ABSTRACT

The Democratic Republic of the Congo (DRC) is endowed with vast mineral wealth. However, although renewed activities in the mining sector ameliorated the DRC's fiscal position and GDP growth in 2005-07, generally the peoples of the DRC neither participate in nor benefit from the exploitation of mineral resources. The problem is that the exploitation of mineral resources in the DRC go against the interests of the Congolese peoples. To be sure, the Congolese peoples are some of the poorest in the world. The main purpose of this paper is to explore the ways in which the peoples of the DRC can in domestic, regional and international law gain control over mineral resources. Accordingly, the basic question for this paper is: *What legal justifications in national, regional and international law could serve to increase the control of the peoples over mineral resources in the DRC?* The paper argues that the scholarship on the legal justifications for a people-based mineral control do not fully articulate the right to control mineral resources (RCMR). The existing scholarship on the RCMR is limited in that it fails to: (1) fully articulate the RCMR, (2) examine the RCMR in terms of first and second generations of human rights and in terms of national mineral resources law, and (3) address the RCMR in the particular circumstances of the DRC. This paper fills up these gaps in the scholarship on the RCMR. Firstly, the paper demonstrates that, in Congolese law, regional and international law, there is more than one principal justification for a people-based control of mineral resources. These justifications include popular sovereignty, socio-economic rights, the right of peoples to enjoy their national wealth, economic self-determination, permanent sovereignty over natural resources, and the right to development. Secondly, the paper utilizes democratic and socio-economic rights enshrined in the Congolese Constitution and the Mining Code as a point of departure in advocating a people-based control of mineral resources. Finally, the paper gives an overview of the exploitation of mineral resources in the particular circumstances of the DRC.

1. INTRODUCTION	3
1.1. <i>Rationale</i>	3
1.2. <i>Research objective and questions</i>	4
1.3. <i>Literature review</i>	5
1.4. <i>Thesis statement and underlying premises</i>	7
1.5. <i>Definition of terms and concepts</i>	7
1.6. <i>Chapter overview</i>	9
2. THE RELATIONSHIP BETWEEN MINERAL RESOURCES AND HUMAN RIGHTS	10

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2.1. Mineral resources in the violations of human rights law.....	10
2.2. Mineral resources in the provisions of human rights law.....	12
2.2.1. Municipal law.....	12
2.2.2. International law	13
2.3. A human rights approach to the control of mineral resources.....	14
3. THE EXPLOITATION OF MINERAL RESOURCES IN THE DRC	17
3.1. Historical background.....	17
3.1.1. Politics.....	17
3.1.2. Mining.....	19
3.2. The legal framework for the exploitation of mineral resources.....	20
3.2.1. Mining in the Constitution.....	20
3.2.2. Mining in the Mining Code.....	20
3.3. Mining in the DRC: The differing patterns of exploitation.....	29
3.3.1. Mining in the Kivus	29
3.3.2. Mining in Katanga.....	31
4. THE LEGAL JUSTIFICATIONS FOR A PEOPLE-BASED CONTROL OF MINERAL RESOURCES..	34
4.1. Basic distinctions.....	34
4.1.1. Control versus ownership of mineral resources.....	34
4.1.2. State versus people	36
4.2. Justifications in municipal law.....	37
4.2.1. The peoples' right to enjoy national wealth	37
4.2.2. The duty of equitable redistribution.....	38
4.2.3. Popular sovereignty	39
4.2.4. Democratic rights.....	41
4.2.5. Socio-economic rights	43
4.3. Justifications in regional and international law.....	48
4.3.1. Economic self-determination	50
4.3.2. Sovereignty over natural resources.....	52
4.3.3. The right to development.....	53
4.4. The right to control mineral resources (RCMR).....	56
4.4.1. The thesis	56
4.4.2. The RCMR as an independent right.....	57
4.4.3. The nature of the right	57
4.4.4. Violations of the RCMR	59
5. CONCLUSION: THE IMPLICATIONS OF A PEOPLE-BASED CONTROL OF MINERAL RESOURCES.....	61
5.1. Legal implications.....	61
5.2. Policy implications.....	63
5.2.1. Institutional policies	63
5.2.2. Mining policies	68
5.2.3. Financial policies	69
5.2.4. Social policies	70

The tragedy of the many tragedies in the Congo was that the people woke up after years of war and found that the family wealth had been given away, or sold off, or at least as far as people knew, it seemed to have just flitted away.

Prof. Peter Rosenblum, Carter Center and consultant to the Congolese commission for the review of mining contracts.

1. INTRODUCTION

1.1. Rationale

The Democratic Republic of the Congo (DRC) is one of the world's wealthiest countries in terms of natural resources, for which reason it is sometimes called a 'geological scandal'.

¹ It is endowed with vast mineral wealth. It produces cobalt, coltan (used in turn to produce niobium and tantalum),² copper, petroleum, industrial and gem diamonds, gold, silver, zinc, manganese, tin, uranium, coal, and timber. Mineral resources are exploited by the Congolese government, local and foreign investors,³ artisanal miners, and, in eastern Congo, by armed groups.⁴

Although renewed mining activities, the source of most exports and foreign exchange earnings, ameliorated DRC's fiscal position and GDP growth in 2005-07,⁵ generally the peoples of the DRC neither participate in nor benefit from the exploitation of mineral resources. The problem is that the exploitation and management of mineral

¹ FATAL TRANSACTIONS, THE STATE VS. THE PEOPLE: GOVERNANCE, MINING AND THE TRANSITIONAL 6 (Netherlands Institute for Southern Africa 2006).

² Coltan is used in consumer electronics products like cell phones, televisions, DVDs, digital cameras, and computers.

³ Foreign investors include De Beers Centenary A.G., BHP Billiton World Exploration Inc., and AngloGold Kilo.

⁴ Some neighboring countries have also been involved in the illegal exploitation of mineral resources in the DRC, namely Burundi, Rwanda, and Uganda. See Mahmoud Kassem, *Rapport du Groupe d'Experts sur l'Exploitation Illégale des Ressources Naturelles et Autres Richesses de la République Démocratique du Congo, delivered to the Security Council*, U.N.Doc. S/2003/1027, (Oct. 23, 2003)[hereinafter UN Report on DRC Resources]; Democratic Republic of Congo v. Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2003) ¶ 92ff.

⁵ Central Intelligence Agency, *The World Factbook: Congo, Democratic Republic of the* (2008), <http://www.cia.gov/cia/publications/factbook/index.htm>.

resources in the DRC go against the interests of the Congolese peoples, mainly due to corruption⁶, lack of institutional capacity,⁷ and the failure to enforce the law.⁸

The Congolese peoples are some of the world's poorest: The DRC ranks 168th out of 174 countries in terms of human development and 88th out of 108 countries in terms of human poverty;⁹ poverty and unemployment are widespread; three-quarters of the population are under-nourished;¹⁰ approximately 5 million people died as an indirect consequence of the 1996-1997 and 1998-2003 civil wars¹¹ fuelled by, amongst others, the exploitation of mineral resources.¹² The African Development Bank reported that social indicators in the DRC are so low that it will be virtually impossible for the DRC to reach even one of the Millennium Development Goals (MDGs) by 2015.¹³

1.2. Research objective and questions

The main purpose of this paper is to explore the ways in which the peoples of the DRC can in domestic and international law participate in and benefit from the exploitation of mineral resources. Stated differently, the purpose of the paper is to survey municipal, regional and international law in order to identify principles and rules that entitle peoples

⁶ The DRC ranks 168th out of 179 in terms of corruption: Transparency International, Corruption Perception Index, http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (last visited March 14, 2008).

⁷ The DRC ranks 7th out of 32 failed states: See The Fund for Peace, Failed States Index Scores 2007, http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=229&Itemid=366 (last visited April 7, 2008).

⁸ GLOBAL WITNESS, DIGGING IN CORRUPTION: FRAUD, ABUSE AND EXPLOITATION IN KATANGA'S COPPER AND COBALT MINES 41 (Global Witness Publishing Inc. 2006)[hereinafter GLOBAL WITNESS, CORRUPTION]; MUZONG W. KODI, ANTI-CORRUPTION CHALLENGES IN POST-ELECTIONS DEMOCRATIC REPUBLIC OF CONGO 15 (Royal Institute of International Affairs, 2007)(stating that the Congolese corrupt elites have plundered mineral resources in collusion with international networks).

⁹ United Nations Development Programme, *2007/2008 Human Development Index Rankings* (2008), <http://www.undp.org>.

¹⁰ See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (United Nations Development Programme 2005).

¹¹ See INTERNATIONAL RESCUE COMMITTEE, MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS (International Rescue Committee 2007).

¹² Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. MIAMI BUS. L. REV. 217, 220ff (2005); André Mbata B. Mangu, *The Conflict in the Democratic Republic of Congo and the Protection of Rights under the African Charter*, 3 AHRJ 243 (2003). Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)(Order of Dec. 19, 2005), available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (last visited Feb. 25, 2008) shows how the plundering of natural resources can help sustain a war and the violation of human rights.

¹³ AFRICAN DEVELOPMENT BANK, AFRICAN ECONOMIC OUTLOOK: MEASURING THE PULSE OF AFRICA 2007 212 (African Development Bank and OECD Development Centre 2007).

to control mineral resources in the DRC. The ultimate goal is to enable peoples to utilize both advocacy and litigation to prosecute the claim that they are entitled to participate in and benefit from the exploitation of mineral resources.

Accordingly, the basic research question for this paper is: *What legal justifications in national, regional and international law could serve to increase the control of the peoples over mineral resources in the DRC?* From the basic research question, two critical sub-issues flow: The first issue is ‘what is the current state of the exploitation and management of mineral resources in the DRC?’ and the second issue is ‘how can the peoples be given greater participation in and benefit of the exploitation of mineral resources?’.

1.3. Literature review

The existing body of scholarship on the peoples’ right to control mineral resources (RCMR) focuses on: conceptual analyses of the legal justifications for the control of mineral resources by the people, the RCMR as a third generation human right or solidarity right, and the RCMR in oil-producing and resource-rich countries like Nigeria, Equatorial Guinea and Angola.

This body of scholarship shows that there are several arguments in law, whether municipal or international, for peoples to press for the RCMR. In municipal law, peoples can argue for the control of mineral resources on the basis of the right to enjoy national wealth;¹⁴ the right to popular sovereignty;¹⁵ certain democratic rights like equality,¹⁶ non-discrimination¹⁷ and the right to receive information;¹⁸ socio-economic rights;¹⁹ and the provisions of the 2002 Mining Code.²⁰

¹⁴ CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO [hereinafter Constitution] art. 58.

¹⁵ Constitution art. 9.

¹⁶ Constitution arts. 11 and 12.

¹⁷ Constitution arts. 13 and 14.

¹⁸ GLOBAL WITNESS, UNDER-MINING PEACE: TIN: THE EXPLOSIVE TRADE IN CASSITERITE IN EASTERN DRC 5 (Global Witness 2005)[hereinafter GLOBAL WITNESS, TIN].

¹⁹ Constitution Title II, Chapter 2.

²⁰ CODE MINIER [C. MIN.]. This paper uses the official English translation of the Mining Code.

In international law, one argument for the control of mineral resources is economic self-determination.²¹ The right to economic self-determination refers to the capacity of peoples to dispose freely of mineral resources according to their democratically-taken decisions.²² Another relevant argument for the greater control of mineral resources is the principle of sovereignty over natural resources.²³ Sovereignty over natural resources entails a number of associated rights, all of which can found a claim by the peoples for the control of mineral resources.²⁴ However, the problem with the literature on all these arguments is that it does not address the logical implications of holding that peoples, and not the state, are entitled to control resources.²⁵ Recently, however, there have been a few analyses of the implications of holding that peoples are entitled to control mineral resources in Africa.²⁶ The controversial right to development is a third ground for a claim by the peoples for the control of mineral resources.²⁷ One problem with the right to development is the difficulty in identifying the right-bearers and the duty-holders.²⁸

²¹ Alice Farmer, *Towards a Meaningful Rebirth of Economic Self-determination: Human Rights Realisation in Resource-Rich Countries*, 39 N.Y.U. J. INT'L. L. & POL. 417 (2006); Richard N. Kiwanuka, *The Meaning of 'People' in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L. L. 80, 95 (1988).

²² Alice Farmer, *supra* note 21, at 418.

²³ NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* 258ff (Cambridge University Press 1997); PHILIP SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 236 (Cambridge University Press 2003).

²⁴ Solomon A. Dersso, *The Jurisprudence of the African Commission on Human and Peoples' Rights with Respect to Peoples' Rights*, 6 AHRLJ 358, 365 (2006); Social and Economic Rights Centre Action Centre (SERAC) and Another v. Nigeria (2001) AHRLR 60 (ACHPR 2001)[hereinafter *SERAC*] ¶ 58.

²⁵ J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalisation: International Mechanisms, Non-state Actors, and the Struggle for Peoples' Rights in Africa*. 18 AM. U. INT'L. L. REV. 851, 891 (2003)[hereinafter Oloka-Onyango, *Peoples' Rights*]; GHEORGHE ELIAN, *THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES* 215 (Alphen 1979).

²⁶ Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L. L. REV. 33 (2006); Alice Farmer, *supra* note 21; Ian Gary, *Transparency and Accountability in the Use of Petroleum Revenues: A Fundamental Ingredient for Security, Reconstruction, and Reconciliation in Africa's Booming Petro-states, in SECURITY, RECONSTRUCTION, AND RECONCILIATION: WHEN THE WARS END* 38, 39 (Muna Ndulo ed., 2007).

²⁷ G.A. Res. 55/56, U.N. Doc. (Jan. 29, 2001), preamble (stating that diamonds play an important role in fuelling conflict and that the link between the illicit transaction of rough diamonds and armed conflict must be broken as a contribution to prevention and settlement of conflicts); see ISSA G. SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 29-33 (Codesria Book Series 1989); JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 326-327 (Juta and Company Ltd 2005); Constitution art. 58.

²⁸ Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L. L. REV. 1425 (2000).

The existing scholarship is limited in that it fails to: (1) articulate the right of peoples to control resources; (2) examine the right to control mineral resources in terms of first and second generation of human rights and in terms of national mineral resources legislation; and (3) address the right to control mineral resources in the particular case of the DRC.

In view thereof, this paper explores the legal justifications for a people-based control of mineral resources in the DRC and then articulates the RCMR within a comprehensive human rights framework.

1.4. Thesis statement and underlying premises

The paramount argument of the paper is that, *although scholars have advanced several legal justifications for the control of mineral resources, they fail to fully articulate the right to control mineral resources (RCMR)*. There are three reasons for the main argument. The primary reason for the main argument is that the scholars who discussed the legal justifications for the control of mineral resources by the people all assumed that there is one legal justification for such control. This paper demonstrates that in actual fact there is more than one legal justification for a people-based control of mineral resources.²⁹ Secondly, scholars have a propensity to search international law for one justification to argue that the people must control mineral resources. By contrast, this paper surveys municipal law for justifications for the control of mineral resources by the peoples. Finally, scholars have engaged in conceptual analyses of the legal justifications for the popular control of mineral resources without stating the policy implications of these justifications. Even when scholars do discuss the implications of mineral control of the people, it is nonetheless the implications of the control, and not the right to control, that form the basis of their discussion.

1.5. Definition of terms and concepts

A key phrase of the paper is 'control of mineral resources'. Although 'control' means different things in different contexts, this paper defines 'control' in terms of process and

²⁹ Chapter 4.

outcome. First, in terms of process, ‘control’ means *participating* in decision-making. In terms of outcome, on the other hand, ‘control’ means *benefiting* from the proceeds of a given activity.³⁰ Thus, the argument that the peoples of the DRC must control mineral resources means that they must participate in decisions concerning these resources and that they must benefit materially from mining activities.³¹

The right to control mineral resources (RCMR), on the other hand, is the *legal* entitlement of peoples to participate in and benefit from the exploitation of mineral exploitation. There is a fundamental difference between the control of mineral resources and the RCMR. Whereas the definition of the control of mineral resource is factual and descriptive, the definition of the RCMR is legal and prescriptive. This distinction is crucial to the main argument of this paper.³²

Another term frequently used in this paper is ‘people’. ‘People’ is a term which has several meanings. In the African context, an authoritative interpretation of the African Charter showed that ‘people’ may at the very least refer to four concepts.³³ First, ‘people’ may refer to the African peoples who lived under colonial rule.³⁴ Second, it may also refer to the entire population of a country.³⁵ However, for the purposes of the paper, the singular form of ‘people’ refers to individuals in general.

The paper adopts the plural form ‘peoples’ to refer to the entire population of the DRC. It uses the plural form to refer to every level and every dimension of the Congolese identity at and from which individuals decide to organize politically.³⁶ Thus,

³⁰ Organization of African Unity, African Charter on Human and Peoples’ Rights art. 21(5), June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter African Charter] (providing that the peoples should be able to ‘fully benefit from the advantages derived from their national resources’); Alice Farmer, *supra* note 21, at 437 (stating that economic self-determination requires that all peoples must be able to freely dispose of their natural resources and that such free disposition in turn requires a certain level of political participation in a representative body that distributes the natural wealth).

³¹ Monika Weber-Fahr *et al.*, *Mining, in A SOURCEBOOK FOR POVERTY REDUCTION STRATEGIES* 439-468, 440ff (Jeni Klugman ed., 2002) (stating that mining can benefit the peoples both directly by generating income and creating opportunities and indirectly); Lila Barrera-Hernandez, *Sovereignty over Natural Resources under Examination: The Inter-American Human Rights System and Natural Resource Allocation*, 12 ANN. SURV. INT’L & COMP. L. 43 (2006)(concluding that participation ensures the enjoyment of natural resources).

³² See Chapter 4.

³³ Richard N. Kiwanuka, *supra* note 21.

³⁴ *Id.* at 88ff.

³⁵ *Id.* at 95ff.

³⁶ I am grateful to Prof. Staffan Lindberg for helping me formulate this definition of ‘people’.

peoples refer to, depending on the context, the various ethnic groups, provincial groups, investors, women or children, trade unions, political parties, and so forth.³⁷

Third, 'people' may refer to a minority in the country, like the Batwa in the DRC.³⁸ The fourth meaning of 'people' may refer to the state. In this paper, we submit that equating the state to the peoples undermines the RCMR because such equation does not reflect the political reality in the DRC.³⁹

Finally, the paper uses the phrases 'mineral resources' and 'natural resources' interchangeably. Actually, the two phrases are different in that the latter is more general than and includes the former. However, the paper uses them interchangeably because the principles and rules of law applicable to natural resources by and large apply to mineral resources as well. Mineral resources are but a sub-category of natural resources.

1.6. Chapter overview

The body of this paper consists of four parts. Chapter 2 links the disposal of mineral resources and human rights to show that the disposal of mineral resources is a human rights issue. Chapter 3 explicates, using the Katanga and Kivu provinces as case studies, the disposal of mineral resources in the DRC. Chapter 4 explores the possible legal arguments for the proposition that the peoples of the DRC have the inalienable right to control mineral resources (RCMR). This chapter also articulates the RCMR by arguing that the RCMR is a right independent of the legal arguments that justify it. Finally, Chapter 5 sketches the policy implications of the argument that peoples are entitled to control mineral resources. The final chapter underlines that the crucial policy implication of the RCMR is state building.

³⁷ *Katangese Peoples' Congress v. Zaire* (2000) AHRLR 72 (ACHPR 1995) ¶ 3 (holding that whether the Katangese is an ethnic group is immaterial and preferring to focus on the claims made by the 'group' instead). It is submitted that, like the *Katangese Peoples' Congress* decision, it is more pragmatic to allow for an elastic and flexible definition of people and to concentrate more on the claims made by the people in question.

³⁸ Richard N. Kiwanuka, *supra* note 21. at 99ff.

³⁹ *Id.* at 91ff.

2. THE RELATIONSHIP BETWEEN MINERAL RESOURCES AND HUMAN RIGHTS

This chapter demonstrates the relationship between mineral resources and human rights. It demonstrates that this relationship is evident in both the provisions and violations of human rights law. It also argues that a human rights approach to mining is a most appropriate strategy to infuse concerns for a people-based control of mineral resources into mining legislation and practices.

2.1. Mineral resources in the violations of human rights law

The relationship between mineral resources and human rights law is manifest in the violations of human rights law. Many a scholar posited that human wrongs are the source of human rights.⁴⁰ Similarly, the present paper is structured around the basic idea that the history of human rights violations in the DRC should inform and substantiate human rights provisions.

The mineral resources and human rights relationship is manifest mostly during massive violations of human rights, especially during armed conflicts. The poor management of a large mining sector almost unavoidably results in massive violations of human rights and breeds armed conflicts. The substantial mining revenues often create cycles of corruption and inefficient governance, which both set the scene for the massive violations of human rights and armed conflicts.⁴¹ The fact that DRC's 1996-2003 civil wars claimed the life of over 5 million people, the worst humanitarian crisis since World War II, is the most irrefutable evidence of the connection between mining and human rights.⁴²

⁴⁰ Christof H. Heyns, *A 'Struggle Approach' to Human Rights*, in HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA: A READER 15-35 (Christof H. Heyns & Karen Stefiszyn eds., 2006)(arguing that it is easier to identify injustice than justice and to work out a way through from human wrongs to human rights); Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, 20 HUM. RTS. Q. 210 (1998) (explaining that injustice is one of the philosophical foundations of human rights); Robert Alexy, *A Defence of Radbruch's Formula*, in RECRAFTING THE RULE OF LAW; THE LIMITS OF LEGAL ORDER (David Dyzenhaus ed., Hart Publishing 1999)(arguing that law loses its legal validity when its contradiction with justice reaches an 'intolerable level'); EDMOND N. CAHN, *A SENSE OF INJUSTICE* (New York University Press 1949) (arguing that demands for equality, dignity and fair adjudication are rooted in a sense of injustice).

⁴¹ See Monika Weber-Fahr *et al.*, *supra* note 31, at 443.

⁴² See INTERNATIONAL RESCUE COMMITTEE, *supra* note 11.

Several stakeholders and actors on both the local and international scene have recognized that the exploitation of mineral resources can have a deleterious impact on the protection of human rights.⁴³ Most significantly, the UN has on many occasions singled out mineral resources as a cause of conflicts in Africa.⁴⁴ The UN General Assembly passed a resolution in which it urges the diamond-rich countries and the diamond industry to ‘find ways to break the link between conflict diamonds and armed conflict.’⁴⁵

More specifically, the UN has published a number of documents to address the human rights violations caused by the illegal exploitation of mineral resources in the DRC. There are two reports that abidingly illustrate the negative relationship between mineral resources and human rights in the DRC. The first report is by the UN Secretary-General and the second by a panel of experts on the illegal exploitation of natural resources and other forms of wealth in the DRC [UN Report on DRC Resources].⁴⁶ The UN Report on DRC Resources is particularly significant. To start with, the Report states that there is a geographical correlation between the activities of armed groups and natural resources exploitation in the DRC.⁴⁷ Moreover, the Report acknowledges the link between the illegal exploitation of natural resources, the illicit trade of those resources and the proliferation and trafficking of arms as key factors in fuelling and exacerbating the conflicts in the Great Lakes.⁴⁸

The issue of the illegal exploitation of mineral resources in the DRC was also the object of two cases brought by the DRC government against Uganda and Rwanda before the International Court of Justice,⁴⁹ and one communication before the African Commission on Human and Peoples’ Rights.⁵⁰

⁴³ For instance, the actor Leonardo DiCaprio in the movie *Blood Diamond* brought to public attention the central role of diamonds, and mineral resources generally, in causing armed conflicts.

⁴⁴ KOFI ANNAN, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, ¶ 14ff, *Report of the Secretary-General, delivered to the Security Council and the General Assembly*, U.N.Doc. S/1998/318, A/52/871 (April 13, 1998).

⁴⁵ G.A. Res. 55/56, U.N. Doc. (Jan. 29, 2001), *supra* note 27 ¶ 2.

⁴⁶ The Secretary-General, *Report on the United Nations Organization Mission in the Democratic Republic of the Congo, delivered to the Security Council*, U.N. Doc. S/2003/1098 (Nov. 17, 2003); and the UN Report on DRC Resources, *supra* note 4, respectively.

⁴⁷ *Supra* note 27, ¶ 46.

⁴⁸ *Id.* ¶ 43-47.

⁴⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 12; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*

The bottom line of this relationship between mining and human rights is the

2.2. Mineral resources in the provisions of human rights law

The relationship between mineral resources and human rights law is evident not only in the violations but also in the several provisions of several human rights instruments, domestic, regional and international.

2.2.1. Municipal law

First of all, the Congolese Constitution contains a number of provisions linking mineral resources and human rights. The Constitution establishes permanent sovereignty over natural resources;⁵¹ provides for the right to enjoy natural wealth and resources;⁵² empowers the state to distribute that wealth and to guarantee the right to development;⁵³ and criminalizes any conduct depriving the Congolese peoples of the enjoyment of these wealth and resources.⁵⁴ Except for the one on the permanent sovereignty over natural resources, all these provisions are found in the bill of rights of the Constitution.⁵⁵

The Congolese Mining Code, although not a human rights instrument, also contains provisions which aim at realizing the socio-economic rights of the Congolese peoples. For instance, the Code requires that applicants for exploitation licenses attach to their application a plan as to how the exploitation of the mine applied for will contribute to the development of the surrounding communities.⁵⁶

(Order of Feb. 3, 2006), available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (last visited Feb. 29, 2008); see Faustin Z. Ntoubandi, *The Congo/Uganda case: A Comment on the Main Legal Issues*, 7 *AHRLJ* 162, 163ff (2007).

⁵⁰ Democratic Republic of Congo v. Burundi, Rwanda and Uganda, *supra* note 4, ¶ 92ff.

⁵¹ Constitution art. 9.

⁵² Constitution art. 58.

⁵³ *Id.*

⁵⁴ Constitution arts. 56 and 57.

⁵⁵ Constitution Title II.

⁵⁶ C. MIN. art. 69(g).

2.2.2. International law

Like civil law countries in general, the DRC is monist, which implies that the international treaties ratified by the DRC are part of the national legal system and are superior to Congolese laws. Article 215 of the Constitution provides that international treaties duly ratified by the DRC have higher authority than the laws of the DRC.⁵⁷ This provision means that the human rights treaties that the DRC ratified and that address the issue of mineral resources not only bind the DRC, they are also superior to the laws of the DRC.

The DRC has ratified the major human rights treaties, including the international bill of rights. Article 1(2) of both the CCPR and the CESCR lay down that '[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources.'⁵⁸ The African Charter in its article 21(1) contains provisions similar to article 1(2) of both the CCPR and the CESCR.⁵⁹

Other international treaties specifically and expressly provide for the right to enjoy or exploit mineral resources. These treaties include the 1982 Convention on the Law of the Sea,⁶⁰ the 1974 Charter of Economic Rights and Duties of States,⁶¹ the 1992 Framework Convention on Climate Change;⁶² the 1992 Convention on Biological Diversity;⁶³ the 1978 Vienna Convention on Succession of States in Respect of Treaties;⁶⁴ and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debt.⁶⁵

⁵⁷ See Constitution preamble.

⁵⁸ United Nations Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. [hereinafter CCPR]; United Nations Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993, U.N.T.S. 3 [hereinafter CESCR].

⁵⁹ African Charter.

⁶⁰ United Nations Convention on the Law of the Sea arts. 56 and 93, Dec. 10, 1982, 1833 U.N.T.S. 397. The DRC ratified this treaty on 17 February 1989.

⁶¹ Charter of Economic Rights and Duties of States, G.A. Res 3281 (XXIX), art. 2, U.N. Doc. A/3281 (May 1, 1974).

⁶² United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107. The DRC ratified this treaty on 9 January 1995.

⁶³ United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143. The DRC ratified this treaty on 3 December 1994.

⁶⁴ United Nations Vienna Convention on Succession of States in Respect of Treaties art. 13, Aug. 22, 1978, 17 I.L.M. 1488.

⁶⁵ United Nations Vienna Convention on Succession of States in Respect of State Property, Archives and Debt art. 38(2), April 8, 1983, 25 I.L.M. 1640.

In addition, there are myriad resolutions of the UN General Assembly which also proclaim the right to enjoy or exploit mineral resources. These resolutions address various issues, including natural resources,⁶⁶ the right to exploit freely natural wealth and resources,⁶⁷ and state sovereignty over natural resources and all economic activities.⁶⁸

2.3. A human rights approach to the control of mineral resources

In a fundamental sense, a human rights approach conceptualizes and formulates the issue of control of mineral resources in terms of human rights. In 2005, the Congolese constituent assembly endorsed the human approach to the control of mineral resources by couching the right of the peoples to enjoy national wealth in human rights terms in the bill of rights.⁶⁹

Scholars have not always accepted human rights approaches uncritically, and critical scholars would be rightly entitled to challenge the wisdom of a human rights approach to resolve problems in mining law. While there may be as many criticisms of human rights as scholars, the following criticisms, when applied to mineral resources, are sufficiently representative.⁷⁰

One criticism is that human rights have so dominated the imagination of policy makers and implementers that more valuable strategies to emancipate people are less available.⁷¹ This criticism is a half-truth. Even if policy makers allocate most resources to human rights, the fact remains that alternative approaches are still available, albeit to a lesser extent. Further, in the context of the DRC, a human rights approach to the control of mineral resources is a constitutional requirement.⁷² In any event, a human rights approach does not entail the exclusion of other strategies for the alleviation of human suffering.

⁶⁶ G.A. Res. 523 (VI), U.N. Doc. A/2119 (Jan 12, 1952).

⁶⁷ G.A. Res. 626 (VII), U.N. Doc. A/2361 (Dec. 21, 1952).

⁶⁸ Declaration on the Establishment of a New Economic Order, § 4(e), G.A. Res. 3201 (S-VI), U.N. Doc. A/9559 (May 1, 1974); Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (Dec. 14, 1962)[hereinafter Permanent Sovereignty Resolution].

⁶⁹ Constitution art. 58.

⁷⁰ See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. RTS. J. 105 107ff (2002).

⁷¹ *Id.*, at 108.

⁷² Constitution art. 58.

Another argument relates to the 'double-edged nature' of the rights discourse.⁷³ The argument is that, while the discourse mobilizes people, it also freezes structures of inequality and preserves the social and economic status quo by entrenching certain property rights.⁷⁴ Although the double-edge effect of human rights is an essential and inevitable part of the rights discourse, the real problem is practical: It is the manner in which the state implements human rights. In the previous constitutional dispensation in the DRC, the inflexible property rights regime of mining concessions undermined human rights and adversely impacted on state revenues.⁷⁵ By contrast, the property rights regime of the new Mining Code has worked out a more supple property rights regime that catalyzes the realization of human rights.

A third criticism is that human rights criticizes the state and seeks public law remedies while delegitimizing remedies in the domain of private law and non-state actors.⁷⁶ This criticism is not entirely true because human rights oblige states to protect peoples from violations of their rights by private parties and non-state actors.⁷⁷ Human rights law obliges the DRC government to provide rights of action and effective remedies in order to protect right-holders from violations of their right to control mineral resources by third parties. Right-holders can use these rights of action and remedies against third parties. Finally, some scholars argue that, notwithstanding claims that they are universal, human rights are actually the product of Western culture and history.⁷⁸ There is some substance in this criticism. However, the need to use a human rights approach to the

⁷³ MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 128 (University of Pennsylvania Press 2002).

⁷⁴ *Id.*

⁷⁵ *Exposé des Motifs du Code Minier*, JOURNAL OFFICIEL, special edition, (2002)(DRC)[hereinafter Exposé].

⁷⁶ David Kennedy, *supra* note 70, at 109.

⁷⁷ SERAC ¶ 44; Commission Nationale des Droits de l'Homme et des Libertés v. Chad (2000) AHRLR 66 (ACHPR 1995) ¶ 20.

⁷⁸ Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 HUM. RTS. Q. 587 (1995)(understanding human rights to be relative and advocating the harmonization of Shari'a norms and human rights); Abdullahi An-Na'im, *Cultural Transformation and the Normative Consensus on the Best Interests of the Child*, 8 INT'L. J. LAW POLICY FAMILY 62-81 (1994)(arguing that cross-cultural dialogues can mediate the contradiction between international human rights norms and particular cultures); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984)(arguing that African traditional societies had other ways to protecting and realizing defensible conceptions of human dignity); Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (Adamantia Pollis & Peter Schwab eds., 1979).

control of mineral resources in the DRC does not reflect Western culture or history. It is rather the tragic history and traumatic experiences of millions of Congolese, and encoded in their genetic memory, that prompt a human rights approach to mining law. The added value of a human rights approach lies in the fact that, unlike more traditional approaches to mining, the human rights approach has the effect of mainstreaming human concerns into mining legislation and practices.

The following chapter shows that, whilst mining is inextricably connected to human rights, the state has thus far failed to make the connection between the two, with negative consequences for the peoples.

3. THE EXPLOITATION OF MINERAL RESOURCES IN THE DRC

The previous chapter established the connection between mineral resources and human rights. This chapter proceeds to demonstrate that Congolese peoples do not, and never did, control mineral resources. Earlier, we defined ‘control’ in terms of participation and benefit.⁷⁹ Accordingly, this chapter shows that the Congolese peoples do not control mineral resources in that they neither participate in nor benefit from the exploitation of these resources. The chapter first provides a historical background, it explains the salient features of the Mining Code, and then uses the two Kivu and the Katanga provinces to briefly illustrate the point that Congolese peoples do not control mineral resources. Where several scholars focused on international law to advocate a people-based control of mineral resources,⁸⁰ this chapter adds an analysis of national mineral resources legislation.

3.1. Historical background

3.1.1. Politics

From King Leopold II to President Joseph Kabila, the history of the DRC is chequered, immersed in several bloodbaths,⁸¹ and is one in which the state constantly had to define and redefine itself. It is a vicious circle of poverty, conflict, and change of government. Throughout this history, DRC’s mineral wealth has been the unfortunate cause of conflicts and instability rather than prosperity and development.

One can distinguish three periods in DRC’s history as a state. The first period, from the Berlin Conference in 1884 to 1908, refers to the status of Congo as a ‘free’ state, officially called the Free State of Congo.⁸² Even though Congo was officially created in 1884 as a ‘free’ state, in actual fact, the then Congo was the sole private property of the

⁷⁹ Chapter 1.

⁸⁰ Alice Farmer, *supra* note 21; Emeka Duruigbo, *supra* note 26; Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT’L. & POL. 331 (2004).

⁸¹ See GEORGES NZONGOLA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE’S HISTORY* (Zed Books 2002).

⁸² The General Act of Feb. 26, 1885 (Berlin Conference) confirmed the region of the Congo as a free state, with Leopold II as its sovereign.

Belgian king, Leopold II. The second period, from 1908 to Independence in 1960, refers to Congo as a colonial territory. In 1908, pursuant to king Leopold II's will, Belgium annexed Congo as a colonial territory. One major contribution of Belgian rule was the creation and development of the industrial exploitation of copper in Katanga, which was in the early years of Congo's Independence the principal pillar of the economy. The third period, from Independence on 30 June 1960 up to date, refers to Congo as an independent state in the sense of it being run by the Congolese peoples.

Tragically, Independence has never translated in many political, social, and economic gains for the Congolese peoples. On the contrary, since Independence, conflicts and strife,⁸³ involving both local and foreign actors,⁸⁴ have always shaken Congo. Mobutu Sese Seko, who became president in 24 November 1965 through a coup and later a key player during the Cold War in Central Africa, proved a brutal and ruthless dictator until his ousting in 1997. Mobutu did not hesitate to use the country's mineral wealth for local and foreign patronage, which eventually resulted in the institutionalization of corruption at every echelon of government up to this day.⁸⁵

In August 1996, a civil war erupted. Laurent Désiré Kabila toppled Mobutu with an insurrection backed by Rwanda and Uganda. Kabila served as the country's president from 1997 to 2001. Subsequently, President Laurent Désiré Kabila was himself challenged in August 1998 by another insurrection backed by Rwanda and Uganda. One of his bodyguards assassinated Laurent Kabila on 16 January 2001. His son, Joseph Kabila, was nominated head of state. In December 2002, all warring parties signed a peace accord in Pretoria to end the fighting. The warring parties set up a transitional government in July 2003; with Joseph Kabila as president and joined by four vice presidents representing the former belligerents. During the wars, the government

⁸³ See BAUDOIN MPIRY-BEN-OPINE, *LA CHRONOLOGIE DE LA MARCHE DU CONGO VERS LA DÉMOCRATIE (1950-2005)* (Editions Sirius 2005).

⁸⁴ On foreign involvement in Congo, see HONORÉ NGBANDA, *CRIMES ORGANISÉS EN AFRIQUE CENTRALE: RÉVÉLATIONS SUR LES RÉSEAUX RWANDAIS ET OCCIDENTAUX* (Deboiris 2004) (explaining how complex networks of multinational corporations, heads of states, and individuals, exploited mineral resources and destabilized eastern DRC); LARRY R. DEVLIN, *CHIEF OF STATION, CONGO: A MEMOIR OF 1960-67* (PublicAffairs 2007) (recounting the part that the United States played in bringing Mobutu to power); ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* (Houghton Mifflin 1999) (telling King Leopold's exploitation of natural resources in the DRC and how he killed millions of Congolese, reducing Congo's population by half).

⁸⁵ MUZONG W. KODI, *supra* note 8, at 4 (arguing that one of Mobutu's most enduring legacies is corruption).

entered into several poorly negotiated mining contracts with private partners that allowed excessive repatriation of profits abroad⁸⁶ and that contributed little or nothing to the national treasury and the peoples.⁸⁷ The transitional government successfully organized a constitutional referendum on 18 and 19 December 2005. The government also held, for the first time in four decades, democratic elections for the presidency, national assembly, and provincial legislatures in 2006. Moreover, the 2006 Congolese Constitution has instituted, short of a federation, a highly decentralized unitary state. The newly democratically elected President and the Prime Minister formally established a government on 7 February 2007. A series of crises ensued, notably the humanitarian disaster and the insecurity in Eastern Congo, though the new government is painstakingly attempting to usher in an era of peace and development, driven by mining activities.

3.1.2. Mining

Currently, mining production, including the artisanal mining of gold and diamond, has just recently started to experience growth. However, notwithstanding its vast reserves of copper and cobalt, the DRC still faces numerous formidable challenges in the mining sector. The sector is characterized by:⁸⁸ Vetust means of production; insufficient financial, material and human resources; weak institutions for the administration of the sector; decreasing export revenues because of poor capital inflows and investment since the early 1990s; anarchic exploitation of mining sites; inadequate equipment; lack of efficient control of exploitation methods; disrespect for the rules of the Mining Code and the Mining Regulations; and the decline of the main mining state corporation, Gécamines.

The ongoing restructuration and liberalization of the mining sector, initiated in 2004 countrywide under the 2002 Mining Code, have not yet realized their full potential. But the mining sector stimulated an economic growth rate of 6.3 per cent as of December 2007 from 5.1 per cent in 2006. The surge of copper and other commodity prices, and

⁸⁶ Ernest Harsch, *Building a State for the Congolese People*, AFRICA RENEWAL, Jan. 4, 2008, at 17.

⁸⁷ FATAL TRANSACTIONS, *supra* note 1, at 9; Memorandum from John W. Reboul, Legal Consultant, Ropes & Gray LLP, to Martin Kabwelulu, Minister of Mines (Dem. Rep. Congo), Re: Review of Mining Agreements in the Democratic Republic of the Congo (Dec. 31, 2007)(on file with author).

⁸⁸ Programme du Gouvernement (2007-2011) [2007-2011 Government Program] 19.

the recent pledge of a five billion dollars loan by China for the development of mining infrastructure in the DRC offer optimistic long-term prospects for the mining sector.⁸⁹

3.2. The legal framework for the exploitation of mineral resources

The Constitution reaffirms the inalienable and imprescriptible right of the Congolese peoples to organize freely and to develop their political, economic, social and cultural life.⁹⁰ The peoples, directly and through elected representatives, organized the mining sector by enacting important laws, namely the Constitution, the Mining Code, and the Mining Regulations. Together, these laws constitute the primary framework for the exploitation of mineral resources in the DRC.

3.2.1. Mining in the Constitution

Article 9 vests in the state permanent sovereignty over its soil, sub-soil, waters, forests, air space, rivers, lakes, territorial sea and continental shelf. This article necessarily implies that the Congolese state exercises permanent sovereignty over its mineral resources.⁹¹ Article 58 confers upon the peoples the right to enjoy their national wealth and upon the state the corresponding duty to distribute it equitably as well as to guarantee the right to development.⁹²

3.2.2. Mining in the Mining Code

The most important piece of legislation on mining is undoubtedly the Mining Code. President Joseph Kabila promulgated the Mining Code in 2002 and the Code, whose drafting involved the World Bank,⁹³ entered into force in 2003. The Code proclaims that the principal role of the state is to 'promote and regulate the development of the mining

⁸⁹ *China Opens Coffers for Minerals*, BBC (Eng.), Sept. 18, 2007, available at <http://news.bbc.co.uk/2/hi/africa/7000925.stm>.

⁹⁰ Constitution preamble.

⁹¹ See also C.MIN. art. 3.

⁹² Art. 56 states that an act by any person which deprives the people of their national resources amounts to 'pillage' while art. 57 states that an act by a person acting with state authority amounts to 'high treason'.

⁹³ Christophe Asselineau & Yves Baratte, *Developing Mining Projects in the Democratic Republic of Congo under the New Mining Code*, 5 I.E.L.T.R. 105, 109 (2004).

industry by the private sector'.⁹⁴ The 2003 Mining Regulations complement the Code by providing for the Code's implementation.

The Code is a voluminous, comprehensive piece of legislation, with 344 articles and 17 titles, which in turn subdivide into several chapters and sections. The Code replaces an archaic 1981 Ordonnance-Loi (order-law),⁹⁵ thus modernizing legislation on mines.

Interpretation and application

Because the DRC is a former Belgian colony, the legal system of the DRC is primarily based on Belgian law. So are the rules of statutory interpretation. When interpreting legal texts like the Mining Code, lawyers, as a rule, assume that the legislator does not make mistakes, that she is always rational and using the same coherent, univocal language.⁹⁶ In reality, this assumption is a fiction that sometimes seems necessary to reduce the complexity of interpretation conundrums.⁹⁷

Characteristically, therefore, lawyers will use the grammatical interpretation, the *travaux préparatoires* (i.e. legislative materials), and the historical and teleological interpretation of the Code.

As far as its scope of application goes, the new Code, unlike previous mining laws, does not apply to hydrocarbons. It does also not cover preliminary geological work.⁹⁸

Definitions

In enacting the Code, the Congolese parliament intended to create a 'new attractive legislation with objective, quick and transparent procedures for the granting of mining and quarry titles, which organize tax, customs, and foreign exchange regimes for the mines'.⁹⁹ In so doing, the parliament was mindful of the fact that the two mining laws

⁹⁴ C. MIN. art. 8. Southern African Development Community (SADC) Protocol on Mining art. 2(7)(providing that one of the general principles of the Protocol is to encourage the private sector participation in the exploitation of mineral resources). The DRC is a member of SADC.

⁹⁵ Mining laws in Congo historically evolved as follows: Decree of December 16, 1910, as amended in 1919, (mining research and exploitation in the Katanga province); Decree of September 24, 1937 (on mining research and exploitation in Congo, it replaced the 1910 Decree); Ordonnance-Loi no 67/231 of May 3, 1967 (on mines and hydrocarbons, it replaced the 1937 Decree); Ordonnance-Loi no 81/013 of April 2, 1981, (replaced the 1967 Ordonnance-Loi).

⁹⁶ HUBERT BOCKEN & WALTER DE BONDT, INTRODUCTION TO BELGIAN LAW 27 (Kluwer Law International 2001).

⁹⁷ *Id.*

⁹⁸ C. MIN. art. 2.

⁹⁹ Exposé.

passed after Independence, especially their tax, customs, and foreign exchange regimes, failed to attract foreign investment and had a negative impact on mining production and public finances.¹⁰⁰

Furthermore, in ascertaining the purpose of the Code, the definition of basic terms is instrumental. Article 1 of the Code defines several terms relating to, amongst others, rights and titles, minerals, the trade of minerals, artisanal exploitation, and the environment. The Code defines mineral resources, sets out the various legal relationships, and identifies the relevant actors. Regarding mineral resources, the Code defines ‘mine’ as any deposit or artificial deposit of mineral substances classified as mines, which can be exploited by means of an open cast or underground mining, and/or any plant for the processing or transformation of the products of such exploitation located within the perimeter of the mine.¹⁰¹ ‘Ore’ means any rock containing one or more minerals made up of one or more chemical elements forming a naturally-occurring substance, simple or complex, inorganic or organic, generally in a solid state, and in a few exceptional cases, in a liquid or gaseous state.¹⁰² ‘Quarry’ means any deposit of mineral substances classified as quarries suitable for open cast mining and/or any plant for the processing of products relating to such exploitation.¹⁰³

Mining rights are the cornerstone of the Mining Code. ‘Rights’ means any right to carry out exploration and/or exploitation of mineral substances classified as mines.¹⁰⁴ ‘Perimeter’ means an area demarcated on surface and of indefinite depth relating to a mining or quarry right.¹⁰⁵

The Code also identifies the important actors in the mining sector. First, ‘purchasers’ are individuals, employed by a trading house which purchases gold, diamonds or other mineral substances extracted by artisanal mining methods, and who carry out their activities in the office of an authorized trader.¹⁰⁶ ‘Traders’ are Congolese nationals who

¹⁰⁰ *Id.*

¹⁰¹ C. MIN. art. 1(29).

¹⁰² C. MIN. art. 1(30).

¹⁰³ C. MIN. art. 1(6).

¹⁰⁴ C. MIN. art. 1(14). Exploration permits, exploitation permits, tailings processing permits and small-scale mining exploitation permits are mining rights.

¹⁰⁵ C. MIN. art. 1(37).

¹⁰⁶ C. MIN. art. 1(1).

purchase and sell mineral substances from artisanal exploitation¹⁰⁷ while ‘authorized traders’ are people authorized to purchase mineral substances extracted by artisanal mining methods from traders or artisanal miners, for the purpose of reselling them locally or exporting them.¹⁰⁸ ‘Holders’ are people in whose name a mining or quarry right is granted and a mining title or a quarry title is issued, and who carry out, directly or through third parties, the operations authorized pursuant to his mining or quarry title.¹⁰⁹

Substantive provisions:

(a) Mining titles

Article 3 of the Code retains the principle of state ownership of mineral resources.¹¹⁰ It provides that all deposits of mineral substances are the exclusive and inalienable property of the state. However, holders of mining rights own the products extracted and processed for sale by virtue of their rights.¹¹¹

The Code defines ‘mining titles’ as the official certificates issued by the Mining Registry in accordance with the provisions of the Code, which evidence the existence of mining rights.¹¹² The Code divides mining titles into permits and authorizations, which in turn sub-divides into five types of titles, namely exploration permits, exploitation permits,¹¹³ small scale exploitation permits¹¹⁴ and, quarry exploration and exploitation authorizations.

Unlike the former mining legal regime where exploitation permits and mining concessions co-existed, the new Mining Code has eliminated mining concessions. Concessions caused disequilibrium and discrimination in the Congolese mining sector.¹¹⁵

¹⁰⁷ C. MIN. art. 1(33).

¹⁰⁸ C. MIN. art. 1(10).

¹⁰⁹ C. MIN. art. 1(53). Nevertheless, the lessee is considered a holder.

¹¹⁰ C. MIN. art. 3.

¹¹¹ *Id.*

¹¹² C. MIN. art. 1(53).

¹¹³ Exploitation permits last for 30 years, renewable indefinitely, each time for 15 years.

¹¹⁴ Small scale exploitation permits or their renewals may not last more than 10 years.

¹¹⁵ Exposé. The Exposé cites a few examples of problems created by or associated with concessions, including the exaggerated proportions of extractive exclusive zones, the lack of job creation, the insufficient improvement of social infrastructures, and the failure to integrate mining in the other sectors of the economy.

(b) Protection of the environment

The applicant for an exploitation title must provide: (1) an environmental impact study (EIS) describing the foreseeable potential effects its operations may have on the environment and the mitigating measures which will be taken;¹¹⁶ and (2) an environmental management plan for the implementation and monitoring of the measures provided in the EIS.¹¹⁷

As part of the process of the preparation of the EIS, the applicant must inform and consult local populations.¹¹⁸ The objectives of the environmental management plan include the safety of the site; reduction of nuisances of the operations on the atmosphere and water, people and animals; and increasing the well-being of local populations.¹¹⁹

The Mining Regulations set out the liability principle under the Code as follows:¹²⁰

The permit holder is responsible for damage caused to the environment by its activities to the extent that it has not complied with its approved environmental plan or has breached an environmental obligation as set out in Title XVIII of the Mining Regulations.

(c) Financial regime

The Code ensures the stability of the financial regime.¹²¹ The financial regime of the Code consists of three elements: (1) Tax and customs, (2) foreign exchange control, and (3) securities.

Regarding taxes and customs, the Code provides for a single, exclusive and exhaustive tax and customs regime, applicable to all titles and holders, excluding holders of quarry exploration and exploitation rights.¹²² Even though it recognizes that taxation is a determining factor in decisions to invest capital in a country,¹²³ the Code expressly states that the principles of such a regime are the maximization of state revenues and

¹¹⁶ C. MIN. art. 204.

¹¹⁷ *Id.*

¹¹⁸ Mining Regulations art. 451. The author translated the Mining Regulations as the official translation of the Regulations is not yet available.

¹¹⁹ Mining Regulations art. 452.

¹²⁰ Mining Regulations art. 405.

¹²¹ Exposé.

¹²² See generally C. MIN. arts. 219-224.

¹²³ Exposé.

the rule of non-exoneration.¹²⁴ The Code provides for a single reduced import tax (2 per cent before the commercial operation date, 5 per cent after and 3 per cent for oil and other consumables).¹²⁵ There are three main taxes applicable to mining projects, to wit mining royalties (*redevance minière*),¹²⁶ 10 per cent withholding tax (*contribution mobilière*) on the mining company's earnings,¹²⁷ and 30 per cent tax on profits.¹²⁸

The Code provisions on foreign exchange control allow permit holders to freely convert their financial assets and to freely market their products abroad.¹²⁹ A permit holder has the right to retain 60 per cent of the sale proceeds outside the DRC ('main account') with an international foreign bank having a correspondent bank in the DRC.¹³⁰ In addition, the holder may hold more than one account in foreign currencies at foreign banks to manage debts and comply with other provisions ('debt management accounts'), with funds from the main account.¹³¹ Holders must also repatriate 40 per cent of the sale proceeds on its national main account.¹³²

Finally, with respect to securities, the Code creates two types of securities: Pledges of marketable mining products¹³³ and mortgages on both immovables and exploitation titles.¹³⁴ Upon request by the mortgagee or the holder, the Minister of Mines must approve the mortgage in advance.¹³⁵ In the event of default by the permit holder or mortgagor, the Code provides for substitution by the mortgagee himself or a third party.¹³⁶

Application procedure

¹²⁴ Exposé. The Exposé recalls that the previous mining legal regime of fiscal exoneration by agreement resulted in blackmailing and other forms of pressure on state officials during negotiations of mining contracts and, as a consequence of the exoneration granted, state revenues slumped.

¹²⁵ Christophe Asselineau & Yves Baratte, *supra* note 93, at 109.

¹²⁶ C. MIN. arts. 240-243.

¹²⁷ C. MIN. art. 246. *See also* Christophe Asselineau & Yves Baratte, *supra* note 93, at 109.

¹²⁸ C. MIN. art. 247. *See also* Christophe Asselineau & Yves Baratte, *supra* note 93, at 109.

¹²⁹ C. MIN. art. 263.

¹³⁰ C. MIN. art. 267.

¹³¹ *Id.*

¹³² C. MIN. art. 269.

¹³³ C. MIN. art. 176.

¹³⁴ C. MIN. arts. 168-175.

¹³⁵ C. MIN. art. 169.

¹³⁶ C. MIN. art. 172.

Natural and juristic persons are eligible for mining titles. Foreign persons or entities must elect domicile with an agreed 'mining agent' and act through his intermediary in order to be eligible for mining titles.¹³⁷ Foreign companies or persons are only eligible for mineral or prospecting rights, whereas Congolese natural or juristic persons are eligible for exploitation mining and quarry rights.¹³⁸

With a view to providing transparency, objectivity, effectiveness and speed,¹³⁹ the Code sets up a three-step uniform application procedure for all mining titles. The first step is a review by the Mining Registry (*instruction cadastrale*);¹⁴⁰ the second step is a technical review by the Mining Authority (*instruction technique*);¹⁴¹ and the third step is an environmental review by the department in charge of the protection of the mining environment (*instruction environnementale*).¹⁴²

The application procedure may last for up to nine months in the absence of any judicial dispute,¹⁴³ although the Ministry of Mines may deliver a preliminary and conditional exploitation permit if the first and second reviews are satisfactory.¹⁴⁴

Applicants can refer disputes to the national administrative courts or judiciary courts.¹⁴⁵

Moreover, upon issuing a mining title, the applicant may agree that disputes in relation to such a title will be settled by arbitration by the International Centre for Settlement of Investment Disputes (ICSID), provided that the applicant is a national of another contracting state according to the terms of article 25 of the ICSID Convention.¹⁴⁶

Institutions

The Code has conferred important powers on four institutions: The President, the Minister of Mines, decentralized authorities, and the Mining Register (*Cadastre Minier*).

¹³⁷ C. MIN. art. 23.

¹³⁸ *Id.*

¹³⁹ C. MIN. art. 32.

¹⁴⁰ C. MIN. art. 40.

¹⁴¹ C. MIN. art. 41.

¹⁴² C. MIN. art. 42.

¹⁴³ Christophe Asselineau & Yves Baratte, *supra* note 93, at 106.

¹⁴⁴ C. MIN. art. 45.

¹⁴⁵ C. MIN. art. 312.

¹⁴⁶ C. MIN. art. 319.

First, in terms of the Mining Code, the President may classify, declassify or re-classify minerals as mines, quarries or reserved substances.¹⁴⁷

Second, the Minister of Mines has a discretionary power to grant and cancel mining titles,¹⁴⁸ but the admissibility requirements for the application provided for in the Code circumscribe the Minister's discretion.¹⁴⁹ The Minister may also approve the creation of mortgages¹⁵⁰, set up restricted access areas¹⁵¹ and reserve deposits to be submitted for tender.¹⁵²

Third, the Code empowers provincial and local authorities to grant such mining authorizations as are not covered by the discretionary power of the Minister of Mines.¹⁵³

Finally, like the department in charge of the protection of the mining environment,¹⁵⁴ the Mining Register is a body with legal status and financially autonomous, created by the Code, although it falls under the control of the Ministry of Mines.¹⁵⁵ The Mining Register is responsible for the application procedures and the registration of mining rights and assets.¹⁵⁶ This 'one-stop system' or single window center should be a great improvement for foreign and local investors¹⁵⁷ because it streamlines the screening and approval procedures by the Register.¹⁵⁸

Infractions and penalties

The Code imposes different fines and imprisonment on persons who engage in illegal activities, who commit offences, and who contravene the decisions of state authorities.

The Code penalizes a number of activities related to mineral substances, including

¹⁴⁷ C. MIN. art. 9(b). The Exposé states that 'reserved substances' refers to substances which the state ought to declare as such for the security of the national or international communities. The President has already declared uranium, thorium and radioactive minerals as reserved substances.

¹⁴⁸ C. MIN. art. 10.

¹⁴⁹ C. MIN. art. 38. These requirements include the provision of certain information and the payment of filing fees.

¹⁵⁰ C. MIN. art. 10(h).

¹⁵¹ C. MIN. art. 10(l).

¹⁵² C. MIN. art. 10(g).

¹⁵³ C. MIN. art. 11.

¹⁵⁴ C. MIN. art. 15.

¹⁵⁵ Exposé.

¹⁵⁶ C. MIN. art. 12.

¹⁵⁷ Christophe Asselineau & Yves Baratte, *supra* note 93, at 106.

¹⁵⁸ See SHERIF SEID, GLOBAL REGULATION OF FOREIGN DIRECT INVESTMENT 35 (Ashgate Publishing 2002).

illegal exploration and exploitation;¹⁵⁹ theft or possession of stolen minerals;¹⁶⁰ diversion;¹⁶¹ illegal purchase and sale;¹⁶² illegal keeping;¹⁶³ and illegal transportation.¹⁶⁴ The Code also penalizes the commission of certain offences, including fraud;¹⁶⁵ infringements of health and safety regulations;¹⁶⁶ corruption of civil servants;¹⁶⁷ and destruction, degradation and damage.¹⁶⁸ Lastly, the Code penalizes several acts against the 'Mines Authority', which refers to all the public administration entities in charge of mines and quarries.¹⁶⁹ These acts include offences or violence against agents of the Mines Authority;¹⁷⁰ hindering the activity of the Mines Authority;¹⁷¹ contravening the decrees of the Minister of Mines and the decisions of the provincial governor.¹⁷²

The above survey of the Mining Code shows that the Code does not explicitly link mining and human rights. Notwithstanding the absence of explicit provisions connecting mining and human rights, there are provisions in the Code that clearly benefit both investors and the peoples. The Code, as it stands, is actually impressive, if judged by the benefits it bestows on investors and the local peoples.¹⁷³ The main reasons why these benefits do not in practice trickle down to the peoples are corruption, lack of institutional capacity and the selective and inconsistent implementation of the Code. The next section describes practices by state and non-state actors in the mining sector that violate the human rights of the Congolese peoples.

¹⁵⁹ C. MIN. art. 299.

¹⁶⁰ C. MIN. art. 300.

¹⁶¹ C. MIN. art. 301.

¹⁶² C. MIN. art. 302.

¹⁶³ C. MIN. art. 303.

¹⁶⁴ C. MIN. art. 304.

¹⁶⁵ C. MIN. art. 305.

¹⁶⁶ C. MIN. art. 306.

¹⁶⁷ C. MIN. art. 307.

¹⁶⁸ C. MIN. art. 308.

¹⁶⁹ C. MIN. art. 1(3).

¹⁷⁰ C. MIN. art. 309.

¹⁷¹ C. MIN. art. 310.

¹⁷² C. MIN. art. 311.

¹⁷³ Some experts, especially provincial ministers, do not share this opinion and recommend the revision of the 2002 Mining Code so as to make it in tune with the new constitutional and institutional contexts brought about by the 2006 Constitution. They also expect this recommended revision to augment the benefits to the state and the peoples of the exploitation of mineral resources: See Bienvenu-Marie Bakumanya, *Le Vrai Enjeu des '5emes Journées Minières': La Re-visitation du Code Minier*, LE POTENTIEL (Dem. Rep. Congo), Mar. 14, 2008, available at http://www.lepotentiel.com/afficher_article.php?id_edition=&id_article=61113.

3.3. Mining in the DRC: The differing patterns of exploitation

North and South Kivu, on the one hand, and Katanga, on the other, provide two differing patterns of mineral exploitation. In North and South Kivu, the government and armed militias compete for the control of mineral resources, thereby exacerbating insecurity in the region. In the Katanga province, only the Congolese state controls the exploitation of mineral resources. These different exploitation patterns imply that the peoples can only control mineral resources, in the case of the two Kivus, if the state provides security and, in the case of Katanga,¹⁷⁴ if the state also reduces corruption and ensures compliance with the Mining Code in both the informal and formal sector.¹⁷⁵

3.3.1. Mining in the Kivus

North Kivu is located in the North East of the DRC and shares a border with Rwanda. Since 1996, the DRC has lost the monopoly of force in North and South Kivu. Military force and state authority are usurped by and dispersed among a maze of armed groups, including the FDLR.¹⁷⁶ Furthermore, the location of the Kivus in the Great Lakes region has turned them into a crossroad for the ethnic conflicts, insurrections and movement of refugees and armed groups from Uganda, Burundi and Rwanda. DRC's mineral wealth and its weak border controls have allowed many of these armed groups to become self-financing and thus self-sustaining.¹⁷⁷ During the 1998-2003 war, numerous rebel groups in Eastern DRC funded their activities through the exploitation of minerals, such as diamonds, coltan and cassiterite (tin ore).¹⁷⁸ The massive increase in demand for tin fuelled the illegal exploitation of tin, the plundering of natural resources in the DRC, and the insecurity in the Kivus.

¹⁷⁴ These different mineral exploitation patterns do not strictly follow the provincial border lines such that certain places in Northern Katanga where the mineral exploitation patterns are similar to those found in the Kivus.

¹⁷⁵ It is the stark contrast between the exploitation of mineral resources in the Kivus and Katanga that motivates the choice of these two provinces. This choice does not, however, imply that other provinces, especially Kasai, do not offer different or interesting patterns of mineral exploitation.

¹⁷⁶ i.e. Rwandan Hutu rebels accused of having participated in the 1994 genocide in Rwanda.

¹⁷⁷ INTERNATIONAL CRISIS GROUP, SECURITY REFORM IN THE CONGO 1 (International Crisis Group 2006).

¹⁷⁸ GLOBAL WITNESS, TIN, *supra* note 18, at 4.

In the Kivus, the state is incapable of fully controlling the exploitation of mineral resources, which are also exploited illegally by armed groups operating in the region. Nor is the state capable of ensuring the security of the local populations.¹⁷⁹ On the contrary, the *Forces Armées de la République Démocratique du Congo* (FARDC), the Congolese army, has been implicated, together with the other armed groups, in several instances of looting, rape, killing, and in other atrocities.¹⁸⁰

In spite of the reunification of the country and the holding of democratic presidential and legislative elections, the pro-Rwandan insurgents led by dissident general Nkunda still control large areas of North Kivu. Over the second half of 2007, fighting has broken out around strategic mining towns, with the insurgents, the FARDC and other armed groups vying for the control of these areas.

Unlike North Kivu, much of South Kivu is under the control of the state and the FARDC.¹⁸¹ Yet the low and erratic pay the FARDC receives has prompted many soldiers illegally mine or tax the miners to supplement their low income while the FDLR is also controlling mines and mining revenues.¹⁸² Large quantities of minerals are illegally exported, undeclared and untaxed, to such foreign countries as Rwanda, Zambia, South Africa, China and other foreign countries, where they are processed with little added value for the DRC.

Notwithstanding the ongoing government reform of the security sector, the FARDC is still so under-resourced, disorganized, disunited and dysfunctional to quell the armed groups operating in the Kivus. The challenges facing the FARDC are in large measure the legacies of the civil wars and the 2003-2006 transition period.¹⁸³

The government and the international community have sponsored a peace and security conference that took place in January 2008 in Goma (North Kivu) to end the insecurity in the Kivus,¹⁸⁴ which has already caused the displacement of 400,000 people.¹⁸⁵

¹⁷⁹ INTERNATIONAL CRISIS GROUP, *supra* note 177, at 2.

¹⁸⁰ HUMAN RIGHTS WATCH, RENEWED CRISIS IN NORTH KIVU, 42ff (Human Rights Watch 2007).

¹⁸¹ GLOBAL WITNESS, TIN, *supra* note 18, at 4.

¹⁸² *Id.* See Joe Bavier, *Congo Catches Army Smuggling Minerals – Minister*, REUTERS (U.K.), Mar. 24, 2008, available at <http://uk.reuters.com/article/latestCrisis/idUKL2450976320080324>.

¹⁸³ Ernest Harsch, *supra* note 86, at 15 (stating that the military reforms achieved include better training, stronger command, improved living conditions and the prosecution of officers and troops who carry out atrocities).

¹⁸⁴ Zachary Ochieng, *Congo-Kinshasa: Suffering of Congolese Shames Humanity*, THE EAST AFRICAN (Kenya), Apr. 7, 2008, available at <http://allafrica.com/stories/200804071477.html>.

3.3.2. Mining in Katanga

The Katanga province, located in the South East of the DRC, is one of the world's richest copper and cobalt producing areas. Unlike the Kivus, the mining industry in Katanga has a formal and an informal sector.¹⁸⁶ In the formal sector, foreign or multinational companies engage in large-scale, industrial mining activities, using modern methods of mineral exploitation. In the informal sector, self-employed artisanal miners dig for minerals independently, although the provincial government is increasingly enforcing mining regulations.

The main reasons why the peoples do not control mineral resources in the DRC are corruption and the inconsistent application of the Mining Code. Corruption and the state's failure to comply scrupulously with the Mining Code, especially in the informal sector, have prevented the Congolese peoples from controlling mineral resources.

Effectively, the mining sector in Katanga is characterized by a system of widespread and institutionalized corruption at all levels. Government officials, including high level political actors, are involved in the negotiation of mining contracts, in siphoning off the profits from the mineral exploitation in Katanga, and in collusions with trading companies in circumventing control procedures and the payment of taxes.¹⁸⁷ The exploitation of mineral resources has enriched a small powerful elite, made up of politicians and businessmen, leaving the vast majority of people in abject poverty.¹⁸⁸

In the formal sector, the state entered into large mining contracts under the transitional government since 2004.¹⁸⁹ Many people in Katanga have complained about the imbalanced nature of these contracts, which ensure disproportionately huge profits for foreign or multinational companies and a negligible amount for the state mining company Gécamines.¹⁹⁰ These complaints have been reinforced by the lack of transparency surrounding these contracts and the absence of public debate and

¹⁸⁵ Paul Lagasse, *Member Charities Struggle to Maintain Lifelines to Embattled Democratic Republic of Congo Region*, GLOBAL IMPACT, Feb. 2008, available at <http://www.charity.org/site/apps/nlnet/content2.aspx?c=gtJUJfMQlqE&b=2506271&ct=5026207>.

¹⁸⁶ GLOBAL WITNESS, CORRUPTION, *supra* note 8, at 4.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 5.

¹⁹⁰ *Id.*

consultation.¹⁹¹ After an extensive review of these contracts, the Congolese government announced in March 2008 that it is to cancel many and to renegotiate others.¹⁹²

The other major reason why the peoples do not control mineral resources is the fact that the state does not consistently apply the Mining Code. More recently, however, the newly elected Katanga governor Moïse Katumbi Chapwe has been making notable and significant efforts to regulate both the formal and informal sector by applying the provisions of the Code.¹⁹³ These efforts generated increased fiscal revenues, a form of material benefit in terms of our definition of control.

As we have just said, the state does not fully implement several provisions of the Mining Code. The export of minerals is one example in point. A significant proportion of the copper and cobalt is mined informally, though the provincial government has reduced the illegal export of minerals. But a year ago, experts believed that 90 per cent of mining exports were illegal.¹⁹⁴ Another example of the state's poor compliance with the Code is in the area of mineral value-addition. Many minerals exploited artisanally are exported raw, which means that, even when these exports are declared, the DRC is still losing out on the higher prices it could fetch had it processed the minerals before exporting them.¹⁹⁵ A third example of the defective application of the Mining Code is the state's failure to regulate the informal or artisanal mining sector. For instance, the state has failed to protect artisanal miners from being extorted and exploited by trading companies and government officials from the Ministry of Mines, the police, customs, intelligence services, and local government offices, and even by the association claiming to represent the rights of artisanal miners ('*Exploitants Miniers Artisanaux du Katanga*' (EMAK)).¹⁹⁶ Moreover, the state has failed to provide safe working conditions for artisanal miners, who work in appalling conditions, without protective clothing,

¹⁹¹ *Id.*

¹⁹² *Mining Deals Cancelled in Congo*, BBC (Eng.), Mar. 20, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7306325.stm>.

¹⁹³ See e.g. *Police Clash With DR Congo Miners*, BBC (Eng.), Mar. 7, 2008 Available at <http://www.bbc.co.uk>.

¹⁹⁴ *RDC: Prêt de 5 Mds USD de la Chine pour les Infrastructures et les Mines*, LE POTENTIEL (Dem. Rep. Congo), Sept. 18, 2007, available at http://www.lepotentiel.com/afficher_article.php?id_edition=&id_article=52375.

¹⁹⁵ GLOBAL WITNESS, CORRUPTION, *supra* note 8, at 4.

¹⁹⁶ GLOBAL WITNESS, CORRUPTION *supra* note 8, at 5.

equipment or training, and die every year in preventable accidents, usually when they are imprisoned by collapsing mineshafts.¹⁹⁷

In conclusion, the probative value of this description of the exploitation of mineral resources in the DRC is to establish beyond reasonable doubt that the state has violated the rights of the peoples to control mineral resources. With the state failing to provide security, reduce corruption, regulate the mining sector, and comply with the provisions of its Mining Code, the peoples in Katanga and the Kivus, as in the rest of the DRC, are dirt-poor and do not control mineral resources.

¹⁹⁷ *Id.*

4. THE LEGAL JUSTIFICATIONS FOR A PEOPLE-BASED CONTROL OF MINERAL RESOURCES

We have seen that there is generally a relationship between mineral resources and human rights and have just shown that, in the particular case of the DRC, this relationship has led to human insecurity and instability. The crucial question of this paper is how the law can justify the proposition that this relationship should facilitate human development. Put another way, the central issue is: What are the legal grounds for holding that peoples are entitled to control mineral resources in the DRC?

Our main submission is that the scholarship on the legal justifications for a people-based control of mineral resources does not fully articulate the right to control mineral resources (RCMR). We develop this submission in three major stages: First, we first enumerate and discuss the relevant principles and rules of Congolese and international law; second, we argue that the RCMR is a right independent from these principles and rules; and, third, we outline the contents of the RCMR. Unlike the first and second stage, the third stage is the object of the next chapter.

In order to avoid that confusion over the use of concepts clouds the principal argument of the paper, some basic distinctions should be made before a full discussion of the legal principles and rules justifying the argument.

4.1. Basic distinctions

4.1.1. Control versus ownership of mineral resources

The contents and implications of ownership and control are fundamentally different. Ownership is defined as:¹⁹⁸

The bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable.

¹⁹⁸ BLACK'S LAW DICTIONARY 1138 (8th ed. 1999).

Control is defined in a legal sense as 'the power or authority to manage, direct or oversee'.¹⁹⁹ With the legal sense of control in mind, state control of mineral resources would refer in practice to the oversight and management powers of the Congolese executive over mineral resources.

However, readers of the present paper should therefore distinguish between the legal meaning of control and the meaning of control in this paper. Control is in this paper defined in terms of participation and benefit of mineral resources.²⁰⁰ Thus, controlling mineral resources means that the state or the peoples participate in the exploitation of mineral resources²⁰¹ and benefit in material terms from such exploitation.

A major point of this paper is not only to postulate that control requires participation and benefit but also to utilize the concept as a benchmark for the evaluation of the legal arguments for the control of mineral resources. Here, the underlying assumption is that if the factually descriptive definition of control is the purpose of the paper, then the legal justifications for such control should be evaluated in light of the factually descriptive definition.

International law is ambiguous as to whether natural resources are owned or controlled by the peoples or the state.²⁰² Although the two concepts are closely related, the argument expounded in the paper is that, whereas the peoples own mineral resources, the state is the expression of that ownership. We elaborate on this argument and its implications below.

¹⁹⁹ *Id.* at 353.

²⁰⁰ See Chapter 1.

²⁰¹ 'Participation' may include minimum participation in terms of shareholding in the capital invested, for instance by allocating shares to representatives of local communities in the mining project companies, although the Mining Code does not prohibit nor permit it.

²⁰² For those arguing that the right of sovereignty over natural resources belongs to the peoples, see Emeka Duruigbo, *supra* note 26, at 47; Alice Farmer, *supra* note 21, at 435; Robert Dufresne, *supra* note 80, at 354; ANTONIO CASSESE, *The Self-Determination of Peoples*, in THE INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 103 (LOUIS HENKIN ed., 1981); THEO VAN BOVEN, *Human Rights and Rights of Peoples*, 6 EUR. J. INT'L. 461, 470 (1995); J. Oloka-Onyango, *Peoples' Rights* *supra* note 25, at 890; JAMES CRAWFORD, *The Rights of Peoples: 'Peoples' or 'Governments'?*, in THE RIGHTS OF PEOPLES, 55, 63 (JAMES CRAWFORD ed., 1988). For those arguing that the right belongs to the state, Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A.J. 463, 464 (1963); Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 48, 92 (1995); the dissenting opinion of Judge Skubiszewski in *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90 (June 30); *Libyan American Oil Co. (LIAMCO) v. Libya*, reprinted in 20 I.L.M. 1, 53 (1981).

4.1.2. State versus people

Frequently, political scientists and other commentators use 'state', 'government' and 'people' interchangeably on the assumption that in a democracy the state is identical to the people, if only because the state acts on behalf of the people. However, the two concepts are in fact as in law distinct. In fact, the state in the DRC often competes with peoples for the control of mineral resources in a manner that strips the peoples of their RCMR. Joe Oloka-Onyango explains this fact in a way that applies to a great extent to the DRC:²⁰³

[S]tates in modern times serve less to facilitate the dynamic of self-determination than they serve to impede it. Their most important function is as a direct competitor with their own peoples for the resources of the territories they govern. This has led states to invest and expand upon their monopoly over the means of violence.

In addition, equating the state and the peoples is unwelcome because of the real danger that the exploitation of mineral resources will only benefit elites while accentuating socio-economic hardship and inequalities.²⁰⁴

Those are some of the reasons why the state cannot be equated to peoples.

In law, article 1 of the Montevideo Convention defines a state in international law as possessing the following qualifications:²⁰⁵ (a) a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to enter into relations with other states.

The paper defines 'peoples', using the plural form, as referring to the diverse social groups in the DRC.²⁰⁶ Therefore, even if 'state' includes 'peoples' insofar as it refers to the 'permanent population' of a defined territory, the two concepts are different.

The existing body of scholarship on the RCMR shows that there are several grounds in law, whether municipal, regional or international, for peoples to press for the control of mineral resources. The actual ground or grounds which individuals may rely on in a

²⁰³ J. Oloka-Onyango, *Heretical Reflections on the Right to Self-determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L REV. 151, 206 (1999) [hereinafter Oloka-Onyango, *Self-determination*].

²⁰⁴ Emeka Duruigbo, *supra* note 26, at 44; Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 447 (1981).

²⁰⁵ Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

²⁰⁶ See Chapter 1.

given case is a matter of strategic and tactical calculation rather than a mandatory condition of Congolese or international law.

4.2. Justifications in municipal law

Under municipal law, justifications for the argument that peoples are entitled to control mineral resources are found in the Constitution, the Mining Code and Mining Regulations. There is at least one justification under each generation of human rights, namely the principle of popular sovereignty (civil and political rights), socio-economic rights and the right of people to enjoy their national wealth (peoples' rights). However, the pivotal justification is the right of peoples to enjoy their national wealth, from which stem the obligation to redistribute natural wealth equitably and the obligation to guarantee the right to development. We now discuss the right to enjoy national wealth and the duty to redistribute that wealth equitably, but we discuss the right to development in another section below under the heading 'justifications in international law'.

4.2.1. The peoples' right to enjoy national wealth

Title II of the Congolese Constitution specifically provides for peoples' rights (*droits collectifs*).²⁰⁷ Title II includes article 58, which protects the right of peoples to enjoy their national wealth, the paramount and most explicit justification for the peoples' right to control mineral resources. Article 58 of the Constitution stipulates that:

All Congolese have the right to enjoy their national wealth. The State has the duty to redistribute equitably and to guarantee the right to development.

The right to enjoy national wealth is the municipal counterpart of the peoples' right to control mineral resources par excellence. It is also clear from the text of article 58 that the right to enjoy national wealth imposes on the state two obligations, namely the duty to redistribute equitably national wealth and the duty to guarantee the right to

²⁰⁷ Constitution arts. 50-61.

development. The downside of the right to enjoy national wealth, as formulated in the Constitution, is that its skeletal form hardly says anything about its contents. We argue below that the concept of ‘control’ should add flesh and substance to the right to enjoy national wealth.

Some interpreters may contend that it does not necessarily follow from the structure of the text of article 58 that the right to enjoy national wealth and the two obligations are related, if only because the right and the two obligations appear in two different sentences. However, the position of the right to enjoy national wealth at the beginning of the article indicates its attribute as a ‘topic sentence’. The position of the right in the first sentence of the article informs the interpreter that what immediately follows the first sentence is but an elaboration of the first sentence. Furthermore, the concept of ‘enjoyment’ in the right is logically and semantically connected to and readily compatible with the concepts of ‘equitable redistribution’ and ‘development’ in the two obligations.

The contextual interpretation of article 58 corroborates the affirmation that the right to enjoy national wealth is related to the duty to redistribute wealth equitably and to guarantee the right to development. For one thing, the sequencing of article 58 and its neighboring articles discloses a logical progression. Article 56 prohibits conduct that deprives peoples of the livelihood they derived from their own and from natural wealth; article 57 penalizes such conduct; article 58 provides for the right to enjoy natural wealth, and article 59 provides for the right to enjoy the common property of humankind. This progression of articles demonstrates that within and across these articles the right to enjoy national wealth is the unifying right and theme.

4.2.2. The duty of equitable redistribution

The duty of equitable redistribution amplifies the second element of control, which requires that peoples benefit materially from mineral resources. Interestingly, the inclusion of the state’s ‘duty to redistribute equitably’ national wealth inescapably leads up to the implication that the Congolese Constitution creates a right of peoples to the equitable redistribution of national wealth and, inferentially, mineral resources.

In French, ‘equitable’ means ‘consistent with equity’ and ‘equity’ means ‘the virtue of a thing which or person who possesses a natural sense of justice, who respects the rights

of individuals, and who is impartial'.²⁰⁸ Read with the phrase '[a]ll Congolese' in the first sentence of article 58, the duty of the state to national wealth 'equitably' imposes on the state a duty to redistribute mineral wealth equally and in a non-discriminatory manner. Thus, the duty of equitable redistribution insinuates that distributive inequalities may account for the fact that Congolese peoples do not benefit from the exploitation of mineral resources.

The Mining Code appears to make an attempt to redistribute mining revenues equitably through its distribution formula of mining royalties. The public treasury, which receives all mining royalties, must allocate 60 per cent of the royalties to the central government, 25 per cent to the provincial government where the project is located, and 15 per cent to the local government where the mineral exploitation activities take place.²⁰⁹ The principle of non-exoneration, which precludes the state from granting tax exonerations, consolidates the distribution formula of mining royalties.²¹⁰ It also goes without saying that an efficient redistribution is impossible without maximizing revenues.

4.2.3. Popular sovereignty

The legal principle

One justification for the control of mineral resources by the peoples is the principle of popular sovereignty.²¹¹ Since the exposition of this principle by the French Renaissance philosopher Jean Bodin, popular sovereignty has been of incredible importance. It is in fact the foundational myth of the modern state.

Article 5 of the Congolese Constitution enshrines the principle of popular sovereignty:

National sovereignty belongs to the people. All [state] power derives from the people who exercise it directly by way of referendum or elections and indirectly through representatives.

²⁰⁸ LE PETIT LAROUSSE ILLUSTRÉ 426 (2006).

²⁰⁹ C. MIN. art. 242.

²¹⁰ Exposé.

²¹¹ SCOTT VEITCH ET AL., JURISPRUDENCE: THEMES AND CONCEPTS 10ff (Routledge-Cavendish 2007)(demonstrating that sovereignty there are other points of attribution of sovereignty apart from the people).

The principle popular sovereignty says that there is one entity that can make and unmake laws. That entity is the fiction of the 'people',²¹² which ultimately exercises state authority through the democratic institutions of the state and freely chosen representatives.²¹³ After all, it is '[w]e, the Congolese people, united by destiny and history around the noble ideals of liberty, fraternity, solidarity, justice, peace, and labor,...[who] solemnly declare that we adopt the present Constitution.'²¹⁴

By laying down that '[a]ll power derives from the people', the second sentence of article 5 implies that the power of the state to oversee, manage and regulate the mining sector ultimately derives from the Congolese peoples. Moreover, there is nothing in the text of article 5 that indicates that the peoples are confined to referenda or elections to exercise that power, nor does it state that peoples can only be represented by state officials.²¹⁵

Despite the practical and legal constraints of the principle of popular sovereignty, the basic idea is that political systems should be justified and justifiable by some form of popular consent. This is done in practice by the organization of periodic and regular elections.

Though the Mining Code and the Mining Regulations may be seen as a manifestation and a product of popular sovereignty, neither the Code nor the Regulations expressly provide for it.

Evaluation of the legal principle

The principle of popular sovereignty is pivotal for the concept of control because one of the two elements of our definition of control is participation.²¹⁶ The fact that control requires participation means that control is essentially a claim for a certain form of

²¹² AUSTIN RANNEY, GOVERNING: AN INTRODUCTION TO POLITICAL SCIENCE 279 (CBS College Publishing 1982).

²¹³ Universal Declaration of Human Rights art. 21(3), G.A. Res. 217A, at 71, U.N. G.A.O.R., 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948)(declaring that the will of the people shall be the basis of the authority of government)

²¹⁴ Constitution preamble.

²¹⁵ MUKADI BONYI, PROJET DE CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO: PLAIDOYER POUR UNE RELECTURE 33 (Centre de Recherche de Droit Social 2005)(stating that art 5 allows for modes of exercise of power other than by elections and referenda).

²¹⁶ See Chapter 1.

democracy. Effectively, one important principle or pillar of the concept of democracy is popular sovereignty. In that sense, the principle of popular sovereignty increases the odds of a people-based control of mineral resources.

Whereas the principle of popular sovereignty is provided for in the Congolese Constitution,²¹⁷ in practice the principle is not a very workable idea. First, the sheer multiplicity, diversity, fluidity of identity and the increasing fragmentation in the Congolese society dilute the fiction of 'people' imbedded in the principle of popular sovereignty.²¹⁸ Effectively, social fragmentation means that more often than not certain social groups exercise state power and control mineral resources at the exclusion or expense of other groups. Second, popular sovereignty is not workable because of what the German sociologist Robert Michels referred to as the 'iron law of oligarchy'.²¹⁹ That rule says that, no matter the political structures of state or government, a minority, of whatever description, will always take decisions on behalf of the majority. In addition, popular sovereignty assumes that the representatives elected by the peoples act in the latter's interest, which is entirely false in view of DRC's post-independence history.

Finally, the idea of popular sovereignty does not guarantee that a democratically elected government will ensure that peoples benefit from the exploitation of mineral resources. The government can be properly authorized by free and fair elections and yet fail to respond to the socio-economic demands of its citizenry.

On balance, however, the greatest substantive force of the principle of popular sovereignty is that it is the ultimate justification for a people-based control of mineral resources. The challenge is to create the conditions conducive to the realization of the principle.

4.2.4. Democratic rights

Constitutional provisions

²¹⁷ Constitution art. 6.

²¹⁸ The Congolese population comprises no less than 365 ethnic groups: ISIDORE NDAYWEL È NZIEM, HISTOIRE GÉNÉRALE DU CONGO: DE L'HÉRITAGE ANCIEN À LA RÉPUBLIQUE DÉMOCRATIQUE 256-7 (Duculot 1998).

²¹⁹ ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY (Eden Paul & Cedar Paul trans., The Free Press, 1915).

A number of democratic rights can strengthen the claim for greater popular control of mineral resources. These rights include the right to equality,²²⁰ non-discrimination,²²¹ the right to participate in government through elections,²²² freedom of conscience,²²³ freedom of expression,²²⁴ freedom of and access to information,²²⁵ freedom of assembly,²²⁶ the right to demonstrate,²²⁷ the right to petition,²²⁸ freedom of movement,²²⁹ and the right to receive information to guarantee transparent and accountable resource exploitation.²³⁰

Evaluation of democratic rights

The greatest advantage of democratic rights is to remind that the realization of these rights is a safest way to achieving the control of mineral resources. Democratic rights, by ensuring rights of participation in a non-discriminatory manner, meet the first element of our definition of control.²³¹ The other advantage of democratic rights is that it affords a platform for the audit of government practices in the mining sector by non-governmental organizations (NGOs) and civil society organizations (CSOs). NGOs and CSOs are key stakeholders in creating the rights-protective settings conducive to the control of mineral resources by the people.²³²

Still, the mere realization of democratic rights does not guarantee that the peoples will benefit from the exploitation of mineral resources, which is the second element of our definition of control. Policy makers will have also to address and resolve issues of good governance, administrative efficiency and institutional capacity.

²²⁰ Constitution arts. 11 and 12.

²²¹ Constitution arts. 13 and 14.

²²² Constitution art. 5.

²²³ Constitution art. 22.

²²⁴ Constitution art. 23.

²²⁵ Constitution art. 24.

²²⁶ Constitution art. 25.

²²⁷ Constitution art. 26.

²²⁸ Constitution art. 27.

²²⁹ Constitution art. 30.

²³⁰ GLOBAL WITNESS, TIN, *supra* note 17, at 5.

²³¹ See Chapter 1.

²³² See Peter Takirambudde & Kate Fletcher, *Civil Society in Governance and Poverty Alleviation: A Human Rights Perspective*, in DEMOCRATIC REFORM IN AFRICA: ITS IMPACT ON GOVERNANCE AND POVERTY ALLEVIATION, 68-78 (Muna Ndulo ed., 2006).

4.2.5. Socio-economic rights

The law on socio-economic rights

Peoples can use socio-economic rights to urge the Congolese government to take reasonable steps to give effect to the right of peoples to control mineral resources.²³³

Socio-economic rights are those entitlements that peoples possess and that they can enforce against the government. Unlike civil and political rights, socio-economic rights do not require the state to refrain from doing something but require the state to take positive action. The necessity of realizing socio-economic rights for the popular control of mineral resources resides in the pervasive socio-economic immiseration of the majority of Congolese peoples.

In addition to the rights recognized in the CESC, ²³⁴ the Congolese Constitution protects a stream of social, economic and cultural rights. The relevant socio-economic rights include the right to invest;²³⁵ the right to work,²³⁶ to form a trade union²³⁷ and other labor rights,²³⁸ and freedom of association.²³⁹

Material benefits and socio-economic rights

It bears cautioning that the concept of 'benefit' encapsulates more than socio-economic rights. This is because mining can benefit the Congolese peoples materially in a variety of ways. Most linkages work directly by generating income and creating opportunities for growth for lateral and downstream businesses.²⁴⁰ There are also indirect linkages through investments.²⁴¹ Investments enable better social services, catalyze

²³³ The well-established international law principle of *pacta sunt servanda* obliges the state to take legislative and other measures to give effect to the rights and duties set out in the treaties the state has ratified: African Charter art. 1; CESC art. 2(1); Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), U.N. Doc. E/1991/23, Annex III (stating that while the CESC provides for progressive realization and recognizes the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect).

²³⁴ The DRC ratified the CESC on 1 Feb 1977.

²³⁵ Constitution art. 35.

²³⁶ Constitution art. 36.

²³⁷ Constitution art. 38.

²³⁸ Constitution arts. 39 and 41.

²³⁹ Constitution art. 37.

²⁴⁰ Monika Weber-Fahr *et al.*, *supra* note 31, at 440ff.

²⁴¹ *Id.*

improvements in physical infrastructure, and provide transfer of patented technologies, access to expertise, scarce managerial skills, and overseas market networks.²⁴²

Evaluation of the socio-economic rights

The claim that peoples are entitled to control mineral resources is another way of saying that the state must enforce socio-economic rights. The advantage of socio-economic rights as a justification for pursuing claims for the control of mineral resources is that they provide a yardstick for determining some of the material benefits required by the concept of control. In other words, peoples will control mineral resources if, in addition to allowing people to participate in decision-making, the state provides education, creates employment, attracts investment, protects labor rights, and so forth. Another advantage is that, with reference to the implementation of rights, the text of the Constitution, unlike that of the CESC, is silent on both civil and political rights and socio-economic rights. The constitutional text does not stipulate whether the implementation of socio-economic rights is progressive and subject to the available resources. Like it was argued with regard to the African Charter, from which incidentally the Congolese Constitution draws inspiration, this omission has positive implications. It may imply first that socio-economic rights are justiciable and second that the implementation of socio-economic rights is immediate and absolute, which in turn is a reflection of the indivisibility of all human rights.²⁴³

However, the socio-economic rights embodied in the Congolese Constitution do not directly and expressly provide for any right for the peoples to control mineral resources. In fact, socio-economic rights are vague and uncertain as to their contents. But there is no doubt that the effective enforcement and implementation of socio-economic rights, whatever their contents, will result in the control of mineral resources by the peoples.

The Congolese Constitution contains other provisions linking mineral resources and human rights, but they are not relevant for our present purposes. Nevertheless, it

²⁴² JAMES C. BAKER, *FOREIGN DIRECT INVESTMENT IN LESS DEVELOPED COUNTRIES: THE ROLE OF ICSID AND MIGA 5* (Quorum Books 1999).

²⁴³ Shedrack C. Agbakwa, *Reclaiming humanity: Economic, social, and cultural rights as the cornerstone of African human rights*, 5 *YALE HUM. RTS. & DEV. L.J.* 177 (2002) (contending that human rights discourse on the indivisible bundle of rights must be put into practice in the African context).

deserves mentioning that the legal justifications for the argument that the peoples have the RCMR are not absolute. The Constitution limits rights by subjecting them to a regime of legal duties which, one African scholar controversially stated, may temper the individualism of human rights norms with the individual's obligations to the society.²⁴⁴ The Constitution subjects the peoples' RCMR to, amongst others, the duty to respect national laws,²⁴⁵ to prevent any attempt to upset the constitutional order,²⁴⁶ to fulfill its obligations vis-à-vis the state,²⁴⁷ and to protect public property and the public interest.²⁴⁸

4.2.6. Relevant provisions of the Mining Code

The Mining Code is no human rights instrument and it thus comes as no surprise that it does not explicitly provide for the right to control mineral resources. Nonetheless, by virtue of the provisions of article 215 of the Constitution, interpreters of the Code are by necessary implication obliged to read international human rights norms into the Code. To recall, article 215 is the incorporation clause in that it declares that international law is superior to the laws of the DRC.

Unlike the other principles and rules presented in this chapter, the provisions of the Code do not directly empower peoples to claim the RCMR, but they are nonetheless justificatory with regard to the RCMR. In addition, the Code's provisions confer specific benefits as opposed to the general right to control mineral resources. First, foreign and Congolese investors stand to benefit from the Code because the Code defines the role of the state as a regulator while leaving the task of developing the mining industry to private investors.²⁴⁹ Articles 34 (right to private property) and 35 (right to private initiative for both local peoples and foreign nationals) reinforce the role of private investors in the development of the private sector. By the same token, the Code offers a

²⁴⁴ MAKAU MUTUA, *supra* note 73, at 82 (arguing that the legal duties contained in the African Charter on Human and Peoples' Rights reflected African culture and philosophy). In addition, *Media Rights Agenda and Others v. Nigeria* (2000) AHRLR 200 (ACHPR 1998) (*held*, that the only legitimate reasons for limitations to the rights set out in the African Charter are found in the legal duties on individuals as provided for in art. 27(2) of the Charter, which lays down that the rights shall be 'exercised with due regard to the rights of others, collective security, morality and common interest'). The African Charter inspired the legal duties imposed by the DRC Constitution on citizens.

²⁴⁵ Constitution art. 62.

²⁴⁶ Constitution art. 64.

²⁴⁷ Constitution art. 65.

²⁴⁸ Constitution art. 66.

²⁴⁹ C. MIN. art. 8.

package of investment guarantees, ranging from protection against unlawful expropriation,²⁵⁰ to compensation (*indemnité équitable*),²⁵¹ to stabilization clauses,²⁵² to dispute settlement forums.²⁵³ The Code also protects the rights of peoples during the mining titles application process by allowing recourse to wide range of dispute settlement forums, from national administrative courts to the ICSID.²⁵⁴

Second, the Code protects the rights of Congolese peoples by excluding foreign nationals from the definition of ‘traders’.²⁵⁵ In addition, whereas foreign and local investors own the products extracted or processed,²⁵⁶ one can arguably claim that the stipulation that the state owns all mineral deposits is aimed at protecting the rights of Congolese peoples.²⁵⁷

Fourth, the requirement that applicants for an exploitation title provide an environmental impact study and manage plan as well as the requirement to inform and consult local peoples clearly protect and benefit the peoples. Indeed, the objectives of environmental management plan include increasing the well-being of local populations.²⁵⁸ Further, the liability of the persons responsible for environmental damage obviously protects the peoples.²⁵⁹

Sixth, to the extent that the Code’s tax, foreign exchange control and securities regime has the practical effect of attracting investment in the mining sector, the Code indubitably benefits the peoples. This is all the more so because the development of a mining sector is capital-intensive. Either multinational companies or states are able to exploit mineral resources in a manner and at a scale that can benefit the whole economy because mining necessitates very extensive knowledge, skills, and technology.²⁶⁰ In the absence of sizeable capital inflows, it is hard to imagine how the

²⁵⁰ C. MIN. art. 275.

²⁵¹ *Id.*

²⁵² C. MIN. art. 276.

²⁵³ C. MIN. art. 312-320. The Code allows for the referral of disputes to administrative courts (arts. 313-314), ordinary or judicial courts (arts. 315-316) and to arbitration (arts. 317-320).

²⁵⁴ C. MIN. arts. 312 and 319.

²⁵⁵ C. MIN. art. 1 (33).

²⁵⁶ C. MIN. art. 3.

²⁵⁷ *Id.*

²⁵⁸ Mining Regulations art. 452.

²⁵⁹ Mining Regulations art. 405.

²⁶⁰ See Ian Gary, *supra* note 26, at 41.

state can develop its mining industry and how the mining industry in turn can significantly benefit the peoples and the economy as a whole.

Eighth, the Constitution and the Code circumscribe the power of the Minister of Mines to grant and cancel mining titles. The Constitution confers upon provincial governments concurrent jurisdiction with respect to land and mining rights²⁶¹ and exclusive jurisdiction with respect to provincial mining programs.²⁶² The Code specifies that provincial governments may grant mining authorizations subject to the conditions set out in the Code.²⁶³

Finally, certain infractions penalized in the Code – like the theft, the illegal purchase and sale of minerals and the corruption of civil servants – indirectly benefit the peoples. However, the Constitution criminalizes the violation of the peoples' right to enjoy their wealth.²⁶⁴ This criminalization provides direct protection to the right of Congolese peoples to control mineral resources.

Evaluation of the Mining Code

The downside of the Mining Code is that it is not a human rights instrument. It does not provide rights to individuals to charge the state to realize human rights. One of the functions of the Mining Code is to solve disputes between investors and the state.

Another problem with the Mining Code is that it approaches dispute resolution from a judicial perspective. In that sense, the Mining Code is limited in that it is unable to solve issues on mining that for some or other reason cannot reach the courts or be resolved by them only. The judicial approach is limited in that it is only reactively – as opposed to proactively – that courts mediate disputes between human rights and investment issues.²⁶⁵ Hence the adoption in this paper of advocacy and litigation as concurrent strategies for the vindication of the right to control mineral resources.

²⁶¹ Constitution art. 203(16).

²⁶² Constitution art. 204(19).

²⁶³ C. MIN. art. 11.

²⁶⁴ Constitution art. 57.

²⁶⁵ Anthony Woodiwiss, *The Law Cannot Be Enough: Human Rights and the Limits of Legalism*, in THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW 34 (Saladin Meckled-García & Başak Çali eds. 2006)(stating that human rights tend not to be proactively enforced, whether by specialized agencies or through the compliance with certain legal requirements. Instead, human rights tend to be reactively enforced on the basis of victim complaints and only in relation to a narrow range of social relationships.)

4.3. Justifications in regional and international law

The legal relevance of regional and international law for the RCMR is the fact that regional and international law, by virtue of article 215 of the Congolese Constitution, supersedes municipal law, which includes the Mining Code.²⁶⁶ In two cases, *Eliwo* and *Massaba*, military courts applied international law despite the existence of relevant provisions in national legislation. In the *Eliwo* case, which involved war crimes and crimes against humanity, the military court of Mbandaka directly applied the provisions of the Rome Statute of the International Criminal Court (ICC).²⁶⁷ Subsequently, in the *Massaba* case, which also involved war crimes, the military court of Ituri, citing the *Eliwo* case with approval, directly applied the provisions of the Rome Statute.²⁶⁸ In both cases, the court relied on article 215 of the Constitution and preferred the provisions of the Rome Statute over the provisions of municipal law, which they considered vague and not clearly defined.

If the justifications for the RCMR in municipal law sufficed, they would have been preferable to those in regional and international law. In fact, if they were effective, there would not have been any need to search regional and international legal regimes for ways and means to strengthen the enforcement of the RCMR. Sadly, the DRC has weak enforcement mechanisms.

There is a great measure of agreement on the nature of the DRC as a weak state. The DRC has been variously described as a weak state,²⁶⁹ a vampire state,²⁷⁰ and a collapsed or failed state.²⁷¹ Moreover, in the DRC, as in most African countries, the

²⁶⁶ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Democratic Republic of Congo*, ¶ 8, CCPR/C/COD/CO/3 (26 April 2006) (noting that, under art. 215 of the Congolese Constitution, the authority of treaties supersedes that of laws and that, according to the Congolese delegation before the Committee, the CCPR may be and is sometimes directly invoked before national courts).

²⁶⁷ Tribunal Militaire de Garnison [lower military court] Mbandaka, January 12, 2006, [unreported][Democratic Republic of Congo](on file with author).

²⁶⁸ Tribunal Militaire de Garnison [lower military court] Ituri, March 24, 2006, [unreported][Democratic Republic of Congo](on file with author).

²⁶⁹ TOM YOUNG, *READINGS IN AFRICAN POLITICS* 5 (Indiana University Press 2003).

²⁷⁰ ALEX THOMPSON, *AN INTRODUCTION TO AFRICAN POLITICS* 205ff (Routledge 2000).

²⁷¹ JAKKIE CILLIERS, *HUMAN SECURITY IN AFRICA: A CONCEPTUAL FRAMEWORK FOR REVIEW* 23 (African Human Security Initiative 2004); JOHN DUGARD, *supra* note 28, at 109; WILLIAM RENO, *WARLORD POLITICS AND AFRICAN STATES* 147ff (Lynne Rienner Publishers 1999); John Daniel & Roger, *Conclusion: False*

judiciary suffers from institutional insufficiencies relating to legitimacy and accessibility, resource constraints, and enforcement mechanisms.²⁷² The astonishingly immense size of the DRC compounds the weakness of the state to implement its own policies and laws.

In such circumstances, the strategic utility of international law, and international human rights in particular, is to enhance the enforcement by the state of the RCMR. A study conducted in 20 different states around the world by Heyns and Viljoen revealed that international law has a tremendous influence on the understanding of human rights and their limits at the domestic level.²⁷³ Another benefit of international human rights law in the DRC is the real potential of human rights for multiplying the opportunities for peoples to claim the right to control mineral resources. The nature of the Congolese state necessitates the multiplication of advocacy opportunities. Because peoples cannot fully trust the enforcement mechanisms of the state, they must be able to advocate the control of mineral resources in several forums and under several normative systems, whether national, regional or international. Hence the importance of the regional and international law justifications for the control of mineral resources.

The most important international law justifications for the control of mineral resources are the principle of economic self-determination, sovereignty over natural resources and the right to development. The list of legal justifications is not exhaustive, though it represents the major possible arguments for the RCMR. Moreover, it is imperative to see these justifications as being mutually reinforcing and constitutive rather than mutually exclusive.²⁷⁴ Whereas all the legal justifications or arguments are instrumental for our purposes, the tactical and comparative advantage of each justification or argument will depend on the circumstances. In the course of advocacy and litigation, activists and lawyers will have to interpret the legal instruments which encapsulate

Dawn or Democratic Opening?, in VOTING FOR DEMOCRACY: WATERSHED ELECTIONS IN CONTEMPORARY ANGLOPHONE AFRICA 243 (John Daniel *et al.* eds. 1999).

²⁷² See Abdullahi An-Na'im, *The Legal Protection of Human Rights in Africa: How to do more with Less*, in HUMAN RIGHTS: CONCEPTS, CONTESTS, AND CONTINGENCIES (Austin Sarat & Thomas R. Kearns eds. 2001).

²⁷³ Christof Heyns & Frans Viljoen, *The Impact of United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483 (2002).

²⁷⁴ All justifications for the RCMR in international law appear to share in common a connection to the principle of self-determination.

these principles in good faith, according to their ordinary meaning and in light of their purpose and goals.²⁷⁵

4.3.1. Economic self-determination

The principle

Under international law, peoples can claim control of mineral resources by virtue of the right to economic self-determination or a people's capacity to dispose freely of natural wealth and resources.

A few key legal instruments enshrine the principle of economic self-determination.²⁷⁶ Of these instruments, the CCPR and the ESCR are the most authoritative. Article 1(2) of both CCPR and ESCR stipulates that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Articles 20 and 21 of the African Charter on Human and Peoples' Rights reinforces article 1(2) of the two UN covenants. Article 20(1) of the African Charter provides that:

All peoples shall have...the unquestionable and inalienable right to self-determination. They shall determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

In addition thereto, article 21 of the African Charter lays down that:

- (1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
- (2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

²⁷⁵ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

²⁷⁶ Universal Declaration of Human Rights arts. 21 and 22, *supra* note 213; Integrated Economic Development and Commercial Agreements, G.A. Res. 523 at 20, UN G.A.O.R. 6th session, Supp. No. 20 UN Doc. A/2119 (Jan. 12 1952); Right to Exploit Freely Natural Wealth and Resources, G.A. Res. 626(VII) *supra* note 67; Permanent Sovereignty Resolution; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 U.N. G.A.O.R. 15th Session Supp. No. 16 U.N. Doc. A/4684 (Dec 14, 1960).

- (3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

Alice Farmer's modern rendition of the principle identifies the following distinctive provisions:²⁷⁷ (1) All peoples must be able to freely dispose of their mineral resources (free disposition);²⁷⁸ (2) the peoples of a state have the right to participate in decisions regarding the disposal of mineral resources;²⁷⁹ (3) mineral resources must be used in the interest of peoples;²⁸⁰ (4) peoples must be able to use their mineral wealth in a manner that benefits them;²⁸¹ economic-self determination is a permanent right;²⁸² (5) economic self-determination is 'unquestionable and inalienable';²⁸³ (6) peoples are beneficiaries and owners of mineral resources;²⁸⁴ (7) economic self-determination may be integrated into advocacy strategies;²⁸⁵ (8) internal self-determination supports economic self-determination;²⁸⁶ (9) economic self-determination may prevent external self-determination or secession; (10) economic-self determination supports economic liberalism and safeguards foreign investment.²⁸⁷

Evaluation of the principle

The economic self-determination, like political self-determination, more irrefutably establishes that economic self-determination belongs to peoples. As Farmer notes, if economic self-determination stems from the continuing right to internal self-determination, then the right to economic self-determination vest in peoples.²⁸⁸

It is surprising that, despite its critical attitude towards the state-centered application of the self-determination principle, the principle of economic self-determination does not articulate the rights and responsibilities of the private sector. The reason for this

²⁷⁷ Alice Farmer, *supra* note 21; Richard N. Kiwanuka, *supra* note 21, at 95ff.

²⁷⁸ Alice Farmer, *supra* note 21, at 437.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 427ff.

²⁸¹ *Id.* at 437.

²⁸² *Id.* at 432.

²⁸³ *Id.* at 434.

²⁸⁴ *Id.* at 435.

²⁸⁵ *Id.* at 437.

²⁸⁶ *Id.* at 443.

²⁸⁷ *Id.* at 431ff.

²⁸⁸ *Id.* at 452.

omission may lie in the fact much of international law is still state-centered.²⁸⁹ However, one of the four obligations of states is to protect the right of peoples from infringement by third parties and, consequently, the private actors.²⁹⁰ This obligation circumvents the problem of the rights and responsibilities of the private sector.

4.3.2. Sovereignty over natural resources

The principle

The most relevant argument to claim greater control of mineral resources is the principle of sovereignty over natural resources.²⁹¹ Today, it is beyond question that sovereignty over natural resources is a widely accepted and recognized principle of international law.²⁹² The most authoritative formulation of the principle of sovereignty over natural resources is the Permanent Sovereignty Resolution of 1962, which proclaims that.²⁹³

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

The purposes for formulating the principle of permanent sovereignty were originally to secure the benefits arising from exploiting natural resources for peoples living under colonial and to protect their newly independent states against violations of their sovereignty by foreign states or corporations.²⁹⁴ However, the emerging consensus is that states must manage their resources in the interests of economic development and that of their population, and in an environmentally sustainable manner.²⁹⁵

It is clear that the Permanent Sovereignty Resolution assumed the right to permanent sovereignty to belong to both peoples and state. In view thereof, the thrust of Duruigbo's argument is to posit persuasively that peoples are the owners of natural resources and

²⁸⁹ JOHN DUGARD, *supra* note 28, at 1.

²⁹⁰ *SERAC* ¶ 46.

²⁹¹ NICO SCHRIJVER, *supra* note 23, at 258ff; PHILIP SANDS, *supra* note 23, at 236.

²⁹² East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30) at 204; NICO SCHRIJVER, *supra* note 23, at 377.

²⁹³ Permanent Sovereignty Resolution ¶ 1.

²⁹⁴ NICO SCHRIJVER, *supra* note 23, at 24.

²⁹⁵ *Id.* at 24-25.

then to conclude that permanent sovereignty, traditionally regarded as a state's right, is in reality a peoples' right.

Schrijver showed that sovereignty over natural resources entails a number of associated rights, all of which can found a claim by the peoples for the control of mineral resources. These rights include the right to dispose freely of natural resources;²⁹⁶ the right to explore and exploit natural resources freely; the right to use national resources for national development;²⁹⁷ and the right to regulate foreign investment.²⁹⁸

Evaluation of the principle

Assuming that the right belongs to peoples, the sovereignty over natural resources is a compelling and cogent argument for the RCMR. By awarding ownership of natural resources to the peoples, it gives peoples the means to participate in the exploitation of natural resources and increases the likelihood that peoples will benefit from it.

The Achilles' heel of sovereignty over natural resources is that its application in the DRC will raise a host of thorny interpretive issues because of potential conflicts between municipal and international law in this area.²⁹⁹ Indeed, article 9 of the Congolese Constitution unambiguously provides that the state 'exercises' permanent sovereignty.³⁰⁰ Thus, unless article 9 is so interpreted as to imply that the state 'exercises' permanent sovereignty 'on behalf of peoples, who own natural resources', permanent sovereignty will be too contentious an issue to be practically effective.

4.3.3. The right to development

The law on the right to development

²⁹⁶ Solomon A. Dersso, *supra* note 24, at 365; SERAC ¶ 58.

²⁹⁷ NICO SCHRIJVER, *supra* note 23, at 269ff.

²⁹⁸ *Id.* at 278ff. See Permanent Sovereignty Resolution ¶ 8.

²⁹⁹ To be sure, a few major treaties consistently vest the right to permanent sovereignty in states only: the Convention on Biological Diversity, *supra* note 63; the Convention on the Law of the Sea, *supra* note 60; the Convention on Climate Change, *supra* note 62; and the European Energy Charter Conference, Energy Charter Treaty art. 18.1, Dec. 17, 1994, 34 I.L.M. 360, 394 (1995).

³⁰⁰ More specifically, art. 3 of the Mining Code declares that the state owns mineral resources.

The controversial right to development is another ground for a claim by the peoples for the control of mineral resources.³⁰¹ The pertinence of the right to development as a legal justification for the RCMR also emanates from article 58 of the Congolese Constitution, which integrates the right to development into the right to enjoy national wealth. The right to development takes on several facets, the most comprehensive of which is the right of peoples to choose their economic, social system freely and to determine their own model of development.³⁰² However, like Jack Donnelly cautioned, the right to development does not imply the right to live in a developing country; it is only a right to *pursue* development.³⁰³

In 1986, the UN General Assembly proclaimed the right to development in the Declaration on the Right to Development.³⁰⁴ The 1993 Vienna Declaration described the right to development as ‘a universal and inalienable right and an integral part of fundamental human rights.’³⁰⁵ The mandate of the UN High Commissioner for Human Rights to establish ‘a new branch whose primary responsibilities would include the promotion and protection of the right to development’³⁰⁶ strengthens the right to development.

In essence, the Declaration focuses on the right of individuals to national development policies that improve their well-being equitably and with their full participation. Thus, like the right to economic self-determination, the right to development fulfils the process and outcome requirements of the control of mineral resources.

Arjun Sengupta, the UN Independent Expert on the Right to Development appointed in 1998, elaborated on the content of the right to development by adding that:³⁰⁷

³⁰¹ Georges Abi-Saab, *The Legal Formulation of a Right to Development*, in *THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL* 163 (Hague Academy of International Law 1980); Mohamed Bedjaoui, *The Right to Development*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 1182 ¶ 22 (Mohamed Bedjaoui 1991)(claiming that the right to development flows from and has the same nature as the right to self-determination); see U.N. Doc. A/Res/55/56, *supra* note 27, preamble; ISSA G. SHIVJI, *supra* note 27, at 29-33; JOHN DUGARD, *supra* note 28, at 326-327.

³⁰² Mohamed Bedjaoui, *supra* note 301, at ¶ 34.

³⁰³ Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CALIF. WESTERN INT. L. J. 473, 482 (1985). Emphasis in the original.

³⁰⁴ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/41/53 (Dec. 4, 1986).

³⁰⁵ Vienna Declaration and Programme of Action, G.A. Res. ¶10, U.N. Doc. A/CONF.157/23 (July 12, 1993).

³⁰⁶ G.A. Res. 48/141 U.N. G.A.O.R. 48th Sess. Supp. No. 49 at 261 U.N. Doc. A/48/141 (1993).

³⁰⁷ Harvard Francois-Xavier Bagnoud Center for Health and Human Rights, The Right to Development Project, <http://www.hsph.harvard.edu/xfbcenter/rtd.htm> (last visited Dec. 27, 2007).

- The right to development is a right to a process through which all human rights and fundamental freedoms are fully realized;
- the process itself must reflect a human rights approach, demonstrating transparency, participation, non-discrimination, and accountability; and
- the right to development concept rejects the notion of trade-offs between one right and another or between human rights and economic growth, requiring an integrated approach to all human rights.

The Rio Declaration on Environment and Development addresses, through the principle of sustainable development, the strain between the demand for development and the protection of the environment. Principle 3 of the Rio Declaration states that

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Further, Principle 4 states that:

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Evaluation of the right to development

The right to development suffers from a variety of handicaps. The greatest handicap of the right to development concerns its contents and its contours. The meaning of the right to development has over the years been fluctuating and today the right to development is a nebulous, amorphous and contested concept.³⁰⁸ Like US representative Novak remarked in 1981, '[t]he concept of "development" is itself in need of development.'³⁰⁹ To be sure, there is no internationally accepted definition of the right to development. For instance, whilst the United States conceives of the right to

³⁰⁸ HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1315 (Oxford University Press 2000).

³⁰⁹ As quoted by Stephen Marks, *The Right to Development: Between Rhetoric and Reality* 17 HARV. HUM. RTS. J. 137, 148 (2004)[hereinafter Stephen Marks, *Development*].

development as a synthesis of human rights the UN Independent Expert conceives of it as a vector of human rights. Marks describes the latter position as follows.³¹⁰

The right to development is a composite right to a process of development; it is not just an “umbrella” right, or the sum of a set of rights. The integrity of these rights implies that if any one of them is violated, the whole composite right to development is also violated. The independent expert describes this in terms of a “vector” of human rights composed of various elements that represent the various economic, social and cultural rights as well as the civil and political rights. The realization of the right to development requires an improvement of this vector, such that there is improvement of some, or at least one, of those rights without violating any other.

The second handicap is the difficulty in identifying the beneficiaries and the duty-holders.³¹¹ Over and above these identification difficulties, there are issues relating to the regulatory functions of the right to development. Although it is clear that the right to development exists as a set of principles, it is yet still uncertain whether the right exists as specific rules aimed at regulating state behavior.³¹²

4.4. The right to control mineral resources (RCMR)

4.4.1. The thesis

The main argument of this paper is that the different treatises on the legal justifications for a people-based control of mineral resources do not fully articulate the RCMR. Although there exist several legal justifications for people-based mineral control, the scholars who elaborated on these justifications all assumed that there can only be one principal ground on which peoples could claim the control of mineral resources. This chapter demonstrates that it is not so.

The argument is also that the treatises on the legal justifications for a people-based mineral control do not articulate the RCMR in the context of three generically different forms of law, namely municipal, regional and international law. Nor did the treatises elaborate on the RCMR as it relates to first and second generations of human rights.

³¹⁰ Arjun Sergunta, *Fifth Report of the Independent Expert on the Right to Development*, at 5 ¶ 6, submitted in Accordance with Commission Resolution 2002/69, U.N. Doc. E/CN.4/2002/WG.18/6 (2002).

³¹¹ Isabella D. Bunn, *supra* note 28.

³¹² See e.g. Stephen Marks, *Development*, *supra* note 309, at 150.

The present paper explicitly accomplishes this relation by incorporating democratic rights (participation) and socio-economic rights (benefit) in the concept of control.

4.4.2. The RCMR as an independent right

On closer scrutiny of the literature on legal justifications put forth for a people-based mineral control, one realizes that such literature does not actually say that there is a right to control mineral resources as a legal right. Rather, it says that certain legal principles *justify* the control of mineral resources as a fact.³¹³ Stated differently, the literature fully articulates the justifications for the control of mineral resources and not the RCMR.³¹⁴ The difference is fundamental because it means that the literature denies the existence of the RCMR as such or as a right independent of its justifications in national, regional and international law. This difference is problematic because the exploration of the legal justifications for a people-based mineral control elicits the inescapable inference, drawn from the provisions of municipal and international law, that peoples have the RCMR. The paper demonstrated, through its survey of the legal justifications for a people-based mineral control, that any alternative interpretation will contradict either Congolese or international law.

The RCMR can exist independently as a fundamental principle of municipal, regional and international law. The RCMR can also be specific as the contents of the principle in specific situations will vary according to the contexts and the specific legal provisions relied on.

4.4.3. The nature of the right

Even though a detailed analysis of the RCMR is beyond the purview of this paper, a few general comments can be made on the nature of the RCMR.

³¹³ See chapter 1 on the distinction between the factually descriptive definition and the legally prescriptive definition of control (i.e. RCMR).

³¹⁴ Alice Farmer, *supra* note 21 (arguing that the principle of economic self-determination justifies a people-based control of natural resources without claiming that there is a RCMR); Emeka Duruigbo, *supra* note 26 (arguing that the principle of permanent sovereignty over natural resources justifies the control of resources without claiming that there is a RCMR).

The RCMR is a third-generation human right.³¹⁵ It belongs to the peoples, albeit the first and second generations of human rights that we have identified earlier also form the contents of the RCMR. This attribute of the RCMR implies that the state has an obligation to extend standing to appear in court to individuals bringing claims on behalf of peoples. Incidentally, the African Commission on Human and Peoples' Rights has already allowed a wide range of complainants to bring complaints before it.³¹⁶

Following the decision in the *SERAC* case, the RCMR imposes four obligations on the state, namely:³¹⁷

1. To respect – the state shall refrain from interfering with the enjoyment of peoples' RCMR³¹⁸ by, for example, refraining from blocking the peoples from forming associations and organizing politically in order to participate in decisions concerning the exploitation of mineral resources;
2. To protect – the state shall protect the peoples from infringements of their RCMR³¹⁹ by, for example, preventing investors from mining in a way that adversely affects the RCMR;³²⁰
3. To promote – the state shall ensure that the peoples are able to exercise their RCMR³²¹ by, for example, raising awareness about the RCMR; and
4. To fulfill – the state shall put in motion its machinery for the actual realization of the RCMR³²² by, for example, building infrastructures or other sorts of resources facilitating the enjoyment of the RCMR.

In interpreting the rights of indigenous peoples, the Inter-American Court of Human Rights in the *Awasi Tingni*³²³ adopts a non-literal and anti-positivist construction of

³¹⁵ African Charter art. 21; Richard Kiwanuka, *supra* note 21, at 95ff.

³¹⁶ See MORTEN PESCHARDT PEDERSEN 'Standing and the African Commission on Human and Peoples' Rights' 6 AHRLJ 2 (2006).

³¹⁷ *SERAC* ¶ 44ff.

³¹⁸ *SERAC* ¶ 45; Velásquez Rodríguez Case, 1988 Inter-Am. Ct.H.R. (Ser. C) No.4 ¶165.

³¹⁹ *SERAC* ¶ 46.

³²⁰ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, ACHPR (*held*, that Chad was guilty of serious and massive human rights violations for failing to protect people within its borders from attacks from non-state actors).

³²¹ *SERAC* ¶ 46.

³²² Velásquez Rodríguez Case, 1988 Inter-Am. Ct.H.R. (Ser. C) No.4 ¶165 (*held*, that this obligation implies the duty of states to organize the governmental apparatus and, in general, all the structures through which public power is organized, so that they are capable of juridically ensuring the free and full enjoyment of human rights).

human rights that informs the interpretation of the RCMR. In that case, the Court held that:³²⁴

The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them under domestic law. Furthermore such human rights are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.

The *Awes Tingni* suggests that the interpretation of the RCMR, as provided for in such human rights treaties as the CCPR and CDESCR, should be different from the one adopted in municipal law. However, in the case of the Congolese legal system, the interpretation of human rights treaties in international law is, by virtue of the operation of article 215 of the Constitution, legally binding on domestic courts.

4.4.4. Violations of the RCMR

A human rights approach legalizes and legitimizes the claims of the Congolese peoples to control mineral resources. This is because human rights law creates rights of action for peoples to enforce their rights. To enforce such rights, claimants must in the first place establish that there has been a violation of the RCMR.

Logically, to make out a case of RCMR violation, proof that a certain conduct or situation resulting in peoples not controlling mineral resources should suffice. This consequentialist approach finds support in article 56 of the Congolese Constitution. Article 56 lays down that any *act* or any other *fact* that has as a *consequence* the deprivation of the livelihood of peoples or of their natural wealth in whole or in part, is an offence punished by law.³²⁵

³²³ The Case of the Mayagna (Sumo) Awes Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79.

³²⁴ *Id.* Para 146.

³²⁵ Literally, Constitution art. 56 stipulates that:

Any act, any agreement, any convention, any arrangement or any other fact, that as a consequence deprives the nation, juristic or natural persons of all or part of their own means of livelihood derived from their resources or from their natural wealth, without derogating from the international provisions on economic crimes, is a criminal offence punished by law.

Thus, the mere violation of the Mining Code provision on the distribution of mining royalties, or any provision or legislation, does not automatically amount to the violation of the RCMR.³²⁶ However, if parties can prove that, as a consequence of that provision being violated, peoples could not participate in or benefit from the exploitation of mineral resources, court and lawyers would find a violation of the RCMR.³²⁷

In the next chapter, we elaborate on the third phase of the main argument, namely the implications of the argument that the peoples have a RCMR.

³²⁶ C. MIN. art. 242.

³²⁷ The fact that the Mining Code provision on the distribution of mining royalties is only applied in Katanga is a good example of a violation of the Code that also constitutes a violation of the RCMR: Bienvenu-Marie Bakumanya, *supra* note 173.

5. CONCLUSION: THE IMPLICATIONS OF A PEOPLE-BASED CONTROL OF MINERAL RESOURCES

Having identified the legal justifications for the proposition that the people are entitled to control mineral resources in the DRC, the next question concerns the measures that the government must take to realize such control. However, because the detailed analysis of the policy implications of the RCMR can support an entire university course, this section simply outlines the policy choices for the practical and effective materialization of the RCMR. The finding made earlier in this paper – that most literature on the right of peoples to control natural wealth and resources does not articulate the logical implications of that right³²⁸ – requires that we address the policy implications of a people-based control of mineral resources.

5.1. Legal implications

From our exploration of the legal justifications for the RCMR, a normative cluster of principles and rules of law flow. Such a normative framework is highly desirable because it is one of the ways in which law can assist the peoples in their quest for the control of mineral resources.³²⁹ These principles and rules are:

- (1) National sovereignty belongs to the peoples;
- (2) National sovereignty refers to the power of peoples to legislate and regulate their own affairs, including the mining sector;
- (3) Peoples are beneficiaries and owners of mineral resources;
- (4) Peoples must be able to freely dispose of their mineral resources;
- (5) Peoples have the right to participate in decisions regarding the disposal of mineral resources;
- (6) Mineral resources must be used in the exclusive interest of peoples and according to the policies they have freely chosen;

³²⁸ Chapter 1.

³²⁹ Emeka Duruigbo, *supra* note 26, at 94 (suggesting normative frameworks in the form of treaties, soft laws or resolutions to re-affirm the principle of peoples' permanent sovereignty over natural resources).

- (7) Peoples exercise their sovereignty directly by way of referendum or elections and indirectly through the democratic institutions of the state and freely chosen representatives;
- (8) peoples must be able to control mineral wealth in a manner that improves their material conditions of living;
- (9) The right to control mineral resources entails that peoples organize themselves for and associate NGOs in the audit of government practices in the mining sector;
- (10) Peoples have the right to control mineral resources and the state has the corresponding obligations to redistribute equitably and to guarantee the right to development;
- (11) Equitable redistribution of mineral wealth and the right to development in turn impose on the state the obligation to reduce, with a view to eradicating, corruption and to promote transparency;
- (12) The state is obliged to build institutional capacity and to provide security and favorable macro-economic and investment environments;
- (13) The claim that peoples are entitled to control mineral resources is the first thread of the argument that the state must ensure democratic rights, especially non-discrimination and equality (participation element);
- (14) The claim that peoples are entitled to control mineral resources is the second thread of the argument that the state must enforce socio-economic rights, including the right to invest and labor rights (benefit element);
- (15) The right to control mineral resources buttresses economic liberalism and safeguards foreign investment;
- (16) Peoples may not be deprived of their right to control mineral resources or their own means of subsistence;
- (17) In case of spoliation the dispossessed peoples shall have the right to the lawful recovery of their property as well as to an adequate compensation;
- (18) Lawmakers should work out a coherent scheme for the liability of the state and investors and for the determination of such liability in specified forums for dispute resolution; and

- (19) The right to control mineral resources does not imply a trade-off between human rights or between human rights and economic growth, requiring an integrated approach to all human rights.

These are all the legal principles that must be read into the Mining Code, the Mining Regulations and the Constitution, and integrated in all mining practices in the DRC. This reading and integration of the principles derived from the RCMR will infuse human concerns into mining legislation and practices.

5.2. Policy implications

The RCMR has also important repercussions on political, financial, mining and social institutions in the DRC. The assumption is that efforts to empower the peoples to control mineral resources in the DRC cannot succeed without simultaneously tackling the institutional deficiencies of the DRC as a state: Lack of capacity and of political participation, pathological corruption, infrastructural decay and inadequacy, and chronic instability.

5.2.1. Institutional policies

(Re)conceptualization of state – The effective implementation of the RCMR calls for a reconceptualization of the state. In the process, it is imperative to avoid Eurocentric political models.³³⁰ Historically, the state in the DRC was created for the export of raw materials and not for its own development. Pierre Englebrecht reminds that the DRC, which was created as the institutional façade of a foreign enterprise of ivory and rubber exploitation, reproduced as the instrument of a violent extractive colonization

³³⁰ Pierre Akele Adau, *Les Défis et les Enjeux de la Nouvelle Constitution: Comment Éviter la Catastrophe d'un Nouveau Rendez-vous Manqué*, 395 CONGO-AFRIQUE 274 280 (2005) (arguing that it is necessary to factor in the particularities of the local context if the DRC Constitution is ever to succeed in effecting social transformation).

system.³³¹ Coupled with decades of mismanagement and corruption, today the state does not have strong institutions, nor does its infrastructure stretch far beyond the few and small urban areas of the country, the third largest in Africa.

Role of the state – The Mining Code defines the role of the state in the mining sector as that of a promoter and a regulator, leaving it to the private sector to drive development in the sector.³³² In other words, the Mining Code posits private sector development as the driver for mining development and economic growth and denies the probability of a developmental state. However, this definition of the role of the state is not without dangers. Joe Oloka-Onyango urges confronting the negative impact privatisation and globalization have had upon attempts by peoples to attain popular sovereignty.³³³ Oloka-Onyango's argument could have been more convincing if he could establish that the real issue was privatisation and not the twin evils of corruption and the failure to redistribute mining revenues equitably.

Emeka Duruigbo relied on the holding of the African Commission on Human and Peoples' Rights (Commission) in *SERAC* to advocate the definition of the role of the state as a trustee.³³⁴ In that case, the Commission held that article 21 of the African Charter (on the free disposal of peoples' wealth and natural resources) imposed a duty on the state.³³⁵ Duruigbo utilized that holding to conclude that governments, as trustees, are in a fiduciary relationship with the citizens that they cannot abuse by, for instance, diverting national wealth for their private use.³³⁶ Indeed, the RCMR implies a fiduciary relationship with peoples, but the correlative concepts of 'agent' and 'principal' are preferable to the concept of trust because it is unknown to most civil law jurisdictions, including the DRC.³³⁷ Thus conceived, the state as an agent owes a duty of good faith

³³¹ Pierre Englebrecht, *Why Congo Persists: Sovereignty, Globalization and the Violent Reproduction of a Weak State*, (Queen Elizabeth House Carnegie Project on 'Global Cultural and Economic Dimensions of Self-Determination in Developing Countries, Working Paper No. 95, 2003).

³³² C. MIN. art. 8.

³³³ J. Oloka-Onyango, *Self-determination*, *supra* note 203, at 205.

³³⁴ Emeka Duruigbo, *supra* note 26, at 67.

³³⁵ *SERAC* ¶ 57ff.

³³⁶ *Id.*

³³⁷ See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 102 (Cavendish Publishing Limited 1999).

to the peoples as principal in the exploitation of mineral resources and the distribution of mining revenues.

Decentralization - The Constitution defines the role of the state in terms of decentralization as well. The Constitution establishes a government and a legislature at both national and provincial levels. Decentralization and the devolution of power in general are vital to the popular participation in and benefit from the exploitation of mineral resources. Decentralization reinforces the peoples' right to self-determination and efforts to combat institutionalized corruption. However, the constitutional fiscal arrangements are a bone of contention between the central and provincial governments. Although article 175 provides for the retention of 40% of national taxes by provinces, the government has been adamant in its refusal to leave the 40% to the provinces. Two senators have recently commenced legal action to challenge the constitutionality of the 2008 budget because it did not provide for the retention of 40% of national taxes by provinces.³³⁸ Muna Ndulo remarks that, for the generation of local economic initiatives to be possible, the central government must refrain from keeping the major sources of revenue to itself and leave minimal sources to local governments.³³⁹

State ownership of mineral resources – One of the legal implications of the RCMR is that peoples are the owners of mineral resources. This implication contradicts article 3 of the Mining Code, which provides that the state owns all deposits of mineral substances. On the other hand, article 9 only provides that the state exercises permanent sovereignty over resources. It is submitted that an interpretation of article 9 of the Mining Code that is in tune with the RCMR is to hold that peoples own mineral resources but that the state exercises that right as an agent of the peoples. After analysing the text and the spirit of article 9 of the Constitution, Garry Sakata concludes

³³⁸ See Freddy MI Nduku, *Le Sénateur Djoli Eseng' Ekeli Dépose une Requête en Inconstitutionnalité de la Loi Portant Budget 2008*, LE POTENTIEL (Dem. Rep. Congo), available at http://www.lepotentiel.com/afficher_article.php?id_edition=&id_article=59550; Yves Kadima, *Lunda Bululu Déclare Inconstitutionnelle la Loi Budgétaire*, LE POTENTIEL (Dem. Rep. Congo), Feb. 8, 2008, available at <http://www.lepotentiel.com>.

³³⁹ Muna Ndulo, *Decentralization: Challenges of Inclusion and Equity in Governance*, in DEMOCRATIC REFORM IN AFRICA: ITS IMPACT ON GOVERNANCE AND POVERTY ALLEVIATION 79, 88 (Muna Ndulo ed., 2006).

that article 9 means that the state remains the owner of mineral resources, but it is no longer the exclusive owner.³⁴⁰

Security reform – Security is a precondition for the control of mineral resources by the peoples, especially in the Kivus. Despite the presence of the world's largest UN peacekeeping force and the security reform the government has embarked upon, the Kivus are still highly volatile and unstable provinces in the DRC. The realization of the RCMR is inconceivable without restoring security in the Kivus and in the rest of the country. Because of the regionalization of insecurity in the Great Lakes region, the DRC must promote regional economic cooperation and good neighborliness. This is all the more imperative for peace in the DRC as it is the only country in Africa surrounded by eight neighbors. Consequently, peace and stability in the DRC and its mining sector significantly depend on its regional diplomatic relations.

Good governance – The effective participation in and benefit from the exploitation of mineral resources in the DRC requires good governance as an institutional policy. John Hatchard and others define good governance as involving 'more than putting constitutional limits to the power of the government' and as 'the conscious management of regime structures with a view to enhancing the legitimacy of the public realm'.³⁴¹ In the DRC context, good governance would therefore imply the conscious management of the mining sector in a manner that optimizes participation of and material benefits for the peoples, which also calls for greater transparency and accountability.

Corruption and transparency – It is beyond question that corruption has prevented peoples from participating in and benefiting from the exploitation of mineral resources. Speaking of oil, Ian Gary says that transparency allows peoples to track how much money mineral resources generate and how the government spends these revenues.³⁴² Corruption and the lack of transparency have led many an analyst to conclude that the

³⁴⁰ Garry Sakata, L'Etat Conserve-t-il Encore le Droit Exclusif de Propriété sur le Sol et le Sous-sol? Analyse de l'Article 9 de la Constitution du 18 Février 2006, 6, *available at* www.congolegal.cd.

³⁴¹ JOHN HATCHARD ET AL., *COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE 2* (Cambridge University Press 2004).

³⁴² Ian Gary, *supra* note 26, at 39.

real problem is not so much the contents of Congolese laws as the defective implementation of these laws. While the reduction of corruption is a *sine qua non* condition for the realization of the RCMR, it is incorrect to state that the sole problem is corruption because there is certainly a need for policy and institutional reform in the DRC.

Integration of national legislation and international law – the RCMR also requires the incorporation of international norms into municipal law. In the case of the DRC, article 215 of the Constitution effects the integration of international law into Congolese law.

Interpretation – the RCMR is a mandate on DRC's future Constitutional Court to construe the provisions relating to the control of mineral resources as human rights provisions. The RCMR is also a recognition that the ultimate source of human rights is not the text of legal instruments that enshrine them but the fundamental values from which they draw inspiration.³⁴³ These values include autonomy, human dignity, equality, and justice.³⁴⁴

Negotiation of mining contracts – The RCMR implies that state officials must vigorously and effectively negotiate and draft mining contracts so that peoples benefit from these contracts. Unfortunately, in the past, the negotiation of mining contracts, especially during the 1996-2003 civil wars, disregarded the interest and benefit of peoples. The Lutundula parliamentary report on the validity of contracts signed during the civil wars concluded that the transitional government mismanaged the mining sector³⁴⁵, and poorly negotiated and drafted mining contracts. There exist different obstacles in the way to effective contract-making in the natural resources sector. These obstacles include corruption, differences in bargaining power, asymmetries of expertise, and international pressure. The Congolese experience has shown that the strict application

³⁴³ Jerome J. Shestack, *supra* note 40.

³⁴⁴ *Id.*

³⁴⁵ Assemblée Nationale, Commission Spéciale Chargée de l'Examen de la Validité des Conventions à Caractère Économique et Financier Conclues Pendant la Période les Guerres de 1996-1997 et de 1998, Rapport des Travaux [National Assembly, Special Commission Charged with the Examination of the Validity of the Economic and Financial Agreements Concluded during the 1996-1997 and 1998 Wars, Report] (Lutundula report) at 270.

of the Mining Code may diminish the probability of pressure or corruption by providing in great detail the fiscal regime of the mining industry. By specifically providing for tax, the Code renders negotiations for tax exonerations illegal and thus decreases the risk of pressure and corruption.³⁴⁶ Finally, the state must publish draft mining contracts so as to enable peoples to monitor the negotiation of these contracts.

5.2.2. Mining policies

Large scale mining policies - Policymakers should generally, with regard to large-scale mining, formulate policies aimed at:³⁴⁷ (1) avoiding the Dutch disease and its effects on the economy; (2) improving governance of state-owned enterprises; (3) increasing opportunities for the non-mining sectors of the economy; (4) changing the culture of dependency, which consists in the government tending to leave service to delivery to mining company, thus creating a vacuum during mine closure and post-closure periods; (5) managing at an early stage mine closures; (6) preventing the threats to indigenous people's land ownership and use in absence of legal frameworks; (7) articulating the roles to be played by key actors in the mining sectors, namely the multinational enterprises, intergovernmental organizations, and voluntary enforcement mechanisms; (8) and allowing local communities to access information and participate in key decision-making processes.

Small scale mining policies – In addition to the policy choices above, policymakers should generally, with regard to small-scale mining, formulate policies aimed at:³⁴⁸ (1) increasing the poor's opportunities for income generation and subsistence as they compete with incoming small-scale miners; (2) providing health care and education facilities for small-scale miners in the context of an unregulated environment; (3) significantly decreasing, with the ultimate purpose of eliminating, child labor; (4) decreasing the risks of losing property and income where mining rights are not regulated or protected; (5) preventing the invasion of lands of indigenous or tribal

³⁴⁶ See Exposé.

³⁴⁷ Monika Weber-Fahr *et al.*, *supra* note 31, at 446ff.

³⁴⁸ *Id.*

people by miners; and (6) preventing risks of cultural conflicts between miners and local or indigenous population.

5.2.3. Financial policies

(Re)distribution of mining revenues and social cohesion – Article 58 of the Constitution indicates that the redistribution of the mining revenues is at the heart of the RCMR. In the context of the DRC, that redistribution has to be equitable and transparent. Transparency in turn demands an accountable government. The centrality of redistribution lies in the fact that, without redistribution, social cohesion and national reconciliation are pious wishes.

Tax, customs, foreign exchange regimes – The redistribution of mining revenues is mainly achieved through the instrumentality of the Mining Code's tax, customs and foreign exchange regimes, including the provisions on non-exoneration and on the convertibility of financial assets. That is all the more reason for the strict and consistent application of the Mining Code.

Saving and volatility funds – For all its qualities, the Mining Code conspicuously fails to provide for a saving fund nor a volatility fund. Saving funds, pursuant to the principle of sustainable development, enable future generations to benefit from mineral resources. Although the government can provide for such fund or account by means of tax law in a separate piece of legislation, it would have been preferable to expressly provide for a saving fund in the Mining Code to bind the state to the provision of such fund. Moreover, given the inevitable fluctuations in the commodity market, it is similarly surprising that the Mining Code failed to provide for a stability fund. This failure exposes the DRC and increases its vulnerability to external shocks in the commodity market.

Maximization of state revenues – a corollary of the obligation on the state obligation to redistribute mining revenues equitably is the maximization of these revenues. It is self-

evident that, absent such maximization, there will only be small revenues to redistribute and, consequently, small benefits for the peoples.

5.2.4. Social policies

There are a few social policy choices that the DRC can adopt to realize the control of mineral resources by the peoples. The most important of these choices is the realization of socio-economic rights.

Socio-economic rights - Socio-economic rights can solve some of the formidable developmental challenges faced by the DRC. Socio-economic rights have developmental aspects beyond their merely survival aspects. The Constitution provides for socio-economic rights that the government can use as development policy agenda. The realization of socio-economic rights is, however, as daunting and unenviable as the other developmental challenges of the DRC. The political, economic, social and developmental challenges facing the new government are unenviable and daunting. Although the DRC, which is endowed with vast mineral wealth, is implementing reforms and economic stability is improving, the economy of the DRC is performing well below its real potential.

Protection and regulation of artisanal miners – The protection and regulation of small scale miners necessitate special consideration given the uniquely vulnerable of Congolese artisanal miners, who are constantly susceptible of being exploited by key actors in the mining sector. Furthermore, the state must ensuring the health and safety of miners.

Linkages between RCMR and private investment – It bears insisting that the policy makers cannot disentangle the realization of the RCMR and private investment. The model of a developmental state has no reasonable chance of succeeding in the DRC. This is why policy makers should promote and embrace private investment, mostly foreign investment, to develop the mining industry. In the existing circumstances, the

Congolese state does not have the capacity to absorb and directly integrate the exploitation of mineral resources such that the bulk of the exploitation, especially the processing of minerals, is done abroad. For this and other reason, the efficient exploitation of minerals in the DRC is inconceivable without private investment.

Local participation and technology transfer – Local participation and technology transfer are tested ways of enhancing the efficiency and effectiveness of the mining industry and mineral exploitation.

This final chapter has outlined the principles and policy choices that can best leverage DRC's vast mineral wealth to bring about development for the peoples. Given the exploratory nature of the research, the principles and policy choices enunciated and outlined in this chapter are tentative and merely calculated to spark additional in-depth debates and studies.