



**ENVIRONMENTAL AND SOCIAL LEGAL COMPLIANCE
ASSESSMENT IN OIL, GAS AND MINING SECTORS:
THE CASE OF TOTAL E&P AND METOREX IN DEMOCRATIC
REPUBLIC OF CONGO.**

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This research is submitted in fulfilment of the regulations for the Master's Degree
in Environmental Law at the University of KwaZulu-Natal

Under the supervision of
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DECLARATION

I declare that the dissertation hereby handed in for the qualification of Master's Degree in Environmental Law at the University of KwaZulu-Natal, is my own independent work and that I have not previously submitted the same work for a qualification at another University.

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Justin Makala Barhasima

DEDICATION

I dedicate this work to my Lord and saviour Jesus Christ for my life's deliverance and to the memory of my late mother, Mrs Helen Nabintu, who passed on while I was writing this thesis.

I also dedicate this work to the Helene Nabintu and Edmond Makala generation, to encourage them to study as I believe that education is the key to success and a tool to fight poverty.

Finally, I dedicate this work to the men, women, youth and children of the DRC, especially the people of the Eastern Congo and Katanga provinces, who are disproportionately burdened by environmental contamination, particularly, oil and mining pollution.

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ABSTRACT

Ongoing concerns regarding environmental degradation in mining, oil and gas areas, the high number of abandoned mines, oil and gas fields have highlighted the need for enhanced environmental compliance in the Extractive Industries (EI) sector. These concerns give rise to questions about the implementation and enforcement of environmental laws and standards to avoid and manage the environmental and social impacts of mining, oil and gas operations. With this in mind, this study provides a discussion on the environmental and social compliance in the oil, gas and mining sectors in the DRC, the national key environmental legislation and international standards applicable in the context of the DRC and assesses compliance with two case studies companies, namely; Total E&P, Block III and Metorex, Ruashi Mining. Having established a solid understanding of environmental and social compliance in the EI, the legal framework and standards around it, the institutions vested with their implementation and enforcement; it is important to emphasise that the DRC has made a progress in its environmental laws and standards development, but the country still faces a significant number of environmental regulatory challenges and deficiencies notably showing vague, duplicate and unclear requirements; uncertainties and institutional conflicting mandates within government environmental institutions. As a “post-conflict “country, the DRC continues to struggle to eradicate instability, repeated political crises, weak governance, mismanagement of natural resources and entrenched corruption. Ongoing fighting over the control of the DRC’s considerable mineral wealth sustains a climate of insurgencies in the eastern provinces; fuelling the country’s persistent governance crisis and limiting its government authority. Coupled with endemic corruption and institutional lack of capacity, this situation undermines the effort of implementation and enforcement of environmental laws and international standards and ultimately weakens environmental and social compliance of the case study companies; though the case study companies are required to implement the UN guiding principles on business and human rights (UNGPS) and the OECD guidelines for multinational enterprises to achieve environmental and social compliance in their operations. In Total E&P Block III; water pollution, degradation of agricultural land, deforestation are very serious concerns, but safeguard the Virunga National Park from oil exploration is the current major concern. At Metorex Ruashi Mining, contamination of groundwater, agricultural land and air pollution, noise, destruction of private properties by explosives, insufficient to non-existent of communities’ engagement, artisanal and illegal mining issues and human right abuses are crucial non-compliance.

KEYWORDS

Environment, Social, Legal , Compliance, Assessment, Oil, Gas, Mining, Sectors, Total E&P, Metorex (Pty) Ltd, The Democratic Republic of Congo.

ABBREVIATIONS AND ACRONYMS

AfDB	African Development Bank
AMV	African Mining Vision
ASADHO	African Association for the Defence of Human Rights
AU	African Union
COP23	Twenty Third Conference of Parties
CSR	Corporate Social Responsibility
DEHPE	Directorate of Human Settlements and Environmental Protection
DPEM	Directorate for the Protection of the Mining Environment
DRC	Democratic Republic of Congo
DSD	Directorate of Sustainable Development
EA	Environmental Audit
EAPPP	Environmental Assessment of Policies, Plans and Programs
EEPPP	Environmental Evaluation of Policies, Plans and Programs
EFR	Environmental Fund for Research
EI	Extractive Industries
EIA	Environmental Impact Assessment
EIS	Environmental Impact Systems
EMPP	Environmental Management Plan of the Project
EPA	Environmental Protection Act
ESIS	Environmental and Social Impact Studies
ESLCA	Environmental and Social Legal Compliance Assessment

GEEC	Group for Environmental Studies of Congo
ICCN	Congolese Institute for Nature Conservation
IFE	Intervention Fund for the Environment
MENSD	Ministry of Environment and Sustainable Development
MMSD	Mining, Minerals and Sustainable Development
MRP	Mitigation and Rehabilitation Plan
NEAP	National Environmental Action Plan
OECD	Organisation for Economic Co-operation and Development
OGP	Association of Oil and Gas Producers
PSA	Production Sharing Agreement
SADC	Southern African Development Community
SAIEA	Southern African Institute for Environmental Assessment
Total E&P	Total Exploration and Production
Total SA	<i>Total Société Anonyme</i>
UKZN	University of KwaZulu-Natal
UNEP	United Nations Environmental Programme
VNP	Virunga National Park

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CHAPTER ONE: INTRODUCTION

1 BACKGROUND

Perceptions of petroleum and mining companies having consistent influence over governments¹ is increasing adverse² impact on the environment and society and lies at the heart of the motivation of social movements protesting at major world³ meetings. Kuschke⁴ argues that the one theme that dominates our age and is part of the daily narrative is the protection of the environment, due to environmental catastrophes and damages caused over past decades. Countries with oil, gas and mining resources around the world are struggling with the challenge of meeting the needs of the present generation without compromising the ability of the next generations to meet their own needs⁵. Extractive Industries are being called upon to take responsibility for the way their operations impact the natural environment and society⁶. They are also being urged to apply voluntary standards that demonstrate the inclusion of environmental and social concerns in business operations and in interaction with stakeholders⁷. Proper stewardship of revenue from the oil, gas and mining sectors has tremendous potential to lift millions of people out of poverty and contribute to sustainable development⁸. Oil, gas and mining industries create jobs, directly and indirectly, transfer technologies and knowledge, and generate significant income for states. Over the years, various actors have recognised that oil, gas and mining resources, when properly managed, hold great potential to contribute significantly to social and economic growth⁹.

¹ C Knaus “Mining firms worked to kill off climate action in Australia, says ex-Prime Minister” (2019) 3 *The Guardian* 2, available at <https://www.theguardian.com › environment › oct › mining-firms-worked-ki...> accessed on 25/11/2019.

² OECD *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (2016) 7.

³ H Ott *Millions hit the streets for global climate change strike*, CBS News; September 20, 2019, Available at <https://www.cbsnews.com › live-news › global-climate-change-strike-prote>.

⁴ B Kuschke “Aspects of insurance for environmental damage claims: some issues raised by proposed hydraulic fracturing” (2016) 22 (1) *The South African Journal of Environmental Law and Policy (SAJELP)* 46.

⁵ United Nations Economic Commission for Africa (E/ECA/CFSSD/6/7) *Africa Review Report on Mining* (2009) 2.

⁶ B Y Abiodun “The Impact of Corporate Social Responsibility on Firms’ Profitability in Nigeria” (2012) 45. *European Journal of Economics, Finance and Administrative Sciences (ISSN 1450-2275)* 39.

⁷ A D’Amato, S Henderson & S Florence *Corporate Social Responsibility and Sustainable business a guide to leadership tasks and functions*, USA (2009) 1.

⁸ International Finance Corporation (World Bank) *Sustainable and Responsible Mining in Africa - A Getting Started Guide*, (2014) 4.

⁹ South African Institute of International Affairs (policy briefing 86) *Mining and Development: Lessons Learnt from South Africa and Beyond* (2014) 4.

However, in Africa, the Extractive Industries (EI) revenues have some characteristics including volatility, uncertainty, exhaustibility, and the fact that they originate largely from abroad constitute a challenge for policymakers. Many resource-rich countries on the African continent have fallen prey to the *resource curse*,¹⁰ under which poor policy choices, mismanagement and corruption have exacerbated the cycle of environmental degradation, poverty and conflicts. Oil, gas and mining regulations and policies have not succeeded yet in stimulating sustainable and inclusive development outcomes, causing instead significant environmental degradation, social conflicts, income inequality and even weakened governance structures on the continent. Frequently, oil, gas and mining industries are accused of taking a “don’t care” attitude towards the impacts of their operations, *inter alia* by operating in areas without social legitimacy, by leaving when an area has been exhausted of its economically valuable resources, and by causing local devastation to the environment¹¹. Jenkins and Obara¹² argues that the cost-benefit approach has often been used to justify damage caused to the environment by claiming that it is outweighed with overall financial benefits. In recent years, however; oil, gas and mining industries have begun addressing their environmental and social responsibilities¹³. Currently, petroleum¹⁴ and mining¹⁵ companies are adopting sustainability policies that contain environmental and social management plans and programs to bring about significant change and focus on addressing environmental issues and local community grievances.

Observing African countries, it is not known whether, for the oil, gas and mining companies, environmental protection and social distresses are really their concerns, because environmental and social legal compliance in these sectors remains quite disputed and controversial at both international and national levels in developing countries, more so than in developed nations. The unfortunate reality indicates that there is much more environmental and social non-compliance by petroleum and mining industries in developing countries than anywhere else. The challenge is that oil, gas and mining companies must decide to control costs and ensure profitability while protecting the environment and empowering affected local communities. Behind such decisions lies their obligation to comply with environmental and social legislation, policies and standards, because for significant projects, such as major oil, gas and mining projects; environmental legacy

¹⁰ World Bank Group *Governance and accountability policies*, available at <http://www.worldbank.org/gaccouncil>, accessed on 12 May 2015.

¹¹ H Jenkins & L Obara *Corporate Social Responsibility (CSR) in the mining industry - the risk of community dependency*, United Kingdom (2008)1.

¹² *ibid* 1.

¹³ OECD *Environmental and Social risk Due Diligence in the financial sector: current approaches and practices*, Brussels (2013) 6.

¹⁴ *Total Safety Health Environment Quality Charter*, Paris (2009) 1.

¹⁵ *Metorex Safety and Environmental Protection Policy* 2011.

frequently poses major problems of environmental mitigation and the liability for cleanup and its costs. According to Balch (2015), the largest liability in this field is the acid mine drainage which may be a long-term problem. Some examples of past mining environmental legacies in sub-Saharan Africa include the tailings dumps from past mining activities around Johannesburg in South Africa, which are a source of dust affecting the health of neighbouring populations¹⁶. Considering these challenges, the level of environmental and social compliance of current operations must then be key in the approval of future projects.

The major challenge for developing states is to find a healthy balance between economic growth, sustainable development and environmental sustainability. Unfortunately, in most of these states, environmental compliance and policies enforcement is still undeveloped; prosecutions and penalties guidelines are also not yet in place. Baumüller, Donnelly and Markus¹⁷ affirm that “negative environmental and health impacts of oil, gas and mining industry are a major concern in Sub Saharan Africa. Some cases are the disruption of traditional way of life of indigenous peoples and a negative impact on the livelihoods of local communities (the case of Shell oil spills in the Niger Delta in 2009)”¹⁸. This chapter outlines the methodology that is used in the research design, and data assortment and analysis. The selection of a qualitative, inductive and interpretative approach to the research are justified, and the measures taken to strengthen the trustworthiness of the data are defined. Some reflections on the limitations of the methodology and the ethical considerations of the work are also been offered. The objectives and motivations of this research are highlighted on a practical and academic extent.

Legal compliance with environmental laws and implementation of international standards in oil, gas and mining industries can be complex in developing countries. Creating sustainable economic growth to meet human needs without sacrificing the environment is also challenging.

In Africa, large-scale projects in the Extractive Industry and natural resources sectors are often controversial and associated with long-term adverse health, environmental and social consequences to surrounding communities. The great strides made over the last twenty years have come at a cost to the environment. Many indicators of the planet's health have continued to decline, with further losses of biodiversity and little progress in reducing emissions and slowing climate change. Carbon emissions continue to increase for the world. Since 1990, global carbon

¹⁶ O Balch *Radioactive city: how Johannesburg's townships are paying for its mining past*, UK (2015) 2.

¹⁷ Baumüller, Heike, E Donnelly, A Vines & W Markus *The effects of oil companies' activities on the environment, health and development in Sub-Saharan Africa*, Belgium (2011)17.

¹⁸ J Vidal *Shell oil spills in the Niger Delta "Nowhere and no one has escaped*, UK (2011) 2.

emissions increased more than 50 percent¹⁹. Emissions in the United States and other developed countries remain very high²⁰. The growth in emissions in developing countries is particularly striking and has been one of the unfortunate consequences of the incredible economic and human development. For this reason, communities living in close proximity²¹ to extractive industry operations are vulnerable to negative environmental, social and health effects that are caused or exacerbated by their activities. Peyer and Maillard²² says that “in DRC in particular, the rush for investment in oil, gas and mining sectors, often allows for the outflow of economic wealth whilst leaving the country and communities further impoverished”. This impoverishment is experienced economically, socially and environmentally and in people’s struggles for a meaningful life and dignity²³. According to Bumbler, Donnelly, Vines and Weimer²⁴, oil, gas and mining companies have frequently been underlined as a primary culprit for producing negative environmental and social impacts, especially in developing countries. In the SADC region, low level and lack of real commitment to aspects relating to environmental and social compliance, accountability, transparency and Corporate Social Responsibility (CSR) in the oil, gas and mining areas are the current top topics²⁵. The unacceptable link between oil, gas and mining exploitation and poverty has been illustrated more clearly. Often, when host developing countries try to emphasise legally binding regulations, extractive firms simply denies what should be their CSR to affected communities²⁶. The Extractive Industries have regular, adverse environmental impacts, such as land degradation, water and air pollution. The impact on local communities²⁷ can be particularly severe where these industries are established in the vicinity of indigenous communities with traditional culture.

¹⁹ United States Environmental Protection Agency *Fast Facts 1990-2016* available at www.epa.gov/climatechange/emissions/usinventoryreport.html, accessed on 17 April 2018.

²⁰ US Environmental Protection Agency *Global Greenhouse Gas Emissions Data*, available at <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>, accessed on 6 June 2017.

²¹ World Health Organization *Managing the public health impacts of natural resource extraction activities: A framework for national and local health authorities* (2010) 7.

²² C Peyer & Y Maillard *Contracts, human rights and taxation: How a company exploits a country. The case of Glencore in the Democratic Republic of Congo*, Switzerland (2011)3.

²³ *ibid.*

²⁴ H Baumüller, E Donnelly, A Vines & M Weimer *The effects of oil companies’ activities on the environment, health and development in sub-Saharan Africa*, Brussels (2011) 7.

²⁵ JDL Nzinga *Critical assessment of Corporate Social Responsibility Programs in the mining sector of the Democratic Republic of Congo: The case of African Rainbow Minerals (ARM)*, unpublished PhD, NWU (2014) 123.

²⁶ R Hamann & P Kapelus *Corporate Social Responsibility in Mining in Southern Africa: Fair accountability or just greenwash?* (2004) 5.

²⁷ International Institute for Environment Development (IIED) & World Business Council for Sustainable Development (WBCSD) *The Report of the Mining, Minerals and Sustainable Development (MMSD) Project* (UK & USA (2002) 200.

However, the environmental and social impacts depend on whether the company is in the exploration, construction, production or closure stage. While environmental and social legal compliance should be assessed at each stage, Extractive Industries need to show commitment to voluntary compliance with environmental legislation and standards and focus their CSR related programs on the real environmental protection and social development of communities. In DRC, oil, gas and mining companies have come under increasing public criticism for not only failing to bring sufficient benefits to the country but also for often not complying with environmental legislation and international standards. This is the case of Glencore International²⁸ in Katanga, for instance. To respond to their increasingly bad reputation, most extractives companies have begun to recognise the business value of the CSR by engaging in initiatives to develop environmental and social programs as well as tackling issues of corruption, transparency and conflict-free resources²⁹. These initiatives include a whole range of activities such as building schools and roads, ensuring environmentally friendly practices, regular reporting and establishing constructive regular consultations with local communities.

3 RESEARCH PROBLEM

As predicted by Global Witness³⁰, the DRC is set to see a rapid increase in oil and gas exploration and production over the coming years. According to the World Bank³¹ the DRC is already experiencing a rise in the mining investment. The escalation of commodity prices and demand on the international market and the “political stability” establishment in the country are contributing to increasing investors flow³². Since the 2011 national elections, there is a growing number of companies who are competing to exploit the country’s unique mineral resources, oil and gas, even in the Virunga National Park (VNP)³³, a protected world heritage site. McCrummer (2008), quoted by Nzinga³⁴ explain that major foreign companies and, more recently; Chinese³⁵ enterprises are investing billions of dollars to extract some of the purest concentrations of copper

²⁸ C Peyer & Y Maillard (note 22 above; 29).

²⁹ JDL Nzinga (note 25 above; 10).

³⁰ Global Witness *Recommendations for the Democratic Republic of Congo’s new hydrocarbons code* (2012) 2.

³¹ World Bank *DRC Economic overview 2019*, available at <https://www.worldbank.org/country/drc/overview>, accessed on 14 October 2019.

³² Unites States Department of State *2011 investment climate statement – Democratic Republic of Congo* (2011) available at www.state.gov, accessed on 24 June 2015.

³³ M Harvey *Virunga National Park is under threat from Europeans oil and gas companies*, available at wwf.panda.org/working/congo/oil-extraction/virunga-under-threat, accessed on 24 June 2015.

³⁴ JDL Nzinga (note 25 above; 9).

³⁵ A M Larrarte & G C Quiroga *Dem. Rep. of Congo: Chinese minerals for infrastructure Sicominex deal has failed to benefit the Congolese population according to analysts* UK (2019) 2.

and cobalt in the south-east of the country. The scramble for natural resources has also brought in new emerging powers such as India, Brazil and South Africa³⁶. The DRC's government, that is delighted to attract Foreign Direct Investments, is routinely criticised³⁷ by Extractive Industries themselves, experts, civil society organisations and other partners for lacking a clear and efficient environmental legal framework and institutional enforcement capacity to safeguard environmental and social compliance and keep peace with the rapid investment growth in these sectors. The implementation and enforcement of the existing legal and regulatory environmental framework remains a complex process³⁸. In 2010 for instance, Canada³⁹ criticised the Congolese Government over its mining reform sustainability, its investment climate and development objectives. Canada expressed concerns over the DRC's relations with Canadian companies operating in the DRC with the case directly linked to First Quantum's⁴⁰ legal proceedings. Over these concerns, Canada reportedly delayed a World Bank decision to cancel most of the DRC's external debt and complete the review of the DRC's Extended Credit Facility.

The DRC faces the ultimate challenge that most of the resource-rich developing countries encounter on how to sustain economic growth, social development and environmental sustainability⁴¹. At the time of independence⁴² in 1960 from colonialism, the DRC was in a state of extreme underdevelopment, which has been aggravated by the continuing armed conflict taking place within and outside of its borders, leading to political and economic instability. Hence, little attention has been given to the development of a robust environmental framework which includes acts, policies and regulations. At the date of writing this dissertation, the only requirement for Environmental Management Plan (EMP) in DRC is found in the Mining Code, Law No 007/2002⁴³. Article 83 of the Mining Code clearly states that mineral processing plants

³⁶ African News Agency (ANA) *SA mining companies to seek export opportunities in DRC*, Johannesburg 2019, available at <https://www.iol.co.za/business-report/international/sa-mining-company...>, accessed on 14 October 2109.

³⁷ The World Bank *Democratic Republic of Congo Growth with Governance In the Mining Sector*, USA (2008) 3.

³⁸ K Kihangi Bindu "Country Report: Democratic Republic of Congo" (2011) 205 (5) *The International Union for Conservation of Nature (IUCN) Academy of Environmental Law eJournal (IUCNAEL eJournal)* 2011.

³⁹ First Quantum Minerals Ltd. (Clive Newall) *First Quantum Minerals launches international arbitration proceedings in Washington relating to Frontier and Comisa: update on Legal Proceedings against the Democratic Republic of Congo*, October 1, 2010, available at www.first-quantum.com, accessed on 28 April 2019.

⁴⁰ First Quantum Minerals *Notice from DRC Mining Contract Review in regard to the Kolwezi Tailings Project* (2008) available at <https://www.first-quantum.com/Press-Release-Details> accessed on 14 October 2019.

⁴¹ The World Bank *Democratic Republic of Congo Systematic Country Diagnostic Policy Priorities for Poverty Reduction and Shared Prosperity in a Post-Conflict Country and Fragile State*, Report No. 112733-ZR (2018) 55.

⁴² Crisis States Research Centre *The rise and decline of the Congolese state: an analytical narrative on State-making* (2007) 21.

⁴³ B Walmsley & S Patel *2011 Handbook on environmental assessment legislation in the SADC Region* 3rd ed. Pretoria: Development Bank of Southern Africa (DBSA) in collaboration with the Southern African Institute for Environmental Assessment (SAIEA) (2012) 69.

must comply with the environmental protection regulations. The Directorate for the Protection of the Mining Environment (DPEM) within the Ministry of Mines is the only institution responsible for all aspects relating to the Protection of the Mining Environment. The DPEM ensures the implementation and compliance with relevant regulations by all mining developments and operations. The DPEM approves the EIA reports, evaluates the Mitigation and Rehabilitation Plan (MRP), the Environmental Impact Systems (EIS) and the Environmental Management Plan of the Project (EMPP) presented by the applicants requesting mining or quarry exploitation rights⁴⁴. According to the World Bank, quoted by Okenda⁴⁵, the Mine inspection services through the Directorate of Mines in the provinces are wholly inadequate to perform their mandated function of monitoring mining operations, health, safety and environmental protection duties at industrial and artisanal mining sites. There are very few inspections, and officials often turn a blind eye to environmental and social non-compliance. There are only about 40 junior officials in the Ministry of Mines, who on the basis of a three-week environmental training course, are responsible for enforcing the environmental regulations throughout the entire country, says Okenda⁴⁶. The gap between legal provisions, compliance and the reality on the ground remains very critical and will be developed further in this study.

4 RESEARCH QUESTIONS

Environmental degradation, such as global warming and air pollution, is a global problem⁴⁷. Thornton and Beckwith give reasons that justify why solving environmental problems often requires international cooperation and the implementation of international standards⁴⁸. Given the links between oil, gas, mining operations and environmental degradation⁴⁹ and the fragility of the DRC due to its post-conflict context, this research poses the following primary question:

- Are Total E&P DRC and Metorex (Pty) Ltd legally complying with environmental legislation and international standards in a post-conflict country, such as the DRC?

It further poses the following secondary questions:

- What are the particular compliance-related challenges for the case studies companies?

⁴⁴ S Goethals, P Okenda & R Mbaya *Chinese mining operations in Katanga: Democratic Republic of the Congo* (2009) 6.

⁴⁵ *ibid* 3.

⁴⁶ *ibid* 6.

⁴⁷ T Schneider *How We Know Global Warming is Real The Science Behind Human-induced Climate Change*, USA (2013) 21.

⁴⁸ T Justine & B Silas *Environmental Law* 2 ed (2004) 29.

⁴⁹ B Vanwelde, T Calcut & H Young *Environmental Resources Management (ERM): Paper for the International Association for Impact Assessment (IAIA) Conference in Calgary, Alberta, Canada, 13-16 May (2013)* 1.

- How does the DRC's government respond to the lack of compliance?

5 RESEARCH OBJECTIVES

5.1 General Objective

This study aims to assess the environmental and social legal compliance of Total E&P DRC and Metorex group (Ruashi Mining), two Extractive Companies operating in oil and mining sectors in the DRC.

5.2 Specific objectives

- This research discusses the existing national environmental legislation of the DRC and the relevant international standards with regard to their implementation by Total E&P DRC and Metorex Group (Ruashi Mining).
- Sketches the environmental and social requirements that the case study companies need to meet and critically assess their practices against these requirements.
- With reference to relevant research and literature, as well as other available environmental compliance reports, a series of recommendations are provided to the case study companies and the DRC government.

6 RESEARCH METHODOLOGY

In seeking to fulfil the research objectives stated above and to answer the research questions, data were generated by utilising a qualitative research⁵⁰ approach. Information was acquired from reliable reports. The qualitative approach was selected for this study in order to offer a better informative understanding of the research problems and setting. Data generated through formal means and information gathered through informal means was also outlined by the emphasis of qualitative research methods on the role of continuous introspection by the researcher during the process of relating empirical data and its interpretation to the researcher's assumptions and research objectives⁵¹. Qualitative research started with the understanding of the research subject.

⁵⁰ N K Denzin & Y S Lincoln *Hand book of qualitative research*, 2nd ed. London (2015) 6.

⁵¹ JDL Nzinga (note 25 above; 34).

6.1 Research Procedure

6.1.1 Historical procedure

The historical procedure was used mainly for the historical⁵² legislation, regulations and policy of Extractive Industry overview within the context of the DRC to analyse, conceptualise and contextualise all facets of the research objectives. In order to safeguard the validity of the literature study, the researcher used the following databases:

- The internet search;
- Books, scientific journals and environmental related articles ;
- Relevant scientific studies;
- Conference reports;
- Annual sustainability reports of oil, gas and mining companies, including the case study companies' sustainability reports.

6.2 Case Study companies

While there are many similarities in terms of the potential for environmental and social legal compliance of Total E&P DRC and Metorex (Ruashi Mining) in any given context, it would be unfeasible to attempt an all-encompassing study within the limits of this thesis. This is particularly true for an environmental and social legal compliance assessment, which it cannot be separated from its context. The limitation of this methodology is that the resulting recommendations are directly appropriate only to the case study companies and context. A generalisation cannot be justified on the basis of this methodology. However, this study may contribute to a wider body of research of similar cases which could justify such generalisation in the longer term.

6.2.1 Case study companies justification

Total E&P DRC was selected by the researcher as a case study company because its *parent company* Total SA⁵³ is the fourth largest publically traded integrated multinational oil and gas company. Secondly, Total claims championing Sustainable Development and that its activities

⁵² J J Tan *Historical research: a qualitative research method* (2015) 2.

⁵³ Total *Registration Document*, France (2014) 8.

are bound up not only with providing access to energy but also protecting the environment and that they strive to reduce their environmental footprint⁵⁴. It is included in the leading Environmental, Social and Governance (ESG) Indexes and it has been the only international oil company selected for the Dow Jones Sustainability Index (DJSI) for the eleventh year in a row⁵⁵. Demonstrating their commitment to better energy, Total need to ensure that their operations consistently deliver economic, social and environmental benefits. Furthermore, Block III is located in the Lake Albert region and 32% of its license is situated in the Virunga National Park which is listed amongst the UNESCO Natural World Heritage sites. Additionally, Total's Block III is the first major oil investment opportunity in this remote part of eastern DRC ruined by recurrent armed conflicts where terrorists and other ethnic armed groups continue to massacre civilians and illegally exploit the DRC's natural resources to finance their armed activities. Total made a public commitment to refrain from prospecting and exploiting oil in the Virunga National Park; therefore, the researcher was motivated to assess this influential and respected multinational oil company's practices in this conflict zone where the DRC State Authority remains very fragile. For the researcher, Total E&P DRC Block III represents a perfect case study to conduct the environmental and social legal compliance assessment in order to ascertain if a reputable global oil and gas company is still complying, even when operating in such conditions.

The selection of Metorex Group (Ruashi Mining) as a case study company was primarily inspired by a resolve for the researcher's personal responsibility and also because Metorex represents a significant South African investment in DRC. The interest for this selection arose during the researcher's involvement as part of a consultant study team in an assessment on the projected reforms of the Mining legislation (Mining Code) and other related policies of the DRC and its impact on the mining investment in the Country. Secondly, Metorex, which was established⁵⁶ in 1975 with the specific objective of participating in the small mining sector as a public liability company, has become one of the South African biggest mining investments in the SADC region⁵⁷.

Jinchuan Group, a Chinese state-owned mining company, acquired Metorex (Ruashi Mining) in January 2012 and converted it into its subsidiary in November 2013. Metorex (Ruashi Mining) claims its commitment to using a modern solvent extraction electro-winning processing plant that resolutely ensures the implementation of environmental protection measures such as green

⁵⁴ Total (note 53 above; 42).

⁵⁵ *ibid* 13.

⁵⁶ Metorex history, available at www.metorex.com, accessed on 16/10/2019.

⁵⁷ Metorex Group *Annual Report for the year ended 31 December 2014* (2014) 3.

exploitation, clean production, recycling, energy-saving, emission reduction, natural conservation and pollution control⁵⁸.

However, local reports⁵⁹ by Congolese civil society organisations show that Metorex does not have a good record of environmental protection and CSR. There are significant complaints⁶⁰ about Metorex (Ruashi Mining) operations amongst local environmental NGOs, who are particularly concerned by the impacts of the company's activities on watercourses and agriculture.

This study will allow the researcher to conclude if the two case study companies, Total E&P DRC and Metorex (Pty) Ltd are behaving in an environmentally and sustainably acceptable way in the course of doing business in DRC, regardless of their commitments to the DRC environmental laws and international standards.

6.3 Data Collection

In order to assess the environmental and social legal compliance of Total E&P DRC and Metorex (Ruashi Mining) practices in a qualitative manner, sustainability reports of these companies were systematically analysed and confronted with a number of field environmental and human rights reports produced by independent organisations.

The qualitative research approach as stated above was based on textual analysis and discourse analysis. With a specific focus, the researcher proposed to determine to what extent Total E&P and Metorex operations and decisions were responsible for environmental degradation in Ruashi area.

6.4 Data sampling

The selection of data and their nature were done by the researcher. The strategy included theoretical and purposeful targeting of data sources.

Hence, the sustainability reports of Total E&P DRC and Metorex and the case study areas, Block III and Ruashi, were chosen for discovering what happened in the past and presently. Furthermore, data generation was considered completed when responses to questions had been provided to support the comprehensive interpretative argument. The most important concerns were related to environmental compliance and a category of CSR related issues. The key objective remained to help appraise the companies' practices with regards to environmental and

⁵⁸ Jinchuan International *Sustainability policies*, available at www.jinchuan-intl.com, accessed on 25 June 2016.

⁵⁹ Radio Okapi *Katanga « La société Ruashi Mining accusée de polluer des champs à Luano »*, 14 July 2014.

⁶⁰ *ibid.*

social compliance. In these areas, the companies were assessed in terms of their policies, management systems, environmental performance and practices.

6.5 Data analysis

The qualitative data analysis procedure entailed transcribing the content of the information, then analysed it by means of thematic (conception) and determining the level of analysis⁶¹. All data obtained were processed and a practical conclusion was drawn based on the findings. Triangulation⁶² was utilised to verify the information regarding reliability and validity. Triangulation refers to the utilisation of mixed methods⁶³ to analyse information such as sustainability reports and documents.

7 RESEARCH MOTIVATIONS

7.1 Practical motivation

The findings of this research could provide a useful perspective for those involved in Environmental and Social Legal Compliance Assessment (ESLCA), in Environmental Impact Assessment (EIA) and in Environmental Audit (EA). As foreign companies, particularly South African based companies, are interested in investing in petroleum and mining sectors in DRC, this research constitutes a real tool for them in terms of environmental regulatory framework review in these sectors. It also serves as a reference for consultants working in natural resources and environmental fields in the DRC. The resulting recommendations might also prove useful as a guide for implementing changes to enhance environmental compliance and performance strategy in DRC. The dissertation will also offer a much-needed balance to discussions about the challenges and difficulties for Extractive Industries in complying with environmental and social regulations in conflict and post-countries. This research also provides views on how foreign companies including South African based Extractive Companies are behaving when operating in African Countries, such as the DRC.

7.2 Academic motivation

⁶¹ G W Ryan & H R Bernard Data management and analysis methods (29) in *N K Denzin & Y S Lincoln Hand book of qualitative research*, London (2015) 772.

⁶² W Olsen *Triangulation in social research: qualitative and quantitative methods can really be mixed* (2004) 3.

⁶³ Ibid.

The research findings will contribute to a unique perspective to international and academic debates on the challenges of environmental legal compliance in conflict and post-conflicts countries which has been identified as a gap in existing literature and research, needing to be filled.

Although it is not the purpose of this thesis to make generalisation about environmental compliance in other contexts and in other industries, the findings may also make a useful contribution to the larger collection of research available on this problem.

8 ETHICAL CONSIDERATIONS

The University of KwaZulu-Natal (UKZN) is a research-led University⁶⁴. It is also a University with a rich history of engagement with society, the environment and more broadly with the world of knowledge. It is of significant importance therefore that the UKZN has a formally adopted research policy relating to an ethical framework within which it and its staff and students engage in research activities. The UKZN Research Ethics Policy is an explicitly stated ethical framework for the University community within which all research should be conducted while being mindful of the goal of developing an enabling environment for all learners and scholars in the pursuit of their studies in accordance with the principles of academic freedom.

This research complies with the UKZN research ethics requirements as set out in the University's Code of Conduct for Research. The researcher totally subscribes to this Policy and commits to maintain the highest standard of honesty and integrity as set in Appendix A, sections four, five and six of the Code of Conduct for Research which is an integrated part of the UKZN Research Ethics Policy. The researcher also makes it clear that the findings will form part of a printed treatise which will be shared and made available in the UKZN archives. The researcher supports the UKZN Plagiarism Policy and Procedures and acknowledges that plagiarism is an academic misconduct and can seriously jeopardize the student and the academic integrity of the university.

9 RESEARCH STRUCTURE

This dissertation is divided into five chapters. The first chapter introduces the subject, scope and purpose of the research. It provides the background information, highlights the research problems and questions. It discusses the research methodology, the research motivations and the ethical considerations. The second chapter discusses the relevant international and African regional

⁶⁴ UKZN *Research Ethics Policy v*, UKZN, (2015) 1.

environmental instruments. The third chapter discusses the DRC legal environmental framework and institutions vested with implementation and enforcement mechanisms. The fourth chapter assesses the environmental and social compliance of the Case study companies. Chapter five is a recap of what is discussed in preceding chapters and extracts the conclusion based on the findings. It also provides a number of recommendations to the case study companies and the DRC government.

CHAPTER TWO: RELEVANT INTERNATIONAL AND AFRICAN REGIONAL ENVIRONMENTAL INSTRUMENTS

1 INTRODUCTION

In the past three decades, protecting the global environment has emerged as one of the major challenges in international relations⁶⁵. Climate change is a current dominant issue, but other issues such as biodiversity loss, forestry and fishing are also attracting significant attention⁶⁶. At the time of writing this dissertation, the world is preparing to host the twenty-fifth Conference of the Parties to the United Nations Framework Convention on Climate Change (COP25) and the Sustainable Innovation Forum (SIF18) in Santiago, Chile in December 2019. Presently, there is a growing awareness that oil, gas and mining companies need to integrate their corporations' impacts on the environment and society and legal compliance into their core business⁶⁷. Corporates has the responsibility⁶⁸ to protect, respect and remedy human rights violations. This responsibility means that the State has a legal duty to protect individuals and communities from human rights abuses⁶⁹ and extractive corporations has a responsibility to respect human rights and avoid causing or contributing to adverse human rights impacts through their own activities, and fairly remedy such impacts when they occur including prevent or mitigate these impacts that are directly linked to their operations⁷⁰.

Although we are living in a changing and modern time, environmental and social legal compliance in oil, gas and mining sectors in the DRC remains a major concern both nationally and internationally. It is positive that the DRC has passed numerous laws and regulations aimed to strengthen a more effective and efficient environmental and social compliance regime in the oil, gas and mining sectors. At the centre of this effort was the promulgation of the 18th February 2006 Constitution, the Code of Mines (2002), the Environmental Protection Act (2011), the Hydrocarbons Law (2015) and other environmental related regulations. Does this legislative effort mean that the DRC is moving in the right direction toward sustainable development?

⁶⁵ D Hunter "Global Foreign Policy in Focus" Environmental Protection in the 21st Century (1999) *Institute for Policy Studies*, available at fpif.org/global-environmental-protection-in-the-21st-century, accessed on 20 April 2018.

⁶⁶ M Kidd *Environmental Law* 2ed (2010) 1.

⁶⁷ A D'Amato, S Henderson & S Florence *Corporate Social Responsibility and Sustainable business a guide to leadership tasks and functions*, USA (2009) 11.

⁶⁸ Respect Framework (2008) 9.

⁶⁹ UN *Guiding Principles on Business and Human Rights*, New York & Geneva (2011) 3.

⁷⁰ *ibid*, 13.

According to Paterson and Kotzé (2009), sustainable development depends on good governance, good governance depends on the rule of law, and the rule of law depends on effective compliance. None is sufficient alone, but together they form an indivisible force that is essential for survival and sustainable development⁷¹. The fundamental issue in DRC is not so much the environmental legislation and regulations, but more the capacity of the environmental institutions to monitor and enforce the laws and regulations. Without adequate enforcement capacity, even the best-designed regulations will be largely ineffective. With good capacity, even general environmental protection requirements can result in significant environmental and social compliance⁷². Institutional strengthening of the environmental authorities is the most crucial issue in the DRC.

2. REASONS FOR OIL, GAS AND MINING COMPANIES SHOULD IMPLEMENT INTERNATIONAL STANDARDS IN THE DRC

Yang Davis⁷³ (1996) believe that, oil, gas and mining companies which uphold environmental and social standards are likely to build a stronger reputation which is important for business in many ways. Oil, gas and mining companies can use international standards to enhance the technical integrity and references performance in order to enable environmental and social legal compliance and improve their reputation on the national and international level. The use of international standards can be a response to shareholders, environmental IGOs and NGOs, customers, interest groups and affected communities' pressure on oil, gas and mining companies to be transparent and accountable for environmental management which ensures environmental compliance. Implementing international standards helps to build more strong and stable community relationships in the society within which oil, gas and mining operations takes place. Oil, gas or mining companies that demonstrate moral leadership by supporting issues such as environmental compliance and human rights are more likely to have an enthusiastic and committed workforce and legitimacy in the communities where they operate. Oil, gas and mining companies must do all that is reasonable within their power to avoid exacerbating social, political and cultural tensions which may lead to communities' armed conflicts and commit to identify, prevent, mitigate and account for adverse human rights impacts with due diligence⁷⁴. Due diligence is understood as a business process through which companies actively identify, prevent,

⁷¹ A Paterson & LJ Kotzé *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 2.

⁷² P Cameron & M Stanley (World Bank) *Oil, Gas, and Mining: a sourcebook for understanding the extractive industries*, Washington DC (2017) 296.

⁷³ Y Davis *Building Your Company's Good Name: How to create and project the Reputation your organization wants and deserves* (1996) 350.

⁷⁴ United Nations *Guiding Principles on Business and Human Rights*, New York & Geneva (2011) 17.

mitigate and account for how they address and manage their potential and actual adverse environmental, social and human rights impacts. The process should include assessing actual and potential impacts throughout their business operations, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed⁷⁵. For this reason, Tully (2008), writes that, oil, gas and mining companies must observe not only the national legislation, but also international standards, regardless of whether such standards have been ratified by the State within which they operate⁷⁶. Implementing international standards in a post conflict-affected country, such as DRC, can enhance business' contribution to peace, stability and socio-economic growth. In the same approach, Nicola J Acutt⁷⁷ argues that corporate environmental responsibility has the potential to take firms beyond compliance and improve environmental management at the organisation level and stakeholder relations. Government may lack the capacity and willingness⁷⁸ to hold oil, gas and mining companies to account for environmental non-compliance; legal systems may be in place, but not efficiently enforced as is the case in the DRC. Oil, gas and mining companies may lack corporate commitment or willingness to comply with existing national environmental laws, taking advantage of the State's weak institutional capacity due to the post-conflict situation. In such cases, the implementation of international standards becomes imperative for these companies as they have to preserve their international reputation.

Though, the challenge is that most international standards are voluntary and place no obligation⁷⁹ on companies to implement them, but the government *can* make it a requirement for companies to implement them. More than the DRC domestic laws, International standards are helping mining, oil, and gas companies to manage risks and address issues of governance, compliance, environmental and social impacts and transparency. They help companies clarify their commitments and put environmental management systems in place to improve efficiency, reduce operations costs, and better relationships with stakeholders including governments, financiers, employees and communities⁸⁰. For instance, in effecting the ICGLR-OECD-UN⁸¹

⁷⁵ M Van Huijstee, V Ricco & L Ceresna *How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: A guide for civil society organisations* (2012) 8.

⁷⁶ S Tully *International Documents on Corporate Responsibility*, UK, Law Department, London School of Economic and Political Science (2008) 89.

⁷⁷ N J Acutt "Perspective on Corporate Responsibility: The South African Experience with Voluntary Initiatives" (2003) 10 (1) *SAJELP*, 18.

⁷⁸ J M Amerson "The End of the Beginning?: A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective" (2012) 4 (17) *Fordham Journal of Corporate & Financial Law*, 930.

⁷⁹ *ibid*, 916.

⁸⁰ International Finance Corporation (World Bank) *Sustainable and Responsible Mining in Africa - A Getting Started Guide*, (2014) 38.

⁸¹ ICGLR-OECD-UN *Meeting on implementing due diligence recommendations for responsible mineral supply chains report*, Bujumbura (2011) 2.

recommendations on the implementing of the OECD and UN due diligence guidance, the DRC's Government requested all mining and mineral trading companies operating in the country to meet the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals in Conflict-affected and high-risk areas⁸² of eastern Congo and Katanga provinces. Based on standards 1 of the IFC: Building Relations with Artisanal Miners; Anglo Gold Ashanti-DRC has developed an approach which aims in promoting a regulatory environment and acknowledges the existence and inevitability of Artisanal and Small-scale Mining⁸³. Anglo Gold Ashanti is helping the DRC government to put in place a comprehensive framework for artisanal and small-scale mining. Currently oil, gas, mining companies and the DRC government are aware of the importance of implementing international standards for doing responsible business. In 2014 for example, Freeport-McMoRan integrated the UN Guiding Principles on Business and Human Rights into their existing human rights programs, which lead them to conduct a corporate level human rights impact assessment to help identify impacts across the company portfolio in Tenke Fungurume Mining in the Katanga province of the DRC. This impact assessment allowed the company to initially determine that their current greatest impacts are related to communities and employees' issues⁸⁴. Additionally, the use of international standards by oil, gas and mining industries has legal implications beyond their formal status of "non-binding" standards or "soft laws"; they have the potential to merge into binding laws since they contain guidelines, declarations, principles and codes of practice from Extractive Industry bodies themselves, international financial institutions and IGOs. There are many international standards relating to environmental and social protection for oil, gas and mining companies, but the researcher will only focus on the most relevant to the research topic, which include:

- The UN Guiding Principles on Business and Human Rights (UNGPs);
- The OECD Guidelines for Multinational Enterprises;
- The International Finance Corporation Performance Standards; and
- The Extractive Industries Transparency Initiative (EITI).

⁸² International Dialogue on Peace & State Building *International standards for responsible business in conflict-affected and fragile environments* (2011) 6.

⁸³ International Finance Corporation (note 80 above; 32).

⁸⁴ Freeport-McMoRan *Voluntary Principles on Security and Human Rights: 2014 Annual Report to the Plenary*, London (2015) 2.

3. UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (UNGPS), 2011

The UN Guiding Principles on Business and Human Rights⁸⁵ apply to all States and all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. The UNGPs are more efficient and more progressive than the United Nations Global Compact⁸⁶, UNGC (2000).

In 2005, on the request of the UN Human Rights Council (UNHRC), the UN Secretary General Kofi Annan appointed John Ruggie (Ruggie) as a Special Representative on human rights issues with regard to Transnational Corporations (TNCs)⁸⁷.

In 2006, Ruggie compiled a report⁸⁸ of best practices for both States and TNCs. On February 9, 2007, Ruggie submitted to the UNHRC, his official report⁸⁹ entitled: “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts”. In this report, Ruggie focus on options to hold TNCs accountable for human rights violations⁹⁰. He emphasized that a many countries admit that they do not have policies, programs, or tools in place to deal with corporates human rights abuses and usually they rely on the framework of voluntary corporate initiatives⁹¹. Consequently, in fragile governance counties, such as the DRC, where the country has no efficient accountability mechanism, victims of human rights and environmental violations are often left without recourse.

On April 7, 2008, Ruggie submitted the UN Protect, Respect and Remedy Framework “the Respect Framework” which stands on the following three essential pillars:

- The State duty to protect against human rights abuses by third parties;
- The corporate responsibility to respect human rights; and
- The need for rights and obligations to be matched with appropriate and effective remedies for victims of human rights abuses, both judicial and non-judicial, when breached⁹².

⁸⁵ UN *Guiding Principles on Business and Human Rights*, New York & Geneva (2011) 3.

⁸⁶ United Nations *UN global compact* available at www.unglobalcompact.org, accessed on 18 July 2016.

⁸⁷ Press Release, Secretary-General Appoints John Ruggie of United States Representative on Issues of Human Rights, Transnational Corporations, Other Business Enterprises (July 28, 2005), *available at* www.unhcr.org/refworld/docid/45377c80c.html accessed on 04 April 2019.

⁸⁸ J Ruggie *2006 Interim Report* (2006) 1, available at <https://www.business-humanrights.org/.../the-2006-interim-report-of-the-un-special-report>, accessed on 26 March 2019.

⁸⁹ Human Rights Council *Business and Human Rights: Mapping international Standards of Responsibility and Accountability for Corporates Acts* Report of the Special Representative of the Secretary General (SRSG) on the issue of Human Rights and Transnational Enterprises and other business enterprises, available at <https://www.business-humanrights.org/.../john-ruggie-2007-report-to-un-human-right>, accessed on 16 April 2019.

⁹⁰ *ibid* 44.

⁹¹ *ibid* 16-17.

⁹² UN Guiding Principles (note 85, above:3).

On March 21, 2011, Ruggie presented the Guiding Principles to the UNHRC which are based on the Respect Framework.

The risks of human rights abuses and environmental non-compliance in post conflict-affected countries, like the DRC and the link between human rights abuse and oil, gas and mining operations are great⁹³. Extractives companies operating in such areas are encouraged use due diligence⁹⁴ to comply with laws and standards on environment and human rights. Principle 19 of the UNGPs on the responsibility to respect human rights requires that oil, gas and mining companies:

- Avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur;
- Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

In order to gauge human rights risks, business enterprises should involve meaningful consultations⁹⁵ and apply due diligence with affected communities and other relevant stakeholders. Meaningful consultations⁹⁶ refers to the ability of the mining, oil and gas company to involve affected communities and other stakeholders in every consultation process to addresses better their issues and grievances. It is an activity undertaken to create opportunities for dialogue between the oil, gas and mining companies, in this case; and all its stakeholders, with the aim of providing an informed basis for the companies' decisions.⁹⁷

Surya Deva and David Bilchitz⁹⁸ write that due diligence refers to the responsibility of corporations to identify impacts, to prevent and mitigate impacts thus identified; and to account for impacts and establish grievance mechanisms. This responsibility means that extractives companies have to respect human rights even if the Host State does not. The idea of due diligence is to have the primary responsibility to promote, secure, ensure respect and protect human rights

⁹³ C Peyer & Y Maillard *Contracts, human rights and taxation: How a company exploits a country. The case of Glencore in the Democratic Republic of Congo*, Switzerland (2011) 20.

⁹⁴ OECD *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (2015) 9.

⁹⁵ G Whiteman & K Mamen *Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector*, The North-South Institute (2002) 37.

⁹⁶ M van Huijstee, V Ricco & L Ceresna *How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: A guide for civil society organisations* (2012) 8.

⁹⁷ *ibid.*

⁹⁸ S Deva & D Bilchitz *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge University Press (2012)19.

by mining, oil and gas companies. Ruggie⁹⁹ believes that Mining, oil and gas companies' responsibility for human rights in weak governance zones, such as the DRC, must be maintained even if the State itself is unwilling or unable to prevent and protect human rights abuses. They still have to obey the law, even if it is not enforced and respect the principles of relevant international instruments where national law is absent.

Jena Martin Amerson¹⁰⁰, write that *despite initial resistance from multinational companies regarding the business and human rights agenda, companies' executives now seem to understand that allowing a corporation to be complicit in human rights violations comes not just at a moral cost, but more than likely at a business cost as well.* To that end, the Guiding Principles are among the most important milestones in the recent era of corporate responsibility and sustainability, particularly given its emphasis on stakeholder engagement and collaboration among government, business and civil society. Caroline Rees¹⁰¹ believe that the UNGPs have distilled and catalyzed an understanding of business' role in society that focuses on impacts on people and they mark a significant shift away from a voluntary framework¹⁰² that is disconnected from a company's core business. For the first time, the UNGPs firmly establish that companies' responsibility to respect human rights extends through their business relationships, with implications for all tiers of their value chains. For Gopinath Parakuni¹⁰³; because of The UNGPs, Extractives companies, can no longer ignore the human rights context of their operations, whether it be Apple selling products containing cobalt from "blood minerals" of the eastern DRC, where wars and human rights abuses are rife, or Formula 1 holding a grand prix in Azerbaijan where political opponents and human rights monitors are languishing in prison.

Although they have been an overall acknowledgement of certain positive features of the UNGPs, Surya Deva and David Bilchitz¹⁰⁴ find them to be a weak regime that suffers from serious deficiencies. In their view, the UNGPs fall short in both articulating human rights obligations of business and in providing robust redress avenues to victims of human rights violations. In this instance, much more needs to be done both normatively and practically to ensure that the

⁹⁹ J Ruggie *Special Representative of the Secretary-General on Human Rights & Transnational Corporations & Other Businesses: 10th OECD Roundtable on Corporate Responsibility: Updating the Guidelines for Multinational Enterprises*, discussion paper, 22–23 (June 30, 2010), available at <http://www.oecd.org/dataoecd/17/35/45545887.pdf>, accessed on 18 March 2019.

¹⁰⁰ JM Amerson *The End of the Beginning?: A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective* *Fordham Journal of Corporate & Financial Law* (2012)932.

¹⁰¹ Business and Human Rights Resource Center *Key Achievements of the UNGPs in the past 5 years*, available at <https://www.business-humanrights.org/en/full-statements-from-stakeholders>, accessed on 25 April 2019.

¹⁰² The United Nations Global Compact, available at www.unglobalcompact.org, accessed on 18 July 2016

¹⁰³ Business and Human Rights Resource Center (note 101, above).

¹⁰⁴ S Deva & D Bilchitz *Response to Comments of Professor John Ruggie on "Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?"* (Cambridge University Press, 2013) (2014) 3.

business sector complies with its legitimate human rights obligations, that these are defined with greater clarity, and that those who fail to walk the talk are made accountable. They suggest further advocacy and efforts to achieve a stronger regime. In the same view, the Institute for Human Rights and Business¹⁰⁵ argues that the major challenge of the UNGPs remains the absence of effective remedies for grave human rights abuses involving companies. Peter Frankental¹⁰⁶ add that States are proceeding in space to develop their action plans to implement the UNGPs, but they are lacking the will to close the accountability gaps that enable companies to get away with abuses; and despite the widespread violations that businesses cause or contribute to, prosecutions are a rarity while effective remedies for victims are conspicuously lacking.

The researcher believes that the Guiding Principles have strengths and weaknesses. Major strengths include the fact that the UNGPs remain very well the most important milestone in the current generation of corporate responsibility and sustainability, particularly given its emphasis on stakeholder engagement and partnership among government, business, civil society organizations and communities. The UNGPs are one of the most internationally recognised frameworks for business and human rights, as it is backed by UN member state governments. The UNGPs have effectively clarified that companies have the responsibility to address the impacts on human rights that occur through their own operations or as a result of their business relationships with other parties, including in their supply chains. It invites governments to view human rights protection against abuses by business as a responsibility that goes beyond the environmental protection, approval, and monitoring of projects. It's undoubtedly an option for guiding and gauging Extractive Industries' efforts to respect, protect and remedy human rights and environmental violations.

Weaknesses of the UNGPs are linked to the fact that it does not attach legal accountability¹⁰⁷ to extractive companies. This means that the UNGPs dependent on company willingness for implementation, enforcement, compliance, protect and remedy human rights or environment violations. Therefore, the UNGPs need improvement that will include a mandatory system and a monitoring mechanism in order for States and extracting companies to achieve environmental and social compliance, respect, protection and remedy of human rights in their operations and supply chains.

¹⁰⁵ Business and Human Rights Resource Center (note 101, above).

¹⁰⁶ *ibid.*

¹⁰⁷ UN Guiding Principles § II.A, (2011) 11-13.

4. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 1976, UPDATED IN 2011

The OECD Guidelines for Multinational Enterprises (the “OECD Guidelines”) form an integral part of the Declaration on International Investment and Multinational Enterprises¹⁰⁸ (the “Investment Declaration”) on responsible business conduct (RBC). The OECD Guidelines apply to all sectors, companies and activities of businesses operating in or from adhering countries and addresses major areas of industry ethics, including information disclosure, environment, human rights, responsible supply chain and anti-corruption¹⁰⁹. The Guidelines remains voluntary for companies, but governments are obliged to promote their implementation and companies are encouraged to act in accordance with them¹¹⁰. In 2011, the OECD Guidelines underwent revision and a new provision on stakeholders engagement was added stating that Multinational Enterprises (MNEs) should engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for oil, gas and mining projects or other activities that may significantly impact the environment and local communities¹¹¹. The OECD Guidelines call on multinational enterprises to carry out meaningful stakeholders’ engagement¹¹² and due diligence¹¹³ to identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed¹¹⁴. The OECD Guidelines indulge mining, oil and gas industries by, *inter alia*:

- Integrating stakeholder engagement into project planning and regular business operations through sharing of decision-making power with interested and affected parties;
- Practising stakeholder engagement that is driven by stakeholders through ongoing consultations and follow-through on agreements, commitment and remedies;
- Developing a stakeholder engagement strategy which prioritises engagement with most severely affected like artisanal and small-scale miners rather than most influential once;
- Establishing clear and functional processes to respond to grievances;

¹⁰⁸ OECD *Guidelines for Multinational Enterprises* (2011) 4.

¹⁰⁹ *ibid* 10.

¹¹⁰ J G Ruggie & N Tamaryn “*Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges.*” *Corporate Social Responsibility Initiative Working Paper No. 66*. Cambridge, MA: John F. Kennedy School of Government, Harvard University (2015) 2.

¹¹¹ OECD *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, (2016)3.

¹¹² N Jeffery *A Road Map to Meaningful Engagement*, Doughty Centre for Corporate Responsibility, Cranfield University (2009) 2.

¹¹³ D Roodman *Due Diligence: an impertinent inquiry into microfinance*, Center for Global Development (2011) 21

¹¹⁴ OECD (note 111 above; 17).

Key topics addressed by the OECD Guidelines¹¹⁵, such as human rights, environment and corruption are significant issues in the DRC context. In 2007 for instance, *Afrimex, a UK based company trading coltan and cassiterite in the DRC was accused by civil society groups for not implementing the OECD Guidelines and making illicit tax payments to an armed rebel group with a documented record of grave human rights abuse. A complaint was filed by Global Witness¹¹⁶ with the UK National Contact Point (UK-NCP) against Afrimex. The UK-NCP issued a strong final statement, in which it confirmed that Afrimex operated in violation of OECD Guidelines and should take measures to prevent conflict, including by ensuring due diligence in its supply chain¹¹⁷.*

John Ruggie and Nelson Tamaryn¹¹⁸, suggest that the OECD presents a greater diversity of human rights complaints cases across the board and a higher admissibility rate for human rights cases than any other international instrument. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas, such as the DRC, has become an “international standard¹¹⁹” on its own. The OECD has a NCP mechanism with focus on mediation to provide those affected by human rights harms by extractives companies, a potentially simpler and relatively quicker alternative for the resolution of certain disputes that either does not require, or for which the complainants prefer not to pursue, judicial or quasi-judicial routes. It also offers those at risk of violations an avenue to file a formal international complaint to stop a potentially harmful practice from moving forward, as it was the case with the WWF vs SOCO international for oil exploration in Virunga National Park¹²⁰, DRC. The OECD Guidelines are complemented by a simplified guide to assist oil, gas and mining companies operating in the DRC to become certified under the African Regional Mineral Certification Scheme of the Great Lakes Region¹²¹ (ICGLR-Mineral Certification Scheme). It is accurate that everything in the OECD guidelines is covered by the UNGPs. However, the OECD

¹¹⁵ OECD (note 111 above; 7).

¹¹⁶ OECD Watch *Global Witness v Afrimex* 2007 (1).

¹¹⁷ International Dialogue on Peace & State Building *International standards for responsible business in conflict-affected and fragile environments* (2011) 6.

¹¹⁸ J Ruggie & T Nelson *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges: Corporate Social Responsibility Initiative Working Paper No. 66*. Cambridge, MA: John F. Kennedy School of Government, Harvard University (2015) 19.

¹¹⁹ OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas, available at <http://www.oecd.org/corporate/mne/GuidanceEdition2.pdf>, accessed on 16 April 2019.

¹²⁰ European Parliament *Resolution on the protection of the Virunga National Park in the Democratic Republic of Congo* (2015/2728(RSP)).

¹²¹ ICGLR-OECD-UN *Report on the Meeting on implementing due diligence recommendations for responsible mineral supply chains*, (2011) 7.

guidelines are the most applied in the mining sector on the ground in DRC¹²² where it has a contact point. The OECD Guidelines implementation on-the-ground due diligence programmes in the DRC has proven to be efficient, effective and useful in the fight against the illegal exploitation of natural resources of the DRC linked to the proliferation of multiple rebellions and armed groups conflicts in the eastern DRC¹²³. The IPIC¹²⁴ confirms that the 2011 the International Conference for the Great Lakes Regional (ICGLR) endorsed and incorporated the OECD Due Diligence Guidelines into its certification mechanism. The ICGLR's regional certification scheme requires all mining companies and traders to undertake OECD due diligence before being issued a certificate. The DRC subsequently implemented the ICGLR regional certification mechanism into its national frameworks in 2012. This led the DRC government to suspend the licenses of two Chinese¹²⁵ mineral companies for breach of the obligation to undertake due diligence in accordance with the ICGLR certification mechanism and the OECD Due Diligence Guidelines in May 2012. The OECD due diligence guidelines is at the center of the fight for conflict-free mineral supply chains mechanism in the DRC¹²⁶. The mechanism is an on-the-ground traceability method for tracing mineral consignments to mines, origin and transit through electronic bar-coded tags attached to individual bags of minerals and shipments. John Ruggie¹²⁷ confirms that at least twelve out of thirty –eight cases of violations to the OECD Due Diligence Guidelines were submitted to the NCPs system by NGOs between the period of June 2003 - June 2004 for the DRC alone. Thus, many implementation challenges remain. The OECD database reveals that 14 NCPs have never received a single complaint, and several others have only received one, probably not because there is absence of breaches, but most likely that the NCPs are probably invisible or unresponsive to potential complainants¹²⁸. Furthermore, no OECD government has publicly stated that non- compliance with the Guidelines will have any material or legal consequences, except Canada, which expressed through its new CSR new strategy in line the OECD Guidelines, “Doing Business the Canadian Way”; that as a penalty for companies that do not embody CSR best practices and refuse to participate in the CSR

¹²² OECD Mineral supply chains and conflict links in eastern DRC: 5 years on: 9th Multi-stakeholder forum on responsible mineral supply chains, Paris 2015 4-6 May (2015)3.

¹²³ ICGLR-OECD-UN (note 121 above; 4).

¹²⁴ IPIS *Responsible Business conduct: Mineral supply chains and conflict links in eastern Democratic Republic of Congo Five years of implementing supply chain due diligence*, (2015) 35.

¹²⁵ S Pickles *Managing the risk of illegal mining and conflict minerals in global supply chains*, Global Witness (2016), available at <https://www.globalwitness.org/.../managing-risk-illegal-mining-and-conflict-minerals...>

¹²⁶ ICGLR-OECD-UN (note 121 above ; 5).

¹²⁷ J Ruggie & T Nelson (note 118 above ; 7).

¹²⁸ *ibid* 12.

Counsellor's Office or NCP dispute resolution, the Government of Canada support in foreign markets will be withdrawn.”¹²⁹

5. THE IFC PERFORMANCE STANDARDS

The IFC's Performance Standards on Environmental and Social Sustainability discusses the IFC's commitments, roles and responsibilities related to environmental and social sustainability. It is a tool developed and adopted by Financial Institutions to assess and manage environmental and social risks and impacts of project financing in extractive industry sector. The IFC has eight Performance Standards that companies, including oil, gas and mining companies must implement throughout the life of their operations¹³⁰. In terms of this study, the researcher will only focus on standards that are mostly in line with the research topic.

5.1 IFC Standard 1: Assessment and Management of Environmental and Social Risks and Impacts

The IFC standard 1 underscores the importance of managing environmental and social performance throughout the lifecycle of a project¹³¹. An effective Environmental and Social Management System (ESMS)¹³² is a dynamic and continuous process initiated and supported by management and involves engagement of oil, gas and mining companies with its workers, local communities directly affected by the project and other stakeholders, such as local authorities and civil society's organisations. IFC Performance Standards require oil, gas and mining companies to respect human rights and address adverse human rights abuse that they may have caused or contributed to, to promote and provide means for adequate engagement with affected communities throughout the project cycle on issues that are potentially affecting them and to conduct an Environmental and Social Assessment and Management System (ESMS).

5.2 IFC Standard 3: Resource Efficiency and Pollution Prevention

This IFC Performance Standard recognises that oil, gas and mining activities often generate pollution to air, water, and land in a manner that may threaten people and the environment at the local, regional, and global levels. It, therefore, indulges that during the project life cycle, oil, gas and mining companies must consider ambient conditions and apply technically and financially

¹²⁹ J Ruggie & T Nelson (note 118 above ; 21).

¹³⁰ International Finance Corporation & World Bank *IFC Performance Standards on Environmental and Social Sustainability*, Washington, DC (2012) 2.

¹³¹ World Bank IFC Performance Standards on Environmental and Social Sustainability (2012) 5.

¹³² *ibid* 5.

feasible resource efficiency and pollution prevention techniques that are best suited to avoid, or where avoidance is not possible, minimise adverse impacts on human health and the environment.

5.3 IFC Standard 5: Land Acquisition and Involuntary Resettlement

This IFC Performance Standard acknowledges that projects, such as oil, gas and mining, involve land acquisition and restrictions on land use and have adverse impacts on communities and persons that use this land¹³³. In this case, oil, gas and mining companies are advised to develop and implement a Resettlement Action Plan and a Livelihood Restoration Plan. Involuntary resettlement¹³⁴ refers both to physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or loss of income sources or other means of livelihood) as a result of the project related to land acquisition and restrictions on land use. Resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement. When resettlement cannot be avoided, oil, gas and mining companies must offer displaced communities and persons; compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods. Compensation must be transparent and applied consistently to all communities and persons affected by the displacement. Oil, gas and mining companies will take possession of acquired land and related assets only after compensation has been paid and, where applicable, resettlement sites and moving allowances have been provided to the displaced communities in addition to compensation.

6. THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI)

The EITI is a coalition of governments, companies, civil society groups, investors and international organisations¹³⁵. Its aim is to strengthen governance by improving transparency and accountability in the Extractive Industries sector¹³⁶. The EITI promotes improved governance in resource-rich countries through the verification and full publication of company payments and government revenue¹³⁷. The DRC government voted to join the EITI in November 2007¹³⁸. Despite difficulties in the beginning, the EITI/DRC has so far published reports¹³⁹ of information

¹³³ World Bank *IFC Performance Standards on Environmental and Social Sustainability* (2012) 31.

¹³⁴ *ibid* 31.

¹³⁵ EITI *The Norm EITI* (2013) 9.

¹³⁶ *ibid* 8.

¹³⁷ *ibid* 43.

¹³⁸ ITIE DRC Overview, available at <https://eiti.org/democratic-republic-of-congo>, accessed on 21/11/2019.

¹³⁹ M Stephens *ITIE-DRC Reconciliation Report for the year 2012*, Kinshasa (2014) 10.

related to payments by Extractive Companies to the government and income collected by the government from such companies for the years 2007, 2008, 2009 and 2010. There are three elements¹⁴⁰ of the EITI process that might be beneficial for enhancing environmental performance and compliance: the reporting and monitoring process, the multi-stakeholder process, and the relationship with energy security. Countries implementing the EITI are required to produce reports covering all payments made by Extractive Companies to the governments where they operate and for governments to publish what they receive. Environmental compliance requiring monitoring and reporting is very likely to have similar capacity challenges and can draw from the experience of EITI capacity building. The EITI has been at the vanguard of multistakeholder initiatives, forging consensus among partners in governments, companies and civil society organisations. At the national level, the EITI creates a platform for dialogue between local communities/civil society organisations, government and companies that in many cases would not otherwise exist. The broad stakeholders' groups involved (companies, governments and local communities) in the EITI are the same as those that will need to work together towards corporate environmental responsibility and compliance.

7. AFRICAN MINING VISION

The African Mining Vision (AMV)¹⁴¹ was conceived in preparation of the First African Union Conference of Ministers Responsible for Mineral Resources Development with the assistance of the International Study Group (ISG) and the Economic Commission on Africa (ECA) with the aims to advocate for transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development¹⁴².

The AMV consist of principles¹⁴³ of sustainable development, wealth creation and the integration of the mining sector into Africa's social and economic development process. Mining by nature is an inherently unsustainable resource in that the life of the mine is limited and will eventually come to close¹⁴⁴.

¹⁴⁰ J Moberg *Climate change and the EITI* 2009, available at www.eiti.org, accessed on 02 August 2016.

¹⁴¹ African Union *Africa Mining Vision*, Addis Abeba 2009.

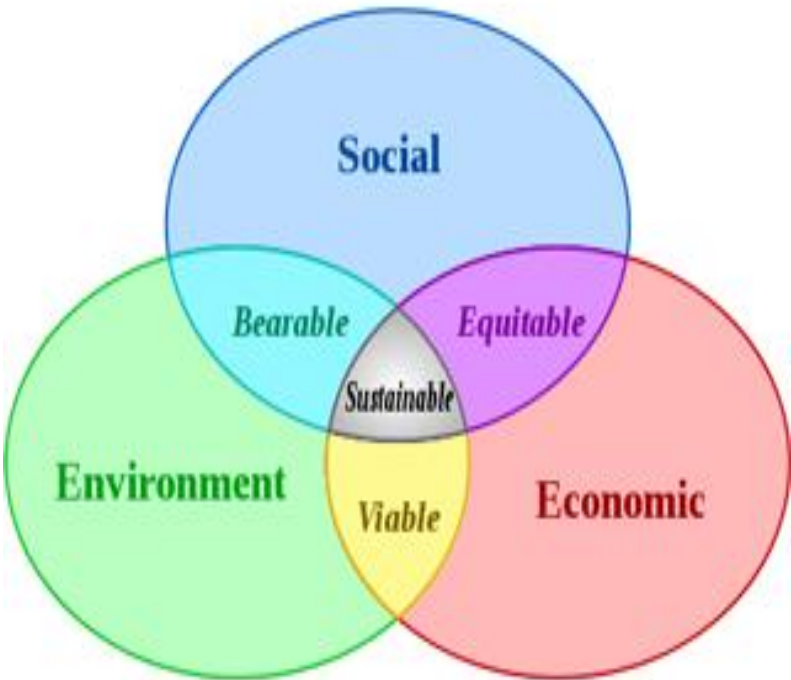
¹⁴² Economic Commission for Africa & African Union *Minerals and Africa's Development. The International Study Group Report on Africa's Mineral Regimes*, Addis Ababa (2011) 13.

¹⁴³ Economic Commission for Africa *Africa Review Report on Mining: E/ECA/CFSSD/6/7*, Addis Ababa (2009) 2.

¹⁴⁴ *ibid* 2.

However, its sustainability¹⁴⁵ can be ensured by the linkages it forms with other sectors of the economy. Sustainability as defined by the World Commission on Environment and Development (WCED) in its Brundtland report¹⁴⁶, states that “*our common future is the development that meets the needs of the present generation without compromising the ability for future generations to meet their own needs*”. Further expansion of this definition was made during the 2002 World Summit on Sustainable Development¹⁴⁷, using the three pillars of sustainable development, namely economic, social, and environmental.

Figure 1



Source: ECA, Africa review report on mining 2009

The improved stability in the political and economic environment has led to increased investment in the African minerals sector¹⁴⁸, more especially in the DRC. But the weaknesses of transparency and accountability, effective and clear regulatory framework, good governance and public participation, environmental compliance and enforcement, economic, social and health impacts and benefits among others, need to be addressed for minerals to generate incomes as pursued by the AMV. In this regards, there is an increase in negative environmental impacts

¹⁴⁵ Economic Commission for Africa & African Union (note 142 above; 2).
¹⁴⁶ *ibid* 2.
¹⁴⁷ Science and Policy for Sustainable Development: Environment, vol.47 (2005) 8-21.
¹⁴⁸ Economic Commission for Africa (note 143 above; 4).

caused by mining activities, coupled with disruption of local social values, traditional norms and livelihoods resulted in environmental and social requirements becoming major features of national mining legislation. Such requirements include ESIA and environmental and social funds prior to the granting of mineral licences. The improved use of ESIA has partially benefited from companies subscribing to international standards¹⁴⁹, such as the UNGPs, the IFC Performance Standards, the OECD Guidelines for Multinational Enterprises, etc. This has had the effect of improving corporate social responsibility, with mining companies taking the view that CSR is part of doing good business¹⁵⁰. Africa and the DRC in particular, are making improvements in creating a vibrant and a diversified mineral sector¹⁵¹. However, these improvements have not yet been sufficient to secure a sustainable sector that is environmentally, socially and economically integrated into the long-term development aspirations of its peoples¹⁵².

¹⁴⁹ Economic Commission for Africa *Africa Review Report on Mining: E/ECA/CFSSD/6/7*, Addis Ababa (2009) 5.

¹⁵⁰ Economic Commission for Africa & African Union *Minerals and Africa's Development. The International Study Group Report on Africa's Mineral Regimes*, Addis Ababa (2011)5.

¹⁵¹ Economic Commission for Africa (note 149 above; 16).

¹⁵² *ibid* 16.

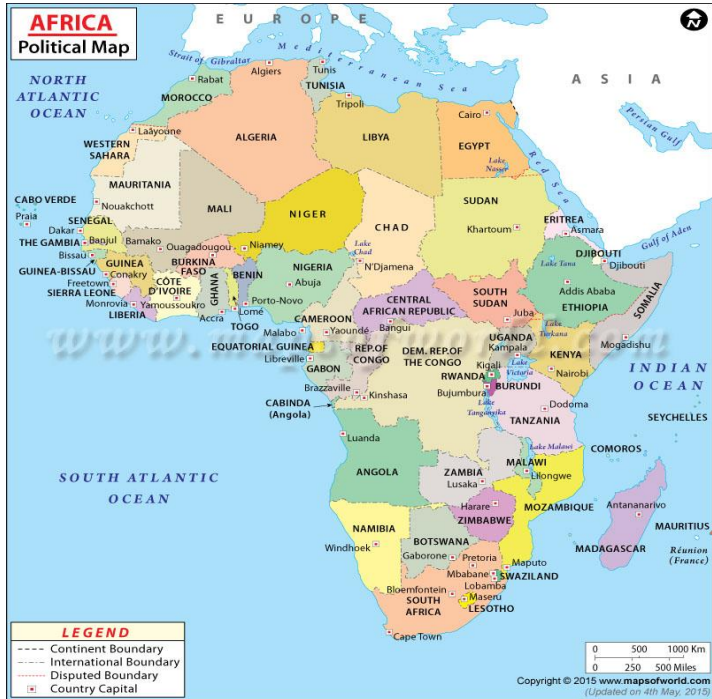
CHAPTER THREE: DRC LEGAL ENVIRONMENTAL FRAMEWORK AND INSTITUTIONS CHARGED WITH IMPLEMENTATION AND ENFORCEMENT MECHANISMS.

An essential condition to discussing the environmental and social legal compliance assessment in oil, gas and mining in the DRC is first, an understanding of the country’s environmental legal framework and the workings of its environmental institutions charged with environmental governance, implementation and enforcement in the extractive sector.

1. DEMOCRATIC REPUBLIC OF CONGO BRIEF PRESENTATION

The DRC is a nation of about 80.4 million people last recorded in 2012 from 15.3 million in 1960, according to the World Bank¹⁵³. The DRC is the second largest country in Africa after Algeria (by area) and is situated in central Africa which straddles the equator and borders nine other African nations (see map below: figure 1)

Figure 2: Africa political Map



Source: Political Map of Africa¹⁵⁴

¹⁵³ Congo Population|1960-2015|Data|Chart|, available at www.tradingeconomics.com/congo/population.htm, accessed on 12 July 2015.

¹⁵⁴ The Political Map of Africa continent, available at www.mapsofworld.com/africa/, accessed on 12 July 2015.

The Country has a dense tropical rainforest in the central Congo River basin and eastern highlands. Its western border lies within the Albertine Rift (the western branch of Africa's Great Rift System) and takes in several of Africa's Great Lakes. Established as a Belgian colony in 1908, the DRC gained its independence in 1960, but it was quickly marred by political and social instability and armed conflicts. Colonel Joseph Mobutu seized power in the November 1965 coup and subsequently changed the name of the country to Zaire. Ethnic strife and civil wars touched off by a massive inflow of refugees in 1994 from fighting in Rwanda and Burundi, led in May 1997 to the toppling of the Mobutu dictatorial regime by a rebellion backed by Rwanda and Uganda and fronted by Laurent Kabila. He renamed the country the DRC, but in August 1998 his regime was itself challenged by a second insurrection, backed by Rwanda and Uganda again. President Laurent Kabila was assassinated in January 2001 and his son, Joseph Kabila, was chosen as Head of State¹⁵⁵. A transitional government was appointed in July 2003, Joseph Kabila as President of the Country and four deputy-presidents represented the government, two former rebel groups and the political opposition¹⁵⁶. The transitional government held a successful constitutional referendum in December 2005 and the presidential and legislative elections in 2006. The most recent general elections were held on the 30 December 2018. The DRC has a large variety of natural resources including oil, natural gas, minerals, a significant hydrography and vast forests. It accounts for one-fifth of Africa's total forest area. About 45 percent of the DRC is covered by a primary rainforest¹⁵⁷.

2. ENVIRONMENTAL LEGAL FRAMEWORK OF THE DRC

This section discusses key relevant environmental legal framework of the DRC applicable to the Environmental and Social Compliance Assessment (ESCA), Environmental and Social Impact Assessment (ESIA) Environmental Governance, Environmental Audit (EA), Environmental Assessment of Policies, Plans and Programs (EAPPP) and the Environmental Rehabilitation Fund (ERF). They include:

- The DRC Constitution;
- The Environmental Protection Act;

¹⁵⁵ C Talbot *The Congo: President Kabila assassinated*, 18 January 2001, available at www.wsws.org/en/articles/2001, accessed on 26 March 2016.

¹⁵⁶ D Tshiyoyo *Democratic Republic of Congo: Road to Political Transition* (2006) 7.

¹⁵⁷ UNEP, *Africa Atlas of our Changing Environment* (2008)12.

- The Mining Code;
- The Mining Regulations; and
- The Hydrocarbons Law.

2.1 The DRC Constitution

The Constitution of the DRC is the supreme law of the land¹⁵⁸. It was promulgated by the President of the Republic on the 18th February 2006 and encloses key provisions relating to the protection and the rights to the environment. Article 53 provides that:

- Every person has a right to a healthy environment and which is favourable to his/her full development.
- The environment must be protected.
- The State must look after the protection of the environment and the health of the people.

Indeed, the above article confirms the environmental rights of the Congolese people and their responsibility to safeguard the environment. Kihangi Bindu¹⁵⁹ maintains that the first section of article 53 of the DRC constitution makes provision for the right to a healthy environment. The second and the third sections indulge Congolese people and businesses to protect the environment. Society is encouraged to defend its right to a healthy environment and the government to ensure the implementation of provisions that guaranties a healthy environment to its people. Article 202.36.f of the DRC Constitution gives provision for laws to be passed on mines and minerals, oil, gas, energy resources and the conservation of natural resources. Article 203 of the DRC Constitution calls for cooperative governance between the national and the provincial governments to protect the environment. Article 123 of the Constitution makes provisions for laws to be made on, *inter alia*, “the protection of the environment and tourism”. Article 150 of the DRC Constitution guarantees the inviolability of fundamental rights and freedoms and the judiciary uphold the rule of law. Indeed, environmental provisions are rooted in the Constitution of the DRC to enhance people and economic development and further to generate more environmental laws, regulations and policies to be enacted within the country.

¹⁵⁸ Art 62 (2) & art 168 (2) of the DRC Constitution.

¹⁵⁹ K Bindu The environmental law framework of the Democratic Republic of the Congo and the balancing of interests in M Faure & W du Plessis *The balancing of interests in environmental law in Africa* (2011) 95.

2.2 The Environmental Protection Act (EPA)

After many years in draft form, the Environmental Protection Act (EPA), Law No. 11/009 was promulgated by the President of the DRC on the 11th February 2014 as provided by Articles 123.o and 202, paragraph 36.f of the DRC Constitution. The EPA sets out fundamental and universal principles¹⁶⁰ such as the principle of cooperative governance in environmental matters and the judicial control over administrative environmental actions for sustainable development and environmental management. Cooperative governance refers to and regulates the interrelationship between the branches of the State. The DRC, as all other modern states, has three branches of State: the legislative; the executive; and the judicial. All three branches of the State have a key role to play in environmental governance and, therefore, environmental compliance and enforcement. Cooperative governance is accordingly regarded as a necessary precursor to develop an effective environmental compliance and enforcement effort¹⁶¹. Article 68 of the constitution sets the framework for cooperation between these three branches of the state and article 203 (16-19) of the Constitution provide for the administration cooperation in environmental matters between the national and the provincial governments.

The EPA contains several requirements¹⁶², particularly the obligation for oil, gas and mining companies to undertake an Environmental and Social Impact Study (ESIS), Environmental Audits (EA), Environmental Evaluation of Policies, Plans and Programmes (EEPPP); the creation of new institutional structures; and an Environmental Fund for Research (EFR), conservation, clean-up operations, rehabilitation and pollution prevention (Article 19 of the EPA). Article 29 of the EPA requires that the development, construction or exploitation of all activities relating to industrial, commercial, agricultural, forestry, mining, oil, gas and telecommunications projects, and any other activities that may have an impact on the environment, be subject to an ESIA and Environmental Management Plan (EMP), before obtaining approval from the competent authority. Furthermore, Article 23 of the EPA makes provisions for the Ministry of Environment and Sustainable Development (MENSDD) to undertake an EA of all works, projects or activities that present a potential risk to the environment or to the population. In this regard, environmental issues that require Environmental Management Plans (EMP) based upon the potential impacts of activities by extractives companies are the following:

¹⁶⁰ Articles 22 & 50 of the DRC EPA.

¹⁶¹ M Kidd *Environmental Law*, 2nd ed (2011) 33.

¹⁶² Articles 19, 29, 32 & 35 of the DRC EPA.

- Air quality
- Energy management
- Noise and vibration
- Waste management
- Water quality
- Environmental emergency plan

To ensure the implementation of the EMP the following mechanism must be established:

- Objectives to be achieved
- Management strategies
- Tasks and responsibilities
- Frequency
- Monitoring and reporting and
- Corrective actions

Article 24 of the EPA stipulates that all projects or activities that could have an impact on the environment must be subject to a public hearing during the ESIA. The aims of the public hearing is to inform the public in general and the affected communities in particular about a project or activity and collect the concerns, ideas and suggestions of the communities in order for the competent authority to consider all aspects necessary for decision-making. Articles 4 to 8, 29 and 31 of the EPA makes provisions for Regulations by means of decrees to be made on the following:

- Access to environmental information and recourse;
- Public participation;
- The Council for Environment and Sustainable Development;
- List of sector activities and projects requiring an ESIS, the procedures and the content of such an assessment;
- The contents and modalities of the review and approval of policies, plans and programmes;
- The organisation and functions of the ESIS review and approval body;
- Environmental audits guidelines;
- All aspects related to the prevention of risks and control of pollution, including the protection of the ambient environment, the management of chemicals, the management of waste, genetically modified organisms and the management of natural disasters and emergency situations.

However, it is important to emphasize that at the time of writing, no Regulations have been made yet in terms of the EPA. Article 5 of the EPA guarantees to Congolese peoples the access to information and the right to environmental education to encourage national awareness on the importance of conservation of biological diversity and classifies protected areas¹⁶³. Article 71 of EPA prohibits pollution of natural reserves, national parks and biosphere reserves, waters, rivers and streams while Article 73 provides that no activity of deforestation, oil and mining exploration or exploitation can be allowed in protected areas, which include national parks. Article 19 of the EPA provides that all policies, plans and programmes drafted by the State, Province, decentralised government structures, institutions or public enterprises, which may have a significant impact on the environment, must be subject to an environmental evaluation. The strategic approach¹⁶⁴ to mainstreaming environmental management into development planning is expressed in Article 6 of the EPA, which requires the State, Province or other decentralised government institution to consider, before the formulation of land use management and zoning plan, the imperatives of environmental protection and the well-being of the local population.

2.3 The Mining Code, Law No. 007/2002

The Mining Code, Law No 007/2002 of 11 July 2002, applies to all commercial activities associated with the prospecting, exploitation, processing, transportation and sale of mineral substances, as well as small-scale and artisanal mining activities¹⁶⁵. The Mining code contains stringent environmental requirements which specify the need for an Environmental and Social Impact Assessment (ESIA), Mitigation and Rehabilitation Plan (MRP) and an Environmental and Social Management Plan (ESMP)¹⁶⁶. The Mining Code¹⁶⁷ requires the protection of the environment and cultural heritage during prospecting, exploration and exploitation as well as measures for the protection of health and safety and public consultations. Moreover, Article 279 of the Mining Code specifies the restrictions on the occupation of land for mining activities or infrastructures (for instance within a national park or a national monument), liability for damages caused by the mining activities (even if they are authorised) and that fair compensation be paid to

¹⁶³ Article 31 of the DRC EPA.

¹⁶⁴ B Walmsley & S Patel, *2011 Handbook on environmental assessment legislation in the SADC Region*. 3rd ed. Pretoria: Development Bank of Southern Africa (DBSA) in collaboration with the Southern African Institute for Environmental Assessment (SAIEA) (2012) 103.

¹⁶⁵ Article 2 of the DRC Mining Code.

¹⁶⁶ N Anamuthoo & C Tomlin *Framework Environmental and Social Impact Assessment (ESIA) and Environmental and Social Management Plan (ESMP) for the PPC Barnett Songololo Cement Project, DRC*, SRK Consulting: 467328 (2014) 11.

¹⁶⁷ Articles 15, 42, 69.e.f.g & 205 of the DRC Mining Code.

the rightful holders (corresponding either to the rent or the value of the land at the time of its occupation, plus 50%) for economic and physical displacement. Articles 46, 317, 318 and 319 of the Mining Code provide for judicial and arbitral recourses in the event of disputes. The titleholder of the mining concession shall be liable for damage to the environment caused by his activities insofar that he has not complied with the terms of his Environmental Management Plan subject to prior approval in line with Article 203 and 204 of the Mining Code. He is also liable in case of changes to the EMP during the project, or in case of violation of one of the environmental obligations provided for under Section 2 Article 205 of the Mining Code including, the right of the landholder, dumps, incinerates or discharges hazardous wastes or radioactive material into fresh water; pollute or degrade in any manner the soil, subsoil, alter the quality of the air; leading to dangerous or negative impacts on the environment¹⁶⁸.

2.3.1 Environmental and social protection under the Mining Code

Article 204(1) of the Mining Code requires that any applicant for an Exploitation Licence, an Exploitation Licence for Tailings, a Small-scale Mining Exploitation Licence, or an authorisation for Quarry Exploitation must submit an Environmental Impact Study (EIS) together with an Environmental Management Plan for the Project (EMPP), and obtain the approval of an EIS and EMPP, as well as implement the EMPP. The Environmental Impact Study (EIS) will include a description of the ecosystem before commencing the mining operations, including the flora and fauna, soil and topography, air quality, underground and surface water. It specifies the aspects which may be affected qualitatively and quantitatively by the mining or quarry exploitation activity. It will include, as well, the measures planned for the protection of the environment, the elimination or the reduction of pollution, the rehabilitation of the sites, as well as the verification of the effectiveness of said measures. The Environmental Management Plan of the Project (EMPP)¹⁶⁹ is an environmental specification of the project consisting of a programme for the implementation and monitoring of measures contained in the EIS. The DRC mining code define the Mitigation and Rehabilitation Plan (MRP)¹⁷⁰ is the plan required for the operations relating to a mineral or quarry exploration right or a Temporary Quarry Exploitation Licence pursuant to which a holder undertakes to carry out certain mitigation measures of the impact of his activities on the environment, as well as rehabilitation measures where said activities taking place. Article

¹⁶⁸ Title 5 of the DRC Mining Code.

¹⁶⁹ Article 1(41) of the DRC Mining Code.

¹⁷⁰ Article 1 (40) of the DRC Mining Code.

258 of the Mining Code requires the holder of the mining right to set up a provision for the site rehabilitation.

2.3.2 Communities Resettlement, liability and Compensation for occupation of the land under the Mining Code

Article 280 of the Mining Code specifies that the holder of the mining right or the operator of the mine shall be liable for the damages caused by the works he carries out with regard to his mining activities, even if they are authorised. All damages caused to the assets of third parties shall be settled at their actual replacement value, plus 50%; unless the assets are returned to the condition they were in prior to the occurrence of said damage¹⁷¹.

Article 281 of the Mining Code require that any occupation of land depriving the rightful holders of access of the surface rights, any modification rendering the land unfit for cultivation, shall cause the holder of the mining right or the operator of the mining and/or quarry rights, at the request of the rightful owners of surface rights, and at their convenience, to pay fair compensation, corresponding either to the rent or the value of the land at the time of its occupation, plus 50%. The amicable settlement of the dispute may be made by any legitimate method other than resorting to the court of law. In the absence of an amicable settlement between the parties within three months from the date on which the dispute arises, the compensation shall be determined by the competent court of law in the DRC¹⁷². However, the usual occupant of the land may, in agreement with the holder, continue to exercise his right to cultivate the land provided that the work in the fields does not hinder the mining activities¹⁷³.

2.3.3 Communities' engagement and consultations under the Mining Code

Article 69.f of the Mining Code requires that the holder of the mining right or the operator of the mine to report on the consultations with the authorities of the local administrative entities and with the representatives of the surrounding communities in the ESIS and EMPP as to how the project will contribute to the socio-economic development of the surrounding mining communities. The communities' consultation program must be conducted during the drafting of the ESIS in order to provide the communities with information about the mining project and the

¹⁷¹ Article 280, paragraph 5 of the DRC Mining Code.

¹⁷² Article 281, paragraph 3 of the DRC Mining Code.

¹⁷³ *ibid*, paragraph 5.

CSR policies and to obtain the comments from communities¹⁷⁴. The principles, methods and programme of consultations with interested and affected stakeholders must be defined in an annexe attached to the ESIS. This annexe should include details about the meetings held, attendance and location of the meetings, questions raised and answers provided, as well as the author's conclusions about the consultations programme¹⁷⁵. Articles 1(37) and 283 of the Mining Code specifies the authorised activities that the holder of a mining exploitation licence have.

2.3.4 Mining exploitation, development and licencing in the DRC

In terms of Article 20 of the Mining Code, exploration and development of mineral resources require an Exploration Permit¹⁷⁶ which is granted following the approval of an EMRP that indulges the holder to comply with regulations on the protection of the environment and the Code of Conduct¹⁷⁷.

Additionally, the holder of an exploration permit or an exploitation licence must pay a financial guarantee¹⁷⁸ to ensure environmental rehabilitation after closure of the mining operations. The granting of mining titles is based on a “first-come, first-served” principle. In exceptional cases, the Minister of Mines may submit to tender, open or by invitation, mining rights relating to a specific deposit¹⁷⁹. To maintain the validity of the mining right, the holder must pay royalties (surface duties) and commence exploration within six months from the day the exploration permit is established or commence development and construction works within three years from the date the exploitation licence is granted¹⁸⁰. Failing to fulfil any of these obligations, the holder may be deprived of his or her mining right. The Land Law No. 73-021 of the 20th of July 1973, stipulates that the State has the exclusive, inalienable and imprescriptible right to the soil and subsoil. The State can grant surface right to private or public parties that have to be distinguished from mining right since surface right do not entail the right to exploit the mineral substances of the soil or subsoil and, inversely, a mining right does not entail any surface occupation right over the surface. However, subjected to any right of third parties over the surface concerned, the holder of a mining exploitation licence has the right to begin the construction of industrial plants and

¹⁷⁴ Article 444 Mining Regulations.

¹⁷⁵ J Yav *Mining laws and regulations in the Democratic Republic of Congo*, DRC (2011) 2.

¹⁷⁶ Article 404 DRC Mining Regulations.

¹⁷⁷ Article 415 of the DRC Mining Regulations.

¹⁷⁸ Article 164 paragraph 5 of the DRC Mining Code.

¹⁷⁹ Article 33 of the DRC Mining Code.

¹⁸⁰ J Yav (note 175 above; 3).

dwellings, to use the water, dig canals and channels¹⁸¹. The mining exploitation licence holder must ensure that the rights of indigenous, lawful occupants and currently or previously disadvantaged peoples are protected during and after mining operations.

2.4 Mining Regulations, Decree No. 038/2003

The Mining Code is supported by the Mining Regulations, Decree No. 038/2003 of 26 March 2003, and the Addenda to the Mining Regulations, which implement the provisions of the Mining Code including the environmental and social requirements relating to mining projects¹⁸². It contains important provisions relating to the environmental and social compliance, implementation and enforcement mechanisms.

2.4.1 Protection of the environment under the Mining Regulations

Title 18, Chapter 1, Section 1 of the Mining Regulations articulates the environmental requirements of mining companies in the DRC. These requirements include:

- the submission and approval of an Environmental Management Plan of the Project (EMPP) provided in Article 404 of the Mining Regulations, the Environmental Impact Study (EIS) (Article 407 of the Mining Regulations), the annual report on the Environmental Mitigation and Rehabilitation Performance of the mining operations (Article 458 of the Mining Regulations).
- To hand in a copy of an approved Environmental Mitigation and Rehabilitation Plan of the Project to local authorities of the jurisdiction where the mining operations are located and explain their rehabilitation and mitigation measures to local communities (article 444 of the Mining Regulations)
- To conduct an Environmental Audit every two years from the date of approval of the EIS; by a registered environmental consultant company/expert, other than the one who prepared the ESIS or the EMPP (article 459 of the Mining Regulations)
- A copy of the Environmental Audit report to be sent to the Directorate for the Protection of the Mining Environment (DPME) and another to the concerned mining company by the consultant company/expert commissioned to conduct the audit within a period of ninety

¹⁸¹ Article 283 (a) of the DRC Mining Code.

¹⁸² SRK Consulting *DRC Mining Governance framework* (2011) 3.

days from the date of the beginning of the audit work article 460 of the Mining Regulations).

- To make the payment of a financial surety for environmental rehabilitation (article 410 of the Mining Regulations).

In addition to environmental requirements, the Mining Regulations also outline socio-economic requirements of mining companies towards affected communities. These include meaningful engagement, consultations and sustainability. In terms of Article 477 of the Mining Regulations, mining companies are required to:

- Collect information and concerns on the impacts of the mining operations from the communities and develop a plan for community consultations;
- Inform communities about the mining operations and their environmental and social impacts in accordance with their Environmental Impact Study (EIS) and the Environmental Management Plan of the Project (EMPP);
- Explain the employment and procurement policies to the local mining communities; and
- Maintain a constructive and constant dialogue with the local mining communities.

2.4.2 Environmental Impact Study (EIS)

With exception of the temporary exploitation of quarries, all mining operations require an EIS and an EMPP to be approved before operations can commence, in accordance with the provisions of Chapter Five of the Mining Regulations. Article 406 of the Mining Regulations states that the EIS and the EMPP must be submitted at the same time as the request for mining licence and must be approved by the competent authority as a condition of granting the mining right.

Annex IX of the Mining Regulations provides detailed guidelines and requirements for the preparation of an EIS. The EIS must include all the information for the project identification purpose, the owner(s), the chair holders of the mining company and its sub-contractors, etc. Where possible the EIS team must make use of the biodiversity plan, and/or published research on the area under study. If there are no existing data, the EIS consultants are required to conduct new studies according to the methods and techniques¹⁸³ provided in the Mining Regulations and the Annex IX. The EIS should detail the following socioeconomic information:

- Identification of all settlements on and around the site, including the local government authorities;
- Sources of income of the local communities;

¹⁸³ Article 453 DRC Mining Regulations.

- Demographic profile of all affected parties;
- Current level and sectors of employment; and
- Tracks and paths used by the local communities through the mining area.

2.4.3 Environmental Impacts Assessment (EIA)

Annex IX of the Mining Regulations provides the following “details regarding the analysis of impacts that should be undertaken and requires that for every aspect of the operation, the mining company must identify the positive and negative impacts, the direct and indirect impacts and the risks associated with those impacts on the environment of the site and in the surrounding areas. Each impact must be evaluated in terms of:

- *The intensity and scale of the impact, based on the degree of environmental perturbation, sensitivity, vulnerability, uniqueness or rarity of the component being affected;*
- *The spatial extent of the impact;*
- *Duration of the impact and its reversibility;*
- *Frequency of the impact and its probability of occurrence;*
- *Level of uncertainty or confidence in the prediction;*
- *Benefits for the affected parties and the risks to the safety and well-being of these communities;*
- *Cumulative effects of the proposed development with others in the vicinity.*
- *Analysis of noise and vibration, air quality, surface and groundwater resources, community health and the risks of accidents, etc.”*

The public consultation programme must be conducted during the drafting of the EIS in order to provide the public with information about the mining project and to obtain the comments of the public¹⁸⁴. The principles, methods and programme of consultations of interested and affected parties must be mentioned in an annexe attached to the EIS¹⁸⁵.

2.4.4 Submission and approval of the Environmental Management Plan of the Project (EMPP)

Articles 404 and 407 of the Mining Regulations provides that, except for artisanal mining, research, mining and quarrying operations must be subject to an EMPP and the EIS to be

¹⁸⁴ Article 451 DRC Mining Regulations.

¹⁸⁵ *ibid*, paragraph 2.

approved by the DPME. The EIS and the EMPP must be filed with the application of the mining exploitation license. In terms of Article 452 of the Mining Regulations, the EMPP pursues the following objectives:

- Ensure the safety and the environmental mitigation of the mining site during and after the mining operations;
- Reduce pollution of the mining operations on the air and the water courses to an acceptable level;
- Integrate the mine and infrastructure in the landscape by appropriate adjustments to protect wildlife and vegetation;
- Reduce erosion, water or chemical leaks and accidents of terrestrial relief caused by mining operations, as well as its harmful effects on the habitat of species of fauna and flora;
- Improve the well-being of local mining communities through economic and social development programs, and providing for compensation to communities in the event of involuntary resettlement;
- Reduce the harmful effects of the mining operations on the activities of the human and animal populations residing in the vicinity of the mines, etc.

The EMPP must address in detail the following¹⁸⁶:

- Noise attenuation;
- Air emissions;
- Water pollution;
- Soil degradation;
- Rehabilitation of mine wastes and residues;
- Worker safety and occupational health;
- Safety and health of affected parties and local communities in the areas surrounding the mine;
- Emergency plans; and
- A closure plan detailing the measures to be undertaken to eliminate the risks to the health and safety of people, limit the production and propagation of harmful substances into the receiving environments such as acid mine drainage¹⁸⁷.

¹⁸⁶ Article 458 DRC Mining Regulations.

¹⁸⁷ Articles 95-105 of Annex IX of the DRC Mining Regulations.

2.4.5 Review of EIA and EMPP

Article 15 of the Mining Code provides that the DPME review the EIS, the EMP and PMRP. At the end of this process, it offers its opinion on the environmental aspects to the Mining Registry, within the time period not exceeding hundred and eighty working days¹⁸⁸. Within a maximum period of five working days following receipt of the opinion on the environmental aspects, the Mining Registry¹⁸⁹ the application for an Exploitation Licence to the Minister of Mines for decision.

Upon receiving the Mining Registrar's environmental opinions, the Minister of Mines makes his decision to grant the Mining Licence to the applicant¹⁹⁰. The License is renewable¹⁹¹ for every fifteen years following the holder's approval of an updated EIS, EMMP and MRP. The approval of the updated EIS, EMMP and MRP cannot exceed 90 working days from the date it is sent by the Mining Registry to the DPME.

2.4.6 Submission of the annual report on the Environmental Mitigation and Rehabilitation Performance of the mining operations

Article 458 of the Mining Regulations require that in the 100 days following the anniversary date of the approval of the EIS and the EMPP, mining companies must submit each year, the Environmental Mitigation and Rehabilitation Performance report to the DPME. This report shall describe briefly the following:

- The current environmental impacts of the mining operations;
- The mitigation and rehabilitation works that have been made to resolve the negative environmental impact;
- The status of mitigation and rehabilitation implementation measures compared to those laid down in the approved EMPP;
- The expenses incurred in connection with the implementation of the mitigation and rehabilitation work; and
- The progress and the results of the implementation of the sustainable development plan.

¹⁸⁸ Article 75 DRC Mining Code.

¹⁸⁹ Article 42 of the DRC Mining Regulations & article 76 DRC Mining code.

¹⁹⁰ Articles 43&44 of the DRC Mining Regulations.

¹⁹¹ Article 80 of the DRC Mining Regulations.

2.4.7 Environmental Audit

Article 459 of the Mining Regulations requires mining companies to conduct an Environmental Audit every two years from the date of approval of the EIS; by a registered environmental consultant company/expert, other than the one who prepared the EIS or the EMPP. Article 460 of the Mining Regulations requires that a copy of the Environmental Audit report must be sent to the DPME and another one to the concerned mining company by the consultant company/expert commissioned to conduct the audit within a period of ninety days from the date of the beginning of the audit work.

Article 410 of the Mining Regulations provide that mining companies are obliged to establish a financial surety for environmental rehabilitation to ensure and to cover the cost of environmental rehabilitation and mitigation after the closure of the mining operations.

2.4.8 Environmental monitoring and inspections

Article 446 of the Mining Regulations provide for monitoring and inspections of mining environmental compliance by checking the effectiveness of mitigation and rehabilitation measures. The DPME, the provincial authorities or any other body commissioned by the DPME are accountable for environmental review in the mining perimeter¹⁹² and carrying out monitoring and inspections on the environmental and social compliance by mining companies¹⁹³.

The Department of Inspections and Monitoring of the Mining Environment, the provincial environmental authorities or any other body with responsibility for environmental compliance, enforcement and monitoring must send a copy of their compliance, inspections and monitoring report to the DPME, the Directorate of Geology and the concerned mining company within fifteen working days from the end of the inspections¹⁹⁴. Article 461 requires that mitigation and rehabilitation work carried out by the mining company, be subject to an inspection carried out by the DPME to check their progress against the schedule and their compliance with the measures provided for in the approved EMPP. At the end of each inspection or monitoring, a report is drawn up in two copies, of which one is sent to the concerned mining company and another one to the Direction of Mines.

¹⁹² Article 1 paragraph 37 of the DRC Mining Code.

¹⁹³ Articles 15 of the DRC Mining Code & 11 of the DRC Mining Regulations.

¹⁹⁴ Article 447 paragraph 2 of the DRC Mining Regulations.

2.5 Hydrocarbons Law, August 2015

The DRC is set to see a rapid increase in oil and gas exploration and production over the coming years. The Ituri province is at the centre of geopolitical relationships, sparking a growing interest with the start of exploration in the Albertine Graben, on the border with Uganda. Regarding the potential gas resources, Lake Kivu could be the solution to counter the lack of energy supply in the country and meet the growing demand of mining operators¹⁹⁵. Already the country is attracting direct foreign investments in this field (Total, Tollow Oil, SacOil, SOCO International, PETROSA, etc.). The Hydrocarbons Law was promulgated on 4 August 2015 by the President of the Republic. This law is supposed to promote good governance and transparency in the sector to allow the State to maximise revenues, protect the environment and minimise the devastating impacts of corruption on the natural resources sector¹⁹⁶.

2.5.1 Protection of the environment under the DRC Hydrocarbons Law

Article 24 of the Hydrocarbons Law provides that the grant of right (oil concessions or blocks) is subject to the respect of protected areas¹⁹⁷. Article 97 of the Hydrocarbons Law provides that the right holder and sub-contractors must comply with the environmental laws and regulations relating to the protection of the environment and cultural heritage. Article 98 of the Hydrocarbons Law requires oil and gas companies to conduct an Environmental and Social Impact Study (ESIS) and an Environmental and Social Management Plan (ESMP) and provides a list of issues¹⁹⁸ that must be dealt with in the ESIS and the ESMP by oil and gas companies: These issues include:

- The impacts assessment of oil and gas activities on the environment and communities;
- The mitigation plan of the negative environmental impacts of oil and gas activities;
- The compensation, resettlement, engagement and consultations plan with the affected communities

Article 21 obliges the following from oil and gas exploration and exploitation companies:

- The operations Plan and Programs approved by the Minister of hydrocarbons;
- The ESIS and the EMP duly approved;
- The Engagements and Consultations Plan with local communities;
- The provision of an esteemed annual amount for community projects;

¹⁹⁵ N.L Smith *Welcome letter*, IPAID DRC Oil and Gas Forum, Kinshasa 10-11 September 2014 (2014) 3.

¹⁹⁶ J Mandelbaum & P Toledano *Comments on DRC Draft Hydrocarbons Law* (2013) 2.

¹⁹⁷ Article 31 of the DRC EPA.

¹⁹⁸ Article 98 paragraph 1 of the DRC Hydrocarbons Law.

- The payment of the Environmental Rehabilitation Funds into an account in the Central Bank of Congo (BCC), as environmental surety, articles 101 and 21 of the Hydrocarbons Law.

Article 34 requires oil and gas exploration and exploitation companies to submit:

- The ESIS and the EMP to the Minister of Environment for approval;
- The report on engagement and consultations with local communities and local administrations entities,
- The Contribution Plan to the development of the local communities affected by the oil and gas exploitation activities.

Article 99 of the Hydrocarbons Law allows both the Ministry of Environment and the Ministry of Hydrocarbons to conduct Environmental Audits on oil and gas operations with the purpose of checking the compliance level of the oil and gas companies' operations against environmental requirements.

2.5.2 Environmental Rehabilitation Funds and the management of oil and gas revenues under the DRC Hydrocarbons Law

The Environmental Rehabilitation Funds provided for at articles 101 and 21 of the Hydrocarbons Law is necessary to ensure that oil and gas companies leave the environment in a usable and sustainable manner once their production is completed. For large projects such as hydrocarbon and gas projects, it is important for the operator company and the government to plan for closure at the outset of the project and provide for available funds so that the government can undertake the environmental restoration work itself if necessary. This financial surety serves a wide array of purposes in mining, oil and gas sectors, such as ensuring fulfilment of environmental rehabilitation and clean-up operations after closure in full compliance to the environmental legislation and international standards. An Environmental Surety is designed to mitigate environmental damage and risks after the extractive projects closure or abandoned mine, oil and gas as it usually cause long-term liability.

Article 112 creates a fund for future generations to be sustained by the allocation of revenues from commercialisation of hydrocarbons. The Prime Minister is to create an institution to govern the management of the funds by decree. This institution was not yet created by the time of writing of this thesis. While the PSA between the DRC government and Total for Block III have been

signed and oil exploration activities has started, there is no information with respect to the payment of rehabilitation funds known at this stage!

2.5.3 Community engagement and consultations under the DRC Hydrocarbons Law

Article 98 paragraph 6 of the Hydrocarbons Law requires public engagement, participation and consultations with local communities and local administration entities regarding environmental and social matters. This requirement for meaningful consultations at each stage of the project, and for dissemination (in a manner which can be understood by communities) of information regarding the project must be included in the ESIA and the ESMP. Mining, gas and oil communities usually find themselves on the margins of these companies' projects with little or no consultation in decisions that significantly impact their lives and land. Conflict between these communities and the extractive industry is widespread and hostilities can be deeply entrenched and explosive. Whiteman and Mamen¹⁹⁹ argues that while each situation is unique, conflict has often resulted from mining communities lack of land rights, divergent beliefs on land and resource management, lack of access to information about mining proposed and existing mining operations. Conflict also arises as communities attempt to resist the negative social and environmental impacts of mining, oil and gas activities. While the communities are fighting against poverty conditions and are reasonably concerned with jobs, development programs, improved health and social services, better education, etc.; they see the mining, oil and gas company as an "enemy" who is coming to dispossess them of their land and natural resources; in this case, meaningful consultations becomes a key tool for the operating company.

2.6 National Environmental Action Plan

In 2002 the DRC government adopted its National Environmental Action Plan (NEAP)²⁰⁰ developed with input from representatives of public institutions, universities, research organisations, private sector and NGOs. The NEAP finds that the management system of the country's natural resources was deficient and hence a legal framework was urgently needed. It also discovered that the environmental management was spread over a wide range of sectors, which precluded the formulation of a coherent environmental policy to focus the attention and

¹⁹⁹G Whiteman & K Mamen *Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector*, North-South Institute.

²⁰⁰ UNDP *National Plan of Environmental Action, Document Synthesis*, New York (1997) 5.

resources on environmental protection²⁰¹. The major challenges identified in the NEAP include²⁰²:

- Daily destruction of the environment as a result of extreme poverty, population growth and general unawareness about environmental matters;
- Water pollution and the absence of national water quality standards;
- Soil degradation in areas with high population densities;
- Air pollution resulting from Extractive Industries, Energy Industries and Agriculture;
- Urban degradation and insalubrious conditions resulting from a combination of poor planning, institutional ineffectiveness, lack of funds, municipal deficient management system and urban population growth.

As a solution to these issues, the NEAP recommended a five-year programme of interventions in the following areas²⁰³:

- institutional development;
- water resources, land tenure and urban environment management;
- natural ecosystems
- air pollution.

Up to 2019, only the Environmental Protection Act (EPA) has been promulgated and implemented. Article 4 of the EPA states that a new National Environmental Policy on the sustainable management of natural resources will be translated into a new NEAP where each province will be required to develop its own programmes related to the management and protection of the environment²⁰⁴. Visibly, the current EPA is more focused on the general environment of protected areas and biodiversity than on the oil, gas and mining environment; leaving them to specific laws, namely the Mining Code and the Hydrocarbons Law.

²⁰¹ UNEP *The Democratic Republic of the Congo Post-Conflict Environmental Assessment: Synthesis for Policy Makers*, Nairobi (2011) 64.

²⁰² *ibid* 32.

²⁰³ *ibid* 65.

²⁰⁴ Article 5 paragraph 2 of the EPA.

3. REGULATORY CHALLENGES AND DEFICIENCIES IN THE DRC EXISTING ENVIRONMENTAL LAWS

The regulatory challenges and deficiencies in existing laws encountered in the DRC environmental system tend largely to be administrative and/or bureaucratic in nature. Laws, regulations and policies are often poorly applied or not applied at all. Proposed environmental laws, regulations and policies are rarely or never published in draft format for public discussion and comments. Discussion is typically limited to the governmental entity that proposes the draft law and the Parliament prior to enactment. Most of environmental laws, regulations and policies are not accessible. There is not a single legislation published online on the ministry of environment website. All the legislative acts are published by the DRC government gazette (official journal of the DRC) and are difficult to access. The government gazette website is usually down, offline or simply under construction and most of the environmental legislation has not been uploaded; making it difficult to know what the latest proposed laws are, when they will come into force or how they will impact or improve environmental and social compliance in mining, oil and gas sectors. Many times an attempt to call government offices are met with an unforgettable bad experience. Phone calls are unlikely to be answered and when you are fortunate to get a response, you are told that the law or regulations you are looking for is not available in the very ministry and no alternative way is given to you. In DRC, many environmental laws and regulations are not clear. The scope, some definitions and terminologies used in the laws are usually vague. This lack of clarity in laws and regulations also makes it difficult for companies to understand them and the less clear the laws and regulations are, the more difficult it is for well-intentioned companies to comply as they cannot ascertain what is expected. For instance, Article 103 of the Hydrocarbons Law requires the rights holder to comply with measures prescribed by the Minister. These measures are not set out, so is not clear which measures this article is talking about. Another regulatory challenge and deficiency in the DRC environmental laws is the conflicting mandates that exist among national institutions, particularly the MENS and the Ministry of Mines, and the MENS and the Ministry of Hydrocarbons. A lot of confusion is created by these three Ministries with regards to environment management, enforcement and compliance in mining, oil and gas sectors. Each ministry has its own environmental framework resulting in duplicated requirements. To solve the issues, the researcher advise that the DRC must adopt a "One Environmental System" that will allow the

Minister responsible for the Environment to set the environmental regulatory framework and standards and the Ministers responsible for Mining and Hydrocarbons would implement the provisions of the environmental legislation as far as it relates to mining or hydrocarbons activities.

4. INSTITUTIONS ASSIGNED WITH IMPLEMENTATION AND ENFORCEMENT MECHANISMS IN MINING, OIL AND GAS SECTORS IN THE DRC

4.1 The Government

The President of the Republic has jurisdiction over the classification²⁰⁵ of “prohibited areas” which include, amongst others, sensitive environment. He has the power to classify, declassify or reclassify mineral substances as mines and a mineral substance as a “reserved substance”²⁰⁶. The National executive authority is vested in the President who, together with his Cabinet (the Government) must implement national legislation, develop and implement national policies, coordinate the functions of state departments and public services, prepare and initiate legislation, and perform any other executive function provided for in the Constitution and sectoral laws.

The Parliamentary Commission²⁰⁷ for Environment and Natural Resources is organised into four committees: general environment, mining environment, flora and fauna, and environmental control. One of the aims of the Commission is to approve sector laws and policies from an environmental perspective. Unfortunately, there is little inter-sectoral coordination or synergy in policy and law development, sometimes resulting in conflicting policy objectives and legal requirements.

The Prime Minister, who is appointed by the President of the Republic, heads the Government. According to Article 17 of the EPA, the Prime Minister oversees the National Council for the Environment and Sustainable Development. The Government define *inter alia* the National Hydrocarbons Policies that provide general orientation of the hydrocarbons resources

²⁰⁵ Article 9 of the DRC Mining Code.

²⁰⁶ *ibid.*

²⁰⁷ B Walmsley & S Patel, 2011 *Handbook on environmental assessment legislation in the SADC Region*, 3rd ed. Pretoria: Development Bank of Southern Africa (DBSA) in collaboration with the Southern African Institute for Environmental Assessment, SAIEA (2012) 95.

management in line with the National Development Plan²⁰⁸. The Government is the executive arm of the State in charge of the country's administration²⁰⁹. The World Bank has been helping the country achieve numerous reforms and one of the main priorities of the World Bank's Governance Compact with the DRC government is the decentralisation of most government administrative functions including environmental affairs to the provinces²¹⁰. At the moment of writing of this dissertation, the DRC has just passed from 11 provinces to 26 provinces as per Article 2 of the Constitution. Despite challenges that come with it, many observers believe that the current demarcation will enhance Government efficiency. According to the World Bank²¹¹, this process provides an important opportunity to boost transparency and proficiency in Government, which is currently lacking in DRC, particularly at provincial levels. (See the map below, Figure 2).

Figure 2: DRC political Map



Source: radio okapi²¹².

²⁰⁸ Article 10 of the DRC Hydrocarbons Law.

²⁰⁹ Article 91 of the DRC Constitution.

²¹⁰ World Bank *Project Information Document: Enhancing governance capacity* (2007) 2.

²¹¹ World Bank *Report AB3435, Washington, DC* (2007) 4.

²¹² B Lutshaka «*Tribune de la presse: la RDC est passée de 11 à 26 provinces*» July, 24, 2015. Available at www.radiookapi.net, accessed on 10 June 2016.

The Ministry of Environment and Sustainable Development which is accountable for the environment in the DRC has experienced numerous changes in names and related duties; directorates of nature conservation, land affairs, tourism, water, forests, rural development have all been included and excluded at various times since the Ministry was created by the Ordinance No. 75-231 of 22 July 1975. According to Forest legality²¹³ “the ordinance No. 75-231 reinforced by the Ordinance No. 07/018 of 16 May 2007, gave the authority for the Management of Environmental Compliance and Impact Assessment (ECIA) to the Ministry of the Environment, Nature Conservation, Water and Forests, later known as the Ministry of Environment, Nature Conservation and Tourism (MENCT) and currently known as the Ministry of Environment and Sustainable Development [MENSND] while the Ministry of Mines was given the responsibility to handle all matters relating to the mining environment through the Directorate of the Department for the Protection of the Mining Environment (Direction chargée de la Protection de l’Environnement Minier [DPEM]).

Since then, this situation has created an overlap of mandates which has the potential to generate conflicts between the two Ministries (Ministry of Environment and Ministry of Mines), where the earlier has general competence in the environmental sector and the latter has limited competence relating to the environment in the mining sector. It is not clear whether this conflict will be resolved with the implementation of the new Environmental Protection Act (EPA).

Additionally, article 86 of the EPA provides that all classified installations in existence at the date of promulgation of the Act (July 2011) must submit copies of permits, licences and authorisations, including copies of their Environmental Management Plans (EMP) to the MENSND within 12 months. Mining is listed in Article 21 as one of the activities for which an EIS is mandatory. So it appears as if mining environment will in future fall under the EPA rather than the Mining Code. Currently, there are twenty-three directorates within the MENSND. A Canadian consulting company undertook an institutional review of the Ministry in January 2008, with the objective of making recommendations on its restructuring. The aim was to reduce the number of departments and directorates to allow for more efficient management. The report of this review is not publicly available. However, the EPA makes provision for the government to establish a National Council for Environment and Sustainable Development under the authority of the Prime Minister”.

²¹³ Forest legality *Democratic Republic of Congo: Constitutional Requirement for Environmental Protection in DRC*, 3 available at [www.forestlegality.org › sites › default › files › country, documents › 5drc09](http://www.forestlegality.org/sites/default/files/country_documents/5drc09), accessed on 8 March 2020.

4.2 The Judiciary.

In DRC the Judiciary is independent²¹⁴ from the Legislative and the Executive. The power of the Judiciary is entrusted to courts and tribunals. The Constitutional Court (the highest court of the Land) is assigned with the control of constitutionality of laws, regulations and of measures having the force of law.²¹⁵ The Constitutional Court rules on the objection of unconstitutionality raised by or before a court. Any individual may appeal to the Constitutional Court for unconstitutionality of a statutory, a regulatory measure or a matter affecting him/her before a court²¹⁶.

Article 27 of the Constitution gives the opportunity for legal action for those wishing to litigate on non-compliance or violations of environmental legislation by mining, oil and gas companies. It is an important ground for any claim that can be brought before the court by any individual, church and community leaders or civil society organization (NGO) involved in environmental protection activism and advocacy. This means that courts and tribunals are able to contribute significantly in the promotion of environmental compliance and enforcement by developing a body of environmental jurisprudence²¹⁷.

Judicial control of administrative acts is crucial for ensuring sustainable development. National and provincial public administrations, which also exercise discretionary powers, apply and enforce environmental law. In fact, public administrations are a cornerstone of environmental protection. Many environmental law provisions are addressed to administrative authorities, which bear responsibility for adopting regulations or decisions, monitoring compliance with the legal order and exercising the corresponding executive powers. In DRC, administrative acts and decisions are controlled by High Courts on provincial level and by the Constitutional Court on the national level. The title V of the Environmental Protection Act embody important environmental criminal provisions and remedies. The DRC Criminal Procedure Code is also applicable to environmental crimes.

Ultimately, a criminal prosecution is an important tool for the courts to promote and safeguard environmental compliance and enforcement in the country. Regrettably, despite a long history of devastating non-compliance of environmental legislation and destruction of the environment by

²¹⁴ Article 146 DRC Constitution.

²¹⁵ Article 160 DRC Constitution.

²¹⁶ Article 162 DRC Constitution.

²¹⁷ K Bindu “The environmental law framework of the Democratic Republic of the Congo and the balancing of interests” in M Faure & W du Plessis *The balancing of interests in environmental law in Africa* (2011) 105.

mining, oil and gas companies in the DRC, there is not yet even a single court decision against any extractive company in the country.

Nevertheless, there are options available for people affected with environmental and social non-compliance of Total and Ruashi mining if the government fails to hold them to account.

Indeed, if the DRC government is unable or unwilling to implement or to enforce environmental laws and standards, churches, civil society organisations, affected communities and individuals have several paths²¹⁸ available to demand Total and Ruashi Mining accountability. In addition to legal action²¹⁹ before the court of law, these include reporting, leveraging public opinion and companies' reputational concerns and raising their concerns directly with the companies through their grievance mechanisms programs. They can also complain to their members of Parliament, who may be able to provide a voice for community concerns and question the Ministers of Environment, Mines and Hydrocarbons or set up a commission of inquiry. Melissa Fourie²²⁰ suggests that a civil and administrative penalty system that provides for adjudication of contraventions and the determination of a monetary penalty on a balance of probabilities by either an administrative body, civil court, or both, can significantly improve environmental compliance. Indeed, as says Michael Kid²²¹ "one should bear in mind the fact that criminal law is designed to react to offences that have already been committed and that they might often be too late to prevent damage to the environment". Kanyi Bindu²²² also retains that "in order to protect the environment efficiently, one need to focus on prevention through education rather than punishing those who harm the environment as it may be too late".

4.3 The Group for Environmental Studies of Congo (GEEC)

The Ministerial Order (*Arrêté*) No. 044/CAB/MIN/ECN-EF/2006 of 8 December 2006 created the Group for Environmental Studies of Congo (*Groupe d'Etudes Environnementales du Congo [GEEC]*)²²³. The Ministerial Order No. 008/CAB/MIN-EF/2007 of 3 April 2007 amended and completed the institution of the GEEC as a technical structure within the MENSD responsible for the management of EIA in the country. Its main objectives are the following:

²¹⁸ Articles 569 & 570 Mining Regulations, Title 5 of the EPA & Chapter 2 of Hydrocarbons Law.

²¹⁹ Article 315 of the Mining Code, article 84 of the EPA, Article 118 Hydrocarbons Law.

²²⁰ M Fourie "How Civil and Administrative Penalties Can Change the Face of Environmental Compliance in South Africa" (2009) 16 (2) *The South African Journal of Environmental Law and Policy* (SAJELP), 93.

²²¹ M Kidd *Environmental law* (2008) 212.

²²² K Bindu *The precautionary principle in the protection of the environment* United Nations International Law Seminar 45 Session (6 – 24 July 2009), International Law Commission: Working Group on the Selection of Future Topics (2009) 161.

²²³ Article 2 of the ministerial Arrêté n°043/CAB/MIN/ECN-EF/2006 of 08 December 2006.

- Conduct and coordinate activities related to Environmental and Social Impact Studies (ESIS);
- Define the procedure of ESIS in the DRC;
- Ensure that the execution of all projects or development programmes is undertaken according to strict environmental and social standards;
- Promote capacity building within Congolese administrative structures and within public and private investors on matters relating to ESIS;
- Promote consultations and information sharing with the public concerning the management of the environment; and
- Present an annual State of the Environment report for the country.

The establishment of the GEEC shows the political will for the DRC’s government to ensure that all extractives projects safeguard the environment. The GEEC oversees all projects that may affect the environment across all sectors with the exception of mining, leaving it to the DPEM²²⁴. But as mentioned above, it would seem as if the administration of EIA for all projects, irrespective of sector, will now be coordinated by a directorate of the MENSND which is in practicality, not the case. The GEEC is composed of five sections, with a total of nine technical and managerial personnel and eight administration and support staff²²⁵ (see figure below).

Figure 3: Organogram of the GEEC



Source: SADC Environmental Legislation Handbook 2012

When required, the GEEC convenes a multi-sectoral committee of about 20 people to review the EIAs, with representatives from MENSND (through the Directorate of Human Settlements and

²²⁴ B Walmsley & S Patel, 2011 *Handbook on environmental assessment legislation in the SADC Region*. 3rd ed. Pretoria: Development Bank of Southern Africa (DBSA) in collaboration with the Southern African Institute for Environmental Assessment, SAIEA (2012) 97.

²²⁵ *ibid* 99.

Environmental Protection (*Direction des Etablissements Humains et Protection de l'Environnement [DEHPE]*), the Congolese Institute for Nature Conservation (*Institut Congolais pour la Conservation de la Nature [ICCN]*), Agriculture, Health, and the like.

However, it was reported that the Directorate of Sustainable Development, which carries responsibility for, *inter alia*, the climate change, desertification and biodiversity matters, does not have the mandate to comment on the EIA's reports²²⁶.

4.4 The Directorate of Sustainable Development (DSD)

The Directorate of Sustainable Development (DSD)²²⁷ was created by Ministerial Order No. CAB/MIN/AFF-ET/049/01 of 3 December 2001. Its aim is to ensure the implementation of the activities, recommendations and resolutions of the World Commission on Sustainable Development and of the Conference of the Parties to the Conventions on Biodiversity, Climate Change and Desertification.

4.5 The Congolese Institute for Nature Conservation (ICCN)

The Congolese Institute for Nature Conservation (ICCN) is a government institution in charge of the management of protected areas²²⁸ in DRC. Various national parks, forest reserves and hunting domains have been created in the DRC, to protect the extreme richness and diversity of its vegetation and animal life. Most of the northern two-thirds of the country are covered by dense rainforest. The mandate of ICCN²²⁹ is to manage, control and protect these protected areas, to collect and analyse data from the field and to facilitate tourism activities in the country.

4.6 The Environmental National Information Centre (ENIC)

The ENIC is an institution under the MENSDD devoted to the following duties:

- Collect, analyse and disseminate information on the state of the environment nationwide;
- Coordinate all activities related to the production, archiving and the flow of information on the environment in the DRC; and
- Ensure and promote environmental education to all layers of the population living in the DRC.

²²⁶B Walmsley & S Patel (note 224 above; 98).

²²⁷DRC MENSDD Ministerial Order No. CAB/MIN/AFF-ET/049/01 of 3 December 2001.

²²⁸Article 31 of the DRC EPA.

²²⁹Article 36 & 39 of the DRC EPA.

The ENIC contains three technical divisions, namely:

- The Information and Environmental Education Division;
- The Telematics Division; and
- The Documentation and Archives Division

4.7 The Inter-ministerial Committee on Environment, Nature Conservation and Tourism

This committee was originally established by Law No. 75/232 of 22 July 1975. It is chaired by the Minister of Environment, and members include ministers whose portfolios address environmental issues in some way, representatives of private sector, civil society, research centres, universities and local authorities²³⁰.

4.8 The Geology Directorate

The Geology Directorate ensure, *inter alia*, the investigation of soil and sub-soil and the identification of minerals concessions, hydrologic resources and land structures susceptible to seismic activities, including geologic studies based on general geology²³¹. It carries out geological and mineral surveys and detailed exploration of selected mineral deposits. It processes prospecting mining lease applications, carries out inspections and demarcation of mining areas and monitors mineral revenue. It's an advisory institution in matters of mineral and natural resources development in the Country. It assists private investors for search for new mineral deposits including those in forest land, promote mineral development, collect, analyse, compile and computerise data relating to minerals and make these available to investors, provide laboratory and testing facilities to companies, researchers and consultants, etc.

4.9 The Directorate of Mines and Mining Investigations

The Directorate of Mines is responsible for inspecting and supervising mining activities and quarry works with regard to safety, health, work procedures, production, transport, sale and social matters²³².

²³⁰ SAIEA & DBSA *Handbook on environmental assessment legislation in the SADC region*, SA (2007) 100.

²³¹ Article 13 of the DRC Mining Code.

²³² Article 12 of the DRC Mining Regulations.

The Directorate of Mining Investigations is responsible for preventing, investigating and discovering, *inter alia*, environmental breaches and open prosecution process against non-compliant mining companies and combats fraud and corruption in the mining sector.

4.10 The Directorate for the Protection of the Mining Environment (DPEM)

The Mining Code²³³ makes provision for the establishment and the powers of the DPEM. Article 11 of the Mining Regulations states that the DPEM is responsible for all aspects of environmental management relating to:

- “The definition and enforcement of mining regulations on environmental protection with regard to exploration, artisanal mining and exploitation activities for mines and quarries;
- The technical evaluation of the Mitigation and Rehabilitation Plan (MRP) in relation to the prospecting operations for mineral substances classified as mines and quarries; and,
- The technical evaluation of the EIS and the Environmental Management Plan of the Project (EMPP) presented by the applicants requesting mining or quarry exploitation rights”.

However, one of the biggest challenges facing the DPEM is the fact that the mining companies are not complying with the requirements of the Mining Code and the Mining Regulations on site and the DPEM lacks the capacity to monitor on-site compliance²³⁴.

5 LEGALLY BINDING ENVIRONMENTAL AND SOCIAL REQUIREMENTS THAT OIL, GAS AND MINING COMPANIES NEED TO MEET

After discussing the DRC environmental law framework and international standards applicable in the DRC context, the following section discusses the DRC’s legally binding requirements.

Article 53 of the DRC Constitution provides that:

- All persons have the right to a healthy environment that is favourable to their development.
- The environment must be protected.

A closer look at the above article suggests that everybody, including the State and extractive companies, must protect environment. This provision outlines ultimately in particular, the responsibility for mining, oil and gas companies to protect the environment while focusing on

²³³ Article 15 of the DRC Mining Code.

²³⁴ B Walmsley & S Patel (note 224 above; 100).

their extractive activities. Mining, oil and gas companies are required detailed information about their operations and the environment (article 24 of the DRC Constitution and article 5 of the EPA). From the understanding of these articles, people has the right to know the contents of mining contracts and oil Production Sharing Agreements and the government, mining and oil companies has the responsibility to make these contracts public.

Oil, gas and mining companies are obliged to carry out the ESIS, EA, ESMP and the EEPPP in accordance to Articles 19, 24, 29, 32 and 35 of the EPA and 21, 34 and 98 of Hydrocarbons Law and submit them together with the report on Engagements and Consultations Plan with local communities and local administrations entities and the provision of an esteemed annual amount for communities' projects in the exploration stage to relevant environmental authorities for approval. They need to ensure the environmental rehabilitation and pollution prevention of natural reserves, national parks and biosphere reserves, waters, rivers and streams as stipulated at article 71.8 of the EPA.

Article 98(6) of the Hydrocarbons Law stipulates that oil and gas companies must conduct public engagement, participation and consultations with local communities and local administration entities regarding environmental and social matters. It's prohibited by article 73 of the EPA and 24 of Hydrocarbon law to conduct oil, gas exploration and logging activities in protected areas, such as national parks.

Section 1 article 204 of the Mining Code requires mining companies to submit and obtain the approval of the EIS together with the EMPP before commencing the mining activities.

Article 84 paragraph 2, article 166 paragraph 2 and article 204 paragraph 3 of the Mining Code call on mining companies to protect the environment and control their industrial pollution.

Articles 15, 42, 69.e.f.g and 205 of the Mining Code oblige mining companies to protect the environment and the cultural heritage during prospecting, exploration and exploitation and conduct public consultations.

Article 279 of the Mining Code commands that fair compensation be paid to the rightful holder(s) of the land affected by mining operations. The payment should correspond to the rent or the value of the land at the time of its occupation, plus 50% for economic and physical displacement²³⁵.

Article 280 of the Mining Code specify that the holder of the mining right or the operator of the mine shall be liable for the damages caused by the work he carries out in connection with his mining activities, even if they are authorised. Article 281 of the Mining Code orders that any occupation of land depriving the rightful holder(s) of access of the surface rights, any modification rendering the land unfit for cultivation, shall cause the holder of the mining right or

²³⁵ Article 280 of the DRC Mining Code.

the operator of the mining and/or quarry rights, at the request of the rightful owner(s) of surface rights, and at their convenience, to pay fair compensation, corresponding either to the rent or the value of the land at the time of its occupation, plus 50%.

Article 69. f of the Mining Code requires that the holder of the mining right or the operator of the mine report on the consultations with the authorities of the local administrative entities and with the representatives of the surrounding communities in the ESIS and EMPP as to how the project will contribute to the socio-economic development of the surrounding mining communities.

Article 404 of the Mining Regulations advises mining companies to submit the Environmental Impact Study (EIS), the Environmental Management Plan of the Project (EMPP) and the Annual Report on the Environmental Mitigation and Rehabilitation Performance²³⁶ of the mining operations. Article 444 of the Mining Regulations commends mining companies to hand in a copy of an approved Environmental Mitigation and Rehabilitation Plan of the Project (EMRPP) to local authorities of the jurisdiction where the mining operations are located and explain their rehabilitation and mitigation measures to local communities. Article 459 of the Mining Regulations requires mining companies to conduct an Environmental Audit every two years from the date of approval of their Environmental Impact Study by the Ministry of Mines.

Article 477 of the Mining Regulations direct mining companies to:

- ❖ Collect information and concerns on the impacts of the mining operations from the communities;
- ❖ Develop a plan for community consultations;
- ❖ Inform communities about the mining operations and their environmental and social; impacts in accordance with their EIS and the Environmental Management Plan of the Project (EMPP);
- ❖ Explain the employment and procurement policies to the local mining communities; and
- ❖ Maintain a constructive and constant dialogue with the local mining communities.

Article 452 of the Mining Regulations instruct mining companies to:

- ❖ Ensure environmental mitigation of the mining site during and after the mining operations;
- ❖ Reduce pollution of the mining operations on the air and the watercourses to an acceptable level;

²³⁶ Article 458 of the Mining Regulations.

- ❖ Reduce erosion, water or chemical leaks and accidents of a terrestrial relief caused by mining operations, as well as its harmful effects on the habitat of species of fauna and flora;
- ❖ Improve the well-being of local mining communities through the implementation of economic and social development programs, and providing for compensation to communities in the event of involuntary resettlement; and
- ❖ Reduce the harmful effects of the mining operations such as noise, dust, etc. on the activities of the human and animal populations residing in the vicinity of the mines.

Article 458 of the Mining Regulations indulge that in the 100 days following the anniversary date of the approval of the EIS and the EMPP, mining companies must submit each year, the Environmental Mitigation and Rehabilitation Performance Report (EMRPR) to the DPME. Article 459 of the Mining Regulations requires mining companies to conduct an Environmental Audit every two years from the date of approval of the Environmental Impact Study. It is important to emphasise that the environmental quality standards²³⁷, the details on monitoring frequency and locations, the calculations and measurement technics related to mining operations in the DRC are provided in Annexe IX of the Mining Regulations. The following Tables 1, 2, 3 and 4 only shows water quality, air pollution and noise standards.

²³⁷ B Walmsley & S Patel *2011 Handbook on environmental assessment legislation in the SADC Region*. 3rd ed. Pretoria: Development Bank of Southern Africa (DBSA) in collaboration with the Southern African Institute for Environmental Assessment, SAIEA (2012) 108.

Table 1: Maximum concentration of contaminants in water (oil, gas and mining)

Determinant	Maximum Concentration mg/l (except where indicated)
Temperature at the edge of the mixing zone	5 ^o C above the maximum ambient temperature of the receiving waters and a maximum of 3 ^o C if the ambient water temperature is 28 ^o C or more
Oil and Grease	20
Biological oxygen demand	50
Acute toxicity	More than the acute level specified for freshwater fish and crustaceans
Ph.	6-9 units
Suspended solids	100
Arsenic	0.4
Copper	1.5
Cyanide, total	2.0
Iron	6.0
Lead	0.5
Mercury	0.002
Nickel	1.0
Zinc	10.0
Hydrocarbons	10.0

Table 2: Threshold limits for air pollution within the oil, gas and mining rights areas

Nature of Contaminant	Threshold limit mg/m ³
Arsenic	0.5
Carbon monoxide	29
Copper	1
Free silica	5
Cyanure d'hydrogène	11
Hydrogen sulphide	14
Lead – emissions and fumes	0.15
Nitrogen dioxide	6
Solid particles	10
Sulphur dioxide	5

Table 3: Threshold limits for air pollution outside the oil, gas and mining rights areas

Nature of Contaminant	Threshold limit g/m ³
Particulate matter (<10 µm): <ul style="list-style-type: none"> ➤ Annual average ➤ Average maximum in 24 hrs 	100 500
Nitrogen oxide as NO ₂ : <ul style="list-style-type: none"> ➤ Annual average ➤ Average maximum in 24 hrs 	100 200
Sulphur dioxide: <ul style="list-style-type: none"> ➤ Annual average ➤ Average maximum in 24 hrs 	100 500

Table 4: Maximum sound levels

Terrain	Nighttime dB(A)	Daytime dB(A)
Built up residential areas with schools, hospitals or other sensitive teaching or health establishments	40	45
Areas with permanent commercial activities, hunting, fishing or other recreational activities.	50	55
Areas with mostly industrial or agricultural activities	70	70

Where no DRC standards exist, the MENSND recommend oil, gas and mining companies to implement the World Bank standards (IFC Performance Standards) and the OECD Guidelines for Multinational Enterprises.

6 ENVIRONMENTAL AND SOCIAL COMPLIANCE RELATED CHALLENGES FOR THE CASE STUDY COMPANIES.

This section discusses key challenges facing Total E&P DRC and Metorex (Ruashi Mining) in doing business in the DRC, in line with the secondary question indicated in the introductory chapter of this dissertation. Environmental and social compliance-related concerns encountered by the companies under the present study include armed conflicts and war activities in the eastern part of the country, the invasion of the Virunga National Park for oil exploration purposes, the artisanal and illegal mining; oil, gas and mining contracts secrecy, corruption, deep poverty, lack of meaningful stakeholders’ engagement and social empowerment.

6.1 Armed conflicts and war activities in the eastern part of the DRC

Similarly to all the other lakes in the Great Lakes²³⁸ Region, the Lake Albert in the Ituri Province is a natural border, whose demarcation between Uganda and the DRC became a problem as soon as oil exploration started²³⁹.

Since 2003, Lake Albert’s oil exploration has been associated with violence in Ituri and is one of

²³⁸ The Great Lakes which border the DRC include Lake Albert, Lake Edward, Lake Tanganyika and Lake Kivu.

²³⁹ CAFOD & PROCAIRE *Oil extraction in Lake Albert*, 2012 (3).

the causes of Ugandan military incursions of the DRC²⁴⁰. During that year, the “rulers” of Ituri were the Hema fighters from the rebel movement UPC (“*Union des Patriotes Congolais*”: *Congolese Patriots Union*), which was allied to Congo's pro-Rwandan rebels of RCD (“*Rassemblement Congolais pour la Démocratie*”: *Congolese Rally for Democracy*) based in Goma, a sworn enemy of Uganda. UPC foreign minister Jean-Baptiste Dhetchuvi says: “In Ituri, we are in an oil war. When you look at the oil map of Lake Albert region and compare it to the massacre map, there really is a strange similarity²⁴¹.” Ituri in the eastern DRC has become the home of the worst massacres and horrors in the Congo crisis and the battlefield for regional and international interests since the beginning of oil exploration activities in the region.

In 2007, the imprecise delimitation of the border led to military clashes²⁴² between Uganda and the DRC. Despite efforts to reach an agreement on this matter, mistrust remains a prominent feature between the DRC and Uganda which stumbles over several outstanding issues, including Uganda’s refusal to pay war reparation fine to the DRC as ruled by the International Court of Justice²⁴³. This is particularly important because on both sides of Uganda and the DRC the present work is still in the oil exploration stage and will take some time before moving into the development and production phases. Unfortunately, the human and environmental costs have not waited to manifest!

6.2 Problematic oil exploration of Lake Albert and the challenges of imprecise borders between Uganda and the DRC.

The presence of oil in the region has been known for a long time²⁴⁴. Shell explored the Ugandan side of Lake Albert in 1938 and the Congolese side between 1952 and 1954²⁴⁵. Interest in Lake Albert only revived with the signature of the first exploration contract in 1997 between the Ugandan government and Heritage Oil and the arrival of Tullow Oil in 2006 in the DRC²⁴⁶. In 2002, while Ituri province was troubled by inter-ethnic violence over control of land and illegal minerals trade, the Ugandan army occupied the province to also loot the natural resources while

²⁴⁰ D Johnson *Shifting sands: oil exploration in the Rift Valley and the Congo conflict*, Goma, DRC (2003) 17.

²⁴¹ *ibid* 19.

²⁴² International Crisis Group *Black Gold in the Congo: Threat to Stability or Development Opportunity?* Africa Report N°188, (2012) 22.

²⁴³ International Court of Justice *DRC v Uganda Case concerning armed activities on the territory of the Congo* (2005) paragraph 23.

²⁴⁴ WCS Uganda *Oil development* available at <https://uganda.wcs.org> > initiatives > oil-development, accessed on 12/11/2019.

²⁴⁵ B Augé “Border Conflicts Tied to Hydrocarbons in the Great Lakes Region of Africa” in J Lesourne, *Governance of Oil in Africa: Unfinished Business*, Paris (2009) 303.

²⁴⁶ *ibid* 5.

its government encouraged civil war and secessionist attempts in this region, funding and arming the two parties in conflicts²⁴⁷. It is during this period of Ugandan occupation over Ituri Province that Heritage Oil (who was already exploring oil in Uganda's side of Lake Albert) interested the Congolese government about assessing the oil potential in Ituri Province. On the 2nd of June 2002, Heritage Oil signed a Memorandum of understanding with the DRC government to explore an immense area of 30,000 sq km stretching from the town of Rutshuru, south of Lake Edward, to Mahagi at the northern end of Lake Albert²⁴⁸. Despite the Memorandum of Understanding, no exploration took place on the Congolese side for various reasons, including the security situation, which only "stabilised" after the 2006 general elections²⁴⁹. In August 2007, four soldiers from the Ugandan army (UPDF) illegally crossed the Congolese border at Rukwanzi Island but were captured by the Congolese army (FARDC)²⁵⁰. This situation revived tensions between Uganda and the DRC again. On 8 September 2007, the Tanzanian President enabled a meeting between President Kabila and President Museveni at Ngurdoto, leading to an agreement to improve cooperation, especially for cross-border oil exploration and production²⁵¹.

Although the Ngurdoto Agreement reaffirmed the inviolability of the colonial borders between the two countries, it also recognised that the "3 February 1915 agreement between the colonialists Belgium and the United Kingdom" was insufficiently precise to determine the border on the Lake Albert. The Ngurdoto agreement provided for the creation of a joint commission to determine the exact border on the Lake Albert, demilitarise the disputed areas and establish a joint administration for Rukwanzi Island²⁵². Rukwanzi Island is a Congolese territory; Congolese peoples had lived there for many centuries and speak French and other Congolese local dialects. The island under Congolese administration has been there since the DRC exist²⁵³. Rukwanzi Island was never disputed until oil exploration started in the region. The island is located in the south of Lake Albert and no evidence indicates the presence of hydrocarbons in its vicinity²⁵⁴. Two days later, after the Ngurdoto Agreement, the two armies (DRC and Ugandan) clashed close

²⁴⁷ International Crisis Group *Africa Report N°64, Congo Crisis: Military Intervention in Ituri* (2003) 13.

²⁴⁸ *ibid* 25.

²⁴⁹ Heritage Oil Corporation *Second Quarter Report* (2007) 1.

²⁵⁰ International Crisis Group Report, *Congo: Four Priorities for Sustainable Peace in Ituri, Bunia* (2011) 18.

²⁵¹ Accord on bilateral cooperation between the DRC & Uganda at Ngurdoto (Tanzania) on 8 September 2007, 25 September 2007, Chapter II, paragraph 2, S/2007/564.

²⁵² *ibid* Chapter I, Article 3, paragraphs 3, 5 & 6.

²⁵³ International Crisis Group *Africa Black Gold in the Congo: Threat to Stability or Development Opportunity?* Africa Report N°188 – 11 July 2012 (2012) 6.

²⁵⁴ *ibid* 7.

to a boat owned by Heritage Oil, killing one of the company's engineers²⁵⁵. Faced with the risk of renewed hostilities between Uganda and the DRC, the UN Mission in the DRC's (MONUC) force commander, General Babacar Gaye was dispatched to Kampala by the UN Secretary-General's special representative in the DRC to defuse tensions²⁵⁶.

However, on 25 September 2007, seventeen days after the accords were signed, another deadly clash between the FARDC and the UPDF took place²⁵⁷. At the same time, troubles were brewing in Kinshasa over Lake Albert contracts, which further delayed exploration work in Ituri. The armed groups present in oil blocks in the eastern DRC are described in the table²⁵⁸ below:

Table 5: Armed groups active around oil blocks in Ituri Province.

Province	Oil Block	Oil company with a CCP	Territory/District	Armed group
Ituri Province	Block 2	Caprikat, Foxwhelp & Cohydro	Irumu Territory	FPRI (Front for Patriotic Resistance in Ituri)
	Block III	Total, SacOil & Cohydro	Bunia Beni & Butembo (North Kivu: 32% of Block III situated in Virunga National Park)	UPC-Hema fighters against FNI- Lendu fighters, Ugandan rebels ADF-Nalu & LRA, FPRI, Mai-Mai fighters, etc.
	Block 4	Not yet allocated	Lubero Territory Masisi Territory	Ugandan rebels of ADF-Nalu, Rwandan rebels FDLR, APFSC, CDF, Pareco Fort, Mai-Mai fighters, etc
North Kivu	Block V	Soco International, Dominion & Cohydro	Rutshuru District:(entirely in Virunga National Park)	Rwandan rebels of FDLR & Mai-Mai armed groups

Oil exploration on Lake Albert has started on both sides of the Uganda and DRC borders. Dominion Petroleum obtained exploration rights for Uganda's Block IVB while the Congolese government allocated Block III to Total E&P and SacOil in 2012. On Lake Edward, however; a highly contested oil exploration permit was awarded for Block V by the Congolese government to SOCO International and Dominion

²⁵⁵ The Sunday Times *The clash between armed men presenting themselves as FARDC and members of the UPDF left two dead, including a civil engineer employed by Heritage Oil. "British man shot dead on Ugandan lake"* (7 August 2007) 6.

²⁵⁶ Radio Okapi *"Bunia: empêcher d'éventuels affrontements entre les FARDC et l'UPDF"*, 15 August 2007.

²⁵⁷ International Crisis Group Africa Report No. 188 (note 255 above; 7).

²⁵⁸ International Alert & Réseau Haki na Amani *Oil exploration in Ituri: a human rights and conflict risk assessment in block III* (2014) 3.

Petroleum in 2010²⁵⁹. Block V is located at the centre of the troubled areas in North Kivu. Fifty-two percent (52%) of Block V is situated in Virunga National Park which poses a major environmental challenge and the Rutshuru and Lubero territories, where militias with a strong presence and armed groups regularly clash with each other, the FARDC and the Rwandan Armed Forces. The Ugandan army commander and UDF chief of staff recently outlined the security risk posed to the Ugandan border oil fields by one armed group; the Allied Democratic Forces (ADF) rebels, operating in this area of Congo²⁶⁰. In an area where the illegal extraction of natural resources thrives, security remains highly precarious as discovery progresses. Two South African employees of a security company contracted by SOCO were held hostage by the Democratic Forces for the Liberation of Rwanda (FDLR) rebels from 14 to 16 February 2011²⁶¹.

On the Lake Kivu, Belgian experts identified significant quantities of methane gas in 1935, but the first attempt to extract it from the lake only took place in 1963 by engineers working for “*Union Chimique Belge*”²⁶². The gas was used until 2005 to supply a brewery in Rwanda²⁶³. The unclear borders around the Lake have not yet caused problems between the two countries²⁶⁴, but could also pose major problems if the agreements signed in Bukavu in 1975, in Gisenyi in March 2007 and in Kinshasa in June 2009 (which provides that operations to extract gas must be conducted jointly) are not respected and implemented. Although Rwanda is making headway in gas exploitation and oil exploration in the Lake Kivu, rivalries and speculations between the Congolese environment and hydrocarbons ministries have blocked progress on the DRC side²⁶⁵.

Lake Tanganyika²⁶⁶ is a new oil exploration area shared by DRC, Zambia, Burundi and Tanzania. Only the latter two countries have issued exploration licenses. Tanzania has allocated the southern Block to the Australian company Beach Energy²⁶⁷ and its Tanzanian subsidiary Beach Petroleum Tanzania in 2008, and the northern Block to Total SA in 2011²⁶⁸. Burundi has granted

²⁵⁹ DRC Hydrocarbon Ministry *Ministerial Order 10/044, approving a production sharing contract concluded on 5 December 2007 between the DRC and Dominion Petroleum Congo, SOCO Exploration & Production DRC and COHYDRO for Block V of the Albertine Graben of the DRC*, 18 June 2010.

²⁶⁰ *The New Vision Uganda: Army to keep an eye on oil fields*, 9 May 2012.

²⁶¹ Radio Okapi *FDLR dissident group SOKI attacked a SOCO convoy on 14 February 2011* (2011).

²⁶² International Crisis Group *Black gold in the Congo: threat to stability or development opportunity?* Africa Report N°188 – 11 July 2012, (2012) 8.

²⁶³ B Augé *Border Conflicts Tied to Hydrocarbons in the Great Lakes Region of Africa* (2009) 17.

²⁶⁴ US Department of State *International Boundary Study No. 52 – June 15, 1965 Democratic Republic of the Congo (Zaire) – Rwanda Boundary* (Country Codes: CG-RW) (1965) 3.

²⁶⁵ Radio Okapi *Lac Kivu : l'exploitation du gaz méthane traîne les pieds*, 13 July 2010 & Geopolis Magazine *A quand l'exploitation du gaz méthane dans le lac Kivu*, June 2010.

²⁶⁶ International Crisis Group (note 264 above; 9).

²⁶⁷ Our operations available at www.beachenergy.com.au, accessed on 18/11/2019.

²⁶⁸ International Crisis Group *Total is present in West Africa, but is increasingly interested in East Africa, interview to Total managers*, Paris, 2011. “Tanzania”, *Petroleum Africa*, (December 2011) 9.

Surestream a license for Blocks D and B²⁶⁹, A-Z Petroleum for Block A and Minergy Ree for Block C²⁷⁰. In May 2008, the DRC and Tanzania signed an agreement for joint exploration of the lake²⁷¹, which Congolese senate strongly criticised. This agreement was signed by the hydrocarbons minister, but has never been implemented²⁷². In addition, the emergence of piracy by the Mai-Mai armed groups in South Kivu compounds insecurity around the Lake. Geologists believe that the DRC has other more promising geological basins, but they too are in disputed border zones. Besides Lake Albert, Lake Edward, Lake Kivu and Lake Tanganyika which are all natural borders; the Central Basin²⁷³ which covers 800,000 sq km at the heart of the DRC across the borders with Congo-Brazzaville and the Central African Republic, the demarcation of these borders are also imprecise²⁷⁴.

6.3 The challenge of protecting the Virunga National Park (VNP)

The hunt for oil is putting pressure on the pristine wilderness areas in Eastern DRC, particularly the Virunga National Park (VNP), Africa's oldest national park and a world heritage site that is home to about a quarter of the world's mountain gorillas and important regional fisheries. The Park is considered one of the most biodiverse slices on the planet. Its powerful volcanoes are bubbling with lava, jungles, swamps and cloud forests constitute an otherworldly place for gorillas, elephants, lions and chimps; a rare mix. Thirty-two percent (32%) of Block III and fifty-two percent (52%) of Block V are situated in the VNP²⁷⁵. If not protected, 84% of the VNP could be destroyed for oil exploitation.

Emmanuel De Merode²⁷⁶ (VNP's director) argues that "while Total has committed not to explore oil in the VNP, exploiting oil in its vicinity remains a huge environmental concern as it risks disturbing the ecosystem of the Park. Beyond that, Virunga's Lake Edward, where the oil is believed to lie, is part of the headwaters of the Nile River. An oil spill here could contaminate

²⁶⁹ International Crisis Group *interview to Surestream managers*, Bujumbura, (September 2011) 9.

²⁷⁰ Burundian Decree 100/193 of 30 June 2011 granting type H exploration licences for hydrocarbons (Block A) to A-Z Petroleum Ltd and decree 100/195 of 30 June 2011 granting type H exploration licences for hydrocarbons (Block C) to MinergyRee Limited.

²⁷¹ N N Malengana *A joint commission responsible for studying the demarcation of the border in Lake Tanganyika north of the Ruzizi delta was created in 1988*.

²⁷² Africa Energy Intelligence No. 464 *Quiet on the Tanganyika Front* 21 May 2008.

²⁷³ DRC Hydrocarbons Ministry *Ministerial Order 118/CAB/MIN-HYDR/CMK/2011 of 27 October 2011 amending ministerial order 009/MIN-HYDR/IMO/2007 of 2 August 2007 partly setting out the geographical coordinates defining the outline of blocks opened for development in the Central Basin*, 27 October 2011.

²⁷⁴ International Crisis Group (note 269 above; 9).

²⁷⁵ I Autissier & S Orru *WWF-France Open letter: Mr. de Margerie, the future of the oldest African national park is in your hands*, Paris (2012) 2.

²⁷⁶ International Crisis Group (note 269 above; 16).

water that hundreds of millions of peoples rely on. Any toxins from here could flow up to the Mediterranean; it could reach all the way to Spain”.

The struggle over oil exploitation in the eastern Congo, particularly in the VNP is a challenge, pitting economic development against environmental conservation. The DRC government says it has a moral obligation to pursue anything that might lift the country out of grinding poverty, including drilling for oil in protected areas²⁷⁷. Alec Crawford²⁷⁸ maintains that the protection of unique ecosystems like VNP was one of the driving forces behind the creation of many of the UN’s multilateral environmental agreements (MEAs) in the early 1970s. Under the UN, a number of MEAs²⁷⁹ relevant to conservation exist, and the DRC is a signatory to all of them, including: the Convention on Wetlands of International Importance (Ramsar, 1971), the UNESCO World Heritage Convention (1972), the Convention on International Trade in Endangered Species of Wild, Fauna and Flora (CITES, 1973), the Convention on Migratory Species (1979) and the Convention on Biological Diversity (1992), among others. Despite the DRC’s participation in these conventions, environmental destruction continues for the VNP, armed conflicts, poaching for ivories and the risk of oil fracking has impacted the park in recent years²⁸⁰. The Park management officially falls under the responsibility of ICCN, the Congolese wildlife authority²⁸¹. But years of conflict and corruption have severely affected the capacity of ICCN to protect the VNP. The park’s continued existence now depends on the dedicated efforts of its under-resourced staff, its under-equipped rangers and a handful of international conservation organizations working in the region²⁸². A survey²⁸³ of the conventions shows that not much has been done to deal with environmental protection in times of conflict. However, Crawford and Bernstein²⁸⁴ states that a number of other regional agreement options outside of the UNMEAs exist for governments and conservationists seeking to address the impacts of conflict on conservation. They include:

- “The Gorilla Agreement (2008) (N’gagi Agreement) negotiated by Convention on Migratory Species (CMS) Parties. It commits signatories to joint activities, programs and projects to conserve existing populations of gorillas.

²⁷⁷ J Gettleman “Oil Dispute takes a page from Congo’s Bloody Past”; *The New York Times*, Nov. 16, 2014,; available at <https://www.nytimes.com › 2014/11/16 › world › oil-dispute-takes-a-page>, accessed on 44/12/ 2019.

²⁷⁸ A Crawford & J Bernstein *Multilateral Environmental Agreements (MEAs), Conservation and Conflict: A case study of Virunga National Park, DRC, Switzerland* (2008) 22.

²⁷⁹ A Najam & M Muñoz (2008) “4 Steps for Targeted Coherence” *Global Environmental Governance (GEG) Briefing Paper IISD, Winnipeg*, http://www.iisd.org/pdf/2008/geg_steps_coherence.pdf, accessed 20 April 2018.

²⁸⁰ Crawford & J Bernstein (note 278 above; 23).

²⁸¹ A Crawford & J Bernstein (note 278 above; 4).

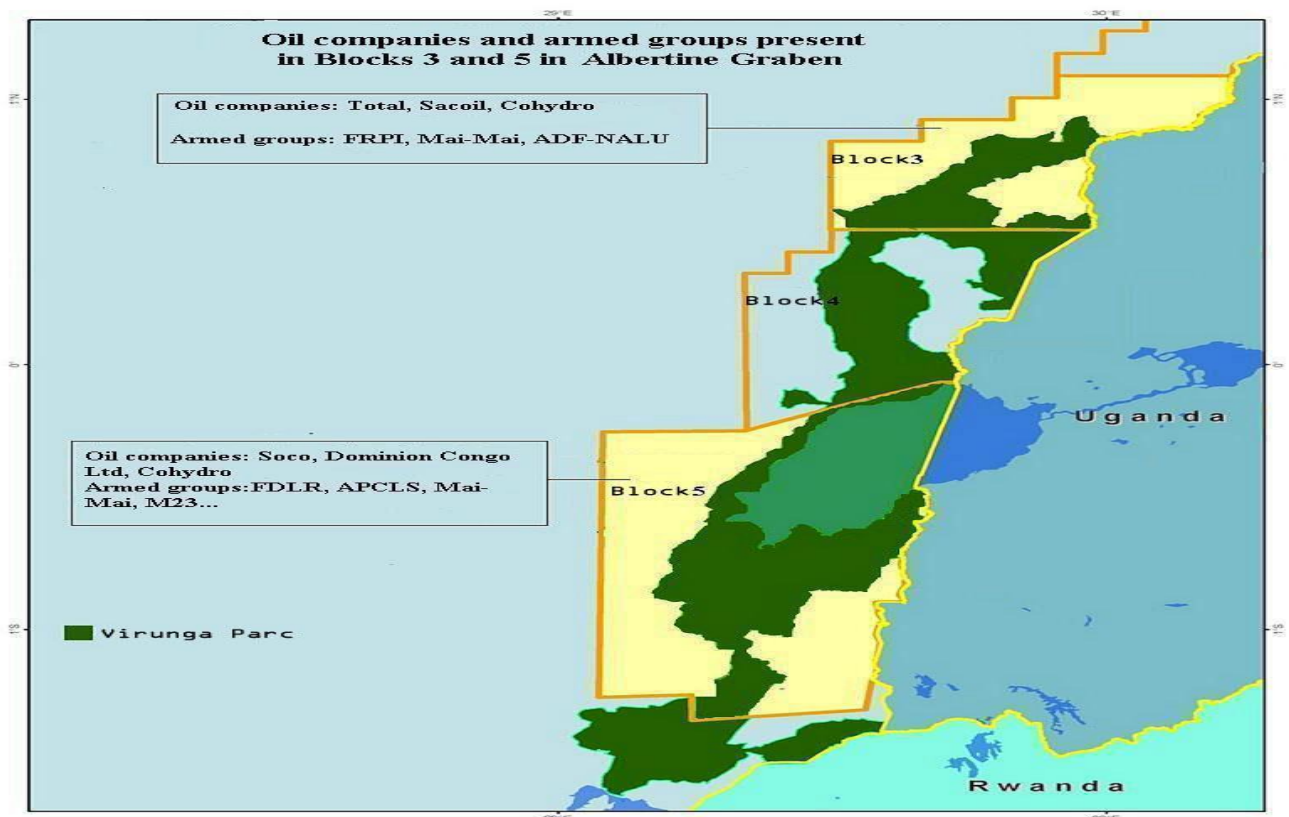
²⁸² M Languy & E De Merode « *Virunga : Survie du premier parc d’Afrique* », Belgium (2006)352.

²⁸³ UNESCO *World Congress of Biosphere Reserves: Biosphere Futures, UNESCO Biosphere Reserves on Sustainable Development, Spain* (2008).

²⁸⁴ A Crawford & J Bernstein (note 278 above; 39).

- The Goma Declaration, signed by the governments of the DRC, Rwanda and Congo/Brazzaville in October 2005. It binds the three governments to continue their collaborative management of the protected area of the Central Albertine Rift.
- The Rubavu Declaration (July 2006). It commits the governments of the DRC, Rwanda and Uganda to strengthen the tourism sector, fight poverty and conserve the biodiversity of the Greater Virunga Region. The Declaration also highlights concern regarding the impact generated by armed groups and
- The Tripartite Ministerial Declaration on the Central Albertine Rift Transboundary Biosphere Initiative. It was adopted by the governments of the DRC, Uganda and Rwanda at the 3rd World Congress of Biosphere Reserves in early 2008”.

Figure 5: Map of oil Blocks in Virunga National Park (VNP)



Source: International Crisis Group

6.4 Artisanal and illegal mining in the DRC.

For many years, as the formal mining sector was in decline and the Country was still “recovering” from the largest armed conflict, the often illegal, dangerous, environmentally and

socially disruptive activity of artisanal and illegal mining was the economic mainstay of the local people in the Country²⁸⁵.

However, from the first democratic elections in 2006, the DRC has “recovered some stability” which has brought back some investor’s confidence, and the Congolese government has granted concessions to new mining companies.²⁸⁶ The concessions which have been granted to various major new investors, including Metorex in Ruashi; were mined previously by artisanal and illegal miners. Artisanal and illegal miners in Ruashi area who have seen available land decrease and natural resources allocated to foreign investors have become hostile to Ruashi Mining. This hostility was increased by political campaigns during the 2011 general elections because many politicians are currently benefiting from artisanal and illegal mining. Metorex’s efforts to claim some of its mining concessions from artisanal and illegal miners in the Ruashi area always cause more violence and social unrest as they do not have other alternative to survive and sustain their families. Despite artisanal mining being legal under the Mining Code²⁸⁷, the conditions stated in the law are flouted virtually in every aspect; therefore artisanal mining in the Ruashi area is, in fact, illegal. The Mining code provides that artisanal mining can only take place in a designated artisanal mining zone. Unfortunately, since the passing of the Mining Code and the Mining Regulations in 2002, no artisanal mining zone has been designated in the Country, making all the current artisanal minings illegal. The DRC government, however, when faced with economic challenges, is likely to overlook the socioeconomic value of artisanal mining, which is, in fact, entirely legal in the country when it complies with the terms of the Mining Code²⁸⁸ and the Mining Regulations. It is estimated that roughly 10 000 peoples²⁸⁹ are working in artisanal mining in the Ruashi concession alone and its simply not possible for Metorex (Ruashi Mining) to provide jobs that can absorb such a number of peoples, which include children²⁹⁰.

6.5 Extreme poverty and corruption

Despite all its abundant natural resources, the DRC is the second poorest²⁹¹ country in the world and is likely to stay in this stage as conflicts and corruption are becoming endemic. Three in

²⁸⁵ International Alert *The role of the exploitation of natural resources in fuelling and prolonging crises in the eastern DRC* (2010)57.

²⁸⁶ C Kabemba *Is a genuine and transparent process of mining contracts renegotiation possible in the DRC?* (2007)6

²⁸⁷ Title 4, Chapter 1, Article 109 of the Mining code.

²⁸⁸ *ibid.*

²⁸⁹ Wardell Armstrong LLP *Artisanal Mining in the DRC: Key issue, challenges and opportunities* (2007) 4.

²⁹⁰ Pact Congo *Le travail des enfants dans les mines artisanales de Kolwezi*, (2015) 2.

²⁹¹ www.worldbank.org/en/country/drc/overview.

five of its estimated 80.4 million peoples²⁹² live on less than \$1.25 (R12.50) per day²⁹³, only sixty-one percent (61%) of children aged 6 -11 regularly attend primary school²⁹⁴, an estimated one in one hundred births results in the death of the mother²⁹⁵, seven out of ten people do not have access to clean drinking water²⁹⁶, and almost one in three children under five are severely malnourished²⁹⁷. The Congolese government is seen as one of the most corrupt on the planet. It ranks amongst the most corrupt in Transparency International's 2018 Corruption Perception Index, at 161 out of 180 countries²⁹⁸. The index reveals continued and widespread practices of corruption amongst the Congolese government officials and the majority of Congolese people believe that the Congolese government's efforts to fight corruption are ineffective. The country is also a difficult place to do business, ranked 184 out of 190 countries in the World Bank Doing Business Guide²⁹⁹ 2019 of country business climate. Civil servants are not regularly paid. At all levels, corruption is rampant, including in the army forces, police, intelligence services and in the government cabinet. Military, police and intelligence senior officials regularly embezzle the pay of soldiers, police officers and other civil servants or declare a large number of "ghost employees" whose salaries they pocket. Frequently, senior military and police officers assign their soldiers and policemen to the protection of rich expatriate investors or mining companies in exchange for payment. As in the public service, and because of low salaries paid irregularly by the Congolese government, civil servants regularly demand all kinds of illegal taxes and bribes from companies or civilians as they find it the only means to sustain themselves. This situation undermines any degree of environmental and social legal compliance for oil, gas and mining companies. The country's tax multiplicity, duplication and overlap of tax regimes coupled with the lack of institutional capacity are identified as contributing factors to the high levels of corruption, which pose major risks to environmental and social legal compliance of oil, gas and mining companies.

²⁹² See UN Statistics Division.

²⁹³ 2016: World Bank PovCalNet, <http://iresearch.worldbank.org/PovcalNetpovcalSvy.html>.

²⁹⁴ DRC Demographic and Health Survey, 2011 (59% girls, 63% boys). This compares to a 2010 Sub-Saharan African average of 73% (71% girls, 76% boys) as reported in the EFA *Global Monitoring Report 2014*.

²⁹⁵ See World Health Organization African Region: Democratic Republic of the Congo Maternal and Perinatal Health Profile Department of Maternal, Newborn, Child and Adolescent Health (MCA/WHO available at www.who.int/maternal_child_adolescent/epidemiology/profiles/maternal/cod.pdf, accessed on 23/9/2017.

²⁹⁶ R Shore Water in crisis - Democratic Republic of Congo available at <https://thewaterproject.org/water-crisis/water-in-crisis-Congo>, accessed on 23/9/2017.

²⁹⁷ See UNICEF - Countries | Pays - UNICEF Democratic Republic of Congo, available at www.unicef.org/wcaro/Countries_1749.html, accessed on 23/9/2017.

²⁹⁸ See http://www.transparency.org/policy_research/surveys_indices/cpi/2014/cpi_2014.

²⁹⁹ World Bank *Doing business*, ed.16 (2019) 5.

6.6 Lack of meaningful stakeholder's engagement and social empowerment

The lack of meaningful stakeholder's engagement, consultations and employment alternatives for mining communities has been identified in this research as one of the key environmental and social compliance challenges around Metorex, Ruashi mining. Violence is always permanent within communities dealing with Metorex, as Metorex seeks to claim exclusive rights to the concessions that they have been granted by the government. One of the biggest challenges for any mining company in DRC remains the issue of community engagement. This research again illustrates the complexity of company-community relations. This is especially so in the Metorex (Ruashi mining) area given the uncertainties regarding land ownership. The key incentive in this respect is contributing to the "social license to operate"³⁰⁰. Gehman, Lianne and Lefsrud³⁰¹ define the Social Licence to Operate as the efforts for extractive companies to establish legitimacy in the area they work in, with local communities being seen as important stakeholders for the smooth running of their operations. Companies can contribute to positive social and economic development when they involve stakeholders, such as affected local communities in their planning and decision making. This is particularly important in the extractive sector, which is associated with extensive social, economic and environmental impacts. Meaningful stakeholder engagement is critical in avoiding some of the potential adverse impacts of extractive operations as well as optimising potential value³⁰². Engaging with stakeholders also makes good business sense as it provides meaningful opportunities for stakeholders and may enhance the company's environmental and social compliance.

In addition, the DRC institutions vested with implementation and enforcement of environmental laws encounters major impediments to ensure environmental compliance in oil, gas and mining sectors. Erin Smith and Peter Rosenblum³⁰³ argue that problems with governments implementing and enforcing environmental laws and international standards exist in every country with a large extractive sector. However, the situation in DRC is far more alarming. Indeed, the government has been consistently improving in passing key legislation³⁰⁴ and ratifying important international environmental standards and treaties. Yet, there are still several impediments inhibiting its ability

³⁰⁰ JDL Nzinga *Critical assessment of Corporate Social Responsibility Programmes in the mining sector of the Democratic Republic of Congo: The case of African Rainbow Minerals (ARM)* (unpublished PhD, NWU 2014) 501.

³⁰¹ Gehman, Lianne & Lefsrud *Social License to operate* (2017) 60.

³⁰² OECD *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, (2015) 7.

³⁰³ E Smith & P Rosenblum *Enforcing the Rules: Government and Citizen Oversight of Mining*, Revenue Watch Institute, USA (8) 2011.

³⁰⁴ Mining code, Environmental Protection Act, Hydrocarbons Law and Land law.

to effectively implement and enforce them. These impediments are also a reflection of the political and economic realities prevailing in the country.

6.7 Political reality of the DRC

In the DRC, besides political instability, armed group activities and inter-ethnic's armed violence in most oil, gas and mineral areas; the interests of politicians and those in positions of influence and authority often do not align with the effective implantation and enforcement of environmental laws and standards. The control over the oil, gas and mining resource sectors is one of the most politically valuable assets available currently in the Congo. To have political influence, you must have interests in oil, gas or mining companies. Oil, gas and mining companies who know that complying with environmental laws and standards involves significant financial investment and human resources, enjoy just having an influential politician or a highly ranked military or intelligence officer linked to them in the form of patronage and "they don't have to be subjected" to any environmental law nor standards implementation and enforcement.

6.8 Economic reality of the DRC

The DRC as a "post armed conflict country" is charged with the goal of both promoting and attracting new investments in the oil, gas and mining sectors to boost its collapsed economy. Implementing and enforcing efficiently environmental laws and standards against companies who accept to invest in a country with political and economic uncertainty can be seen as opposing this goal and discouraging investors.

CHAPTER FOUR: CASE STUDY COMPANIES

1. TOTAL E&P DRC

1.1 Introduction

Total E&P DRC is the operator of Block III³⁰⁵, which straddles the northern part of the province of North Kivu and the southern part of the Ituri Province. Thirty-two percent of the Block III license area is situated in the Virunga National Park³⁰⁶.

On 12 September 2012, SacOil Holdings³⁰⁷ announced that Total E&P DRC (“Total”), the operator of Block III, Albertine Graben in the DRC, has successfully acquired an airborne gravity and magnetic survey over the northern part of Block III outside the Virunga National Park. Processing and interpretation of the data has now been completed and confirms the expected geological trend observed in the area. With this positive geological information, planning for the acquisition of a 2D seismic survey to map potential oil and gas prospects has begun. The operator (Total E&P DRC) is currently active in Block III, with environmental and societal personnel on the ground to finalise the data acquisition and to complete the environmental and social impact report for submission to the DRC authorities.

The purpose of this section is to assess if Total E&P DRC “Total” (the operator of Block III) is legally complying with environmental and social legislation, international standards and the Production Sharing Agreement (PSA) and to better understand the complex situation in the DRC, specifically in and around the Block III area. This study summarises the findings of the environmental and social legal compliance assessment of the case study company.

1.2 Background

Total E&P DRC (or “*Total E&P RDC*”) is a private oil and gas exploration and production company based in Kinshasa, DRC. Total E&P DRC is a subsidiary of Total S.A³⁰⁸ (“*Total*

³⁰⁵ Article 2.5 of the DRC Hydrocarbons Law.

³⁰⁶ I Autissier & S Orru *The future of the oldest African national park is in your hands* (unpublished open letter to Total SA, WWF France, 2012) 1.

³⁰⁷ SacOil holdings *Block III operations Update 2013*, available at www.sacoilholdings.com/.../sacoil-operations-update/?id=14&entryId=119, accessed on 23 September 2015.

³⁰⁸ *Total Registration Document 2014*, Paris (2015) 8.

Société Anonyme” in French or Total). Total SA (Total) is the world’s fourth-largest oil and gas company and second largest solar energy operator with Sun Power³⁰⁹. It was founded after World War I, when the then French Prime Minister Raymond Poincaré rejected the idea of forming a partnership with Royal Dutch Shell in favour of creating an entirely French oil company³¹⁰. The company is headquartered in Paris, France and was incorporated on August 20, 1954, as an energy operator. Total operations segments³¹¹ include exploration and production of crude oil and natural gas. It has exploration and production activities in more than 50 countries and produces oil or gas in approximately 30 countries, including the DRC in Block III. Total E&P DRC³¹² has 66.66% interest in Block III, SacOil Holdings owns 12.5% (through Semlike Energy Sprl), Divine Inspiration Group (DIG) owns 5.84% and 15% is owned by COHYDRO, the DRC state-owned oil company. SacOil Holdings has 68% interest in Semliki Energy Sprl and its local partner, Divine Inspiration Group (DIG), holds an effective 32% participating interest in Semliki.

1.3 Case study Location

Block III straddles the Irumu territory in the Ituri Province. Ituri was one of the regions most affected by the war that ravaged the country from 1996 to 2003³¹³. The exploration of property rights is located in the DRC Lake Albert area at the border of Uganda and DRC. The area is part of the Rift Valley and is known as the Albertine Graben area which is a proven petroleum discovery region³¹⁴. The block encompasses an area of approximately 3,177 square kilometres, much of which is located in the highly prospective Albertine Graben. One-third of the acreage of Block III is located in the Virunga National Park³¹⁵. In the Production Sharing Agreement (PSA)³¹⁶, Total has pledged not to work on this section of Block III, in compliance with the Congolese legislation³¹⁷ and international conventions³¹⁸, such as The United Nations Guiding

³⁰⁹ Total *Total SA history*, available at www.total.com/en/total-global-energy-operator, accessed on 28 May 2015.

³¹⁰ *ibid.*

³¹¹ Forbes *The World’s Biggest Public Companies*, available at <http://www.forbes.com/companies/total/>, accessed on 28 May 2015.

³¹² SacOil *DRC-Block III*, available at www.sacoilholdings.com/operations/drc-block-III/, accessed on 28 May 2015.

³¹³ International Crisis Group *Black Gold in the Congo: Threat to Stability or Development Opportunity? Africa Report N°188* (Kinshasa, Nairobi, Brussels 2012) 5.

³¹⁴ SacOil Holdings Ltd, *Oil & Gas Portfolio*, available at SacoilHoldings.com, accessed on 28 May 2015.

³¹⁵ Miles Litvinoff Development Consultant *oil extraction in Lake Albert, Briefing booklet* (2012) 3.

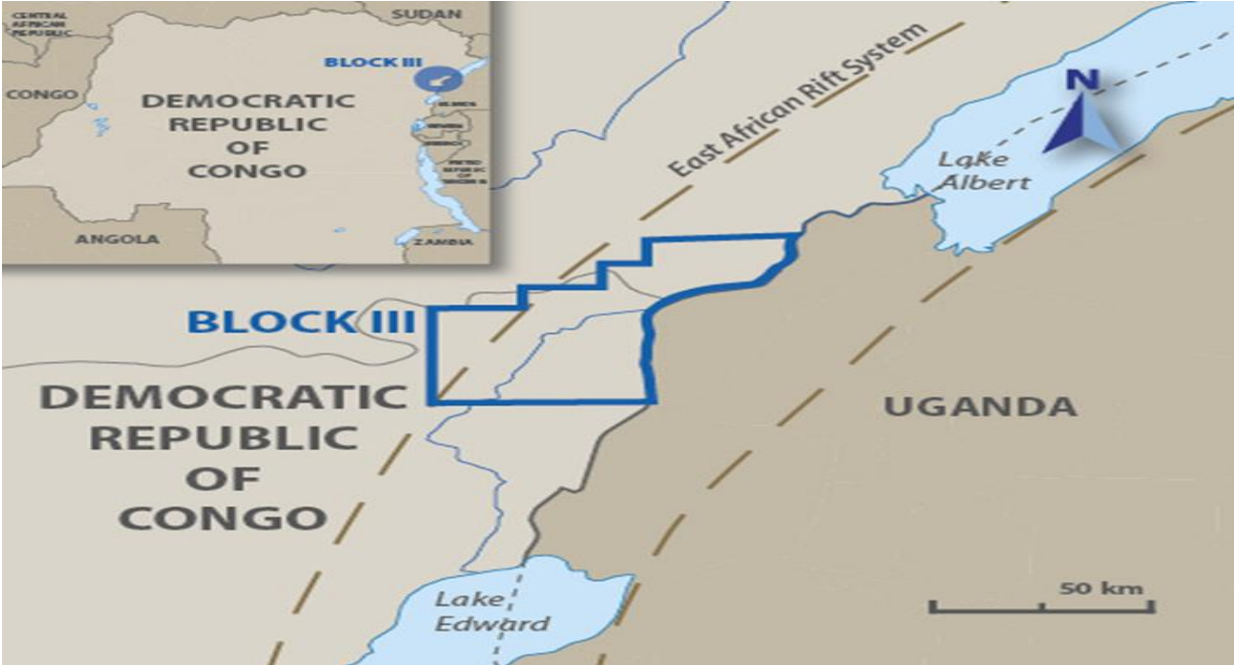
³¹⁶ WWF *Planned Block III, Albertine Graben Exploration Will Be Conducted Outside Virunga National Park*, 2012. available at www.savevirunga.files.wordpress.com/2012/07, accessed on 03 June 2015.

³¹⁷ DRC Hydrocarbons Law, Title 4 (2015) 29.

³¹⁸ Total *Human Rights Briefing Paper Update* (2018) 10.

Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Figure 3: View of Block III in Ituri Province



Source: SacOil holdings.

Total and its partners plan to explore the northern area of Block III, Albertine Graben, which is located well outside the Virunga National Park in Ituri province.

Figure 4: View of the distance between Block III and the Virunga National Park



Source: www.savevirunga.files.wordpress.com

1.4 Environmental and Social policies of Total E&P DRC

In 2013, Total SA adopted a detailed Environmental Protection General Policy, based on its Safety, Health, and Environment Quality Charter³¹⁹ adopted in 2009 but updated in 2014, grounded on the following ten principles (articles)³²⁰:

- Total considers people's safety and health protection, safety in regard to operations, respect for the environment.
- Total strives to comply with applicable laws and regulations wherever it conducts its business.
- Total promotes among its employees a shared culture of management, incident feedback, information and dialogue.
- Total favours the selection of its industrial and business partners on the basis of their ability to comply with its policy on safety, health, environment and quality.
- Total implements, for all its operations, appropriate management policies regarding safety, health, environment and quality risks which are regularly assessed.
- Appropriate safety, health, environment and quality management systems for each business undergo regular assessment.
- In order to respond effectively in the event of accidents, Total equips itself appropriately.
- Each person, at all levels, must be conscious in his or her job of his or her personal responsibility, giving due consideration to the prevention of risks of accident, harm to health and environmental damage.
- In matters of safety, health, environment and quality, Total adopts a constructive attitude based on open dialogue with stakeholders and outside parties.
- Total monitors and controls the Group's energy consumption, greenhouse gas emissions, production of final waste and impact on biodiversity.

1.5 Environmental and Social impacts (facts) in Total Block III oil exploitation area

The purpose of this section is to ascertain the extent of compliance by Total E&P DRC with the legally binding environmental requirements labelled in Section Six of Chapter Two of this dissertation. As a result of the research findings, the researcher discovered that Total E&P DRC

³¹⁹ Total SA Registration Document 2013, Paris (2014) 3.

³²⁰ Total SA Safety Health Environment Quality Charter, Paris (2009) 1.

is still in the exploration phase of its Block III license area which began in 2012. Activities during exploration phase include seismic surveys, testing and exploratory drilling³²¹. Throughout the study, the researcher finds occurrences of significant environmental and social non-compliance impacts³²² from Total's operations in Block III. They are:

1. According to VJ Movement³²³, Total E&P DRC's lead concentration in Block III is about 19%, much higher than the required concentration which must be 0.5% (see Table 1, Chapter Two, Section Six above). VJ Movement is a Dutch public organisation created in 2009 with the aims to persuade leaders in private and public sectors to implement policies that solve issues and improve the lives of communities.³²⁴ Jordan³²⁵ argues that lead is one of the principal causes of toxicity in waterfowl, and is also known as the main cause of death in wild bird populations. Lead poisoning affects every one of the body's systems, especially the nervous system, but also the bones and teeth, the kidneys, and the cardiovascular, immune, and reproductive systems.
2. Toxic mud waste was also discovered³²⁶ in the Lake Albert Block III site, containing lead, zinc, chromium, cadmium, nitrogen and chloride. Ingestion of any of these chemicals could prove to be fatal for human beings, animals and fish³²⁷.
 - This is a violation of Article 53 of the DRC Constitution which requires that all persons have the right to a healthy environment that is favourable to their development and that the environment must be protected.
 - It is a breach of Article 71.8 of the Environmental Protection Act which requires that oil, gas and mining companies must ensure pollution prevention of natural reserves, national parks and biosphere reserves, waters, rivers and streams.
 - It is a breach of the DRC binding standards requirements which provide that the maximum lead concentration for oil, gas and mining should be of 0.5%.
 - Is also a violation of Article 98 of the Hydrocarbons Law which requires that oil and gas companies undertake precautionary measures to prevent, mitigate, remediate or if

³²¹ Barclays Bank Plc *Environmental and Social Risk Briefing Oil & Gas*, UK (2015) 4.

³²² T Lay & MM Paluello *A Lake of Oil Congo's contracts escalate conflict, pollution and poverty*, UK (2010) 27.

³²³ VJ Movement *Impacts of oil exploration in Lake Albert Uganda: "a few environmental considerations" 2012*, available at <https://savevirunga.com/>, accessed on 03 June 2015.

³²⁴ JV Movement, available at <https://vjmovement.com/about-us>, accessed on 31 May 2017.

³²⁵ JS Jordan *Lead poisoning in wild waterfowl* (2012) available at <https://www.ideals.illinois.edu/bitstream>, accessed on 03 June 2015.

³²⁶ VJ Movement (note 323 above).

³²⁷ PB Tchounwou, CG Yedjou, AK Patlolla & DJ Sutton *Heavy Metals Toxicity and the Environment*, US (2014) 21.

possible avoid negative the impact of oil operations on the environment and local communities.

➤ It is in non-compliance with:

- (i) The IFC Performance Standard 1, on Assessment and Management of Environmental and Social Risks and Impacts which require companies to identify and evaluate, mitigate or avoid environmental and social risks and impacts of the Project on the eco-systems, local communities and the environment.
- (ii) The IFC Performance Standard 3, on Resource Efficiency and Pollution Prevention which requires Extractive Industries to avoid or minimise adverse impacts, such as pollution on humans and the environment.
- (iii) The IFC Performance Standard 6, on Biodiversity Conservation and Sustainable Management of Living Natural Resources which requires oil and gas companies to consider direct and indirect project-related impacts on biodiversity and ecosystem services and identify any significant residual impacts; especially on habitat loss, degradation and fragmentation, invasive alien species, overexploitation, hydrological changes, nutrient loading and pollution.

3. According to Litvinoff³²⁸, there is a lack of information on the development of oil in Block III including the Production Sharing Agreement (PSA), secrecy and strong allegations of corruption. The DRC-Sacoil-Total PSA remains secret, since 2008 up until today. The PSA for Block III remains unavailable from both the DRC's government and Total – Sacoil consortium despite repeated requests and criticism by various actors³²⁹.

➤ This is a violation of Article 24 of the DRC Constitution which provides that all persons have the right to information and Article 5 of the EPA that guarantees to Congolese peoples the right to access environmental information. Keeping oil contracts secrets contributes to environmental non-compliance, human rights abuse, community conflict and corruption while weakening the government's ability to negotiate further favourable deals as well in the future.

International NGOs have strongly criticised the DRC's PSAs for an absence of enforceable environmental safeguards and applicable fines for environmental damage to land and water resources³³⁰.

³²⁸ M Litvinoff *Oil extraction in Lake Albert Action for Better Governance Program*, UK (2012) 4

³²⁹ International Crisis Group *Black Gold in the Congo: Threat to Stability or Development Opportunity? Africa Report N°188* (Kinshasa, Nairobi, Brussels 2012)16.

³³⁰ M Litvinoff (note 328 above; 8).

4. In a study on oil exploration in Block III by International Alert³³¹, the researcher finds that meaningful stakeholder engagements and consultations processes were not properly handled by Total in Block III. Communities in Bukiringi district, Pygmies' communities, women and young people's groups, local business communities in Block III and civil society in Bunia have all been ignored in Total's engagements and consultations process. Total E&P DRC in Block III is focused on consulting only government/local authorities in Ituri and some influential groups of individuals instead of consulting the directly affected communities³³².
- This is a violation of Principle (article) 9 of Total's own Environmental Protection General Policy which requires that Total adopts a constructive attitude based on open dialogue with stakeholders and outside parties and that its social commitment be focused on developing its activities in harmony with the neighbouring communities.
 - This is a breach of Article 98 paragraph 6 of the Hydrocarbons Law that requires oil and gas companies to conduct public engagement, participation and consultations with local communities and local administration entities regarding environmental and social matters.
 - This also a breach of Article 34 of the Hydrocarbons Law that requires oil and gas companies to submit the report on engagements and consultations with local communities and local administration entities and the Contribution Plan to the development of the local communities affected by oil and gas exploitation activities.
 - This is a violation of the OECD Guidelines for Multinational Enterprises requirements that require oil and gas industries to:
 - ❖ Develop a stakeholder engagement strategy which prioritises engagements and consultations with the most severely affected rather than most influential stakeholders;
 - ❖ Practice stakeholder engagement that is driven by stakeholders through ongoing consultations.
 - This is a violation of Principle 5 on Stakeholder Engagement of the Equator Principles that require oil, gas and mining companies to demonstrate effective stakeholders' engagement as an ongoing process in a structured and culturally appropriate manner with affected communities and, where relevant, other stakeholders.

³³¹ International Alert & Réseau Haki na Amani *Oil Exploration in Ituri: A Human Rights and Conflict Risk Assessment in Block III*, UK (2014) 14.

³³² *ibid* 21.

- This is a violation of the IFC Performance Standards 5 and 7 that commit Extractive Companies to promote and provide means for adequate engagement with affected communities throughout the project cycle on issues that potentially affect them.
5. In a statement released by Save Virunga³³³, the research found that thirty-two percent of Block III's oil license area of Total E&P DRC is located in the Virunga National Park.
- This is a violation of Article 24 of the DRC Hydrocarbons Law which requires that the granting of oil exploitation rights (oil blocks or oil concessions) must be subject to the respect of protected areas. Even if Total E&P DRC has pledged³³⁴ not to work on the section of Block III located in Virunga National Park in compliance with the Congolese legislation, international conventions and the EU resolution³³⁵ on Virunga, this still constitutes a non-compliance, because Total oil's licence was not supposed to be granted in the Virunga National Park in the first place.

1.6 Total's response to environmental and social non-compliance findings

Olivier Michel³³⁶, Chief of the Societal Department of Total EP, states that Total usually subcontracts its seismic and drilling activities but specifies its commitment to the respect and protection of the environment and human rights to the designated contractors.

However, said Olivier Michel, it has emerged that Total's contractors do not always follow systematically these commitments and this frequently results in potentially negative environmental and human rights impacts on the ecosystems and neighbouring communities. During the 2D seismic campaign, some contractors did not systematically respect the procedures that Total affiliates had put in place regarding environmental protection, human rights and access to land. Some contractors changed the course of the mulching tractor and recording vehicles at the last minute. In these areas, there were cases where a contractor would take a shortcut between one place to the other, and drive through someone's land when no access to this person's land had been negotiated. Olivier Michel confirms that, Total SA is aware that such issues can arise, hence the emphasis placed on having one of Total affiliate's societal teams present on the ground. The objective is to quickly identify any non-compliance that comes up, consult with affected

³³³ Save Virunga *Block III*, available at www.savevirunga.com/Mapping the Oil Threat, accessed on 3 July 2105.

³³⁴ C de Margerie *Total will refrain from prospecting or exploiting oil and gas in natural sites inscribed on the World Heritage List* (2013), available at www.foxbusiness.com/news/2013, accessed on 3 July 2015.

³³⁵ European Parliament *Resolution on the protection of the Virunga National Park in the Democratic Republic of Congo* (2015/2728(RSP) B8 1346/2015 of 9 December 2015.

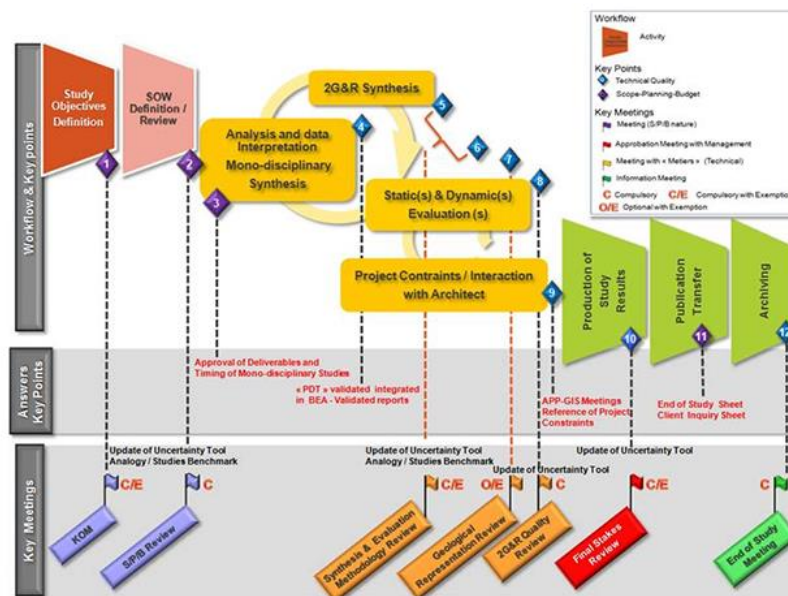
³³⁶ Total *Human Right Briefing Paper 2016* (2017) 24.

communities, identify remedial actions and work with the contractor to ensure that impacts are not repeated.

1.7 Assessment of Total E&P DRC's environmental and social impacts in Block III.

Oil and gas exploitation poses heavy threats and challenges towards environmental and social compliance, management and enforcement around the world, particularly with groundwater and waterways' pollution and contamination, air pollution, noise, oil spills, degradation of ecosystems and biodiversity, communities' resettlement, and other devastating impacts on the environment and local communities³³⁷. In Block III, while Total E&P is still in the exploration phase, negative environmental and social impacts are already significant, especially with the Lake Albert water being polluted with lead and toxic mud from Total operations. Meaningful engagement and consultations with the most affected communities have also not been properly conducted by Total. The current environmental and social non-compliance findings in Block III could potentially have more important negative impacts if they are not well managed and mitigated by Total. The following picture shows the different activities in the exploration phase.

Figure 5: Total Exploration cycle



Source: Total E&P³³⁸

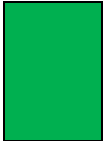
³³⁷ DK Twerefou *Mineral Exploitation, Environmental Sustainability and Sustainable Development in EAC, SADC and ECOWAS Regions*, Ghana (2009) 8.

³³⁸ Total E&P *Reservoir: Determining stage of Exploration Production*, available at <https://www.ep.total.com/en/expertise/reservoir/reservoir-engineering-essential-link-exploration-production->, accessed on 06/ 5/2019.

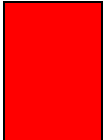
The following section provides an assessment of the significance of the environmental and social impacts that have been identified so far in Total E&P DRC's Block III.

All impacts are presented in the columns of the following table:

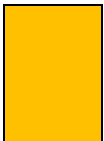
- Index: reference number for the impact.
- Findings/Activities and Performance: researcher findings in confrontation with legal requirements and international standards.
- Legal Environmental and social requirements: legal requirements as provided in different DRC environmental laws and international standards.
- Impact: brief description of the nature of the impact.
- Phase: phase of the current operation by Total E&P DRC in Block III.
- Severity: severity of the impact without mitigation.
- Significance: overall importance of the impact without mitigation.
- Assessment: researcher evaluation and appraisal of the impact.



No environmental or social impact: compliance



High environmental or social impact: non-compliance



Moderate environmental or social impact: non-compliance

Table 6: TOTAL E&P DRC, Block III environmental and Social Assessment

Index	Findings/Activities & Performance	Impacts	Legal environmental & social requirements	Phase	Level of environmental impact		Assessment
					Severity	Significance	
1.	Total submitted the ESIA to the DRC government (the Ministry of Hydrocarbons and the MENS), but this ESIA is not available.	Evaluating and predicting the likely environmental and social impacts in Block III at an early stage in order to design a proper environmental social Management Plan.	Environmental and Social Impact Study of Total in Block III (Article 19 of the EPA)	Exploration	None		Compliance
2.	The researcher find that no EA, EEPPP, ESMP report of Total E&P for the Block III is publically available		Environmental Audits (EA), EEPPP (articles 19, 29, 32 and 35 of the EPA)	Exploration	High		Non-compliance
3.	Toxic mud waste was discovered in the Lake Albert Block III site, containing lead, zinc, chromium, cadmium, nitrogen and chloride.	Lake Albert water pollution, loss of the lake biodiversity, illness or death of communities members depending on the lake resources	Article 53 of the DRC Constitution provides that all persons have the right to a healthy environment that is favourable to their development. The environment must be protected.		High		Non-compliance
4.	The researcher found that access to information from Total E&P DRC sources was impossible, despite all his efforts (emails, telephone conversations, and visits)	Corruption, lack of transparency, degradation of the environment and loss of socio-economic benefits and contracts secrecy.	Access to environmental information (Article 5 of the EPA)	Exploration	Moderate		Non-compliance
5.	The oil license area of Block III covers 32% of the Virunga National Park, but Total E&P DRC	The protection of Virunga National Park	Environmental pollution prevention of natural reserves, the Virunga National Park and biosphere reserves	Exploration	None		Compliance

	committed not to explore oil in the park		(Articles 71.8 of the EPA).				
6.	Total E&P DRC was granted oil exploration rights (license) in part of Virunga National Park	Loss of part of the Virunga National Park and its biodiversity and ecosystem	The granting of rights (oil concessions) is subject to the respect of protected areas (Article 31 of the EPA and Article 24 of the Hydrocarbons Law) No activity of oil or gas exploration or exploitation can be allowed in a protected area (Article 73 of the EPA)	Exploration	High		Non-compliance
7.	The Researcher found that Total E&P DRC has conducted consultations not with affected local communities, but with some influential local individuals and local administrative officials.	Worsen communities' conflicts, feed armed conflicts and disturb Total E&P operations in Block III.	Oil and gas companies are required to conduct public engagement, participation and consultations with local communities and local administration entities regarding environmental and social matters (Article 98 paragraph 6 of the Hydrocarbons Law)	Exploration	Moderate		Non-compliance
8.	Total E&P DRC has conducted consultations with some influential local individuals and local administrative officials not with directly affected local communities as required by the (OECD Guidelines for Multinational Enterprises)	Worsen communities' conflicts, feed armed conflicts and disturb Total E&P operations in Block III.	Integrate stakeholder engagement into project planning and regular business operations through sharing of decision-making power with interested and affected parties; Practice stakeholder engagement that is driven by stakeholders through ongoing consultations and follow-through on agreements and commitment; Prioritises engagement with most severely affected rather than most influential stakeholders (OECD Guidelines for Multinational Enterprises)	Exploration	Moderate		Non-compliance
9.	The Researcher found that Total E&P DRC has conducted ESIA, but haven't engaged with all affected communities in an effective and constructive manner.	Raise communities' conflicts and feed armed conflicts in the region and disturb Total oil operations	Conduct an ESIA, Demonstrate effective Stakeholder Engagement with affected communities' and other stakeholders. Establish a grievance mechanism designed to receive and facilitate resolution of concerns and grievances about the	Exploration	Moderate		Non-compliance

			Project's environmental and social performance (Equator Principles)				
10.	Toxic mud waste was discovered in the Lake Albert Block III site, containing lead, zinc, chromium, cadmium, nitrogen and chloride.	Pollution and contamination of the Lake Albert water and possible loss of aquatic resources and ecosystem	The IFC Performance Standard 3 requires Extractive Industries to avoid or minimise adverse impacts, such as pollution, on human health and the environment	Exploration	High		Non-compliance
11.	The researcher found neither environmental nor social audit report, training reports, surveys report from Total E&P DRC. Communication and consultations with communities are very poor and mud pits are been used by Total in Block III.	Environmental degradation, feeding of socio-economic and armed communities conflict; pollution and contamination of Lake water.	The OGP require oil and gas companies to conduct environmental screening, environmental reporting, auditing, training, baseline surveys, consultation and communication of with local authorities and stakeholders, Protect watercourses from contamination and filtration and avoid use of mud pits.	Exploration	High		Non-compliance
12.	Total-SacOil's Production Sharing Agreement with the DRC government has never been made public for Block 3 till to date.	Secrecy of contracts may cover corruption.	Articles 24 of the DRC Constitution provide that all persons have the right to information.		High		Non-compliance

2 METOREX (Pty) Ltd

2.1 Background

Metorex (Pty) Ltd ("Metorex")³³⁹ was established in 1975, when Simon Malone and other founders acquired Rand London Mines. The objective was to participate in the small mining sector. Metorex is a medium capital, multi-commodity mining and public liability company headquartered in Johannesburg, South Africa and has operations in Katanga, DRC (Ruashi and Musonoi Mining), in Zambia (Chibuluma and Sable Mining) and Mozambique (Kisenda Mining). In terms of this study, this research will only focus on Metorex's operations of Ruashi Mining, in Katanga, DRC. Formerly listed on the Johannesburg and London Stock Exchanges, Metorex was acquired by Jinchuan Group³⁴⁰ in January 2012 and became part of Jinchuan Group International Resources Co Ltd ("Jinchuan International") and a Jinchuan Group subsidiary in

³³⁹ Metorex history, available at www.metorexgroup.com/aboutus, accessed on 12 July 2015.

³⁴⁰ Jinchuan company background, available at www.jinchuan-inter.com, accessed on 12 July 2015.

November 2013. Listed on the Hong Kong Stock Exchange, Jinchuan Group is a Chinese state-owned mining company based in the Gansu province of China and it is engaged in mining, concentrating on metallurgy and chemical engineering and deep processing. The company produces Nickel, Copper, Cobalt, Platinum, Palladium, Silver and Selenium³⁴¹.

2.2 Ruashi Mining Sprl

Ruashi Mining Sprl (“Ruashi Mining or Metorex Ruashi Mining”) is a copper and cobalt mine located in the Ruashi municipality in Haut-Katanga province in the DRC and operated by Metorex. Ruashi Mining³⁴² started production back in 1911. In 2004, the South African company Metorex reached an agreement with the Congolese government, Gécamines and Sentinelle Global Investments (Pty) Ltd to mine and treat the high-grade copper and cobalt of Ruashi’s ore body and Etoile stockpiles³⁴³. In 2005, Ruashi Mining Sprl was registered in DRC under the new trade register No. 8711, national identification No. 6-128-N4921 with exploitation permit No. 578³⁴⁴.

2.3 Metorex Safety and Environmental Protection Policy

According to Metorex-Jinchuan International’s environmental policy³⁴⁵, every accident is preventable; every accident can be avoided. The group is resolutely committed to the implementation of environmental protection measures such as green exploitation, clean production, recycling, energy-saving, emission reduction, natural conservation and pollution control. It has established a rehabilitation trust fund³⁴⁶ for the Ruashi Mine, to cover environmental liabilities caused by its mining operations. As part of Metorex’s sustainable development policy and its CSR, the company is committed to developing projects in communities where it operates. The focus of the projects is varied and diverse, including education, social development, entrepreneurship development, job creation, roads construction,

³⁴¹ Jinchuan company background, available at www.jinchuan-inter.com, accessed on 12 July 2015.

³⁴² N Tsurukawa, S Prakash & A Manhart *Social impacts of artisanal cobalt mining in Katanga, Democratic Republic of Congo*, Institute for Applied Ecology, (2011) 2.

³⁴³ Metorex Group *Metorex limited Annual Report 2007*, SA (2007) 25.

³⁴⁴ Association Africaine de Défense des Droits de l’Homme, ASADHO “*Mise en œuvre du projet de loi type : quelle est la part de communautés locales de Luano, kalukuluku et kawama dans le projet Ruashi Mining*”, Kinshasa (2015)14.

³⁴⁵ Jinchuan International Sustainability, available at <http://www.jinchuan-inter.com/sustainability>, accessed on July 2016.

³⁴⁶ Metorex-Jinchuan International *Annual Report 2014*, (2014) 25.

sports and recreation, security, materials and monetary donations to schools, churches, traditional leaders, national events, health and life-skills training³⁴⁷.

However, it is not clear from the available information how much the company has allocated to these activities. While Metorex-Jinchuan International's Annual Report 2015 provides detailed information on project focus, the financial statement is silent on the financial value of these projects to the company. Furthermore, there is no mention of the community consultations strategies used by the company in dealing with potential conflicts in the course of doing business in host communities, nor any mention on how the company is dealing with human rights and climate change issues in its operations.

2.4 Environmental and Social impacts (facts) in Ruashi Mining area

It is well known that the extractive sector, particularly mining, has adverse environmental impacts. Mining can radically alter the natural environment by stripping away the ground and adding chemicals and other toxic substances to rivers and wells. In this study, the researcher finds the following environmental and social impacts of Ruashi Mining:

1. In June 2014, Pollution of agricultural land, air and watercourses with toxic acid from Ruashi Mining Plant were discovered in the Ruashi area, according to a field report published by the African Association of Human Rights (ASADHO)³⁴⁸. Hundreds of hectares of farming land were damaged and polluted with toxic acid from Ruashi Mining Plant³⁴⁹.
 - This is a violation of:
 - (i) Article 53 of the DRC Constitution which provides that all persons have the right to a healthy environment that is favourable to their development. The environment must be protected.
 - (ii) Article 71.8 of the Environmental Protection Act, which requires mining companies to ensure pollution prevention of natural reserves, national parks and biosphere reserves, waters, rivers and streams and guarantees their environmental rehabilitation.

³⁴⁷ ASADHO (note 344 above; 27).

³⁴⁸ ASADHO (note 344 above; 20-21).

³⁴⁹ The Carter Center « *Les Investissements Miniers en République Démocratique du Congo : Développement ou Appauvrissement des Communautés Locales? Rapport d'impact des investissements miniers étrangers sur les droits humains: Cas des investissements Chemical of Africa (Chemaf) et Ruashi Mining au Katanga* » (2012) 53.

- (iii) Articles 84 paragraph 2, 166 paragraph 2 and 204 paragraph 3 of the Mining Code which requires mining companies to protect the environment and control their industrial pollution.
 - (iv) Article 452 of the Mining Regulations which require mining companies to avoid or reduce the harmful impacts of mining operations such as pollution, noise, dust, contamination, etc. on the air, watercourses, agricultural land, and other activities of the human and animal populations residing in the vicinity of the mines
 - (v) The IFC Performance Standard 3, on Resource Efficiency and Pollution Prevention which requires Extractive Industries to avoid or minimise adverse impacts, such as pollution, on human health and the environment. The IFC Performance Standards also require Extractive Companies to avoid the discharge of pollutants or, when avoidance is not feasible, minimise and control the intensity and mass flow of their discharge.
 - (vi) The ICMM Sustainable development principles require mining companies to rehabilitate land disturbed or occupied by operations in accordance with appropriate post-mining land uses.
 - (vii) The Voluntary Principles on Security and Human Rights, which require mining companies to develop a systematic plan for implementation of the Voluntary Principles on Security and Human Rights
2. According to the communities of Ruashi District quoted by ASADHO³⁵⁰, Metorex-Ruashi Mining unilaterally removed two water treatment plants which supplied clean water to the Ruashi communities and drilled two low capacity water wells where water remains muddy and untreated.
- This a breach of:
- (i) Article 53 of the DRC Constitution which provides that all persons have the right to a healthy environment that is favourable to their development.
 - (ii) Article 71.8 of the Environmental Protection Act which requires mining companies to ensure the environmental rehabilitation and pollution prevention of natural reserves, waters, rivers and streams.
 - (iii) Articles 84 paragraph 2, 166 paragraph 2 and 204 paragraph 3 of the Mining Code which requires mining companies to protect the environment and control their industrial pollution.

³⁵⁰ ASADHO “*Mise en œuvre du projet de loi type : quelle est la part de communautés locales de Luano, kalukuluku et kawama dans le projet Ruashi Mining*”, Kinshasa (2015) 20.

- (iv) Article 452 of the Mining Regulations require mining companies to *inter alia* improve the well-being of local mining communities.
 - (v) The UN Guiding Principles on Business and Human Rights which require mining companies to protect and respect human rights, prevent and redress potential adverse impacts on human rights linked to business operations.
 - (vi) The Equator Principles which require mining companies to implement human rights due diligence, as the researcher considers that access to clean drinking water in an issue of basic human rights for the communities of Ruashi.
 - (vii) The IFC Performance Standards which require Extractive Industries to respect and protect human rights.
 - (viii) The ICMM Sustainable development principles which require mining companies to implement an environmental management system focused on continual improvement to review, prevent, mitigate and ameliorate adverse environmental impacts.
3. In a field report³⁵¹ by a group of NGOs, the researcher found that, in conducting its EIS and its EMPP; required by articles 19, 29, 32 and 35 of the EPA, the section 1 Article 204 of the Mining Code and Articles 404 and 407 of the Mining Regulations; for obtaining the mining license, Ruashi Mining had never consulted the local communities to inform them about the project, nor integrate their concerns in the EIS as required by the Mining Code, the Mining Regulations and other international standards.
4. A report by the Carter Centre³⁵², states that communities in Ruashi complained about the fact that Ruashi Mining never informed them about their labour and procurement policies nor consult them about the company communities' projects.
- These are breaches of:
- (i) Article 69 of the Mining Code which requires Mining Companies to report on the consultations with local communities.
 - (ii) Article 444 of the Mining Regulations which require mining companies to hand in a copy of an approved EMRPP to local authorities of the jurisdiction where the

³⁵¹ Plateforme des ONG de la Société Civile intervenant dans le Secteur Minier (POM), la Maison des Mines du Kivu (MMKi) et le Cadre de Concertation de la Société Civile sur les Ressources Naturelles (CdC Ituri) *Qui Cherche, Ne Trouve Pas – Transparence des Projets Miniers en République démocratique du Congo*, Kinshasa (2015) 75.

³⁵² The Carter Center « *Les Investissements Miniers en République Démocratique du Congo : Développement ou Appauvrissement des Communautés Locales? Rapport d'impact des investissements miniers étrangers sur les droits humains. Cas des investissements Chemical of Africa (Chemaf) et Ruashi Mining au Katanga* » (2012) 51.

mining operations are located and explain their rehabilitation and mitigation measures to local communities.

- (iii) Article 477 of the Mining Regulations which obliges mining companies to:
 - ❖ Collect information and concerns on the impacts of the mining operations from the communities;
 - ❖ Develop a plan for community consultations;
 - ❖ Inform communities about the mining operations and their environmental and social impacts in accordance with their EIS and the EMPP;
 - ❖ Explain the employment and procurement policies to the local mining communities; and
 - ❖ Maintain a constructive and constant dialogue with the local mining communities
- (iv) The OECD Guidelines for Multinational Enterprises requires mining industries to:
 - ❖ Integrate stakeholder engagement into project planning and regular business operations through sharing of decision-making power with interested and affected parties;
 - ❖ Practice stakeholder engagement that is driven by stakeholders through ongoing consultation and follow-through on agreements, commitment and remedies;
 - ❖ Develop a stakeholder engagement strategy which prioritises engagement with those most severely affected rather than the most influential stakeholders.
 - ❖ Engage with stakeholders to ensure remediation is appropriate.
- (v) The Equator Principles 5, which require mining companies to demonstrate effective Stakeholder Engagement as an ongoing process in a structured and culturally appropriate manner with affected communities and, where relevant, other stakeholders.
- (vi) The IFC Performance Standards 1 on Assessment and Management of Environmental and Social Risks and Impacts which requires Extractive Companies to promote and provide means for adequate engagement with affected communities throughout the project cycle on issues that are potentially affecting them.
- (vii) The UN Global Compact which requires businesses to support and respect the protection of internationally proclaimed human rights, to support a precautionary approach to environmental and social challenges.
- (viii) The ICMM Sustainable development Principle 9 which requires mining companies to contribute to the social, economic and institutional development of

the communities in which they operate, to engage at the earliest practical stage with affected communities to discuss and respond to issues and conflicts concerning the management of social impacts and to ensure ongoing interaction with affected parties.

5. In a report by IANRA³⁵³, the researcher finds that Ruashi Mining unilaterally evicted the communities using police and army forces, without compensation nor consulting them on any resettlement plan. Few members of the communities that were “paid” for their land did not have the opportunity to negotiate the compensation with the company. The money that they received from Ruashi Mining was very far below the value of their land.
 6. In a field report compiled by ASADHO³⁵⁴, the researcher also finds that the 48 hectares of land where Ruashi Mining has built its current pool of rejection, belongs to Mr. Katanga, Ndashe and Kipili Koda, but Ruashi Mining never compensated these people for their land.
- These are violations of:
- (i) Article 279 of the Mining Code which requires that fair compensation be paid to the rightful holder(s) of land affected by mining operations (corresponding either to the rent or the value of the land at the time of its occupation, plus 50%) for economic and physical displacement.
 - (ii) Article 281 of the Mining Code which requires that any occupation of land depriving the rightful holder(s) of access to the surface right, or any modification rendering the land unfit for cultivation, shall cause the holder of the mining right or the operator of the mining and/or quarry right, at the request of the rightful owner(s) of surface right, and at their convenience, to pay fair compensation, corresponding either to the rent or the value of the land at the time of its occupation, plus 50%.
 - (iii) Article 508 of the Mining Regulations which requires that the compensation for land use or land damaged by the mining company, be freely fixed between the mining company and the land right holder.
 - (iv) The Equator Principles 6 which requires mining companies to establish a grievance mechanism designed to receive and facilitate resolution of concerns and grievances about the Project’s environmental and social impacts and performance.

³⁵³ International Alliance on Natural Resources in Africa (IANRA) *The need for model mining legislation: case studies on the impact of mining in Angola, Democratic Republic of Congo, Kenya and Zimbabwe*, (2016) 16-17.

³⁵⁴ ASADHO “*Mise en œuvre du projet de loi type: quelle est la part de communautés locales de Luano, kalukuluku et kawama dans le projet Ruashi Mining*”, Kinshasa (2015) 21.

- (v) The IFC Performance Standards 5 which stipulates that mining companies must offer displaced communities and persons compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods. Compensation must be transparent and applied consistently to all communities and persons affected by the displacement. In this case, mining companies are required to develop and implement a Resettlement Action Plan and a Livelihood Restoration Plan
 - (vi) The ICMM Sustainable development principles which require mining companies to contribute to the social, economic and institutional development of the communities in which they operate.
7. According to AZADHO³⁵⁵, 10 000 artisanal miners were evicted from Ruashi Mining concession, from 2006 to 2014, without compensation or a proper plan to integrate them into economic activities so that they can sustain their families as provided for by the Mining Code and the Mining Regulations.
- This a breach of:
 - ❖ Title 6, Chapter 1 of the mining code and Article 416 of the mining regulations which provide that mining companies must engage continuously with artisanal miners;
 - ❖ OECD Guidelines for Multinational Enterprises which require mining companies to engage with artisanal and small-scale miners;
 - ❖ The Voluntary Principles on Security and Human Rights and the UN Global Compact which require businesses to support and respect the protection of internationally proclaimed human rights, to support a precautionary approach to environmental and social challenges.

³⁵⁵ Institute for Applied Ecology (Öko-Institut e.V) *Social impacts of artisanal cobalt mining in Katanga, Democratic Republic of Congo*, Germany (2011) 19.

2.5 Assessment of Metorex's (Ruashi Mining) environmental and social impacts in Ruashi area

Table 7: Ruashi Mining environmental and Social Assessment

Index	Findings/Activities & Performance	Impacts	Legal environmental and social requirements	Phase	Level of environmental Impact		Assessment
					Severity	Significance	
1.	In June 2014, pollution of agricultural land, air and watercourses with toxic acid from Ruashi Mining Plant were discovered in Ruashi area. Hundreds of hectares of farming land were damaged and polluted with toxic acid from Ruashi Mining Plant.	Pollution	The environment must be protected (Article 53 of the DRC Constitution). Mining companies must ensure pollution prevention (Articles 71.8 of the EPA, 84, 166 and 204 paragraph 3 of the Mining Code, 452 of the Mining Regulations, The IFC PS3 and the ICMM Sustainable development principles.	Exploitation and Production	High		Non-compliance
2.	Ruashi Mining didn't consult local communities to integrate their concerns in the ESIS and the EEPPP, nor to inform them about their communities' projects or their labour and procurement policies.	No engagements and consultations with local communities	Environmental and Social Impact Study (ESIS), Environmental Evaluation of Policies, Plans and Programs (EEPPP) (Articles 19, 29, 32 and 35 of the EPA) Mining Companies are required to report on the consultations with local communities (Articles 69 of the Mining Code, 444 and 477 of the Mining Regulations. The OECD Guidelines for Multinational Enterprises, the EP5 the IFC Performance Standards 1, the UN Global Compact and the ICMM Sustainable development Principle 9)	Exploitation and Production	Moderate		Non-compliance
3.	Using police and army forces, Ruashi Mining unilaterally	Human rights violation	Fair compensation must be paid to the rightful holder(s) of land affected	Exploitation and Production	Moderate		Non-compliance

	evicted communities without compensation or consulting them on any resettlement plan. Few members of the communities that were “paid” for their land didn’t have the opportunity to negotiate the compensation with the company. The money that they received was very far below the value of their land.		by mining operations (corresponding either to the rent or the value of the land at the time of its occupation, plus 50%) for economic and physical displacement (Articles 279, 508 and 281 of the Mining Code) Mining companies are required to establish a grievance mechanism (The EP6, the IFC Performance Standards 5 and the ICMM Sustainable development principles.				
4.	Between 2006 to 2014, 10 000 artisanal miners were evicted from Ruashi Mining concession without compensation or a proper plan to integrate them into economic activities to sustain their families as provided by the Mining Code and the Mining Regulations.	No engagement with artisanal miners.	Mining companies must engage continuously with artisanal miners (Title 6, chapter 1 on of the mining code and article 416 of the mining regulations). The VPSHR and the UN Global Compact requires businesses to respect the protection of internationally proclaimed human rights and support a precautionary approach to environmental and social challenges.	Exploitation and Production	Moderate		Non-compliance
5.	Metorex- Jinjoing contract for Ruashi Mining still unknown till to day	Secrecy of contracts may cover corruption	Articles 24 of the DRC Constitution provide that all persons have the right to information.		High		Non-compliance

3 THE DRC GOVERNMENT RESPONSE TO THE LACK OF COMPLIANCE

Armed conflicts, armed groups and militias, political power struggles, corruption, government’s lack of commitment, lack of institutional capacity and resources makes environmental laws’ implementation, enforcement and compliance more precarious and challenging in DRC. However, in recent years, the Government has embarked on certain positive initiatives to try to address issues linked to environmental protection. These initiatives include:

- The DRC has developed the Poverty Reduction and Growth Strategy Paper (PRSP)³⁵⁶, involving district, provincial and national levels. The vision of the PRSP is to ensure

³⁵⁶ Swedish Embassy in Kinshasa & University of Gothenburg *The Environment and Climate Change Policy Brief* (2008) 10.

economic growth and equitable wealth distribution of revenues from natural resources. The strategy is based on a number of pillars³⁵⁷ which include environmental protection.

- The DRC has increased its budget³⁵⁸ allocation for the Ministry of Environment from 0.9% in 2006 to 2.3% in 2018.
- The DRC has established the Service for Assistance and Development of Small Scale Mining (“SAESSCAN”)³⁵⁹ to implement and enforce the mechanisms of the Kimberly Process.
- The DRC has joined the EITI to enhance transparency in the natural resources sector.
- The DRC has joined the Reduced Emissions from Deforestation and Forest Degradation (REDD+)³⁶⁰ initiative.

One of the principal vehicle initiatives for catalysing positive environmental compliance and sustainable development in the DRC is the REDD+³⁶¹. The REDD+ is aligned with the DRC National Development Plan, the international agreements of the United Nations and the Convention on Climate Change (UNFCCC) to promote policies and measures aimed at ensuring sustainable and integrated development for the country. To address the issue of lack of resources in the environmental sector, the DRC has set up the REDD+ National Fund, the Forest Investment Programme (FIP), the Strategic Climate Funds (SCF) and the Climate Investment Funds (CIF)³⁶² as financial vehicles designed to drive the implementation of the REDD+ National Strategy Framework through which the required environmental international funding is raised and financial allocations are coordinated. For the DRC, the implementation of REDD+ is a major phase in the transition of the country's development pathway towards a low carbon green economy³⁶³, which combines economic efficiency, environmental sustainability, social equity and human progress. Under the REDD+, the DRC Forest Investment Programme (FIP)³⁶⁴ received \$60 million from international donors³⁶⁵ to deal with the issue of the protection of the Virunga National Park threatened by oil exploitation from TOTAL and SOCO International³⁶⁶.

³⁵⁷ DRC Ministry of Environment & Forex Carbon Partnership *Mid-Term Progress Reporting for the Democratic Republic of Congo and request for additional funding from the Forest Carbon Partnership Facility* (2012) 31.

³⁵⁸ Swedish Embassy in Kinshasa & University of Gothenburg (note 356 above; 10).

³⁵⁹ *ibid* 14.

³⁶⁰ Forest Peoples Programme-DRC *The Status of the REDD+ process in the Democratic Republic of Congo* (2012)2

³⁶¹ DRC Ministry of Environment & Forex Carbon Partnership (note 357 above; 16).

³⁶² Forest Peoples Programme-DRC (note 360 above; 9).

³⁶³ DRC Ministry of Environment *REDD+ Investment Plan 2015-2020* (2015) 11.

³⁶⁴ DRC Ministry of Environment & Forex Carbon Partnership (note 357 above; 3).

³⁶⁵ DRC Ministry of Environment & Forex Carbon Partnership (note 357; above)151.

³⁶⁶ Global Witness *Plans to press ahead with oil exploration in Africa's oldest National Park and UNESCO World Heritage site, Virunga National Park in the DRC* available at www.globalwitness.org/work/plan2/explore/congo-unesco-world-heritage-site, accessed on 17 June 2016.

The DRC has adopted the Environmental Education Strategy 2020³⁶⁷ which is a joint initiative of the MENSU and the Ministry of Higher Education and Universities (MINESU) with the aims to establish academic and technical training in Natural Resources Management, which did not exist before 2015.

³⁶⁷ DRC Ministry of Environment (note 363 above; 8).

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

1 CONCLUSION

As the DRC emerges from a long period of wars, violence and instability; the country continues to struggle with repeated political crises, weak governance, mismanagement of natural resources and entrenched corruption. Ongoing fighting over the control of the DRC's considerable mineral wealth sustains a climate of violence, insecurity, armed conflicts and public discontent in the eastern provinces; fuelling the country's persistent governance crisis and undermining its capacity to escape the trap of mismanagement, conflict and poverty. This research provides the essence of the discussion of the DRC's environmental legislation, the powers and functions of different environmental institutions and the important role they play in environmental governance in the country. After introducing the subject and the background in chapter one, the researcher explained the research methodology and the research structure.

Discussing the relevant international instrument and African regional environmental instrument in Chapter Two, the researcher highlighted that given the post-conflict situation of the DRC, it is important for the case study companies to adopt international standards, such as the UNGPs and the OECD Guidelines for Multinational Enterprises to enhance environmental and social compliance in Total E&P block III and Ruashi Mining areas. Implementing international standards shows a sense of responsible business conduct, especially in a post-conflict country such as the DRC. This can significantly enrich business contribution to peace stability and socio-economic growth in the eastern DRC.

The researcher find that despite the lack of legal accountability mechanism and monitoring system, the UNGPs remains one of the most comprehensive international standard that the case study companies can implement in order to achieve environmental compliance and respect for human rights given its emphasis on stakes holders meaningful engagement and partnership with government, businesses and civil society's organisations. The OECD also represent a great opportunity for the case study companies to accomplish environmental and social compliance because of their NCP mechanism which provide to affected communities, several alternatives including resolving certain disputes with Extractives Industries without taking judicial route.

The OECD guidelines are very important in the context of the DRC, particularly in the eastern part of the country where Total and Metorex operate. The OECD guidelines provide for due

diligence mechanism for responsible supply chains with regard to minerals from conflicts affected and high risk areas, such as the eastern part of the country. They are complemented by a guide to assist Ruashi Mining, in particular; to become certified under the African Regional Minerals Certification scheme of the Great Lakes region (ICGLR Minerals certification scheme) in order to eradicate the “blood minerals”³⁶⁸ in the DRC. The OECD guidelines are implemented on the ground in the DRC by the partnership OEDC NCP-ICGLR-DRC-UN and have been very efficient in the fight against illegal exploitation of natural resources linked to the proliferation of multiples insurgencies and armed conflict in the eastern part of the country.

Discussing the DRC legal environmental Framework and the institutions vested with their implementation and enforcement mechanisms in Chapter Three, this study underlines that the constitution of the DRC enclosed key provisions for various environmental laws to be passed including the Environmental Protection Act. The researcher discovered that the EPA is more about general environment and leaves the mining and oil environment sectors to be regulated in details by the mining and hydrocarbons laws. The mining law which is the most old and perhaps the most effective in terms of mining environment regulation, contains rules on EIS, EMPP, MRP, communities engagements and resettlement, artisanal and small scale mining, etc. It is important to emphasise that both the EPA, the Hydrocarbons law and the mining laws makes provisions for these laws to be completed by Regulations.

However, at the time of writing of this thesis, it was discovered that only the Mining law is currently completed by the Mining Regulations. It has also been noted that the Environmental Rehabilitation Funds to undertake environmental restauration works after the closure of oil fields is not yet been officially created by the Premier Minister as required by the hydrocarbons law and the EPA. It is essential to emphasise that the DRC effort in environmental legal framework development is been hampered by a number of regulatory challenges most of which are administrative in nature.

Speaking of environmental implementation and enforcement institutions in the DRC, the researcher finds that the President of the Republic who appoints the Prime Minister to lead the government, has tremendous powers, including in environmental management areas, notably the power of classification and declassification of sensitive environment and minerals substances.

³⁶⁸ P Marks *Blood minerals are electronics industry's dirty secret* (2014) available at <https://www.newscientist.com/article/mg22229734-800-blood-minerals-are-electronics-industrys-dirty-secret> accessed on 21/05/2019.

The researcher learned that the Ministry in charge of the environment and its decentralised institutions faces significant challenges, including lack of resources and institutional capacity which affect its ability to enforce environmental law and ensure the case study companies environmental and social compliance.

This study realised that the Judiciary which is entrusted "*inter alia*" with the power of control and guarantee of environmental rights is also facing challenges of lack of capacity, corruption and manipulation by politicians and other influential individuals; have not taken any decision for environmental non-compliance despite a long history of environmental devastation by mining, oil and gas companies in the DRC.

After assessing the case study companies Total and Metorex in Chapter Four, the researcher identifies significant gaps between the requirements of environmental laws and their implementation and enforcement by the case study companies. Regardless of the DRC enacting the EPA, the Hydrocarbons laws and the Mining code; despite the DRC recommendation to mining and oil companies to implement the OECD Guidelines and the UNGPs; the case study companies still have not been complying; rather shows important non-compliance from contracts secrecy to communities issues.

From this research, is evident that the Congolese environmental legal framework relevant to oil, gas and mining are somehow flawed from their drafting. They seek to regulate every aspect for environmental protection but often do so in vague and imprecise terms and; that open the door to selective interpretation and confusion which lead to non-implementation and enforcement of the same laws by the Extractives Industries. In addition, the relevant laws, policies and regulations keep changing in significant ways, (is depending on who is the minister at that particular time!) which erodes the certainty and predictability required.

Environmental legislation should thus be clear, certain, and reasonable, rather than vague, duplicate, fluctuating, and unduly onerous. Major skills shortages within the parliamentary commission on natural resources, further erode the quality and comprehensive legislation. Nevertheless, the research maintains that the case study companies should not take advantage of this situation as an excuse for non-compliance. They must comply with environmental laws and standards even when the RDC is unable or unwilling to enforce its own laws and international standards.

2. RECOMMENDATIONS

Environmental issues have constituted a major concern for world leaders for decades in both industrialised and developing nations. Therefore, environmental and social legal compliance is becoming fundamental to oil, gas and mining companies³⁶⁹. Given the growing importance of the management of environmental and social issues for oil and mining operations, environmental and social legal compliance has to become a core business requirement, particularly in the DRC's Extractive Industry. This dissertation, therefore, offers the following recommendations regarding the manner in which environmental and social legal compliance can be effectively and efficiently achieved by the case study companies based on the findings of this study.

2.1 To the case study companies

- Total E&P DRC and Metorex (Ruashi Mining) must manage community expectations through regular and transparent disclosure of information about the oil or mining project and commission a detailed study of community expectations and concerns and seek the advice of an experienced conflict practitioner to agree on an action plan to address the findings.
- Total E&P DRC and Metorex (Ruashi Mining) must publish the details of their contracts as soon as possible and provide support to the local community in understanding the terms of the contracts with particular reference to their social obligations.
- Total E&P DRC and Metorex (Ruashi Mining) must establish direct and regular dialogue with local and traditional leadership and ensure that meaningful engagements with the communities are as inclusive as possible.
- Metorex (Ruashi Mining) must begin formal mediated dialogue with artisanal miners or their representatives to explore the ways in which industrial and artisanal mining can co-exist.
- Total E&P DRC and Metorex (Ruashi Mining) must ensure a transparent and fair recruitment process, employing as many workers as possible from the areas of their operations.

³⁶⁹ O E Zephaniah "The challenges of effective environmental enforcement and compliance in the Niger delta region of Nigeria" (2012) 14 (6) *Journal of Sustainable Development in Africa*, 2.

- Total E&P DRC and Metorex (Ruashi Mining) must implement relevant international standards, such as The UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and the IFC Performance Standards on Environmental and Social Sustainability; in order to safeguard environmental and social legal compliance of their operations. This will help them to protect the environment and keep higher their international reputation.
- Metorex (Ruashi Mining) and Total E&P DRC need to invest substantially in innovative technologies to protect the environment while improving their productivity and profit. Innovation is crucial to achieve greater sustainability, environmental compliance and the highest levels of oil, gas and mining performance.
- Metorex (Ruashi Mining) and Total E&P DRC must promote transparency and fight against corruption by implementing the EITI standards and start publically disclosing information of all financial payments made to the DRC's government to enable citizens and interested stakeholders to see how much money is generated from them.

2.2 To the DRC Government

- Adopt a "One Environmental System" that will allow the Minister responsible for the Environment to set the environmental regulatory framework and standards and the Ministers of Mining and Hydrocarbons would implement the provisions of the environmental legislation as far as it relates to mining or hydrocarbons activities.
- Improve environmental governance of oil and mineral resources development and ensure contractual and financial transparency.
- Eradicate corruption at all levels, particularly in natural resources management sector.
- Clarify jurisdictional roles and responsibilities in the oil and mining sectors as it pertains to environmental and social compliance and management.
- Order Total and Metorex to undertake immediate remediation of pollution hotspots identified in Block III and Ruashi areas, given their human health risks.
- Carry out detailed environmental audits in the oil, gas and mining provinces, including Block III and Ruashi.
- Formalise and designate artisanal mining areas as provided for in the Mining Code³⁷⁰ and the Mining Regulations³⁷¹.

³⁷⁰ Title IV of the Mining Code (2002) 44.

³⁷¹ Article 416 the Mining Regulations (2003)18.

- Build the capacity of national and provincial environmental institutions and strengthen the decentralisation of environmental management in the country.
- Develop a dedicated environmental data management center.
- Promote and strengthen environmental education and awareness-raising.
- Promote trans-boundary cooperation, especially with Uganda for oil exploration and environmental management in the internationally shared Lake Albert.
- Strengthen the enforcement of the EPA, the Hydrocarbons Law and other environmental policy frameworks and international standards.

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