

## **Industrial liability of the holder of a mining right for damage caused to persons, property and the environment as a result of mining activities in DR Congo<sup>1</sup>**

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### **Summary**

The Democratic Republic of Congo, like many other countries in the world, is rich in mineral resources. Exploitation of these resources endangers the environment and human life in local communities. The installation of mining companies has a negative impact on the atmosphere, on infrastructure, on private property and on health. Mining pollutes the air and water, and in terms of health, the chemical reactions of certain minerals expose the surrounding population to toxic diseases. These observations are borne out by numerous practical cases<sup>2</sup>, reports<sup>3</sup> and studies<sup>4</sup>.

On the strength of these observations, the Congolese legislator has introduced innovations to mining legislation through Act no. 18/001 of 09 March 2018 amending and supplementing Act no.

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<sup>1</sup> This is the subject of our paper at the 2nd ASTANA INTERNATIONAL SYMPOSIUM ON "LAW AND SOCIAL SCIENCES", ISTANBUL, 11-12 NOVEMBER 2023.

<sup>2</sup> See e.g., Lshi, 19 January 2017, RCA 15990, COMILU Sarl /Contre NGWESHA TSHIENSE et OCC, unpublished, in this judgment, the Court of Appeal of Lubumbashi (Province of Haut-Katanga, in DR Congo) overturned a judgment convicting the Company COMILU, stating that the respondent (Dame Ngweshu) had not demonstrated fault on the part of this mining company (dumping of toxic waste on the river running right up to the lady's farm). However, in another case, basing itself on Articles 258 and 259 of CCCL III and the expert reports, the Likasi High Court had established the industrial liability of METAL Mines for environmental degradation that caused illness to the child of Mr Jeff KIBAMBE, the plaintiff (TGI/Likasi, 08 December 2015, RC 7172, unpublished.).

<sup>3</sup> See e.g. --RMF, "The harmful effects of mining when extraction harms people, environments and economies", Report published by Responsible Mining Foundation, 2021, in [www.responsibleminingfoundation.org](http://www.responsibleminingfoundation.org); --AFREWATCH, "Glencore gives priority to copper production over protecting human lives", *Report*, 22 December 2021 in : <https://afrewatch.org/glencore>; --FRANCISCANS INTERNATIONAL et al, "The impact of mining on the rights of local communities in the Democratic Republic of Congo", *Report*, 2022, in <https://franciscaninternational.org>; -- *Report* on "Strategies used by Ruashi Mining to avoid taking responsibility for human rights violations", produced by ACIDH and AFREWATCH, November 2021, in <https://www.business-humanrights.org>; -- THE CARTER CENTER, "Mining Investment in the Democratic Republic of Congo: Development or Impoverishment of Local Communities", *Report* on the impact of foreign mining investments on human rights: The case of Chemical of Africa (Chemaf) and Ruashi Mining investments in Katanga, October 2012, p.46, in <https://www.cartercenter.org>; --*Report* of the study on expropriation, compensation, relocation/resettlement practices of communities affected by mining projects, published by the POM (Platform of Civil Society Organisations intervening in the mining sector) , Lubumbashi, December 2015; --CORDAID RDC "Mining in the heart of rural areas: what development for local communities?", December 2015, p. 28-29, in : <https://www.cordaid.org/media/medialibrary/2016/01/2015>; etc.

<sup>4</sup> See e.g. - M. MAZALTO, "Gouvernance, droits humains et secteur minier en RD Congo", in B. CAMPBELL, *Ressources minières en Afrique : quelle réglementation pour le développement*, PUQ, Québec, 2010, p.175-213 ; A. MUSOYA MAZUWA, « Responsabilité sociétale et communauté locale : apport de la gouvernance locale », in G. KISHIBA FITULA, *Ressources naturelles et environnement : apport et contrepartie de l'Afrique au développement contemporain de l'humanité*, PUL, Lubumbashi, 2022, p.263-286;-- B. NKUBA et al., « Le mercure dans l'exploitation de l'or : responsabilité environnementale et perceptions locales », in *Conjonctures congolaises*, 2016, pp.192-212 ; --R. KANGILA KAMESA, « Violations des droits humains dues aux délocalisations des populations dans les sites d'exploitation minière en république démocratique du Congo », in *CRIDHO Working Paper 2019/2*, in <https://sites.uclouvain.be>; --D. VERBRUGGEN et H. MERKET, « Eaux troubles au Kasai. Pollution par l'industrie diamantaire angolaise et négligence coupable du gouvernement congolais », *IPIS Briefing*, août 2022, in : <https://ipisresearch.be>, etc.

007/2002 of 11 July 2002 on the Mining Code in DR Congo. The various innovations also include the introduction of industrial liability for the holder of a mining right, creating a new civil liability regime. Under the provisions of article 285 bis of the Mining Code (inserted by the aforementioned 2018 law), "all holders of mining and/or quarrying rights are liable for damage caused to people, property and the environment as a result of their mining activities, even in the absence of any fault or negligence. He is obliged to make good such damage. It may only be exonerated if it can prove that the damage was caused by a cause unrelated to its mining activities (...)".

"As a result of its mining activities, the holder is also liable in the event of direct or indirect contamination of water, soil or the atmosphere causing damage to humans, fauna and flora"<sup>5</sup>. These provisions go hand in hand with those of Article 68 of the 2011 Law on the Fundamental Principles of Environmental Protection relating to "the liability of the operator for damage caused to the environment and to health as a result of its activities". In addition, there is no statute of limitations on claims for compensation for damage caused to people and the environment by mining activities.

In the light of the foregoing, it is legitimate to consider in this paper, firstly, the theoretical basis for such a system of liability. Secondly, the typology of reparable damage and the practical arrangements for ensuring the effectiveness of this new system of liability (or how to guarantee and actually achieve appropriate compensation for damage caused to individuals, direct and indirect victims, to property and to the environment).

In response to these questions, it should be briefly stated that through this system of industrial civil liability (which is not to be confused with the system of liability for occupation of the land provided for in article 280 of the Mining Code, the system of compensation for occupants of the land provided for in article 281 of the Code or the system of corporate liability of the holder of a mining right provided for in article 285sexies), the legislator enshrines the liability in principle of the legal entity, holder of a mining and/or quarrying right<sup>6</sup>. Only companies or firms engaged in industrial mining activities are liable, to the exclusion of small-scale operators. This no-fault regime derogates from the main principles of civil liability under ordinary law, as set out in articles 258 et seq. of Book III of the Congolese Civil Code. It is therefore a system of objective civil liability based on the theory of risk-profit and the principles of polluter-pays and precaution. In terms of procedure, three phases are provided for (ascertainment of damage and harm, conciliation phase and judicial phase).

As can be seen, this is a liability regime that contains progressive provisions, the effective application of which can significantly contribute to the protection of various direct and indirect victims of mining and quarrying activities<sup>7</sup>.

However, a critical analysis of the opportunities indicates that a good number of them require additional measures in terms of clarification, adoption of implementing texts and monitoring with a view to appropriate compensation for these victims. For this reason, we have put forward ten (10) proposals to improve the effectiveness of appropriate compensation for harm in this area.

With regard to the dispute settlement procedure, the guarantee of reparation and precaution, five (5) pillars were proposed, such as the introduction of a collective reparation action for direct and indirect victims of mining activities, the inoperative effect of the existence or non-existence of an

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<sup>5</sup> Art. 285 ter of Law no. 007/2002 of 11 July 2002 on the Mining Code as amended and supplemented by Law no. 18/001 of 09 March 2018, J.O. RDC, special issue of 3 May 2018.

<sup>6</sup> Access to mining and quarrying activities by legal entities requires a valid mining title, i.e. the official permit issued by the Mining Registry in accordance with the provisions of the Mining Code and recording the mining rights for exploration or exploitation. These include research permits, operating permits, discharge permits and small mine operating permits, and authorisations for research and commercial quarrying.

<sup>7</sup> See Article 405 ter of the Mining Regulations (Decree no. 038/2003 of 26 March 2003 on the Mining Regulations as amended and supplemented by Decree no. 18/024 of 08 June 2018, J.O. RDC, special issue of 12 June 2018).

Environmental Plan as a prerequisite for the admissibility of the victims' action, the extension of the statute of limitations on industrial liability claims and any liability of the Congolese State, the introduction of compulsory industrial liability insurance for holders of mining and/or quarrying rights, and the proper application of the law and the strengthening of precautionary measures.

With regard to the classification and assessment of harm caused to people and the environment in this area, the main suggestion was to use the driving principles of appropriate reparation. This suggestion contains five (5) practical proposals, including the use of the uniform concept of appropriate reparation, the strengthening of capacities and requirements regarding the role of the judge in the qualification and assessment of individual and ecological mining damage (training of magistrates and a requirement that their decisions be better reasoned), the adoption or design of methodological tools to assist judges in their task of classifying and assessing these losses (design of nomenclature, guides or lists of assessment criteria), the use of the principle of dissuasive compensation through restitutive or punitive damages imposed on mining companies and the use, in certain cases, of collective distribution of compensation to victims ordered by the judge.

**Keywords:** Industrial liability, holder, mining law, individual and ecological damage, environment, appropriate redress, mining activities.