

Researching livelihoods and
services affected by conflict

Mining minerals or mining the state?

The practical norms governing
mineral extraction in former Katanga,
Democratic Republic of Congo

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Cover photo: Creuseurs at Gecamines, Kolwezi, Katanga Province. Bas Van Abel/Fairphone, 2011.

About us



The Secure Livelihoods Research Consortium (SLRC) is a global research programme exploring basic services, and social protection in fragile and conflict-affected situations. Funded by UK Aid from the UK government (DFID), with complementary funding from Irish Aid and EC, SLRC was established in 2011 with the aim of strengthening the evidence base and informing policy and practice around livelihoods and services in conflict.

The Overseas Development Institute (ODI) is the lead organisation. SLRC partners include: Centre for Poverty Analysis (CEPA), Feinstein International Center (FIC, Tufts University), Focus1000, Afghanistan Research and Evaluation Unit (AREU), Sustainable Development Policy Institute (SDPI), Wageningen University (WUR), Nepal Centre for Contemporary Research (NCCR), Busara Center for Behavioral Economics, Nepal Institute for Social and Environmental Research (NISER), Narrate, Social Scientists' Association of Sri Lanka (SSA), Food and Agriculture Organization (FAO), Women and Rural Development Network (WORUDET), Claremont Graduate University (CGU), Institute of Development Policy and Management (IOB, University of Antwerp) and the International Institute of Social Studies (ISS, Erasmus University of Rotterdam).

SLRC's research can be separated into two phases. Our first phase of research (2011 - 2017) was based on three research questions, developed over the course of an intensive one-year inception phase:

- State legitimacy: experiences, perceptions and expectations of the state and local governance in conflict-affected situations
- State capacity: building effective states that deliver services and social protection in conflict-affected situations
- Livelihood trajectories and economic activity under conflict

Guided by our original research questions on state legitimacy, state capacity, and livelihoods, the second phase of SLRC research (2017-2019) delves into questions that still remain, organised into three themes of research. In addition to these themes, SLRC II also has a programme component exploring power and everyday politics in the Democratic Republic of Congo (DRC). For more information on this work, visit: www.securelivelihoods.org/what-we-do

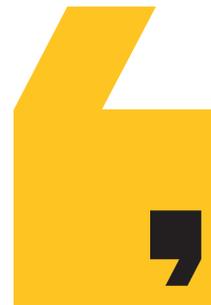
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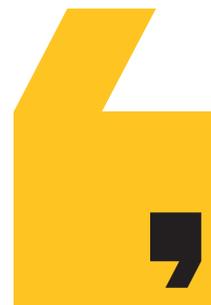
necessarily reflect the UK government's official policies or represent the views of DFID. I am also very grateful for the comments of Professor Pierre Englebert and Kristof Titeca as well as George Richards. This publication is an output of SLRC's Power, Poverty and Politics in the DRC (DRC-PPP) programme.

Acronyms and glossary



ANR	Agence nationale des renseignements	DGDA	Direction générale des douanes et assises
BSRS	Brigade spéciale de recherche et renseignements	DPEM	Direction pour la protection de l'environnement minier
CAMI	Cadastre minier	DRHKAT	Direction des recettes du Haut-Katanga
CEEC	Centre d'évaluation, d'expertise et de certification des substances minérales précieuses et semi-précieuses	MMG	Minerals and Metals Group
CGA	Commissariat général à l'énergie atomique	OCC	Office congolais de contrôle
DECN	Division de l'environnement et de la conservation de la nature	PDG	Président Délégué Général
EIES	Etude d'impact environnemental et social	PGEP	Plan de gestion environnementale du projet
		PMH	Police des mines et hydrocarbures

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Executive summary



This working paper examines the fragmented landscape of the Congolese administration governing the copper and cobalt extractive sector in Haut-Katanga and Lualaba provinces between April and December 2017. In the Democratic Republic of Congo (DRC), designated state entities are expected to play a formal stewardship role in governing this sector. However, in the study areas, the specific case of large-scale extraction of copper and cobalt shows that this governance fabric is largely fragmented. Mapping the main actors and studying their overlapping roles and interactions with extractive companies, this working paper builds upon the literature on practical norms. It argues that, rather than being a coherent entity, the state governance of mining is broken up into various—if not parallel—administrative lines within the state itself, enabling many state actors to develop informal governance practices. Unless these practices are unveiled and addressed, transparency in governing the extractive sector and collecting mining rents from it will continue to be negatively stymied. The key finding of our analysis is that

mining governance is largely fragmented and feeds, in many instances, practical norms.

The study underpinning this paper found the following:

- Rather than emerging from arrangements with non-state entities *per se*, the practical norms governing copper and cobalt mining are produced and have thrived within and from the state itself.
- There are four reasons for fragmented mining governance and practical norms feeding each other in turn: ambiguities and loopholes in the law, the rent-seeking behaviour of civil servants, in the face of appalling living and working conditions and, finally, the increased privatisation of the mineral sector.
- Local multiplication of state agencies in mining governance contributes to fragmented governance overall, which does not facilitate the Congolese state because of the relative autonomy of these agencies.

The practical norms governing mineral extraction in former Katanga, Democratic Republic of the Congo

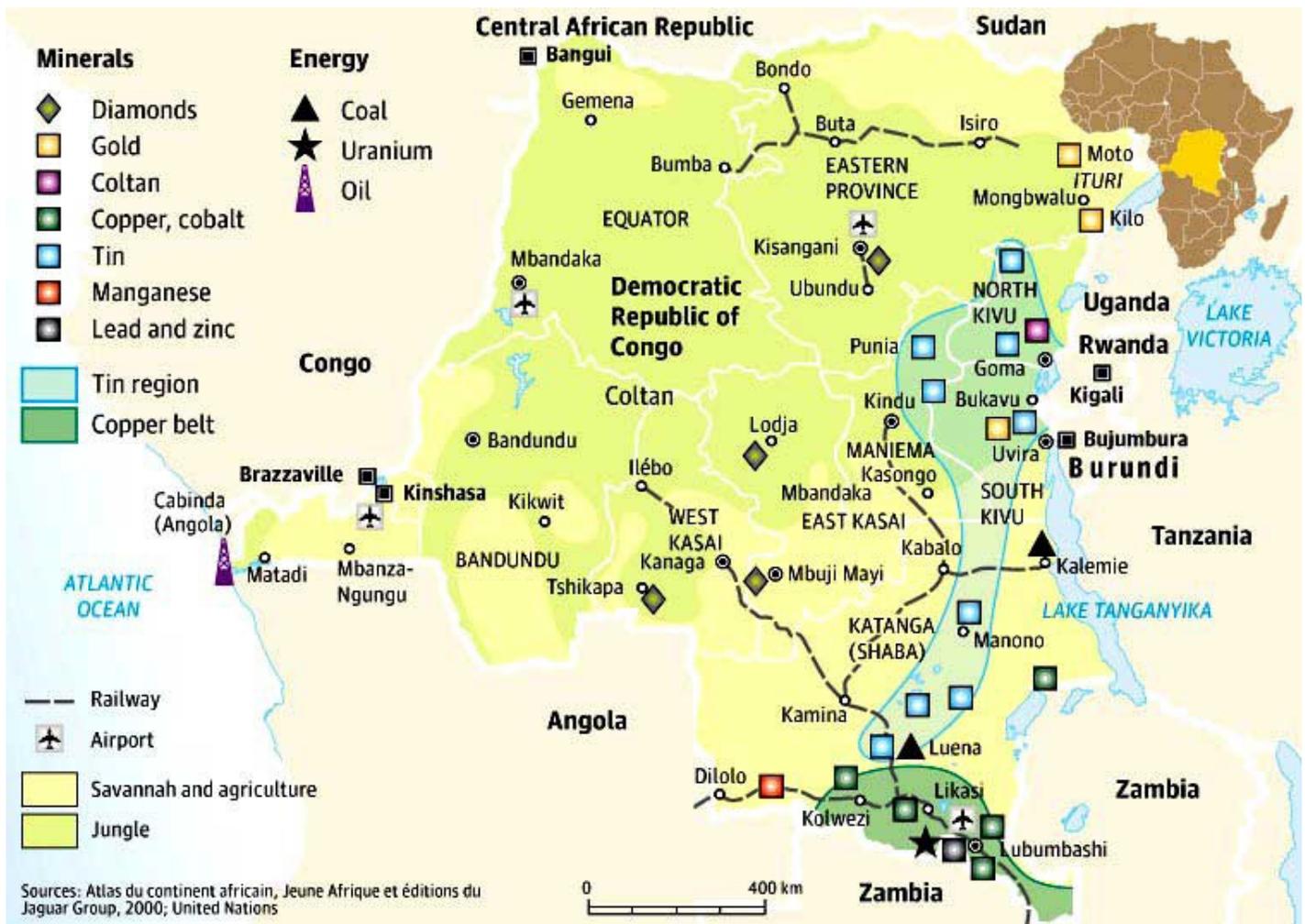


Figure 1: The geography of mining and minerals in the Democratic Republic of the Congo

1 Introduction

Most civil servants governing the extractive sector run for easy money. With the widespread belief that one who governs the mines is stupid if she/he does not reap financial benefit from it, those civil servants will enjoy 'eating' if extractive companies offer them such an opportunity

[interview with a geologist of Kamoto Copper Company, Kolwezi, May 2017].

This study explores how, by whom and through which means, the large-scale copper and cobalt sector is governed in real terms in the Haut-Katanga and Lualaba provinces (the former Katanga, south-eastern Democratic Republic of Congo, (DRC)). The study builds upon the premise that this sector experiences the practical norms of mining governance: the convention that public servants governing this sector 'do not follow official rules' (Olivier de Sardan 2015: 8) but have developed a series of practical (or 'informal') norms that subsequently underlie their practices. In this study, these practices are explored in three domains: coordination among state agencies (also referred to as entities), everyday supervision of extractive companies and the security of their activities. Drawing on concrete examples and several accounts, the study has shown that these practical norms have mainly thrived within state's regulations of the mineral sector.

For decades, mining has been the main engine of Congo's economy, contributing up to 80% of exports. The former Katanga province itself has provided around 81.9 % of national revenue from the extractive sector (World Bank 2008: 10). But these revenues and other benefit streams generated by the sector have been largely squandered, due to key problems with the mineral sector's governance, especially corruption, political interference and institutional management incapacity (Marysse and Omasombo 2012; Misser 2016). During the early 1990s, flagship industrial mining, mainly copper and cobalt, declined substantially (Rubbers 2006). Successive Congolese wars in 1996 and 1998 did little to improve this situation (Ministère des mines 2007).

In the 2000s, the privatisation of mining paved the way to a stunning rebirth of this sector (Marysse and Omasombo 2012). In 2006 and 2007, private entrepreneurs committed no less than USD 2.1bn to mining projects in Congo, especially in the Katanga region. Several public-private partnerships were concluded, including 38 for the mining parastatal *Gécamines (Générale des carrières et des mines)*, as the main copper and cobalt extractive company. Meanwhile, the number of granted mining

licences rose to 1,635 (Cuvelier 2009: 7). Moreover, thanks to a provincial ban on the export of unprocessed minerals, Katanga witnessed the construction of a large number of new metallurgical plants. This, in turn, gave rise to an increase in metal production and significant growth in the state's fiscal and parafiscal revenues. These upsurges had a positive impact on local employment (Marysse and Omasombo 2012: 23–29). In 2015, the mineral sector generated up to USD 1,722m of Congolese revenue and contributed USD 1,177m to the national budget, or 68.3% of its revenue (ITIE 2017: 11).

The improved functioning of both industrial and artisanal mining, with the state playing a regulatory role (Mazalto 2008), builds on the notion of 'good governance' (Bevir 2002). This improvement has been a priority for the Congolese government and supported by the international community. The World Bank (2008: 29) has noted that 'governance of the mining sector in DRC needs significant improvement' in the following areas:

- government equity participation
- disclosure
- transparency of revenue streams
- avoidance of conflicts of interest
- traceability of mineral commodities.

The Congolese government has therefore taken considerable steps to regain control over the mining sector. This started in the 2002 to 2003 period, with the passing of a new and investor-friendly mining law (*Code*

minier, revisited in 2018) and its associated regulations. The government also set up a series of initiatives that aimed to make the flow of minerals more transparent (Autesserre 2012; Wakenge 2018), which were rather controversial because of their limited impact. But how does the state actually govern copper and cobalt mining in the context of privatisation? How is this governance performed in practice and who are the actors involved in shaping it? This paper sits within a context where policymakers expect the Congolese state to make the mining sector more efficient and well-run (World Bank 2008: 3). The DRC, like many African countries, is a space with a long history of state fragility (Englebert 2009: 122–135), where empirical attributes of modern states are hardly performed (Trefon 2004; Englebert and Tull 2013; Tull 2017). With this in mind, this paper addresses two fundamental questions at the centre of the copper and cobalt sector's governance: how the state really works and for whom. It thereby makes an empirical contribution to an under-studied area where observation is difficult.

The remainder of this study consists of seven sections. In the next two sections, the paper begins by explaining the theoretical framework underpinning the discussion and methods. After providing the historical background for how the *Gécamines* has been divided up, the study then examines who governs the Haut-Katangese copper and cobalt sector (and how) and which practical norms have developed. It then considers why these practical norms prevail.

2 State bureaucracy and practical norms

Norms, broadly defined as rules governing the actions of people (e.g. public servants) are by definition practice-based. No bureaucracy works strictly according to official norms: those that are legal, professional, formalised and made explicit (Olivier de Sardan 2008; 2015: 15). However, the gap between official norms and the actual workings of public services, appears to be particularly wide within African bureaucracies both more generally and in fragile states in particular (De Herdt and Olivier de Sardan 2015). This partly occurs because the state is weak in enforcing regulations in these settings, opening doors to a wide range of practices of negotiation (Hagmann and Péclar 2010; Titeca and De Herdt 2010; 2011) and ensuing practical arrangements (Tuijnstra *et al.* 2014). Nonetheless, as Meagher *et al.* (2014: 2) remark: 'The emphasis on practicability risks bringing in normative judgments through the back door.' It overstates people's agency and 'blurs the line between coping strategies and socially accepted practices.' (Meagher *et al.* 2014: 2).

The concept of 'practical norms' is thus focused on exploring how both state and non-state actors routinise and institutionalise implicit arrangements, exploring the socio-political dynamics that shape the rules actually governing the actions of actors.¹ As Titeca and De Herdt note, 'The prevalence of practical norms is therefore rather a function of the inventory of tactics and maneuvers available to all parties involved, than a reflection of either 'legal' or particular social norms' (Titeca and de Herdt 2010: 575).

The notion of the practical norm is particularly useful in this study for two reasons. First, it has been long argued that the Congolese state has retreated from its basic functions, including the provision of public services (Trefon 2004), security (Tull 2017) and education (Titeca and Herdt 2011). This can pave the way to various hybrid arrangements (Raeymaekers *et al.* 2008; De Herdt and Titeca 2016), whereby non-state actors operate alongside state actors in the provision of public services. Yet, despite the state's retreat in fulfilling its basic functions, this study shows that state agents endure this arrangement in the Congolese mineral sector but follow 'practical norms' in governing it. Instead of retreating

¹ De Herdt, T. and Olivier de Sardan J.P. (2015: 4–9) distinguish official and social norms from practical ones. Official norms refer to those that are *legal, professional and bureaucratic*. They express the rights and obligations explicitly recognised by public and professional institutions. Social norms can be defined as the cultural rules regulating the non-professional and non-official world, while practical norms can be described as 'the various informal, de facto, tacit or latent norms that underlie the practices of actors which diverge from the official norms (or social norms)'.

from it and promoting hybrid arrangements *per se*, the Congolese state is omnipresent in the mining governance landscape, resulting in the fragmentation of its administration. State officials and ordinary civil servants then produce and display various tactics that infringe the state's regulation of mining, enabling extractive companies to participate in the arrangements that emerge. Thus, beyond what is often depicted as a weak, disorganised and corrupt public administration (Trefon 2011), agents of the Congolese state paradoxically wield considerable power in mining governance, yet in a fragmented fashion.

Second, there are two over-researched, interrelated and showcased processes geared towards the state's reconstruction in the Congolese mineral sector: mining reforms and increased privatisation in the sector. This study aims to contribute to discourse in this area by explaining how the practical norms of mining governance—taking place against the backdrop of these processes—build upon existing legal norms regarding mining. The 'gap' engendered by regulations such as the 2002/2018 Mining Law (*code minier*), in terms of actual practices, has created opportunities for people to develop practical norms. Reforms and privatisation of the extractive sector can therefore be seen, according to Lund (2016) as 'open moments' for mining governance: when things are very fluid and negotiable, and when different politico-legal institutions, established or not, are trying to strengthen their authority and legitimacy, such as by taking decisions on mining governance issues.

Importantly, practical norms are outcomes of negotiation processes (Twijnstra *et al.* 2014). These involve a wide group of social actors, organisations, and public and semi-public institutions. As Olivier de Sardan (2008: 17) argues, the production of new norms may also take place through a constant readjustment and recycling of the available norms, which are therefore to be considered as resources for interaction and negotiation. A recent stark example of this would be President Joseph Kabila's stance on 7 March 2018, after a meeting with key Congolese extractive companies. Here, he promised to re-negotiate certain provisions of the new 2018 code minier on a case-by-case basis, despite a new mining code being endorsed by the Congolese parliament and senate in 2017 (Radio Okapi 2018). This window of negotiation fundamentally constituted a pathway to informal governance practices and corruption (Global Witness 2018). It also proved that practical norms governing the mines build upon legal norms (the code minier), which creates opportunities for the development of such practical norms. The copper and cobalt sector case indicates how the Congolese state administration functions, points to emerging practical norms and negotiation processes, as well as how these take place, who they involve and the significance of these practices for the Katangese '*trous noirs*' (black holes, Marysse and Tshimanga 2013: 131) in terms of the rents or revenues yielded from mining activities.



Washing the copper ore, Katanga. Fairphone, 2011.

3 Methods

Empirical data for this ethnographic study was collected in Kolwezi and Lubumbashi: the provincial capital cities of Lualaba and Haut-Katanga, respectively. Additional data was gathered in Likasi and during occasional visits to mining areas. These cities were selected mainly because they host the headquarters of the majority of extractive companies and joint-ventures established in Haut-Katanga and Lualaba, enabling researcher meeting with their staff members and the civil servants supervising their activities. Lubumbashi is also the transit-town for minerals' exportation. Primary data was collected using two methods over a period of nine months (between April and December 2017).

Most of the in-depth semi-structured interviews were conducted with key informants from nine state agencies and 23 staff members from eight large-scale extractive companies or joint-ventures:

- Boss Mining
- Compagnie minière de Kambove
- Gécamines
- Kamoto Copper Company
- Kipushi corporation
- Minerals and Metals Group (MMG)
- Mutanda Mining
- Ruashi Mining

Participants included 29 public servants from the following state agencies: *Division des mines; Cadastre minier (CAMI); Centre d'évaluation, d'expertise et de certification des substances minérales précieuses et semi-précieuses (CEEC, or the Centre for Evaluation, Expertise and Certification of Precious and Semi-precious Mineral Substances); Commissariat Général à l'Énergie Atomique (CGEA); Agence Nationale des Renseignements (ANR, or the national intelligence agency); Police des mines et hydrocarbures (PMH); Brigade spéciale de recherche et renseignements (BSRS); Direction des recettes du Haut-Katanga (DRHKAT); Direction générale des douanes et assises (DGDA); Office congolais de contrôle (OCC, or the Congolese control office).*

In total, 52 persons were involved in individual or group interviews. These were supplemented with documents, articles, books and occasional reports from advocacy NGOs and think tanks (e.g. the Carter Centre) to obtain a better understanding of the mining dynamics in the study areas.

4 Privatising Gécamines

Gécamines was the main Katangese extractive company from 1906 to the beginning of the 1990s. During the colonial era, before the independence of Zaïre (now the DRC) in 1960, *Gécamines*, (then called *Union Minière du Haut-Katanga*, abbreviated to UMHK) produced about 300,000 tonnes of copper per year and accounted for more than 2,000 expatriates and 20,000 employees. In 1965, with an annual benefit estimated at USD 53m, *Gécamines* contributed up to 50% of public revenue and 70% of the Congolese state foreign currency (Young and Turner 1985).

There are several combined reasons for the decline of *Gécamines*. In 1967, the Mobutu regime nationalised the company in an attempt to sever the mineral sector from foreign corporations' dominance. This decision allowed members of the Mobutu regime to develop means for benefiting from fraudulent appropriation of *Gécamines*' assets, through networks of patronage and corrupt practices (Rubbers 2006). Internal mismanagement by *Gécamines*' staff members has been the second reason for its decline in the 1990s (Ngoy Mushila 2014). Moreover, it has been confronted with greater international price fluctuations than expected and these have had a very negative impact on the company's business and led to a decrease in the state revenues. Finally, in 1996, the first regional war ravaged former Zaïre, resulting in the pillage of the *Gécamines*' assets, while providing room for artisanal miners to start encroaching on its concessions (Cuvelier 2011).

Gécamines continues to exist, though arguably not in a functional manner (Carter Center 2017). A new mining law in 2002 opened the door to foreign investors. Thus, between 2003 and 2010 and later on, *Gécamines* underwent a gradual process of privatisation. In a context often described as opaque (Marysse and Omasombo 2012: 23–29), *Gécamines* has contracted with around 38 major extractive companies.² Overall, participation in the joint-ventures arrangement that was set up under the *Gécamines* partnership contracts has varied between 12.5 and 17.5% in most cases (World Bank 2008: 13; Carter Center 2017: 56–70). While *Gécamines* has very little production of its own, it sells concessions, consultancies and technical services to private companies and participates in joint-ventures with them. It remains, as such, a crucial actor in mining governance but one with multiple layers of activity and great opacity.

² For more details, see www.congomines.org. Accessed 7 May, 2017.

5 Who governs the copper and cobalt mines?

5.1 On paper

The 2002 national Mining Law³ (Titre 1, Chapter 1 on general principles) was renewed in 2018 (Titre 1, Chapter 2, Article 16b). This stipulates that the state plays a regulatory role in governing mining, through specific agencies.⁴ The law therefore bestows, albeit in overly general terms – from the national to provincial level – the prerogatives of a number of entities in enforcing legal provisions related to mining activities and their governance. These entities are:

- the Congolese President
- the national ministry of mines, environment and finances
- the *Direction des mines and of geology (Direction de géologie)*
- the mining cadastre (*Cadastre Minier*)
- the Directorate of protection of mining environment (*Direction de protection de l'environnement minier*)
- provincial governments (starting from the renewed 2018 *code minier*)
- provincial-based agencies in charge of governing the extractive sector.

For example, on a nationwide level, the ministry of mines allocates mining titles, demarcates the so-called artisanal exploitation zones (AEZ)⁵ and allows trading houses (*comptoirs* or *maisons d'achat*) to operate. At the provincial level, the *code minier* and, in part, the 2014 *Manuel des procédures de tracabilité des produits miniers: De l'extraction à l'exportation* also set boundaries for entities' responsibilities. While the provincial governor's duties do not expand to industrial large-scale mining in the 2002 *code minier* (Article 11 and its regulations section 3, Article 15), the 2018 *code minier* (Chapter 2, section III, Article 11) provides a number of prerogatives. Apart from granting 'middlemen cards' (*carte de négociants*) to mineral buyers and to also authorise the opening of a quarry for works of

³ In 2017, this law was revised by the Congolese parliament and senate and promulgated by President Joseph Kabila on 9 March, 2018. In this study, the phrase 'mining regulations' refers to those promulgated in 2003, which are still operational today. Despite these mining regulations actually being under review, this neither adds up much to the substance of the mining law nor challenge the prerogatives of state entities.

⁴ This new Mining Law has increased fear for large-scale extractive companies, namely Randgold, AngloGold Ashanti, Glencore, Ivanhoe Mines and China Molybdenum Company. These organisations are worried that the raising of export taxes on 'strategic minerals'—especially cobalt—from 2% to 10% will negatively impact their business.

⁵ These are the mining sites where the technological and economic factors are not suited for the site to be industrially exploited and which are exclusively reserved for artisanal mining activities.

public interest, provincial governors' responsibilities now expand to elaborating and proposing specific policies to the provincial assembly. These regard provincial-based 'mining programmes'. It should be noted, however, that this is largely a theoretical responsibility, as most provincial assemblies fall well below the level of capacity necessary to assess or implement such programmes. The *code minier* neither clarifies what these programmes entail nor whether (and to what extent) provincial governors are allowed to impose more taxes on large-scale mining, apart from the ones on *voirie* and *concentrés* imposed by Moïse Katumbi Chapwe (see section 6.1.) and later recognised in the presidential decree number 13/001 of 23 February 2013.

At both artisanal and industrial sites, provincial *Division des mines* plays a centre-stage role in mining governance. Concretely (mining regulations, Article 13), the charges of this division extend to issuing artisanal diggers' cards (*cartes de creuseurs*) and granting authorisation for extractive companies to use commonly used construction materials for exploring quarry products on a permanent or temporary basis. The *Division des mines* also regularly supervises all mining sites and controls the operations of extractive companies. This takes place in terms of conditions such as minerals' extraction, taxation and trade, as well as environmental safety. All this suggests that the *Division des mines* performs in principle, like a well-organised 'data bank' endowed with enough technical, human and financial resources to do so.

5.2 The governance patchwork

Here, the reality is more complex, as illustrated by the following quote from a field interview:

In practice, legal prerogatives enshrined in the code minier outline [the] official mandate of the Division des mines and related state agencies like CAMI. But these prerogatives are just empty words. Here [in Haut-Katanga and Lualaba], mining governance is organised like a jungle because many agencies with [an] unofficial mandate are also involved in it. A 'too nosy' civil servant is often ordered by powerful state officials [with] bullying words like: 'bomba mayele na yo' ['Keep away your cleverness' in Lingala].⁶

This statement rightly conveys that Congo can be effectively seen as a place of suspended laws, where

legal provisions exist, yet are rarely enforced or complied with (Trefon 2009). Despite state agencies being ascribed official prerogatives (formal mandates), the copper and cobalt sector witnesses the involvement of an amalgam of other entities in its governance landscape. As the number of state agencies and informal taxes (in *italic*) are shown in the table below, most of these entities (e.g. the ANR) seek to reap benefits from the mining business, often through informal means (an effective mandate)

Table 1 identifies 23 entities involved in the governance of the mining sector. These range from state agencies to armed actors operating at various levels: from extractive concessions to minerals' exporting routes and at customs. Eight of these (Numbers 1–8) enforce formal and countrywide mandates. Their prerogatives derive either from the *code minier*, mining regulations or other specific regulations (i.e. the 2014 *Manuel des procédures*). Seven entities (Numbers 9–15) were provincial creations in that their functioning was set up and authorised by provincial authorities. Finally, eight entities (Numbers 16–23) had no formal prerogatives allowing them to govern mining or levy taxes on it yet were found to be involved in the sector's governance on the ground, e.g. at mining concessions.

The table above shows three interesting aspects. First, it highlights the shifting or fluid relationships between the formal and informal (Cuvelier and Muamba Mumbund 2013) and the effective mandate between legal and illegal. Second, this shift opens up wriggle room to a number of taxation practices. Of 17 taxes identified, nine (in *italics*) are informal because of a lack of legal basis. Importantly, even entities with formal mandates (i.e. *division des mines* and PMH) impose informal taxes. This is not surprising for entities created at the provincial level or those without any prerogatives in mining governance. Overall, these aspects indicate that civil servants are able to use the legal-administrative powers associated with their state position to extract revenue from mining: a tactic Pierre Englebert (2009) has referred to as the 'capacity of legal command.'

⁶ Interview with CAMI and CEEC's civil servants participating in Alternative Mining Indaba, Kolwezi, May 2017.

Table 1: State agencies governing large-scale copper and cobalt mining in Haut-Katanga and Lualaba

N°	Agency	Formal mandate	Effective mandate	Tax and amount
Nationwide				
1	CAMI	Mining titles	N/A	N/A
2	CEEC	Control/tax collection	N/A	Export licence: USD 125/Truck
3	CGEA	Control /tax collection	N/A	Radioactivity assessment: USD 80/un camion
4	DGDA	Export	N/A	Authorisation of export : 1% of payments made Licence of origin: USD 20/truck
5	DPEM	Environmental protection	N/A	Licence of environmental protection: USD 10/truck
6	Mining service (<i>Division des mines</i>)	Administration	Tax collection	Certificate of transport: USD 20/truck Certified report on loading: USD 10/truck Certified report on sampling: USD20/truck
7	OCC	Control/tax collection	N/A	Export checking licence: USD 10 /truck Certificate on loading: USD 250/truck
8	PMH	Security	Tax collection	Certified report on loading and unloading: USD 5-10/truck
Provincial-creation				
9	Anti-fraud	Security/investigation	N/A	N/A
10	Export office (Haut-Katanga provincial ministry of mines)	Control of export documents	Tax collection	Checking licence: USD 5/truck
11	Lualaba liaison office/ Lubumbashi	Control of export documents	N/A	N/A
12	Foreign trade	Control	Tax collection	Checking licence: USD 20/truck
13	DRHKAT and Lualaba revenue authority (<i>Direction des recettes du Lualaba</i> , DRLU)	Tax collection	N/A	Road and drainage tax (<i>taxe voirie</i>): USD 50-15 Tax on concentrates: USD 100-60 ⁷
14	Counter office of environment and resources/ <i>Lualaba</i>	Control	N/A	N/A
15	Provincial ministry of mines	Administration	N/A	N/A
Ad-hoc				
16	ANR	N/A	Security/Taxation	Certified report on loading: US \$ 20/truck
17	BSRS	N/A	Security/Investigation	
18	Health department (Quarantine)	N/A	Health conditions at mining concessions	N/A
19	Labour department	N/A	Compliance with Labour Law by extractive companies	N/A
20	Planning department	N/A	Control of EIES and PGEP	N/A
21	Department of environment and nature conservation	N/A	Control of EIES	N/A
22	Department of transport	N/A	Tax collection	Waybill: USD 10//truck
23	Republican Guard		Security (presidential family's concessions)	N/A

⁷ Trucks from other provinces pay USD 15 while trucks matriculated in Haut-Katanga and Lualaba are charged USD 50. Another distinction concerns pures concentrés (USD 100/truck) and faibles concentrés, charged USD 60/truck of minerals.

6 Practical norms governing copper and cobalt mining

This section examines how civil servants liaise with copper and cobalt extractive companies. In the domain of mining governance, civil servants would normally perform their duties (e.g. supervising mining activities) according to official norms: the formal rules and state regulations designed to govern the extractive sector. But these norms have been, in many instances, replaced by practical ones that infiltrate the governance sphere. As De Herdt and Olivier de Sardan (2015) argue, practical norms are usually different from official norms, complementing, bypassing and even contradicting them. In the following sections, I will focus my analysis of practical norms within three domains where, mostly, fragmented governance patterns can be observed. These are:

- coordination among state entities
- everyday supervision of extractive activities
- security of mineral extraction.

6.1 Uncoordinated state entities

As will be further explained, the uncoordinated nature of entities that govern the mines is the first outstanding pattern of fragmentation. There is no collective action among these entities. There are evidently limitations, fragmentation and dysfunctional character of the state administration in routinising its control over the extractive sector. During my interviews, an inspector from the *Division des mines* remarked that:

In Haut-Katanga and Lualaba, there is neither a law that organises the administration of the entire province nor a clear policy regarding mining governance. State agencies work and act alone, [and] develop their own strategies to deploy public servants at mining concessions. There, those individuals rarely meet, each among them having an ordre de mission signed by a given hierarchy.

Current governance patterns of mining are thus profoundly fragmented. Among state entities, it is rare to find meetings and discussions focused on scrutinising mining governance successes and challenges.⁸ This enables some entities or individuals to be able to decide on mining issues without consulting others, thus informally privatising the state and institutionalising the ‘informal’ as a management mode within it in everyday life (Blundo 2006). Three aspects exemplify this fragmentation. First, there is still much opacity regarding

⁸ Interview with DPME’s civil servants, Lubumbashi, July and December 2017.

which state entity really governs the mines *per se*. Even though Congolese mining law (the *code minier* of 2002 and 2018) grants a number of prerogatives to provincial governors and provincial ministries of mines, these prerogatives or ruling principles are still too general, to the extent that they will be confronted with well-established and opaque practical norms governing the extractive sector. For instance, since 2007, successive Katangese provincial governors and provincial ministries of mines have, in practice, been quasi semi-autonomously involved in governing copper and cobalt mines, including artisanal mining (Diemel and Cuvelier 2015: 155). Specifically, in 2008, the then former Katanga governor (Moïse Katumbi Chapwe) bypassed the national ministry of mines and the *code minier* and imposed a tax on mining: the *taxe voirie* (on road repair, edit number 0001, 23 May, 2008). This was followed in 2010 by another: the *taxe concentrés* (Edit number 0001, 20 April, 2010). It was only later in 2013 (presidential decree number 13/001, 23 February, 2013) that these taxes were officially recognised by the Kinshasa government. These taxes still hold today, serving as potential inspiration to other provincial authorities.

A second example of fragmentation concerns unilateral decisions taken by Katangese governors regarding the collection and use of mining rents. These decisions have also fed conflicts between these authorities, the provincial assembly and Kinshasa officials. A telling example occurred on 18 April, 2017, when the acting governor of Haut-Katanga, Jean-Claude Kazembe suffered a no-confidence vote from the Haut-Katangese provincial assembly—allegedly under Kinshasa pressure—after allegations that Jean-Claude Kazembe embezzled USD 26.7m paid that had been as mining royalties by Mutanda Mining,⁹ a company based in Lualaba since 2010. Kazembe deposited this amount in a separate private bank account from the one held by the Haut-Katanga province. On 26 May 2017, the constitutional court reinstated Kazembe, but he was not allowed to run in the new elections. Meanwhile, the embezzled USD 26.7m allegedly ended up with Kabila (RFI 2017).

Another example of state's agencies' fragmentation relates to the field of environmental protection regarding extractive activities. For instance, through mining regulations (Chapter II, Article 11), the DPEM (or the Directorate of Environmental Protection) is legally responsible for examining, monitoring and evaluating

extractive companies' environmental and social plans, via EIES. However, public servants from the *division de l'environnement et de la conservation de la nature* (DECN, or the division of environment and nature conservation) also inspect copper and cobalt mining sites and occasionally collect illegal fees from companies. The DECN rarely, if ever, report to the DPEM. Yet, on 18 May, 2015, a Katangese senator, David Mutamba Dibwe, unsuccessfully flagged down the illegal taxes on Katangese mining, estimating that around USD 260m escaped the public treasury in 2014 (Forum des As 2015).

Importantly, the mining code of 2002 (Article 42 and Article 148 of the Congolese mining regulations) and 2018 (Chapter 3, Article 42) requires extractive companies to elaborate an EIES that is renewed every five years. Annually, the company reports to the DPEM on its risks mitigation strategies and pre-emptive actions regarding environmental protection. As the reports require expertise, each company is asked to contract with a certified cabinet when elaborating and implementing the EIES. Every year, the DPEM inspects the concessions and conducts an audit. In Haut-Katanga and Lualaba, practices regarding environment protection still lack coordination at different echelons of administration, despite these requirements. First, companies are free to select the contracting cabinet, often on the basis of unknown criteria. The consultancy fees the companies pay this cabinet is not recorded anywhere. Concerningly, some well-informed sources have reported that some DPEM officials in Kinshasa and Lubumbashi have set up their own cabinets to contract with companies regarding their EIES.¹⁰ In other cases, when DPEM civil servants who inspect mining concessions attempt to check compliance with EIES, they also invent tricks in order to obtain illegal payments from companies instead of enforcing regulations. As Trefon (2009: 14) argues, DRC's public agents' relations with service users depend on the context: 'They may adopt a formal discourse (strictly adhering to rules and regulations) just as they may opt for an informal approach (inventing or 'interpreting' rules).'

Some state agencies governing the mines have overlapping mandates. Good examples here would be the *Commissariat général à l'énergie atomique* (CGA), CEEC and OCC. The mandate of the CGEA is to check the radioactivity of extracted minerals. CEEC and OCC are also Congolese mining authorities responsible for

⁹ Mutanda Mining Sarl explores and produces copper and cobalt. It operates as a subsidiary of Glencore.

¹⁰ Interview with Mérimée Makonga Kalumba, independent consultant on environmental protection, Lubumbashi (August and December 2017).

checking minerals' chemical components and their economic value. However, in many regards, the mandate of CGEA resembles those of the CEEC and OCC.¹¹ CEEC and OCC deliver *certificat d'origine* and *certificat de qualité*, respectively, in addition to a *procès-verbal d'échantillonnage* (certified report on sampling) issued by the *Division des mines*. Overall, this leads to a situation in which extractive companies feel they are overburdened by similar forms of taxation.¹² Moreover, the CGEA neither report to the *Division des mines* nor to the provincial branch of the CEEC. Rather, the CGEA is an autonomous structure that is functionally and directly subordinated to the national Ministry of Scientific Research in Kinshasa. Likewise, the OCC's provincial branch reports to its national Kinshasa-based office.

The final illustration of fragmentation can be found in the ambiguous relationships between the *Division des mines* and *provincial ministries of mines*, and the free-riding administration of these entities. Administratively, this *division* is not subordinated to provincial ministry of mines and reports directly to the Kinshasa-based *Direction des mines*. In addition to existing state agencies, such as the CAMI and CEEC, both in Haut-Katanga and Lualaba, there have been additional provincial agencies created between September 2016 and July 2017. Respectively, these are the *Bureau de liaison of Lualaba* in Lubumbashi and the *Bureau export* (of Haut-Katanga), which either reflect or bypass the *Division des mines*' prerogatives.

Interestingly, conflicts rarely break out between the *Division des mines* and the provincial ministry of mines or between the newly-created entities. Their staff members are said to work 'in collaboration',¹³ meaning that they often find mutual arrangements on matters such as tax collection and its distribution in the two provinces. Recently, the provincial ministry of mines has been granted many prerogatives in the renewed 2018 *code minier* (Chapter 2, section III, Article 11bis), including the supervision of provincial-based agencies governing mining. As these prerogatives were previously exerted by *chef de division des mines*, it would be interesting to examine how their collaboration will develop over time or how it will foster administrative overlap and confusion.

6.2 Scattered oversight

Practical norms have also developed in civil servants' supervision of copper and cobalt extractive activities. Paradoxically, the supervision of extractive activities is financially, logistically and technically supported by extractive companies, rather than being backed by state agencies. These companies provide the necessary means of supervision. Reflecting on the practical norms shaping West African bureaucracies, Blundo (2015: 156) argues: 'The central administration asks officers to fill the coffers of the state and the communes, but deprives them of material means and human resources to carry out this mission.' In a similar vein, inspectors from the *Division des mines* and CAMI told us about the following complaint:

We do not visit mining concessions regularly. Inspections take place only once or [twice] a week or a month because of the lack of financial and technical resources to do so. When we visit concessions, mining companies—and rarely our agencies—provide us with transport, food ration, accommodation, per diem and many other incentives that enable us to do our job.¹⁴

Other interviewees noted that many state inspectors are unskilled and lack the technical knowledge or experience to adapt to the up-to-date technology used by many large-scale companies producing copper and cobalt.¹⁵ Indeed, many inspectors are not recruited by the state agencies' officials on the basis of merit, but nepotism and other informal relationships with people in positions of power in the mining administration. Thus, apart from a few geologists from CAMI whose staff members are technically well-trained, many other civil servants inspecting the mines ignore up-to-date techniques of detecting minerals or the use of spectrograms. Respondents also noted that 'The field reports from companies' inspection are often unreliable because these reports are cut and pasted from other reports'.¹⁶ As a result, fraud is widespread, difficult to detect and sometimes condoned by state's authorities. For example, Martin Kabwelulu Labilo, the national minister of mines, acknowledged the lack of transparency in tracking

¹¹ See such overlaps in Ministère des mines et des finances (2014: 17).

¹² Interviews with inspectors from *Division des mines*, Lubumbashi (August 2017).

¹³ Interviews with civil servants from *Division des Mines* and *Ministère provincial des mines*, Lubumbashi (May 2017).

¹⁴ Interview in Lubumbashi and Likasi (July 2017).

¹⁵ *Gécamines* and Boss Mining's staff members, Lubumbashi, Likasi and Kolwezi (May and July 2017).

¹⁶ Interview with CEEC's civil servants, Kolwezi (July 2017).

companies' extractive and export operations (Agence congolaise de presse 2017). Another staff member of MMG noted:

State inspectors are unable to control every aspect of extractive activities. Thus, many suspicious things happen inside and out of mining concessions, behind state's oversight, often in complicity with security forces like ANR, PMH or Republican Guard.¹⁷

These words convey two important elements. First, trickery and false declarations prevail within some mining companies' production. This explains why some of them avoid declaring the genuine mineral products extracted in their concessions, under the pretext of fearing unfair competition with other companies. Instead of declaring cobalt, these companies may claim to government officials that they have extracted and exported copper. Cobalt is worth almost ten times more per ton than copper. Therefore, mining companies can benefit by paying less tax during export operations.¹⁸ The above statement also suggests that extractive companies liaise with state officials on transport routes and at the Congolese customs. These officials allow them to transport and export under-declared minerals. This explains why one public servant from the *Division des mines*, who had been working in Likasi since 2000, described a resulting power game, where companies try to outsmart officials:

Civil servants who try to fairly enforce state regulations over large-scale activities develop relationships like 'cat and mouse' with extractive companies. When those civil servants hold control over them, these companies also develop informal strategies to avoid compliance to state regulations.¹⁹

However, inspectors supervising companies are not naive. Given that they do not stay in these mines for a long time and only supervise them on an irregular basis, they have developed strategies to access companies' information, allowing them to overcome their trickery. In doing so, those inspectors collaborate with one or two persons who are known under the name of *l'oeil* (eye). *Les Yeux*

(*Eyes*, or *aviseurs* according to Misser 2016: 106) may be company employees or ordinary civil servants akin to state spies) appointed by the heads of state agencies for supervising these companies. The 'Eyes' who are often unknown by the companies because they are used as conduit of opaque transactions, are selected on the basis of many criteria, including personal social ties with heads of agencies or inspectors, their discretion and negotiation capacity with these individuals. Acting as 'sleeper cells' in the leaking of companies' information, the 'Eyes' regularly update the inspectors about activities taking place in the companies' concession or at a mineral depot, especially those that violate laws on, for example, water pollution, fraud or concealment of production. The work of the 'Eyes' is akin to 'administrative brokerage' (Blundo 2006), allowing state agencies to exert indirect control over extractive companies' operations. This collaboration also illustrates the extent to which 'strategies have replaced policy' (Trefon 2009: 13) in Congo's mining governance.

Importantly, the 'Eyes' swap leaked information for their own financial advantage and that of state inspectors regarding the encountered companies' infractions. When inspectors appear to have discovered something previously hidden to them, they directly charge the companies. After several rounds of negotiation, the latter often pay a fee. This is then shared between the 'Eyes', the inspectors and their official hierarchy. This practice is locally known under the Kiswahili phrase *kukata milomo* (literally, 'cutting the lips'). This consists of civil servants corrupting (Petit and Mulumba 2005) or rewarding state officials who have appointed them with a lucrative position, from where money easily flows into their pockets. These officials subsequently cannot 'speak' out in terms of subrogating or sanctioning those civil servants.

It is not clear how much money goes to the employees serving as the 'Eyes' or their associates. This depends on the type of infraction committed and the companies' negotiation capacity. Overall, this depiction of the mining administration, with its on-the-spot arrangements with extractive companies and between public servants and their hierarchical echelons, explains why cases involving

¹⁷ Interviews with geologists of MMG, Lubumbashi, August 2017.

¹⁸ Interviews with geologists from Mutanda Mining, Kolwezi, August 2017. These revealed that the sale price of cobalt at the international market provides incentives for cheating. In July 2017, for instance, one tonne of copper and cobalt, respectively, was sold for USD 5,940 and 58,708.

¹⁹ Interview in Likasi, May 2017.

extractive companies or individual public servants sanctioned for misconduct have been rare.²⁰ The use of ‘Eyes’ in operations also suggests mining governance patterns have institutionalised corruption, paving the way to its own destruction. All of this contributes to the production and reproduction of a weak state, lending support to Misser’s (2016: 106) observation that ‘The operations of *aviseurs* and their expectation of being rewarded for their job have prompted many civil servants to search for infractions in order to illegally charge companies, instead of imposing a normal taxation regime.’ [author’s translation].

The practical norms of mining governance, along with the ‘wheel-and-deal’ environment they produce are also well mirrored in the creation of apparently informal new departments or *bureaux* (offices) next to or within existing state agencies. The *bureau de liaison* and *bureau export* mentioned earlier exemplify this aspect. In addition, the Lubumbashi-based *Division des mines* is composed of six departments: the Services Généraux, Personnel, Geology, Mining, Investigation and the *département de la protection de l’environnement*. However, in January 2017, the *Division des mines*’ chief office (Emmanuel Kyanda) added three new sub-departments: the *vulgarisation du code minier* and *planification*, in addition to a *cellule des explosifs*: a sub-department functioning under the mining department. These additional departments were created for improving mining governance. Yet, as one inspector from the *Division des mines* told us,²¹ it was surprising that the *Direction des mines* in Kinshasa knew so little about them.²²

6.3 Securing extortion

The changing nature of security agencies or units around extractive activities is also worth highlighting. In many instances, their presence and operations challenge the idea that, in the field of security, the Katangese extractive sector is characterised by limited statehood (Hönke 2013: 53). Rather, the state is present even over-present. Given that the goal in proliferating these security units is to maximise transaction costs, not production or security, some security units impose informal taxes (see table 1)

on companies in exchange for supposedly securing their activities. As one interviewee pointed out:

Each security unit present in mining governance [is] prêche pour sa chapelle [which translates as ‘preaches for its chapel’, or ‘defends its own interests’], boasting about securing extractive activities. At mining sites, their staff members work independently, often [imposing] informal fees and financially [reporting] to their hierarchy. An important share of this money is pocketed by these individuals and rarely reaches the public treasury.²³

The overpopulation of mining areas with security units is a common feature. Despite this, PMH units are officially entitled to secure mining concessions. The *Division des mines* comprises a *bureau des investigations* (department of investigation) aimed at preventing and searching for breaches of the *code minier* (Mining regulations Article 12). Moreover, the copper and cobalt sector witnesses a presence of at least seven security units on a permanent or occasional basis (based on selected mining concessions). These units are:

- the ANR²⁴
- the *Service anti-fraude*
- the *garde de sécurité industrielle*
- the *Direction générale des migrations* (DGM, or border control)
- the *Division de l’hygiène et sécurité* (working under the DPEM)
- the BSRS
- the Republican Guard, in its role in looking out for the so-called *famille présidentielle*’s concessions managed by President Kabila’s inner circle (Congo Research Group 2017: 33). Neither taxes nor designated state agencies are present in and around these *famille présidentielle*’s concessions (e.g. Sokohosho and Kimbui, respectively 50 and 60 Km on the road to Likasi and Lupoto, 30 km south-west/ Lubumbashi). But this does not mean that the state has retreated from these concessions altogether.

The unclear and overlapping prerogatives of these

²⁰ A rare case occurred in 2012 after First Quantum, a company extracting copper around Sakania closed down its operations, after allegations of concealing its production. For more details, see the Investment and settlement agreement between the DRC, *Gécamines*, Sodimico and CAMI [...] signed in Lubumbashi on 1 March 2012 and the Centre International pour le règlement des différends relatifs aux investissements, International Quantum Resources Limited, Frontier SPRL et Compagnie Minière de Sakania SPRL, Affaire CIRDI ARB/10/21, Ordonance de procédure Number 3, Paris.

²¹ Interview in Lubumbashi, May 2017.

²² Interview with a civil servant from the *Direction des mines*, Lubumbashi, August 2017.

²³ Interview with a staff member of Boss Mining, Lubumbashi, August 2017.

²⁴ The ANR mandate for instance is officially limited to investigating crimes against state security, such as treason, espionage, political crimes and conspiracy.

security units raise serious doubts about their interests in improving the security of mineral's extraction and trade. As one respondent pointed out to us, these units rarely report security incidents or illegal practices plaguing extractive activities.²⁵ In the Congolese context, where public servants—including militaries—are badly paid, this overwhelming presence of security units suggests a parasitic nature. In summary, these units are mostly involved in the mining business for the purposes of extortion,²⁶ fostering a culture of rent-seeking and survival (Trefon 2011: 21; World Bank 2008: 2). It is unclear to whom and where the amounts collected by these security units end up, but the well-known practices of *rappontage* and *kukata milomo* suggest that much is syphoned back up to the top of the hierarchy.²⁷

Regarding extortion, individual actors are also able to set up their governance or revenue extraction logics, confirming that 'Katangese mining resembles more and more a gang market'.²⁸ In their study on transborder traffic at Kasumbalesa's custom (Lubumbashi), Cuvelier and Muamba Mumbund (2013: 96) noted that civil servants generate their own informal rules, bypassing official legislation and norms. An account from one staff member of Metal Mines reflects this.²⁹ Managed by a Congolese *President Délégué Général* (PDG) who has worked for the company for more than five years, Metal Mines produces and exports copper and cobalt. Between September 2015 and March 2017, the PDG was able to liaise without being noticed by the Chinese company's managers, by employing soldiers from the Republican Guard. These soldiers helped the PDG to obtain fake documents from export-related state agencies like the DGDA, enabling the individual in question to export a large amount of copper and cobalt while circumventing compliance and export fees. From the Metal mines' Likasi-based concessions to the Kasumbalesa's border, the Republican Guard escorted

the vehicle transporting the minerals, arguing that the amount allegedly belonged to Maman Sifa (President Kabila's mother, who was living in Lubumbashi) or that the loads were parcels for an unnamed advisor at the Kabila's presidency. Following these illegal exports, the share of benefits between the Metal Mines' PDG, the Republican Guard and the public servants involved in the scam were near equal, with each group pocketing around 30% of the total amount earned. The PDG was allegedly able to collect up to USD 14,000 per export. When Metal Mines' staff managers were informed about these deals, the PDG was fired from the company. Another respondent in our study added:

In many Katangese extractive companies, a Congolese staff member often occupies the second position of authority and is subordinated to an expatriate at the top. This position is rarely random and has become a strategy for many companies to hire nationals capable of 'negotiating' on a range of issues with high-ranking state authorities. Yet, these individuals can also abuse their position.³⁰

The example of Metal Mines suggests that the deals described above are well-networked. In reality, illegal and clandestine sales or leakage of minerals are not solely deals involving militaries and companies' staff members. Rather, a wide range of state intermediaries participate in these operations. Interestingly, rumours on Maman Sifa or Kabila's advisors' involvement in such deals are hard to verify. But these rumours show that the mining governance is less under formal state's control than it should be, lending credibility to the argument that people can institute their own governance logic next to or within the state's governance patterns (Garrett *et al.* 2009). Individuals are thus able to invent their own tricks to scam the state.

25 Interview with a security officer of MMG, Lubumbashi, July 2017.

26 Interview with a member of the Lubumbashi *Chambres de mines*, July 2017.

27 An example of this can be seen in ANR, with between 100 and 150 trucks of mineral crossing the Kasumbalesa border per day (as stated in our interview with DRHKAT staff members in Lubumbashi, June 2017). These amounts can roughly be estimated between USD 2000 and 3000 when the amount of USD 20 charged per truck is taken into account. The practice of *rappontage* refers to informal kickbacks that civil servants pay to superiors in their hierarchy. Please see a similar account by Nkuku, A.M. and Titeca A. 2018. Market governance in Kinshasa: the competition for informal revenue through 'connection'. *Working paper* 2018.03. Antwerpen: IOB.

28 Interview with a policeman of BSRS (bureau 2), Lubumbashi, May 2017.

29 Interview in Likasi, May 2017. The subsidiary of Nanjing Hanrui Cobalt Co Ltd, Metal Mines is a Chinese company that has been extracting copper and cobalt since August 2007 in Likasi. It employs around 30 Chinese workers and 50 to 60 who are local.

30 Interview with an independent journalist, Lubumbashi, August 2017.

7 Discussion: why do practical norms prevail?

Meagher *et al.* (2014: 2) argue that it should be not taken for granted that practical norms work for everyone. One should ask who these practices work for and why, and who pays the price for them. The aim of this section is to explain why practical norms persist in the mineral sector's governance and who they serve.

Four reasons account for why fragmented mining governance feeds practical norms: ambiguities and loopholes in the law, the rent-seeking behaviour of civil servants in the face of appalling living and working conditions and, finally, the increased privatisation of the mineral sector resulting in the involvement of many state actors in its governance landscape.

7.1 Ambiguities and loopholes

First, as with much of the legislation that exists in weak states, mining governance experiences legal precedents, ambiguities and loopholes that are subject to diverse interpretations. This is especially the case with regard to the 2002/2018 *code minier*, as well as the 2014 *Manuel de procédures*, which remains too silent, vague and overlooked (or appears to be) to be able to serve as sources of effective mandate for many states' entities (e.g. the series of security units and divisions mentioned in the table 1). In addition, the Governor's prerogatives on governing large-scale companies is unclear, likewise the relationship between the *Division des mines* and the provincial ministry of mines. The 2018 *code minier* (Article 11 bis) does little to clarify these prerogatives, given that this law focuses on general principles, paying more attention to the revenue streams generated from mining rather than providing concrete measures for enforcing the entities' prerogatives on the ground.

For instance, the 2018 *code minier* (Article 11 bis) stipulates that the provincial ministry of mines should supervise the activities of state agencies governing mining at the provincial level. For its part, the *chef de division des mines* (Article 11 ter) controls and supervises extractive activities. It is not clear who reports to whom, when, how and on which issues. Thus, such legal fluidity contributes to the production of practical norms by state agents, who institutionalise informal governance patterns and the types of arrangements that go with them. Thus, the 'informality' associated with practical norms can be defined as 'what is a shifting and ill-defined political realm' (Chabal and Daloz 1999: 149). This has become a resource in itself, opening up 'wriggle room' for people to create departments and invent their own tricks and prerogatives regarding mining (i.e. *the bureau export or bureau de liaison* in reality

scams and, ultimately, weakens the state). While ‘the very weakness of the state is a resource to many Congolese’ (Englebert 2003: 6), especially state authorities and civil servants governing the mines, it also becomes clear that the ‘law can be used in an open-ended way, according to multiple interests, to suit particular interests’, as Nkuku and Titeca, (2018: 7) argue in their study on markets’ governance in Kinshasa.

7.2 Rent-seeking behaviour

The pervasive rent-seeking behaviour of civil servants serves as a second reason for practical norms. This culture has developed since the Mobutu era, through the ‘fend for yourself’ slogan that has prevailed for decades at all levels of Congolese society (MacGaffey 1986). In the extractive sector, rent-seeking culture is not only local: it starts from the apex of the state in Kinshasa to Lubumbashi, Kolwezi and at mining concessions. National authorities in Kinshasa appoint officials at the top of the state agencies governing the extractive sector in Lubumbashi and Kolwezi. Such appointments are rarely random. For instance, the *chef de Division des mines* of Haut-Katanga (Emmanuel Kyanda) is closely and politically linked to the acting national ministry of mines, Martin Kabwelulu Labilo, with both serving as active PALU members (*Parti Lubumbiste*). Without overstating the impact of this relationship for mining governance, it can be seen as a tool for rent-seeking. For example, Martin Kabwelulu acknowledged (18 May, 2015) that the so-called *attestation de transport des minerais* (certificate of minerals’ transport) tax was informal and illegal, and its revenue was not traced. He also pledged to sanction the culprit (Le Soft International 2015). However, this tax, which roughly generates between USD 2,000 and USD 3,000 per day, continues to be imposed on extractive companies by the Lubumbashi-based *division des mines*.

Overall, many public servants who supervise extractive activities or levy taxes over companies at mining concessions across transport routes and at customs, are selected due to their familial, friendship or political connections to heads of provincial agencies. The use of ‘Eyes’ testifies to this. The informal appointment of civil servants explains why, out of the 23 interviewees from extractive companies, only nine people were officially hired by these companies after successful recruitment. As a common feature of Congolese administration (Trefon

2009: 17), mining governance is not implemented by state agents committed to and accountable to the state. Rather, those civil servants develop practices of extortion to reinforce their patronage-based networks (Global Witness 2017).

7.3 Civil servants’ living and working conditions

Civil servants’ working and living conditions also account for the prevalence of practical norms. Out of around 300 agents from the *Division des mines*, only 60 were paid by the state and had a badge number.³¹ Given such prevailing work uncertainties and meager remunerations, these individuals cannot cover basic needs and thus are driven to complement their wages through illicit means and corruption (Global Witness 2006). Consequently, few state officials are concerned with breaking away from predatory practices and improving their working conditions. The statement mentioned in the introduction of this study points to this reality. When a state official of DPEM/Lubumbashi was asked why his office was under-equipped and populated with staff members without any computers for data recording and reporting, he asserted:

Why [should] I spend so much money [on] buying computers? The staff cannot use them and for years, they have never used them. Why [should] I make a difference with my predecessors because I met them [in] this office in that condition? For the little time I spend in this office, I’m not someone able to change the working of this administration and of this country.³²

In many instances, this mindset is clearly ingrained in the reproduction of a parasitic administration. Rather than improving their working conditions, people scramble to maximise the financial benefits offered by their administrative position (Blundo and Olivier de Sardan 2000).

7.4 Increased privatisation of extraction

Privatising the extractive sector in line with mining reforms is the fourth reason explaining the prevalence of the practical norms shaping this sector. Actively encouraged by the World Bank at the beginning of the 2000s, a new mining law was passed by the Congolese government in 2002 (recently renewed in 2018). This law was designed

³¹ In July 2017, the monthly wage paid to *chef de division* was around 100,000 CDF (USD 66). An ordinary civil servant would earn no more than USD 53 during that same period.

³² Interview in Lubumbashi, July 2017.

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to provide an investment-friendly framework for the mining sector. Given that *Gécamines* still exclusively control nearly 100 exploitation permits of Katangese copper and cobalt concessions (see section 4), the reforms also aimed to end *Gécamines*' monopoly position, resulting in the establishment of 38 major extractive companies in the former Katanga region.

Thus, overwhelmed by increased privatisation of mineral extraction and the number of actors involved in its

governance landscape (see table 1), the *Division des mines* has little control over certain actors (e.g. the large variety of security units). It could be argued that privatising the copper and cobalt mines is not only illustrated by the presence of many extractive companies and joint-ventures across the Haut-Katanga and Lualaba region: this 'haphazard privatisation' (Carter Center 2017: 16–19) is also well illustrated in how it triggers the presence of many entities governing the mines behind formal state agencies, especially the *Divisions des mines* (see table 1).



Tenke Fungurume mining plant - one of the world's largest copper and cobalt mines UNEP, 2010

8 Conclusion



The study underpinning this paper has examined practical norms as a series of informal practices governing the copper and cobalt sector in the Haut-Katanga and Lualaba provinces (the south-eastern area of the Democratic Republic of Congo). The paper itself has drawn attention to the fragmentation of mining governance in these provinces. Our analysis shows that, while the mining sector lacks a coherent, efficient and unique administrative command, it still remains wedded to state authority in many crucial ways. For instance, it is the state that designs the agencies governing the copper and cobalt mines. Despite the creation of security units and other provincial entities, these end up functioning according to practical norms, levying unofficial taxes, with the state still wielding much power in terms of governing the mines. The key finding of our analysis is that mining governance is largely fragmented and feeds, in many instances, practical norms.

This fragmentation occurs in a context of increased privatisation of the extractive sector and has been explored in three domains: coordination between state agencies, everyday supervision of extractive activities and security. Overall, this study shows that the practical norms shaping these domains stem from four sources:

- 1 Ambiguous regulations governing the extractive sector
- 2 The lack of a coherent administrative framework
- 3 Pervasive rent-seeking behaviour from state agents
- 4 The ongoing mineral sector's privatisation.

We tentatively conclude that the more the extractive sector is privatised, the more this unleashes informal governance practices.

This study also found that it is largely state actors themselves who are involved in the production of practical norms. These include provincial governors, heads of state agencies, ordinary civil servants and armed actors. Through official regulations and designated agencies, especially the *Division des mines*, the state has been expected to play a regulatory role in governing extractive activities, while practical norms have taken place in a different fashion. The entities involved have developed their own practices in a semi-autonomous way, liaising with one another and providing extractive companies with leeway to follow suit. Although this study provides basic information on the impact of practical norms on Katangese mining rents and outlines how the actors involved strategise to reap benefits from the mining business, these issues deserve further attention in future

work, such as the forthcoming paper from Wakenge on corruption in the Katangese copper and cobalt sector of the DRC (see bibliography).

This paper has sought to show that, rather than emerging from arrangements with non-state entities *per se*, the practical norms governing copper and cobalt mining are produced and thrive within the state itself, while simultaneously leading to a fragmentation of the latter

and a reduction in its effective governance capacity. However, these different actors and agencies do not add up to a Congolese state because of their relative autonomy. Given the increased privatisation of the mineral sector, practical norms are in danger of damaging ongoing efforts to reform the Congolese mineral sector. Policymakers should understand and pay special attention to the existence of these norms in order to make the governance of the mineral sector more transparent.

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