

The ‘*débrouillardise*’: Certifying ‘conflict-free’ minerals in a context of regulatory pluralism in South Kivu, DR Congo*

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ABSTRACT

This article explores the relationship between transnational governance initiatives for ‘conflict-free’ certification in the eastern provinces of the Democratic Republic of the Congo (DRC) and the regulatory pluralism one finds on the ground. Efforts in certifying artisanal gold mining are scrutinized by analysing how three different gold mining sites in the DRC’s South Kivu province are governed. Most artisanal mining in the DRC is usually referred to as ‘informal’ - a term associated with non-state actors. Instead, the article introduces the idea of a mode of governing that follows the principle of ‘*débrouillardise*’, which combines different rule systems and state and non-state regulators. It argues that ‘conflict-free’ governance will need to improvise via *ad hoc* agreements on the legal status of mining sites among state authorities, economic actors and international monitors. The act of declaring mining sites legal will provide for the semblance of a ‘conflict-free’ status and a unitary state system of rule, while in practice, the plurality of regulatory authority will not be reversed.

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INTRODUCTION

There is a transnational struggle around minerals from the Democratic Republic of the Congo (DRC), which is fundamentally about how territories that contain mineral resources ought to be governed in a so-called post-conflict context. An array of international initiatives was taken to end the trade in ‘conflict minerals’ from the DRC (IPIS 2012; Johnson 2013a: 9; Matthysen & Zaragoza Montejano 2013), following the Congo Wars (1996–1997, 1998–2003) whose ramifications continue to structure local realities in eastern DRC. International actors exerted increasing pressure on the Congolese government (Cuvelier 2013: 132), for they viewed the trading and taxation of minerals by non-state armed groups and the military as perpetuating conflict in its eastern provinces (for a critique on this focus on ‘conflict minerals’ see Autesserre 2012; Johnson 2013a). The struggle is transnational in nature, because not only are inter-governmental institutions but also non-governmental organisations (NGOs), companies, the Congolese state, and non-state actors actively involved in this debate and the concurrent practices.

In March 2011, the government of the DRC declared that the certification of minerals originating from its eastern provinces as ‘conflict-free’ was a legal requirement (Ministère des Mines 2011c), following a model of ‘certified trading chains’ by the German geological service BGR. While ‘conflict-free’ certification as promoted by BGR was meant to be voluntary in character (BGR 2012), Section 1502 of the 2010 Dodd-Frank Act, a law regulating the US-based financial services industry, obliges all companies listed on US stock exchanges to publicly report on whether they procure or use the minerals gold, coltan (tantal), tungsten and cassiterite (tin) (the so-called 3Ts) from the DRC or its neighbouring countries (Government of the United States 2010).

Mineral smelters stopped buying minerals from the Great Lakes region, causing prices for tin and tungsten in the Kivu provinces to drop drastically (UN Group of Experts 2011;

Manhart & Schleicher 2013: 4). As a result, the majority of artisanal miners moved to the gold sector because gold is much easier to smuggle due to its small size and high value (IPIS 2014: 11). 98% of gold is estimated to be smuggled through neighbouring countries to the United Arab Emirates (UN Group of Experts 2014: 37, 41).

The impact of this mandatory US regulation is relevant for future policy measures with regard to the DRC and similar conflict-affected areas around the world (cf. EURAC 2014). Critics of Section 1502 of the Dodd-Frank Act point to, among other things, the economic hardship caused by the near halt of international sales in tin and tungsten, given that the minerals economy is an important source of income for a large part of the Kivus' population (Geenen 2011a; Autesserre 2012, Seay 2012; Taylor 2012).ⁱⁱ Proponents of the regulation call for a cautious assessment of the law's effect, which is difficult to distinguish from the effect of the suspension of mining activities in the eastern provinces by the Congolese president in the period of September 2010 to March 2011 (Cuvelier 2013: 13; IPIS 2012; EURAC 2014).

The inconclusive debate on the US Dodd-Frank Act shows that its impact cannot be easily measured. It is necessary to understand the local conditions that affect how the artisanal mining sector is governed—particularly in the gold sector, which is gaining importance for the local economy. Since the Congo Wars, political authority in eastern DRC is fragmented and being renegotiated (Raeymaekers *et al.* 2008: 14). State institutions and other competing power holders such as customary authorities or armed groups attempt to regulate mineral extraction.ⁱⁱⁱ In this article I refer to this political context as regulatory pluralism. 'Conflict-free' certification, on the contrary, is rooted in an understanding of a unitary state system of rule where there is an absence of illegal armed group or military involvement. The rule of force by armed actors is meant to be overcome by the rule of law. In this spirit, only legal mining sites should be certified as 'conflict-free'.

The following questions thus arise: How are transnational governance initiatives implemented in the context of regulatory pluralism? Is a ‘conflict free’ certification scheme compatible with regulatory pluralism? In order to answer these questions, one needs to first understand what regulatory pluralism means in the context of the Congolese mining sector. This article aims to do just that by empirically investigating how artisanal gold mining in the DRC’s South Kivu province is governed in practice, and by developing a conceptual framework that is better able to capture this reality and its relation to ‘conflict-free’ governance initiatives.

First, a conceptual framework for the analysis of ‘conflict-free’ governance initiatives in the context of regulatory pluralism is proposed. I argue that the concept of modes of governing is best able to account for the actual governing practices of Congolese and international actors. Second, the article describes how three different gold mining sites in South Kivu were governed at the time of the field research in late 2011 to illustrate the collusion of actors supposedly representing different rule systems. Third, I propose to understand the current practices of governing the mining sector in South Kivu, DRC, according to three different modes of governing, which represent different political projects of developing the Congolese mining sector. The article finally assesses the implications of the interplay of ‘conflict-free’ initiatives with governing practices on the ground.

CONCEPTUAL FRAMEWORK: FROM REGULATORY PLURALISM TO MODES OF GOVERNING

An entry point to what is meant by regulatory pluralism is provided by the ‘state-in-society approach’ of Migdal (Migdal 2001). To Migdal, ‘there is no uncontested universal code—in law, religion, or any other institution—in any society for guiding people’s lives’ (ibid.:11). Different groupings in society, including states, strive for political control and domination, using different modes of sanctioning and rewarding. In the discussion on legal

pluralism, proponents of a social science perspective have held the same view that plural normative orders are found in virtually all societies (Merry 1988: 873).^{iv} Unlike Migdal or Merry who see regulatory pluralism present in every society, some scholars use regulatory pluralism as a more neutral concept than ‘fragile states’ for conflict-affected regions, where the authority of a unitary state is more drastically challenged, as is the case in the DRC. Roitman (2005: 204), for instance, delineates how ‘military–commercial networks’ prevail over commercial exchanges in the border regions of the Chad Basin, which are outside the state’s regulatory reach. However, she underlines that ‘the pluralisation of regulatory authority in the Chad Basin is not [...] indicative of the demise of state sovereignty’ (ibid.: 200). As it is the state itself who grants civil servants opportunities for private appropriation to replace their salary, the ‘state is at the very heart of the proliferation of (...) the pluralisation of regulatory authority’ (ibid.: 204).

One needs to distinguish between the empirical reality of regulatory pluralism, determining which specific groupings in society achieve such regulatory powers, and regulatory pluralism as an analytical tool to decipher such reality. Benda-Beckmann (2002) has emphasised the importance of such a distinction in the discussion on legal pluralism. Whether the norms of the state should have primary effect in society is a separate question that needs political and moral deliberation (ibid.: 45). By contrast, in the literature on environmental regulation, regulatory pluralism takes on a positive, normative connotation of how things ought to be regulated efficiently:

The term ‘smart regulation’ is used to include an emerging form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control which seek to harness not just government but also business and third parties. [...] The central argument is that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader

range of regulatory actors, will produce better regulation (Gunningham 2007: 6–7).

This article is concerned with the empirical reality of regulatory pluralism in the DRC and thus merely uses the concept of regulatory pluralism as an analytical starting point. Hesselbein *et al.*, (2006) describe four competing rule systems in Africa that provide distinct normative frameworks and incentive structures: First, ‘the rule systems adopted by the state (statutory law)’, second, systems, which ‘evolved over time by older communities (customary traditions)’, third, ‘rule systems that communities or groups have devised for survival’, and fourth, those ‘hatched by non-state centres of power (warlords, bosses, criminal gangs)’ (ibid.: 1). Effectively, different systems of rule may contradict one another. One example for this in the DRC are mining concessions, where state authorities provide mining companies with licenses for exploration or exploitation in areas where artisanal miners have been digging before with the endorsement of customary authorities (Kamundala 2012: 14).

However, this article finds that, as regards the DRC, beyond this apparent distinction between customary and state systems of rule, it is nearly impossible to neatly separate different rule systems from one another (cf. Johnson 2013b: 22). For instance, a separation between the survival rule system and the system led by criminals is challenging. In the DRC, survival depends on an informal economy and cross-border trade, which relies on networks that could be characterised as criminal. High-ranking military personnel are involved in unofficial trading networks (Pole Institute 2010; De Koning 2010; UNODC 2011). Equally, it would be difficult to clearly separate the customary and statutory system of rule from the rule of warlords, for customary rulers are known to have supported community-based militia groups (Mai-Mai), while state authorities at the national, provincial and local level have used armed groups to maintain influence (Verweijen

2012:18, 28). Even state and non-state armed actors are difficult to distinguish at times, for example in the case of former militia groups that were integrated into the national army but still resemble non-state actors in their ‘constitution and structure’ (Garrett *et al.* 2009: 10). Moreover, we see that ruling elites straddle different rule systems, such as customary chiefs who run for elections of representative assemblies (Verweijen 2012: 28). The concept of ‘straddling’ (Roitman 1990) accounts for actors who have their feet in different spheres, which are usually referred to in dichotomies (‘formal’ and ‘informal’, ‘legal’ and ‘illegal’, or ‘political’ and ‘economic’). Therefore the concept of distinct systems of rule is of little analytical value when trying to understand the empirical reality of governing the mining sector in the DRC.

It is equally of little analytical value for the purpose of analysing transnational governance initiatives that bring together different kinds of actors representing different systems of rule. The following international actors were initiators of ‘clean’ supply chains of minerals from the DRC: governmental agencies (e.g. BGR), intergovernmental organisations (INGOs) (e.g. the International Conference for Peace, Security, Stability and Development in the Great Lakes Region, ICGLR), NGOs (e.g. Global Witness) and corporate associations (e.g. the International Tin Research Institute, ITRI) (Cuvelier 2013: 136–39; Pole Institute 2010: 10–12). Congolese state institutions (national and provincial), NGOs and economic players take part in the implementation efforts of ‘conflict-free’ certification. As such, it would clearly be difficult to categorise the ‘conflict-free’ initiatives within the conceptual framework of the four systems of rule.

Following an alternative analytical concept, one could understand the reality of governing the Congolese mining sector just described as a ‘hybrid governance arrangement’ (Luckham & Kirk 2012: 43). Hybrid political orders encompass a variety of state and non-state forms of order—‘customary’, those inherited through colonialism, and ‘new forces’

related to globalisation (Boege *et al.* 2008: 9). The concept acknowledges that ‘these spheres do not exist in isolation from each other, but permeate each other and, consequently, give rise to a different and genuine political order’ (ibid.: 10). This genuine political order, however, is no more clearly defined and does not tell us anything about the specific situation in the DRC and different governing projects that varying coalitions of actors pursue over time.

Hence, I propose to think of the ‘conflict free’ undertaking as a mode of governing (see Bulkeley, Watson & Hudson 2007), which links different systems of rule. This is different from inventing yet another categorisation because a mode of governing is dynamic and specific to its historic and geographic context—which does not exclude that similar modes of governing can be found elsewhere. Rather than representing distinct systems of rule, modes of governing point us to the practices of governing and administration. They allow us to address ‘the complexities of how authority is attained, maintained, and exercised, with the practice of governing’, taking shape around particular objects of governing (ibid.: 2734), in this case the mineral economy.

In comparison to governance, modes of governing do not completely replace the state and hierarchical forms of rule, as had been the case in the analytical shift from government to governance (ibid.). Hierarchical relationships between military rulers and artisanal miners cannot be denied. The nation-state continues to be a positive reference point among a diverse range of Congolese stakeholders, in the face of its objective failure (Trefon *et al.* 2002: 384; Autesserre 2012: 219–21). Unlike concepts such as ‘coercive governance’ or ‘self-governance’ (Garrett *et al.* 2009: 11), modes of governing do not represent pure ideal types but rather constitute a combination of ideal types (normative frameworks) and practices. Normative frameworks that guide the modes of governing are not confined to explicitly formulated rules (such as written laws and regulations). ‘Practical knowledge’

(Reckwitz 2003: 292), which has grown historically and is socially determined, is more important than explicit rules for understanding people's behaviour. This idea is influenced by a theory of social practices (Reckwitz 2003), which assumes that people are driven by routines. This means that it is more important to know *how* to do things than to know *what* the truth is or what the rules are. Part of this practical knowledge form 'practical norms' that De Sardan (2008: 1) asks us to focus our attention on in order to determine 'what rules actually govern the action of public actors'.

Such a theory of social practices is useful for capturing the fuzzy reality of governing mineral extraction in eastern DRC. In practice, it may be more important to a Congolese civil servant to know how to navigate the Congolese political system and the intricacies of the mining sector than to know the formal rules. The historical record of practical knowledge implies that the practical knowledge of Congolese actors must be different from those of international stakeholders who were socialised in a different context. To be socially determined also means that a Congolese public servant will act differently from, for instance, a German civil servant. Conversely it means that routines in Congolese state administrative offices may not differ substantially from customary systems of rule.

To sum up, in this article, modes of governing are understood as governing projects - by a coalition of diverse actors - that rely on a distinct normative framework of explicit rules and practical knowledge that define access to resources, and on a set of governmental techniques (practices) to administer these access rights.

GOVERNING PRACTICES IN THREE GOLD MINING SITES

In the following section I will describe how three artisanal gold mining sites in South Kivu are governed. The description is based on a desk study and interview material from a research visit of several weeks in South Kivu, DRC, in September to October 2011 with a

colleague and partners from local NGOs, to mining sites in the administrative territories Walungu and Mwenga as well as Southern Fizi. The research encompassed 50 interviews and informal conversations with a wide range of stakeholders in the Kivu's mining sector (miners, traders, state institutions, civil society groups...) and was complemented by a visit to Bukavu in September 2012. It should be highlighted that the following account only applies to this time period, unless otherwise noted.

All mines were situated in government-controlled territory, i.e. where state military (FARDC) was stationed nearby. In areas controlled by non-state armed groups, such as the Forces Démocratiques pour la Libération du Rwanda (FDLR) or Mai-Mai militia groups, the positions military actors held in governing the mining sites described here would be held by these armed groups. A recent mapping exercise by a European research institute in co-operation with state and civil society institutions shows the location of 1088 mining sites in eastern DRC, over 500 of which included cases of taxation by non-state armed groups or the Congolese army (313 cases) (IPIS 2014:8).

Artisanal gold mining in the DRC is mostly done manually, but in some mines, mechanisation tools are used to facilitate some steps in the process of extracting and processing the gold ores. Explosives are used to advance more quickly towards the gold artery in mountainous terrain, grinding machines serve to crush gold ores, water pumps empty tunnels filled with river or underground water, and oxygen pumps provide life-saving oxygen to workers digging deep underground (Geenen 2011a; Hütz-Adams & Müller 2012).

The first two sites introduced here, near the villages of Nyamurhale and Mukungwe in Walungu Territory, are similar in the sense that they are both underground pits, i.e. primary deposits of gold. The mining sites visited in Mukera, Fizi Territory, on the other hand, are alluvial, open pit sites.

Mukungwe

The mining sites at Mukungwe are an interesting case, for Mukungwe had been chosen as a pilot site for the national certification system. Not much has occurred in that direction because the mine was highly disputed at the time of research. Mukungwe is part of the concession area acquired by the Canadian company Banro.^v At the time of research, Banro had not been able to start exploration activities. In practice, the mining sites at Mukungwe had been governed by two rival local families who had contested their claims to the gold reserves for generations, referring to their customary rights to the land. During the second Congo War (1998–2003), the family of Kurhenga Muzimu had supported the militia group *Mudundu 40*, whereas the family of Chunu had formed its own called *Matonge*. After the war, both families tried to back up their claims to the gold mines by acquiring mining titles from state authorities. Since then, they have been building alliances with influential military commanders, ousting each other in turn (interviews by author; Geenen & Claessens 2012).^{vi}

In 2011, the mining site was run by an ‘Administrative Committee’, organised by one family clan and associated miners. While the Committee tried to resemble an official body, with president, vice-president and various sub-committees, its main function was the collection of taxes from all those who undertook economic activities in the mine: miners, the owners of treatment units, gold buyers, shopkeepers, market vendors, bar owners, and prostitutes. The revenues were shared with units of the Congolese army, which were stationed in the mine (Miners 2011 int.; Mine managers 2011 int.; Prostitutes 2011 int.).

In addition, the military commanders extracted money from individual pit managers and diggers by force, descending down into the pits: ‘Every month, the soldiers change. The soldiers treat us very badly. (...) They come to the underground tunnel and ask for money.

If you don't have it, they slap you. Even if you pay, they can come back the next day to ask the same amount of money' (Miners 2011 int.).^{vii}

As at most artisanal mining sites in eastern DRC, in each pit a group of diggers work under the supervision of one or several managers (*PDG*) (Geenen 2011a). The workers tried to organise themselves collectively, together with the *PDGs*, in committees and co-operatives, not only to represent them, but also to settle disputes among themselves (Hütz-Adams & Müller 2012; Miners 2011 int.; Mine managers 2011 int.). In the face of customary authorities who are backed up by military force, such efforts at self-organisation are fraught with difficulties: The two local strongmen Kurhenga Muzimu and Chunu each had created their own cooperative and excluded members of the miners' co-operative (Miners 2011 int.).

In Mukungwe, both customary and military agents physically controlled the mine, taxed the miners and were thus actively co-governing the mining site. State agents were mostly sidelined, but some state agents like the Administrator of Walungu Territory tried to play a mediating role between Banro, the miners, the customary authorities and military units (Miners 2011 int.; Mine managers 2011 int.; Administrative Committee 2011 int.; Prostitutes 2011 int.).

Nyamurhale

The second mining site described here is the one near the village of Nyamurhale. An investigation team consisting of the mining authorities, Banro and the United Nations Organization Stabilization Mission in the DR Congo (MONUSCO) identified Nyamurhale in late 2011 as one of two mining sites in Walungu Territory (South Kivu) that are not covered by the concession held by Banro (SAESSCAM 2011 int.). Gold gravel is extracted from a hilltop and later crushed, grinded and washed at a water source further down the

hill.

In 2011, Nyamurhale was not militarised like Mukungwe, but governed by customary authorities. The statement of interview partners in 2011: ‘La colline est pour le *Mwami*’ (‘The hill belongs to the *Mwami*’) reflects the local understanding of who has the right to the land (including the underground resources) and the right to administer it. Accordingly, the *Mwami* or *Chef de groupement*,^{viii} gives permission to start a new pit. At the time of research, the *Mwami* had two representatives at the mining site who collected taxes (Miners 2011 int.; Representatives of *Mwami* 2011 int.). The military was not stationed in the mine, but, according to miners in Nyamurhale, soldiers from a brigade in the nearby town Burhale came and forced diggers to work several hours a week for them. From the interviews alone the relationship between customary and state authorities did not become clear. The diggers also paid levies to the state mining institutions, which shows that the state authorities had access to the mining site (Miners 2011 int.; Representatives of *Mwami* 2011 int.).

The miners had formed two committees, one for the pits in the hill (‘*Comité de carrière*’) and one for the treatment centre at the foot of the hill. The committee on the hill stated that it defended the rights of the diggers, resolved conflicts and was the contact point for the (customary) authorities. It was elected in the presence of the *Chef de groupement*, with a three-year mandate (Miners 2011 int.).

The fact that at the time of research there was no administrative committee like in Mukungwe, but merely two representatives of the customary authorities, shows that the governance by customary authorities was less comprehensive and intrusive than in Mukungwe. However, one can say that the miners’ committees formed part of the governance by customary authorities, for they were contact point for the authorities, and the elections were overseen by the *Chef de groupement*. Arguably, through them, the

customary authorities were better able to control the mining site and the miners.

Mukera

The mining sites at Mukera, Fizi Territory, are situated outside the village, as in Nyamurhale. Alluvial gold is washed out of open pits along the river Angute^{ix} in rapidly shifting pits and groups of workers. In 2011, various regulatory authorities were present in Mukera: the mining authority (with its own office), a local *chef de police* (with his own office), the village chief, the Congolese secret service (ANR), and military units. Armed groups were not involved in the active governing of the mining site in 2011. More hidden links between customary authorities and the militia group Mai-Mai Yakutumba appear to have existed nevertheless (Verweijen 2012: 29). Both the mining authority and the village chief (supposedly representing the *Chef de groupement*) physically checked on the mining sites to control miners' registration cards and collect fees that go beyond what is foreseen by law. Sometimes they were accompanied by a local policeman who could lock up those who did not have valid papers or who were not prepared to pay a bribe (Miners 2011 int.; Customary authorities 2011 int.; State mining authorities 2011 int.).

At the time of research, customary and civil state authorities thus actively co-governed the mining sites at Mukera and collaborated closely. Their governance was intrusive, their regime rigid. Mine workers were hardly permitted to talk to the researchers in the presence of the mining authorities and police. In contrast, the military units stationed in Mukera were not directly positioned at the mining sites. They were reported to occasionally erect barriers at the entry points of the mining sites only and to force miners to pay random amounts of 'duties'. In addition, the mining division reportedly collected fees on behalf of the military (Miners 2011 int.; Customary authorities 2011 int.; State mining authorities 2011 int.).

The mining authority also used forms of miners' self-organisation for governing the mining site. Pit managers and diggers were organised in so-called cells. The cell chiefs were responsible for co-ordinating the collection of levies by the mining authority. Therefore some miners were very hostile towards the state authorities; even towards a miners' co-operative: 'The mining [authority] cannot tell the miners anything. (...) We consider the two [mining authority and cooperative] as thieves' (Miners 2011 int.; State mining authorities 2011 int.).

The mining division also collaborated with unofficial regulatory authorities—the village chief and his entourage—in the distribution of land for mining. It reported itself that, when gold was found on land around the village, it would divide the land into three zones, one of which would belong to the original land owner, one to the lucky finder of the gold and the third to the authorities.^x A mining officer based in a town nearby admitted that it would need a prospection permit to do so, but that 'because we do not have the documents, we leave them free access' (Mining authority 2011 int.; Chef de police 2011 int.; cf. Verweijen 2012). By distributing land in a completely informal way, the local mining authority had incidentally seized control of land titling. It thereby provided the extraction practices with a semblance of legality.

The three cases show that none of the four distinct rule systems formulated by Hesselbein *et al.* aptly describe how the mining sites were governed. The artisanal mining operations are partially ruled by customary law, and, at the same time, captured by state institutions through the registration and taxation of traders and miners. Taxation here refers to the levying of various fees and not corporate investment taxes in the proper sense. State agents collaborated with unofficial regulators—customary and military—to collect levies they would otherwise not have access to (cf. iTSCi Governance Assessment 2013; IPIS 2014: 17). At the same time, the semblance of legality of the mining activities was kept intact,

which confirms Roitman's (2005) assertion that the pluralisation of regulatory authority does not imply the demise of state sovereignty, but rather that state agents participate in the proliferation of such pluralisation.

MODES OF GOVERNING IN SOUTH KIVU'S MINERAL SECTOR

In the following section, I will chart three competing modes of governing mineral extraction that are pursued by different but overlapping coalitions of actors in relation to minerals from the Kivus—the one just described, transnational efforts aimed at 'conflict-free' minerals and the project of 'statutory' large-scale mining ventures.^{xi} All three suggest different solutions of how the Congolese mining sector ought to be governed (normative framework) and leave certain imprints on the local level (practices).

'Débrouillardise'

Most artisanal mining in the DRC operates outside the legal framework of the state. The Congolese mining law only allows large-scale (*industrielle*) and small-scale (*petite mine*) mining ventures to acquire exploration and exploitation licenses. Artisanal miners are merely allowed to extract minerals in areas that are not due for industrial exploitation and that are officially designated 'artisanal mining zones' (Geenen & Claessens 2012: 187). None of the handful declared artisanal mining zones in South Kivu were operational in 2011 and most of artisanal mining areas are covered by industrial concessions (Kamundala 2012: 14). This way, the Congolese state has effectively rendered most artisanal mining illegal.

The terms 'informal' (Geenen 2012: 1) or 'extralegal' (Strazzari & Kamphuis 2012: 58) are sometimes preferred, for artisanal mining activities are not illegal in themselves. Yet, 'informality' would not aptly characterise the mode of governing described above.

Following the widespread dichotomies of ‘formal’ vs. ‘informal’ and ‘state’ vs. ‘customary’, informality is usually associated with customary authorities and other non-state actors. However, we observe that those supposedly ‘informal’ artisanal mining sites are co-governed by customary authorities, armed groups or military units *and* civil state institutions.

This high degree of conjunction between official and unofficial actors in the DRC and elsewhere has elicited a debate on what is (in)formal and (il)legal.^{xii} As an example of similar modes of governing outside the DRC, Janet Roitman (2005: 166) succinctly notes in her account of transnational unofficial trading networks across the borders of Chad, Cameroon and the Central African Republic:

In an unregulated market town, [...] a Cameroonian customs unit [...] managed to take in 20 million in F CFA each year through sales of market duties and licenses.[...] But this does not necessarily mean rendering ‘legal’ unregulated traffic. The state can offer a legal structure for these activities without altering the fact that they are either formally illegal or based on fraud.

One might follow Roitman in calling such state practices ‘formalisation’. It makes sense if the term ‘formalisation’ is understood as referring to the practice of performing administrative measures (issuing forms, dividing land plots, etc.), which imply a recognition by the state. Arguably, this state recognition is part and parcel of the term formalisation that is used in policy circles to denote the path towards legalisation, acknowledging that it will be a long way to achieve outright legalisation (cf. Hinton & Levin 2010: 12). As a consequence, a large part of artisanal mining activities in eastern DRC may no longer be called ‘informal’ but rather ‘formalised’, for state institutions levy taxes on them by issuing miners’ and traders’ cards.

Given the implication of state actors in this ‘informal’ mode of governing, I suggest to call it ‘*débrouillardise*’. The French term *débrouillardise* is often associated with the informal economy and the marginalised, a way of getting by—*se débrouiller*. *La débrouille* is also used by Congolese people to denote a common survival tactic (Marriage 2013: 2–3). At the

same time, the French original contains notions such as ingenuity and resourcefulness, which refer to the creative and inventive spirit that is often needed to cope with the hazards of the informal economy. In that sense, it is related to the concept of ‘bricolage’ as elaborated by Lévi-Strauss—making do with what is at hand (Levi-Strauss 1966). However, ‘bricolage’ does not fit a concept of governing practices, where no common material output is sought.

The ‘*débrouillardise*’ implies a great deal of complicity and overlap between state and non-state power holders. The exact mode of governing, including the set-up of actors who exert control, differs from mining site to mining site. The mode of governing is thus very flexible.

As there is no formal rule system that guides the ‘*débrouillardise*’, the normative framework only consists of practical knowledge of the actors involved. Local livelihoods and survival are the dominant rationale that drives actors of this mode of governing. Greed or profit-maximisation is only a minor part of the norms, as ‘the majority of those involved in the trade in precious minerals continue to be motivated by coping and survival’ (Larmer, Laudati & Clark 2013: 6). Artisanal miners in South Kivu consider artisanal mining as a way of life and a viable and profitable livelihood, preferable to industrial mining (Geenen *et al.* 2013: 9, 25–30).

Access to land and (economic proceeds of) mineral resources is not only determined by customary rules, long-term relationships (cf. Geenen 2011b; Geenen & Claessens 2013) but also by arbitrary inventions by state and military representatives, which can be seen as an outcome of negotiated settlements (Garrett *et al.* 2009). Bullying and harassment of miners by various kinds of authorities, civil and military, is widespread. Complaints by the general population about these hassles—locally known as *tracasseries*—are common.

'Statutory'

The mode of 'statutory' refers to legal large-scale exploration and exploitation. The normative framework is that of a national mining economy that feeds into the growth of the national gross domestic product (GDP) and increases state revenues from mining (cf. Bebbington *et al.* 2008: 901 in Geenen *et al.* 2013: 8). According to statutory principles, this mode of governing is supposed to be universal and static in its application to different mines in the national territory of the DRC. The underlying developmental vision is that of a mining economy dominated by large-scale mining ventures. It is contained in the Congolese mining code of 2002, which was influenced by the World Bank's favourable treatment of industrial mining (Geenen *et al.* 2013: 6, 12).

In practice, however, the governance of the specific concession areas only resembles a statutory framework. A number of international mining companies hold exploration concessions in the DRC, but the only larger mining company that currently extracts gold in South Kivu, is the Canadian Banro Corporation. It acquired its concessions under dubious circumstances at the outset of the first Congo War and had its concessions (partly) confirmed after the second Congo War in an out-of-court agreement, which does not follow the mining law but the convention approved by the Congolese president (République Démocratique du Congo 2002: Article 340; Geenen 2011a). The deal with Banro is not an exception: Between 2010 and 2012, mining deals with the DRC government may have cost the state of the DRC US \$1.36 billion in lost revenues through asset under-pricing (Africa Progress Panel 2013: 56).

The fact that the Mining Code allows for extra-legal arrangements between the president and mining companies, reveals yet again the partly informal character of state institutions' governing practices. In addition, the mining sites are not only governed by state institutions, as statutory law would have it, but also by the mining companies (cf. Hönke

2014) and customary authorities. Banro, for instance, was part of a mixed mission with state institutions in late 2011 that sought to determine which artisanal mining sites in South Kivu were within the perimeters of its concession areas and which were not. The mission had to rely on technical equipment held by Banro (SAESSCAM 2011 int.). In another concession area of Banro around Luvindja in Walungu Territory, customary authorities were crucial in negotiating a deal with Banro on the compensation of artisanal miners and development projects for the community. The same customary representative of the community was co-opted into the provincial assembly through close relations with the Congolese president (Geenen & Hönke 2013: 7). Hence, even according to the practices of the ‘statutory’ mode, the state relies on non-state actors to govern the mining sites.

Given the extra-legal arrangements between state and non-state actors and mining companies, one could be inclined to consider these governing practices to be part of the same hybrid political order as the artisanal ‘*débrouillardise*’. What distinguishes them from one another, are the distinct normative frameworks they are guided by.

‘Conflict-free’

The mode of ‘conflict free’ refers to the legal exploitation and trading of minerals which are free of involvement of non-state armed groups and the military. The process of certification consists of qualification and subsequent certification missions, during which teams of state representatives, BGR, NGOs and economic partners assess the state of governance in each mining site. The explicit rules of the ‘conflict-free’ mode of governing are contained in the national certification system of the DRC, which allows for the implementation of different international minerals tracing initiatives by governments, INGOs, and (electronics and minerals processing) industry (IPIS 2012). It is part of a regional certification mechanism of the ICGLR, which defines mining sites as ‘conflict-

free' when they are free from illegal armed group or military involvement and from the worst forms of child labour and human rights abuse (ICGLR & PAC 2012). In the DRC, this definition boiled down to mines in which no armed groups, military, children and women were present (BGR 2011 int.; BEST 2011 int.).

A precondition to being certified as 'conflict-free' is the legality of the mining venture (Ministère des Mines 2011b: 31). To achieve legal status, the Congolese government demanded all miners to organise themselves as co-operatives (Ministère des Mines 2011c). The requirement of legality would accommodate the state rule system, but customary and survival forms of rule would not be excluded either, as long as they did not include non-state armed groups or the military.

While industrial mining was certainly not immune to the financing of armed groups in the Congo wars (Geenen *et al.* 2013: 13–16; Hönke 2014), efforts to establish clean supply chains within the DRC focus on the artisanal mining sector. Industrial companies like Banro do not use intermediates to have their gold smelted and exported and therefore did not seem open in 2011 to take part in 'conflict-free' certification efforts (BGR 2011 int.).

How is this normative framework of what constitutes 'conflict-free' turned into practical knowledge of Congolese and international stakeholders who coalesce to achieve this kind of governance? We get an idea by examining how the different stakeholders interpret the definition of 'conflict-free'. The most obvious case to exemplify different interpretations is that of 'children' and 'women' not allowed to work in the mines. Whereas in the interviews with the author, the BGR referred to international standards that completely forbid the work of children, local NGOs involved in the process referred to local practices of child labour and argued that only dangerous work should be forbidden. Some NGOs insisted that all women should be banned from working in the mines for their own protection,^{xiii} whereas some state representatives made clear this interdiction should only apply to

women at risk like pregnant women (BEST 2011 int.; Multi-stakeholder workshop 2011 int.).

As a result, it was very difficult to see through the exact criteria applied during the Congolese certification process for gold in 2011. As the official guideline for certifying gold mining sites (Ministère des Mines 2011a) was very vague, interview partners referred to the guideline for the 3T minerals instead. No ‘common check-list’ for mine site assessments by different tracing initiatives existed (Johnson 2013a: 13).

In June 2013, two mines in eastern DRC were certified as conflict-free by the regional standards of the ICGLR. 86 out of more than 1000 registered sites were considered ‘green’ by October 2014 (EURAC 2014: 12). One of the certified mines, Kalimbi in Nyabibwe, used to be similarly contested between two rival strongmen as Mukungwe (Cuvelier 2013: 140–42; Matthysen & Zaragoza Montejano 2013: 16–21). State institutions forced a compromise between the rival co-operatives claiming the mine, and the Minister of Mines declared the mine legal to allow it to be certified as ‘conflict-free’ (Hütz-Adams & Müller 2012: 56).

In line with the variety of stakeholders who champion different tracing systems and interpret the definition of ‘conflict-free’ differently, the implementation of the ‘conflict free’ certification scheme is varied and patchy (cf. Autesserre 2012; Seay 2012; Johnson 2013a). The infrastructure to trace the trading of artisanally mined minerals, in particular, hardly exists. In South Kivu, only two trading centres were built, in Mugogo and Baraka, that were supposed to offer a safe place to market minerals at fairer prices (IPIS 2012: 21): clearly insufficient for the whole of Kivu. At the time of research, a whistle-blowing mechanism was being installed at the regional level of the ICGLR to report non-compliant behaviour. Local *Comités de suivis* made up of local state institutions and civil society groups now collect information on what is happening in the mines and along the trading

chains and report it to state authorities for them to follow-up (Global Witness 2013). The difficulties that state authorities have in doing so are shown in an incident in October 2013: After two seizures of smuggled gold in South Kivu, ‘high-ranking officials’ intervened and released the gold traffickers (UN Group of Experts 2014: 38). Asked whether the ‘conflict-free’ certification initiative was known to them, a member of the ‘Administrative Committee’ in Mukungwe replied: ‘I would not want to miss that certificate. I would ask to proceed slowly. People are still ignorant of the law,’ and: ‘We first need peace. We are following the logic of the state, but the evildoers need to be punished’ (Administrative Committee 2011 int.).

TRANSFORMING THE MODE OF ‘DÉBROUILLARDISE’ INTO ‘CONFLICT-FREE’?

Is the current project of ‘conflict-free’ minerals compatible with the mode of ‘*débrouillardise*’? Is ‘conflict-free’ even a good approach to changing things for the better for the people whose livelihoods depend on artisanal mining?

Starting with the second question first, one could expect that many miners and traders involved in the artisanal mining economy would benefit from a ‘conflict-free’ mode of governing, because one part of the daily *tracasseries* they endure—the exactions by military and armed groups—would stop. However, the other part of the *tracasseries*—taxation by civil state and customary authorities beyond state regulations—is not directly addressed by ‘conflict-free’ certification. In addition, ‘conflict-free’ does not mean free of violence and it is questionable whether ‘conflict-free’ will change how minerals are exploited in the DRC in any substantive way.

As to the first question, the normative frameworks of the modes of ‘*débrouillardise*’ and of ‘conflict-free’ are largely incompatible. The bottom-line of the ‘conflict-free’ framework – to exclude armed actors- is not fundamentally incompatible with principles of survival and

customary rule that prevail in the *'débrouillardise'* of artisanal mining areas. However, the formal requirement of the 'conflict-free' certification to be legal is incompatible with the regulatory pluralism of the *'débrouillardise'*. As was noted earlier, the requirement of legality currently excludes most of artisanal mining sites in the Kivus. Implicitly, the 'conflict-free' certification favours industrial and small-scale mines that hold concession titles. Moreover, in the mode of *'débrouillardise'*, one cannot clearly separate between 'forces of evil' and 'forces of good', as expressed by the idea of 'conflict-free'. The fact that civil state and non-state regulatory authorities actively collaborate with military units or armed groups (cf. Verweijen 2012) runs counter to a 'conflict-free' framework.

On the other hand, the flexibility of the *'débrouillardise'* can also be favourable to projects of 'conflict-free' minerals in practice. Influential actors, such as the Minister of Mines, can relatively easily change the status of a mine by declaring it legal, i.e. by announcing an official agreement between holders of mining licenses and artisanal miners. However, any change towards a 'conflict-free' status can also be easily reversed. In the case of Kalimibi, it was reported that some military actors were able to commercialise parts of the mine's production in parallel to the certified minerals (Global Witness 2013: 8; Pact Institute 2013: 6). Congo expert Jason Stearns advocates a 'flexible approach' by the 'conflict-free' initiative to safeguard the achieved improvements (Matthysen & Zaragoza Montejano 2013: 21).

Hence, 'conflict-free' certification can only be achieved via *ad hoc* agreements on the legal status of mining sites among state authorities, economic actors and international monitors. This means that, in the DRC context of regulatory pluralism, a 'conflict-free' certification scheme can only be implemented if it operates in part according to the principles of the *'débrouillardise'* (cf. Johnson 2013b: 25). The declaration of artisanal mines as legal by the mining authorities in the run up to certification will serve to uphold the semblance of a

unitary state system of rule, while in practice, the plurality of regulatory authority will not be reversed. While this does not mean that no mine can effectively manage to ban connections to military or armed groups, it highlights the very fragile character of such a ‘conflict-free’ status, which only represents a certain moment in time and which can be easily reversed by the persistent practices of *‘débrouillardise’*.

CONCLUSION

‘Conflict-free’ mining initiatives are faced with an artisanal mining sector that in practice is governed by the dominant mode of *‘débrouillardise’*. Under this mode, artisanal miners operate outside the legal framework because the state hardly provides for the legally required artisanal mining zones and most of the gold mining areas are covered by industrial mining concessions, which represent a ‘statutory’ mode of governing. This status of ‘informal’ mining, however, takes place in a context of regulatory pluralism, which some state institutions themselves condone. They partly register and tax miners and traders, thereby collaborating with customary authorities and sometimes military units who appear as competing regulatory authorities. This can be considered a kind of formalisation that is not openly recognised by state authorities.

The mode of ‘conflict-free’ governing, which requires legality of the mining operations and a clear separation of ‘forces of evil’ from ‘forces of good’, is hardly compatible with this mode of *‘débrouillardise’*. However, faced with the reality of highly contested access to artisanal mining areas, a ‘conflict-free’ certification scheme can only be implemented in the DRC context by adapting to that mode of governing and by operating partly according to the principles of the *‘débrouillardise’*. That means the ‘conflict-free’ governance initiative has to become hybrid to achieve anything on the ground in the DRC.

It appears that the competing modes of governing, namely '*débrouillardise*', '*statutory*' and '*conflict-free*', will become part of the same hybrid political order in the end. However, the differing political projects they represent do matter to how minerals are mined in the DRC and should not be all lumped together. Behind the different modes of governing lies a struggle over different models of a mining economy and who will benefit from it. Distilling those different developmental visions might help in imagining a political future for the Congo that goes beyond 'conflict-free' and 'state reconstruction' (cf. Autesserre 2012).

By insisting on legality, the 'conflict-free' initiatives evade the debate about what constitutes legitimate mining in the eyes of the Congolese or 'responsible sourcing' (EURAC 2014) in the eyes of consumers world-wide. One might see the practice of '*débrouillardise*' as undermining a 'formalized peace economy' (Garrett *et al.* 2009), but with regard to the Kivus' mining sector, this reality is here to stay. Instead of repeatedly calling for the formalisation of the DRC's artisanal mining sector, it may be more fruitful for the Congolese state and international actors to finally recognise artisanal mining as a legitimate practice and the *de facto* formalisation of parts of it by state authorities. This way, the chances of accounting for the unaccounted state revenues (accrued through legal and extra-legal taxation) and of contributing to the development of the regions where mining takes place may actually rise. It may also be one step towards building positive peace in eastern DRC.

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NOTES

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- i . The term ‘international’ refers to external, non-Congolese actors here.
- ii . See An Open Letter, published in September 2014 by some 70 researchers and practitioners: <<http://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf>>, accessed 25.11.2014.
- iii . Through regulation, political rulers seek control over opportunities to access power, wealth and rights (Roitman 2005).
- iv . To avoid confusion in the discussion on (extra-)legality and (in)formality, the term regulatory pluralism is used here instead of legal pluralism, legality hence referring to state legality. Some legal pluralists require regulatory authorities to have a minimum of voluntary compliance, whereas this article does not distinguish between voluntary and non-voluntary compliance.
- v . Even this fact was disputed by the local civil society in an open letter of March 2012.
- vi . In August 2013, the government decreed an interdiction of all artisanal mining in that zone (Radio Okapi, 11 September 2013: <http://radiookapi.net/economie/2013/09/11/sud-kivu-lexploitation-artisanale-interdite-dans-le-site-de-mukungwe/>).
- vii . All interview quotes are translated from French to English by the author.
- viii . A *groupement* is an administrative unit between the village and territory level. The function of the *Mwami* was instituted by the Belgian colonial authorities, replacing several traditional chiefs in one area (Verweijen 2012: 6).
- ix . The river Angute flows into the river Mukera, which is a tributary to the river Mutambala, which flows into Lake Tanganyika (bordering Burundi, Tansania and Zambia).
- x . It did not become clear from the interviews which authorities he was referring to.
- xi . For an alternative perspective on modes of governing in Ituri, DRC, see Puijenbroek & Schouten 2013.
- xii . Most literature understands ‘informal’ as consisting of non-criminal unofficial activity, whereas ‘illicit’ includes criminal and non-criminal activity (Gallo 2012: 14). With regard to the DRC, alternative terms such as the (non-criminal unofficial) ‘second economy’ (McGaffey 1991) or (official and unofficial) ‘plunder’ (Marysse 2003) have been suggested to distinguish legitimate from illegitimate activities (Gallo 2012).
- xiii . This position may be related to beliefs in some mining regions in DRC and elsewhere, according to which women are seen as posing a supernatural danger to underground mining. Such beliefs underpin a division of labour, in which women mostly work in mineral processing, which is paid less. About half of artisanal miners in Africa are female (Hayes & Perks 2012: 535; Hargreaves & Hamilton 2013: 7).