



OCCASIONAL PAPER 208

Governance of Africa's Resources Programme

December 2014

# **A Critical Analysis of Human Rights Due Diligence Processes in Mineral Supply Chains: Conflict Minerals in the DRC**

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**African Perspectives. Global Insights.**

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## ABSTRACT

This paper reviews recent developments in the human rights due diligence concept. In doing so, it highlights the challenges of developing and applying human rights due diligence processes in mineral supply chains in the Democratic Republic of the Congo (DRC) and the broader Great Lakes region.

The eastern DRC has valuable industrial minerals such as tantalite, cassiterite and tungsten, all of which are critical components in the electronics industry. Since 1996 this part of the DRC has seen violent conflict that has claimed more than 5 million lives and is considered one of the world's worst humanitarian crises. This civil war has been variously explained as a manifestation of the resource curse or rebel greed, profiteering from the minerals trade. The demand for these 'conflict minerals' remains strong and the minerals trade continues to provide both an incentive and a means for belligerents to maintain their operations.

In the DRC, about 90% of minerals are mined using artisanal methods, and minerals are often traded informally. In this context, applying human rights due diligence through establishing traceability has been promoted as a means to ensure responsible sourcing of raw materials and curb the trade in conflict minerals. Moreover, it has become a legal requirement through the conflict minerals provision of the 2010 US Dodd-Frank Wall Street Reform and Consumer Protection Act. Given the complex supply chains of these minerals and the weak governance capacity in the DRC, a number of initiatives adopt multi-stakeholder processes to develop and implement human rights due diligence.

This analysis is based on a review of six such frameworks, and concludes that the narrow focus on traceability is unlikely to prevent minerals from being used to finance belligerents. The paper argues that this limitation largely stems from the reductionist approach of the resource curse theories, which could have an adverse impact on local communities. Instead, including key local stakeholders in developing and implementing human rights due diligence processes could lead to the sustainable management of mineral resources.

## ABOUT THE AUTHOR

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## ABBREVIATIONS AND ACRONYMS

AFP	Analytical Fingerprint
BGR	German Federal Institute for Geosciences and Natural Resources
CFS	Conflict Free Smelter
CTC	Certified Trading Chains
DRC	Democratic Republic of the Congo
GeSI	Global e-Sustainability Initiative
ICGLR	International Conference on the Great Lakes Region
ITRI	International Tin Research Institute
iTSCi	ITRI Tin Supply Chain Initiative
KPCS	Kimberley Process Certification Scheme
MMR	Mining Minerals Resources Limited
NGO	non-governmental organisation
OECD	Organization for Economic Cooperation and Development
PPA	Public-Private Alliance for Responsible Minerals Trade
RINR	Regional Initiative against the Illegal Exploitation of Natural Resources
SAESSCAM	Service for the Assistance and Supervision of Small-Scale Mining
SEC	Securities and Exchange Commission
SfH	Solution for Hope Project

## INTRODUCTION

This paper seeks to examine the challenges in developing and applying human rights due diligence processes in the mineral supply chains in the Democratic Republic of the Congo (DRC). The DRC, and particularly its eastern region, is endowed with valuable minerals such as tantalite, tin, tungsten and gold. These minerals have wide-ranging applications for which there has been growing demand since the 1990s, as high-tech consumer electronics such as mobile phones have become widely available. The eastern DRC has been plagued by violent conflict and insecurity since 1996, and the situation is regarded as one of the world's worst humanitarian crises. It has claimed more than 5 million lives and contributes to serious social dislocation, with about 1.7 million internally displaced persons<sup>1</sup> and 491 500 refugees.<sup>2</sup> The UN has labelled the country the 'rape capital of the world'.<sup>3</sup> Various 'resource curse' theories attribute the conflict to competition over proceeds from the trade in the region's minerals. These minerals are commonly referred to as 'conflict minerals', as their 'control, exploitation, trade, taxation, or protection contribute to, or benefit from the context of, armed conflict'.<sup>4</sup> As the demand for these minerals remains strong, the conflict minerals issue has drawn attention globally and prompted numerous investigations and campaigns, particularly over the past decade.

A series of investigations and reports by the UN Panel of Experts between 2000 and 2003<sup>5</sup> highlighted the role of business in fuelling the DRC conflict. These reports were the first to publish the names of companies involved in the illegal exploitation of natural resources in the DRC. The role of the electronics industry in the DRC conflict was also highlighted by a report commissioned by an electronics industry association, the Global e-Sustainability Initiative (GeSI).<sup>6</sup> These investigations were followed by numerous research initiatives on the role of mineral exploitation and trade in fuelling and sustaining the conflict, including by the Initiative for Central Africa, the UK's Department for International Development, and Resource Consulting Services.<sup>7</sup> In addition, for several years non-governmental organisations (NGOs) such as Global Witness, makeITfair and the Enough Project have been drawing global attention to the DRC conflict and lobbying governments and electronics companies for action.

In parallel with these research activities and debates on the role of the minerals trade in the DRC conflict, a body of literature has evolved on the part played by business in conflict since the 1990s, reflecting the increasingly globalised operations of corporations.<sup>8</sup> Some frameworks, such as the Organization for Economic Cooperation and Development's (OECD) Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones,<sup>9</sup> the OECD Guidelines for Multinational Enterprises<sup>10</sup> and the Voluntary Principles on Security and Human Rights,<sup>11</sup> have been developed to provide guidance to multinational companies. Moreover, the management of global supply chains has become a key strategic issue for business in recent years, regardless of whether or not companies operate directly in conflict areas or weak states. This is due in part to their vulnerability to the reputational risk of being associated with human rights abuses in their supply chains.<sup>12</sup>

In this context, various initiatives to curb the trade in conflict minerals originating from the DRC have been developed. Given the complexity of these mineral supply chains, in which the minerals are mined by artisanal miners and traded initially within a largely informal market, as well as the state's weak governance capacity in the DRC, the initiatives

have increasingly adopted multi-stakeholder processes to achieve traceability and apply human rights due diligence within mineral supply chains.

This paper reviews the emergence of multi-stakeholder processes to clamp down on conflict minerals in global supply chains, in order to illustrate the challenges these frameworks face. More importantly, it aims to discuss and highlight the perspectives of local stakeholders, who are largely excluded from these multi-stakeholder processes. It is vital to pay attention to these perspectives when considering the effectiveness of multi-stakeholder frameworks and their impact on the resource supplier communities. The data used has been collected from relevant literature, media reports and fieldwork conducted in 2009 in Rwanda.<sup>13</sup>

The paper is structured in four parts. The first section provides a brief outline of the development of the human rights due diligence concept. The second gives a synopsis of six emerging initiatives that seek to facilitate human rights due diligence in order to curb the trade in conflict minerals. The third examines the current debates on these initiatives and the local operational environment in which they are implemented, while the fourth reviews local perspectives on conflict minerals and highlights the missing voices in discussions on how the conflict minerals issue should be addressed through human rights due diligence processes.

## THE CONCEPT OF HUMAN RIGHTS DUE DILIGENCE

Awareness of the role of business in conflict and human rights abuses has grown since the 1990s, and business and human rights issues have become a global policy agenda, mirroring the rapid expansion of the private sector and transnational economic activities. In response to the evolution of business and human rights literature and the growing need for guidance on addressing business's impact on human rights, John Ruggie was appointed as a Special Representative of the UN Secretary-General in 2005 to develop a business and human rights framework. This UN framework, which consists of the three core principles of 'the state duty to protect against human rights abuses by third parties, including business, the corporate social responsibility to respect human rights, and the need for more effective access to remedies', was established in 2008.<sup>14</sup> Following this, on 16 June 2011<sup>15</sup> the UN Human Rights Council endorsed a new set of Guiding Principles for Business and Human Rights,<sup>16</sup> which outlines how to implement the above UN framework to 'Protect, Respect and Remedy'. It also established a Forum on Business and Human Rights to discuss questions relating to the implementation of the Guiding Principles and wider business and human rights issues. This forum has been held annually since 2012.

The second principle of the UN framework to 'Protect, Respect and Remedy' states that the corporate responsibility to respect human rights is the 'basic expectation society has of business', and one which requires due diligence.<sup>17</sup> The framework defines due diligence as 'a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it' and hence strive 'to do no harm'.<sup>18</sup>

The first African Regional Forum on Business and Human Rights was organised in September 2014 to discuss key business and human rights challenges for the continent, including those related to extractive industries.<sup>19</sup>

The human rights due diligence concept is at the core of the international movement for corporate accountability and has become the cornerstone of efforts to address conflict minerals in global supply chains. Ensuring the traceability of minerals is critical to these efforts; however, mineral supply chains ‘may span thousands of miles across the globe, involve numerous suppliers, retailers, and consumers, and be underpinned by multinational transportation and telecommunication networks’.<sup>20</sup> Minerals are therefore difficult to trace fully.

Furthermore, the upstream supply chain of minerals in the eastern DRC is characterised by extensive and complex networks of artisanal mining and informal economy activities, which pose enormous challenges to achieving traceability and applying due diligence processes. In the DRC, the increase in artisanal mining and informal economic activities was triggered by the decline in industrial mining operations and state capacity after an economic crisis in the 1980s.<sup>21</sup> Consequently, in 2008 an estimated 90% of minerals came from artisanal miners.<sup>22</sup> Furthermore, more than half of the DRC’s natural resource exports are not officially recorded because of tax evasion and state institutions’ lack of governance capacity.<sup>23</sup> A 2011 study confirmed the extent of the informal trade in the DRC, claiming that 80% of gold produced there is illegally exported.<sup>24</sup>

Despite these challenges in establishing the traceability of conflict minerals, performing human rights due diligence has become a requirement rather than a recommendation since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>25</sup> (the Dodd-Frank Act) in July 2010. Section 1502 of the Dodd-Frank Act includes a conflict minerals provision requiring companies to disclose whether their product contains tantalum, tin, tungsten, gold or their derivatives originating from the DRC or its neighbouring countries. Companies also have to provide an independent audited report on due diligence undertaken on the chain of custody.

On 22 August 2012, the US’ Securities and Exchange Commission (SEC) issued the final rule on reporting requirements for section 1502, after the rules proposed in 2010 were criticised for being too complex and vague in terms of the scope of the requirements and audit standards.<sup>26</sup> While the Dodd-Frank Act does not prohibit companies from sourcing conflict minerals, it requires at least 6 000 publicly traded companies in the US to trace the origins of minerals in their products and perform supply chain due diligence on their extensive global supply chains.<sup>27</sup> Similar legislation has been considered by other countries, which will affect a significant number of companies. While the Canadian Parliament did not pass the proposed Conflict Mineral Act (Bill C-46) in September 2014,<sup>28</sup> in March 2014 the European Commission proposed a draft regulation to establish EU self-certification for importers of tantalite, tin, tungsten and gold.<sup>29</sup> The certification requires more than 400 ore and metal importers in the EU to apply due diligence when importing these ores into the EU, in line with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. The most important initiatives developed to establish traceability and apply human rights due diligence are reviewed in the following section.

## INITIATIVES TO IMPLEMENT HUMAN RIGHTS DUE DILIGENCE IN MINERAL SUPPLY CHAINS

### **OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas**

The OECD developed the 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas'<sup>30</sup> (hereafter the OECD Guidance)<sup>31</sup> to help companies buy minerals without violating human rights or contributing to conflicts. The OECD Council recommended that the OECD Guidance be established in 2011 to represent the common position and political commitment of adhering countries. In order to address the complex issues surrounding conflict minerals, the OECD Guidance has been developed through a collaborative approach, involving numerous stakeholders such as African and OECD countries, industry, civil society, the UN Group of Experts on the DRC, and a DRC supervisory authority for the artisanal mining sector called the Service for the Assistance and Supervision of Small-Scale Mining (SAESSCAM).<sup>32</sup>

The OECD Guidance takes into consideration the complex operating environments in the eastern DRC and defines due diligence as<sup>33</sup>

an ongoing proactive and reactive process whereby companies take reasonable steps and make good faith efforts to identify and respond to risks of contributing to conflict and serious abuses in accordance with internationally agreed standards, with a view to promoting progressive improvements to due diligence practices through constructive engagement with suppliers.

This definition is consistent with the UN Group of Experts' due diligence guidelines<sup>34</sup> and has become widely accepted. Furthermore, the OECD has developed standards for risk-based due diligence in the conflict mineral supply chain, albeit without describing how they should be implemented.<sup>35</sup>

- Establish strong company management systems;
- identify and assess risks in the supply chain;
- design and implement a strategy to respond to identified risks;
- carry out an independent third-party audit; and
- report on supply chain due diligence.

The OECD Guidance is expected to help companies establish a process to exercise due diligence and generate the information for disclosure needed to comply with the Dodd-Frank Act under section 1502.<sup>36</sup> Likewise, the SEC refers to the OECD Guidance as an acceptable starting point for companies to draw up their policies in compliance with the Dodd-Frank Act. Nonetheless, the OECD Guidance is limited, as it does not explain how supply chain due diligence can be carried out.<sup>37</sup> More importantly, it is not a compulsory process, such as the Dodd-Frank Act.



### **ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources**

The International Conference on the Great Lakes Region (ICGLR), a regional body of 11 members,<sup>38</sup> signed the Pact on Security, Stability and Development in the Great Lakes Region in 2006. The Pact includes a Protocol on the Fight against the Illegal Exploitation of Natural Resources, which outlines a comprehensive approach to end the predatory use of natural resources. The ICGLR has since established the Regional Initiative against the Illegal Exploitation of Natural Resources (RINR) to translate the protocol into concrete actions. The RINR aims to break the link between mineral revenues and rebel financing. It uses six tools to curb the illegal exploitation of natural resources in the Great Lakes region, the most important of which is the Regional Certification Mechanism. The Regional Certification Mechanism provides a regionally harmonised supply chain due diligence framework in ICGLR member states, including mine site inspections by the national mining authority, chain of custody management, mineral export shipment certification, and data management and exchange with the ICGLR secretariat for the above processes. The ICGLR supports the OECD Guidance and has integrated it into the Regional Certification Mechanism and a Certification Manual on the mechanism<sup>39</sup> that was adopted in 2011.

### **The Conflict Free Smelter Programme**

Two electronics industry associations – the Electronic Industry Citizenship Coalition (EICC)<sup>40</sup> and the Global e-Sustainability Initiative (GeSI)<sup>41</sup> – view responsible sourcing as a priority for their members, and aim to extend their influence beyond their immediate suppliers to improve social and environmental conditions throughout their extensive supply chains. They have been working together through the joint EICC and GeSI Extractive Workgroup since 2005 and have developed the Conflict Free Smelter (CFS) programme<sup>42</sup> for tin, tantalum, tungsten and gold to enable companies to source conflict-free minerals. The CFS is a voluntary programme in which an independent third party assesses smelters to determine whether they can demonstrate that all the materials they process are from conflict-free sources, based on a business process review and a material analysis review. The CFS simplifies the due diligence process for companies using tin, tantalum, tungsten and gold, as they only need to trace their mineral supply chains to the level of the smelter.

### **ITRI Tin Supply Chain Initiative**

The International Tin Research Institute (ITRI), a tin industry association based in the UK, has since 2008 been developing a chain of custody and due diligence system, namely the ITRI Tin Supply Chain Initiative (iTSCi).<sup>43</sup> The iTSCi process aims to support upstream companies, from mine to smelter, to adhere to the OECD Guidance at a very practical level, although the companies remain responsible for their sourcing practices. It consists of three components, namely chain of custody data collection to achieve traceability; risk assessment; and independent third party audits. The chain of custody data collection requires that a barcoded mine tag and processor (or *négotiant*)<sup>44</sup> tag, each with unique

reference numbers, be attached to bags of minerals. The tagging is accompanied by detailed data collection via purpose-designed logbooks to provide records and data. All members in upstream supply chain are audited by an iTSCi auditor. Smelters are audited by the aforementioned CFS programme, as the iTSCi chain of custody system provides information required by the CFS programme. The iTSCi process is also expected to help companies fulfil the reporting requirement of the Dodd-Frank Act. While the initiative's first pilot project, which was launched in South Kivu in 2010, had to be suspended after the DRC government imposed a six-month mining ban in September 2010, the programme has been implemented in Rwanda and in the DRC's Katanga Province, with the intention of expanding it to the entire Great Lakes region. The ITRI has also signed a partnership agreement with the ICGLR to set up a Regional Certification Mechanism for tin.

### **Certified Trading Chains and Analytical Fingerprint**

The German Federal Institute for Geosciences and Natural Resources (BGR)<sup>45</sup> has been a driving force in the advancement of minerals certification in the Great Lakes region. It initiated two research projects to provide assurance on the production standards and origins of tantalum in 2006. The BGR currently has four ongoing projects, namely the G-8 pilot project Certified Trading Chains (CTC) in Mineral Production in Rwanda, the Mineral Certification project in the DRC, the Analytical Fingerprint (AFP) method, and support to the abovementioned ICGLR RINR.<sup>46</sup>

The CTC is a means to foster traceability, transparency and responsible production standards in the artisanal and small-scale mining sector, and includes performance monitoring through third party baseline audits and compliance audits, in order to provide the basis for potential certification at a national level. In Rwanda, it was launched in co-operation with the Rwandan Geology and Mines Authority in 2008; in the DRC, it has supported the Ministry of Mines since 2009 in its effort to strengthen transparency in and control over the mining sector through mineral certification. Most CTC standards have been incorporated into the ICGLR Regional Certification Mechanism as progress criteria.

The AFP was initiated in 2006 in order to verify the origin of minerals through the mineralogical and geochemical analysis of ore samples and comparison with the AFP database. The BGR has developed methods to track independently the origin of tantalum ore concentrates produced in Central Africa and has been developing a similar AFP scheme for tin ore concentrates, with a plan to expand the scheme to tungsten ore concentrates. As part of its support to the ICGLR, the BGR intends to make the AFP method available to the ICGLR by transferring skills, technology and ownership.

### **Solution for Hope Project**

In July 2011, Motorola Solutions Inc.<sup>47</sup> and AVX Corporation<sup>48</sup> launched a pilot initiative, the Solution for Hope Project (SfH),<sup>49</sup> to secure conflict-free tantalum from the DRC. The SfH uses a closed-pipe supply line and a defined set of key suppliers to source minerals in the region. In this closed-pipe supply line, the Coopérative Des Artisanaux Miniers du Congo, a mining co-operative that includes artisanal miners and buyers in Katanga Province, manages artisanal production and mineral purchasing at the Mai

Baridi, Kisengo and Luba mines – the concessions of Mining Minerals Resources Limited (MMR).<sup>50</sup> A local SAESSCAM agent weighs and logs minerals at the mines as part of the iTSCi traceability process. Through this closed pipeline from the production sites, organised by MMR, participating companies can buy tantalum under the SfH.

Any company can take part in the SfH. Current participants include Foxconn, HP, Intel, Motorola Solutions, Nokia and Research in Motion. The initiative expects to increase the number of participating companies as well as locations in the DRC, and to expand to include tin and tungsten. The SfH supports the iTSCi, CTC and ICGLR processes with the objective of having ICGLR certificates issued for materials mined at its sites. The Mai Baridi mine was evaluated for compliance with the CTC and has been designated a ‘Green’ site, meaning that mining operations can be carried out and minerals sold. MMR participates in the Upstream Pilot Implementation of the OECD Guidance, and was audited twice by an independent auditor against the OECD Guidance.

## CHALLENGES AND POTENTIAL IMPACTS OF THE HUMAN RIGHTS DUE DILIGENCE APPLICATION

The initiatives reviewed in the preceding section seek to provide standards, independent audits and chain of custody guarantees for human rights due diligence, in order to establish responsible mineral supply chains. The development of these mechanisms and the growing awareness of the challenges posed by conflict minerals have provoked heated discussions in the industry and among policymakers and NGOs. The diverse views expressed in the debate reflect the rapidly evolving nature of responsible mineral supply chain management, as well as the sometimes-unforeseen implications of placing all the supply chain responsibility on the end users of materials.

There is growing pressure on the industry to ensure responsible and transparent supply chain management. However, the mechanisms meant to enable responsible supply chain management were set up to serve the specific situations that companies and sectors face.<sup>51</sup> Moreover, the current frameworks do not clearly delineate the boundaries of responsibility in supply chain management, and defining responsibility remains one of the most challenging issues in the corporate social responsibility field. As a result, responsible supply chain management initiatives have advanced mostly on an ad hoc basis, usually requiring responsibility over first-, second- or third-tier suppliers. This reflects the call for companies to act within their sphere of influence by the UN Global Compact, the largest voluntary corporate responsibility initiative in the world to support the private sector in advancing sustainability policies and practices.

This section examines the discussions prompted by the development of the human rights due diligence frameworks, as well as the conditions on the ground that can influence the implementation of these frameworks. The examination first focuses on the technical issues of achieving traceability of conflict minerals and sourcing conflict-free minerals through human rights due diligence. It then looks at the potential impacts of these initiatives on the upstream supply chain communities in the eastern DRC and broader Great Lakes region.

### **Feasibility of achieving traceability to source conflict-free minerals**

The feasibility of tracing minerals and the effectiveness of the due diligence mechanisms' implementation have been questioned. Metal supply chains are extensive and complex because of the nature of the metal markets and trade, which creates strong barriers to effectively implementing traceability processes.<sup>52</sup> Metals such as tantalum are usually traded via direct, long-term contracts between buyers and sellers, and the line of sight between the seller and buyer is lost due to contract confidentiality and the mixing of metals from different sources in the supply chain. When metals are traded in commodity markets such as the London Metal Exchange and the New York Mercantile Exchange, they come from various sources and buyers do not have direct contact with sellers. Furthermore, at the extraction stage in the eastern DRC, as explained in more detail below, minerals are extracted by artisanal miners, often illegally, in remote areas with poor infrastructure, and the minerals are transported and traded largely within the extensive informal sector, all of which pose a significant challenge to achieving traceability. To illustrate the challenge, Intel claimed to have travelled over 193 000 km and visited 30 smelters in pursuit of a conflict-free supply chain since 2009 and had mapped out 92% of its tantalum, tin, tungsten and gold supply lines by the end of 2011.<sup>53</sup>

Notwithstanding the enormous challenge in achieving traceability of minerals from the DRC, according to an industry insider it is inevitable that minerals, especially tantalum, will continue to be sourced from the DRC because of the size of its reserves, its high-grade deposits and the ease of accessing ore bodies.<sup>54</sup> It is estimated that about half of the tantalum used to manufacture electronics has been sourced from conflict areas,<sup>55</sup> mostly because conflict-free regions are unable to meet the current demand from the electronics and aerospace industry.<sup>56</sup>

Secondly, a number of issues may hinder the effective implementation of due diligence processes. End-user companies have expressed concern about the cost of implementation,<sup>57</sup> the confidentiality of supply chain partnerships, manufacturing processes and contracts,<sup>58</sup> and their lack of influence over suppliers.<sup>59</sup> According to previous studies, overlapping standards can present a significant obstacle to responsible supply chain management programmes, and duplication should be avoided.<sup>60</sup> Industry-wide mechanisms can, however, reduce the costs and complexity of compliance for suppliers, as exemplified by the CFS (developed by the EICC and GeSI) and may create a 'critical mass' of industry support.<sup>61</sup> There are also some potential benefits to conducting supply chain due diligence for end-user companies, such as identifying opportunities for supply chain simplification, rationalisation and cost reduction; improving customer brand recognition; and implementing other standards and certifications in the area of environment and sustainability.<sup>62</sup>

Nonetheless, local conditions in the upstream supply chain in the DRC are likely to be the key barrier to effective implementation. This is despite the fact that the DRC government has demonstrated its commitment to mineral supply chain due diligence through the ICGLR and the issuance of a directive in September 2011 obliging all mining and mineral trading companies to perform supply chain due diligence, in line with the OECD Guidance and UN Security Council Resolution 1952 (2010).<sup>63</sup> The DRC government incorporated the directive into national law in February 2012,<sup>64</sup> and suspended two exporters from North Kivu for their failure to apply due diligence.<sup>65</sup>

Of the various issues on the ground that hamper the implementation of human rights due diligence mechanisms, the biggest problem is security conditions. This was confirmed after a visit by the Public-Private Alliance for Responsible Minerals Trade (PPA)<sup>66</sup> in February 2012 to assess the situation in the eastern DRC and consider the criteria for projects that support sourcing conflict-free minerals from the Great Lakes region. The PPA's subsequent report<sup>67</sup> underscored that security is a critical prerequisite for developing a pilot conflict-free supply chain. The embryonic iTSCi bag-and-tag process, which seeks to certify the origin of tin and gold in North Kivu, was halted following the heavy clashes which began in April 2012;<sup>68</sup> illustrating the need for security and stability in order to implement due diligence mechanisms. In contrast to the bag-and-tag system in North Kivu, the SfH closed-pipe supply chain in Katanga Province has thus far been considered a success, largely because of the relative security and existing political will in the province.<sup>69</sup> The report also identified political will as a necessary precondition to effective due diligence processes. While there seems to be a general shift in attitude towards due diligence processes among local traders in the DRC,<sup>70</sup> wider stakeholders need to demonstrate their commitment by taking ownership of the initiatives.<sup>71</sup>

Other issues that may affect the implementation of due diligence processes include mine ownership, the status of artisanal mining, and the lack of effective governance in the country.

Conflicts over mine ownership in the eastern DRC have involved government forces, rebel groups and private companies, mainly because of the complexities of mine ownership. Three contradicting laws in the DRC – the Mining Code, the General Property Law and customary law – have caused these complexities. The Mining Code<sup>72</sup> specifies that the state possesses all mineral deposits and can grant mining and exploration rights,<sup>73</sup> but these rights do not include surface rights. Surface rights are governed by the General Property Law of 1973, which specifies that the state owns the land and can grant surface rights to private or public parties. However, in some cases these surface rights are granted to parties other than the current mining and exploration rights owners.<sup>74</sup> In addition, the General Property Law repealed the system of customary land ownership and enabled the purchase of individual land rights from the state,<sup>75</sup> but the customary land tenure system continues to exist in practice.<sup>76</sup> To complicate matters even further, rebel groups have controlled large parts of the eastern DRC since the start of conflict in 1996, leading to even more mine ownership disputes.<sup>77</sup> The Mining Code does not supply mechanisms to resolve conflicts over mine ownership or address problems arising from the contradicting legislation, thereby affecting the security situation in the mining areas.<sup>78</sup> Mine ownership conflicts are a very sensitive issue, as land is a vital source of livelihood in the densely populated eastern DRC,<sup>79</sup> hence disputes over land ownership can significantly affect the security and stability of the mining areas and thereby undermine the implementation of due diligence processes.

The Mining Code, together with the Mining Regulations of 2003, makes a clear division between industrial and artisanal mining, and is intended to regulate artisanal and small-scale mining and minerals trading.<sup>80</sup> The artisanal mining sector – while being fairly common in developing countries and considered an important activity with significant economic impact – lacks a universally agreed definition, owing in part to the diversity of activities in the sector.<sup>81</sup> It is widely understood to be the most rudimentary domain of the mining sector<sup>82</sup> and its activities are mostly carried out informally.<sup>83</sup>

The formalisation of artisanal mining is viewed as a way to reduce the negative environmental and socio-economic impacts associated with the sector and enhance its potential for poverty reduction, and has therefore been the focus of various research projects and donor initiatives. However, the lack of understanding of the dynamics of the sector<sup>84</sup> as well as contradicting economic reform efforts,<sup>85</sup> which seek to promote foreign direct investment in large-scale industrial mining, hinder the formulation of effective instruments to address artisanal mining. As a result the sector remains largely informal and illegal, and hence vulnerable.

Attempts to formalise the artisanal mining sector in the DRC have had limited success. According to the DRC Mining Code, artisanal miners do not have legal mining rights, but they can apply for a one-year Artisanal Mining Exploration Card (*carte de creseur*) from the Provincial Mining Division after paying fees and undergoing training, and mine within a designated zone for artisanal exploitation. Areas covered by a valid mining title cannot be converted into artisanal mining zones, and artisanal mining zones cannot receive a mining title for industrial mining, although security of tenure is inadequately protected in artisanal mining zones. These provisions appear to be inappropriate, as few Artisanal Mining Exploration Cards are issued<sup>86</sup> and designated artisanal mining areas were not created in the Kivu provinces until recently, largely due to the relevant authorities' lack of resources and capacity; issues exacerbated by the distance from the capital and the absence of infrastructure.<sup>87</sup> While at least 13 artisanal mining zones have recently been created in the Kivus, it is unlikely that artisanal miners will develop these sites given the fact that the necessary information, resources and technical skills are not available.<sup>88</sup> In fact, allocating artisanal mining areas on potentially lucrative deposits would contradict the requirement in the Mining Code (drafted by the World Bank) that economic reform be facilitated by attracting large mining investments.<sup>89</sup>

The inadequate provisions for artisanal mining force most artisanal miners to operate outside the legal framework. There is also no legal protection for artisanal mining communities.<sup>90</sup> Although the Mining Code clearly forbids the presence of military and security forces at mines, illegal taxation by armed groups and the national army at various roadblocks is common,<sup>91</sup> which threatens the effective implementation of due diligence schemes. Moreover, artisanal mining communities do not benefit from the trade in their products as the trading houses control access to international buyers and markets. On the contrary, artisanal miners and surrounding communities are negatively affected by environmental damage, socio-economic problems and insecurity.<sup>92</sup> The existing human rights due diligence processes thus emphasise the sourcing of conflict-free minerals without addressing the largely illegal and informal status of artisanal miners in the DRC.

The gap between the requirements of the Mining Code and the reality on the ground exemplifies the complex governance issues in the DRC. Governance challenges have affected the implementation of the Kimberley Process Certification Scheme (KPCS)<sup>93</sup> in the DRC since 2003, and lessons can be drawn from this for the human rights due diligence initiatives.

The KPCS is a multi-stakeholder certification process to curb the trade in diamonds from conflict zones. Although the scheme succeeded in the DRC in increasing state revenue by facilitating the collection of export taxes on diamonds and licensing fees, diamond smuggling is still widespread in the country and the KPCS implementation process appears to have failed there.<sup>94</sup> Reviews of the KPCS implementation process in

the DRC have highlighted a number of problems, including smuggling, undervaluing diamonds to evade tax, secrecy and extensive corruption, mainly due to weak internal controls.<sup>95</sup> These weak internal controls are largely caused by the difficulties in monitoring the vast country's pervasive and uncontrolled artisanal mining sector,<sup>96</sup> where the government does not have authority over many areas.<sup>97</sup> In addition, the relevant government agencies lack incentives<sup>98</sup> and adequate resources to perform their responsibilities.<sup>99</sup> Without being provided with significant funding and capacity building, these government agencies cannot be expected to act efficiently to ensure the effective implementation of human rights due diligence processes.<sup>100</sup>

### **Potential impact of the due diligence initiatives**

When looking at the potential impact of the due diligence processes on the upstream supply chain community, it is important to ask whether applying due diligence in mineral supply chains will positively influence the socio-economic and environmental conditions faced by artisanal mining communities in the DRC.<sup>101</sup>

There is concern that the requirement for due diligence will result in a de facto embargo on minerals from the region, as companies seek other sources in order to guarantee conflict-free supply chains. This de facto embargo on minerals from the DRC and neighbouring countries may have an unintended and undesirable impact on the already very limited livelihoods of the local population.<sup>102</sup> While mineral production and export has increased in non-conflict areas where due diligence and traceability systems have been introduced, conflict-affected areas such as the Kivus and Maniema Province have seen a decline in mineral production and exports as well as in mining sector governance, as the mineral trade is being criminalised and associated with military and/or armed groups.<sup>103</sup> An estimated 200 000 to 300 000 artisanal miners operate on a regular, seasonal or supplementary basis in the Kivu provinces.<sup>104</sup> The due diligence processes are unlikely to improve their poor social and environmental conditions, as long as the warring parties derive their funds from a wide range of sources, including other natural resources, cannabis and various cash crops, according to the UN Group of Experts report, and may easily move to alternative sources of revenue.<sup>105</sup> In addition, other industries and companies may continue sourcing from these regions – the same report indicated that some buyers were still buying untagged minerals and selling these to Chinese companies.

There had been an expectation that minerals verified as conflict-free through due diligence processes would fetch better prices and thereby benefit the artisanal mining community. The PPA's recent visit to the eastern DRC showed that tagged minerals received 'a fair market price', but untagged minerals were highly discounted because it was illegal to export them.<sup>106</sup> In addition, stockpiles are not considered conflict-free if they are not tagged and therefore cannot be sold, or will be sold at much lower prices. Because of artisanal miners' vulnerable status, the lower prices received for untagged minerals by traders will be passed on to them and others at the extraction stage, thus undermining rather than strengthening their economic status. Moreover, any endeavour to regulate artisanal mining and trade through due diligence, or to change any aspect of the existing systems in the mining sector, will inevitably have an impact on vested interests. Such efforts are therefore likely to meet strong resistance. If tensions are not managed carefully, the reforms could provoke further violence and conflict in the area instead of reducing the

conflict and the predatory exploitation of minerals.<sup>107</sup> As a consequence, artisanal miners may face even more severe exploitation.<sup>108</sup>

Most importantly, even if the challenges to performing due diligence in the area are dealt with, it is unlikely that the application of due diligence alone will delink mineral extraction and trade from the violent conflict in the eastern DRC. This is because the dynamics of the mining sector and the conflict on the ground<sup>109</sup> are largely ignored in the design of the various due diligence schemes. The relationship between the conflict and mineral extraction and trade is much more complex than the prevailing simplistic view of conflict minerals<sup>110</sup> that underpins the human rights due diligence approach. There appear to be grave limitations in the empirical analysis of the motivations for and processes of conflict in the eastern DRC. For instance, while it is often assumed that the violent conflict in the region is motivated by the potential profits from mineral exploitation and trade, it may also be a military strategy to deprive an opponent by taking control of mineral-rich areas in the opponent's territory.<sup>111</sup> The observed collaboration between opposing armed groups at mine sites is often misinterpreted, the assumption being that the conflict is motivated solely by economic interests rather than political and other drivers, without consideration of the profound problem of poverty in the DRC, which forces armed groups and others to seek livelihoods.<sup>112</sup> The motivations and dynamics of conflict are not always linked to resource exploitation, although resource exploitation serves various incentives in the socio-economic and political systems.<sup>113</sup> This is confirmed by interviews with local actors, who do not attribute the conflict in the eastern DRC to the area's mineral resources but distinguish among the various causes, such as trade disputes, of different conflicts.<sup>114</sup> The limited understanding of the dynamics and systems of mineral extraction and trade, which form part of the larger informal economy in the eastern DRC, stems from generalisations over exploitation systems and a narrow focus on mineral exploitation, based on research conducted on a limited number of mine sites.

In addition, the historical context of the conflict in the region has not been taken into account in the due diligence movement. Issues of migration, ethnicity, citizenship and land have been intertwined since the colonial period, creating grievances and insecurity, which in turn replicates violence and conflict in the region. Without appreciating the long-standing, complex dynamics underpinning the violence and conflict, efforts to mitigate conflict through due diligence schemes may have an unintended negative impact.

It can be argued that the neglect of these socio-economic and political issues and the schemes' narrow, technical focus are the result of the externally driven nature of the conflict mineral agenda to secure ethically sourced conflict-free raw materials.<sup>115</sup> Moreover, important actors in the upstream supply chain communities are excluded in the development of the due diligence schemes.<sup>116</sup> However, it must also be recognised that there are numerous difficulties in consulting with these local stakeholders. For example, most artisanal miners in the region are not organised to voice their issues and concerns freely and constructively,<sup>117</sup> and where artisanal mining co-operatives do exist they have different purposes and do not necessarily protect the interests of the miners.<sup>118</sup> Artisanal miners have limited capacity and resources to organise themselves in order to influence the policies and measures that affect them.<sup>119</sup> Moreover, although armed groups are central to socio-economic dynamics in the region, companies are generally not able to engage with these groups due to the safety and ethical risks involved. Yet, as pointed out earlier,



meaningful participation by key local actors is essential in instilling a sense of ownership of the initiatives and enhancing local buy-in.

## MISSING VOICES OF LOCAL STAKEHOLDERS

Local stakeholders' awareness of due diligence processes appears to have increased following the recent, rapid development of the due diligence programmes. At the early stage of these developments in 2009, local stakeholders interviewed during fieldwork did not acknowledge these processes and strongly opposed the idea of a ban on minerals from the DRC, as it would affect a large number of local communities. However, a *de facto* embargo on minerals from the eastern DRC has been observed since 2010 and many actors in the mining sector have been forced to move to other areas such as Katanga Province in the south-eastern DRC<sup>120</sup> or to seek illegal parallel markets.<sup>121</sup> While the *de facto* embargo is often attributed to the Dodd-Frank Act,<sup>122</sup> it is not possible to establish clearly to what extent the Dodd-Frank Act is responsible for the decrease in the mineral trade.

Based on a review of recent comments by some local stakeholders, it seems that international efforts to enhance transparency and promote the demilitarisation of the mining sector in the DRC are superficially accepted and supported.<sup>123</sup> However, there are serious doubts about the feasibility of the traceability mechanisms, based on practical issues such as the lack of sensitisation, organisation and capacity of stakeholders at the grassroots level to adapt to new requirements; the insufficient capacity of and wages for civil servants to support their involvement in the implementation of these initiatives; and the lack of support for artisanal miners and people living around mining areas.<sup>124</sup> There is also little trust in the ability of government agencies to implement the traceability mechanisms without resorting to fraud and corruption.<sup>125</sup>

More importantly, local stakeholders' scepticism about these due diligence processes is based on the design of the mechanisms, which were developed without regard for the conditions in mining areas, including poverty, lack of infrastructure and land disputes. The insecurity caused by armed groups in mining areas is largely explained by local stakeholders as a consequence of these conditions, rather than as being struggle over mineral wealth.<sup>126</sup> Because of the ineffective and incoherent Mining Code and the inability of the state to address the numerous unresolved conflicts over land ownership and mineral exploration rights in the eastern DRC, certain local actors are trying to resolve matters through the use of force.<sup>127</sup> Given this context, local actors are concerned about some mines being selected for due diligence projects despite the presence of the national army and police, both of which have been implicated in grave human rights abuses.<sup>128</sup> They also regard the absence of functional, legal artisanal mining areas and provisions for the artisanal mining community as priority issues.<sup>129</sup>

These conditions illustrate the challenges posed by bad governance in the DRC, as well as the absence of authority in mining areas in the eastern DRC.<sup>130</sup> Local actors emphasise that the state is impoverished and does not function in many parts of the country, particularly in the eastern provinces.<sup>131</sup> Consequently, the benefits from mineral resources are not distributed to the very people who work in the mining sector and no investments are made in local mining communities. At the same time, the international

community's efforts to strengthen state authority in the eastern DRC, where people's experience of the state has mostly been negative due to corruption and state violence, worry local stakeholders.<sup>132</sup> There is concern that strengthening the state may merely shift the balance of power in the conflict instead of reducing fighting, as the Congolese state has historically distributed wealth to selected groups and individuals rather than the general population.<sup>133</sup>

While ostensibly expressing support for international efforts to demilitarise the mining sector in the eastern DRC, local actors criticise international due diligence standards for disregarding existing legal and administrative requirements for mining in the DRC and for failing to ensure the systematic harmonisation of these international standards with national legislation and local arrangements.<sup>134</sup> In the eyes of the Congolese, the international due diligence standards appear to have superseded Congolese legislation, creating the impression that Congolese laws and arrangements on the ground do not matter. Critics also point out that the simplistic assumptions underlying the international due diligence processes are the result of flawed and limited analyses of the conflict dynamics, particularly the assumption that 'belligerents in the DRC wage war and terrorise the population because they have access to export revenues, and conversely that if they had no money there would be peace'.<sup>135</sup> They argue that this link between the conflict and mineral resources has been proven to be flawed, as the significant progress made in reducing fraudulent exports and improving the monitoring of mineral trade has not brought peace to the eastern DRC.

As a result, local actors demand that their voices be heard and that they be included in decision-making processes.<sup>136</sup> They claim that many existing local initiatives have been ignored and have asked for better communication and information-sharing between local and international groups. Congolese civil society representatives demand that decision-making processes not only involve local stakeholders but are also informed by their viewpoints, thereby integrating local concerns.<sup>137</sup>

## CONCLUSION

Human rights due diligence, as a process that seeks 'to do no harm' while complying with national laws, has become an important concept in business and human rights literature and in the global economy. However, an analysis of the implementation of human rights due diligence mechanisms uncovers enormous challenges arising from the local operating environment. Worse, the due diligence mechanisms' limited focus on traceability is unlikely to be effective in reducing either armed groups' financial resources or conflict in the eastern DRC. It can be argued that this limitation largely stems from the reductionist approach of the resource curse theories and the externally driven nature of the due diligence processes. As a result, increasing demand for the relevant minerals, which are critical to some industries, combined with the responsible supply chain management imperative, appear to be driving the due diligence mechanisms to secure conflict-free minerals.

This paper suggests that the inclusion of local perspectives in developing and implementing human rights due diligence processes could lead to the sustainable management of mineral resources in the long run. Analysis of local conditions and

interviews with local actors show that contradictory and inappropriate legislation and governance issues in the DRC worsen the status of the artisanal mining sector and increase land/mine ownership conflict – issues that are often addressed by violent means, thereby affecting security in mining areas. By disregarding the local political and socio-economic context, including livelihood imperatives as well as the national laws and local arrangements around mining, the due diligence mechanisms can have an adverse impact on local communities. While there are practical obstacles involved in trying to include all of the key local stakeholders in processes, it is necessary to give them a greater role – these local stakeholders are still not meaningfully or sufficiently involved in decision-making processes. As human rights due diligence is ‘an ongoing proactive and reactive process’,<sup>138</sup> the progress of due diligence processes rely on how openly and constructively local stakeholders can be engaged with in order to build consensus on the issues that affect them.

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## SAIIA'S FUNDING PROFILE

SAIIA raises funds from governments, charitable foundations, companies and individual donors. Our work is currently being funded by, among others, the Bradlow Foundation, the UK's Department for International Development, the European Commission, the British High Commission of South Africa, the Finnish Ministry for Foreign Affairs, the International Institute for Sustainable Development, INWENT, the Konrad Adenauer Foundation, the Royal Norwegian Ministry of Foreign Affairs, the Royal Danish Ministry of Foreign Affairs, the Royal Netherlands Ministry of Foreign Affairs, the Swedish International Development Cooperation Agency, the Canadian International Development Agency, the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the United Nations Economic Commission for Africa, the African Development Bank, and the Open Society Foundation for South Africa. SAIIA's corporate membership is drawn from the South African private sector and international businesses with an interest in Africa. In addition, SAIIA has a substantial number of international diplomatic and mainly South African institutional members.

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