PAIN POUR LE PROCHAIN ACTION DE CARÊME RAID Rights and Accountability in Development

A. Executive summary

This is the third report published by Bread for All and Fastenopfer on the activities of Glencore in the Democratic Republic of Congo (DRC), this time in collaboration with the British organisation *Rights and Accountability in Development* (RAID)[1]. It is based on research carried out over a period of one and a half years assessing the impact of the operations of two subsidiaries, the Kamoto Copper Company (KCC) and Mutanda Mining (MUMI). Field research was conducted in close cooperation with a Congolese non-governmental organisation (NGO)[2]and local observers based in Kolwezi, each of whom produced a monthly report. Two international research missions took place in October 2013 and March 2014. The information published in this report is based on a study of the documentation, field investigations and interviews with over two hundred people including representatives of the Congolese national and provincial administrations, non-governmental organisations (NGOs) and customary chiefs and residents of the towns and villages located close to the Glencore mines.

Throughout the investigation, RAID, Bread for All and Fastenopfer remained in regular contact with Glencore. A research team visited Glencore mines and installations in the DRC between 7 and 11 October 2013. The researchers conducted interviews with selected senior managers at KCC and MUMI on the issues of the environment, human rights and taxation. We sent the main conclusions of the investigation to Glencore at the end of May to which the company gave a written response. The company's response is included in the report.

We are grateful to Glencore, particularly to members of the Sustainability Department based in Switzerland and the DRC, for having allowed us unprecedented access to their mining sites and for organising interviews with managers of their Congolese subsidiaries. Glencore may not always agree with the conclusions we have reached, but we hope that our recommendations will help the company translate its policies into practical changes on the ground.

A.1. Introduction

The Democratic Republic of Congo: a strategic investment for Glencore

Glencore is a giant in the raw materials sector and has a presence in more than 50 countries. Last year, the company had a turnover of **US$ 239.7 billion**. Glencore's senior managers are also shareholders, which allowed the company's CEO, Ivan Glasenberg, to receive, in addition to his salary, US$ 182 million in tax-free dividends in 2013,despite the losses resulting from the merger with Xstrata.

Since it was formed in 1992, Glencore has had a controversial history. And the company continues to be hit by scandals, in the Philippines, Colombia, Zambia and the DRC. Since 2013,Glencorehas responded with a charm offensive: the company has organised meetings with the Government, politicians, Swiss NGOs and the general public to try and persuade them of the legitimacy of its business and to criticise the "myths" disseminated about Glencore.

Glencore's turnover is more than 30 times the DRC's national budget, a scandalously poor country despite the wealth of its natural resources. In the DRC, Glencore controls two mining complexes, KCC

[1] Chantal Peyer and François Mercier: Glencore in the Democratic Republic of the Congo: Profit Before Human Rights and the Environment, Bread for All and Swiss Catholic Lenten Fund, 2012.

[2] *Action contre l'impunité et pour les droits humains* (ACIDH).

and Mutanda-Kansuki and buys their entire production. These companies are strategically important: they supply 19% of Glencore's copper and 82% of its cobalt and enjoyed a 50% increase in production last year. Glencore obtains from its DRC operations one fifth of the world's cobalt production, an essential component in all electronic appliances.

A.2. Glencore's corporate social responsibility: improved policies

Since its merger with Xstrata, the company has been engaged in a lengthy process of developing and rolling out its policies for the Group. During 2013 Glencore issued policies on environmental management, community and stakeholder engagement and human rights. Glencore is committed to upholding the United Nations (UN) Guiding Principles on Business and Human Rights and has applied for admission to the Voluntary Principles on Security and Human Rights. In May 2014 Glencore joined the International Council on Mining and Metals (ICMM), which aims to improve sustainable development performance in the mining and metals industry.

Glencore key sustainability targets for 2013 include achieving zero fatalities in its operations, supporting community health programmes in areas such as HIV/AIDS and malaria, allocating 1% of Group profits for community investment activities and preventing major environmental incidents. As regards human rights, Glencore's main targets are achieving corporate membership of the Voluntary Principles Initiative, and integrating these into security arrangements. The company is reviewing its contracts with private security providers and strategies for engagement with public security for its operations in the DRC, Bolivia, Peru and Colombia.

Many of the targets are process orientated. Other targets are not readily measurable or are too general to be verified or meaningful. The main exception is the information on its zero fatalities goal: 26 fatalities were reported during 2013. Despite the serious challenge that artisanal and small-scale mining activities represent in some countries, including the DRC, no overall strategy appears to have been developed and no targets have been set.

During our visit to KCC and MUMI the attitude of staff seemed somewhat defensive. They were anxious that the impact of the companies' operations and activities should be viewed not in the light of actual performance but rather as 'a work in progress' whereby improvements were being brought about in a difficult and complex context.

There is little doubt that Glencore has made great strides in integrating many relevant international standards into its polices but questions remain about its capacity and resolve to translate these into effective action in its day-to-day operations.

A.3. Environmental issues

Management of mining effluent: broken promises at Luilu

The study published by Bread for All and Fastenopfer in 2012 showed how KCC discharged untreated effluent from its hydro-metallurgical plant into the River Luilu. The pH of 1.9 and concentrations of copper, cobalt and lead were above international and Congolese environmental thresholds. In April 2012, the company acknowledged the facts and claimed to have resolved the problem: 'Glencore has been working on a complex engineering project, which includes 4,500 metres of intricate steel piping and over 30 specialised pumps, to address this issue […]. This work has been completed in the past few weeks and all effluent is now delivered to a tailings pond.'[3]

[3]Glencore's response to up-coming BBC Panorama report, 12 April 2012.

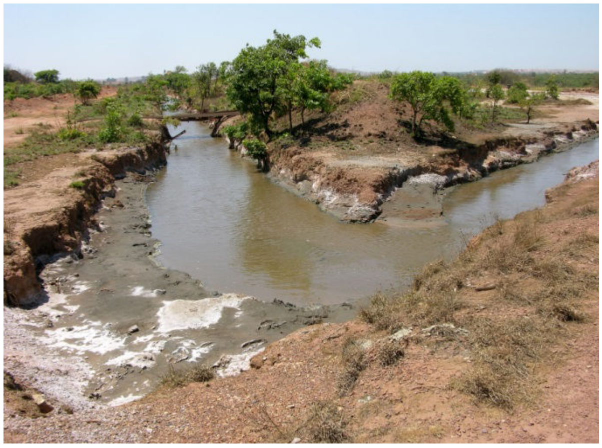
Point where effluent was previously discharged into the River Luilu (photo by Glencore – April 2012)

Photo sent by Glencore in April 2012 to Bread for All and Fastenopfer and international media, indicating that effluent was no longer discharged into the River Luilu via the Albert Canal.

Discharge of effluent into the River Luilu

However, that is not what we observed in October 2013. We discovered that waste from the Luilu plant was still being discharged into the Luilu River, only further upstream. We saw how the Albert Canal has been diverted and now there is a bend in its course before it discharges effluent upstream into the Luilu River.

KCC plant waste (October 2013)



Bend in the Albert Canal, where it has been diverted (October 2013)

We took several samples of the effluent.[4] Laboratory analysis showed that:

- the pH level, which was between 5.2 and 6.14, had significantly improved since April 2012. However, the acid content remained high.
- The concentrations of copper and cobalt remained extremely high. Copper concentrations were up to six times (9.927 mg/l) higher than the thresholds set by the Congolese Mining Code for effluent. They were also above the threshold set by the World Health Organisation (WHO) for drinking water. Cobalt concentrations were up to fifty-three times (53.59 mg/l) higher than WHO thresholds.

[4] Six samples were collected in polystyrene flasks at all sampling sites and analysed at the Industrial Toxicology and Occupational Health Laboratory at the Saint-Luc University Clinics of the Catholic University of Louvain.

Glencore therefore continues to pollute the Luilu River and to exceed current environmental standards. Questioned on this issue, the company said that it regularly monitors the situation and has not noted the pollution. It also said it had been putting acid neutralisation systems in place since 2012. It added that: ‘KCC is not the only operator in the area, and cannot take responsibility for any discharge that may occur as a result of the operations of other companies.’ However, Bread for All, Fastenopfer and RAID believe there is no doubt that the source of the pollution documented above is KCC’s installations. This is confirmed by satellite images.

MUMI: a concession in a game reserve

The other environmental issue for Glencore in the DRC concerns the Basse-Kando game reserve. The DRC game reserves were created to protect wildlife. No new human activities are allowed in the reserves, as set out in article 3 of the Mining Code: ‘Mining or quarryng rights cannot be granted in a protected area and artisanal production is also prohibited.’Given that Basse-Kando is a game reserve and that MUMI’s concession (No. 662)is in the middle of this reserve, the exploitation permit should never have been granted. Questioned on this issue, Glencore said that the responsibility for the situation lies with the Mining Registry (CAMI) and the Ministry of Mines, which granted the licences: ‘We refute that there was any exploitation of ambiguities in the mining law. The mining law is very clear in that the *Cadastre Minier* grants all mining licences in accordance with the laws of the country including the Mining Code. In addition, our operations fall under the Ministerial direction of the Minister of Mines.’

RAID, Fastenopfer and Bread for All believe that the situation is more complicated. In fact, MUMI managers have known for a long time that the company is operating in a reserve and have done nothing to clarify the situation. On the contrary, they have taken advantage of the lack of coherence within the Congolese government to establish a long-term presence and have refused to enter into dialogue with those responsible for protecting the reserve, notably the Congolese Institute for Nature Conservation (ICCN). As long ago as 2006, the director of the Basse-Kando reserve wrote to Group Bazano – the first title holder of the concession and Glencore’s former partner in MUMI – to denounce an infringement of Congolese law on protected areas[5]. However, neither Group Bazano nor Glencore contacted ICCN to try and clarify the situation. In 2009, the same scenario: invited by ICCN to a meeting in Lubumbashi to discuss the status of the Basse-Kando reserve, MUMI did not reply or attend. ‘It’s a very stubborn company’, explained an ICCN official in Katanga. ‘The other companies are prepared to discuss the situation, but MUMI has always refused to talk to ICCN.’[6]

A.4. Security and Human Rights:[7] New Policies, Old Problems

KCC’s sprawling concession presents enormous security challenges as it is surrounded by the townships of Luilu, Musonoi and Kapata, all of which have high levels of unemployment and poverty. Many of the young men living there are involved in artisanal mining. At KCC, security is provided by its internal security staff, a number of different private security contractors - of which the British company, G4S, is the largest - and the Congolese police. Controversially, Congolese military are also based inside MUMI’s concession. Mine police deployed to guard KCC’s site often use disproportionate force when trying to prevent incursions of artisanal miners on to its concessions. On several occasions over the past 18 months, mine police have fired live ammunition in pursuit of artisanal miners on KCC’s site resulting in deaths and serious injury, not only of artisanal miners, but also passers-by. The report examines a number of these cases in detail,[8]including the death of 23-

[5] Letter from the ICCN, the Upemba National Park and the Kando reserve to the Bazano group”, 27 September 2006.
[6] Interview, 12 March 2014.
[7] References and Glencore’s responses can be found in the main report.
[8] See annex Incidents at KCC and MUMI 2013-2014.

year old Eric Mutombo Kasuyi, who died on 15 February 2014, shortly after being apprehended by a KCC security patrol.

Post mortem results concluded that Mutombo's injuries were consistent with his having been beaten. Glencore maintains that 'the arrest was undertaken solely by the officers of the Mine Police, with no involvement of KCC or G4S employees, and that no violation of human rights had been perpetrated by KCC or G4S staff.' Yet Fastenopfer, Bread for All and RAID are concerned that unanswered questions remain: a lack of clarity about what happened and actions by KCC that appear to have obstructed the investigation.

Glencore states that it has no control over the DRC mine police, yet they are in the company's pay and provide security services on KCC's sites.[9] Their operations appear to be directed by KCC's Security Department. The fact that, according to numerous reports, mine police are susceptible to bribes and are ill-disciplined demonstrates the urgent need for greater supervision.

Moreover, there is a pattern of failure by the Kolwezi authorities to investigate violent or suspicious deaths of artisanal miners. The number of serious incidents involving the use of firearms or excessive force by the mine police should be a matter of the utmost concern to Glencore. Under the Voluntary Principles security guards should only use force when strictly necessary and to an extent proportionate to the threat. Passive acceptance of the flawed procedures of the DRC authorities is not compatible with the UN Guiding Principles. RAID, Bread for All and Fastenopfer believe that the current system whereby KCC's own security staff carry out the functions of judicial police officers on site is open to abuse or the perception of abuse.

A major source of friction between KCC and the surrounding communities is its closure of the only road (originally built by Gécamines) connecting the townships of Kapata and Luilu. The control of this road engages rights of freedom of movement. Using the road can lead to arrest on charges of trespass (*circulation illicite*), engaging rights of protection from arbitrary detention. There have been instances where minors have been detained without proper safeguards.

The Tilwezembe mine – about 30 kilometres from Kolwezi - is part of KCC's concession. According to our investigations, artisanal mining continues to take place at Tilwezembe under the control of the same local trader, who according to the BBC and Bread for All and Fastenopfer, was allegedly responsible for serious human rights abuses in 2012 and 2013.[10]

When questioned about action it had taken, Glencore said: 'KCC continues to engage with the DRC government for a peaceful resolution to this issue.'[11]

Glencore appears to have adopted a military-style response to the problem of artisanal mining which ultimately is a complex social problem. This approach is only likely to heighten the risk of further human rights violations. Until Glencore improves its relations with local communities and puts in place a security strategy that is compliant with international standards, violent incidents are likely to recur.[12]

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[9] Glencore Response 21 May 2014: 'KCC has no control or jurisdiction over the DRC Mine Police, and cannot comment on their actions'.

[10] Bread for All and the Swiss Catholic Lenten Fund, Glencore in the Democratic Republic of Congo: profit before human rights and the environment, April 2012, pp. 13 and 19. BBC Panorama, Billionaires behaving badly?, 16 April 2013; and Amnesty International, Profit and Losses, 2013, pp. 9-15.

[11] Glencore Response 21 May 2014.

[12] The Commentary to Guiding Principle 13 states: 'For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships"

A.5. Glencore and the communities

A top-down approach that lacks transparency

We do not believe that Glencore's approach to community participation and complaints procedures complies with international standards, notably the UN Guiding Principles on Business and Human Rights[13] and the Sustainability Framework of the International Finance Corporation (IFC)[14].

Glencore conducted Environmental and Social Impact Assessments (ESIAs) for its two subsidiaries, KCC and MUMI, in 2009 and 2008 respectively. The company began the process of updating the ESIAs in 2013. Glencore refused to provide a list of community representatives who had been consulted or participated in the process. According to our own survey of several dozen residents of the townships and villages closest to the concessions, nobody had even heard about the ESIAs. So the people most affected by KCC and MUMI's operations, contrary to the DRC's Mining Regulations (Article 451), have not been consulted nor have they received a summary of the ESIAs. There is a complete lack of transparency: Glencore, unlike other mining companies, refuses to make its ESIAs publicly available. Bread for All, RAID and Fastenopfer believe that Glencore should use a variety of methods including newspapers and local radio to disseminate information about its operations; affected communities should be invited to the ESIA consultations. The company should post the complete ESIAs on its website, with a summary in local languages, and list its liaison officers, so that residents know whom to contact with their complaints or concerns.

Large budgets – failure to prioritise local communities

Our analysis shows that Glencore's investments only marginally benefit the communities who live close to its concessions. Out ofUS$16.7 million spent in 2011 on social projects, around 15 million were spent on major infrastructure projects, including roads, bridges and the renovation of Kolwezi airport, which directly benefit Glencore's subsidiaries. The central problem of Glencore's community work is the lack of a rights-based approach. This is evident in three specific areas:

a. *The right to water*
For the last ten years KCC's operations have been responsible for the pollution of the Luilu River which has denied local people of their right to water. In the past, Gécamines mitigated the problem by installing an electric pump and pipes to provide the township with drinking water. But these were damaged in 2007. Since it took over KCC, Glencore has refused to accept responsibility for Luilu's water: 'In accordance with DRC regulation, water supply and delivery is the responsibility of the State, and managed by state entities REGIDESO and SNEL.' Local people have no option but to use dirty water drawn from small artisanal wells they dig in their gardens. Bread for All, RAID and Fastenopfer believe that Glencore does have responsibility for providing access to clean water to Musonoi and Luilu. This should be a priority in its community development budget.

b. *The right to a livelihood*
The villages of Kapaso, Riando, Kando and Kisenda are extremely poor. They do not appear on any maps, have not been included in any census or considered by any development plan. The main sources of income in these villages are agriculture, the sale of firewood and fishing. The villagers sell their produce on the side of the main road (National Highway No 1),

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are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.'

[13] See UNGuiding Principles 18, 20 and 31.

[14] IFC Performance Standards on Environmental and Social Sustainability. (PS 1§ 25-36): Assessment and Management of Environmental and Social Risks and Impacts, 2012.

which is used by thousands of lorries and cars every day. Three years ago, MUMI closed the access road to the highway. As a result, instead of a 5 km journey on foot or bicycle, villagers now have to travel 15 km. This detour is an enormous handicap, further isolates the villages and exacerbates their poverty. It is practically impossible for them to sell their maize and manioc. On the other side of the National Highway, another access road was closed, again without prior consultation. These closures are contrary to international best practice. Fastenopfer, RAID and Bread for All believe that Glencore should have consulted the communities and assessed the negative impact of these decisions before closing the roads. The company should also have introduced mitigating measures, for example, the construction of an alternative road towards Mwazaminda and the introduction of a bus service to Kando.

c. *Right to Housing: Secret Plans for the Relocation of Musonoi*
Glencore claims to be committed to ensuring that KCC will follow the IFC's Performance Standard on Resettlement. But KCC has failed to consult the affected community neither has it provided them with information about its Resettlement Plans. This goes against the UN Guiding Principles[15].

Houses in Musonoi, particularly those closest to the T17 open pit mine, are in an extreme state of disrepair, the walls have gaping fissures as a result of the blasting. One reason for the company's unwillingness to spend money on rehabilitating the buildings or upgrading the local infrastructure may be due to the fact that resettlement of most if not all of the residents has long been considered inevitable.[16] In September 2009 Katanga Mining Katanga Mining (KML) [17]cut $58 million US dollars of capital expenditure earmarked for the relocation of Musonoi village. KML told investors that it was accelerating its plan to increase production. KML said that it was 'assessing the potential to mine the Kamoto East ore body from underground'.[18] What Glencore failed to mention was that blasting at the T17 mine would also accelerate. The suspension of the resettlement programme is part of Glencore's cost cutting approach. This was the case in 2009 and it remains true in 2014. Glencore continues to give evasive or ambiguous responses to our questions about its plans for Musonoi.[19] An official – *Chef de Quartier* – in Musonoi told us that KCC had warned him to keep this information to himself because 'this is a secret, if people know too much, it will cause tension and they might make a fuss.'[20]RAID, Fastenopfer and Bread for All believe that Glencore, in line with IFC and international human rights standards, has an obligation to consult and inform the affected community about its intentions and provide compensation for the damage their operations have already caused.

A.6. Taxation – Substantial profit transfers to tax havens

KCC is part of the Katanga Mining Ltd (KML) group controlled by Glencore. Despite strong growth, KCC has systematically recorded **losses since 2008** and its shareholders' (negative) equity is close to US$ -2 billion. With a situation like this, the company should have been liquidated or recapitalised.

In fact, the heavy losses can be explained principally by significant interest payments to five parent companies, all registered in tax havens and to which KCC has become more and more indebted.

[15] UN Guiding Principle 11 and 15 (b).
[16] SRK Consulting, An Independent Technical Report on the Material Assets of Katanga Mining Limited, Katanga Province, Democratic Republic of Congo ("DRC"), 17 March 2009, pp. 185-186.
[17] Katanga Mining Katanga Mining Ltd (KML) a Canadian listed company is controlled by Glencore.
[18] Bloomberg, Katanga Announces Accelerated Development Plan, 9 August 2009: http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTkEDGdU8HVQ.
[19] Letter from Anna Krutikov, GlencoreXstrata, 31 January 2014.
[20] Interview with neighbourhood chief, Musonoi, 10 March 2014.

While KCC has recorded systematic losses in the DRC, its parent KML group has made substantial profits for investors overseas.

This practice of shifting recorded profits to offshore jurisdictions with low company taxes is not illegal in itself, but it allows KCC to avoid paying tax on profit (30%) and dividends to the DRC, which owns 25% of KCC. On the basis of the results of KML, the company should have paid the DRC **US$ 153.7 million** more than it has done since 2009. In comparison, Swiss development aid to the DRC during the same period only amounted to **US$ 58 million**.

Glencore's support for certain social projects does not offset the far greater loss to the DRC's social budget resulting from Glencore's aggressive tax optimisation strategy. Avoiding tax aggravates poverty in Africa. To put an end to these practices, Fastenopfer, Bread for All and RAID are calling for an international requirement for companies to **publish their accounts on a country by country basis** (*country-by-country reporting*).

Large degree of opacity in tax and fee payments despite the ITIE

Questions about whether KCC and MUTANDA pay the right level of tax arise because there are wide discrepancies and a large degree of opacity in the available information. The amounts that KCC declares it paid to the state under the EITI (Extractive Industries Transparency Initiative – *Initiative pour la Transparence dans les Industries Extractives*) do not correspond to our estimates of amounts due according to the production carried out or to the amounts contained in the accounts of KCC.

It is not unusual for mining companies in the DRC to seek to exaggerate their costs and investments to reduce their basis for taxation. It is noteworthy that the subsidiaries of Glencore have had several legal disputes with the tax authorities: KCC paid **US$ 44.0 million** in fines and tax penalties over the last 5 years and MUTANDA was given formal notice in October 2013 to pay **US$ 41.2 million** of fees and fines due.

To determine if the taxes paid are correct and if the accounting entries were over or under estimated, Fastenopfer, Bread for All and RAID are calling for an **audit**of Glencore's subsidiaries as well as of other mining companies.

Questionable sales of mining concessions to a friend of the President

In 2011, shares in MUTANDA-KANSUKI belonging to the state company Gécamines were sold far too cheaply and without competitive tender to the group of the Israeli businessman Dan Gertler. The DRC state is said to have lost close to **US$ 630 million** in these sales. Between 2012 and 2013, these same sales were resold to Glencore at a "market price" several times higher than the original price. A remarkable fact is that Glencore could have made a competitive offer for these shares in 2011, but turned it down. Dan Gertler, a close associate of the DRC President, Joseph Kabila, has been implicated in several other scandals and secret sales from Gécamines to offshore companies.

In 2013, history repeated itself: negotiations took place for the sale of shares of Gécamines in KCC to Dan Gertler. Once again, the deal was shrouded in secrecy and, once again, Glencore chose not to exercise its right of first refusal over Gécamines shares. Glencore refused to comment at the time. According to our information, the sale of shares was stopped by the DRC government, but other transactions that have not been publicly disclosed still took place between KCC and Gécamines concerning mining deposits.

Fastopfer, Bread for All and RAID are demanding greater transparency and compliance with good governance agreements concluded with the international financial institutions.