

African Mining and Mineral Policy Guide:

*A resource for non-
governmental organisations,
activists, communities,
governments and academics*

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About this guide

This Guide has been developed to provide IANRA members and partners with a shorter, less technical and more user-friendly version of the ‘Legal and Policy Analysis Report’ (the Report). The Guide aims to be used as a reference and consultation document by community-based organisations (CSOs) that advocate for more just and sustainable management of natural resources in Africa.

The Guide is part of the IANRA’s Pan-African Advocacy Project on Extractive Industries (Pan-African Advocacy Project), which seeks to develop and advocate for mineral resource legislation and related policies that will protect and promote human rights, and work towards inclusive development. The Pan-African Advocacy Project includes study, analysis and reflection at community, national, and continental levels. Besides being closely related to the ‘Legal and Policy Analysis Report’, the Guide is linked to four recent publications in the IANRA’s Pan-African Advocacy Project framework:

1. ‘Case Studies Synthesis Report’: case study research in communities in five countries – Angola, Democratic Republic of Congo (DRC), Kenya, South Africa, and Zimbabwe. The case studies focus on the impact of extractive industries – by one particular company’s operations – on human and peoples’ rights. The African Charter on Human and Peoples’ Rights was used as the reference point. The case studies were then analysed and a synthesis report, which highlights problems identified across the five case studies and are seen in most cases of extractive industry operations, was developed. Principles that could address those problems were developed and formulated into a ‘First Principles’ document which sets the bases of the Model Mining Legislation (MML).
2. ‘Legal and Policy Analysis Report’: identifies how the gaps in policies and legislation impacts mining-affected communities. The recommendations included in the report are intended to inform the development of the MML.
3. ‘Advocacy and Gender Mainstreaming Guide: geared especially for non-governmental organisations (NGOs), activists and communities to use in their advocacy work.
4. ‘Model Mining Legislation’: a community-oriented legislative proposal for an African model legislation on mineral resources, which the IANRA and its partners will develop.

The Guide is structured in three parts. Part One introduces both the Guide and the Report. Part Two outlines 12 focus areas covered in the comparative study of the Report. Part Three summarises two more focus areas, the continental and international institutional mechanisms, assessed in the Report.

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Abbreviations

ACHPR	African Commission on Human and Peoples Rights
ATI	Access to Information
AU	African Union
CSI	community social investment
CSO	community-based organisations
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EIA	environmental impact assessments
EITI	Extractive Industries Transparency Initiative
FPIC	free, prior and informed consent
IANRA	International Alliance on Natural Resources in Africa
MML	Model Mining Legislation
MPRDA	Minerals and Petroleum Resources Development Act (South Africa)
NGO	non-governmental organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
PAP	Pan-African Parliament
RDC	Rural District Council (Zimbabwe)
RRI	Rights and Resources Initiative
SADC	Southern African Development Community
UNDRIP	United Nations Declaration on the Rights of Indigenous People
WAEMU	West African Economic and Monetary Union

Part One: Introduction to the Guide and the Report

1.1 How to use this guide

This Guide aims to provide the IANRA members and partners with a shorter, less technical and more user-friendly publication than the ‘Legal and Policy Analysis Report’. This Guide, although containing useful references to the Report, does not necessarily need to be read together with it.

Part One introduces both the Guide and the Report: section 1.1 explains how to use the Guide; section 2.2 describes the subject of the study in the Report; and section 2.3 introduces the structure of the Report and gives a little more detail about Part I of the Report, which is not summarised in this Guide.

Part Two summarises 12 of the 14 focus areas covered in the comparative study of the Report:

- Purpose of mining legislation (Chapter 5)
- The ownership or custodianship of minerals (Chapter 6)
- Presidential and ministerial discretion (Chapter 7)
- Mineral rights (Chapter 8)
- Land tenure (Chapter 9)
- Community consent and consultation prior to awarding mineral rights (Chapter 10)
- Compensation (Chapter 11)
- Resettlement (Chapter 12)
- Impact assessment, which covers environmental, social, and human rights impact assessments (Chapter 13)
- Benefit sharing: royalties, shared and local content (Chapter 14)
- Dispute settlement processes (Chapter 15)
- Access to information (Chapter 16).

For each of the 12 focus areas the Guide includes:

- An introduction to the focus area. When considered necessary, because of the length or technicality of the Report, the Guide provides a shortened version of the introduction. The reader should therefore refer to the Report for further detail.
- The questions that have guided the comparative study. This will give the reader a quick overview of the research questions that are analysed – country-by-country – in the Report. The reader interested in knowing more about the research questions should refer to the Report.
- A table summarising the comparative study. The table summarises one, but sometimes two, research questions. This is intended to provide the reader with a snapshot of the comparative study. For an in-depth explanation, the reader should refer to the Report.
- Findings and recommendations. This includes the conclusions of the chapter. The findings identify the main problems of inadequate legislation or poor implementation of existing legislation. The recommendations are aimed at informing the MML and its related policy recommendations that relate to promoting community rights and inclusive, more

sustainable development. Both the findings and the recommendations can be used by CSOs working on sustainable management of natural resources.

Part Three offers a summary of the final 2 of the 14 focus areas, continental and international institutional mechanisms, which are assessed in the Report. Here the reader can find:

- A list of the mechanisms covered in the Report, both at the continental and international levels. This can be used as a reference list of mechanisms by individuals, communities, and/or CSOs to seek remedy and justice for extractive industries-related impacts.
- Key findings and recommendations provide a brief analysis of the mechanisms that have been identified. It explains how the mechanisms and standards are relevant to IANRA activities, with special focus on the Pan-African Advocacy Project and development of the MML.

The chapter and table numbers included in Parts Two and Three of the Guide correspond to the chapter and table numbers of the Report.

1.2 What does the Report do?

The Report looks at how policies and legislation impact on mining-affected communities in Africa. Using a legal lens, the Report analyses how behind all aspects of mining are legislation and policies that can be improved. The Report shows that policies seldom address the real needs of communities – from free, prior and informed consent (FPIC) to compensation to the externalisation of environmental costs.

In a comparative study of 14 focus areas of legislation in five countries – Angola, DRC, Kenya, South Africa, and Tanzania – the Report identifies areas that can be used to take steps toward reducing the negative impacts of mining. It is with this in mind that the Report reviews legislation and policies at national, regional, continental and international levels.

The Report, however, does not limit itself to a comparative study (Chapters 5 to 16). Chapter 2 outlines the key features of the legal systems and governance in Africa; Chapter 3 looks at the key generations of mining regimes in Africa; and Chapters 17 and 18 analyse the relevant institutional mechanisms (at the continental and international levels) for legislative advocacy that can be used by individuals, communities, and/or CSOs to seek remedy and justice.

The Report is not intended to be exhaustive, but does take the first step in presenting analysis of the topic. The compilation of the Report was limited by length and resources, so focus areas were selected based on what is most relevant for this project, as well as what the IANRA hopes is most relevant for its members, partners, and various practitioners in the field. The Report is a working document – so feedback, input, and suggestions are very welcome and will help the IANRA strengthen its knowledge.

1.3 A roadmap of the Report

The Report has 18 chapters divided into three parts. Part I: Introduction, presents a general context about the mining sector in Africa; Part II: Comparative Study, analyses 14 issues of the mining legislation in Angola, DRC, Kenya, South Africa, and Zimbabwe; and Part III: Institutional Mechanisms, assesses instruments (at the continental and international levels) for legislative advocacy that can be used by individuals, communities, and/or CSOs.

1.3.1 Part 1: Introduction

Part I of the Report aims to show that the political-economic context is essential to understand the way the rule of law does, or does not, operate in contemporary African nations, and why laws, even where they provide strong rights to citizens, may not be implemented or are easily circumvented.

Chapter 1 outlines the methodology of the study. Chapter 2 introduces the complexity of the legal and governance tapestry of Africa. Section 2.1 covers the legal aspects, presenting the variety of legal systems, the status of customary law, and the application of international law. Section 2.2 focuses on the institutional level, highlighting the relative strength of informal institutions vis-à-vis formal institutions. The chapter explains how the influence of the law to determine citizens' abilities to secure and defend their rights in African states is generally less significant than in other parts of the world where institutions are more formal or impersonal, and where the rule of law is stronger. This serves as a cautionary note for the overreliance on formal institutional interactions, such as advocacy with government or parliamentary institutions, to develop and implement the MML. It also considers other ways that informal institutions can be used to secure and defend human rights for citizens in African states.

Chapter 3 describes the generations of mining regimes in Africa. The chapter is divided in five sections that explain the history of mining policy and legislation. These periods were marked by legal and policy transformations in response to: the mode of primary accumulation; the fluctuation of commodity prices; and induced debt crisis in Africa. These processes serve to explain the redefinition of structural power relations in favour of extractive interests and at the expense of people and the environment.

1.3.2 Part II: Comparative study

Part II of the Report presents a comparative study of the mining legislation in Angola, DRC, Kenya, South Africa, and Zimbabwe. The comparative study assesses how common areas and issues incorporated in mining regimes impact on communities living in mining areas.

Furthermore, the analysis aims to identify the gaps and opportunities in mining legislation that may be of use in advocacy efforts at the local, national, regional, and/or continental levels, in particular for the development of the MML.

The comparative study shows the urgent need to fully recognise communal and customary rights of mining communities, in line with the African Charter on Human and Peoples' Rights, and to curb the power balances and excesses of mining in Africa. It also shows that mining can be used to improve other sectors that are more sustainable, which mining in itself is not. Moreover, the study shows the need to transform mining in such a way that it becomes part of a genuine, inclusive development process, which might also imply establishing no-go mining zones, and/or pursuing alternatives to mining in development plans.

Chapters 5 to 16 contain the comparative studies and describe the 12 focus areas of legislation, each of which follows the same structure:

- Introduction, which provides a background to the chapter's theme.
- Comparative study, which examines the impact of legislation on mining-affected communities in each of the case study countries.
- Summary comparison, which provides a recap of the main issues of the comparative study.
- Key findings and recommendations, which present the chapter conclusions. The findings identify the main problems of inadequate legislation or poor implementation of existing legislation. The recommendations are aimed to inform the MML and make recommendations to policy related to promoting community rights and inclusive, more sustainable, development.

1.3.3 Part III: Institutional mechanisms

Part III assesses the relevant continental and international institutional mechanisms that can be used by individuals, communities, and/or CSOs to seek remedy and justice, focusing on the IANRA's Pan-African Advocacy Project.

Chapter 17 focuses on the continental level and Chapter 18 focuses on the International level.

Part Two: A Summary of the 'Comparative Study'

In Part Two, the Guide recaps the 12 focus areas researched in Part 2: Comparative Study of the Report. This includes:

- An introduction to the focus area.
- The questions that guided the comparative study.
- A table summarising the comparative study.
- Findings and recommendations.

Chapter 5: Purpose of mining legislation

The stated purpose of a piece of legislation is a common legislative provision that provides a description of the aims of the statute.

The comparative study is guided by the following questions:

- What is the stated purpose of the main mining legislative provision?
- To what extent is the stated purpose of the legislation supportive of community development prerogatives?

5.1 Summary comparison

Table 1 summarises the purpose of the main mining legislation in the countries selected in this study (see Appendix 1 for the legislative framework used in the Report).

Table 1 Purpose of the legislation: summary comparison

COUNTRY	PURPOSE OF LEGISLATION
Angola	The Mining Code aims to consolidate all previous legislation applying to mining activities.
DRC	The Mining Code aims to consolidate all previous legislation applying to mining activities.
Kenya	The Mining Bill refers to the provisions to which it gives effect.
South Africa	The Minerals and Petroleum Resources Development Act of 2002 (MPRDA) aims ‘to make provision for equitable access to and sustainable development of the nation’s mineral and petroleum resources; and to provide for matters connected therewith’.
Zimbabwe	The Mining Code aims to consolidate all previous legislation applying to mining activities.

5.2 Key findings and recommendations

The key findings and recommendations on the purpose of mining legislation in the case study countries:

- The main mining legislation in Angola, DRC, South Africa, and Zimbabwe share a common purpose: to consolidate and amend the law relating to mines and minerals, which was dispersed in many different locations. Moreover, the objectives of the law are elaborated in separate provisions.
- In South Africa, the purpose of the legislation includes a broad objective and then elaborates on a laudable set of intentions. However, there is a gap between intention and impact, which is often determined by debatable underlying assumptions. This is commonly known as the ‘talk left-walk right’ approach.
- Regrettably, none of the main pieces of legislation examined acknowledges those most negatively affected by mining activities. It is therefore recommended that the MML make reference to locally affected peoples.
- In order to avoid or minimise the divergence between intention and impact, the MML should combine strategic and operational objectives. It is therefore recommended to draft in a clear and explicit manner the development objectives of mining, both for local communities and the state. In addition, a set of outcomes and target indicators should be included to monitor the objectives, as well as the legislative and policy instruments that will serve to achieve these objectives.

Chapter 6: The ownership or custodianship of minerals

Legal systems usually differentiate between subsurface and surface rights holders.¹ Subsurface rights holders possess the ownership of minerals, while surface holders own the rights to the surface of the land. This distinction is explicitly stated in some legislative provisions. For example, article 3 of the DRC Mining Code provides that the ownership of natural resources, including minerals, constitutes a right that is separate and distinct from the rights resulting from the surface area.² As a consequence, the holder of surface rights is not usually entitled to claim any right of ownership whatsoever over the deposits of minerals. This means that the intersection between surface and subsurface rights is also the critical nexus between land and mineral legislation, discussed in Chapter 8 and Chapter 9.

In general terms, the ownership of mineral rights has been either in the form of the state, individual or group/collective. In Africa, the mining regime reforms over the last period associated with resource nationalism has seen harmonisation towards state ownership of subsurface rights, whereas state ownership of all land it is still more of a mixed reality.

Commercial level mineral exploitation has historically been beyond the preserve of the average (customary) landowner, occupier or user. The presence of a mineral under communities' grazing land rarely results in communities engaging in mining the mineral. However, where land rights holders automatically hold rights over minerals beneath them, they are better placed to benefit from mining.³ This position achieved significant developmental outcomes for landowners in South Africa, though primarily for the white population (see subsection 6.2.4 of the Report for further information).

The comparative study is guided by the following questions:

- How is ownership of mineral resources regulated in the mining legislation?
- Is there a distinction between surface and subsurface rights holders?
- Is there a distinction between use and ownership of land?
- Do customary law and statutory law conflict in relation to land use and ownership?

6.1 Summary comparison

Table 2 summarises the ownership or custodianship of minerals in the countries selected in this study.

COUNTRY	HOW IS OWNERSHIP OF MINERAL RESOURCES REGULATED IN THE MINING LEGISLATION?
ANGOLA	The Mining Code establishes minerals are the original property of the state and part of its private domain.
DRC	The Mining Code establishes the minerals are exclusive, inalienable and imprescriptibly property of the state.
KENYA	The Mining Bill states all minerals are the property of the republic and are vested in the national government in trust for the people of Kenya.
SOUTH AFRICA	The MPRDA assigns the 'custodianship' of minerals to the state for the benefit of all South Africans.
ZIMBABWE	The Mines and Minerals Act vests ownership of all minerals in the president.

6.2 Key findings and recommendations

Based on the comparative study, it is possible to draw the following conclusions:

- The mining regime reform in Africa has seen harmonisation towards state ownership of subsurface rights.
- In all case study countries mining legislation includes the distinction between subsurface and surface rights.
- In South Africa, the apartheid laws in which subsurface and surface rights were related, seemed to form the foundation for remarkably successful rural development and an affirmative action programme for whites. Should the MML, therefore, consider private ownership of minerals?
- None of the legislation takes into account customary law regarding ownership of minerals.

Chapter 7: Presidential and ministerial discretion

Another feature of mining regimes is the extent to which power is conferred upon government officials and agencies, usually the licensing authorities, to be exercised at their discretion according to policy considerations rather than precise legal standards. While presidential and ministerial discretion can be exercised over different areas related to mining legislation, such as environmental or labour regulations, this chapter focuses on presidential and ministerial discretion over mining rights

It is important to note that discretionary powers are neither necessarily nor typically in some way arbitrary or beyond the law per se.⁴ However, predictability and clarity should accompany the procedural requirements to exercise discretionary powers in order to avoid arbitrary decisions. Moreover, predictability and clarity are fundamental principles to ensure legal certainty and confidence. This is particularly important for the mining sector, where decisions for granting mining rights are taken many years in advance of the consequences that will follow from these decisions. In this regard it is important to note that the mining sector causes irremediable costs for mining-affected communities, such as severe environmental harm and/or resettlement.

The comparative study is guided by the following questions:

- To what extent does the main mining act allow for presidential or ministerial discretion when granting mining rights?
- Does presidential or ministerial discretion balance community and mining interests when exercising discretion?

7.1 Summary comparison

Table 3 summarises the ministerial and presidential discretion over mining rights in the countries selected in this study.

Table 3 Ministerial and presidential discretion: summary comparison

COUNTRY	DOES THE MAIN MINING ACT ALLOW FOR PRESIDENTIAL OR MINISTERIAL DISCRETION WHEN GRANTING MINING RIGHTS?
ANGOLA	The Mining Code establishes a general discretion in the hands of the minister of geology and mining or the president when granting concession of mining rights.
DRC	The Mining Code provides broad discretion to the minister of mines when granting mining rights.
KENYA	The current Mining Act provides an unfettered ministerial discretion in the hands of the commissioner of mines when granting mining rights.
SOUTH AFRICA	The MPRDA provides for limited discretion to both the minister of mineral resources and officials within the department when considering prospecting or mining rights. However, the lack of clarity of some of the provisions of the MPRDA opens the door for more discretion.
ZIMBABWE	The Mines and Minerals Act provides considerable discretion for the licensing authorities.

7.2 Key findings and recommendations

Based on the comparative study is it possible to draw the following conclusions:

- In all countries selected in this study the main mining legislation allows for broad presidential and ministerial discretion over mining rights.
- Usually, discretionary powers that are vested in very broad terms increase the risk of arbitrary decisions (see for example subsection 4.1.3 of the Report regarding Kenya).
- In most cases discretionary powers are given to central authorities, but not to local administrations. The comparative study shows that discretionary powers given to central authorities are more inclined to promote mining corporate interest than community interests.
- Discretionary powers in the examined mining regimes are not accompanied by accountability mechanisms, increasing the risk of arbitrary decisions. Arbitrary decisions very often leave communities vulnerable without protection under law.
- A combination of vague legislative requirements and high levels of administrative discretion undermines security of tenure (see for example subsection 4.1.4 of the Report regarding South Africa).
- If the MML includes discretionary powers, provisions should ensure the predictability and clarity of the decisions with guidelines for interpretation.
- If discretionary powers are granted in the MML, these should be accompanied by decision-making and governance systems that ensure communities' interests are considered.
- Clear procedural requirements such as consent and consultation with affected communities should be amongst the criteria considered.
- If granted, discretionary powers should consider the creation of adequate impact assessment mechanisms, as well as effective, accessible and, where applicable, customary grievance and dispute settlement mechanisms for affected communities.

Chapter 8: Mineral Rights

Chapter 6 notes that in most countries natural resources are owned by the state, but the right to explore and exploit the natural resources is commonly granted to companies through mining rights concessions. Mining rights give the company the ability to undertake mining-related activities within a designated area and set out the responsibilities and obligations that the rights entail.⁵ Mining rights can be granted and administered in different ways, but the two primary regimes are contracts and licensing.⁶ In a contracts regime mineral rights and obligations are granted through a negotiation process with each company, while licence regimes define the process of granting mineral licences and all rights and obligations in generally applicable laws.⁷

There are different types of mining rights or licences depending on the phases of mining activities for which the rights or licences are drafted. Although there is no unique set of mining activities, it is possible to differentiate three phases: prospecting and exploration; exploitation; and closure. It is important to note that granting mining rights overlaps in content with other specific areas of legislation, such as community consultation or environmental protections. These specific areas will be explained in Chapter 10 and Chapter 13. An explanation of the three phases: prospecting and exploration, exploitation, and closure are provided in subsections 8.1.2, 8.1.3, and 8.1.4 of the Report, respectively.

8.1 Summary comparison

Because of both the length and complexity of a narrative comparative study on the mining rights in the country case studies, the comparative study is presented in two tables in the Report, according to the phases of prospecting and exploitation. For each of the tables, the right holders, the obligations, and the procedures to secure the rights are discussed. As the information is already included in the tables, no summary comparison has been drafted for this section.

8.2 Key findings and recommendations

- Besides specific considerations of different processes and timeframes of different mineral rights, most of the laws under review confer a general set of mineral holder's 'rights and obligations' that are in many respects quite similar.
- Financial capability is a major concern in all the mining regimes examined. However, no reference is made to community interests or the impacts of mining in communities.
- When regulating mineral rights, the legislation in the selected countries places a strong emphasis on maximising exploitation in the shortest possible timeframe, but does not include provisions related to using mining for sustainable economic growth, sustainable or community development.
- Research shows it is at the point of granting mineral rights that community-development outcomes are most notably impacted. Issues of compensation, expropriation, and resettlement become critical at this stage.
- The main mining statutes in four of the countries selected, excluding South Africa, do not provide for engagement provisions with mining-affected communities in the prospecting and exploration phases.
- In order to ensure full participation of the affected communities during all mining phases, the MML should contain consent-based decision-making provisions with mining-affected communities in all mining phases.
- The closure and rehabilitation phases have been historically a very poor area of legislative focus with grossly inadequate provisions, which has had severe consequences for mining-affected communities, as for example in South Africa (see Chapter 8 of the Report in this regard).
- MML should include provision for adequate closure and rehabilitation.

Chapter 9: Land Tenure

Chapter 9 analyses the interaction between mining activities and land-related issues, focusing on land tenure legislation.

In mining regimes, the legal interaction between mining activities and land-related issues is approached through a number of different provisions, including placing restrictions on certain types of land where mining will be expressly excluded, such as national parks or nature reserves; giving permission to the subsurface rights holder to use water, timber, and other material essential to mining processes; or requiring the consent of the landowner or the lawful occupant to access or use the land for the mine itself, or for access to and from the mining site.⁸

Consent-related provisions usually include statutory requirements if permission is denied, such as for example relocation (see Chapter 12). Moreover, if landowner permission is not required, the land- owner or the lawful occupant may be compensated for access or user activities (see Chapter 11).

Traditionally, mining regimes have given mining-related activities precedence over other land uses.⁹ The rationale underpinning such an approach is the assumption that mining activities constitute the highest and best use of land and therefore is a public interest activity.¹⁰ This traditional approach has recently been challenged and the new mining regimes assign more value to social and economic issues (for a more detailed explanation, see Chapter 3 of the Report).¹¹ However, new mining regimes still face major barriers to foster local, national and regional development, which is explained by the interconnection of land tenure, local governance and natural resource law. And governments and companies are often not willing or able to accommodate communities' preferred methods of land rights recognition.¹²

9.1 Security of tenure: Social and institutional realities in Africa

In most jurisdictions, once a mining right has been obtained the right holders must reach an agreement with the landowners or the lawful occupants. Landowners or lawful occupants may be the state, a private landowner, communities or a mix of these.¹³ In Africa, landownership needs to be explained together with some important social and institutional considerations.

First, a reality across most African countries is that customary land rights remain formally unrecognised and women's rights, especially, are neither recognised nor secured. This is particularly notable as rural women are central to land-based domestic food production, producing 60% to 80% of food consumed within rural households, and harvesting natural resources, such as fruits, medicinal herbs and plants, which are essential to the reproduction and well-being of household members.¹⁴ As a result, communities are vulnerable to dispossession from their land.¹⁵ As a consequence, states have historically claimed ownership over untitled land, which has caused the tenure insecurity in most African countries, rendering rural communities as tenants of the state. For example, research by the Rights and Resources Initiative (RRI) has found that in Africa's most forested countries, only 3% to 5% of forests are recognised as being owned or securely allocated to rural communities.¹⁶

Second, the status of land and natural resource tenure is fundamentally linked to wider political circumstances and the conditions under which land is governed and resources are extracted in a highly unequal model of development governed 'by the political, socio-economic and cultural relations within the respective country or region: the economy and class structures, gender relations, the state and public discourse'.¹⁷ The ability of local communities and civil society organisations to penetrate political processes to advocate for and secure land and resource rights generally remains constrained in sub-Saharan Africa.¹⁸ Heavily centralised executive power circumscribes the influence of representative legislative bodies and independent judiciaries, as well as civil society organisations and individual citizens in general. Research on global farmland acquisition made by the World Bank highlights the fact that investors are targeting Africa for land because of the weak protections afforded to residents of rural areas in terms of recognition of their land rights, making it easier, and cheaper, for governments to appropriate land and allocate it to investors.¹⁹

One of the major barriers to local development in Africa, therefore, lies in this interconnected realm of land tenure, local governance, and natural resources law. Across most of Africa, for reasons that relate to the region's political history and governance patterns, local communities continue to lack recognition of customary land rights, or legally recognised collective governance institutions, or rights over natural resources found on their lands, or in some cases, all three.

The comparative study is guided by the following questions:

- What is the legislation relevant to the recognition (or lack) of community territories?
- What are the forms of title or tenure provided in that legislation?
- Is collective, Native or Aboriginal title recognised? If so, is it considered 'private' or 'public'?
- How is collective tenure managed and protected in practice? What are the main challenges being confronted in the practical day-to-day management of collective tenure systems?
- Have customary law systems been accommodated in land and similar legislation, regulation and policy?

9.2 Summary comparison

Table 4 summarises the regulation and recognition of collective land tenure in the countries selected in this study.

COUNTRY	RECOGNITION AND REGULATION OF COLLECTIVE TENURE
ANGOLA	The state has ultimate ownership of all Angola's land, but the rights to occupy and use land can be granted to individuals as well as rural communities. However, few people are aware of their land rights or the process to formalise these, and the law and regulations have not been yet fully implemented. Moreover, the Land Law allows expropriation in cases of the existence of natural resources.
DRC	According to the Land Law, the state has ownership of the soil, but private individuals are enabled to obtain private rights over land. The Land Law recognises community land and customary land tenure and notes that the status of these lands should be defined by a Head of State's Order. However, that order has not yet been enacted. Moreover, community and customary land are not surveyed or registered, and villagers lack knowledge about the laws.
KENYA	The Constitution of Kenya recognises and protects community land. According to the constitution, community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Moreover, the constitution places the responsibility on the government to hold unregistered land in trust for the communities.

COUNTRY	RECOGNITION AND REGULATION OF COLLECTIVE TENURE
SOUTH AFRICA	<p>The land reform measures after apartheid introduced new legislation with regard to the security of tenure: The Interim Protection of Informal Land Rights Act, which relates specifically to state-owned land that is informally occupied as well as trust land, provides for the temporary protection of certain rights to and interests in land, which are not otherwise adequately protected by law; the Upgrading of Land Tenure Rights Act provides for the transfer of communal land to full ownership to ‘traditional communities’ as well as other related matters; the Restitution of Land Rights Act provides for the restitution of rights in land to persons or communities that were dispossessed of such rights; the Communal Property Associations Act enables communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property; and, the Extension of Security of Tenure Act (ESTA) is intended for the security of tenure, in particular for agricultural and farm workers and protects against illegal eviction of ‘occupiers’ providing some guidance to the resettlement process.</p>
ZIMBABWE	<p>The Communal Lands Act recognises occupiers’ rights to occupy and use communal land for agricultural and residential purposes. According to the Traditional Leaders Act, collective tenure is managed by the traditional leaders with approval from the Rural District Council (RDC). This situation has led to conflict between traditional leaders and RDCs.</p>

9.3 Key findings and recommendations

- Land ownership in Africa should be considered together with some important social and institutional particularities, such as the interconnected realm of land tenure, local governance, and natural resources law.
- Across most of Africa, local communities continue to lack recognition of customary land rights, legally recognised collective governance institutions, customary decision-making methods, or rights over natural resources found on their lands, or in some cases all three.
- Recognition of communal landownership is either non-existent or tenuous in mining legislation.
- The lack of recognition of customary rights for local communities poses pervasive threats to their land rights and tenure security.
- The recognition of community and customary land tenure within land laws is not followed by adequate provisions to ensure the principles of (gender) equality and the right to property.

- The administration of communal lands is usually vested in chiefs, tribal authorities, committees or leaders or a representative of a community. However, legislation does not include appropriate mechanisms to ensure adequate participation of individuals and communities, and/or historically disadvantaged or marginalised groups.

Chapter 10 Community consent and consultation prior to awarding mineral rights

Community consent prior to the exploration, prospecting, and award of mineral rights has proven to reduce the risk of social conflict and increase stability throughout the life of the project, which benefits all stakeholders.²⁰ For example, through different case studies OXFAM concludes that an appropriate consultation helps to prevent situations in which communities might be forced to seek administrative or legal measures at the national and/or international levels in defence of their rights.²¹ However, the avid economic and political interests to launch mining projects often result in inadequate consultation and consent processes that fail to meaningfully engage mining-affected communities. This short-termism approach may lower short-term costs for project sponsors, but an increasing number of studies suggest the medium- to long-term costs associated with potential project stoppages or even project termination stand to far outweigh any short-term savings.²²

Moreover, prior consent before the exploration, prospecting, and award of mineral rights will make it much easier for the mining-affected communities to make a decision regarding the project, than when companies have begun to invest funds in prospecting or exploration.²³ In addition, exploration activities can already have significant impacts on communities by, for example, creating a road that may put in danger sacred sites for the affected communities or that can damage the livelihoods of the communities. Currently, most governments grant mineral rights prior even to consulting potentially affected local communities. However, some countries, such as Kenya, have established legal requirements aimed at ensuring community agreements or consent prior to the initiation of extractive activities.

10.1.2 Free, prior and informed consent

The principle of FPIC allows host communities to be part of the decision-making of development projects that may affect them. It should be considered both as an engagement process and as an outcome. The principle is enshrined in international law as a basic right of indigenous peoples. FPIC is a way to give local communities an opportunity to express their ideas and opinions about projects developed in their region. FPIC is about self-determination, control over natural resources and the right to effective participation. Communities are often not involved in the planning and decision-making of large-scale projects. The purpose of FPIC is to protect communities and their livelihoods in such processes. The element ‘free’ entails that communities give their consent without coercion, manipulation or any other kind of force. In addition, the consent of the community needs to be given before action is taken, hence the element ‘prior’. Communities should also have the right to revoke their consent in case of non-compliance, and penalties for companies should be instituted. However, FPIC is an ongoing process and should

be executed in every development phase and commitments by companies must be fulfilled. Additionally, communities must have enough time, and technical independent expertise, to consider the plans. In order to do so, the information provided to the communities needs to be accessible, complete, objective, understandable, and correct. This is captured in the element ‘informed’. FPIC needs to be broadened to make sure it is accessible to all communities. Although the FPIC is embedded in international law, the element is not present in the Angolan, DRC, Kenyan, South African, and Zimbabwean legal systems and it generally does not apply to local, but rather to indigenous communities.

The United Nations Declaration on the Rights of Indigenous People (UNDRIP), in which FPIC is included, expects states to consult with indigenous people before projects that may affect them are carried out. The UNDRIP is not currently binding, but this will be the case if states incorporate the principles into national legislation. An example is the case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya. The Endorois were forced off their ancestral land without being properly consulted or compensated. The African Commission on Human and Peoples Rights (ACHPR) found that the state should have ensured the FPIC of the Endorois and that the rights of the Endorois had been violated.²⁴

Based on this principle, every community affected by mining projects should have the opportunity to participate in decision-making. Furthermore, the opinions and wishes of the local population should be taken into account in the decision-making.

Although these regulations provide important provisions for public participation in decision-making, implementation unfortunately remains problematic, and legislation on continuous consent is absent. A 2011 report by the Economic Commission for Africa and African Union titled ‘Minerals and Africa’s Development: The International Study Group Report on Africa’s Mineral Regime’ states ‘there is usually a mismatch between the expression of public participation rights in formal instruments and its implementation’.²⁵ The report attributes this to challenges such as existing power relations (especially for vulnerable groups) and resource constraints of both public institutions and project-affected communities.

The comparative study is guided by the following questions:

- Do mining laws contain provisions related to consultation and/or consent processes for affected mining communities?
- If so, in which phases of the mining activities (reconnaissance and exploration, exploitation, or closure) are consultation and/or consent processes required? Does the legislation set timeframes for consultation and/or consent processes?
- Do mining laws require the specific disclosure of information on which communities will base their decision to respond or give consent?
- Do mining laws provide mining-affected communities with adequate safeguards to guarantee consultation; and/or is consent given voluntarily with the absence of coercion, intimidation or manipulation?
- To what extent do provisions related to consultation and/or consent processes acknowledge or recognise community customary decision-making processes?

10.2 Summary comparison

Table 5 gives a summary of whether mining regimes recognise the provisions on consent or consultation prior to the award of mineral rights and whether those provisions comply with the standard of FPIC.

COUNTRY	IS THERE A PROVISION ON CONSENT OR CONSULTATION FOR MINING-AFFECTED COMMUNITIES?	DO THE PROVISIONS COMPLY WITH THE STANDARD OF FPIC?
ANGOLA	The Mining Code of Angola contains a general provision related to the consultation with affected communities. No consent processes are established.	No
DRC	The Mining Code of the DRC contains several provisions related to community consultations (see Chapter 11 of the Report). No consent processes are established.	No
KENYA	The Mining Act has no provisions for community consent or consultation.	No
SOUTH AFRICA	The MPRDA contains a vague provision regarding consultation with 'interested and affected persons'. No consent processes are established.	No
ZIMBABWE	The Zimbabwe Mines and Minerals Act, 1961 contains no provisions for community consent and consultation.	No

10.3 Key findings and recommendations

- The comparative study shows that granting mining licences is largely not conditional on community consultation. Only the mining statutes of Angola, DRC, and South Africa contain provisions related to community consultation.
- None of the mining regimes examined allows for community consent prior to the award of mineral rights.
- Consultation processes that are in place fail to:
 - ensure specific disclosure of information
 - ensure opinions are given voluntarily with no form of coercion, intimidation, or manipulation
 - acknowledge or recognise customary decision-making processes.

- Only the DRC has a consultation process that provides for partial culturally tailored information, as information should be in the language spoken by communities, but it does not ensure a medium appropriate to communities.
- The MML should:
 - include provisions to ensure community consent prior to awarding mineral rights
 - hold states responsible and accountable for ensuring the right to consent is protected; states should properly regulate company-community consent processes
 - include provisions to ensure FPIC is implemented at each phase of project development; FPIC should not be seen as a ‘once-off’ procedure, but as an ongoing process on the basis of which consent can be revoked and non-compliance legally penalised
 - ensure it includes a right to refuse a mining development along with a right to consent
 - ensure that governments and companies make a clear commitment to respect community decisions.

Chapter 11 Compensation

The primary emphasis of compensation in mining regimes is on land rights. In principle, most constitutions provide for the right to compensation in the event of land expropriation.²⁶ Many constitutions provide that landowners not be deprived of an interest in land or other property without arrangements for the payment of compensation. The challenge is then to obtain compensation from the mining-affected communities, usually land occupants or users whose rights (as discussed in Chapter 11 of the Report) are unrecognised, particularly where the state is the legal proprietor of land under customary tenure.

Besides land, mining activities also affect local communities’ economic interests, such as loss of property, infrastructure, and/or livelihoods, as well as social and cultural interests, such as power dynamics of communities or social disturbances to which mining regimes pay little or no attention.²⁷ Compensation provisions rarely provide for ongoing compensation for communities’ loss of resources, and ever more rarely provide for benefit sharing.

Another big challenge is to ensure fair, prompt, and adequate compensation for mining-affected communities’ interests. Compensation may be in the form of a once-off monetary payment, resettlement, provision of job opportunities and training, or alternative livelihood schemes. Importantly, the adequacy of the compensation requires careful consideration through agreed-upon negotiation and evaluation methods in order to be successful.²⁸ Otherwise it can generate long-term tensions between mining companies, governments, and mining-affected communities.²⁹

The comparative study is guided by the following questions:

- Is there provision for compensation where communities are affected?
- How is compensation paid and to whom?
- What is covered in such compensation?
- How is such compensation calculated?
- How have these provisions been implemented historically?

11.1 Summary comparison

Table 6 summarises the compensatory provisions in the countries selected in this study.

COUNTRY	IS THERE PROVISION FOR COMPENSATIONS WHERE COMMUNITIES ARE AFFECTED?
ANGOLA	Both the Constitution of Angola and the Land Law provide for compensation in case the land held by rural communities is expropriated. However, compensation schemes are poorly defined and only refer to 'just compensation'. Moreover, compensation is only granted to rural communities with land titles, a small percentage of the population.
DRC	According to the Mining Code compensation must be paid by the mineral right's holder for any occupation of land depriving the rightful surface holders of enjoyment of the surface rights or any modification which renders the land unfit for cultivation. Compensation will be paid at the request of the rightful holders of the surface rights.
KENYA	The issue of compensation in Kenya is discussed together with resettlement (see Chapter 12).
SOUTH AFRICA	The Constitution of South Africa provides for compensation in case of expropriation. Compensation is based on market consideration, a system that has proved to be entirely inadequate to compensate communities for the loss of their land. Moreover, section 54.7 of the MPRDA provides for compensation for the owner or lawful occupier of land if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation.
ZIMBABWE	The Mines and Minerals Act provides for compensation when mining occurs in communal land. However, the entity eligible for compensation is the RDC, not the affected-mining communities, which hinders the ability of mining-affected communities to engage and negotiate for fair and adequate compensation. The Communal Lands Act also refers to compensation for any person who is dispossessed or suffers any diminution of their right to occupy or use the land, and who shall be granted a right to occupy or use alternative land. Where no alternative land is available, a person shall be entitled to be compensated for the loss or diminution of his rights.

11.2 Key findings and recommendations

- Generally, the mining regimes examined only assign rights to landowners, posing pervasive threats to the land rights of land users, ie occupants.
- The comparative study indicates that mining legislation gives communal land very tenuous claims to compensation which are not compliant with the constitutional guarantees accorded to them (directly or indirectly) as owners, users, or occupants of their land.
- The deficient land tenure regulation for communal occupants is one of the reasons that communities struggle to receive fair and adequate compensation.
- In Zimbabwe, where customary land is deemed the property of the state, compensation is not granted directly to affected community members but to a designated government department or authority.
- The comparative study shows that levels of compensation vary widely across the mining regimes examined. This provides good reason for the harmonisation of standards for how compensation should be calculated in the MML.
- The comparative study indicates that none of the regimes require benefit sharing.
- The MML should:
 - include provisions to ensure legitimate rights occupiers receive fair and equitable compensation
 - include provisions to ensure FPIC is provided for damage or loss to communities or individuals directly affected by a mining activity, including, but not limited to, compulsory acquisition or lease of land to the extent that the MML allows for compulsory acquisition
 - finalise compensation and/or resettlement before the commencement of mining on the affected community's land
 - consider that FPIC also includes the loss of use of land for mineral activities; disturbance of land, water, or environment; resettlement; loss of livelihood; loss of the resource; and benefit sharing amongst others
 - consider incorporating different types of compensatory measures including monetary payment; resettlement; the provision of job opportunities; training; or alternative livelihood schemes
 - consider ensuring that communities are empowered to negotiate the compensation arrangements based on the value of the extraction project (current and future values), and that communities should be entitled to compensation that includes the full value of potential alternative uses of such land.
- Where applicable, compensation should apply to upstream and downstream communities; all those that are affected, directly and indirectly.

Chapter 12 Resettlement

Resettlement is a deeply complex process, with the potential of economic and social impacts on very different scales. Well-planned and executed resettlement combined with adequate compensation will contribute to positive long-term relationships with mining-affected communities. Conversely, poorly managed resettlement can result in involuntary resettlement, placing vulnerable populations at great economic and social risk.³⁰

Increased participation of local communities and recognition of local decision-making processes has proved to help to better identify the risks related to the mining projects. Regardless of these risks, the starting point for inclusive decision-making is that all people have the same, inalienable rights and are entitled to a level playing field when it comes to negotiating mining-related deals. This requires meaningful and adequate systems of participation with respect for the views, opinions, and livelihoods of mining-affected communities. Crucially important to the resettlement process is access to adequate information for mining-affected communities (see 15.1 below). Moreover, adequate grievance mechanisms are critical to raise concerns about the resettlement (see Chapter 15).³¹

The comparative study is guided by the following questions:

- What is the legal framework for resettlement in the context of mining?
- Is resettlement a measure of last resort?
- Do the legal provisions provide for risk mitigation and livelihood restoration measures? If so, which ones?
- Is there any provision to monitor or evaluate resettlement? If so, do the provisions provide for participatory monitoring?

12.1 Summary comparison

Table 7 summarises the resettlement provisions in the countries selected in this study.

COUNTRY	WHAT IS THE LEGAL FRAMEWORK FOR RESETTLEMENT IN THE CONTEXT OF MINING?
ANGOLA	The Decree Regarding Resettlement of Displaced People acknowledges the right of displaced people to housing. In the Mining Code, relocation is identified as a right of local populations if their normal housing conditions are put into question by mining activities. Importantly, the provisions on compensation only apply to those rural communities with land titles. The mineral rights holder is supposed to build houses in an area as close as possible to the area the affected communities were forced to leave. However, this compensation mechanism is not obligatory if the land has been expropriated for public interest. Therefore, pressure to allocate land for mining has resulted in government decisions to expropriate land on the grounds of public interest.
DRC	The mining regime in the DRC does not regulate resettlement and relocation in a clear manner. The law is silent on whether relocation is a measure of last resort. The Mining Code imposes an obligation on mine operators to carry out environmental impact assessments (EIAs), which should also contain livelihood restoration measures. However, the Mining Code does not provide specific rules and criteria, such as houses to build and the extent of compensation that should be given to victims. There are also no provisions in the DRC to monitor resettlement.

COUNTRY	WHAT IS THE LEGAL FRAMEWORK FOR RESETTLEMENT IN THE CONTEXT OF MINING?
KENYA	In Kenya there is no comprehensive national resettlement policy or legislation. The mining regime is silent on whether resettlement is a measure of last resort. The legal provisions in Kenya do not provide for adequate risk mitigation and livelihood restoration measures, and there are no provisions to monitor or evaluate resettlement.
SOUTH AFRICA	There is currently no comprehensive national resettlement policy or legislation in South Africa and the mining regime is silent on whether resettlement is a measure of last resort. The legal provisions do not provide for risk mitigation and livelihood restoration measures, and there are no provisions to monitor or evaluate resettlement.
ZIMBABWE	In Zimbabwe, the protection of rights in communal land is clearly not rigorous, particularly when compared with private landowners. The legal provisions do not provide for risk mitigation and livelihood restoration measures, and there are no provisions to monitor or evaluate resettlement.

12.2 Key findings and recommendations

- The comparative study shows government decisions to expropriate land are often justified on the grounds of public interest. This is partly because compensation mechanisms are not obligatory if the land has been expropriated for public interest.
- In most of the countries selected in this study:
 - mining regimes do not regulate the processes of resettlement and relocation in a clear and specific manner
 - the law is silent on whether relocation is a measure of last resort
 - the legal provisions do not provide for risk mitigation and livelihood restoration measures, and there are no provisions to monitor or evaluate resettlement.
- The MML should:
 - include provisions to ensure the process of relocation and issues of compensation are clearly outlined in mining legislation and in communal land legislation
 - include a clear provision stating that resettlement be a measure of last resort
 - advocate for the clarification of a legal framework which establishes guidelines for mandatory consideration of options, develops procedures for community engagement and consent, develops procedures for land valuation, and designs compensation packages and resettlement programmes
 - advocate for granting mining rights on the ground of public interest, taking into consideration the interests of the affected community or communities; the national interest (including national heritage); any negative impacts identified in the strategic, integrated (human rights) impact assessments.

Chapter 13 Impact assessments

Mining activities can have different sets of environmental, social, and economic impacts within the different phases of a mining project. For example, activities associated with the exploration phase may require clearing wide areas of land and vegetation or the construction of a road that may have permanent effects on the livelihoods of local communities. Moreover, activities associated with placer mining exploitation – the mining of alluvial deposits for minerals such as gold or gemstones – may release large quantities of sediment that can impact surface water for several miles downstream of the placer mine generating social and environmental impacts for communities located far away from where the mining is taking place. In order to assess those risks many countries require companies to undertake EIAs and/or social impact assessments. Chapter 13 analyses how the assessment processes are dealt with in the mining regimes of the five countries selected for the study. In doing so, the chapter differentiates between EIAs and social impact assessments as well as introduces the concepts of human rights impact assessments and gender impact assessments. While some constitutional provisions, for example in Zimbabwe and South Africa, contain guarantees on the right to a clean and safe environment, mining regimes do not usually prioritise or refer to those constitutional provisions.

However, most of the mining regimes require mining companies to undertake EIAs, and to:

- refer to environmental audit and accompaniment programmes
- have water and solid waste management plans and plans for environmental rehabilitation at the end of operations
- hold consultations with communities and share information of what has been done
- make a contribution to an environmental fund and to do an assessment of the nature, extent, duration, probability, and significance of the identified potential environmental impact.³²

Unfortunately, when it comes to the agencies responsible for oversight of environmental impacts and enforcement polices, most environmental protection measures fall under environmental management legislation, rather than under mining legislation. Moreover, responsibility for reviewing and endorsing EIAs might either be the sole responsibility of the environmental ministry, for example, in Zimbabwe; the joint responsibility of the mining and environment ministries, as for example in Angola or DRC; or the sole responsibility of the mining ministry, as in South Africa.

The EIA is a very important planning tool which identifies, predicts, and assesses potential positive and negative impacts that may arise from the planned project and recommended ways of minimising negative impacts.³³ Such impacts can include issues of relocation and compensation of affected communities. In addition, the procedures for carrying out an EIA include carrying out public consultation with the affected community.

The comparative study is guided by the following questions:

- How does mining legislation and policy interact with other laws and policies that relate to environmental regulation?
- Are EIAs and social impact assessments dealt with separately or in an integrated way?
- What timeframes are provided for impact assessments?

- What are the environmental requirements for mining?
- To what extent are immediate host communities elevated in status (if at all and relative to other stakeholders) for consultation, consent, EIAs, and social impact studies?

13.1 Summary comparison

Table 8 summarises the comparison of environmental protection and procedures maintained by the case study countries.

COUNTRY	ENVIRONMENTAL PROTECTION AND PROCEDURES: SUMMARY COMPARISON
ANGOLA	Environmental issues in Angola are taken into account at various levels in the new Mining Code. Industrial mining companies must respect the environmental legislation. An EIA is required in order to receive an exploration licence. The Ministry of Geology and Mining must approve the EIA.
DRC	The DRC takes a similar approach to Angola. Managing the protection of the mining environment is the responsibility of the Ministry of Mines, which focuses exclusively on environmental issues in the mining sector. This is done without intervention from the Ministry of the Environment.
KENYA	The Constitution of Kenya ensures the rights of every person to a clean and safe environment. However, when it comes to mining, the only condition in relation to protecting the environment is the production of an EIA licence from the National Environmental Management Authority (NEMA).
SOUTH AFRICA	The Constitution of South Africa recognises the rights of everyone to an environment that is not harmful to their health or well-being. EIAs are required for mining. Unlike all other industries, the Department of Mineral Resources (DMR) decides whether EIAs should be approved (though it does this after consultation with other state entities). DMR decisions may be appealed to the Department of Environmental Affairs.
ZIMBABWE	In Zimbabwe, the Mines and Minerals Act does very little to interact with the Constitution of Zimbabwe and other legislation on environment and human rights. The Environmental Management Act states that mining operations will only commence after a holder of a mining licence has carried out an EIA. An EIA has to be done after a mining licence has been issued by the Mining Commissioner, which means that environmental and human rights issues are deemed trivial with regard to minerals extraction. However, in the case of a special mining lease the EIA is a requirement upon application.

13.2 Key findings and recommendations

- Most of the countries selected in this study make the issuance of mining rights conditional on EIAs being done prior to the issuing of an exploration or mining licence, with the exception of Zimbabwe, where mining legislation does not require an EIA to issue a mining licence.
- In Zimbabwe, an EIA is required only prior to the commencement of mining.
- In the DRC, holders of mining or quarry rights must ‘provide security’ in order to guarantee compliance with environmental obligations.
- The MML should include provisions to ensure:
 - EIAs prior to the issuing of exploration or mining licence
 - policy coherence between ministries and government agencies when it comes to environmental protection
 - adequate participation of mining-affected communities during EIAs
 - independent monitoring and enforcement of the right to a clean and healthy environment is vested in the state, in partnership with affected communities.

Chapter 14 Benefit sharing: Royalties, shared and local content

Recognition of the rights of mining-affected communities over their land as the basis for negotiations around proposed extractive industries should also include sharing of financial benefits.³⁴ It is increasingly becoming accepted, both at the continental and the international levels, that communities affected by mining should not only receive compensation for damage loss but must also be afforded benefit sharing. As previously noted, communities should be offered compensation for loss of future earnings and usage of the land. At the international level, Chile and Papua New Guinea have strong policy and regulatory approaches, whilst at the continental level Egypt, Eritrea, Guinea, and Mozambique have recently introduced community development regulations.³⁵ It is important to highlight the case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya before the African Commission on Human and People’s Rights in which the Commission recommended the Kenyan government register the Endorois Welfare Committee. In doing so, it recognised the importance of benefit sharing:

*The African Commission further notes that in 1990, the African Charter on Popular Participation in Development and Transformation benefit sharing is key to the development process. In the present context of the Endorois, the right to obtain ‘just compensation’ in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.*³⁶

Moreover, it is worth noting that the International Bar Association (IBA) has included a community development foundation clause in the Model Mining Development Agreement.³⁸

While there is no general model for implementing benefit sharing, it is possible to differentiate three different mechanisms: government payments; compensation; and community social

investment (for further information on the issue of compensation, see Chapter 11). When it comes to government payments, revenue sharing such as taxes based on property value or royalties levied mine-by-mine are gaining attention.³⁸ Decentralisation of benefit sharing from mining activities is becoming increasingly common, but many states still collect major tax flow to a general fund, allowing central or provincial governments to determine where and how monies should be expended for the good of the public as a whole, as is the case in the DRC or Kenya. The extent to which tax collection is decentralised varies widely, and the extent to which provisions with respect to resource extraction allow for the fair and equitable sharing of costs and benefits arising from resource extraction remains unsettled. According to Elizabeth Wall and Remi Pelon 'in practice, royalties payable to the central government rarely revert back to the affected region. Even when legislation specifies that this should be the case'.³⁹

Regarding community social investment (CSI), governments and companies have considered the establishment of dedicated instruments, such as Foundations, Trusts and Funds (FTFs). FTFs can be designed to meet multiple goals, including partnerships with local communities; support to the decentralisation process by increasing the transparency and traceability of financing; or the formalisation of agreements between local communities and mining developments. CSI provides an interesting method of sharing revenue for local communities which can include an attractive combination of community-based measures, such as share equity or royalties and individual-based measures, or provisions on local procurement and employment. CSI will only achieve these benefits, however, if it is guided by strong and detailed regulation that centres community interests and sets concrete standards for the fair and equitable sharing of costs and benefits arising from resource extraction.⁴⁰ For example, CSIs should include monitoring provisions, such as annual reviews, ensure that decision-making processes of the communities are represented, and provide for minimum benefits to ensure that CSIs are not merely for good publicity but also deliver meaningful benefits.

The comparative study in this chapter is guided by the following questions:

- Is there any benefit sharing provision for local communities? (Including royalties, shared and local content.)
- If benefit sharing exists, how is it calculated, who is identified to benefit (what are the gender dimensions), how is it paid, and what are governance requirements for these resources?
- What impact does benefit sharing provisions or practices have on local economic development?
- Are there ownership provisions allocated on the basis of race, nationality etc that apply beyond host indigenous and local peoples?
- To what extent do provisions with respect to resource extraction allow for the fair and equitable sharing of costs and benefits arising from resource extraction?

14.1 Summary Comparison

Table 9 summarises the benefit sharing provisions for local communities and black or indigenous considerations in the countries selected in this study.

COUNTRY	LOCAL BENEFIT	BLACK OR INDIGENOUS CONSIDERATIONS
ANGOLA	There is no provision establishing a revenue benefits regime for local communities.	Neither provision is allocated to host indigenous and local peoples
DRC	Out of the mining royalties, 25% is paid into an account designated by the provincial administration where the project is located and 15% into an account designated by the town or the administrative territory in the area where the exploitation activities take place.	None
KENYA	The funds resulting should be allocated exclusively to the building of basic infrastructure in the interests of the community.	None
SOUTH AFRICA	Benefit sharing is operationalised through sharing revenues from royalties, but there is no direct allocation to local communities. The closest level of revenue allocation for local communities is the county government.	Must be 26% black owned
ZIMBABWE	Benefit sharing is operationalised through social and labour plans, which are a prerequisite for the granting of mining or production rights. However, no set amount of benefit sharing is established.	51% indigenous ownership, 10% community ownership

14.2 Key findings and recommendations

- The current legislative provisions do not sufficiently address the need for benefit sharing as a cost of doing business.
- The current legislative provisions do not ensure a fair and equitable sharing of benefits for communities.
- When it comes to government payment, the extent to which tax collection is decentralised varies widely. Moreover, it still needs to be determined how in practice, royalties payable to the central government revert to the affected communities.
- When it comes to CSI, self-regulation and administrative discretion does not create a clear platform for the development of affected communities. CSI could benefit from strong and

detailed regulation that brings the interest of communities to the centre. Provisions might include specific guidelines as to the quantum of community investment or what constitutes community investments.

- Sharing revenues through CSI should ensure participation of communities. Participation must be aligned to full FPIC.

Chapter 15 Dispute settlement processes

Dispute settlement processes require a strong, independent mechanism to recognise and resolve grievances and can be important in preventing conflict between local communities and mining companies.⁴¹ However, as shown in the comparative study, access to a fair and accessible mechanism for mining-affected local communities is not yet established in most of the jurisdictions under consideration.

Mining-affected communities are unlikely to be parties to mining contracts and therefore have no direct right to enforce contractual provisions. They are often excluded from attending hearings or submitting information.⁴² Moreover, they are unlikely to be part of the negotiations determining the dispute resolution mechanism in the first place.⁴³

The way in which complaint mechanisms are designed and operated, therefore, is often critically important to their success. There are well-established best practice criteria on grievance mechanisms effectively set out in the UN Guiding Principles on Business and Human Rights.⁴⁴ The South African Human Rights Commission has also included recommendations on grievance and dispute resolution mechanisms.⁴⁵

The comparative study in this chapter is guided by the following questions:

- What mechanisms are in place in legal and policy provisions to deal with conflict resolution and/or dispute settlement?
- Are the mechanisms independent?
- How effective are the mechanisms? For example, to what extent do the mechanisms recognise customary dispute settlement?

15.1 Summary comparison

Table 10 confirms that the mining regimes in the countries selected in this study do not provide for settlement mechanism to deal with disputes between communities and mining companies.

COUNTRY	DOES THE MAINING REGIME PROVIDE FOR A DISPUTE SETTLEMENT BODY OR MECHANISMS TO DEAL WITH DISPUTE BETWEEN COMMUNITIES AND MINING COMPANIES?
ANGOLA	No
DRC	No

COUNTRY	DOES THE MAINING REGIME PROVIDE FOR A DISPUTE SETTLEMENT BODY OR MECHANISMS TO DEAL WITH DISPUTE BETWEEN COMMUNITIES AND MINING COMPANIES?
KENYA	No
SOUTH AFRICA	No
ZIMBABWE	No

15.2 Key findings and recommendations

- None of the mining regimes examined provides for a dispute settlement body or mechanism to deal with disputes between communities and mining companies.
- The MML should consider including an independent mechanism to resolve grievances between local communities and mining companies and enforce legal protections.
- This enforcement mechanism should also be empowered to inspect a mining activity without prior notice.
- To ensure the effectiveness of the grievance mechanisms, it is recommended that the MML considers the effectiveness criteria included in Principle 30 of the UN Guiding Principles on Business and Human Rights: legitimacy, accessibility, predictability, equitability, and transparency. In addition, where a right for exploration, prospecting or mining is granted, the applicant must establish a local grievance mechanism which:
 - can resolve disputes in good faith
 - is proportionate to the risks and adverse impacts of the project
 - is established in consultation with the affected community or communities, through an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, at no cost to the affected communities and without retribution
 - does not prevent any person from seeking judicial or administrative remedies
 - ensures the company informs the affected communities about the mechanism in the course of its community engagement process.
- The MML should also consider the establishment of accessible channels through which complaints regarding violations can be reported. Such complaints should be investigated and reported on in a timely manner.

Chapter 16 Access to information

Access to information (ATI) is vital in enabling communities to participate in informed decision-making about the impact of mining activities. Companies and states must proactively disclose information and adequately report on mining activities for communities to exercise their rights. For example, tax revenues, mining agreements, and impact studies must be publicly disclosed,

debated and made available. However, the Bench Marks Foundation notes that mining-affected communities often have less information at their disposal than states and companies,⁴⁶ which increases the risk of manipulation and coercion.

In addition, company tax payments often lack transparency, for example, individual mining agreements are sometimes secretly negotiated with governments, and the public and/or parliament are unable to give input. Local administrations' funds should be transparent and allow for the participation of affected communities. Countries, therefore, should engage in national public debates to set and monitor tax rates. Additionally, governments must publish tax receipts and payments.

At the continental level, the ACHPR recognised the right to ATI when it launched a Model Law on Access to Information in April 2013. According to the preamble of the Model Law:

The African Commission has therefore gone a step further than the Declaration, by providing detailed and practical content to the legislative obligations of Member States to the African Charter with respect to the right of access to information, while leaving the specific form in which such laws will be adopted to individual States Parties. Ultimately, each State Party must determine the nature and scope of adjustments that may be required to the content of this Model Law based on the provisions of its Constitution and the structure of its own legal system of access to information, albeit in the context of public administration.⁴⁷

A comparative study for Model Law on Information shows that the access to information legislative landscape in Africa is sparse, with only 11 (Angola, Ethiopia, Guinea, Liberia, Niger, Nigeria, Rwanda, South Africa, Tunisia, Uganda, and Zimbabwe) of the 54 African Union (AU) Member States having adopted ATI legislation, each with varied degrees of compliance with regional and international standards. Numerous State Parties also have access to information Bills pending at various stages of the legislative process.⁴⁸

The comparative study is guided by the following questions:

- Are there constitutional provisions for the right to ATI?
- How do ATI laws apply to extractive activities and regulation in practice?

16.1 Summary Comparison

Table 11 summarises the provisions of ATI in the countries selected in this study.

COUNTRY	ATI OR INFORMATION DISCLOSURE WITHIN EXTRACTIVE REGULATION	CONSTITUTIONAL PROVISIONS ON ATI
ANGOLA	No provision.	Article 69 of the Angola Constitution provides for the right to ATI.

COUNTRY	ATI OR INFORMATION DISCLOSURE WITHIN EXTRACTIVE REGULATION	CONSTITUTIONAL PROVISIONS ON ATI
DRC	Article 20 of the Mining Bill (2010) makes the director of mines responsible to the cabinet secretary for facilitating access to information by the public, subject to any confidentiality restrictions.	Article 24 of the DRC Constitution provides for the right to ATI.
KENYA	Article 97 of the Mining Bill (2014) establishes that the cabinet secretary shall ensure all mineral agreements are available online. The legislation is focused on information disclosure.	Article 35 of the Kenyan Constitution provides for the right to ATI.
SOUTH AFRICA	The MPRDA contains a specific and detailed provision regarding information disclosure.	Section 32 of the South African Constitution provides for the right to ATI.
ZIMBABWE	No provision.	Section 62 of Zimbabwe's Constitution provides for the right to ATI.

16.2 Key findings and recommendations

- Access to information is a key part of providing for meaningful FPIC.
- All the case study countries' constitutions provide for the right to ATI, however, many of the grounds for refusal are drafted in vague terms, such as the definition of public interest. Without a clear definition of public interest, public bodies retain the prerogative to determine what the public interest is, which can be used to deny the public access to state-held information.
- In Kenya, the disclosure of information is limited to financial information. The MML should include an obligation to disclose financial and non-financial information relevant to the impact of mining, including information on contracts (including their terms, conditions, and obligations), sub-contracts over US\$1,000 concluded with other parties (including their terms, conditions, and obligations), tender results, impact assessments and audits, human rights assessments, due diligence policies, payments to governments, reports of inquiries, or investigations of abuse.
- ATI, transparency and accountability should be key principles of the MML. This may mean including provisions for the adoption and implementation of global transparency and best standards such as the Extractive Industries Transparency Initiative (EITI).
- The MML could be aligned or refer to the Model Law on Access to Information for Africa developed by the ACHPR.
- The MML should consider a mechanism through which a request for information is made, granted or refused, with independent monitoring thereof.

Part Three: Institutional Mechanisms

This part of the Guide summarises Chapters 17 and 18, which deal with the continental and international level mechanisms covered in the Report. While the lists of mechanisms assessed in the Report are extensive, they are not exhaustive, as new mechanisms are initiated every year by different actors and assessing the content and usefulness of these new mechanisms is not always feasible. Furthermore, mechanisms that are no longer up to date or are simply not useful for the purposes of this study are not included. Each chapter ends with a list of key findings and recommendations.

Chapter 17 Continental Level

Chapter 17 of the Report provides descriptions of continental institutions and standards related to extractive industries and human rights. Criteria for selecting the institutions were relevancy for the IANRA's activities and the harmonisation of legal standards.

17.1 List of continental mechanisms assessed in the Report

The most prominent continental mechanisms assessed in the Report are:

- The African System of Human Rights Protection (section 17.1)
- The Pan-African Parliament (section 17.2)
- The Southern African Development Community (section 17.3)
- The Economic Community of West African States (section 17.4)
- The West African Economic and Monetary Union (section 17.5)
- The African Mining Vision (section 17.6)
- The Framework and Guidelines on Land Policy in Africa (section 17.7).

By identifying these continental mechanisms and standards, it becomes clear which actors can be influenced to enable the development and future adoption of the MML and to foster the IANRA's Pan-African Advocacy Project. Some of these international mechanisms also allow CSOs to find ways to gain access to remedies for mining-affected communities.

17.2 Key findings and recommendations

Chapter 17 of the Report also provides a brief analysis of the mechanisms that have been identified and explains how the mechanisms and standards are relevant to the activities of the IANRA, with a special focus on its Pan-African Advocacy Project and the development of the MML in particular. However, it is important to remark that the effectiveness of initiatives, guidelines, standards, and regulations cannot be adequately evaluated solely through desk research. Such an evaluation requires more extensive research, including field research.

The key findings of the analysis of the institutional mechanisms at continental level are:

- The institutions and standards identified in this chapter provide relevant information for the development of the MML.
- The majority of the institutions and standards provide opportunities for the IANRA to influence the relevant actors in drafting a MML. Influencing can either be done via official

public mechanisms or advocacy activities. Official public mechanisms include complaints, forums, and revision rounds of standards and initiatives.

- The Southern African Development Community (SADC) Harmonization of Mining Policies Standards and Regulatory Frameworks lacks reference to international best practice standards of good quality EIAs, to the principle of FPIC, and to grievance mechanisms.
- The absence of a specific provision for cooperation of the Pan African Parliament (PAP) with civil society has not prevented it from engaging with civil society.
- SADC, the Economic Community of West African States (ECOWAS), and the West African Economic and Monetary Union (WAEMU) have taken concrete steps towards harmonising their national policies, laws and regulations and developing common standards. The emphasis has generally been on attempting to create a uniform business environment for investors.

Recommendations for the IANRA on promoting the Pan-African Advocacy Project via the institutional mechanisms at the continental level:

- It is important to understand the content of the wide variety of standards and initiatives. Creating a coherent legal and policy framework will be easier if an overlapping consensus within the existing international and continental standards and initiatives can be found.
- Potential contradictions within and between standards should be taken into account, such as the possible contradiction between the WAEMU code and the ECOWAS directive.
- CSOs should focus their engagement activities on institutional mechanisms that have:
 - shown to be responsive to the complaints of CSOs
 - effectively integrated the viewpoints of CSOs in existing standards and initiatives, such as the ECOWAS Mining Directive.
- As there is a momentum for advocating towards the MML in the case study countries, CSOs should try to act quickly and strategically in engaging with the relevant stakeholders. With this regard, the IANRA should consider undertaking a power analysis for policy-making targets at the continental level. This could include identifying the most influential members within the different institutions and establishing to what extent they are aligned (or not) with the IANRA's campaign objectives.
- The ACHPR special mechanisms could prove to be of particular value to the MML Project by providing input and guidance. Furthermore, the ACHPR could be very useful in terms of assisting the IANRA to enable its members to collaborate and participate in national and continental advocacy and campaigning efforts.
- The IANRA should strategically consider a modality for cooperation between the MML Project and the PAP, which provides a useful platform to raise institutional awareness of the IANRA's Pan-African Advocacy Project.

Chapter 18 International Level

Chapter 18 of the Report provides descriptions of international institutional mechanisms related to extractive industries and human rights. Relevant standards were identified on the basis of previous studies carried out by Profundo as well as new research.

18.1 List of international mechanisms assessed in the Report

The most prominent international mechanisms assessed in the Report can be grouped into three categories.

Intergovernmental organisations (section 18.1)

- The United Nations Human Rights Council and its advisory bodies, including:
 - UN Treaty Monitoring Bodies
 - UN Guiding Principles on Business and Human Rights
- International Labour Organization (ILO)
- Proposed regulation for EU system of self-certification for 3TG importers
- OECD Guidelines for Multinational Enterprises
- OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas

Industry and multi-stakeholder standards (section 18.2)

- International Council on Mining and Metals
- Extractive Industry Transparency Initiative
- Publish What you Pay
- Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development
- Kimberley Process
- Voluntary Principles on Security and Human Rights
- Global Reporting Initiative – Sector Disclosure on Metals and Mining
- Responsible Mining Draft of the Initiative for Responsible Mining Assurance

Financial institutions (section 18.3)

- World Bank: World Bank Safeguards and IFC Performance Standards
- Equator Principles
- African Development Bank: Independent Review Mechanism

18.2 Key findings and recommendations

Financial institutions have influence on the environmental and social practices of companies they invest in. It is possible to use these financial institutions as points of leverage to address environmental and social standards with mining companies. Financial institutions that have committed to voluntary international guidelines like the IFC Performance Standards and Equator Principles can use their influence as investors to promote sustainability at mining companies. This section presents the main standards applied by financial institutions.

The key findings of the analysis of the institutional mechanisms at international level:

- International organisations, industry and multi-stakeholder initiatives and financial institutions alike provide numerous standards on responsible mining that can be applied globally.
- The majority of the institutional mechanisms provide opportunities for CSOs to influence the relevant actors in drafting a MML. Influencing can either be done via official public mechanisms or advocacy activities. Official public mechanisms include complaint mechanisms, forums, and revision rounds of standards and initiatives.

- Several industry and multi-stakeholder standards and initiatives are in the process of revision. This includes standards and initiatives of key actors like EITI, the World Bank, the African Development Bank and the Initiative for Responsible Mining Assurance.
- There is momentum to establish a MML in the case study countries:
 - Angola, DRC, Kenya, and South Africa have accepted business and human rights recommendations of other governments via the Universal Periodic Review of the UN Human Rights Council
 - South Africa has started the process of establishing a national action plan to further the implementation of the UN Guiding Principles on Business and Human Rights within its national context
 - EU regulations on conflict minerals will be implemented following the agreed regulation of 2015.

Recommendations for CSOs to promote the MML via the institutional mechanisms at international level:

- It is important to understand the content of the wide variety of standards and initiatives. Creating a coherent legal and policy framework will be easier if an overlapping consensus within the existing standards and initiatives can be found.
- CSOs should focus their engagement activities on institutional mechanisms that:
 - have shown to be responsive to the complaints of CSOs
 - have effectively integrated the viewpoints of CSOs in existing standards and initiatives.
- As there is momentum for establishing a MML in the case study countries, CSOs should try to act quickly to engage the relevant stakeholders.
- The Office of the United Nations High Commissioner for Human Rights (OHCHR) could prove to be of particular value to the MML Project by providing input and guidance. The OHCHR could also be useful in terms of assisting the IANRA to enable its members to collaborate and participate in national, regional, and international advocacy and campaigning efforts.
- As the Special Procedures are a central element of the UN human rights machinery, the Human Rights Council in 2011 insisted once again that states have an obligation to cooperate with the Special Procedures and respect the integrity and independence of the Special Procedures.⁴⁹ Member States in turn reaffirmed their strong opposition to retaliation against those who cooperate with the UN, or its human rights mechanisms and representatives.⁵⁰ This is an important point to consider when looking at countries where civil society face reprisals for their activities, as the Human Rights Council could provide backing for their projects.

Appendix 1 Legal Framework

National legal framework

Table 12 presents the policies and legislation applicable in each of the case study countries researched in the Report. A brief description of each of the mining regimes is included in the Report (see Chapter 4).

Table 12 reveals that most of the case study countries are undertaking mining reforms: Kenya, South Africa, and the DRC are in the process of changing their mining legislation, and Zimbabwe is about to enter the reform process. Whilst the changes in legislation broadly reflect the analysis around the different mining regimes in Africa, they also serve to make the point that mining dispensations in Africa are far from homogenous, but seem to be moving towards this state.

COUNTRY	ANGOLA	DRC	KENYA	SOUTH AFRICA	ZIMBABWE
Main mining legislative provision and/or policy framework	Mining Code, 2011	Mining Code, 2002	Mining Act, 1940	MPRDA, 2008	Mines and Minerals Act (Chapter 21:05), 1961
		Decree 038/2003, 26 March 2003 Mining Regulation	Mining Bill, 2014 (pending parliamentary approval into law) Draft Mining Policy	MPRDA, 2002	Mining Policy, 2013
Amendments of the main mining legislation	1992, 2011	2002, amendment in process	1940, 2012, 2014, amendment in process	2002, 2008, 2013, 2014	1961, amendment in process
Related legislation	Angolan Constitution, 2010	DRC Constitution, 2011	Kenyan Constitution, 2010	South African Constitution, 1996	Zimbabwean Constitution, 2013
	Diamond Law, 1994	Nature Conservation Law, 1969	Natural Resources (County Royalties) Bill, 2014 (draft)	National Environmental Management Act, 1998	Environmental Management Act (Chapter 20:27)
	Foundations of the Environment Law, 5/1998	Principles of Environmental Protection Law, 2011	Royalties Bill, 2013	Environmental Waste Management Act, 2008	Rural Land Act (Chapter 20:04)
	Cultural Heritage Law, 94/2005	General Property Law (Law 73-021), as amended	Water Act, 2002	National Heritage Resources Act, 1999	Communal Land Act (Chapter 20:10)
	Land Law, 9/2004	Forest Code, 2002	Environment and Land Court Act, 2011	Interim Protection of Informal Land Rights Act, 1996	Occupiers Act (Chapter 20:26) Water Act (Chapter 20:24)

COUNTRY	ANGOLA	DRC	KENYA	SOUTH AFRICA	ZIMBABWE
Related legislation	Law of Territorial Planning and Urbanization, 23/2004	National Forest Management Policy, 1990	Environmental Management and Coordination Act, 1999	Extension of Security of Tenure Act, 1997	Indigenisation and Economic Empowerment Regulations, 2010 (Chapter 14.33)
			Forest Act 7, 2005	Mine Health and Safety Act, 1996	Indigenisation and Economic Empowerment (General) Regulations, Statutory Instrument 21/2010 (SI 21/10)
			Land Act, 2012	Mineral and Petroleum Resources Royalty Act, 2008	Indigenisation and Economic Empowerment (General) (Amendment), 2010
			Land Registration Act, 2012 National Land Commission Act, 2012	National Water Act, 1998	
			National Museum and Heritage Act, 2012		
			Community Land Bill, 2013		

Table 13 International legal framework

	ANGOLA			DRC			KENYA			SOUTH AFRICA			ZIMBABWE			
	Obligations	Status in domestic interpretation	Obligations	Status in domestic interpretation	Obligations	Status in domestic interpretation	Obligations	Status in domestic interpretation	Obligations	Status in domestic interpretation	Obligations	Status in domestic interpretation	Obligations	Status in domestic interpretation	Obligations	Status in domestic interpretation
ICESCR	No	10/01/1992 Accession	No	01/07/1976 Accession	03/10/1994	12/01/2015	No	01/05/1972 Accession	No	01/05/1972 Accession	No	13/05/1991 Accession	No	13/05/1991 Accession	No	13/05/1991 Accession
OPIESCR	24/09/2013	No	23/09/2010	No	No	No	No	No	No	No	No	No	No	No	No	No
PACHPR	22/01/2007	30/08/2007	05/12/2003	09/06/2008	16/03/2004	17/12/2004	17/12/2003	06/10/2010	17/12/2003	06/10/2010	18/11/2003	15/04/2008	18/11/2003	15/04/2008	15/04/2008	15/04/2008
PACHPRE-ACHPR	22/01/2007	No	09/09/1999	No	09/06/1999	03/07/2002	07/07/2003	04/02/2004	07/07/2003	04/02/2004	09/06/1998	No	09/06/1998	No	No	No
PSACJHR	31/01/2009	No	02/02/2010	No	No	No	No	No	No	No	No	No	No	No	No	No
ILO N.169	-	04/06/1976	No	No	No	No	No	No	No	No	No	No	No	No	No	No
SADC MP	08/09/1997	No	No	No	08/09/1997	No	No	No	No	No	08/09/1997	No	08/09/1997	No	No	No
Vote UNDRIP	Yes	Yes	Yes	Abstained	Yes	-	-	-	-	-	-	-	-	-	-	-

Legend:

- ICESCR
 OPIESCR
 PACHPR
 PACHPRE-ACHPR
 PSACJHR
 ILO N.69
 SADC MP
 Vote UNDRIP
- International Covenant on Economic, Social and Cultural Rights
 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights
 Protocol on the Statute of the African Court of Justice and Human Rights (merged court)
 ILO Indigenous and Tribal Peoples Convention 169
 SADC Mining Protocol
 Vote in favour on the UN Declaration on the Rights of Indigenous Peoples

Appendix 2 References

- ¹ Columbia Center on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI
- ² Mining Code of Angola, Law 31/11 of 23 September 2001, article 3
- ³ Columbia Center on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI
- ⁴ For more information on discretionary powers, see DJ Galligan (1990) *Discretionary Powers: A Legal Study of Official Discretion* United States: Oxford University Press
- ⁵ Columbia Centre on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI, p.12
- ⁶ Columbia Centre on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI, p.12
- ⁷ Columbia Centre on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI, p.12
- ⁸ T Bakheit (2005) 'Mining and land access issues in South African mineral laws' MA thesis, University of Dundee
- ⁹ See, E Bastida (1997) 'Competitive land-uses in some selected Latin American countries: Towards a relative procedure of mining land-use?' *The Dundee Yearbook of Natural Resources Law*
- ¹⁰ See, E Bastida (1997) 'Competitive land-uses in some selected Latin American countries: Towards a relative procedure of mining land-use?' *The Dundee Yearbook of Natural Resources Law*
- ¹¹ T Bakheit (2005) 'Mining and land access issues in South African mineral laws' MA thesis, University of Dundee
- ¹² ActionAid International (2014) 'The great land heist, South Africa' *African Studies Quarterly*
- ¹³ Columbia Center on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI
- ¹⁴ WoMin (2014) 'Women, Gender and Extractivism in Africa. A collection of papers' online: <http://womin.org.za/images/papers/background-note.pdf>, viewed in January 2016
- ¹⁵ L Alden Wily (2011) "'The law is to blame": The vulnerable status of common property rights in sub-Saharan Africa' *Development and Change* 42(3): 733–757
- ¹⁶ Rights and Resources Initiative (2012) *What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights* Washington, DC: Rights and Resources Initiative
- ¹⁷ U Brand (2013) 'Austria & Germany: Energy policy and resource extractivism: resistances and alternatives' online: <http://rosalux-europa.info/publications/books/energy-policy-and-resource-extractivism/>, viewed in January 2015; and WoMin (2014) 'Women, Gender and Extractivism in Africa. A collection of papers' online: <http://womin.org.za/images/papers/background-note.pdf>, viewed in January 2016
- ¹⁸ K Deininger, D Byerlee, J Lindsay, A Norton, H Selod & M Stickler (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* Washington, DC: World Bank; see also L Alden Wily (2011) "'The law is to blame": The vulnerable status of common property rights in sub-Saharan Africa' *Development and Change* 42(3): 733–757
- ¹⁹ K Deininger, D Byerlee, J Lindsay, A Norton, H Selod & M Stickler (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* Washington, DC: World Bank
- ²⁰ R Goodland (2004) 'Free, prior and informed consent and the World Bank Group' *Sustainable Development Law & Policy* 4(2): 66–74
- ²¹ OXFAM America (2012) *From Controversy to Consensus? Lessons Learned from Government and Company Consultations with Indigenous Organizations in Peru and Bolivia* United States: Oxfam America, p.37
- ²² R Davis & DM Franks (2011) 'The costs of conflict with local communities in the extractive industry' *First International Seminar on Social Responsibility in Mining* Santiago, Chile 19–21 October; S Herz, A La Vina & J Sohn (2009) *WRI Report: Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects* Washington, DC: World Resources Institute; International Finance Corporation (2012) *International Finance Corporation's Policy on Environmental and Social Sustainability*
- ²³ A Niber, H Owusu-Koranteng, D Owusu-Koranteng & E Greenspan (2015) *The Right to Decide: Free Prior Informed Consent in Ghana* Boston: Oxfam America
- ²⁴ The African Commission on Human and People's Rights 276/ 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (the Endorois case), p.13
- ²⁵ Economic Commission for Africa and African Union (2011) *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regime* Addis Ababa: Economic Commission for Africa p.55

- ²⁶ Global Witness (2013) *A Shaky Foundation: Analysing Afghanistan's Draft Mining Law*, London: Global Witness
- ²⁷ See in that regard, DD van Wyk, L Segwe, F Cronjé, J van Wyk & C Chenga (2008) *Corporate Social Responsibility and the Mining Sector in Southern Africa: A Focus on Mining in Malawi, South Africa and Zambia* South Africa: The Bench Marks Foundation
- ²⁸ S Valiani (2015) *The Africa Mining Vision: A Long Overdue Ecofeminist Critique* Johannesburg: WoMin – African Gender and Extractives Alliance; United Nations Economic Commission for Africa (2011) *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes* Addis Ababa: UNECA, p.49
- ²⁹ S Valiani (2015) *The Africa Mining Vision: A Long Overdue Ecofeminist Critique* Johannesburg: WoMin – African Gender and Extractives Alliance; United Nations Economic Commission for Africa (2011) *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes* Addis Ababa: UNECA, p.49
- ³⁰ S Lillywhite, D Kemp & K Sturman (2015) *Mining, Resettlement and Lost Livelihoods: Listening to the Voices of Resettled Communities In Mualadzi, Mozambique* Melbourne: Oxfam
- ³¹ S Lillywhite, D Kemp & K Sturman (2015) *Mining, Resettlement and Lost Livelihoods: Listening to the Voices of Resettled Communities In Mualadzi, Mozambique* Melbourne: Oxfam
- ³² Columbia Centre on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI
- ³³ Columbia Centre on Sustainable Investment (2013) *Mining Contracts: How to Read and Understand Them* New York: CCSI
- ³⁴ H Smith & W Wicomb (2011) 'Customary communities as "peoples" and their customary tenure as "culture": What we can do with the Endorois decision?' *African Human Rights Law Journal* 11(2): 422–446, p.445
- ³⁵ E Wall & R Pelon (2011) *Sharing Mining Benefits in Developing Countries* Washington DC: The World Bank, pp.6–10
- ³⁶ The African Commission on Human and People's Rights 276/ 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (the Endorois case), paragraph 295
- ³⁷ IBA (n.d.) *Model Mining Development Agreement Project*, <http://www.mmdaproject.org/>
- ³⁸ E Wall & R Pelon (2011) *Sharing Mining Benefits in Developing Countries* Washington DC: The World Bank, pp.6–10
- ³⁹ E Wall & R Pelon (2011) *Sharing Mining Benefits in Developing Countries* Washington DC: The World Bank, pp.6–10
- ⁴⁰ International Bar Association Mining Law Committee (2011) *MMDA 1.0: Model Mine Development Agreement: A Template for Negotiation and Drafting* London: International Bar Association
- ⁴¹ Global Witness (2013) *A Shaky Foundation: Analysing Afghanistan's Draft Mining Law* London: Global Witness
- ⁴² Global Witness (2013) *A Shaky Foundation: Analysing Afghanistan's Draft Mining Law* London: Global Witness
- ⁴³ Global Witness (2013) *A Shaky Foundation: Analysing Afghanistan's Draft Mining Law* London: Global Witness
- ⁴⁴ United Nations (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* New York & Geneva: United Nations
- ⁴⁵ See, United Nations (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* New York & Geneva: United Nations, pp.27–35
- ⁴⁶ Bench Marks Foundation (2014) *written response to the 'Country Questionnaire: Review of National Law and Policies'*.
- ⁴⁷ African Commission on Human and People's Rights (2012) *Model Law on Access to Information for Africa*
- ⁴⁸ African Commission on Human and People's Rights (2012) *Model Law on Access to Information for Africa*
- ⁴⁹ UN OHCHR (n.d.) 'Special Procedures of the Human Rights Council' online: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>, viewed in December 2015
- ⁵⁰ UN OHCHR (n.d.) 'Special Procedures of the Human Rights Council' online: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>, viewed in December 2015