



Best practice guidelines for mining in the SADC region:  
Towards an inclusive and sustainable approach  
by the Centre for Applied Legal Studies

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# 1. Background

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Mining in Africa has become synonymous with economic exploitation, departure from binding human rights norms and often provides little benefit for those communities most affected by mining. Many mining communities expect mining to bring development, infrastructure, employment and other socio-economic advances to their lives. However, mining operations often result in worse conditions after the conclusion of their operations, than existed before mining began. This is regression, not progress. While mining certainly brings profit, this profit does not always result in social and economic development of affected communities.<sup>1</sup>

This is a pattern common across many parts of Africa. To give just a few examples:

- In the Geita District of Tanzania, the socio-economic impacts of gold mining have led to displacement, unemployment, crime, and child labour.<sup>2</sup> About 1800 villagers were forcibly displaced following the establishment of the Geita Gold Mine.
- Residents of the Kishiba village in the Democratic Republic of Congo were also forcibly displaced to Kimfumpa to make way for Frontier, a cobalt and copper mine.<sup>3</sup> Locals were inconsistently compensated and where there was compensation, it was hardly enough to make up for the loss of the land.<sup>4</sup> Their new homes in Kimfumpa lack the most basic of services such as clean water, fertile farmland, schools and health care. Their new homes are cramped (about 10m<sup>2</sup>), poorly constructed and infested with termites.<sup>5</sup>
- In Chilonga, Zambia, the establishment of a mine in the area has led to displacement and homelessness, particularly amongst children.<sup>6</sup> In some areas, retrenched mine workers were expected to relocate at their own expense.<sup>7</sup> In some parts displaced residents received no compensation, and where there was compensation, the manner in which compensation was calculated was unknown and generally perceived to be insufficient.<sup>8</sup> Residents reported that they did not derive any benefits from the mine and were not even permitted to sell scrap from the mine.<sup>9</sup>
- Coal mining in the Karonga district in north-western regions of Lake Malawi has left local residents in circumstances that feature coal running into the back yards and fields of residents, forced removals of families, insufficient compensation, no access to healthcare, and decreased harvests due to water and air pollution.<sup>10</sup> A resident described that her family was given only MK50,000 (about US\$150) as compensation for relocation: an amount that, she says, fell short of the basic material costs to buy new land and replace her house, forcing her to sell two cows to cover the expenses needed to build a new home.<sup>11</sup>
- In the Amajuba district, a major coal mining region in South Africa, locals complained that the mining company chose to hire non-locals at the mine leaving the residents without employment options.<sup>12</sup> In addition, the mining companies' lack of commitment to fulfil the promises made at the start of the mining activity further exacerbates the adversarial rather

than partnership nature of the relationship between communities and mining companies.<sup>13</sup> Local residents complained that they were promised computers for the local high school, repairs to the cracks in their houses as a result of blasting at the mine, new housing at the expense of the mining company and upgrades to a local hospital – all of this was not done.<sup>14</sup> Residents reported that they did not even know how or where to start to raise these complaints because the mining company was inaccessible to them.<sup>15</sup>

Yet these need not be the only kind of stories emerging out of mining development in Africa. Mining has at least the *potential* to play a much more positive role on the continent. While for some communities, their struggles are for the right to say no to mining outright, for many, their interest is in participating in how decisions around mining are taken, and in negotiating for an equitable share in the benefits of mining.

While it is acknowledged that mining in the Southern Africa Development Community (SADC) region continues to contribute to trade flow, the approach that mining companies have taken historically that sees the payment of royalties and taxes as a sufficient contribution is dated and fails to take account of the true costs associated with mining. For mining activity to be sustainable, mining companies need to contribute to a socially sustainable environment.<sup>16</sup> It is within this context that the best practice guidelines for mining in the SADC region contained in this report place the needs of those most affected by mining at their centre.

The consultations and interviews undertaken during this project with various stakeholders quickly illustrated the need for such a model as the legal framework in each country within the SADC region differs significantly and is often fragmented, unclear, contradictory or out of date. Furthermore, mining affected communities often shared the same or similar frustrations with regards to mining activity such as the lack of access to information, the lack of transparency and accountability, inadequate or no compensation for local communities, forced relocations, and political interference. While the African Union's African Mining Vision (AMV)<sup>17</sup> was intended to serve this role to some extent and address the high levels of poverty and underdevelopment in Africa which stand in stark contrast to the abundance of its mineral resources, the AMV is a highly contested document. We discuss this further below.

These guidelines therefore aim to assist mining companies operating in the SADC region, and the governments and agencies that regulate them, by providing a set of principles to advance long term sustainable development in the mining sector. The goal of this tool is not to advocate either for or against mining, but rather to provide a set of guidelines so that *when* mining takes place, it does so in a manner that supports education, health, sanitation, employment, technology, agriculture, environmental and social obligations and overall long term sustainable and holistic economic and social development. This set of guidelines hopes to contribute to dismantling the legacy of colonialism and inequality in mining in Africa, and work towards a more inclusive mining system where those most affected by mining are included in the distribution of its benefits.

## 2. About CALS

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CALS is a civil society organisation based at the School of Law at the University of the Witwatersrand, in Johannesburg, South Africa. CALS is also a law clinic, registered with the Legal Practice Council. As such, CALS connects the worlds of academia and social justice. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS focusses on five programmatic areas: namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law.

This project is located within CALS' Business and Human Rights Programme which examines the role of corporations in respect of the rights of individuals and communities that they affect, particularly in the mining sector. This continues CALS' legacy of addressing conditions of poverty and the human rights violations associated with it, not only domestically but on the African continent as a whole. The Programme's work not only seeks to hold corporations accountable but demands responsive behaviour from those who provide their funding such as investors and financial institutions. More information about CALS can be found here: <https://www.wits.ac.za/cals/>.

## 3. Overview and Methodology

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### 3.1 Aim of the project

The development of this set of guidelines forms part of a broader project, the overarching aim of which was to harness African expertise and knowledge to develop an African-developed model of best practice for mining companies conducting business in Africa, thereby bringing the continent closer to the twin goals of poverty alleviation through mining and a reduction of human rights violations caused by the extractives industry.

### 3.2 Phase one: Academic conference

In Phase One of the project, CALS hosted a Pan-African conference on Business and Human Rights under the theme 'Corporate accountability: An African perspective'. The objective of the conference was to garner African authors from the continent to discuss how the business and human rights framework can better accommodate, and be more responsive to, the African political, social, legal and economic context. By far the majority of the academic business and human rights discourse has been dominated by academics and theorists from the Global North. As a result of this, issues pertaining to Africa have had little ventilation in the international discourse. There are comparatively few African scholars contributing in international compilations and convenings, notwithstanding a wealth of expertise in this area. CALS and OSISA identified this gap and determined to develop an academic narrative in this area. The objective was to hold a convening of African authors, discussing theories about business and human rights and Africa. This resulted in a convening in July 2017.

The conference covered a number of interrelated themes and sought to:

1. Explore ways in which the business and human rights project can better respond to the causes, effects and maintenance of economic inequality between the Global North and Africa;
2. Investigate why economic inequality persists, despite increased investment in Africa;
3. Examine how economic inequality facilitates the perpetuation of harmful business practices, despite the prominence of the business and human rights project at an international level; and
4. Discuss how economic inequality can be addressed in a manner that sees human rights and poverty eradication informing Africa's interactions with the Global North and its regulation of business.

The papers presented by African scholars who attended the conference are being developed into chapters in a book on the same subject matter as the convening. Their papers are intended to develop theory on business and human rights from an African perspective that provides some insight on the issues raised in the themes mentioned above.



### 3.3 Phase two: Civil society and community convening

Phase Two of the project comprised consultations with civil society organisations working in the mining sector as well as community members from the SADC region during a convening held in June 2018. The convening was held under the theme 'A human rights and sustainable socio-economic benefits approach to mining in SADC'. The following countries were represented at the convening: Botswana; Lesotho; Malawi; Mozambique; South Africa; Tanzania; Zambia; and Zimbabwe.

Participants were given the opportunity to openly discuss the challenges faced by communities when mining activity takes place and after mine closures, share ideas amongst each other and consider solutions to these challenges from the perspective of those who experience them on a daily basis. The convening was non-prescriptive, loosely structured and informal to ensure community members felt free and open to discuss their concerns and ideas and lead the conversation themselves. This approach facilitated a safe space for a free-flowing discussion where participants shared their experiences and challenges with mining.

Specifically, the convening sought to create a space for the stakeholders to:

1. Share information on the successes and challenges faced by civil society organisations working with mining affected communities in the SADC region;
2. Share information on the frameworks for socio-economic benefits from mining and its effectiveness in their jurisdictions;
3. Share views on what a model tool for socio-economic benefits flowing from mining in the SADC region should look like; and
4. Make recommendations on how this tool could be collectively developed by stakeholders in the SADC region.

The convening identified a number of challenges common across the SADC region. These included:

1. Access to information in the mining sector;
2. Transparency and accountability on the part of companies and states;
3. Compensation for mining affected communities;
4. Relocation of communities;
5. Pollution of the environment as a result of mining;
6. Political interference in the mining sector;
7. The right of the community to say no to mining;
8. The role of traditional leaders;
9. Grievance mechanisms for mining affected communities;
10. Monitoring and compliance of mining activity;

11. The impact of mining projects on gender, labour, education, health and children; and
12. Mine closure.

The findings from this convening were used to develop a questionnaire to guide subsequent consultations with stakeholders.

### **3.4 Phase three: Consultation with government and industry**

Having considered the views of mining affected communities, CALS embarked on country visits to consult with government departments and industry officials within the SADC region, particularly those engaged with the issues and challenges identified by communities in Phase Two of the project. These consultations were loosely guided by the questionnaire developed from the findings in Phase Two.<sup>18</sup> A semi-structured interview technique was employed to ensure a degree of consistency across the interviews whilst also allowing sufficient scope for flexibility so that participants could raise issues that they deemed important.

The following institutions were identified as relevant stakeholders with whom to consult:

1. Department responsible for mining;
2. Department responsible for land affairs;
3. Department responsible for gender/women;
4. Department responsible for finance;
5. Department responsible for environmental affairs;
6. Local government/municipality;
7. Chamber of Mines representative; and
8. Individual mining companies.

CALS conducted a visit to Zambia from 11 to 14 November 2018 during which time one-on-one interviews and small group meetings were held with the various representatives, guided by the themes identified in the questionnaire. These consultations were semi-structured and informal in nature. The following entities were engaged during this visit:

1. The Zambia Environmental Management Agency;
2. The Chamber of Mines;
3. The Ministry of Local Government; and
4. The Ministry of Gender.

CALS also conducted a visit to Malawi from 13 to 18 January 2019 during which time one-on-one interviews and small group meetings were held with the various representatives, guided by the themes identified in the questionnaire. Again, these consultations were semi-structured and informal in nature.

The following entities were engaged during this visit:

1. The Ministry of Lands and Rural Development;
2. The Department of Mines;
3. The Ministry of Finance;
4. The Chamber of Mines;
5. The Ministry of Local Government; and
6. The Ministry of Environmental Affairs.

To widen the scope of consultations, CALS also attended the African Mining Indaba held in Cape Town from 4 to 7 February 2019. The participants in the African Mining Indaba included heads of state, mining ministers and their delegates, CEOs of mining companies, investors and financiers, government regulators, mining exploration and services companies and a few civil society organisations. One-on-one interviews and small group meetings were held with various representatives both from the government and mining companies representing the following countries:

1. Angola;
2. Botswana;
3. Democratic Republic of Congo;
4. Lesotho;
5. Madagascar;
6. Mozambique;
7. Namibia;
8. South Africa;
9. Tanzania; and
10. Zimbabwe.

These consultations were semi-structured and informal in nature, with the themes driven by the person interviewed and their role in sector. CALS also had the opportunity to participate in roundtable discussions where issues relevant to the project were discussed.

In their totality, these consultations provided insight into the lived experiences of those involved in, and affected by, mining throughout its lifecycle. For example, the civil society and community convening described in Phase Two was useful and important in that it showed that there are a number of recurring challenges faced by mining affected communities which include: the lack of access to information, the lack of transparency and accountability on the part of the state and mining companies, pollution and the related consequences thereof, inadequate or no compensation for relocation, no implementation of laws in practice and lack of consultation with community members. It seems that most community members were in agreement that their living conditions seemed to deteriorate rather

than improve as a result of mining activity in their communities. However, community members remain determined to empower themselves to assert their rights and negotiate increased social and economic benefits for the community.

Similarly, Phase Three presented opportunities to hear other perspectives. The government representatives shared quite candidly the difficulties associated with carrying out their responsibilities and complying with the applicable laws. For instance, it was clear that often interference by political figures or structures frustrated the intentions or actions of regulatory officials. The pressure of balancing the need for development and investment against the need for protection of the environment and sustainable socio-economic growth was illuminated. For the most part, this scale often tipped in favour of investment.

Engagements with companies also confirmed that companies still consider their primary objective and priority in the mining industry to be making a return on their investment. While some companies stood out as taking their role in social and economic development and sustainability in mining more seriously in recent years by training or employing large members of the mining community in the mining company, other companies still see their role in the strict sense of a voluntary corporate social responsibility system. This confirmed the need for a set of best practice guidelines that can assist companies in making their contribution a meaningful one aimed at sustainable socio-economic development.

The information gathered from stakeholder consultations at the convening, during country visits and at the African Mining Indaba form the basis on which this set of guidelines was developed, such that they harness African expertise and knowledge culminating in an African-developed model of best practice for mining companies conducting business in Africa.

## 4. Limitations

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Unfortunately, given questions of scale, it was not possible to consult with a full set of stakeholders from each country within the SADC region. As such, the consultations were limited to the two countries where in-country visits were held, as well as the representatives present at the African Mining Indaba, who were not always the people with the most expertise in a particular field. For instance, the representatives present at the Mining Indaba were predominately from the Department or Ministry of Mines and as such hold expertise in this particular area and not necessarily with regards to issues such as the needs and positioning of women, environmental regulation or the relocation of mining communities which are often administered by separate departments. Furthermore, workers and trade unions were not consulted.

In addition, while the semi-structured nature of the consultations was useful in allowing interviewees to be open and honest and provide context for their responses, the inherent difficulty of this research methodology is that it makes drawing comparisons across interviews more challenging.



## 5. Regional legal instruments

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While this document contains best practice guidelines, it is important not to lose sight of the fact that there are many binding legal instruments operating in the SADC region which contain legal obligations that have to be adhered to by those states which have ratified them. This section provides a brief overview of some of the key legal instruments applicable to mining within the SADC region. The instruments are discussed from the vantage point of whether and how the key themes identified in the accompanying guidelines are addressed. The presented instruments vary in their nature and status but all have applicability within the regional mining framework.

### 5.1 Applicable regional instruments

#### 5.1.1 African Charter of Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR)<sup>19</sup> is the major regional instrument that seeks to promote and protect human rights in Africa. Articles 21, 22 and 24 of the ACHPR have a direct impact on the extractive industries. They respectively recognise the right of all peoples to freely dispose of their wealth and natural resources, the right to development and the right of all peoples to an environment favourable to their development. These provisions in the ACHPR are directly applicable to the concerns regarding the human rights impact of the extractive industries in Africa identified in these guidelines. Importantly, local communities are granted the right over the use and disposal of natural resources in a number of international and regional treaties to which governments are signatories, most specifically the ACHPR. Article 9 (1) of the ACPHR, further enshrines a 'right to receive information'.<sup>20</sup>

The ACHPR creates judicial and non-judicial complaints mechanisms to adjudicate grievances of affected communities or individuals including the African Commission on Human and Peoples Rights (African Commission).<sup>21</sup> The African Commission is tasked with promoting and protecting human rights by interpreting the ACHPR and considering individual complaints. In 2009, the African Commission established a Working Group on Extractive Industries, the Environment and Human Rights.<sup>22</sup> Within the framework of the Working Group, and as part of the implementation of the Commission's responsibilities of reviewing the reports of States under Article 62 of the ACHPR, the African Commission has developed the practice of formulating questions pertaining to the extractives sector and the environment.<sup>23</sup>

### 5.2 Applicable SADC instruments

#### 5.2.1 Treaty of the Southern African Development Community

The 1992 Treaty of the Southern African Development Community (SADC Treaty)<sup>24</sup> is the founding document of SADC. While the SADC Treaty is not specifically concerned with mining, it creates a broad framework for

laws and regulations in the SADC region including with regard to issues of sustainable development. First, several of the objectives of the SADC Treaty speak to sustainable development and mining issues. The objectives include: sustainable economic growth and development to ensure poverty eradication, sustainable usage of natural resources and protection of the environment, and to mainstream gender in the process of community building.<sup>25</sup>

Second, the SADC Treaty also provides for a remedial avenue in the form of a tribunal 'to ensure adherence to' the treaty.<sup>26</sup> In 2014, following a series of rulings against the Zimbabwean government and the effective suspension of the Tribunal, a new protocol was signed by SADC states confining the Tribunal to hearing disputes between states and not between citizens and states. This curtailing of the jurisdiction of the SADC Tribunal is currently under dispute. In South Africa for example, the Constitutional Court handed down a judgment in December 2018 which confirmed that the then South African President's participation in the suspension of the operations of the Tribunal and his subsequent signing of the 2014 Protocol was unlawful, irrational and unconstitutional on the grounds, *inter alia*, that the state acted contrary to the objects and purposes of the SADC Treaty which it had signed.<sup>27</sup>

### **5.2.2 Protocol on Mining in the Southern African Development Community (SADC Protocol on Mining)**

In 1997, member states of SADC decided to establish a Protocol on Mining,<sup>28</sup> agreeing to adopt internationally-accepted regional standards within the mining sector. Through the Protocol, '[m]ember states agree to share information on exploitable mineral resources in the region, enhance the technological capacity of the sector as well as promote policies that will encourage and assist small scale mining'.

Article 8 states that Member States 'shall promote sustainable development by ensuring that a balance between mineral development and environmental protection is attained'.<sup>29</sup> The article further provides that '[m]ember States shall encourage a regional approach in conducting environmental impact assessments especially in relation to shared systems and cross border environmental effects', '[m]ember States shall collaborate in the development of programmes to train environmental scientists in fields related to the mining sector' and '[m]ember States undertake to share information on environmental protection and environmental rehabilitation'.<sup>30</sup> Environmental and occupational health and safety issues are also highlighted.<sup>31</sup>

Furthermore, the SADC Mining Ministers agreed on the Mining Strategic Plan in 2001.<sup>32</sup> The Plan fleshes out in more detail how the Mining Protocol should be implemented in fulfilment of the SADC agenda.<sup>33</sup> The Plan is organised according to seven areas namely: a mining protocol dealing with issues of institutional framework, policy harmonisation, capacity and funding; information and geology; mining, marketing and mineral processing; small scale mining; human resources development and technology; environmental protection; and gender mainstreaming in the mining sector.<sup>34</sup>

### 5.3 Application of regional instruments through case law

Instruments such as Treaties and Protocols invariably contain rights that are outlined at high levels of generality, in order to be as widely applicable as possible. There is therefore sometimes a need for interpretation to address gaps and uncertainties, and clarify the meaning of a legislative provision in a concrete situation. The African Commission is the body created by the ACHPR to provide the definitive interpretation of the ACPHR which binds all signatories, which include all SADC states.<sup>35</sup> Its decisions therefore must be adhered to by SADC governments and companies operating in the area.

#### 5.3.1 Endorois case

This case was launched by the Endorois community which had been forcibly evicted by the Kenyan state from their ancestral lands around Lake Bogoria in the early 1970s, to pave way for the creation of a wildlife conservation area.<sup>36</sup> The eviction took place without adequate consultation and the state failed to honour many of its commitments with regard to compensation for the value of the land lost and for indirect compensation (revenue and employment).<sup>37</sup> The African Commission found that in the 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 derived from the land whose right of use they had been deprived.<sup>38</sup> The African Commission found that the state should have ensured the FPIC of the Endorois and that the rights of the Endorois had been violated.<sup>39</sup> Critically it held that the right to development has a procedural as well as a substantive component and that it includes freedom of choice (of those affected by development).<sup>40</sup> The *Endorois* judgment is thus a critical authority for arguing that the ACPHR supports and requires the right of directly-affected communities to consent to whether and how mining takes place.

#### 5.3.2 SERAC case

The *SERAC* case concerned the far-reaching environmental and health related impacts of oil companies in the Niger Delta. The Nigerian Government had also been complicit in the resulting harms from contaminated water, soil and air experienced by the local communities. The oil companies had been freely polluting the receiving environment with excessive levels of toxic substances, flouting applicable local and international environmental regulations and accepted standards. The judgment handed down by the African Commission consequently stated that all impacted communities should 'be provided with all information on the nature of the damage, on its actual and potential environmental and health impacts and on measures to be taken'.<sup>41</sup> The African Commission further prescribed that all negatively affected people are entitled to 'full, adequate and effective compensation for the consequences of environmental damage arising from industrial activities'.<sup>42</sup> The nature of this compensation is far-reaching in that it includes not only material loss but also includes support for emotional distress, as well as the provision of any primary health care and the rehabilitation of livelihoods resulting from the harm. Similarly, in cases of significant ecological damage, companies have an obligation to clean up and restore the affected area.

## 5.4 Policy and model law instruments applicable to SADC countries

### 5.4.1 African Mining Vision

The Africa Mining Vision (AMV) was established in 2009 by the African Union (AU), with the goal of harnessing Africa's mineral wealth for 'equitable, broad-based development through the prudent utilisation of the continent's natural wealth'.<sup>43</sup> It was intended to create a new regulatory framework better suited than existing frameworks to address structural challenges including value addition, rent capture and integration.<sup>44</sup> It aims 'to foster transparent, equitable and optimal exploitation of Africa's mineral resources to underpin broad-based sustainable growth and socio-economic development'.<sup>45</sup> The AMV is organised around six areas of intervention namely: 'improving the quality of geological data; improving contract negotiation capacity; improving the capacity for mineral sector governance; improving the capacity to manage mineral wealth; addressing Africa's infrastructure constraints; and elevating artisanal and small-scale mining'.<sup>46</sup>

There has been slow progress in adopting the AMV.<sup>47</sup> This is despite the fact that AU member states are required to adopt the AMV in full and align domestic mineral sector policies with it.<sup>48</sup>

Certain non-governmental and community based organisations have critiqued the fundamental orientation of the AMV. They argue that the AMV follows an extractivist and top-down developmental paradigm, with a focus on ensuring African governing and capitalist elites benefit from the mineral economy rather than on empowering communities to choose their own development path to resist harmful impacts of mining on human rights.<sup>49</sup> A range of shortcomings and omissions have been identified, for example, the lack of guidance on FPIC, the lack of concrete proposals to address the roots of gender inequality and violence against women as well as a further concern regarding the lack of guidance on remedial avenues open to communities experiencing rights violations.<sup>50</sup> Other issues for which the lack of guidance has been noted include fair compensation for loss of land due to mining, resettlement and measures to protect water sources and prevent acid mine drainage.<sup>51</sup>

### 5.4.2 Model Law on Access to Information for Africa

As stated above, the ACHPR enshrines a right of access to information. All state parties are therefore compelled to realise this right. However, effective access to information legislation remains uncommon on the continent. Due to the lack of an African legislative framework to guide the development of domestic access to information legislation, state parties have drawn on access to information legislation developed in other legal systems.<sup>52</sup> Consequently, many existing and draft access to information laws in Africa do not adequately take into consideration conditions that are common in African states. These have been identified as including poor record-keeping systems, a culture of secrecy in many African public administrations, high levels of illiteracy and poverty, as well as common barriers to access to justice.<sup>53</sup> In response, in 2012 the African Commission developed the Model

Law on Access to Information in Africa, which seeks to 'provid[e] 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'.<sup>54</sup> The Model Law has significantly contributed to the adoption of access to information laws in Africa.<sup>55</sup>

## 5.5 Conclusion

The ACHPR (as interpreted through African Commission jurisprudence), the AMV, the SADC Treaty, the SADC Protocol on Mining and the ACHPR Model Law on Access to Information have been briefly surveyed as instruments applicable to SADC countries that speak to some or all of the mining industry issues identified in these guidelines. The ACHPR, in particular, imposes obligations with regard to communities' right to development, to an environment favourable to their development and contains an access to information clause. The African Commission has held that the right to development entails that communities must be afforded the opportunity to meaningfully participate in decisions regarding development on their land and which includes mining. The SADC Protocol on Mining and the (SADC) Mining Strategic Plan require state parties to undertake measures with regard to environmental regulation and the mainstreaming of gender. Therefore many of the principles of good practice identified in the guidelines which follow in the next section are grounded in the requirements of binding legal instruments.



## 6. Best practice guidelines for mining in the SADC region

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These guidelines aim to assist mining companies operating in the SADC region, and the governments and agencies that regulate them, work towards a more inclusive mining system where those most affected by mining are included in the distribution of its benefits, thereby bringing the continent closer to the twin goals of poverty alleviation through mining and a reduction of human rights violations caused by the extractives industry.

Importantly, they are not a CALS product, but have been developed through engagement with stakeholders across the SADC region. This was a deliberate choice in order that the outcome be something that resonates with those active in the mining space across the region, rather than reflecting the peculiarities of a particular country or regulatory system. By design then, these are guidelines, the implementation of which will need to be adapted for the specifics of a particular context.

The structure used in the sections which follow is to introduce the nature of the problem concerned, followed by some key guidelines which can be of use in responding to that problem. Whilst each of the topics covered below can be highly complex, we have tried to distil the core characteristics of best practice in order to present a workable model of inclusive and sustainable mining.

### 6.1 Access to information

#### *Nature of the problem*

Without adequate information about mining activities, all stakeholders - including mining companies applying for licenses, the financial institutions which invest in them, government regulators making decisions and conducting oversight, and communities who are affected by mining operations - are not able to participate meaningfully in decision-making. It is also important that the information in circulation is holistic - while the positive aspects of mining developments are often highlighted upfront, the negative impacts often only come to light much later. In addition, language and technical language are frequent barriers to the processing of information.

Access to information is critical in promoting transparency, which in turn is a necessary precondition for accountability. There is often a lot of secrecy around the internal processes linked to the interaction between the state and mining companies around licencing processes. This is particularly acute in jurisdictions where state and corporate interests blur. Further, experience has shown that while having strong domestic laws on access to information is instrumental in enhancing transparency, it is not always the complete solution as implementation of such laws remains problematic and request-based systems hinge on response to requests, to work. Proactive disclosure

of information, without the need to resort to a request-based system, is thus vital for the attainment of transparency and accountability in practice.

### ***Best practice guidelines***

- 6.1.1 Mining developments should be undertaken in a transparent manner in line with the requirements of the African Charter.
- 6.1.2 Communities should be well informed of the impacts of mining activities from the beginning of a project so that they are able to make informed decisions. Both positive and negative impacts of mining should be disclosed.
- 6.1.3 Access to information laws should be developed using the Model Law on Access to Information for Africa as a guide. Such laws should also then be implemented, which includes making provision for adequate resources to facilitate such implementation.
- 6.1.4 Laws should provide for proactive disclosure. Proactive disclosure can also be achieved by requiring mining companies to disclose key information as a condition of their mining licenses.
- 6.1.5 All information shared must be accessible. This may require the translation of information into local languages and making it available in simplified versions that can easily be disseminated through easy-to-read documents such as pamphlets. Consideration should also be given to the mechanism of sharing of information as written communication publication may not be sufficient. Additional means of reaching communities such as presentations at community meetings and the use of community radio stations may need to be considered.
- 6.1.6 Where companies seek to amend their licence conditions, they should provide comprehensive information so that communities may participate meaningfully on an informed basis in license amendment processes.

## **6.2 Consultation with and participation of affected community members**

### ***Nature of the problem***

A failure to consult, or inadequate consultation, with those most affected by mining is in no-one's interests. Not only does it violate international laws such as the African Charter and therefore raise compliance issues but it also introduces the practical risk of delay as the exclusion of communities heightens the risk of opposition to a mining development. It is clear that stakeholders across the SADC region are experiencing challenges with consultation. Communities routinely report either inadequate consultation or a complete absence of it. A major concern highlighted is the role of traditional leaders who often give consent to mining companies without earnestly consulting their communities. In some cases, consultation with communities happens after traditional leaders have already given consent, leading to a situation where they speak on behalf of companies during

consultations. A common challenge flagged by companies is the definition of 'community' in the context of determining which groups of people to engage with. While some countries have laws which define 'community', there is often inconsistency on the application of these definitions in practice.

### **Best practice guidelines**

- 6.2.1 Decision-making processes around mining should recognise the agency of communities to decide what sustainable development means for them. This is in line with article 21 of the African Charter which enshrines the right of all peoples to freely dispose of their wealth and natural resources, as well as the decision of the African Commission in *Enderois*. Community members should therefore have the right to consent or withhold consent to mining activities.
- 6.2.2 For consent to be valid all the elements of free prior and informed consent (FPIC) must be present – consent must be free (without coercion), prior (before the activity in question), and informed (communities must have access to comprehensive and accurate information and the same technical expertise as project proponents).<sup>56</sup>
- 6.2.3 To be valid, consent with respect to land under collective customary ownership should be given by those in whom rights are invested in terms of the communities' living customary law – whether at the individual, household, community or other level.
- 6.2.4 Particular attention should be paid to ensure that consultation processes capture the voices and experiences of women and other marginalised groups.
- 6.2.5 In areas where traditional leaders govern, consultation must be with community structures broader than just the traditional leader concerned.
- 6.2.6 Consultation should be ongoing throughout the life cycle of a mining project.
- 6.2.7 States, in collaboration with communities and other stakeholders, should develop a model to ensure that communities have access to experts for advice and capacitation in relation to understanding and engaging with the technical impacts of mining, mining social benefit mechanisms and alternative forms of development to mining.
- 6.2.8 Laws should provide for a generous definition of 'community'. The identification of a community should be determined with reference to the law, including customary law.
- 6.2.9 Laws should clearly outline the consequences of non-compliance with consultation and consent requirements and provide accessible remedies to aggrieved parties.

## 6.3 Relocation

### *Nature of the problem*

Many mining communities have to relocate to make way for mining. This is often a difficult process for all concerned. The state and mining companies do not always provide the support communities need to relocate. Specifically, communities are often moved to new areas where there are no proper facilities such as housing, health centres, schools or water sources within a reasonable distance, and grazing land. Again, relocation processes which are transparent, fair and inclusive not only respect the rights of the communities concerned but lessen the risk of community opposition, and therefore delay.

### *Best practice guidelines*

- 6.3.1 Communities should have the right to refuse relocation in accordance with FPIC.
- 6.3.2 Laws should adequately regulate relocation processes in cases where communities consent to relocation.
- 6.3.3 The site of relocation should be determined with due consideration of relevant factors including the size of the community; the sources of income for the community; the livestock of the community; and the availability of basic services such as running water, electricity, healthcare and education.
- 6.3.4 Where the proposed mining project affects burial, ancestral, cultural or religious sites, special consideration should be given to cultural practices and the wishes of immediate family members.
- 6.3.5 States, in collaboration with communities and other stakeholders, should develop a model to ensure that communities have access to independent advisors should they need assistance in negotiations around relocation.
- 6.3.6 Laws should clearly outline the consequences of non-compliance with relocation requirements and provide accessible remedies to aggrieved parties.

## 6.4 Compensation

### *Nature of the problem*

Many stakeholders raised issues with compensation in cases of relocation. The challenges include that compensation is inadequate, is not always paid at all or on time, and where it is paid, there are often unjustifiable inconsistencies in the amounts paid. In addition, the determination of the amount of compensation is not always easily discernible. Compensation is not just relevant to relocation but also arises in relation to the impacts of blasting on building structures, as well as the impact of mining activity on livelihoods and health. There is need for clarity on compensation in the law.

Mining companies stand to benefit from abiding by the law when it comes to compensation. They are more likely to be accepted in the community as community members will not feel like they have been unfairly treated and robbed of their property. This in turn contributes to the peaceful running of the companies' operations.

### ***Best practice guidelines***

- 6.4.1 Compensation for relocation must be negotiated upfront before any relocation begins.
- 6.4.2 Mining companies, community structures and the state should all be involved in these negotiations in order to mitigate any disparity in bargaining power.
- 6.4.3 Laws should provide clear guidance as to how compensation is calculated. At a minimum, compensation should be fair and equitable, taking into account relevant factors including:<sup>57</sup>
  - 6.4.3.1 loss of access to agricultural land;
  - 6.4.3.2 loss of food security;
  - 6.4.3.3 loss of access to sites of cultural significance, including any displacement of graves; and
  - 6.4.3.4 any negative impact on health and wellbeing.
- 6.4.4 Community members should have the election to choose either once-off or on-going payments for compensation. In the latter case, the dates on which compensation should be paid should be clearly agreed upon at the outset.
- 6.4.5 Negotiations should be conducted in the language of the community.
- 6.4.6 Laws should clearly outline the consequences of non-payment or late payment of compensation and provide accessible remedies to aggrieved parties.
- 6.4.7 Laws should place an obligation on mining companies to put in place programmes – supported by budgets and timeframes – for the prevention, treatment and compensation of any negative health impacts of mining.
- 6.4.8 The existence of laws which govern blasting damage can go some way towards ameliorating damage caused by blasting and therefore the need for compensation for blasting damage. Such laws should take account of local conditions and the types of housing that are common, as well as impose positive obligations on mining companies to take measures, in consultation with affected persons, to fix any structural damage caused by blasting. The standard for causation triggering the positive obligation should be that the exceedance of blasting standards is a probable cause of the damage, not that a specific incident of blasting contributed to the specific loss.



## 6.5 Social benefit models

### *Nature of the problem*

Mining is not living up to its potential. Stakeholders lamented the fact that mining oftentimes leaves communities worse off than they were before mining. The benefits of mining promised during consultations at the beginning of the mining development do not materialise. There are often no means to compel mining companies to deliver on their promises. Further, the social benefit derived from mining is not always commensurate with the amount of mineral worth generated from the operation and the negative social, economic and environmental impacts experienced by communities. In some cases, the community development projects that are undertaken by mining companies do not align with the priorities of the community. This is because communities are not always consulted on their needs. The fact that communities are not homogenous should be taken into account in developing social benefit models. The obligations on mining companies also do not erase the fact that the government remains the primary provider of basic services to the people. Thus mining companies should be seen as partners with the government in the development of communities. Compliance with the requirements of binding social benefit models is a way of recognising that communities have an interest in the natural resources that lie in their community that gives legitimacy to the operations of the mining company.

### *Best practice guidelines*

- 6.5.1 Laws should establish a legally binding social benefit model so that mining companies make a contribution to community development in return for extraction.
- 6.5.2 Communities should be consulted on the benefits they seek from mining activity in their area. The principles of consultation outlined in section 6.2 should apply equally to consultation around social benefit, including the importance of capturing the voices and experiences of women and other marginalised groups.
- 6.5.3 States, in collaboration with communities and other stakeholders, should develop a model to ensure that communities have access to independent advisors should they need assistance in negotiating social benefit plans.
- 6.5.4 The content of social benefit models should take into account the impact of mining on basic services as well as the role mining companies can play in upskilling local people
- 6.5.5 Financial provision should be made to support the practical implementation of the social benefit model concerned. These resources should be ring-fenced at the commencement of mining operations and administered by the relevant government department or agency.

- 6.5.6 The documents containing the commitments made the mining company (including budgetary allocations and timeframes) as well as progress reports, should be made publicly available in the relevant local languages.
- 6.5.7 The overall social benefit contribution made by mining companies should be commensurate with both the scale of the mine concerned (assessed using benchmarks such as projected annual turnover) and any negative social, economic and environmental impacts experienced by communities.
- 6.5.8 Laws should clearly outline the consequences of non-compliance with social benefit models and provide accessible remedies to aggrieved parties.

## **6.6 Grievance mechanisms**

### ***Nature of the problem***

When things start to go wrong, there need to be mechanisms to address concerns before conflict escalates. All players in the mining system are left feeling frustrated when there are no established mechanisms to address their concerns. Where mechanisms exist, they are not always accessible to affected communities due to factors such as physical distance and highly technical procedures. The establishment of open, independent and accessible grievance mechanisms benefits companies by giving them a platform where disputes can be resolved without perceptions of bias. As such, the outcomes of such mechanisms are more likely to be accepted by all parties.

### ***Best practice guidelines***

- 6.6.1 Individual mining companies should develop clear internal grievance mechanisms. These should be complemented by independent grievance mechanisms established by national laws.
- 6.6.2 Grievance mechanisms should be accessible to communities with no strict requirements for technicalities or legal representation.
- 6.6.3 All affected parties should play a role in deciding on the procedure to be followed in the event of a grievance. Components of processes could include problem diagnosis, facilitated dialogue, grievance hearing, mediation and arbitration.<sup>58</sup>
- 6.6.4 Communities pursuing a complaint through an independent grievance mechanism should have free access to specialists to enable them to engage on an equal footing with mining companies.
- 6.6.5 Laws should provide for the establishment of an independent, transparent and accountable monitoring body with investigative and punitive powers in cases of non-compliance.

## 6.7 Mine closure

### *Nature of the problem*

For mining to be sustainable, all stages of the lifecycle of the mining development must be planned for, including mine closure. When a mining development has run its course, communities are at times left with numerous challenges such as land that is not rehabilitated and water sources that are unsafe. Closures also often adversely affect the livelihoods of communities who come to rely on the mine's existence in their economic activities. Inclusive planning for closure and rehabilitation process is therefore critical. The issues on which engagement may be necessary include: decisions on appropriate land use for the mine site itself post-closure; ongoing management of sensitive zones such as sinkholes; repurposing wastewater facilities and mine buildings; and the management of the economic impact of closure of the mine such as loss of earnings.

### *Best practice guidelines*

- 6.7.1 Community members should be timeously informed of mine closure.
- 6.7.2 A mine closure plan should be developed as early as possible. Such plans should speak to related plans such as those addressing environmental rehabilitation and retrenched mineworkers.
- 6.7.3 Communities should participate in the formulation and implementation of mine closure plans. The principles of consultation outlined in section 6.2 should apply equally to consultation around mine closure, including the importance of addressing the needs of women and other marginalised groups.
- 6.7.4 Financial provision should be made to support the implementation of mine closure plans. These resources must be ring-fenced at the commencement of mining operations and administered by the relevant government department or agency.
- 6.7.5 Laws should clearly outline the consequences of non-compliance with mine closure requirements and provide accessible remedies to aggrieved parties.

## 6.8 National measures

### *Nature of the problem*

There are many issue-specific guidelines in the sections above which relate to the content of laws and operation of state regulatory bodies. However, in addition to these, there are a range of challenges and principles which cut across the issues traversed above which are worth emphasising given the frequency with which they were highlighted in our engagements with stakeholders across the SADC region. Firstly, while mining laws exist at national level, these are often inconsistent with other national laws. This is

compounded by a pervasive lack of co-operative governance between the various departments and agencies involved at national level. Secondly, national laws (and their implementation or lack thereof) do not always reflect the international legal obligations contained in treaties ratified by states.

### ***Best practice guidelines***

- 6.8.1 Laws that affect mining should be harmonised to avoid conflicts between different government agencies, particularly those charged with mining rights and surface land rights.
- 6.8.2 There should be collaboration between government departments (such as through multi-departmental committees) to ensure that the various interests of the departments are covered in the way in which mining operations are regulated.
- 6.8.3 Government assistance (including capacity building and support during negotiations with mining companies) should be decentralised to ensure that it is more accessible to local communities.
- 6.8.4 States should ratify and domesticate relevant international standards that promote the rights of mining communities. Where states have ratified international instruments, domestic regulatory systems must comply with these standards.

## 7. Conclusion

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Mining has the potential to significantly contribute to the development of a nation. In some cases, mining communities also directly benefit from mining in various ways such as road infrastructure, schools and health care facilities. However, some mining communities do not experience the benefits of mining in their areas and they are left worse off after mining. The challenges experienced by communities relate to various issues such as access to information in the mining sector; transparency and accountability on the part of companies and the state; consultation; compensation; relocation; environmental pollution; political interference in the mining sector; grievance mechanisms for mining affected communities; non-compliance with the law; and mine closure processes. This project set out to understand the challenges in the mining sector with the ultimate aim of developing a set of guidelines for stakeholders to use to work towards an equitable, inclusive and sustainable mining regime.

Drawing from consultations with various stakeholders that included mining affected communities, civil society, government and industry, these guidelines hope to contribute to the realisation of a more inclusive mining system where those most affected by mining are meaningfully included in the distribution of its benefits. The model advocates for the ongoing meaningful consultation and participation of communities throughout the lifecycle of any mining project. To facilitate this, communities should have access to information about the mining project in a manner and language that they understand. The guidelines also speak to compensation and relocation, stressing that communities should be entitled to adequate and fair compensation in the event of relocation. With regard to a social benefits model, the guideline motivates for a participatory and transparent model which should include consultation with communities and a legally enforceable agreement of the undertakings of mining companies.

When it comes to mine closures, a desirable position is one which prioritises timely provision of information to the community to facilitate consultation and ensures early planning for closure including the setting aside of funds at the beginning of the project. It is inevitable that differences will arise between communities and mining companies. Therefore, the guidelines also recommend that there should be accessible and independent grievance mechanisms for the resolution of such disputes.

Weaving throughout the guidelines is an awareness that communities are not homogenous and should not be treated as such. In particular, women are impacted in particular ways by mining because of their gendered societal roles and this disaggregated impact must be factored into the way in which mining is planned, funded and implemented.

It is important to reiterate that the guidelines reflect existing regional and sub-regional human rights norms in Africa. These include the ACHPR and SADC instruments. The guidelines call on states to ratify and domesticate

relevant international standards that promote the rights of mining communities and to ensure that domestic regulatory systems comply with these standards. The guidelines also encourage states to harmonise their laws to avoid conflicts of interest amongst different state departments. Effective collaboration amongst state departments is crucial to advancing a holistic approach to mining that serves the state, communities and companies. Importantly, the development of domestic laws and policies governing mining should include robust and meaningful participation of mining-affected communities, workers and other stakeholders. Lastly, the existence of laws is inconsequential without implementation. States are, therefore, called upon to ensure that there is effective monitoring of mining companies for compliance and that there are effective consequences for non-compliance that are enforced consistently.

We thank all those from across the SADC region who contributed their experiences and expertise to this project. These guidelines offer an African-developed model of best practice for mining companies conducting business in Africa, thereby bringing the continent closer to the twin goals of poverty alleviation through mining and a reduction of human rights violations caused by the extractives industry.

# Endnotes

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<sup>1</sup> See, for example, Bonita Meyersfeld 'Empty promises and the myth of mining: Does mining lead to pro-poor development?' 2017 2(1) *Business and Human Rights Journal* 31, 32.

<sup>2</sup> AGN Kitula, 'The environmental and socio-economic impacts of mining on local livelihoods in Tanzania: A case study of Geita District' (2006) 14 *Journal of Cleaner Production* 405-415, 410.

<sup>3</sup> Fleur Scheele, Esther de Haan and Vincent Kiezebrink *Cobalt blues: Environmental pollution and human rights violations in Katanga's copper and cobalt mines* (2016) 29, available at <https://www.somo.nl/cobalt-blues/> (last accessed 12 March 2019).

<sup>4</sup> Id, 33-34.

<sup>5</sup> Id, 29.

<sup>6</sup> Sepo I Musokotwane *The socio-economic impact of mining: A comparative study of Botswana and Zambia* (PhD thesis, University of the Witwatersrand, 2016) 57, available at <http://wiredspace.wits.ac.za/bitstream/handle/10539/23224/Sepo%27s%20Final%20Thesis%20for%20Print%20and%20CD.pdf?sequence=1&isAllowed=y> (last accessed 14 March 2019).

<sup>7</sup> Id, 58.

<sup>8</sup> Id, 59.

<sup>9</sup> Ibid.

<sup>10</sup> Human Rights Watch *They destroyed everything: Mining and human rights in Malawi* (2016) 4-5, at [https://www.hrw.org/sites/default/files/report\\_pdf/malawi0916\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/malawi0916_web.pdf) (last accessed 12 March 2016).

<sup>11</sup> Id, 47.

<sup>12</sup> Sihlangu S Ngobese *Examining the socio-economic impact of mining on the livelihoods of Amajuba District mining communities* (unpublished LLM thesis, University of Kwazulu-Natal, 2015) 33, available at [https://researchspace.ukzn.ac.za/bitstream/handle/10413/14247/Ngobese\\_Shlangu\\_Sixtus\\_2015.pdf?sequence=1&isAllowed=y](https://researchspace.ukzn.ac.za/bitstream/handle/10413/14247/Ngobese_Shlangu_Sixtus_2015.pdf?sequence=1&isAllowed=y) (last accessed 12 March 2016).

<sup>13</sup> Id, 34.

<sup>14</sup> Id, 33-35, 53.

<sup>15</sup> Id, 41.

<sup>16</sup> Ngobese (note 12) 15.

<sup>17</sup> African Union *African Mining Vision* (2009), available at [http://www.africaminingvision.org/amv\\_resources/AMV/Africa\\_Mining\\_Vision\\_English.pdf](http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf). (last accessed 14 March 2019).

<sup>18</sup> See Annexure 1.

<sup>19</sup> CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), ), available at [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (last accessed 12 March 2019).

<sup>20</sup> Many national constitutions or domestic legislation extend the applicability of this right to private actors, such as mining companies, as well. Section 32 of the South African Constitution is one such example.

<sup>21</sup> Part II Chapter 1 of the ACHPR.

<sup>22</sup> See <http://www.achpr.org/mechanisms/extractive-industries/> (last accessed 12 March 2019).

<sup>23</sup> African Commission on Human and Peoples' Rights *State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries and the Environment* (2018) 3 (hereafter 'ACHPR State Reporting Guidelines'), available at [http://www.achpr.org/files/news/2017/10/d312/state\\_reporting\\_guidelines\\_and\\_principles\\_on\\_articles\\_21\\_and\\_24.pdf](http://www.achpr.org/files/news/2017/10/d312/state_reporting_guidelines_and_principles_on_articles_21_and_24.pdf) (last accessed 12 March 2019).

<sup>24</sup> Consolidated Text of the Treaty of the Southern African Development Community (1992), available at <https://www.sadc.int/documents-publications/show/4171> (last

accessed 12 March 2019).

<sup>25</sup> Articles 5 (1) (a), (g) and (k) of the SADC Treaty.

<sup>26</sup> Article 16 of the SADC Treaty.

<sup>27</sup> *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) BCLR 329 (CC).

<sup>28</sup> Protocol on Mining in the Southern African Development Community (1997), available at [https://www.sadc.int/documents-publications/show/Protocol\\_on\\_Mining.pdf](https://www.sadc.int/documents-publications/show/Protocol_on_Mining.pdf) (1997) (last accessed 12 March 2019).

<sup>29</sup> Article 8 (1) of the SADC Protocol on Mining.

<sup>30</sup> Articles 8 (2), (3) and (4) of the SADC Protocol on Mining respectively.

<sup>31</sup> Article 9 of the SADC Protocol on Mining.

<sup>32</sup> Economic Commission for Africa and SADC *Harmonisation of mining policies, standards, legislative and regulatory frameworks in Southern Africa* (2004) 4, available at <https://www.uneca.org/sites/default/files/PublicationFiles/harmonisation-study-sro-sa.pdf> (last accessed 12 March 2019).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Article 45 (3) of the ACPHR.

<sup>36</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (the Endorois case) Communication No 276/ 2003, African Commission on Human and Peoples' Rights, paras 1-21.

<sup>37</sup> Endorois case at paras 110-111.

<sup>38</sup> Endorois case para 295.

<sup>39</sup> The African Commission found Kenya to be in breach of various articles, namely articles 8, 14, 17, 21 and 22 of the ACPHR.

<sup>40</sup> Endorois case paras 277 and 278.

<sup>41</sup> ACHPR State Reporting Guidelines, 26.

<sup>42</sup> *Id.*, 50.

<sup>43</sup> Oxfam International *From aspiration to reality: Unpacking the African Mining Vision* (2017) 3, available at <https://www-cdn.oxfam.org/s3fs-public/bp-africa-mining-vision-090317-en.pdf> (last accessed 12 March 2019).

<sup>44</sup> *Id.*, 5.

<sup>45</sup> *Ibid.*

<sup>46</sup> Oxfam (note 44) 8-9.

<sup>47</sup> *Id.*, 2.

<sup>48</sup> *Id.*, 6.

<sup>49</sup> See, in particular, ActionAid 'The African Mining Vision: Are we repackaging a colonial paradigm?' (2017), available at [http://www.actionaid.org/sites/files/actionaid/press\\_releases/the\\_african\\_mining\\_vision- repackaging\\_an\\_old\\_paradigm.pdf](http://www.actionaid.org/sites/files/actionaid/press_releases/the_african_mining_vision- repackaging_an_old_paradigm.pdf) (2017).

<sup>50</sup> *Id.*, 10-11; Oxfam (note 44) 13.

<sup>51</sup> Oxfam (note 44) 13.

<sup>52</sup> Media Institute of Southern Africa Swaziland 'Draft law on access to information on Africa' (undated), available at <https://misaswaziland.com/draft-law-on-access-to-information-in-africa/> (last accessed 12 March 2019).

<sup>53</sup> *Ibid.*

<sup>54</sup> African Commission on Human and Peoples' Rights *Model Law on Access to Information for Africa* (2012) 7, available at [http://www.achpr.org/files/instruments/access-information/achpr\\_instr\\_model\\_law\\_access\\_to\\_information\\_2012\\_eng.pdf](http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf) (last accessed 12 March 2019).

<sup>55</sup> See Fola Adeleke 'The impact of the Model Law on Access to Information for Africa' in Ololade Shyllon (ed) *The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (Pretoria University Law Press, Pretoria, 2018) 14, who notes at 16 that as of 2018, 12 countries had adopted access to information laws since the adoption of the Model Law, bringing the total number



of countries with such laws to 22.

<sup>56</sup> See further the International Alliance of Natural Resources in Africa *Model Law on Mining on Community Land in Africa* (2016) (hereafter 'IANRA Model Law'), available at <https://ianra.org/images/images/PDFs/IANRA-Model-Law-2016.pdf> (last accessed 12 March 2019).

<sup>57</sup> See section 35.2 of the IANRA Model Law.

<sup>58</sup> These are the components proposed by the Bench Marks Foundation in South Africa which has been piloting an independent problem solving service for communities. See Bench Marks Foundation *Turning the tide – Independent problem solving service for mining companies and affected communities* (2018), available at [http://www.bench-marks.org.za/publications/ipss\\_brochure.pdf](http://www.bench-marks.org.za/publications/ipss_brochure.pdf) (last accessed 12 March 2019).

# Annexure 1:

## Interview Questionnaire

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### Questions for government departments

1. Consultations with community members
  - a. Where new mining activity is anticipated in a particular area, what consultative processes are in place with the affected community members before, during or after mining activity, if any?
  - b. Are these processes required under the law?
  - c. What is the format of these processes? Written submissions or representations, face-to-face meetings, or voting?
  - d. Do you find that these processes are effective? If so, why? If not, why not?
  - e. What improvements would you suggest in this regard?
  - f. Do community members have the right to say no?
2. Openness and transparency
  - a. Are community members informed when a new mining project is undertaken?
  - b. If so, how is this information communicated?
  - c. Is this type of communication effective in practice?
  - d. What improvements would you suggest in this regard?
3. Relocation
  - a. How are removals and relocation regulated?
  - b. How and when are affected community members informed about relocation?
  - c. How is the place of relocation determined? What factors are taken into account, for example, the size of the community; the livestock of the community; the availability of basic services such as running water, electricity, healthcare and education?
  - d. What special consideration and action is taken when the proposed mining site is the site of various burial plots or possesses some other traditional and cultural significance?
  - e. What are the challenges faced by the government in the relocation process?
  - f. What suggestions do you have to improve this process?

#### 4. Compensation

- a. Are relocated community members compensated?
- b. If so, how is this compensation determined and by whom?
- c. How is this compensation distributed?
- d. Is this process effective? If so, why? If not, why not?
- e. What suggestions do you have to improve this process?

#### 5. Mine closures

- a. Are community members consulted in the process of a mine closure?
- b. What steps, if any, are taken by the state from a socio-economic perspective?
- c. What obligations are on mining companies with regard to rehabilitation of the land and loss of employment?
- d. What are the challenges experienced by the state during mine closures?
- e. What suggestions do you have to improve this process?

#### 6. Social benefit models

- a. In South Africa, an application for a mining right must be accompanied by a Social and Labour Plan (SLP). The SLP sets out how the mining company intends to share some of the economic benefits that flow from mining with the affected communities. For example, employment opportunities, skills training for employees, building or upgrading schools, roads, hospitals and providing basic services in the mining area such as clean water, electricity and sanitation. Once lodged with the Department of Mineral Resources, the SLP is legally binding and cannot be amended or varied without the consent of the Minister.
- b. Do you have a similar model in your country? If so, please elaborate.
- c. Is this model enforceable in a court of law?
- d. Do you find this model effective? If so, why? If not, why?
- e. What challenges do you face ensuring compliance with this model?
- f. Are there any consequences or accountability mechanisms in the instance that the mining company does not meet its obligations?
- g. What suggestions do you have to improve this process?

#### 7. Access to information

- a. How does the public find out about new and ongoing mining projects?

- b. Is information regarding mining projects free and easily accessible?
  - c. What are the challenges you face with regards to access to information?
8. Accountability
- a. How are mining companies held accountable for non-compliance with mining and environmental laws?
  - b. Is there a specific body that investigates cases of non-compliance?
  - c. Do you find these processes effective? If so, why? If not, why not?
  - d. What suggestions do you have to improve this process?
9. Civil society organisations
- a. What is the role of CSOs in the mining sector, if any?
  - b. Would you consider working with CSOs to develop processes and policies in the mining sector? Particularly, a model tool for the SADC region to guide a human rights and socio-economic benefits approach to mining.
  - c. How would you see this relationship in practice?

### **Questions for mining companies**

1. Consultations with community members
- a. What consultative processes are in place with the affected community members before, during or after mining activity, if any?
  - b. Are these processes required under the law?
  - c. What is the format of these processes? Written submissions or representations, face-to-face meetings, or voting?
  - d. Do you find that these processes are effective? If so, why? If not, why not?
  - e. What improvements would you suggest in this regard?
2. Relocation
- a. How are removals and relocation regulated?
  - b. How and when are affected community members informed about relocation?
  - c. How is the place of relocation determined? What factors are taken into account, for example, the size of the community; the livestock of the community; the availability of basic services such as running water, electricity, healthcare and education?
  - d. What special consideration and action is taken when the proposed mining site is the site of various burial plots or possesses some other traditional and cultural significance?

- e. What are the challenges faced by the government in the relocation process?
- f. What suggestions do you have to improve this process?

### 3. Social benefit models

- a. In South Africa, an application for a mining right must be accompanied by a Social and Labour Plan (SLP). The SLP sets out how the mining company intends to share some of the economic benefits that flow from mining with the affected communities. For example, employment opportunities, skills training for employees, building or upgrading schools, roads, hospitals and providing basic services in the mining area such as clean water, electricity and sanitation. Once lodged with the Department of Mineral Resources, the SLP is legally binding and cannot be amended or varied without the consent of the Minister.
- b. Do you have a similar model in your country? If so, please elaborate.
- c. Is this model enforceable in a court of law?
- d. Do you find this model effective? If so, why? If not, why?
- e. What challenges do you face ensuring compliance with this model?
- f. Are there any consequences or accountability mechanisms in the instance that the mining company does not meet its obligations?
- g. What suggestions do you have to improve this process?

### 4. Civil society organisations

- a. What is the role of CSOs in the mining sector, if any?
- b. What guidance or assistance would you like to receive from CSOs with regards to mining?
- c. Would you consider working with CSOs to develop processes and policies in the mining sector? Particularly, a model tool for the SADC region to guide a human rights and socio-economic benefits approach to mining.
- d. How would you see this relationship in practice?





