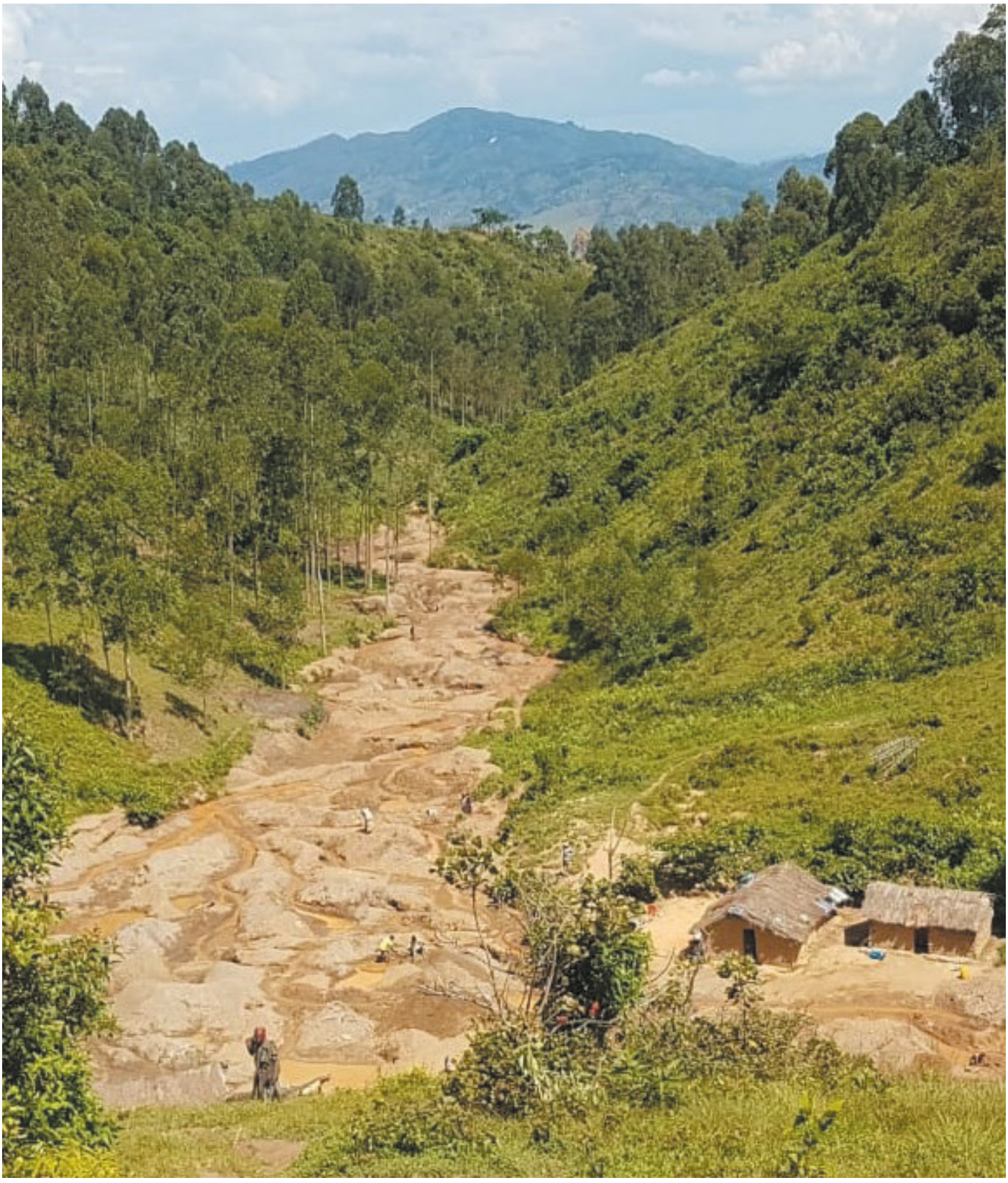
Democratic Republic of the Congo: A rights-based analysis of mining legislation

July 2023



Author: Lassana Koné

Forest Peoples Programme

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We extend our gratitude to our partners in the DRC, APEM and ERND for their work in collecting data and compiling information and organising field visits and consultations with communities.

Cover photo

T20 is one of the 2 sections of the Nyabibwe Kalimbi mine. It is a tin (cassiterite) mine. Tin is one of the 4 'conflict minerals' referred to as 3TG (tin, tantalum, tungsten and gold). The deposits in Kalimbi were first explored in the 1980s before being passed on to a French mining company and eventually given into concession to artisanal miners. It is now dug by artisanal miners organised in cooperatives. Nyabibwe is the first mining site in the DRC to implement a traceability system following the OECD Due Diligence Guidance. Despite having a history of conflicts, it is considered a good example of the potential beneficial impact responsible artisanal and small scale mining can have on the economic development of miners and their community.

Credit: Richard Badosa

Contents

Executive summary

This report analyses existing mining legislation in the Democratic Republic of the Congo (DRC) from a rule of law and human rights perspective. It examines the legal framework pertaining to land tenure and mining, as well as the capacity of public authorities to respect and apply principles of due diligence, accountability, transparency and the legality of decision-making procedures.

Despite relatively low historical rates of deforestation over the period 1990-2010, deforestation has increased sharply in the DRC in recent years. Future land-use scenarios predict a continued increase in deforestation due to population growth and the expansion of commercial agriculture, as well as timber and mineral extraction. Driven by increasing global demand for mineral resources, both industrial mining and artisanal mining are intensifying across the DRC.

The provinces of Haut-Katanga and Lualaba in the south had the highest deforestation rates between 2016-20. This was likely due to mining activities and charcoal production, but also to urbanisation and migration, which is often uncontrolled. In 2020, however, the highest deforestation rates were in Tshopo and Bas-Uele in the north. Sud-Ubangi, in the northeast, has the fifth highest rate of deforestation.

Governance is an ongoing challenge in the DRC due to weak institutions; a context of legal pluralism; poor coordination between sectoral ministries; and, often, no implementation of the laws governing the mining sector. Similarly, gaps in the existing legal framework – including no genuine recognition of customary tenure rights; an absence of consultation and Free, Prior and Informed Consent (FPIC); and inadequate due diligence standards in the mining law – impede indigenous peoples and local communities from enjoying their rights.

The Mining Code subordinates both indigenous peoples' and local communities' rights to the economic interests of the state and corporations. It was amended to officially rebalance mining revenues in favour of the state. As a result, the government's work has focused primarily on revitalising mining revenues and tax rates, with little attention paid to communities' rights.

Land grabbing by local and national elites, as well as significant overlaps between mining exploitation and the collective landholdings of indigenous peoples and local communities, have the effect of undermining customary systems and marginalising communities. Women, particularly indigenous women, face additional disadvantages mainly due to discriminatory beliefs, impediments to their agency and bargaining power. In addition, given the history of legal pluralism – a formal system set by the state and an informal system created by customary occupation of ancestral land – significant ambiguities surround the legal status of customary tenure rights. Therefore, despite constitutional provisions, these rights are not well-protected and leave many customary land rights holders with insecure tenure.

The report highlights the importance of informal mining to the livelihoods of a number of rural communities who engage in it due to a lack of economic alternatives, but also as a form of resistance to unjust laws and failed policies. At the same time, informal mining faces strong pressure from companies, non-governmental organisations (NGOs), donors and policymakers to formalise, often without sufficient consideration for these rural livelihoods. We therefore argue that the dynamic and often delicate day-to-day legalities that influence behaviour and power dynamics in rural areas need to be mainstreamed in a way that considers the rights and aspirations of marginalised groups, including indigenous peoples, local communities and women.

In the absence of an effective national legal liability landscape requiring human rights due diligence as a standard of conduct, some frameworks have been developed at the international level, including in the European Union (EU) and the United States (US), to support "clean supply chains". However, existing international interventions in the DRC have largely ignored the prevailing legal and institutional framework and have failed to address issues of state sovereignty over minerals; indigenous peoples' and local communities' land rights; good governance; and poverty.

Summary of key findings

- The scale of mining-related deforestation (both the impact of large-scale mining and small-scale artisanal mining) in the DRC is still unknown. Current estimates of mining's overall impact on forests are based on broad extrapolations of the direct or indirect impact of informal mining.

- While mining is not always a primary direct driver of deforestation and forest degradation, its indirect and cumulative forest impacts can be significant. Given the anticipated demand for minerals such as iron, ore, copper, gold, nickel, cobalt, tin, tungsten, tantalum and bauxite – which are often found in critical forest landscapes – it is important that the mining sector's forest impacts are better understood and addressed.

- The State has exclusive ownership over land and sub-surface resources, but some specific land rights, like access and use rights, are attached to customary occupation, including through explicit constitutional recognition, which is also reflected in the Forestry Law and the Land Law. State property rights are mitigated, to some extent, by specific provisions of Law No. 22/030 of 15 July 2022 on the Protection and Promotion of the Rights of Indigenous Pygmy Peoples[1] (Indigenous Peoples' Rights Law), which recognises indigenous peoples' right to the land and natural resources they own, occupy or use, "in accordance with applicable law". Despite constitutional and legislative affirmations, the legal regime applicable to extractive industries (particularly mining and hydrocarbons), ignores this recognition.

- DRC has legal obligations under international instruments it has ratified. According to its Constitution, the provisions of international human rights law should enjoy a privileged status under the DRC legal framework. The recognition of land rights under national law falls short of these international obligations.

- There may be greater potential in the DRC civil law system to incorporate direct references to international human rights standards in the domestic legal frameworks relevant to corporate negligence cases.

- While the UN Guiding Principles on Business and Human Rights (UNGPs) are not binding per se, they state that the responsibility of business enterprises to respect human rights refers to internationally recognised human rights. Of course, ratified human rights treaties are binding on states and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is recognised by treaty bodies as an authoritative source for interpreting treaty obligations.

- Loopholes in the existing legal framework governing the mining sector, a lack of harmonising sectoral legislation with the Mining Code, and gaps in implementing international human rights standards, including the UNGPs, create an acute risk that indigenous peoples and local communities, as well as other vulnerable groups, such as women and youth, will continue to be left behind.

- The legal setting is designed to perpetuate and protect the interests and property rights of the state, foreign companies and investments.

- The procedure for granting mining concessions under national law is not consistent with the requirements of international human rights standards, including but not limited to the right of indigenous peoples and of communities with customary land tenure systems to consultation and FPIC.

- The Mining Code creates opportunities for local development through transferring a part of the mining royalties to local communities. However, the current capacity at local level to utilise these funds is weak.

- The Indigenous Peoples' Rights Law provides a starting point for indigenous peoples to challenge government decisions on forest classification or the allocation of forest or mining concessions without their consent. The law also guarantees indigenous peoples the right to participate in decision-making that affects them and recognises their right to the lands and natural resources they traditionally own, occupy or use. If they agree to be relocated, they should receive just and equitable compensation.

1 The title of the law uses the term "Pygmy" which is considered pejorative by indigenous peoples and others. The use of the term in this context was to ensure clarity regarding which groups the law applies to.

- Sector-specific legislation developed in recent years, such as the local community forest concessions (Concessions Forestières des Communautés Locales – CFCLs) and the Ministerial Arrêté on FPIC in the context of REDD+, provides a legal basis for communities to manage the forests they occupy customarily, and an opportunity to claim their rights to FPIC and effective participation in the implementation of REDD+ projects.

- Improved land tenure security can provide opportunities to reduce the negative environmental and social impacts of mining. CFCLs and artisanal mining zones (Zones d'Exploitation Artisanale – ZEA) provide communities with an alternative to secure their customary lands or protect them from mining titles.

- International actors such as the US and the EU have set out their ambitions to become key players in the raw materials value chain. Although the proposed due diligence policies and frameworks developed to promote "clean supply chains" or "conflict-free minerals" have some limitations and incomplete coverage of human rights, they provide avenues for challenging mining in DRC and internationally.

- There is growing investment by China in the DRC's mining sector. However, unlike the US and the EU, China has no specific commitment to due diligence and human rights standards. Western companies have grown increasingly wary of sourcing minerals from the DRC due to human rights abuses in the extractive sector. That reluctance is not shared by the Chinese government and its companies. This has allowed China to increase its extraction of resources – mainly cobalt and copper – from the DRC in recent years.

- Climate policies, including the Reducing Emissions from Deforestation and Forest Degradation programme, the national Climate Change Adaptation Plan (2022-26), and the Central Africa Forest Initiative (CAFI), acknowledge the vulnerability of indigenous peoples and local communities in land use processes as well customary land tenure insecurity.

- Disparate gender relations within artisanal and small-scale mining (ASM) sites and communities are entrenched by social structures, norms, beliefs and values. Women and girls face additional disadvantages mainly due to discriminatory beliefs, impediments to their agency and bargaining power.

1. Introduction

Figure 1: Map of the DRC

The Democratic Republic of the Congo (DRC) has the second largest area of rainforests in the world – 152 million hectares, accounting for most of the remaining rainforest in the Congo Basin (FCPF, 2022). The country is also home to the world's largest peatland reserve (Dargie et al., 2017). An estimated 40 million people depend on forests for their livelihoods, of which approximately 600,000-700,000 are indigenous people (IWGIA, 2012).[2] DRC is exceptionally well-endowed with natural resources, including subsoils highly valued for their mineral content (EITI-DRC, 2019). Specifically, the country contains rich deposits of minerals such as copper, cobalt, gold, diamonds, cassiterite (tin), coltan (tantalum) and wolframite (tungsten) (World Bank Group, 2018), which means it is a target for mining activity.

Levels of deforestation and forest degradation in the DRC vary widely depending on areas and population density. Despite relatively low historical rates of deforestation from 1990-2010, deforestation has increased sharply in the country in recent years (MECNDD, 2015) and future land-use scenarios predict an increase in deforestation due to population growth and the expansion of commercial agriculture, as well as timber and mineral extraction driven by global demand (Forest Declaration Assessment, 2022; Galford et al., 2015; Mosnier et al., 2014). With the increasing global demand for batteries and electrification related to new technology and growing global competition over critical raw minerals (CRMs),[3] environmental and social problems have been steadily pushed to countries where the resources are to be found. This includes fragile states and countries with weak institutional capacity, such as the DRC (Wingqvist & Quinn, 2021).

2 The exact number of indigenous people in DRC is unknown, but other estimates run to 2 million individuals.

3 Critical Raw Materials are essential in the modern-day economy. Minerals such as lithium, cobalt, and copper are essential for digitalization, for renewable energy technologies, and for the further deployment of electric vehicles. Demand for these and other minerals – known as "critical raw materials" (CRMs) – is growing fast as governments and businesses act to reach net-zero emissions.

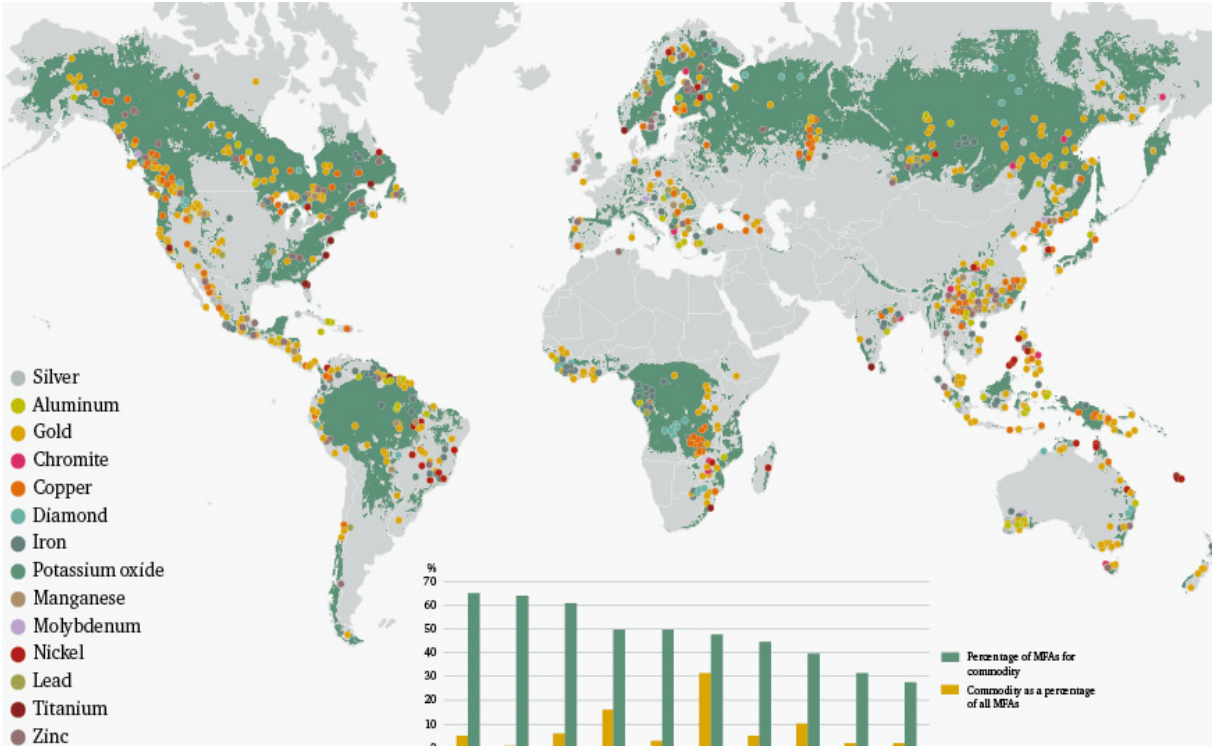

Figure 2: Large-scale mines in forest areas (MFAs), by primary commodity.

The forest impacts of mining tend to be concentrated in certain countries and associated with particular commodity supply chains. Figure 2 shows large-scale operational mines in forest areas, with each mine labelled according to the primary commodity it produces. Almost three-quarters of these mines are in low and middle-income countries, including the DRC (Chatham House, 2020).

Although there is overwhelming consensus in the scientific literature that agriculture is the main driver of deforestation in the DRC, it is not due to shifting cultivation *per se*, but agriculture as practised in areas with a relatively high population density in surrounding towns and cities (Ickowitz et al., 2015). Small-scale deforestation for agriculture actually covers a wide range of activities (including traditional subsistence agriculture, as well as expansion from urban areas and agriculture by migrants working on development projects, etc.) and is therefore not a particularly helpful category; moreover, the underlying factors and characteristics are very poorly understood. Deforestation accounts for 78 per cent of greenhouse gas emissions and results from the population's heavy dependence on woody energy and low use of alternative energies, in particular; the widespread practice of shifting cultivation; the anarchic establishment of mining quarries; the lack of zoning and forest land use plans; and the non-application of the legal and regulatory provisions relating to the sustainable management of forests (Lutumba, 2021).

Figure 3 shows province-by-province forest degradation for the period 2016-2020. Haut-Katanga and Lualaba in the south, with dry, open forests, had the highest deforestation rates during this period. This was likely to have been due to mining activities and charcoal production, as well as to urbanisation and migration, often uncontrolled. Tshopo and Bas-Uele provinces in the north, with dense, humid forests, follow closely. In 2020, the highest deforestation rates were in Tshopo and Bas-Uele. Sud-Ubangi, in the northeastern corner, has the fifth-highest level of deforestation (The Mandela Institute, 2022).

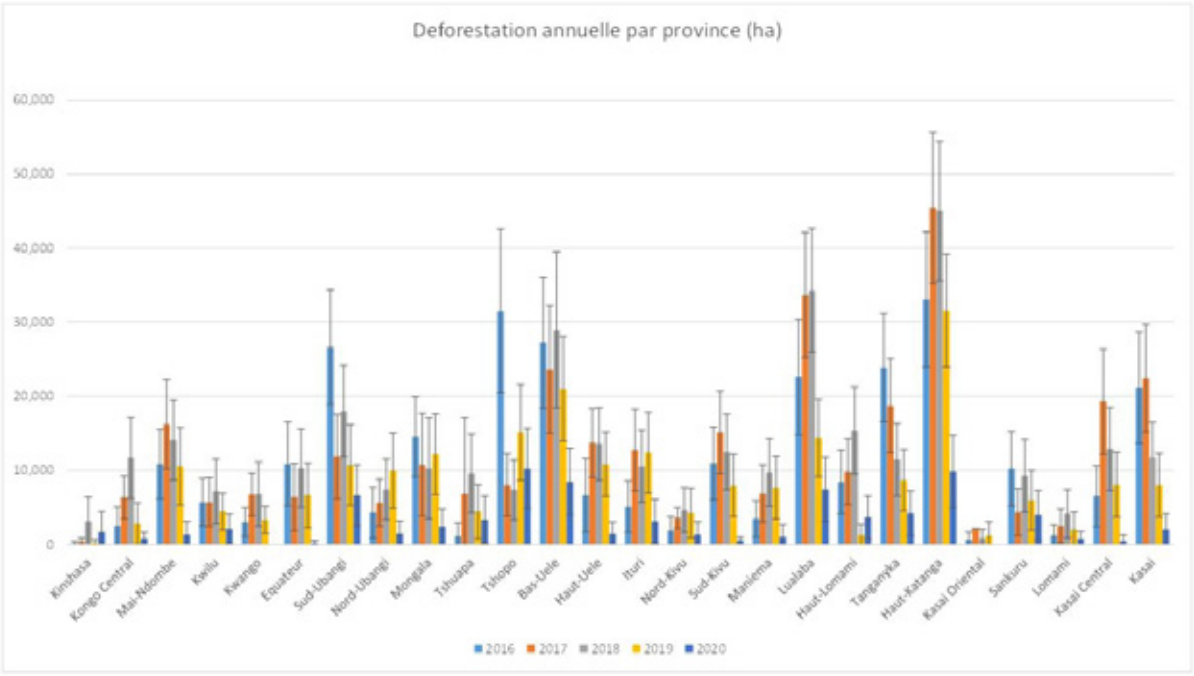

Figure 3: Provincial breakdown of forest deforestation by hectare in the DRC, 2016-2020.

The DRC mining sector has been the subject of much controversy, particularly linked to allegations of grave human rights violations (Kabamba et al., 2018). Mining activities are associated with several environmental risks and challenges – including natural resource depletion, pollution and soil erosion – that have ravaged the country's landscape. Millions of trees have been cut down, the air around mines is hazy with dust and grit, and the water has been contaminated with toxic effluents from the mining processing (Kara, 2023; NPR, 2023). When there is a lack of social and environmental safeguards, the environmental impacts can lead to grave social and human rights challenges (Wingqvist & Quinn, 2021). There have been some attempts to identify and address the role of private sector actors in human rights violations; however, there has been a general lack of information and research to fully interrogate the challenges and opportunities for holding private sector actors accountable for their actions (ABA ROLI, 2021). For many years, the widely shared conviction that control over natural resources (mostly minerals) was a crucial driver of insecurity in some of the regions, including Eastern DRC, has informed policy responses. Many of these responses started from the assumption that cutting the links between resources and armed actors would decrease the level of violence without empirical evidence to support it. Recently, the main focus has shifted to the recognition that the "root causes" of conflict – including land access, lack of good governance and poverty – need to be better understood and addressed (Carayannis et al., 2018).

Historically, the mineral sector has been an important source of tax income in DRC, and it's likely to continue to be important for the country's economic development. However, according to the World Bank, DRC's strong macroeconomic performance has "failed to translate into significant reduction in poverty and inequality". The reforms implemented were primarily aimed at stabilising the economy, rather than making growth inclusive. The government has failed to make the necessary investments to share the returns of the economic growth with the people living in poverty (World Bank, 2018).

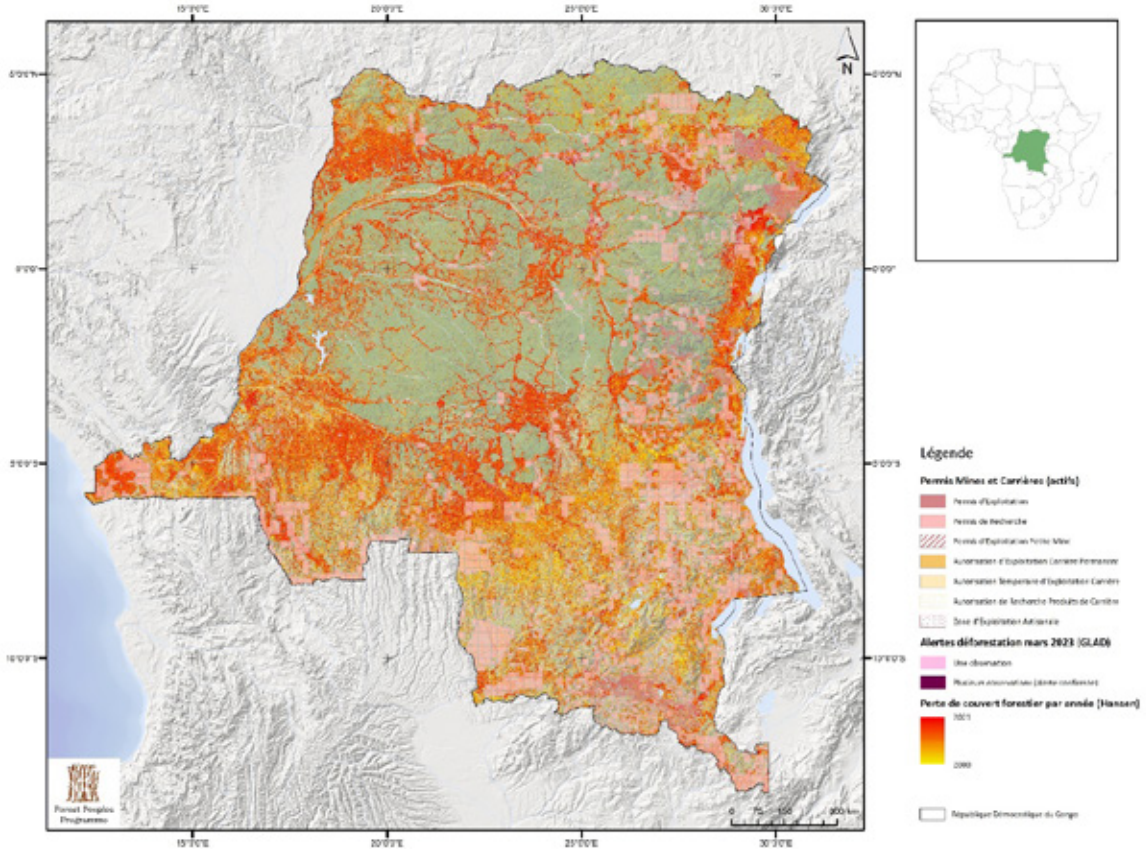

Figure 4: Mining permits and recent GLAD deforestation alerts.

2. Legal framework

2.1 Land regime

The DRC's legal system is civil law-based and, like civil law countries in general, the DRC is monist, which implies that the international treaties ratified by the DRC form part of the national legal system. The DRC Constitution affirms the principle of non-discrimination[4] and it also gives international treaties and agreements supremacy over national laws.[5] DRC is a state party to various international and regional human rights instruments, including the International Covenant on Civil and Political Rights;[6] the International Covenant on Economic, Social and Cultural Rights;[7] the Convention on Biological Diversity;[8] the Convention on the Elimination of All Forms of Racial Discrimination;[9] the Convention on the Elimination of All Forms of Discrimination against Women;[10] the African Charter on Human and Peoples' Rights;[11] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[12] It also voted in favour of the UN Declaration on the Rights of Indigenous Peoples. Despite all these international obligations and commitments, in practice, indigenous peoples continue to face discrimination. It is worth mentioning that the constitutional provisions that make international human rights law part of national law in DRC provide opportunities to challenge existing "legal" practices (in line with more "legitimate", human-rights-compliant ones).

The legal framework inherited from the colonial era does not recognise collective, customary or other modes of land ownership. Rather, it recognises access and use rights primarily. Like in the colonial legislature, post-independence laws have dispossessed communities and indigenous peoples of their customary rights. The legal setting is meant to protect the interests and property rights of the government, foreign companies and investments (Mugangu, 2019).

Land tenure in DRC has evolved without formal recognition of communities' customary property rights to the forest lands they have occupied and used for generations, although traditional practices and customs remain widespread. *De facto* customary ownership[13] of local communities and indigenous peoples has continued largely uninterrupted, while statutory law has denied forest peoples formal legal title to their traditional lands, and the state has exercised *de jure* control over the land and forests (Koné, 2017). As a result, most rural land continues to be subject to customary law, and the DRC is in a situation of legal and institutional dualism, with a strong contradiction between the legal and the legitimate, the norm and the practice in land appropriation mechanisms (Le Roy, 2003).

4 Law of 18 February 2006 as amended by Law No. 11/002 of 20 January 2011, section 13.
5 Law of 18 February 2006 as amended by Law No. 11/002 of 20 January 2011, section 215.
6 Ratified 1 November 1976
7 Ratified 1 November 1976
8 Ratified 3 December 1994
9 Ratified 21 April 1976
10 Ratified 21 April 1976
11 Ratified 20 July 1987
12 Ratified 9 June 2008
13 According to section 48 of the Law on Indigenous peoples, the State shall grant legal recognition and protection to the lands and resources traditionally owned, occupied or used by the indigenous Pygmy peoples. This recognition shall take place with due respect for the customs of the peoples concerned.

The Community Forest Decree of 2014,[14] and its regulatory framework of 2016,[15] provided the opportunity, for the first time, for indigenous peoples and local communities to obtain legal recognition of their customary and ancestral forestland in the form of a community forest title. Once communities have been granted their customary forests, they are likely to be less vulnerable to land grabs and have a greater and more recognised role in the management of their forest areas. They may exploit all or part of the forests they hold according to custom, and manage them according to their chosen model and customary laws and traditions, provided these are not contrary to existing laws and regulations.[16] Community Forest Concessions (*Concessions Forestières des Communautés Locales* – CFCLs) are allocated upon community request, free of charge and in perpetuity, and grant communities the rights to manage and use the forest and its resources according to defined parameters. However, community forest "titles" are effectively concessions and not titles of land ownership. In theory, therefore, helping a community to establish community forests can provide some protection against mining once it has obtained a concession, but the level of protection is not as strong as if the communities owned the land.

Community forestry holds some promise as an alternative way to secure customary tenure rights and community development. Major gaps remain, however, between community forestry in theory and in practice (Kipalu et al., 2016). For example, devolution of forest management authority from states to communities has been partial and disappointing, and local control over forest management appears to be subjected to strict regulations on adoption of management plans (Charnley & Poe, 2007).

Despite official recognition of state ownership over lands, forests, soil and subsoil, some specific land rights arise from customary occupation of the land. There are various substantive provisions on access and uses rights provided for in the legal framework.

14 Decree No. 14/018 of 02 August 2014 establishing the modalities for granting forest concessions to local communities.
15 Ministerial Order n°025 of 9th February 2016 setting out the process for the attribution and management of CFCLs.
16 Decree No. 14/018 of 02 August 2014, section 19.

2.1.1 Access and use rights in the legal framework

Box 1: Substantive provisions on consultation, benefit sharing, access, and use rights in sectoral legislation

i. The right to individual or collective property acquired in accordance with law or custom, or customary rights to forests (Article 34, Constitution; Article 388, Land Law[17] and Article 22, Forest Law);

ii. the right to establish their dwellings on their lands and/or forests (Article. 388, Land Law);

iii. the right to use land and/or forests (Article 388 and 389, Land Law Article 36 and following, Forest Code);

iv. the right to economic valuation of their land or forest (Article 112, Forest Code) or by third parties (Article 113, Forest Code);

v. the right to consultation in land and forest allocation processes, which is carried out respectively through: i) the land vacancy survey for the remit of land concessions on rural land of more than ten hectares (Articles 193 *et seq*., Land Law); ii) the prior public enquiry for the remit of forestry concessions (Article 10, paragraph 4; and 84 and 85, Forestry Code, supplemented by Decree No. 024) or for the classification of forests (Article 15, Forestry Code, supplemented by decree no. 08/08) or iii) a public enquiry during the preparation of land use and urban planning plans (Article 6, Framework Law on the Environment and 1957 Urban Planning Decree);

vi. the right to give their consent in any process of allocation of spaces that communities occupy on a customary basis (Article 13, Annex 2, decree 028 of 07 August 2008; Decree No. 023 of 07 January 2010; Article 40 of Decree No. 08/09 of 08 April 2008 mentioned above);

vii. the right to benefit from the development of socio-economic infrastructure (Articles 88 and 89, Forestry Code, Order 023; Mining Code);

viii. the right to participate in decision-making processes affecting them or their lands or forests (Art. 9, Environment Framework Law, cited above; Articles 2, points 25 and 26, Decree No. 08/03 of 26 January 2008; Article 19, points m and n of Decree No. 08/09 of 08 April 2008, cited above; Articles 2 and 4, point 15 of Decree No. 034 of 05 October 2006);

ix. the right to prior, fair and equitable compensation in the event of expropriation for public utility (Constitution, Article 34, Expropriation Act, Article 9 *et seq.*);

x. the right of access to justice, in order to claim and obtain compensation for damages suffered, in the event of non-compliance with the legal guarantees organised by the laws and regulations; as reviewed here (Article 134, Forestry Code);

xi. the right to the livelihoods derived from their resources or natural wealth (Articles 56 and 57 of the Constitution).

Source: Adapted from Mpoyi, 2019. (Unofficial translation)

17 *Loi portant régime général des biens, foncier et immobilier*

The enumeration in Box 1 shows that, to some extent, land rights are attached to customary occupation. This is a constitutional recognition (Sections 34[18], 56[19] and 57[20]) reflected in the Forestry Law (Articles 22[21] and 112[22]) as well as the Land Law (Articles 387[23], 388[24] and 389[25]). Section 389 of the Land Law provides that a presidential ordinance would regulate the rights of rural communities to use their land. The Land Law was revised in 1980, but the ordinance was not drafted – an oversight that has never since been addressed by the various governments.

In addition to the provisions outlined in Box 1, in 2022, Indigenous Peoples' Rights Law was adopted. This reiterates the principle that rights to land arise from the traditional occupation and use of land,[26] but then recalls the rights of the state to the land and the sub-surface, creating ambiguity in the legal framework. It does specify that no displacement or relocation can take place without indigenous peoples' FPIC and it contains provisions on compensation and the right to return, but the status of indigenous land is left open to interpretation.

Overall, DRC legislation has left open the question of securing the customary land rights of local communities and indigenous peoples.

Despite the aforementioned constitutional and legislative affirmations, the legal regime applicable to extractive industries, particularly mining and hydrocarbons, ignores this recognition. Presumably, this is for reasons related to the strategic nature of these resources, but there is no clear and objective explanation for this choice (Mpoyi, 2019).

18 Private property is sacred. The state guarantees the right to individual or collective property acquired in accordance with law or custom.
19 Any act, agreement, convention, arrangement or any other fact, which has the consequence of depriving the nation, natural or legal persons of all or part of their own means of existence derived from their resources or natural wealth, without prejudice to the international provisions on economic crimes, shall be made an offence of plunder punished by law.
20 The acts referred to in the previous article, as well as their attempt, whatever the modalities, if they are committed by a person invested with public authority, shall be punished as an offence of high treason.
21 A local community may, at its request, obtain as a forest concession part or all of the protected forests among the forests regularly owned under custom.
22 In addition to use rights, local communities have the right to exploit their forest. This exploitation can be done either by themselves or through private artisanal loggers, under a written agreement.
23 Land occupied by local communities shall, from the entry into force of this Act, become state land.
24 Land occupied by local communities is land that they inhabit, cultivate or use in some way – individually or collectively – in accordance with local customs and practices.
25 The rights of enjoyment regularly acquired on these lands shall be regulated by an Ordinance of the President of the Republic.
26 Articles 42 and 45.

2.1.2 Harmful land use planning policies

When new areas are being established for mining purposes, it is commonly associated with land use change. In DRC, this generally involves deforestation, resulting in negative effects on ecosystems, loss of habitat and loss of biodiversity (Wingqvist & Quinn, 2021). Land-use change can have large impacts on local communities, with reduced access to land, forests and other vital natural resources and ecosystem services. Additionally, land and property rights are violated, and with the lack of formal harmonisation between customary law and national law, and insufficient state oversight, conflicts can arise over land-grabbing (Wingqvist & Quinn, 2021).

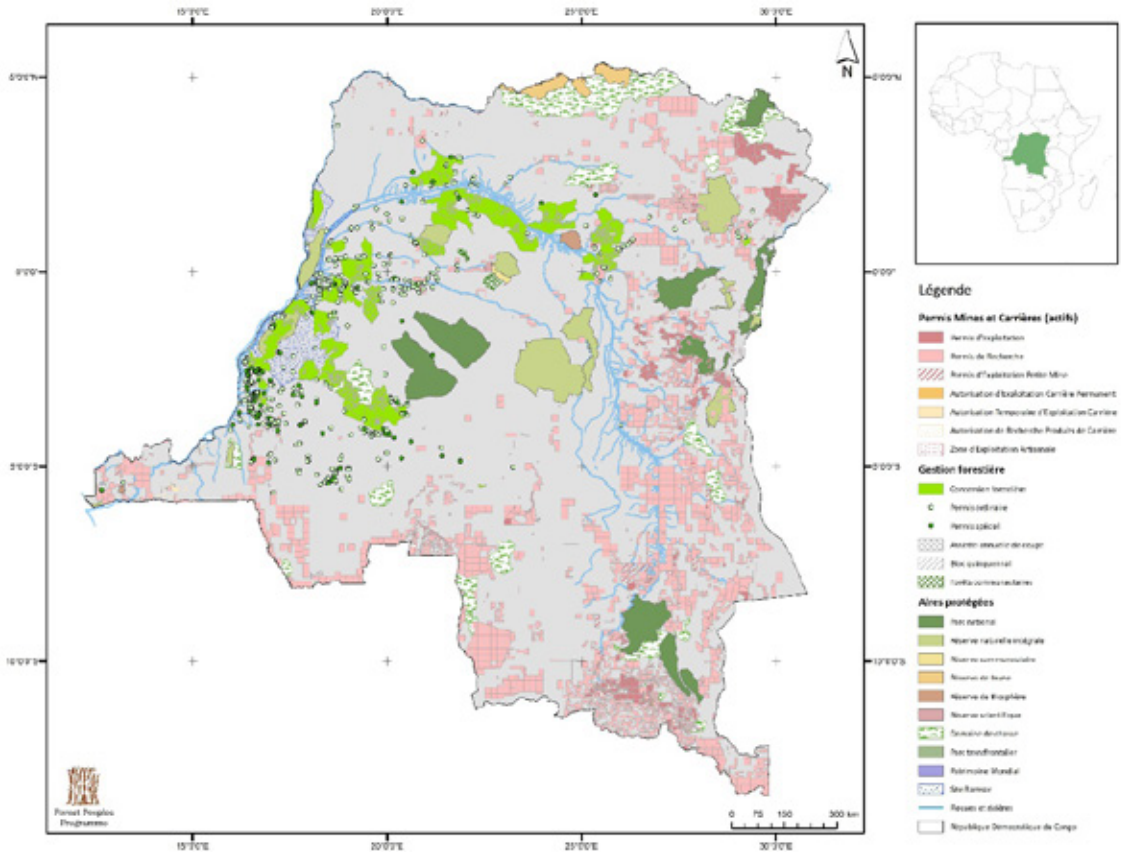

Figure 5: Overlap between mining, logging and protected areas in DRC.

The PNAT aims to end the overlapping of titles, the anarchy of land use, and to ensure sustainable development. But until now there have been no changes in the way concessions are allocated. Concepts of growth and competitiveness are at the heart of the policy, leaving little room for environmental and social aspects (FPP, 2021). The current motivations for spatial planning are also aimed at resolving conflicts from overlapping land use patterns – such as those between mining and agriculture – and between mining, forestry concessions and protected areas, as well as the implementation of sectoral policies, such as agriculture, forestry management and the REDD+ strategy. Local communities' and indigenous peoples' rights are not well integrated into this dynamic (De Wit, 2019).

2.2. Mining regime

The mining sector is regulated through national legislation. The Mining Code is supplemented by Decree No. 2003/038 of 26 March 2003, related to mining regulations and as amended and supplemented by Decree No. 18/024 of 8 June 2018. Other laws affecting the mining sector include the Land Law,[27] the Forest Code[28] and the Environmental Protection Law.[29]

Underground minerals are the State's exclusive property according to the Constitution[30] and the Mining Code,[31] but the state can grant private actors the right to explore and exploit minerals resources through granting mining titles.[32] In essence, land rights holders (including customary rights holders) cannot claim ownership rights of minerals in the subsoil. However, the holders of mining rights or exploitation quarries acquire ownership of the marketable products by virtue of their right. Ownership of mineral deposits constitutes a real estate right distinct and separate from the rights arising from a land concession. In no way may the land concessionaire use their title to claim any ownership right over the mineral deposits, including groundwater and geothermal deposits contained in his concession.[33]

2.2.1 Innovations in the new mining code

The Congolese Mining Code was amended in March 2018 to officially rebalance mining revenues in favour of the state. The main revisions relate to the conditions for the transfer of mining rights, royalties and taxes, local development and transparency. They cover common issues in mining laws and regulations, including acquisition of rights by companies; ownership requirements and restrictions; processing; transfer and encumbrance; environmental aspects; native title; and land rights. Compared with the previous version of the Mining Code, the revision increases royalties on minerals and removes a clause that protected mining companies from changes to the tax and customs regime for ten years (OECD, 2019). Permits may only be acquired by legal entities, not individuals. Mining royalty rates have been set at 3.5 per cent of gross revenues for non-ferrous and base metals, including copper, and at 10 per cent for strategic substances (OECD, 2019).

The previous Mining Code only referred to Environmental Impact Assessment (EIA), while the new Mining Code now integrates the concept of Environmental and Social Impact Assessment (ESIA).[34] The *Exposé des Motifs* of the Mining Code recalls the absence of a standard set of specifications defining the socioenvironmental obligations of mining companies to local communities, in addition to the need to rebalance state royalties. It also points out the need to clarify the elements relating to the social and environmental responsibility of mining companies to the communities affected by their projects, and subsequently introduces the *cahier de charges*[35] (local community benefits agreement), which is intended to set out mining companies' contributions towards affected local communities. It also includes an agreement to fulfil social responsibility commitments to local communities, involving the transfer of funds from mining royalties from the national level to regional and local levels. Direct payments to subnational authorities also aim to address the central government's effective lack of redistribution (*rétrocession)*, of mining royalties to local authorities as the 2002 Mining Code mandates. While periodic lump-sum payments were made prior to the reform under this provision, they have been irregular to date (NRGI, 2019).

27 Law No 73-021 of 20 July 1973 on the general regime of property, land and immovable property and security, as amended and supplemented by Law No 80-008 of 18 July 1980.
28 DRC (2002). Law n° 11/2002 of 29 August 2002.
29 DRC (2011). Law n° 11/009 on 9 July 2011.
30 Section 9 provides that the State exercises permanent sovereignty over the soil, subsoil, waters and forests.
31 Law No. 18-001 of 9 March 2018, section 3.
32 Law No. 18-001 of 9 March 2018, section 33 and following.
33 Law No. 18-001 of 9 March 2018, section 3.
34 Law No. 18-001 of 9 March 2018, section 1; and section 1 of Law N° 007/2002 of 11 July 2002 on the Mining Code.
35 Pursuant to section 285g of the Mining Code, the *cahier des charges* sets out the social responsibilities of the holders of mining rights towards the local communities affected by mining activities. The *cahier des charges*' purpose is to guide and organise the implementation of the mining rights holders' obligations to create socioeconomic infrastructures and social services to benefit the local communities affected by their mining activities. The holder of mining rights is obliged, from the date of issue of his mining title and at the latest six months before the start of operation, to draw up and submit the specifications defining the social responsibility to the local communities affected by the mining activities and to obtain the Provincial Government's approval after receiving advice from the technical services.

Section 285 of the Mining Code requires mining companies to establish a fund for community development projects; the minimum amount equal to 0.3 per cent of the company's annual turnover.[36] The fund is to be managed by a legal entity comprised of representatives of the local community, the company and the local government, although no further representativity requirements are stated. In parallel, the companies are required to negotiate with the local community a *cahier des charges* – a set of commitments for implementing community development projects – overseen by a local development committee and a local monitoring committee, although these committees' possible composition is unclear. The costs of implementing such commitments are to be covered separately by the company's own corporate social responsibility budget, not by the 0.3 per cent annual turnover fund. A series of transparency measures requiring publication of contracts; information related to beneficial owners and Politically Exposed Persons; and production and export statistics are also planned as part of forthcoming secondary legislation (OECD, 2019).

According to section 285, the Mining Regulation (*Règlement Minier*) will define the legal nature of the entity responsible for managing the fund, the number of members of each community, and the modalities of their cooperation and control by the Ministries of Mining and Social Affairs. However, there are some issues to consider from a rights perspective, including the dynamic in play at the local level and the representativity of the concerned indigenous peoples or local communities sitting on the legal entity who are responsible for managing the fund. Despite relevant affirmation of the principle of non-discrimination in DRC's Constitution, indigenous peoples continue to face discrimination on the ground. For example, indigenous villages do not hold the land chieftainship.[37] This lack of recognition weakens their bargaining power and their participation in decision-making processes impacting their traditional lands as well as their rights more broadly. The situation is exacerbated by difficulties in accessing education and justice.

2.2.2 The new mining law subordinates indigenous peoples' and local communities' rights to state and corporate economic interests

The Government's work in the review of the Mining Code focused primarily on revitalising private investment in the mining sector, mining revenues and tax rates, and tendering procedures for granting mining rights. The DRC Government's main criticisms of the 2002 Mining Code included the ten-year legal and fiscal stabilisation clause, the low level of free state participation in mining companies and the lack of transparency (Simmons & Simmons, 2018). Therefore, revisions to the law aimed to decrease the disparity between the state and investors; and to remedy the alleged inadequacy of state revenues in the mining sector, as well as the gaps and weaknesses in the previous code, in order to establish more competitive, faster and more transparent procedures. The rights of indigenous peoples and local communities potentially affected by mining activities, as well as other environmental and social issues, have not received the same attention. According to Section No. 109 of the Mining Code:

> *When the technical and economic factors which characterize certain deposits of mineral substances classified as mines or quarries do not allow them to be exploited industrially or semi-industrially, but allow small-scale exploitation, such deposits are erected, within the limits of a geographical area covering a maximum of two squares, in an artisanal mining area. The establishment of an artisanal mining zone is made by order of the Minister after consulting the specialized research body, the Governor of the province, the Head of the Provincial Division of Mines, the authority of the decentralized territorial entity and the Mining Cadastre [...] As long as an artisanal mining area exists, no mining or quarry title can be granted there."*[38] [Unofficial translation]

36 According to section 258 bis, the holder of a mining right or permanent quarrying authorisation is obliged to set up, free of tax on profits and earnings, an endowment for contributions to community development projects, the minimum amount of which is equal to 0.3% of the turnover of the financial year during which it is set up. The endowment must be made available in full to local communities before the end of the financial year following that in which it was established.

37 In mixed communities, for example, the customary chiefs recognised by the administrative authorities are chiefs from the local Bantu communities.

38 Lorsque les facteurs techniques et économiques qui caractérisent certains gîtes des substances minérales classées en mines ou carrières ne permettent pas d'en assurer une exploitation industrielle ou semi-industrielle, mais permettent une exploitation artisanale, de tels gîtes sont érigés, dans les limites d'une aire géographique couvrant maximum deux carrés, en zone d'exploitation artisanale. L'institution d'une zone d'exploitation artisanale est faite par voie d'arrêté du ministre après avis de l'Organisme spécialisé de recherches, du Gouverneur de province, du Chef de Division provinciale des mines, de l'autorité de l'entité territoriale décentralisée et du Cadastre minier. Un périmètre minier ou de carrières faisant l'objet d'un titre minier ou de carrières en cours de validité ne peut être transformé en zone d'exploitation artisanale. Un tel périmètre est expressément exclu des zones d'exploitation artisanale instituées conformément aux dispositions de ce chapitre. L'institution d'une zone d'exploitation artisanale est notifiée par le Secrétaire général aux mines au SAEMAPE pour l'encadrement et l'assistance des exploitants artisanaux affiliés à une coopérative minière agréée et au Cadastre minier qui la porte sur la carte de retombes minières.

Reading this article, it is regrettable that the legislator's motives in creating artisanal mining zones (*Zone d'Exploitation Artisanale* – ZEA) did not consider the needs and interests of local communities who depend on the natural resources of their customary lands. Like the regulations on community forestry, this provision could have created an opportunity to formalise communities' direct access to alternative sources of income through sustainable artisanal exploitation.

However, like community forestry, the creation of ZEA to benefit cooperatives or communities can help to safeguard customary lands and thus protect them from mining titles.

2.3 Environmental requirements and climate change

2.3.1 Environmental and Social Impact Assessment

Section 1 of the Mining Code defines **Environmental and Social Impact Assessment (ESIA)**, as a: "systematic process of identification, prediction, evaluation and reduction of physical, ecological, aesthetic and social effects prior to the project of development, work, equipment, installation or establishment of a permanent mining or quarrying operation, or of a processing entity, and making it possible to appreciate the direct or indirect consequences on the environment" (unofficial translation).

In addition, **Environmental and Social Management Plan** (*Plan de Gestion Environmental et Social* – PGES*)* is defined as the environmental specifications for the mining project, consisting of a programme for implementing and monitoring the measures envisaged in the ESIA to eliminate, reduce and possibly compensate for the adverse environmental impacts of the mining project.[39]

The **Mitigation and Rehabilitation Plan** (*Plan d'Atténuation et de Réhabilitation* – PAR) is a commitment by the holder of a mining licence to carry out certain measures to mitigate the impact of its activity on the environment and to rehabilitate the site of the activity.[40] The Environmental Protection Law promotes mainstreaming environmental and sustainable development issues into all policies and plans, and includes an obligation to adopt and implement national measures for climate change mitigation and adaptation and disaster management (Nachmany et al., 2015). It also outlines the principles for environmental protection and governance, and calls for the inclusion of environmental and social considerations in decision-making and promotes sustainable development and public participation. Article 21 makes it mandatory for "all development, infrastructure or exploitation projects – industrial, commercial, agricultural, forestry, mining, telecommunication or other project – likely to have an impact on the environment" (unofficial translation) to carry out an ESIA.[41] Decree No. 14/019 of 2 August 2014 outlines the administrative process that should be followed and the content of ESIAs but does not clarify the threshold for conducting one (i.e. it does not elaborate on the wording of the Law, which indicates that it should include all projects likely to have an impact on the environment).

The Congolese Environment Agency, the National Fund for Promotion and Social Service, in collaboration with the Directorate in charge of the protection of the mining environment and, where appropriate, any other State body concerned are supposed to examine the ESIA.[42] However, as can be seen, no institution with a mandate to promote or protect human rights (such as the National Human Rights Commission) is empowered to review the ESIA. Also, the environmental regulatory framework does not provide practical information on specific consultation guidelines, and details regarding the specific rights of indigenous peoples and local communities. There is no provision in the legal framework for the state or private companies to take all necessary measures to protect indigenous peoples' land and natural resources following an ESIA.

39 Law No. 18-001 of 9 March 2018 on the Mining Code, section 1
40 Law N° 007/2002 of 11 July 2002 on the Mining Code, section 1.
41 DRC (2011). Law n° 11/009 on 9 July 2009.
42 Section 42 of the Mining Code.

2.3.2 Relevance of climate provisions to mining

Climate policies, including Reducing Emissions from Deforestation and Forest Degradation (REDD+), the national climate change adaptation plan (2022-26), and the Central Africa Forest Initiative[43] (CAFI) acknowledge the vulnerability of indigenous peoples and local communities in land use processes as well customary land tenure insecurity. A Ministerial *Arrêté*[44] on FPIC adopted in November 2017 provides an opportunity for communities affected by REDD+ projects to claim their rights to FPIC and an effective participation in project implementation.

Through the commitments in the CAFI Letter of Intent (CAFI LoI), the DRC commits to work towards the goal of halting and reversing forest loss and land degradation by 2031 while ensuring sustainable development and promoting inclusive rural transformation, in line with the DRC's revised National Determined Contribution (NDC), the Paris Climate Agreement, and the Glasgow Leaders' Declaration on Forests and Land Use of 2 November 2021. Three milestones in the CAFI LoI deserve attention:

- **Land use planning:** High value forests, peatlands and local community forest concessions are systematically integrated into land use planning and processes, with a view to their preservation. All land-use contracts (agriculture, forestry, mining, hydrocarbons) are centralised and published in a transparent manner.

- **Mining and hydrocarbons:** All mining and hydrocarbon activities that are incompatible with the conservation objectives of the protected areas are prohibited, according to the legal framework in force. The programme also includes the adoption of social and environmental standards to regulate mining and hydrocarbon investments in forest and peatland areas.

- **Land tenure:** Collective and individual land rights will be recognised through flexible and reliable local land information systems.

The National Climate Change Adaptation Plan includes recommendations for improving the institutional conditions and human capacity to design and implement the DRC's response to climate change, taking into account the differentiated impacts of climate change on men, women, indigenous peoples, children, the elderly and other potentially vulnerable groups.

Although climate policies are not enforceable, they provide an opportunity for CSO and communities to secure community land tenure and forest rights through flexible and reliable land information systems and simplified mechanisms at the local level.

43 Letter of Intent for the renewal and expansion of a Green Development Partnership under the Central African Forest Initiative (CAFI) for the period 2021-2031.

44 Ministerial Order No.026 of 8 November 2017 setting the framework for the National Guidelines on Free Prior Informed Consent (FPIC) in the context of REDD+ implementation in the Democratic Republic of Congo.

2.4 Absence of consultation and Free Prior Informed Consent (FPIC)

Provisions on consultation under sectoral legislation are not based on internationally recognised human rights standards in terms of scope and process, including "meaningful consultation with potentially affected groups and other relevant stakeholders"[45] (unofficial translation).

In accordance with Article 33 of the Mining Code, the procedure for granting mining and quarrying titles is subject to a tender procedure, which must be completed within nine months of the reservation of the deposit to be tendered. It is carried out in accordance with the procedure laid down by Congolese legislation on public procurement and that is generally accepted or recognised by international mining practice. The tendering procedure is used exceptionally when the public interest requires it.[46] This means that, in the majority of cases, mining rights could be granted on a discretionary basis by the competent authorities. The application for mining or quarrying rights contains no indication of prior consultation with communities or FPIC. There is no explicit possibility for a community to say "No" to a project, for example. And there is no indication of any prior baseline studies such as pre-existing customary rights, socioeconomic studies, multi-resource inventories, potential environmental impact or impact on local communities.[47]

The Mining Code does not explicitly provide for the right of indigenous and local communities to give or withhold their consent to the granting of or the allocation of mining or exploration licenses. There is no possibility for a community to say "No" during the procedure of granting a permit. As a result, some communities are excluded from their land because private companies apply for and receive mining concessions from Kinshasa without their knowledge (Mpoyi, 2019).

However, in the absence of an explicit FPIC guarantee in the Mining Code, it is worth noting that there has recently been a positive development with the adoption of a specific law on the rights of indigenous peoples[48](Article 42). Under this law, indigenous peoples may give or withhold consent to any project that may affect the lands and natural resources they traditionally own, occupy or use.[49] Notwithstanding the property rights of the state, indigenous peoples have the right to the lands and natural resources that they own, occupy or use, in accordance with the applicable law; no relocation or resettlement can take place without FPIC (Articles 42-48).

45 UN Guiding Principle 18.
46 Law N° 007/2002 of 11 July 2002 on the Mining Code, section 33.
47 Law N° 007/2002 of 11 July 2002 on the Mining Code, section 35.
48 Law no. 22/030 of 15 July 2022 on the protection and promotion of the rights of indigenous Pygmy peoples.
49 As above, section 2.

Box 2: Relevant provisions of the Law on Indigenous Peoples on the right to land and natural resources (unofficial translation from French)

Article 42

Without prejudice to the State's property rights over the soil and subsoil, indigenous Pygmy peoples shall have the right to the land and natural resources which they own, occupy or use, in accordance with the law in force.

No relocation or resettlement shall take place without the free, informed and prior consent of the peoples concerned, in return for fair and equitable compensation.

Unless otherwise freely determined by the peoples concerned, compensation shall be in the form of lands, territories and resources equivalent in quality, size and legal status, or monetary or other appropriate compensation.

In the event that the subject matter of the expropriation ceases to exist, the latter shall retain the priority of return to their former lands.

Article 43

The state shall ensure the proper relocation and resettlement of indigenous Pygmy peoples when their lives are threatened by natural disasters, epidemics or any other event that affects the survival of their community.

The state shall grant them land and resources equivalent in quality and extent to those they left as a result of relocation.

Article 44

Indigenous Pygmy peoples have the right to the full enjoyment of all natural resources, both timber and non-timber, and the benefits of environmental services on the lands they traditionally own, occupy or use.

Article 45

Indigenous Pygmy peoples [shall] participate in setting priorities and strategies for the development, use and control of the lands and resources they traditionally own, occupy or use.

Article 46

The central government, the province and the decentralised territorial entities shall consult the indigenous Pygmy peoples concerned and cooperate through representatives chosen by them with a view to obtaining their free, prior and informed consent before any development, use or exploitation of mineral, water, petroleum or other resources on the lands they traditionally own, occupy and use.

Article 47

Indigenous Pygmy peoples have the right to appropriate benefits from the commercial exploitation by a third party of the lands and natural resources they traditionally own, occupy or use, on the basis of *a cahier des charges*.

Article 48

The State grants legal recognition and protection to the lands and resources that indigenous Pygmy peoples traditionally own, occupy or use. This recognition shall be done in accordance with the customs and traditionsof the peoples concerned.

However, we understand that the law is partly the outcome of compromises and therefore has some weaknesses from an indigenous peoples' rights perspective. Aside from the provisions on FPIC relating specifically to displacement, more general provisions referring to FPIC were watered-down in the final text. Whereas a previous draft of the text foresaw *prior consultation with a view to obtaining consent* "for *any project* affecting the life of indigenous Pygmy peoples directly or indirectly", as well as "appropriate mechanisms for consultation which take account of their customs, *before any elaboration or implementation of administrative or legislative measures*", these provisions have been removed and replaced with much weaker wording on the "*implication*" (involvement) of indigenous peoples in the elaboration and implementation of *projects affecting them directly or indirectly*. This wording doesn't have the same scope or legal weight as the previous draft of the law, having removed reference to "legislative and administrative measures", and replaced "consultation" with "involvement" (Thornberry, 2023).

In addition, there are lesser obligations on consultation under the tender procedure of the Mining Code, and the Environmental Protection Law. According to section 33 of the Mining Code, under the tender procedure, and in the case of an invitation to tender (exceptional procedure), the Minister consults the Provincial Minister for Mines and the local community concerned, within the framework of a Consultation Commission, before reserving the quarrying concessions to be put out to tender.[50] On the other hand, the Environmental Protection Act provides that any project or activity likely to have an impact on the environment is subject to a prior public enquiry.[51] The purpose of this public enquiry is: a) to inform the public in general and the local population in particular about the project or activity; b) to gather information on the nature and extent of any rights that third parties may have in the area affected by the project or activity; and c) to collect opinions, suggestions and counter-proposals, in order to provide the competent authority with all the information necessary for its decision.[52]

50 Law N° 007/2002 of 11 July 2002 on the Mining Code as amended and supplemented by Law No. 18/001 of 09 March 2018, section 33 al. 1, 2, 3, 4 and 7)

51 Law no. 11/009 of 9 July 2011 on the fundamental principles relating to the protection of the environment, section 24.

52 As above, section 24.

2.5 Inadequate human rights due diligence

According to the UN Guiding Principles on Business and Human Rights (UNGPs) unanimously endorsed by the UN Human Rights Council in 2011, human rights due diligence (HRDD) is carried out by businesses in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts. The UN framework to "Protect, Respect and Remedy" outlines the state duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy. According to the UNGPs, HRDD should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. It should also be ongoing, recognising that the human rights risks may change over time. [53]

2.5.1 Procedure for granting mining rights

The procedure for granting mining and/or quarrying rights is governed by Articles 33 to 49 of the Mining Code as amended and supplemented by Law No. 18/001 of 9 March 2018. It provides for the granting of titles, either by tender or by application for rights. The granting of rights by the government through a call for tenders is an exceptional procedure (Art. 33 al. 1, 2, 3, 4 and 7 of the Mining Code), while the granting of rights by application is the ordinary procedure (Art. 34 al. 1 of the Mining Code).

The ordinary procedure consists of six stages, namely the cadastral investigation (Article 40 (1), (3) and (4) of the Mining Code), the technical investigation (Article 41 of the Mining Code), the environmental and social investigation (Article 42 of the Mining Code), the decision of the competent authority (Article 43 (1) and (4) and Article 47 of the Mining Code), and the registration of the right granted in the mining register. The exceptional procedure (tender procedure) allows the Minister in charge to consult the provincial Minister of Mines and the local community concerned within the framework of a consultation commission, the modalities of which are set by regulation.

In light of these provisions, it appears that the procedure for granting mining rights to private sector actors does not comply with relevant international standards regarding FPIC or respect for pre-existing customary land rights. For example, the purpose of the cadastral survey is not to check whether the area applied for encroaches on pre-existing customary rights, but to ensure it does not encroach on an area that is the subject of a mining right or a pending application.

Explicit references are made in national regulations to ensure that human rights due diligence is based on internationally-recognised human rights standards in terms of scope and process, such as the Ministerial Order of 29 February 2012[54] requiring all companies involved in the extraction or trade of certain minerals to comply with the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict or High Risk Areas. However, there is no such legal framework for human rights due diligence as described in the UNGPs, the authoritative international principles on business and human rights.[55]

53 UNGPs, Principle 17.

54 Ministerial Order No 0054 (057) cab.min/mines/01/2012 of 29 February 2012 on the implementation of the regional certification mechanism of the International Conference on the Great Lakes Region (ICGLR) in the DRC.

55 Human rights due diligence refers to the processes and activities by which businesses identify, prevent, mitigate, and account for how they address their adverse human rights impacts (UN Guiding Principles 17-21 and Commentary).

Table 1: Gaps between national standards in the granting of mining rights and the United Nations Guiding Principles on Business and Human Rights (non-exhaustive):

Standards in national legislation	UNGPs standards
A few discreet references are made in national regulations to ensure that human rights due diligence is based on internationally-recognised human rights standards in terms of scope and process.	Set out clearly the expectation that businesses respect human rights throughout their operations.
The procedure for granting mining rights ignores the recognition of pre-existing customary rights attached to customary occupation.	Principle No. 3 provides that State should "ensure that laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights". It provides greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, in order to protect both rights-holders and business enterprises.
No explicit provisions enshrined in the Mining Code on the right of indigenous peoples and local communities to be consulted or to give or withhold their consent during the allocation of mining or exploration licenses.	UN Guiding Principle No. 18 explicitly points out that the process of identifying human rights impacts should involve "meaningful consultation with potentially affected groups and other relevant stakeholders". Consultation should be undertaken in accordance with international standards, prior to decision-making regarding the project's feasibility. It should be undertaken in good faith and in a form appropriate to the circumstances, through appropriate procedures, and with the representative institutions of indigenous peoples. Businesses should seek to understand the concerns of potentially affected stakeholders "by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement …".
The procedure for granting mining rights does not make specific reference to judicial or non-judicial grievance mechanisms on how companies are going to address human rights issues.	Require business enterprises to communicate how they address their human rights impacts. Establish permanent and institutionalised mechanisms for continuous dialogue, as well as access to grievance mechanisms that can effectively address emerging concerns.

Further to this, as stated earlier, the UNGPs stipulate that HRDD should be ongoing, recognising that human rights risks may change over time as the business enterprise's operations and operating context evolve. This indicates that HRDD should be a process extending way beyond just granting mining rights.

Many companies appear to view human rights due diligence as relevant to their management of litigation risks. However, there is little evidence as yet that the consensus position in the UNGPs, regarding the corporate responsibility to respect human rights and regarding human rights due diligence, is impacting judicial decision-making about the nature and scope of corporate duties and standards of care in cases where businesses are alleged to have caused or contributed to adverse human rights impacts (McCorquodale et al., 2017).

DRC does not have a National Action Plan (NAP) on Business and Human Rights.

2.5.2 China's growing investment in strategic resources in the DRC is not matched by clear commitments to accountability and due diligence.

On the other side, China's growing investments in strategic resources in the DRC go hand-in-hand with special demands including increased military assistance intended to secure those assets. Unlike the US and the EU, China has no specific commitment to due diligence and human rights standards. Western companies have grown increasingly wary of sourcing minerals from the DRC due to human rights abuses in the extractive sector. That reluctance is not shared by the Chinese government and its companies. This has allowed China to increase its extraction of resources – mainly cobalt and copper – from the DRC in recent years.

In 2020, China imported just under US$9 billion worth of goods from the DRC, up from just US$5.8 billion in 2019. That remarkable jump was not an outlier. China imported goods worth just US$1.45 million from the DRC in 1995 – representing average annual growth of over 40 per cent. According to data from the Observatory of Economic Complexity (OEC), from 2015 to 2020 China's imports of cobalt from the DRC ballooned by 191 per cent, imports of cobalt oxides by 2,920 per cent, and imports of copper ore by 1,670 per cent (OEC, 2021). Of the 19 cobalt operations in the DRC, 15 are now owned or co-owned by Chinese entities. The five largest Chinese mining corporations with interests in cobalt and copper in the nation have access to credit lines from Chinese state banks totalling an astounding US$124 billion (Nikkei Asia, 2022). All told, 70 per cent of world's cobalt is mined in the DRC, and 80 per cent of that DRC output then heads to China for processing (Nikkei Asia, 2022).

3. Access to justice and remedy

Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Unless citizens have access to justice, the rights and duties enshrined in international treaties, constitutions and laws are meaningless, and fail to provide any protection to vulnerable groups. Access to justice requires that citizens are able to use justice institutions to obtain solutions to common justice problems.[56] Pillar III of the UNGPs also concerns access to justice.

3.1 Possible grounds for challenging mining operations nationally

The Mining Code provides for private actors to resolve mining disputes or threats to mining rights. Such disputes can be resolved through administrative recourse, judicial recourse and national or international arbitration procedures, depending on the nature of the threat or dispute (Yav & Associates, 2021).

Civil liability in Congolese law, considered from the point of view of the damage that an act (whether voluntary or not) may have caused to others, means that the person (or company) at fault is obliged to make good the damage caused to one or more persons as a result of his or her own acts or those of persons (or companies) for whom he or she is responsible. Civil liability is a right recognised to any person who has been the victim of an act for which he or she is at fault. It means that communities, or anyone else who has suffered damage in relation to the granting of a mining licence, have recourse to civil liability. Civil liability under Congolese law is provided for by the Decree of 30 July 1888 on contracts or conventional obligations:

> *Art. 258. - Any act of man which causes damage to another, obliges the person by whose fault it was done to repair it.*
>
> *Art. 259. - Each person is liable for the damage which he has caused, not only by his own act, but also by his negligence or imprudence.*
>
> *Art. 260. - One is liable not only for damage caused by one's own act, but also for damage caused by the act of persons for whom one is responsible, or of things which one has in one's custody"* (unofficial translation).

National security, the safety of the population, the incompatibility of mining activities with other existing or planned uses of the soil or subsoil, and the protection of the environment may justify a ban by the President of the Republic on mining activities in a given area.[57] Similarly, if the safety of the population so requires, the President of the Republic may, by decree, declare a mineral substance to be a "reserved substance" and subject it to special rules.[58] In addition, the *Règlement Minier* (Mining Regulation) also provides for the possibility of prohibiting mining activities in certain areas (including protected areas) for reasons of national security, public safety, incompatibility with other existing or planned uses of the soil or subsoil and environmental protection.[59]

The *Règlement Minier* also places **protected areas** outside the scope of mining operations. This could logically be seen as an opportunity for communities to secure certain customary areas through community forestry or recognition of their Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs), in order to remove them from mining operations that could negatively impact their livelihoods or lifestyle.

In addition, **the eligibility of the holder of a mining right may be challenged by the judge** at the request of

56 According to article 7 of the African charter ratified by the State of DRC: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal."

57 Law N° 007/2002 of 11 July 2002 on the Mining Code, section 6.

58 Law N° 007/2002 of 11 July 2002 on the Mining Code, section 7.

59 Decree No. 2003/038 of March 26, 2003 related to mining regulations as amended and supplemented by Decree No. 18/024 of June 8, 2018.

any interested or affected third party.[60] Mining rights may be revoked with retroactive effect on the grounds of illegality, incompetence of the granting authority, a formal defect or abuse of power on the part of the granting authority. The injured third party or the public prosecutor may bring an action for annulment before the administrative court within three months of the publication of the decision to grant the permit in the Official Gazette or, within three months of the date on which they learned of its existence.[61]

There is also **a right to compensation** in the event of the occupation of the land of title-holders:

> *Any occupation of land which deprives the rightful occupiers of the enjoyment of the land, or any alteration which renders the land unfit for cultivation, shall, at the request of the rightful occupiers and at their option, give rise to the obligation to pay just compensation equal either to the rent or to the value of the land at the time of the occupation, increased by half"* [62] (unofficial translation).

This section provides an opportunity for customary landowners (occupants) to claim compensation for any damage related to mining. In addition, section 285 of the Mining Code also provides that holders of mining and quarrying rights are liable, even without fault or negligence, for the damage caused by their mining activities to persons, property and the environment, and must compensate for such damage.

With regard to the contribution of mining companies to community development projects, the Mining Code offers the possibility to **claim substantive revenues from mining**:

> *... The holder of a mining right or permanent quarrying authorisation is obliged to set up, free of tax on profits and earnings, an endowment for contributions to community development projects, the minimum amount of which is equal to 0.3% of the turnover of the financial year during which it is set up. The endowment must be made available in full to local communities before the end of the financial year following that in which it was established"* [63] (unofficial translation).

Furthermore, Article 285 bis of the Mining Code establishes **the mining right holder's liability** in the following terms:

> *Any holder of a mining right is liable for **damage caused to persons, property and the environment as a result of his mining activities,** even in the absence of any fault or negligence. He is obliged to repair them. He can only be exonerated if he proves that the damage was caused by a cause unrelated to his mining activity" (unofficial translation, emphasis added).*[64]

Similarly, the holder of the mining right is liable for **damage caused to people and the environment by direct or indirect contamination** as a result of mining activities that have an impact on human health and/or lead to environmental degradation and result in particular in the pollution of water, soil and the atmosphere and cause damage to humans, fauna and flora. Finally, the holder of the mining and/or quarrying right is obliged to compensate for any damage caused by diseases attributable to mining activity in accordance with the rules of common law.

The affected communities can also bring a case before the Congolese Environmental Agency or the Environmental Protection Directorate to ascertain whether the holder of the mining rights has failed to meet its **social obligations**.[65]

60 Law No. 18-001 of 9 March 2018, section 27 bis.
61 Law No. 18-001 of 9 March 2018, Article 48 ter.
62 Law No. 007/2002 of 11 July 2002 on the Mining Code, Article 281.
63 Law No. 18-001 of 9 March 2018, Article 281.
64 Law No. 18-001 of 9 March 2018, Article 285.
65 Law No. 18-001 of 9 March 2018, Article 288.

3.2 Possible avenues for challenging mining issues in DRC internationally

Some international frameworks, such as the Organization for Economic Cooperation and Development's (OECD) Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (OECD, 2006), the OECD Guidelines for Multinational Enterprises and the Voluntary Principles on Security and Human Rights,[66] have been developed to provide guidance to multinational companies (Shtender-Auerbach 2010). In addition, the US Congress as well as the EU have taken up this cause to support the responsible sourcing of critical minerals such as **tantalum, tin, gold and tungsten** (3TG).

3.2.1 US Congress Dodd-Frank Act

In 2010, the US Congress passed the Dodd-Frank Act,[67] which requires certain companies to disclose their use of conflict minerals if those minerals are "necessary to the functionality or production of a product" manufactured by those companies. Section 1502 is intended to address a concern by Congress "that the exploitation and trade of conflict minerals originating in the DRC is helping to finance conflict characterized by extreme levels of violence in the eastern region, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein (Ayogu & Lewis 2011)." Therefore, it imposes additional reporting requirements on US companies regarding their sources of certain "conflict minerals", including 3TG. Countries covered under this legislation are the contiguous nation states of South Sudan, Uganda, Rwanda, Burundi, Tanzania, Malawi, Zambia, Angola, Congo, Central African Republic and DRC. 3TG and other minerals determined by the US Secretary of State as financing conflict in the DRC countries are modelled after a certification scheme for "conflict diamonds" commonly called the Kimberley Process. The breadth of industries affected includes aerospace, automotive, electronics and communications, jewellery, healthcare machines, and manufacturing conglomerates (Ayogu & Lewis, 2011). For a company to be compliant, it must conduct supply chain due diligence and, where necessary, perform third-party verification and furnish details that may include the mine of origin. If the company is unable to ascertain the source of its conflict minerals, this fact must be disclosed in both its annual report and website (Ayogu & Lewis 2011).

3.2.2 EU regulations

The EU regulation that entered into force on 1 January 2021,[68] aims to "ensure [...] responsible sourcing standards set by the OECD (OECD, 2016), break the link between conflict and the illegal exploitation of minerals, and help put an end to the exploitation and abuse of local communities, including mine workers, and support local development."[69] Under the new EU due diligence legislation, multinationals will be expected to conduct robust supply chain assessments to ensure their products are conflict-mineral free. It provides a framework to legally mandate more responsible business conduct and hold companies liable for human rights violations or environmental damage. The new law must require companies to address their adverse risks and impacts on human rights, the environment and good governance through the process of human rights and environmental due diligence (Global Witness, 2021).

On 23 February 2022, the European Commission published a proposal for a directive on corporate sustainability due diligence. It may offer opportunities to hold companies in the EU who use minerals from DRC responsible for human rights and the environmental impacts of that mining. The current proposal has many limitations but is still under negotiation. It does, however, offer the possibility of initiating proceedings against EU companies who fail to conduct adequate due diligence, or raising complaints with regulators in the EU who can then pursue administrative proceedings. However, the directive is not yet finalised or adopted, and will not enter into force for some years. It is also unclear to what extent the directive will create liability for EU businesses who are not directly involved in mining activities but are, instead, smaller downstream buyers (Gibert & Perram, 2022). Finally, in the current trialogue negotiation process there has been a push from one of the negotiating institutions – the EU Council – to remove the specific requirement in the current proposal for companies to

66 The Voluntary Principles on Security + Human Rights, 'The Principles', http://www.voluntaryprinciples.org/principles/introduction.
67 Dodd-Frank Wall Street Reform and Consumer Protection Act (2010). Public Law 111–203, as amended through P.L. 117–286, Enacted December 27, 2022, available at https://www.govinfo.gov/content/pkg/COMPS-9515/pdf/COMPS-9515.pdf , accessed 15 March 2023.
68 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821, accessed 4 April 2023.
69 EU Website "The regulation explained" (accessed 1 April 2021): https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/#regulation-what

evaluate impacts on indigenous peoples' land, territory and resource rights. If this approach is successful, it would substantially undermine the opportunities for indigenous peoples and other communities to challenge human rights violations linked to mining in the DRC under the directive (Gibert, 2023).

3.3 Litigation as a tool for environmental defenders and affected communities

Environmental defenders and affected communities are increasingly using litigation as a tool to influence climate action worldwide. In DRC, litigation has begun to be used as a tool for transforming environmental and extractive risks into liabilities. The objective is to either hold major polluters to account or protect their land and livelihoods.

3.3.1 Using pollution or bribery cases to address corporate responsibility and legal liability

The French company Perenco S.A. is being sued in the French courts, under the French due diligence law – *Loi de devoir de viligance* – for pollution linked to its oil activities in the DRC (Friends of the Earth France, 2022).

In 2008, the UK National Contact Point (NCP) concluded that the UK company Afrimex had violated OECD guidelines by sourcing minerals from the Congolese war zone. Global Witness and other international NGOs brought the complaint before the NCP in the UK, which resulted in the verdict that Afrimex had "failed to contribute to sustainable development in the region and to respect human rights" and "applied insufficient due diligence to the supply chain, sourcing minerals from mines that used child and forced labor" (Shtender-Auerbach, 2010).

Box 3: Summary of the UK NCP Decision in the case of Afrimex UK Ltd (the Company)

The UK National Contact Point (NCP) considered the complaint brought by Global Witness and other international NGOs alleging that Afrimex paid taxes to rebel forces in the DRC and practiced insufficient due diligence on the supply chain, sourcing minerals from mines that used child and forced labour, who work under unacceptable health and safety practices. The NCP upheld the majority of the allegations brought by Global Witness and others:

- Afrimex initiated the demand for minerals sourced from a conflict zone.
- Afrimex sourced these minerals from an associated company SOCOMI, and 2 independent *comptoirs* who paid taxes and mineral licences to RCD-Goma when they occupied the area.
- These payments contributed to the ongoing conflict.

Therefore the NCP concluded that Afrimex failed to contribute to the sustainable development in the region; to respect human rights; or to influence business partners and suppliers to adhere to the Guidelines. The NCP concluded that Afrimex did not apply sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labour in the mines or to take steps to influence the conditions of the mines.

Source: OECD, 2008.

3.3.2 Using the African human rights system for litigation

The African Charter on Human and Peoples' Rights (the African Charter) provides a legal framework for the promotion and protection of human and peoples' rights in Africa. The Charter establishes the African Commission on Human and Peoples' Rights (the Commission) to promote, protect and interpret the rights enshrined under the Charter. The jurisprudence of this Commission has been a robust resource for national jurisdictions, NGOs and other regional systems. The state reporting mechanism established under the Charter has provided an opportunity for constructive dialogue and review. It has also helped member states to keep stock of their human rights achievements and challenges. Communication is one of the mechanisms the Commission employs to ensure states' compliance with the human rights enshrined in the Charter. The Commission may receive complaints from states against another state (inter-state complaints) or by individuals and NGOs against one or more states (individual complaints) on alleged violations of human rights in accordance with its mandate under articles 48, 49 and 55 of the African Charter. The establishment of the African Court of Human and Peoples' Rights (AfCHPR) with powers to render legally binding decisions has further enabled us to hold to account human rights violators in Africa.

In October 2004, in the city of Kilwa in the southeast, DRC armed forces killed 70-80 people, including children, in an event that became known as the Kilwa massacre. The killings were alleged to be linked to, and have the logistical support of, Anvil Mining, a Canadian-Australian mining company. Specifically, it was alleged that Anvil Mining provided an airplane and vehicles to transport the soldiers and move arrested persons to places of detention or execution. The violations were committed during an armed conflict between the DRC armed forces and the Revolutionary Movement for the Liberation of Katanga (*Mouvement Revolutionnaire de Liberation du Katanga)* (Global Witness, 2008).

In November 2010, three NGOs brought a complaint to the African Commission on Human and Peoples' Rights on behalf of eight victims of the massacre. In June 2017, the Commission found the DRC Government responsible for the Kilwa massacre and demanded that victims be awarded US$2.5 million as compensation. It also called on the government to "prosecute and punish" Anvil Mining staff who helped the army (Business & Human Rights Resource Centre, 2010). The Kilwa decision was ground-breaking in the compensation awarded to the Kilwa Community and the comprehensive remedies the African Commission recommended. The case represents a new body of jurisprudence on the human rights obligations of non-state actors under the African human rights system.

Box 4: The Kilwa Massacre and the Landmark Decision of the African Commission of Human and Peoples Rights

Kilwa is a remote fishing town with an estimated population of 48,000 in what used to be called Katanga province[70] in southeastern Congo. It is nestled on the shores of Lake Mweru near the border with Zambia, some 320 kilometres from Lubumbashi, the region's main city. A copper and silver mine is located at Dikulushi, some 50 kilometres away.

In the early hours of 14 October 2004, a motley crew of about six or seven naive and lightly armed rebels tried to take control of Kilwa. Led by a 20-year-old fisherman from a nearby town, they claimed to belong to an unknown rebel movement supporting the cessation of Katanga and managed to recruit some 100 local young people to their cause. According to a United Nations (UN) investigation[71], the Congolese army response was heavy handed and brutal. Before entering Kilwa, the soldiers bombarded the town, destroying homes. The rebels provided little or no resistance as their leaders fled into the bush. Civilians tried to flee, including women and children, some of whom were shelled by the soldiers as they desperately tried to flee across the lake in small fishing boats or who drowned when their boats overturned. In the town, the soldiers went on a rampage, conducting house-to-house searches for rebels, looting shops and homes, and arbitrarily detaining, torturing and killing civilians who they accused of siding with their enemies. Over two days, at least 73 civilians were killed, including an estimated 28 people who were arbitrarily arrested and then summarily executed. Others were brutally tortured, some dying from their injuries in the weeks and months that followed. A week after the events, a team of investigators from the UN peacekeeping mission based in Congo, known then as MONUC, interviewed victims and witnesses to the events and pieced together what happened. The UN accused the Congolese army of war crimes and said those responsible should be brought to justice.

Anvil Mining[72] was a small Australian mining company led by Bill Turner, its CEO, with its head office in Perth, Australia. The company won the license to mine the copper and silver at Dikulushi in 1998, during Congo's war, by passing the usual negotiations with the state-owned mining company Gecamines. A close advisor to Congolese president, Joseph Kabila, sat on the board of Anvil and held shares in the company. Anvil began mining operations in 2002. The Dikulushi mine was Anvil's "flagship project" and its primary asset. In 2004, when the Kilwa massacre occurred, Anvil Mining's shares were traded on both the Australian and Toronto stock exchanges. Anvil also had an office in Canada. In June 2004, Anvil reported its net operating profit was over US$10 million. In 2010, the Dikulushi mine was sold to Mawson West, a small Australian mining company. In January 2015, Mawson West stopped industrial production at Dikulushi, stating the mine was no longer economically viable.

Anvil Mining provided substantial logistical support to the military action by the Congolese army in Kilwa. According to witnesses interviewed by UN investigators, including a local military commander, Anvil's assistance was instrumental to the military operation. An airplane chartered by Anvil Mining was used to transport an estimated 150 troops from Pweto to Kilwa on October 14-15. The Congolese army used the company's vehicles, driven by Anvil employees, to transport soldiers. According to UN investigators, the vehicles also transported looted goods, corpses and people that were arbitrarily detained by the soldiers. UN investigators also found that Anvil provided fuel, food and may have paid money to a number of the soldiers. Anvil Mining says that the logistical support it provided to the soldiers was requisitioned by the army. The company's CEO, Bill Turner, acknowledged that the company helped the soldiers to get to Kilwa. During an interview with an Australian TV broadcaster in June 2005, he said, "We helped the military to get to Kilwa and then we were gone. Whatever they did there, that's an internal issue." Anvil denies it or its employees committed any wrongdoing.

70 Now called Haut-Katanga.

71 Report on the conclusions of the Special Investigation concerning allegations of summary executions and other human rights violations perpetrated by the Armed Forces of the Democratic Republic of Congo (FARDC) in Kilwa (Katanga Province) on 15 October 2004.

72 Originally listed as Anvil Mining Management NL. In 2004, following a company reorganization, it became a wholly-owned subsidiary of Anvil Mining Limited, which was incorporated in Canada and had an office in Montreal, Quebec.

In 2010 RAID and ACIDH joined forces with the Institute for Human Rights and Development in Africa (IHRDA) to submit a complaint to the African Commission on behalf of eight Kilwa victims. A number of the other families who had lost loved ones feared there might be repercussions from Congolese government officials if they continued to pursue legal action and declined to be associated with the action. Some of the individual claimants requested confidentiality.

The Commission publicly rebuked Anvil Mining by stressing that extractive industry companies are also legally required to carry out their activities with due regard to the rights of the host communities. At paragraph 101 of its decision, the Commission said, "At a minimum, they [extractive industry companies] should avoid engaging in actions that violate the rights of communities in their zones of operation. This includes not participating in, or supporting, violations of human and peoples' rights." The Commission made its position on Anvil Mining clear in its first recommendation where it calls on the Congolese government to prosecute and punish not only the soldiers involved in the Kilwa massacre, but also staff of Anvil Mining involved in the violations.

The Commission found the Congolese Government was responsible for 9 violations of the African Charter relating to arbitrary arrest, extrajudicial executions, torture, disappearances, and forced displacement of the population.[73] It also found the articles relating to the independence of the judiciary, the right to housing and development had been violated. The Commission said the Congolese government should do the following: a) Take all diligent steps to prosecute and punish agents of the state and staff of Anvil Mining involved in the violations; b) Pay damages to the victims. The decision lists out the amount of damages each of the 8 victims should receive. This totals US$4.36 million. The Commission also said the government should provide compensation to other Kilwa victims not represented by the complaint; c) Make a full apology to the people of Kilwa; d) Exhume the bodies buried in mass graves at Nsensele, at the outskirts of Kilwa, and give them a dignified burial; e) Construct a memorial to honour the victims who died and disappeared; f) Rehabilitate the socio-economic infrastructure destroyed during the attack, such as the school, the hospital and the dilapidated roads; and g) Provide pyschosocial support, such as trauma counselling, to the victims and others in Kilwa to help them overcome the trauma of the events.

Source: RAID, 2017.

73 The articles of the Charter that it found had been violated included Articles 1, 4, 5, 6, 7(1) (a), 7 (1) (c), 14, 22 and 26.

In 2012, there was also a lawsuit filed in Canada against Anvil Mining.

3.3.3 Anvil Mining Ltd. v. Association Canadienne Contre l'Impunité (ACCI)

This case was brought in 2012 to the Montreal Court of Appeal by the Canadian Association Against Impunity, whose mission is to assist victims of rights violations committed by companies or persons in countries where the judicial system does not allow for credible access to justice. ACCI alleged that Anvil, an Australian mining company incorporated in Canada, was responsible for providing logistical assistance and transportation for the troops responsible for the 2004 massacre in the DRC city of Kilwa near one of the company's mines, which resulted in the deaths of 70 to 80 persons, including a number of children. Anvil was alleged to have provided vehicles, petrol and food supplies for the troops (CRIN, 2012).

ACCI sought to institute a class action against Anvil in the interests of "all those who lost members of family, who were victims of abuses, of the pillaging of their property, or who had to flee Kilwa as a result of the illegal actions of the armed forces of the DRC". They relied on article 3148(2) of the Civil Code of Quebec, which gives Quebecois courts jurisdiction to hear cases in which "The defendant is a company not based in Quebec, but which has an office there and the disputes relates to its activities in Quebec."

The Court found that ACCI did not sufficiently demonstrate the impossibility of the victims bringing their case before the DRC's courts. Furthermore, it found that Anvil did not have any registered office in Quebec prior to June 2005, whereas the events in Kilwa took place in October 2004. For all the above reasons, the Court reached the conclusion that Quebecois courts did not have jurisdiction to hear this class action.

The outcome in this case highlights the challenges of pursuing extraterritorial cases, but such avenues may continue to be explored in contexts where domestic remedies are inadequate.

3.4 Strategic Lawsuits Against Public Participation

Conversely, in some cases, corporations also use Strategic Lawsuits Against Public Participation (SLAPP) as a strategy to deter whistleblowers or land rights defenders. Two whistleblowers employed in a bank in Kinshasa exposed alleged money laundering involving Israeli billionaire, Dan Gertler and his network; they were prosecuted by Congolese authorities and subsequently sentenced to death in absentia following a deeply flawed legal process (RAID, 2023). In December 2017, the United States imposed sanctions on Dan Gertler and his network, including VENTORA group, for bribe-fuelled transactions in DRC (US Department of the Treasury, 2017). In an agreement between the DRC and VENTORA signed on 24 February 2022,[74] VENTORA agreed to return to Congo an estimated US$2 billion worth of mining and oil-drilling rights secured over the past two decades. In exchange, the Congolese government agreed to pay Mr. Gertler's companies US$260 million and to help him lobby in Washington to have the sanctions revoked (The New York Times, 2023). But human rights activists say the agreement is hardly a good deal for DRC and, in a letter sent in March 2023, urged the US Secretary of State Antony J. Blinken and Treasury Secretary Janet L. Yellen to leave the sanctions in place (The New York Times, 2023).

74 According to the agreement, the DRC agree to "waive all claims, present or future, that it may have, directly and indirectly, against the VENTORA center and its directors or managers (including those brought before the Court of Arbitration of the Center du Commerce International de Paris , relating to the two oil permits), against VENTORA , its directors, managers and official advisers covering the entire period of ownership by VENTORA of the mining assets and oil permits in the DRC and in connection with their withdrawal".

4. Artisanal and Small-Scale Mining

Section 109 of the 2018 Mining Code provides for the creation of artisanal mining zones (*Zone d'Exploitation Artisanale* – ZEA) when the technical and economic factors which characterise certain deposits of mineral substances classified as mines or quarries do not allow them to be exploited industrially or semi-industrially but allow small-scale exploitation. ZEA are government-designated areas where artisanal miners are allowed to work. This is a clear distinction from ASM, which is defined in the OECD Due Diligence Guidelines as: "formal or informal mining operations with predominantly simplified forms of exploration, extraction, processing and transportation. ASM is normally low capital intensive and uses high labour-intensive technology."

ZEA is part of the formalisation process, and artisanal miners are called upon to organise themselves into cooperatives. The cooperatives can help empower the miners in relation to traders and government and may increase their revenue share.[75] However, many artisanal miners in DRC feel that the formalisation is forced upon them, and the cooperatives are often subject to elite capture (De Haan & Geenen, 2016). In Eastern DRC, coltan and cobalt as well as tin, tantalum, tungsten and gold (3TGs) are mainly produced via artisanal and small-scale mining (ASM). ASM is an activity that provides a crucial source of income for many communities and is a catalyst for economic development yet is often informal, highly labour-intensive and characterized by dire occupational, environmental and social risks (Gender Resource Facility, 2016).

4.1 Assessing the key drivers of informality

The informal economy supports some of the most vulnerable in society, including in rural areas, where it sustains livelihoods of impoverished populations through natural resource and land-based economic activities such as farming, logging and mining (Xiaoxue Weng, 2015). The rural informal economy is messy and complex, with activities sometimes classified as illegal but often rooted in customary land and resource governance norms traditionally practiced by local communities (Xiaoxue Weng, 2015). A review of empirical studies finds industrial mining to be more frequently associated with poverty exacerbation, and artisanal mining with poverty reduction (Gamu et al., 2015).

According to the Mining Code, ASM is legal when mining takes place in a specifically allocated geographic zone or ZEA,[76] all miners are registered, have a permit (*carte d'exploitant artisanal*) and are members of a cooperative.[77] In addition, the cooperative should be able to prove that it is registered and has been assigned to the ZEA, has paid all taxes and levies related to registration, and also pays the annual flat rate tax of 10 per cent of the turnover and the operational fee of the competent mining authorities (BGR, 2019). The ZEA license for artisanal mining is provided by the Artisanal and Small-Scale Mining Service (*Service d'Assistance et d'Encadrement de l'Exploitation Minière à Petite échelle* – SAEMAPE). It is not known how large a share of all artisanal miners is registered, but it can be assumed that most ASM activities are illegal or at least informal (Wingqvist & Quinn, 2021).

The co-existence of the artisanal and large-scale industrial economies is significant. Most artisanal mining in the DRC is usually referred to as "informal" – a term associated with non-state actors. Whereas regulatory initiatives base the definition of conflict-free minerals on the distinction between legal and illegal behaviour, in the Congolese mining sector, the line between legal and illegal, "good" and "bad" is blurred. Government actors are enmeshed in legally ambiguous activities within the sector, collaborating with armed actors and profiting from the illegal exploitation of the minerals. At the same time, the central government in Kinshasa grants most of the mining concessions to industrial mining companies, making it nearly impossible for artisanal miners to legally work in the mining sector (Bernarding et al., 2015). The suspension of informal mining in Eastern DRC in 2010/11 has worsened the already vulnerable rural livelihoods of communities as it resulted in increased unemployment, loss of income and food, as well school dropouts by both pupils and teachers (Makanishe, 2012).[78]

75 DRC Mining Law (2018). Law n°18/001 of March 9, 2018, section 109.
76 DRC Mining Law (2018). Law n°18/001 of March 9, 2018, section 109.
77 DRC Mining Law (2018). Law n°18/001 of March 9, 2018, sections 109, 111 & 114 bis.
78 Concerns over fraud, corruption, loss of state revenues and the perpetuation of conflicts associated with informal mining activities were the main causes of its suspension in the eastern DRC.

The key drivers of rural informality include existing legal pluralism, informal land tenure, exclusionary and costly regulations for rural actors, as well as high economic profits for poverty-stricken communities. Informality is also practiced as a form of resistance against unjust legislation, as well as unsuccessful policy interventions (Xiaoxue Weng, 2015). Regulation – when exclusionary or poorly implemented – is another cause for informality in the rural economy. First, government laws and regulations may exclude certain players from the formal economy due to its registration cost, burdensome bureaucracy and corruption (Chambwera et al., 2011). Legal and policy reform tend to implicitly delegitimise ASM, and the people involved, creating them as part of a lawless place which needs to be "brought into" the space of national development and legal investment, primarily through so-called "formalization" initiatives. Processes of formalization tend to involve the redistribution of resources and economic opportunities and are strongly associated with various forms of elite capture and marginalisation (Banchirigah, 2006).

4.2 Pressure to formalise the informal economy

The importance of ASM has not been fully recognised by the donor and policymaking communities who underestimate its economic and livelihood potentials (Hilson & Mcquilken, 2014). Therefore, ASM faces strong pressures to formalise from businesses, NGOs, donors and policymakers. This negative framing is also linked to the fact that minerals mined artisanally tend to be traded and exported outside state systems of regulation and taxation, hence offering limited state revenue. Reforms attempting to integrate artisanal miners and small mining companies into the formal economy have had limited success for they have tended to ignore the elephant in the room; the unequal power relationship between rural communities and the elites as well as large companies (Banchirigah, 2006).

4.3 Informality as a form of resistance against land allocation to private companies

Case study analyses have shown that the lack of availability of land has also been a major factor behind the rapid increase of illegal mining activity in sub-Saharan Africa. Under reform, large tracts of land are being demarcated for multinational companies for periods spanning decades (Akabzaa et al., 2001).

The delegitimisation of the people involved in ASM by national regulations is received with resistance by indigenous peoples and local communities, who consider themselves the legitimate owners of customary lands. Communities engage in informal mining to "resist" what they perceive to be unjust arrangements imposed by the state that do not account for their interests (Nyame & Blocher 2010). They are also concerned that governments frequently allocate their customary land to large companies for industrial production without consultation and compensation (Nyame & Blocher 2010). This is also partly because processes of formalisation tend to involve the redistribution of resources and economic opportunities and are strongly associated with various forms of elite capture and marginalisation (Banchirigah, 2006).

4.4 The Gender Dimension of ASM

A significant proportion of ASM communities in the DRC are made up of vulnerable and disadvantaged groups, many of whom are disenfranchised and sometimes landless or displaced. Many men and women, adults, youth and children, driven into ASM mainly by economic vulnerability, extract minerals in the DRC (Gender Resource Facility, 2016). Securing land tenure can therefore open opportunities for reducing future negative environmental and social effects of mining through providing better land tenure security. However, disparate gender relations within ASM sites and communities are entrenched by social structures, norms, beliefs and values (Gender Resource Facility, 2016). Within these groups, women and girls face additional disadvantages, mainly due to discriminatory beliefs; impediments to their agency and bargaining power; the undue burden of women's and girls' work; and lack of access to and control of key assets and benefits derived from them (Gender Resource Facility, 2016). For women, this situation is exacerbated where their work is invisible or perceived as lesser value. ASM's illegality is also constructed through moralising narratives of it as an arena for gambling, prostitution, alcoholism, a reorientation of youth towards vice and money, violence and lawlessness (C Huggins et al., 2017). These mutually reinforcing factors jointly restrict women's and girls' access to skills, education and training; impede their freedom to participate and influence decisions that concern them; and ultimately increase their vulnerability to insecurity, sexual and gender-based violence and other dimensions of poverty (Gender Resource Facility, 2016).

Conclusions and issues to consider

Driven by rapidly increasing demand for mineral resources, both industrial mining and artisanal mining are intensifying across the tropical biome. A number of regional studies have analysed mining-induced deforestation, but scope and patterns across all tropical countries have not yet been investigated (Giljum et al., 2022).

Some land rights are attached to customary occupation, including explicit constitutional recognition, which is reflected in the Forestry Law as well as the Land Law. Despite constitutional and legislative affirmations, the legal regime applicable to extractive industries, particularly mining and hydrocarbons, ignores this recognition.

Sector-specific legislation offers an opportunity for indigenous peoples and local communities to secure access and use rights on the basis of custom, and challenge developments interventions on their lands.

The Mining Code opens up opportunities for local development and more equitable income distribution through transferring a part of the mining royalties to state, provincial, and local communities (and to a future fund). However, the capacity at local level to utilise these funds for local development is currently weak.

Despite a diverse legal framework, there are many remaining legal and practical challenges to developing and implementing human rights due diligence in the mining sector. The process for granting mining rights to private actors does not meet relevant international standards regarding FPIC or respect for pre-existing customary land rights.

This report highlights that the US and the EU have set out their ambitions to become key players in the raw materials value chain with the recent adoption of due diligence policies and critical commodities legislation. However, both the EU and the US should consider ensuring that these policies meet the requirements of international human rights standards to protect the rights of the most marginalised in society, including indigenous peoples and women. "Conflict-free" governance or "clean supply chains" require multistakeholder consultation with communities, state authorities, economic actors and international donors to clarify the legal status of mining sites (both informal and industrial) and rights therein. On the other hand, there is growing investment by China in the mining sector in the DRC. And, unlike the US and the EU, China is not developing a clear human rights due diligence framework to support "clean supply or value chains".

Existing international interventions in DRC have largely ignored the prevailing logic of the marketplace and failed to address the "root causes" of conflict, including land access, lack of good governance and poverty (Carayannis et al., 2018). The widely shared conviction that control over natural resources (mostly minerals) was a crucial driver of conflict in DRC has inspired policy responses. And over the years, natural resources have also been considered an opportunity for development rather than a cause of conflict (Garrett, 2013).

In addition to this, the mainstream developments interventions presupposes that formalising the informal is good for poverty reduction. This orthodoxy has guided numerous reforms in land, forest and mineral governance in DRC. It has also fuelled international initiatives, including efforts to make large corporations' agriculture supply chains "more sustainable", advocating timber legality (e.g. the EU's Forest Law Enforcement Governance and Trade and Voluntary Partnership Agreements) and promoting conflict-free mineral production (e.g. the Dodd-Frank Act in the US). However, some of these initiatives have not sufficiently accounted for rural populations' needs – if not by design, then in their implementation. This has precipitated the exclusion of already-marginalised small-scale producers (Putzel et al., 2014; Vorley, 2013; Maconachie & Hilson, 2011).

The points below are some issues for civil society actors to consider for future actions, including further research, strategic test cases or case studies.

1. Advocacy

There may be greater potential in DRC civil law system to incorporate direct references to the UNGPs and other international human rights standards in domestic legal frameworks relevant to corporate negligence cases (Human Rights Council, 2018).

Climate policies, including REDD+, the national climate change adaptation plan (2022-26), and the Central Africa Forest Initiative (CAFI) acknowledge the vulnerability of indigenous peoples and local communities in land use processes as well customary land tenure insecurity.

There is potential to explore the links between customary tenure rights and DRC's climate commitments. Climate policies provide an opportunity for CSOs and communities to have their collective land rights recognised through flexible and reliable local land information systems.

The Mining Code and Forest code open up opportunities for local development and more sustainable livelihoods and income for indigenous peoples and local communities through the CFCLs and the ZEA.

CSOs and international donors, who provide support to DRC, should urge for full implementation of the African Commission decision on the Kilwa case.

2. Research

There is a need to:

- undertake new empirical studies analysing the direct effects of mining on forest loss in quantitative terms;
- conduct specific land tenure and land use studies to clarify the multiple uses and understand fully the relationship between indigenous peoples' and local communities' customary lands and mining concessions;
- undertake specific studies to understand the dynamics around specific governance and representativeness issues and the balance between indigenous peoples and local communities in the context of the Fund for Community Development Project; and
- undertake specific studies to assess the extent to which international human rights obligations in general, and human rights due diligence standards in particular (including the UNGPs), are influencing judicial decisions on the nature and scope of corporate duties and standards of care in cases where companies are alleged to have caused or contributed to adverse human rights impacts.3.

3. Law reform processes

FPIC and the effective participation of the affected communities have to be ensured in the allocation of mining titles, conduct of ESIAs and the entire life cycle of mining projects, where already operational.

Weaknesses in the broader land tenure system lead to multiple and overlapping land claims, including from the mining, agriculture and oil sectors. There are some contradictions between the 2022 Indigenous Peoples Law and other laws that need clarification or harmonisation.[79]

This study also clearly highlights the need to conduct a comprehensive legal review of the DRC Mining Code to align mining policy with the rights of Indigenous peoples and local communities, including consideration of

79 Notably, in reference to the following articles: "Without prejudice to the State's ownership rights over the soil and subsoil, indigenous peoples have the right to the lands and natural resources which they possess, occupy or use in accordance with the applicable law" (Article 42 of Indigenous peoples Law); and "The State grants legal recognition and protection to the lands and resources that indigenous Pygmy peoples traditionally own, occupy or use. This recognition shall be done in accordance with the customs and traditions of the peoples concerned" (Article 48 of Indigenous peoples Law).

human rights due diligence, FPIC, customary land tenure, adequate compensation, and international human rights standards.

The National Land Use Policy (*Politique Nationale d'Aménagement du Territoire* - PNAT), despite its shortcomings, offers an opportunity to promote the effective participation of indigenous peoples and local communities in the process, and to improve the legal framework by addressing the issue of overlap between customary land and mining, as well as overlapping titles between, mining, forest concessions or protected areas.

There are also some opportunities for CSOs and affected communities to bring relevant legal information on the status of implementation of its international commitments, before regional and international human rights monitoring bodies and others mechanisms. These mechanisms could help guide the process of bringing national legislation in line with international human rights standards in the extractive sector.

Reference List

American Bar Association Rule of Law Initiative (ABA ROLI) & Global Initiative for Justice, Truth & Reconciliation (GIJTR). (2021). *The role of the private sector in transitional justice processes in Africa*. Regional Report. https://gijtr.org/wp-content/uploads/2021/06/ABA-ROLI-The-Role-of-the-Private-Sector-in-TJ-Processes-in-Africa-June-2021-Report-Secure.pdf

African Commission & Centre for Human Rights. (2011). *Celebrating the African Charter at 30: A guide to the African human rights system*. Pretoria University Law Press (PULP). https://www.pulp.up.ac.za/pulp-guides/celebrating-the-african-charter-at-30-a-guide-to-the-african-human-rights-system

African Commission on Human and People's Rights' (ACHPR) Working Group on Indigenous Populations/Communities (WGIP). (2017). *Extractive Industries, Land Rights and Indigenous Populations/Communities' Rights*. https://iwgia.org/en/documents-and-publications/documents/publications-pdfs/english-publications/132-report-on-extractive-industries-land-rights-and-indigenous-populations-communities-rights-eng/file.html

Akabzaa, T., & Darimani, A. (2001*). Impact of Mining Sector Investment in Ghana: A Study of the Tarkwa Mining Region.* A Draft Report Prepared for SAPRI. http://www.saprin.org/ghana/research/gha_mining.pdf

Anvil Mining lawsuit (re complicity in Dem. Rep. of Congo, filed with the African Commission on Human and Peoples' Rights) (2010). Business & Human Rights Resource Centre. https://www.business-humanrights.org/en/latest-news/anvil-mining-lawsuit-re-dem-rep-of-congo/

Auerbach, M. (2010, 13 January). The Top 5 Socio-Political Business Risks for 2010. *Huffington Post*. www.huffingtonpost.com/michael-shtenderauerbach/the-top-5-socio-political_b_421466.html

Autesserre, S. (2012). Dangerous tales: Dominant narratives on the Congo and their unintended consequences. *African Affairs, 111*(443), 202-222. https://doi.org/10.1093/afraf/adr080

Ayogu, M., & Lewis, Z. (2011). *Conflict Minerals: An Assessment of the Dodd-Frank Act.* [Op-Ed]. The Brookings Institution. https://www.brookings.edu/opinions/conflict-minerals-an-assessment-of-the-dodd-frank-act/

Banchirigah, S. M. (2006). How have reforms fuelled the expansion of artisanal mining? Evidence from sub-Saharan Africa. *Resources Policy, 31*, 165-171. https://doi.org/10.1016/j.resourpol.2006.12.001

Bernarding, N., Guesnet, L., & Müller-Koné, M. (2015). *No rebel without a cause: shifting the debate about conflict minerals in eastern DRC*. Bonn International Center for Conversion (BICC) Working Paper, 2/2015. https://nbn-resolving.org/urn:nbn:de:0168-ssoar-61803-3

Bundesanstalt für Geowissenschaften und Rohstoffe (BGR). (2019). *Mapping of the Artisanal Copper-Cobalt Mining Sector in the Provinces of Haut-Katanga and Lualaba in the Democratic Republic of the Congo*. Hannover: BGR (Federal Institute for Geosciences and Natural Resources). https://delvedatabase.org/uploads/resources/BGR_Cobalt_Congo_2019_en.pdf

Carayannis, T., Vlassenroot, K., Hoffmann, K., & Pangburn, A. (2018*). Competing networks and political order in the Democratic Republic of Congo: a literature review on the logics of public authority and international intervention*. [DRC Synthesis Paper]. London School of Economics' Conflict Research Programme. http://eprints.lse.ac.uk/100161/1/Vlassenroot_Competing_networks_Published.pdf

Chambwera, M., Downing, T., Venton, C.C., Dyszynski, J., Crawford, V., Butterfield, R., Kaur, N., Birch, T., Bezabih, M., & Loga, D. (2011). *Planning and costing agriculture's adaptation to climate change*. [Synthesis Report] Department for International Development (DFID). https://assets.publishing.service.gov.uk/media/57a08abeed915d622c0008a5/60921-Final_Report_Agricultures_Adaptation_to_Climate_Change.pdf

Charnley, S., & Poe, M. (2007). Community Forestry in Theory and Practice: Where Are We Now? *Annual Review of Anthropology, 36,* 301-336. https://doi.org/10.1146/annurev.anthro.35.081705.123143

Chatham House. (2020). *Mining's Impacts on Forests: Aligning policy and finance for climate and biodiversity goals*. https://www.chathamhouse.org/2020/10/minings-impacts-forests

Child Rights International Network (CRIN). (2012). *Anvil Mining Ltd. v. ACCI* (Association Canadienne Contre l'Impunité). https://legallibrary.crin.org/anvil-mining-ltd-v-acci-association-canadienne-contre-limpunite/

Corriveau-Bourque, A., Maindo, A., Augustin Mpoyi, M. De Wit, P., Oyono, R., & Mugangu, S. (2019). *Étude de référence sur la tenure en République Démocratique du Congo* (Reference Study on tenure in the Democratic Republic of the Congo). https://rightsandresources.org/wp-content/uploads/Etude-de-Reference-RDC_RRI_2019.pdf

Dargie, G., Lewis, S., Lawson, I., Mitchard, E.T.A, Page, S.E., Bocko, Y.E., & Ifo, S.A. (2017). Age, extent and carbon storage of the central Congo Basin peatland complex. *Nature, 542,* 86-90. https ://doi.org/10.1038/nature21048

De Haan, J., & Geenen, S. (2016). Mining cooperatives in Eastern DRC: The interplay between historical power relations and formal institutions. *The Extractive Industries and Society, 3*(3), 823-832. https://www.sciencedirect.com/science/article/abs/pii/S2214790X1630079X

Deléchat C., & Medina, L. (2020). *What Is the Informal Economy? Having fewer workers outside the formal economy can support sustainable development*. International Monetary Fund (IMF). https://www.imf.org/external/pubs/ft/fandd/2020/12/pdf/what-is-the-informal-economy-basics.pdf

Extractive Industries Transparency Initiative (EITI). (2019). *Progress Report 2019*. https://eiti.org/sites/default/files/attachments/eiti_progress_report_2019_en.pdf

Feiring B., & Thornberry, F. (2019). *Respecting the rights of indigenous peoples: A due diligence checklist for companies*. The Danish Institute for Human Rights. https://www.humanrights.dk/files/media/migrated/dihr_-_respecting_the_rights_of_indigenous_peoples_-_a_due_diligence_checklist_for_companies.pdf,

Forest Carbon Partnership Facility. (n.d.). *Congo (Democratic Republic of)*. Retrieved 23 January 2023, from https://www.forestcarbonpartnership.org/country/congo-democratic-republic

Forest Declaration Assessment. (2022). *Regional Assessment 2022: Tracking progress towards forest goals in the Congo Basin*. https://forestdeclaration.org/wp-content/uploads/2022/11/2022RegionalAssessment_ENG.pdf

Forest Peoples Programme (FPP) (2021). *République Démocratique du Congo: Retour en arrière en temps de COVID-19* (Democratic Republic of Congo – Rollback in the time of COVID-19). https://www.forestpeoples.org/sites/default/files/documents/DRC%20Rollback%20Report%20FR.pdf

Friends of the Earth France (*Les Amis de la Terre France*). (2022, November 09). *French oil company Perenco sued over environmental damage in the Democratic Republic of Congo*. [Press Release]. https://www.amisdelaterre.org/communique-presse/french-oil-company-perenco-sued-over-environmental-damage-in-the-democratic-republic-of-congo/

Galford, G.L., Soares-Filho B.S., Sonter L.J., & Laporte N. (2015). Will Passive Protection Save Congo Forests?. *PLOS ONE, 10*(6), https://doi.org/10.1371/journal.pone.0128473.

Gamu J., Le Billon P., & Spiegel S. (2015). Extractive industries and poverty: A review of recent findings and linkage mechanisms. *The Extractive Industries and Society, 2*(1), 162-176. https://doi.org/10.1016/j.exis.2014.11.001.

Garrett, N. (2014). *Artisanal mining and conflict financing in eastern Democratic Republic of Congo(DRC); coping, conflict and shadow economy actors and the impact of 'conflict minerals' campaign*. [Doctoral dissertation. Freie Universitat Berlin]. Refubium – Freie Universitat Berlin Repository. https://d-nb.info/1049437942/34

Geenen, S. (2011). Local livelihoods, global interests and the state in the Congolese mining sector. In A. Ansoms & S. Marysse (Eds.) *Natural Resources and Local Livelihoods in the Great Lakes Region of Africa. A political economy perspective* (pp. 147-69). Palgrave Macmillan. https://doi.org/10.1057/9780230304994_8

Gender Resource Facility. (2016). *The Gender Dimensions of Tin, Tantalum and Tungsten Mining in the Great Lakes Region*. [Desk Study]. https://www.kit.nl/wp-content/uploads/2019/02/The-Gender-Dimensions-of-3Ts-in-the-GLR-1.pdf

Gibert A., & Perram A. (2022). *What will the European Commission's proposed Corporate Sustainability Due Diligence Directive mean for the human rights of indigenous peoples and of local communities?*. [Briefing]. Forest Peoples Programme. https://www.forestpeoples.org/sites/default/files/documents/FPP%20Due%20Diligence%20Briefing_EN.pdf

Giljum, S., Maus, V., Kuschnig, N., Luckeneder, S., Tost, M., Sonter, L. J., & Bebbington, A. J. (2022). A pantropical assessment of deforestation caused by industrial mining. *Proceedings of the National Academy of Sciences of the United States of America (PNAS), 119*(38). https://doi.org/10.1073/pnas.2118273119

Global Witness. (2008). *The Kilwa Appeal - A Travesty of Justice*. [Policy Briefing]. https://www.globalwitness.org/en/archive/kilwa-appeal-travesty-justice/

Global Witness. (2021). *Holding companies to account – a blueprint for European Legislation*. [Policy Briefing]. https://www.globalwitness.org/en/campaigns/holding-corporates-account/holding-companies-to-account-a-blueprint-for-european-legislation/

Gross, T. (Host). (2023, February 01). *How 'modern-day slavery' in the Congo powers the rechargeable battery economy*. Fresh Air [Radio program] on National Public Radio (NPR). https://www.npr.org/sections/goatsandsoda/2023/02/01/1152893248/red-cobalt-congo-drc-mining-siddharth-kara

Hilson, G., & McQuilken, J. (2014). Four decades of support for artisanal and small-scale mining in sub-Saharan Africa: A critical review. *The Extractive Industries and Society, 1*, 104-118.

Huggins, C., Buss D., & Rutherford, B. (2017). A cartography of concern: Place-making practices and gender in the artisanal mining sector in Africa. *Geoforum, 83*, 142-152. https://doi.org/10.1016/j.geoforum.2016.09.009.

Ickowitz, A., Slayback, D., Asanzi, P., & Nasi, R. (2015). Front Matter. In *Agriculture and deforestation in the Democratic Republic of the Congo: A synthesis of the current state of knowledge* (pp. i-ii). Center for International Forestry Research. http://www.jstor.org/stable/resrep02234.1

International Work Group for Indigenous Affairs (IWGIA). (2012). *Country Technical Note on Indigenous Peoples' Issues: Democratic Republic of the Congo*. https://www.ifad.org/documents/38714170/40224547/congodr_ctn.pdf/2c80e90b-b0a9-4171-a621-3f0df1925ff9

Kara, S. (2023). *Cobalt Red: How the Blood of the Congo Powers Our Lives*. St. Martin's Press.

Kipalu P., Koné L., Bouchra S., Vig, S., & Loyombo, W. (2016). *Securing Forest Peoples' Rights and Tackling Deforestation in the Democratic Republic of Congo: Deforestation drivers, local impacts and rights-based solutions*. Forest Peoples Programme. http://www.forestpeoples.org/sites/default/files/publication/2016/05/fppdrcreportinternet-2.pdf,

Koné, L. (2017). *Garantir les droits fonciers coutumiers en République Démocratique du Congo: Guide pratique à l'intention des acteurs impliqués dans le processus de la réforme foncière*. Forest Peoples Programme. https://www.forestpeoples.org/sites/default/files/documents/A5-DRC-Report-French-web.pdf

Leon-Kabamba, N., Ngatu, N.R., Kakoma, Jean-Baptise Kakoma, S., Nyembo, C., Mbelmabela, E.P., Moribe, R.J., Wembonyama, S., Danuser, B., Oscar-Luboya, N. (2018). Respiratory health of dust-exposed Congolese coltan miners. *International Archives of Occupational and Environmental Health, 91*(7): 859-864. https://doi.org/10.1007/s00420-018-1329-0

Le Roy, E. (2003). *Les pluralismes juridiques*. Karthala.

Lipton, E., & Searcey, D. (2023, April 02). Fight Over Corruption and Congo's Mining Riches Takes a Turn in Washington. *The New York Times*. https://www.nytimes.com/2023/04/02/us/politics/dan-gertler-biden-congo-sanctions.html

Lutumba, S, A., Zhang, K., & Kouassi Anoma, C.J. (2021). Dynamics of Deforestation and Degradation of Forests in the Democratic Republic of Congo from 1990 to 2018. *Open Journal of Ecology, 11,* 451-461. 10.4236/oje.2021.115029

Maconachie, R., & Hilson, G. (2011). Safeguarding livelihoods or exacerbating poverty? Artisanal mining and formalization in West Africa. *Natural Resources Forum (NRF): A United Nations Sustainable Development Journal, 35*(4), 293-303. https://doi.org/10.1111/j.1477-8947.2011.01407.x

Maddox, T., Howard, P., Knox, J., & Jenner, N. (2019). *Forest-smart mining: Identifying factors associated with the impacts of large-scale mining on forests*. World Bank, Washington, DC. http://hdl.handle.net/10986/32025

Makanishe, B.T. (2012). *Politics of mining reforms and poverty: informal mining suspension and its impacts on rural livelihoods in the Twangiza mining area, Eastern DRC*. [Master's dissertation, University of Kwazulu-Natal]. Research Space. https://researchspace.ukzn.ac.za/handle/10413/9174

Mandela Institute. (2022). *Deforestation and biodiversity loss in the Democratic Republic of the Congo*. University of the Witwatersrand.

McCorquodale, R., Smit, L., Neely, S., & Brooks, R. (2017). Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises. *Business and Human Rights Journal, 2,* 195-224. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0306945323DD6F6C9392C5DBDE167001/S2057019817000025a.pdf/human_rights_due_diligence_in_law_and_practice_good_practices_and_challenges_for_business_enterprises.pdf

Ministere de L'Environnment, Conservation de la Nature et Developpement Durable (MECNDD) (2015). *Protocole méthodologique et résultats de l'analyse de changement du couvert forestier 1990-2010 de la Republique Democratique du Congo*. UN-REDD Programme. https://www.un-redd.org/document-library/protocole-methodologique-et-resultats-de-lanalyse-de-changement-du-couvert

Mosnier, A., Havlík, P., Obersteiner, M., Aoki, K., Fritz, S., McCallum, I., & Leduc, S. (2014). Modeling Impact of Development Trajectories and a Global Agreement on Reducing Emissions from Deforestation on Congo Basin Forests by 2030. *Environmental and Resource Economics, 57,* 505-525. https://doi.org/10.1007/s10640-012-9618-7.

Mpoyi, A. (2019). The impact of land-use processes on the rights of local communities. In A. Corriveau-Bourque, et al. *Baseline study on land tenure in the Democratic Republic of Congo* (p.78). Rights and Resources Initiative.

Mugangu, S. (2019). Customary land tenure in the Democratic Republic of Congo: Status and prospects for legislative reform. In A Corriveau-Bourque, et al. *Baseline study on land tenure in the Democratic Republic of Congo* (p. 94). Rights and Resources Initiative.

Nachmany, M., Fankhauser, S., Townshend, T., Collins, M., Landesman, T., Matthews, A., Pavese, C., Rietig, K., Schleifer, P., & Setzer, J. (2015). *The GLOBE Climate Legislation Study: A Review of Climate Change Legislation in 66 Countries* (4th ed.) (p. 154). Grantham Research Institute on Climate Change and the Environment at the London School of Economics with GLOBE International. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2014/03/Globe2014.pdf

Natural Resource Governance Institute (2019). *NRGI End-of-Year Review 2019* (pp. 9-10). https://resourcegovernance.org/sites/default/files/documents/nrgi_end-of-year_review-2019-executive-summary.pdf

Nyame, F. K., & Blocher, J. (2010). Influence of land tenure practices on artisanal mining activity in Ghana. *Resources Policy, 35*, 47-53. https://doi.org/10.1016/j.resourpol.2009.11.001

Observatory of Economic Complexity (OEC). (2021). China / Democratic Republic of Congo. Retrieved 18 April 2023, from https://oec.world/en/profile/bilateral-country/chn/partner/cod#latest-trends

Organisation for Economic Co-operation and Development (OECD). (2006). OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. https://www.oecd.org/daf/inv/investmentfordevelopment/36885821.pdf

OECD. (2008). *Final statement by the UK national contact point for the OECD guidelines for multinational enterprises: Afrimex (UK) LTD*. https://www.oecd.org/investment/mne/43750590.p

OECD. (2011). *OECD Guidelines for Multinational Enterprises* (2011 ed). OECD Publishing. http://dx.doi.org/10.1787/9789264115415-en

OECD. (2016). *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* ((2nd ed.). OECD Publishing. http://dx.doi.org/10.1787/9789264252479-en

OECD. (2019). *Interconnected supply chains: a comprehensive look at due diligence challenges and opportunities sourcing cobalt and copper from the Democratic Republic of the Congo*. https://mneguidelines.oecd.org/Interconnected-supply-chains-a-comprehensive-look-at-due-diligence-challenges-and-opportunities-sourcing-cobalt-and-copper-from-the-DRC.pdf

Putzel, L., Cerutti, P.O., Artati, Y., & Kelly, A. (2014). Policy options for improved integration of domestic timber markets under the voluntary partnership agreement (VPA) regime Lessons from formalization case studies. *Infobrief, 85*. Center for International Forestry Research (CIFOR). https://www.cifor.org/publications/pdf_files/infobrief/5078-infobrief.pdf

Rights and Accountability in Development (RAID). (2007). *Kilwa Trial: a Denial of Justice – A Chronology October 2004-July 2007*. https://www.raid-uk.org/sites/default/files/chronology-kilwa.pdf

RAID. (2017). *Q&A The Kilwa Massacre and the Landmark Decision of the African Commission of Human and Peoples Rights*. https://www.raid-uk.org/sites/default/files/african_commission_qa_kilwa_decision_updated.pdf

RAID. (2023, March 15). *Rights groups inform Dan Gertler they cannot support his DRC deal*. [Press release]. https://www.raid-uk.org/blog/rights-groups-inform-dan-gertler-they-cannot-support-his-drc-deal

Ruggie, J.G. (2008, 07 April). *Protect, respect and remedy: a framework for business and human rights: a report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/8/5. UN Human Rights Council. https://digitallibrary.un.org/record/625292?ln=en

Simmons & Simmons. (2018). *A new mining law for the Democratic Republic of Congo*. https://www.simmons-simmons.com/en/publications/ck0axnd39nq2s0b85x7eqddo3/160318-new-mining-law-for-democratic-republic-of-congo-4fr1ca

Taka, M. (2014). *A Critical Analysis of Human Rights Due Diligence Processes in Mineral Supply Chains: Conflict Minerals in the DRC*. [Conference Paper]. For South African Institute of International Affairs (SAIIA). SAIIA Occasional Paper No 208. https://www.researchgate.net/publication/283515471_A_Critical_Analysis_of_Human_Rights_Due_Diligence_Processes_in_Mineral_Supply_Chains_Conflict_Minerals_in_the_DRC

United Nations (UN). (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. UN Office of the High Commissioner for Human Rights. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

UN. (2018). *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability – Report of the United Nations High Commissioner for Human Rights*. UN Office of the High Commissioner for Human Rights. https://www.ohchr.org/en/documents/reports/improving-accountability-and-access-remedy-victims-business-related-human-2

United States Department of the Treasury. (2017). *United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe*. [Press release]. https://home.treasury.gov/news/press-releases/sm0243

Vorley, B. (2013). *Meeting small-scale farmers in their markets: Understanding and improving the institutions and governance of informal agrifood trade*. International Institute for Environment and Development (IIED)/HIVOS, Mainumby, London/The Hague/La Paz. https://iied.org/sites/default/files/pdfs/migrate/16548IIED.pdf

Watanbe, S. (2022, January 07). Chinese cobalt producer to double Congo output with eye on top spot. *Nikkei Asia*. https://asia.nikkei.com/Business/Markets/Commodities/Chinese-cobalt-producer-to-double-Congo-output-with-eye-on-top-spot

Weng, X. (2015). *The rural informal economy: Understanding drivers and livelihood impacts in agriculture, timber and mining*. [Working Paper]. International Institute for Environment and Development (IIED). http://pubs.iied.org/16590IIED

Wingqvist, G.Ö., & Quinn, S. (2021). *Democratic Republic of the Congo: Mining sector overview and mapping*. Sida's Helpdesk for Environment and Climate Change/Sida's Helpdesk for Democracy and Human Rights.

World Bank Group. (2018). *Democratic Republic of Congo Urbanization Review: Productive and Inclusive Cities for an Emerging Democratic Republic of Congo*. https://openknowledge.worldbank.org/bitstream/handle/10986/28931/9781464812033.pdf?sequence=2&isAllowed=y).

Yav Katshung, J. (2011, 12 January). *Mining Duties, Royalties and Taxes in the Democratic Republic of the Congo*. Conseil-Juridique.net. https://www.conseil-juridique.net/yav-associates-rdc/article/mining-duties-royalties-taxes-democratic-29-1737.htm

Acronyms and Abbreviations

3TGs: tin, tantalum, tungsten and gold

ACCI : Association Canadienne Contre l'Impunité

ACIDH: Action Contre l'Impunité pour les Droits de l'Homme

ASM: Artisanal and Small-Scale Mining

CAFI: Central Africa Forest Initiative

CFCLs: Concessions Forestières des Communautés Locales

CRMs: Critical Raw Materials

CSO: Civil Society Organisations

DRC: Democratic Republic of the Congo

EU: European Union

ESIA: Environmental and Social Impact Assessment

FPIC: Free, Prior and Informed Consent

HRDD: Human rights due diligence

ICCAs: Indigenous peoples and Community Conserved territories and Areas

IHRDA: Institute for Human Rights and Development in Africa

IWGIA: International Working Group for Indigenous Affairs

LoI: Letter of Intent

MFAs: Large-scale mines in forest areas

NCP: National Contact Point

NDC: National Determined Contribution

NGO: Non-Governmental Organisation

OEC: Observatory of Economic Complexity

OECD: Organisation for Economic Co-operation and Development

PAR : Plan d'Atténuation et de Réhabilitation

PGES : Plan de Gestion Environnemental et Social

PNAT : Politique National d'Aménagement du Territoire (National Land Use Policy)

RAID: Rights and Accountability in Development

REDD+: Reducing Emission from Deforestation and Forest Degradation

SAEMAPE : Service d'Assistance et d'Encadrement de l'Exploitation Minière à Petite échelle

SLAPP: Strategic Lawsuits Against Public Participation

UNGPs: UN Guiding Principles on Business and Human Rights

US: United States

ZEA: Zones d'Exploitation Artisanale

Maps, figures, table and boxes

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Forest Peoples Programme (FPP)
1c Fosseway Business Centre, Stratford Road, Moreton-in-Marsh,
GL56 9NQ, UK
Tel 00 44 1608 652 893
info@forestpeoples.org
www.forestpeoples.org