



Rights and Accountability in Development

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Principles without justice  
*The corporate takeover of human rights*

March 2016

# Principles without justice

## *The corporate takeover of human rights*

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## Executive summary

This report, *Principles without justice – the corporate takeover of human rights*, offers an in-depth critique of company complaints mechanisms as practised by two extractive industry companies Acacia Mining (formerly African Barrick Gold, ABG) operating in Tanzania and Glencore’s subsidiary, the Kamoto Copper Corporation (KCC), in the Democratic Republic of the Congo (DRC). Both companies have explicitly endorsed the UN Guiding Principles on Business and Human Rights (‘GPs’) and adhere to the Voluntary Principles on Security and Human Rights (‘VPs’), although only Glencore is a participant in the initiative. Acacia Mining claims adherence to the VPs by virtue of Barrick Gold (its majority shareholder) being a signatory and member of the Voluntary Principles Plenary.

The effectiveness of the approach promoted by the GPs and VPs is examined through the perspective of victims of human rights abuses and their quest or that of their families for an effective remedy:

- North Mara Gold Mine, Tanzania – There have been reports of a long series of killings by police and security forces at North Mara, dating back to 2005 or earlier.
- Violent death of Eric Mutombo Kasuyi, KCC mine site, Katanga, DRC - the young father died on 15 February 2014 after being apprehended by mine police and security patrol. According to the results of a post-mortem he died after being severely beaten.

An undoubted attraction of the GPs for many companies is that they are non-binding and there is no expert body to monitor their application. Redress – one of the central pillars for the GPs’ framework – is largely to be achieved through company and operational-level grievance mechanisms that are not subject to scrutiny or oversight.

In its analysis, RAID breaks down the GPs’ framework, by which companies demonstrate their respect for human rights, into four steps: endorse-assure-manage-remedy. The report also considers the effectiveness of the VPs under the same four steps, since efforts are on-going to fully align them with the GPs. RAID concludes that both sets of principles are a pragmatic solution for companies to consider and manage the human rights impact of their operations, but they do not necessarily offer a solution that brings fair settlement or justice to the victims of abuses.

### Step 1 – Endorse

All that is required is for a company to issue a policy statement endorsing respect for universal human rights. As RAID notes, endorsement of the GPs often occurs only after exposure in the media about human rights violations at company-controlled assets.

Extractive companies can also enhance their human rights credentials by joining the VPs, which deal with impacts arising from their security arrangements. But the mechanism is not equipped to make a determination on an applicant’s human rights record before admission.

Shootings and violations at the North Mara mine have continued despite Barrick Gold’s membership of the VPs. The death of Mutombo occurred after Glencore/KCC declared its commitment to the VPs (though just before its formal admission). The occurrence of human rights violations calls into question the relevance of the VPs or GPs to the situations at North Mara and KCC mine sites.

### Step 2 – Assure

Business groups opposed any oversight mechanism or regulatory body for the GPs. Monitoring of the implementation of the GPs within a particular business is therefore largely left to the companies themselves. The corporate responsibility to respect human rights requires human rights due diligence: companies need to assess their operations, so that they can offer assurance that they respect human rights. A troubling nexus,

criticised for its lack of independence, has therefore formed between companies and the organisations and consultancies responsible for advising them on human rights, who they hire to carry out human rights impact assessments on their behalf.

The VPs, which are voluntary and do not impose binding regulation directly on companies, include a main section on risk assessment and provisions on due diligence. Whilst there is a requirement for companies to report on their implementation of the VPs, these reports are produced by the companies themselves, remain confidential (unless a company decides to publish), and are not independently verified.

A human rights assessment of the North Mara mine was carried out by Avanzar, described by Barrick as ‘an independent consulting organization’. But the contractual relationship between Barrick and Avanzar is one of company to consultant, which is far removed from an independent monitoring of Barrick’s human rights record. Despite Avanzar’s claim that it does not compromise on its findings, its reports are internal to the company and held under legal privilege. It is of obvious benefit to Avanzar and Barrick to avoid concerns or threats arising from public disclosure, but it is not so clear how this approach necessarily benefits victims of abuse who depend upon wider public recognition of their plight, outside of a confidential reporting mechanism, to have even the slimmest hope of seeking meaningful redress.

The GPs and VPs therefore offer companies a way to manage human rights risks, thereby protecting their business reputation, insuring against claims, and managing problems to avoid their escalation. Ultimately, like any other risk management process, it is an approach which protects profits by reducing costs. However, it is difficult to see how ‘rights holders’ impacted by company operations can remain at the heart of the exercise. Rather, there is evidence to suggest that human rights impact assessments, due diligence and company-based grievance mechanisms are being used technically – perhaps cynically – to minimise risks without necessarily delivering positive change in the lives of affected individuals.

### Step 3 – Manage

The GPs recognise that primary responsibility for protecting human rights lies with the state. This acceptance creates a conundrum for business: how to operate in a country when the state fails to deliver this protection and, indeed, may violate human rights? Both the GPs and VPs, despite or perhaps because of their pragmatic approach, posit a simplified schema of private and public actors. The GPs distinguish between direct harm caused by a company and harm resulting from a relationship with others, including the state. The very structure of the VPs is founded on the distinction between public and private security.

The GPs and VPs introduce the concept of leverage, so a company can legitimise its continued presence in a recalcitrant state provided that it has used its influence with government to seek to further human rights. The principle of leverage is doubly useful. Firstly, should a situation arise in which violations arise out of a relationship between a company and the state, the notion that a company can exert leverage but cannot control the state is useful in distancing the company from the abuse. Hence Glencore, a company that endorses the GPs and VPs, believes that it is credible to state:

‘KCC has no control or jurisdiction over the DRC Mine Police, and cannot comment on their actions’.

Secondly, the GPs and VPs therefore implicitly recognise the limits of leverage, but never specify that a company should cease to do business in a particular country. Yet merely demonstrating an attempt to use leverage followed by a disclaimer of responsibility for the actions of law enforcement officials acting in the service of a private company is insufficient when the risk of human rights violations is foreseeable.

RAID has obtained a copy of the Memorandum of Understanding drawn up in July 2010 between ABG’s NMGML subsidiary and the Tanzanian police force. Whilst this is the kind of agreement recently endorsed by the VPs, its shortcomings are all too apparent when it comes to preventing human rights abuses. At the same time, its very existence undoubtedly helps protect the company by setting out the extent and limits to its influence over state security.

## Step 4 – Redress

The final element of the GP framework is the provision of redress to victims. The GPs, while recognising the problem of obstacles to judicial redress, including imbalances between the parties to business-related human rights claims, could have included provisions to further the removal of such barriers, as recommended by NGOs. Instead, the GPs concentrate on the non-judicial alternative of grievance mechanisms, to include operational-level grievance mechanisms run by the companies themselves.

Dealing with grievances in-house has many advantages for companies: they design and control the grievance mechanism; they or their appointed agents investigate the claim; they adjudicate on whether a claim is valid; they determine the type of remedy and – for example, when financial compensation is offered – the level at which it is set. Most importantly, companies access and control all information relating to a claim, from personal details about the victim, through to provisions of any final settlement, invariably bound up by confidentiality clauses that allow the company to decide what will be made public. The process is all too often less about achieving justice for victims and more about containment to minimise damage to a company's reputation.

It is difficult to conceive of any grievance mechanism under which redress for an alleged violation is considered without first there being an investigation of the claim and a determination of its validity. Yet the GPs do not distinguish between investigative, determinative and remedial phases inherent within any grievance mechanism. As a consequence of this, the GPs offer no guidance or prohibitions on how the former two phases are conducted. (The GPs do include generic 'effectiveness criteria' – that grievance mechanisms should be legitimate, accessible, predictable, equitable, rights-compatible, and transparent – but these were never formulated to govern investigations.)

Company-controlled grievance mechanisms are increasingly being used to manage redress, even when there are very serious allegations of human rights abuse, to the detriment of the formal legal process.

Parallel proceedings and company interventions by Glencore/KCC in the Mutombo investigation exemplify how the GPs legitimise such an in-house approach and how they offer no guidance as to when and how such interventions in official inquiries should be constrained or curtailed.

- KCC intervened in the process to determine the cause of death, disputing the results of a first post mortem and insisting that a second examination of Mr Mutombo's body be carried out.
- The company elected to direct its cooperation with the Congolese authorities to the Public Prosecutor, with whom senior KCC security staff had an existing relationship, only cooperating with the Military Prosecutor when company and private security personnel had already been exonerated.
- KCC's internal investigation was initiated before the Public Prosecutor or Military Prosecutor had concluded their respective investigations. When the Public Prosecutor cleared company and G4S staff, the KCC internal investigation came to the same conclusion on the very next day. Glencore has never published its internal investigation.
- After the acquittal of two mine policemen by a tribunal in Congo, no one has been held responsible for Mr Mutombo's death: his extensive, fatal injuries – according to the post mortem, as being consistent with having been beaten – are now attributed to 'a fall on uneven ground'.

Operational-level grievance mechanisms are presented by advocates of the GPs as offering two benefits: they nip grievances in the bud so that they do not escalate and they offer victims direct access to a low-cost and potentially quick remedy process close to company operations where people live.

Whilst grievance mechanisms have been promoted as overcoming barriers to accessing judicial redress, other controls – monopolising information, legal waivers, and confidentiality clauses – have been introduced. Instead of being blocked from accessing redress, victims are corralled and channelled through a redress mechanism of a company's own making, which is centrally devised and controlled.

- At its North Mara mine, ABG imposed legal waivers on victims – removing their rights to pursue other claims and participate in legal action or even to assist in criminal cases. The waivers were only retrospectively modified by the company after a barrage of criticism, when their existence emerged as a result of a case filed in the UK courts on behalf of locals killed or injured in security incidents at the North Mara mine.
- At Porgera mine in Papua New Guinea, victims of rape, sexual assault and violence, who participated in Barrick’s Remedy Framework, received a settlement worth only a quarter of that received by those who benefitted from independent legal representation in a claim brought outside of the company process.
- A similar pattern is emerging at North Mara, whereby victims represented by law firm Leigh Day have successfully concluded a settlement, whereas those within the company’s remediation programme claim their redress packages have been curtailed and support contracts ended early, leading to a protest and a two-day occupation of Acacia’s Community Relations Office in July 2015. Acacia denies any curtailment or the early ending of contracts, but there is clearly a dispute over what the protesters and Acacia believe settlement to have entailed, which needs to be resolved.
- Instances reported to RAID and MiningWatch Canada suggest that ABG investigators are given regular access to the medical records of victims of violence at the hands of mine police at North Mara. The investigators routinely question and photograph seriously injured people awaiting treatment in nearby hospitals and clinics, as well as their family members.

## Conclusion

The endorsement of the United Nations Guiding Principles on Business and Human Rights in June 2011 was an important milestone in the fight to ensure that rights are protected in context of business operations. The GPs provide a clear global framework, in which critical concepts such as the responsibility to respect and corporate human rights due diligence are embedded. But after almost five years since the adoption of the GPs, it is time to take stock of problematic ways in which they are being implemented. Formal compliance with the principles may mask actions that undermine the human rights of victims of serious violations.

The Voluntary Principles on Security and Human Rights too can help extractive companies maintain the safety and security of their operations within a functioning framework that encourages respect for human rights. However, the VPs’ assumption that public state security forces are solely responsible for human rights abuses not only exonerates a company from all responsibility but may also misrepresent the reality on the ground. Memoranda of Understanding (MoUs) around security can be viewed as allowing the relationship between the company and state security to continue in the face of repeated human rights violations.

The rhetoric of decentralised operational-level grievance mechanisms tailored to the needs of local communities is trumped by a reality in which companies exercise carefully prescribed, centralised, corporate oversight. In particular, in the absence of robust oversight, company involvement in the redress process can result not in remedy but in an additional violation of human rights.

The cases studies examined in RAID’s report demonstrate that there are significant omissions and gaps in the GPs and VPs which urgently need to be addressed in order to prevent their misuse and misapplication.

## Recommendations

### 1. Endorsement

Companies that claim to endorse or abide by the GPs must demonstrate their compliance by welcoming external scrutiny. The VPs must scrutinise and test applications, including ensuring that a company’s recent human rights record is not at odds with its stated action plan. By publishing the names of applicants and the timetable for admission, the VPs should invite comments from any interested NGOs, affected people, governments and other bodies on the application. A rationale for admission or refusal should be published in each case. Companies with a problematic record should be given probationary status until they can publicly demonstrate how their actions are improving compliance.

## *2. Human rights assessments*

- a) There needs to be much greater transparency and independent scrutiny of human rights impact assessments: these are of limited value if they are produced by consultants only for the internal consumption of the company in question.
- b) All fatalities and serious injuries at company facilities and mine sites, from whatever cause, should be immediately and publicly reported.
- c) To avoid an obvious conflict of interest, consultants and organisations that advise a company on human rights or provide training under the GPs or VPs should not also be involved in the monitoring or investigation of incidents.

## *3. Managing complicit relationships*

- a) The GPs and VPs should not be misused to encourage companies to enter into, or continue to operate in, unstable situations where their security is dependent on public law enforcement bodies which routinely perpetrate human rights violations and where the rule of law is weak.
- b) The concept of leverage needs to be clarified: a company should not be able to justify maintaining flawed security arrangements where excessive use of force by public law enforcement agents is prevalent and recurring and a culture of impunity prevails.
- c) MoUs and contractual arrangements with public and private security providers should be disclosed, including information on what steps a company will take in the face of breaches of the agreement.

## *4. Redress*

- a) Governments should make clear that operational-level grievance mechanisms are not an appropriate mechanism for dealing with cases of gross human rights violations, serious crimes such as torture, rape and killings, or for violations of international human rights or humanitarian law, which should be reported to the appropriate national competent authorities and international human rights bodies.
- b) Guidance is required to govern the nature and timing of company inquiries into human rights violations when the state or other legitimate authorities are also conducting investigations. Governments should ensure that companies' own investigations do not interfere with criminal investigations or bona fide human rights examinations. There is also a role for home governments to ensure that companies headquartered, listed or operating out of their countries are clear on the requirement to desist from interference.
- c) The GPs' failure to distinguish between investigative, determinative and remedial phases inherent within any grievance mechanism should be rectified.
- d) Further guidance is urgently needed to set standards governing how corporate officers, including a company's general counsel and legal department, should act when investigating, determining and remedying complaints of human rights violations. Limits must be established on the use of legal waivers, confidentiality clauses and the extension of legal privilege. The use of legal waivers should be avoided as part of any settlement reached in a non-judicial grievance process; the onus should be upon companies to set out a 'special case' for their use in specified circumstances; and then it must be unequivocally verified that claimants are able to access and receive independent and proper legal advice as part of an appropriately benchmarked, fair settlement and that the resulting waivers are narrowly defined.

## **Note about the report**

The report is based on RAID's collaborative field research in the DRC, carried out during 2013 and 2014 with the Swiss NGOs, Bread for All and the Swiss Catholic Lenten Fund) and in Tanzania with Mining Watch Canada. Interviews with over 100 victims were conducted in North Mara in June-July 2014 and October-November 2015. In March 2015, an outline of the full report was published and responses were sought from the companies, as well as from certain organisations and individuals referred to in the report, including



Professor John Ruggie. Full responses were received from Acacia Mining Plc, Barrick Gold Corporation and Avanzar; Glencore Plc has not responded. All of Acacia's responses (presumably its latest 7 March 2016 letter will be posted in due course) are available at: <<http://www.acaciaminging.com/sustainability/our-material-areas/community-relations/grievance-mechanism.aspx>>. Further details and links to the responses can be found in the current full report.

## Preface

An outline of the current full report was published in advance on 17 March 2015.<sup>1</sup> Two of the mining companies referred to in the report (Barrick Gold Corporation and Acacia Mining plc) responded at the time. Glencore plc has not responded. RAID's report considers aspects of the Guiding Principles on Business and Human Rights, and Professor John Ruggie (the former Special Representative) has issued a response, although there has been no feedback from the official UN Working Group on the issue of human rights and transnational corporations and other business enterprises. Links are given in the text to all public responses and RAID encourages the reader to consider these when reaching their conclusions on the issues discussed. Furthermore, prior to publication of the full report, RAID wrote to Glencore, Acacia, Professor Ruggie and the law firm Foley Hoag (which acts as the secretariat for the Voluntary Principles), highlighting supplementary material and inviting comment. Acacia responded on 7 March 2016: RAID has incorporated changes to the full report, as necessary. All of Acacia's responses (presumably its 7 March letter will be posted in due course) are available at: <<http://www.acciamining.com/sustainability/our-material-areas/community-relations/grievance-mechanism.aspx>>. At the time of publication, Glencore has not responded to RAID's further invitation to comment. Correspondence between RAID and both Professor Ruggie and Foley Hoag is reproduced in Annex 1 (with permission).

In their responses, Acacia Mining plc (formerly African Barrick Gold – ABG) and Barrick Gold Corporation asserted the independence of the two companies, albeit in an identically worded paragraph (which is a striking coincidence, given their stated independence).<sup>2</sup> RAID's rejoinder (in light of Barrick's continuing controlling interest in Acacia), highlighting statements from both companies that show their interdependence over time, is also publicly available (see also Annex 2 to the current report, *Barrick and Acacia: control, independence and human rights*).<sup>3</sup>

Acacia, despite stating that it is 'glad to provide further information related to our human rights assessments', has failed to respond to RAID's request to provide copies of these assessments, even in a summary form. Avanzar, the consultancy which carries out human rights assessments for both Barrick and Acacia has issued its own response to RAID's report.<sup>4</sup>

The detailed case material concerning ABG analysed in RAID's current report has been in the public domain for several months.<sup>5</sup> RAID and MiningWatch Canada put questions to ABG about its North Mara mine in Tanzania in February 2014, issuing a briefing in March 2014. RAID and MiningWatch Canada, working with local grass-roots organisations, visited the North Mara mine and surrounding communities in June/July 2014, and conducted interviews with victims of alleged human rights abuses. The resulting briefing, shared with the company, has already been the subject of an exchange between RAID and ABG (now Acacia).

Between late October and early November 2015, RAID and MiningWatch Canada undertook a second human rights fieldwork assessment around Acacia's North Mara mine. More than 50 interviews were conducted with victims of excessive use of violence by mine security and police. The results of the 2015 field visit have not been incorporated into the current report, but analysis already undertaken supports the findings that both security arrangements and the company remedy programme for victims of human rights abuse remain flawed

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<sup>1</sup> Available at: <<http://www.raid-uk.org/documents/principles-justice-summary-pdf>>.

<sup>2</sup> Barrick Gold Corporation Response to RAID "Executive Summary", 23 March 2015, opening paragraph, available at:

<<http://business-humanrights.org/sites/default/files/documents/Barrick%20Gold%20Corporation%20Response%20to%20RAID%20Executive%20Summary.pdf>>. See also Acacia Mining plc, response to RAID, March 2015, available at: <<http://business-humanrights.org/sites/default/files/documents/Acacia%20-%20Response%20to%20Raid%20-%20March%202015%20%282%29.pdf>>.

<sup>3</sup> RAID, Clarification sought from Barrick and Acacia, 27 March 2015, available at: <<http://business-humanrights.org/sites/default/files/documents/RAID%20Clarification%20Barrick%20%20Acacia%2027-03-15.pdf>>.

<sup>4</sup> Avanzar LLC, Letter to RAID, 25 March 2015, available at: <<http://business-humanrights.org/sites/default/files/documents/Response%20to%20RAID%20report%20March%2025%202015.pdf>>.

<sup>5</sup> This material is available on RAID's website, which also includes copies of responses received from ABG: <<http://www.raid-uk.org/content/african-barrick-gold-and-north-mara>>. Acacia (formerly ABG) has also posted its responses to RAID and MiningWatch Canada, as well as other documentation relating to the North Mara grievance process: <<http://www.acciamining.com/sustainability/our-material-areas/community-relations/grievance-mechanism.aspx>>.

and inadequate. RAID and MiningWatch have issued a press release on their findings and concerns, which have been raised with Acacia.<sup>6</sup> Acacia has posted a public response.<sup>7</sup>

Glencore has not made a substantive response to RAID's advance summary; it is stated on the Business and Human Rights website, which is hosting an exchange of views:<sup>8</sup> 'Glencore have indicated that they will respond to the full report when it is released.' In December 2014, after RAID and Bread for All and Fastenopfer jointly published *Up-date on the Report "PR or Progress? Glencore's Corporate Responsibility in the Democratic Republic of the Congo"*, which included reference to human rights issues at Glencore's Kamoto Copper Company (KCC) mine and to the same factual information reproduced in RAID's current report, Glencore stated: 'We looked into it [the update] and don't see the need to alter our position we issued back in June this year'.<sup>9</sup> Glencore's June statement is available on Glencore's website.<sup>10</sup> Glencore's statement was itself a response to a report by RAID et al. published earlier in June.<sup>11</sup> The joint NGO report was based upon field visits to Glencore's operations in the DRC, interviews with Congolese national and regional administrations, NGOs, and local residents, and meetings with Glencore at its headquarters in Switzerland. The findings of the report were discussed extensively with Glencore. RAID et al.'s dialogue and correspondence over, *inter alia*, human rights concerns at its Kamoto Copper Company (KCC) mine in the Democratic Republic of the Congo, was expressly handled by Glencore rather than by its subsidiary.<sup>12</sup>

John Ruggie, the former Special Representative on Business and Human Rights, and current special consultant to Barrick Gold Corporation, has also responded to RAID's summary report.<sup>13</sup> Many of the issues raised by Ruggie are already covered in the full report: on the ultimate negotiating power of business and concerns expressed by leading human rights NGOs about the final draft of the Guiding Principles, see p.10; the privatisation of human rights is dealt with throughout. RAID of course recognises, as do the Guiding Principles, the State's duty to protect human rights, including the provision of judicial remedy, but RAID's focus in the report is upon those unique aspects to the Guiding Principles, including the self-assessment of human rights impacts (pp.16 ff.) and private grievance mechanisms, which have been readily seized upon by companies (pp.43 ff.), skewing implementation of the Guiding Principles. For a critique of the 'effectiveness criteria' by which grievance mechanisms should operate, see pp.67 ff. Certain of these criteria could be used to deliver fairer redress for victims, but it must be recognised that other criteria were re-drafted – for example, to limit transparency – and their interpretation remains contested. Indeed, the question of 'authoritative' interpretation takes on added significance when the former Special Representative advises Barrick on human rights issues (p.19). The practice of attributing authorship of the Guiding Principles should not be dismissed lightly because companies, law firms, and consultancies are using such attribution to lend credence to their own interpretations.

The sources for the current report include company publications (including media releases, policy documents, human rights and corporate social responsibility reports), company correspondence, regulatory filings, memorandums, court documents and newspaper reports. Many of these have been published and others are in the public domain. The report includes comprehensive references for the documents consulted in its preparation. This RAID report and its executive summary should be read in conjunction with the underlying source documents.

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<sup>6</sup> More information on the fieldwork can be found at: <<http://www.raid-uk.org/content/african-barrick-gold-and-north-mara>> and <<http://www.miningwatch.ca/news/broken-bones-and-broken-promises-barrick-gold-fails-address-ongoing-violence-tanzania-mine>>.

<sup>7</sup> Available at: <<http://www.acamiining.com/~media/Files/A/Acacia/documents/Response%20to%20MWC%20and%20RAID%20Field%20Assessment%20Report%20-%20November%202015.pdf>>.

<sup>8</sup> <<http://business-humanrights.org/en/raid-calls-on-govts-to-rectify-serious-problems-in-un-guiding-principles-on-business-and-human-rights-voluntary-principles-on-security-and-human-rights#c121423>>.

<sup>9</sup> Glencore, e-mail to RAID, 2 December 2014. A copy of the update by Bread for All, the Swiss Catholic Lenten Fund and RAID is available at: <<http://www.raid-uk.org/sites/default/files/glencore-report-update.pdf>>.

<sup>10</sup> <<http://www.glencore.com/assets/media/doc/news/2014/201406170700-Response%20to%20BFA,%20RAID%20and%20Fastenopfer,%20June%202014.pdf>>

<sup>11</sup> *PR or Progress? Glencore's Corporate Responsibility in the Democratic Republic of the Congo*, available at: <<http://www.raid-uk.org/sites/default/files/glencore-report-June2014.pdf>>.

<sup>12</sup> Letter from RAID, Bread for All and Fastenopfer to Glencore, 19 March 2014.

<sup>13</sup> <<http://business-humanrights.org/sites/default/files/documents/Ruggie%20response%20to%20RAID.pdf>>

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“The Council’s endorsement establishes the Guiding Principles as the authoritative global reference point for business and human rights...”

*[John Ruggie, the United Nations Secretary-General’s Special Representative for Business and Human Rights]*

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### I. SUMMARY OF CLAIMS

1. These claims are bought by eleven Tanzanian nationals, for death or personal injury caused by the servants of the Defendants or members of the Tanzanian police force with whom the Defendants had entered into a security agreement, suffered between 2 July 2010 and 7 May 2012 in or around an open-pit gold mine occupied, controlled and operated by the Defendant at North Mara, Tanzania ("the mine"). Those persons who were injured are referred to by Claimant number. Those killed are identified as "Deceased [Claimant No.]".

*[Claim bought by law firm Leigh Day against Africa Barrick Gold (ABG) and its subsidiary, 28 March 2013, High Court of England and Wales]*

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“We are proud to be the first Canadian mining company to join the Voluntary Principles on Security and Human Rights”.

*[Aaron Regent, then Barrick Gold Corporation President and CEO].*

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Barrick has established a Corporate Social Responsibility (CSR) Advisory Board and named five distinguished individuals to serve as inaugural members.... John Ruggie, author of the U.N. Guiding Principles on Business and Human Rights, will serve as a Special Consultant to the Board....

*[Announcement, Barrick Gold Corporation, 2 March 2012]*

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Affected sites have taken measures to protect their employees, property and production facilities....Some sites have entered into arrangements with law enforcement agencies to provide policing and law and order in the areas surrounding the applicable site. Incidents of criminal activity, trespass, illegal mining, theft and vandalism have occasionally led to conflict with security personnel and/or police, which in some cases resulted in injuries and/or fatalities.

*[Barrick Gold Corporation, Regulatory Filing, March 2014]*

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A team, consisting of KCC employees, G4S contractors and Mine Police was dispatched to apprehend these [illegal] miners....The apprehension of Mr Mutombo was completed by a group consisting of two officers of the Mine Police. On his arrest, Mr Mutombo stated that he was unwell....KCC security team therefore drove him to the KCC hospital (as this was nearest to the location), where Mr Mutombo died.

*[GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014]*

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“And from the medical reports, the three...doctors clearly told the Court that the large bruise on the right side of the chest would have caused the death of the victim [Mutombo] within minutes on 15/02/2014. This is contrary to what the accused and KCC...wanted the Court to believe that the victim had sustained this injury before the date of the incident.”

*[Submission in the trial of two Military Policemen accused of the unintentional killing Eric Mutombo at Glencore’s KCC mine]*

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This policy is developed in accordance with...the United Nations (UN) Guiding Principles on Business and Human Rights.

*[Glencore, Human Rights Policy]*

## Introduction

The purpose of this report is to explore the ways in which these eight opening texts are linked and, by so doing, to critique the growing nexus between companies and recent human rights standards and codes: in order to apply human rights to the private sector, human rights are themselves being privatised. The ultimate consequence of this is to treat human rights as a risk to be managed in a total approach that begins with business-endorsed standards, encompasses human rights impact assessments to assure on compliance, and ends with redress and grievance mechanisms, all under private control. This trajectory from the normative standards – which include just enough detail on how they are to be implemented – to a company’s containment of human rights violations varies from one situation to another, but, for simplicity, is presented here as four steps: endorse, assess and assure, manage, and redress:

- **Endorse** the standards;
- **Assure** by undertaking human rights risk assessments;
- **Manage** complicit relationships by demonstrating an attempt to exert influence to further human rights (as prescribed in the standards), but then fall back upon the limits to influence to distance the company from abuses blamed on state security.
- **Redress** complaints through in-house investigations and grievance mechanisms to control and close-down the remnants of allegations, keeping the results and any agreements confidential and away from public scrutiny.

The critique that follows considers the deployment of key business-orientated human rights instruments. The widely accepted standard that dominates the sector is the UN Guiding Principles on Business and Human Rights (GPs), endorsed by the United Nations Human Rights Council in June 2011. A particular focus within the report is upon addressing human rights violations that arise from the security arrangements put in place by mining companies. This leads to consideration of the Voluntary Principles on Security and Human Rights (VPs).

## The Guiding Principles

The Special Representative summarises the context in which his mandate arose.<sup>14</sup> In the 1990s, it was increasingly recognised that the continued global impact of private companies on people’s lives required a consideration of business and human rights. A UN expert body drew up the Norms on Transnational Corporations and Other Business Enterprises, which sought to impose on companies, directly under international law, the same duties that States have accepted under human rights treaties.<sup>15</sup> The Norms ‘triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments.’<sup>16</sup> The rejection of the Norms by business meant their inevitable rejection by governments. The UN’s Commission on Human Rights never endorsed the Norms, but instead established a mandate for a Special Representative “on the issue of human rights and transnational corporations and other business enterprises” to undertake a new process.<sup>17</sup>

This new process led to the development of a framework by the Special Representative of the Secretary-General for Business and Human Rights. Within this framework,

- States have a duty to **protect** against human rights abuses by third parties, including business;
- business enterprises have a responsibility to **respect** human rights, which means to act with due diligence to avoid infringing on the rights of others, and to address adverse impacts that occur;
- and the requirement of greater access for victims to effective **remedy** is recognised.

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<sup>14</sup> General Assembly, United Nations, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Human Rights Council, Seventeenth session, 21 March 2011, A/HRC/17/31, paragraphs 1- 3.

<sup>15</sup> Ibid., paragraph 2.

<sup>16</sup> Ibid., paragraph 3.

<sup>17</sup> Ibid.

The GPs constitute guidance to ground and implement the protect-respect-remedy framework. Important elements in operationalising the foundational principles include, *inter alia*:

- the general regulatory and policy means by which States should foster business enterprises’ respect for human rights;
- for business enterprises, a human rights due diligence process (including dealing with third parties, such as contractors and state security) for assessing actual and potential human rights impacts and acting upon the findings;
- and ensuring greater access to effective remedy, both judicial and non-judicial. Redress includes guidance to companies on providing their own grievance mechanisms for those whose human rights have been adversely affected by their operations.

Not only do the GPs lack a mechanism to enforce compliance, they lack any independent body to even monitor compliance. If this were simply the case – that the GPs had no mechanism for their implementation – then they could be more easily dismissed by their critics.

The GPs do, of course, recognise the duty of the state to protect human rights and this means: ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’ The state’s duty to protect is inherent in underlying treaties and ‘[n]othing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.’

What is different, however, is that key elements of the GPs are to be monitored and implemented *by the companies themselves*. Notwithstanding state or multi-stakeholder involvement in operationalising the GPs, it is company-led due diligence/assessment and company grievance mechanisms that have attracted significant attention and are the focus of RAID’s critique. The inclusion of a company-centred approach is the pragmatic solution in the face of opposition to any regulatory body and is perhaps the reason why so many companies are keen to endorse the GPs. There has also been a fine-tuning of implementation by companies for companies, such as the piloting of operation-level grievance mechanisms (below, *intra*, p.68).

## The Voluntary Principles

The VPs grew out of recognition that ‘the extractive sector often operates in countries or areas of elevated security risk.’<sup>18</sup> Whereas the GPs encompass the full range of human rights that companies across all sectors can impact, the VPs focus upon impacts arising from security arrangements at the operations of extractive and energy companies. They are ‘designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights.’ The VPs, formulated by a group of businesses, certain NGOs, and governments (the three ‘pillars’ that make up the initiative) in 2000, provide guidance in key areas:

- the use of security risk assessments that consider the potential for violence and the human rights records of public and private security forces;
- and principles for interactions with public and private security, which include, *inter alia*, consultation with local communities, communication of company human rights policies, and principles on deployment, conduct, the reporting of alleged abuses and the investigation of such incidents.

Whilst the VPs pre-date the GPs, given the latter’s over-arching status, increasingly there are calls to fully align the VPs with the GPs.<sup>19</sup> The recently adopted vision for the VPs states: ‘The U.N. Guiding Principles on

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<sup>18</sup><http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>.

<sup>19</sup> See Alexandra Guáqueta, Chair of the UN Working Group on Business and Human Rights, ‘Keynote remarks’, Voluntary Principles on Security and Human Rights annual plenary, Montreux, Switzerland, 26 March 2014: ‘It is important to fully align the Voluntary Principles with the UN Guiding Principles on Human Rights, which are the global authoritative reference on how to manage and address business-related adverse impacts on human rights.’ Available at: <http://www.voluntaryprinciples.org/wp-content/uploads/2014/04/Guaqueta-VPs-talk-March-2014-FINAL.pdf>.

Business and Human Rights provide a commonly accepted framework of normative principles and policy guidance, which informs the implementation and development of the Voluntary Principles Initiative.<sup>20</sup>

The VPs have elements in common with the GPs:

- they are voluntary and do not impose binding regulation directly on companies;
- the VPs cannot be enforced, although a company can – theoretically at least – be expelled from the initiative; and companies should undertake human rights risk assessments.
- Whilst there is a requirement for companies (and other participants) to report on their implementation of the VPs (see *intra*, p.26), these reports are produced by the companies themselves, remain confidential (unless a company decides to publish) and are not independently verified.
- Participants also agree to respond to reasonable requests for information on implementation of the VPs from other participants and accept a dispute resolution process should other participants raise concerns about their performance (for a critique of this mechanism, see *intra*, p.72). However, this process differs from a grievance mechanism in that it is not open directly to victims of human rights abuse and it is not concerned with redress.

The VPs are administered by a secretariat, but decisions are made by the Plenary, the body which comprises all Participants (companies, NGOs and governments) in the initiative.<sup>21</sup> Generally, the Plenary meets annually. A smaller Steering Committee (made up of Participants from each of the three Pillars) conducts the main business of the VP initiative.<sup>22</sup>

## The case studies

When the GPs were being endorsed at the UN, prominent human rights organisations, including RAID, made the criticism that the Special Representative’s mandate ‘lacked the standard function of other UN Special Procedures to receive information relating to specific-instances and conduct country visits.’<sup>23</sup> The NGOs advocated an assessment of the GPs in practice, ‘with regard to actual situations and cases, in order to identify relevant issues, inform future action and take into consideration the perspectives and experiences of victims of human rights abuse.’

Throughout this report, reference is made to cases in which RAID, in conjunction with partner organisations, has sought to support the victims of human rights violations linked to the operations of mining companies.

The opening quotes include references to instances in the Democratic Republic of Congo (DRC) and Tanzania and the companies concerned: respectively, the Swiss-based and London-listed natural resources company, Glencore plc and its Congolese subsidiaries; and Acacia Mining plc (‘Acacia’, formerly African Barrick Gold hereinafter (‘ABG’)), operating in Tanzania, in which the Canadian transnational, Barrick Gold Corporation (‘Barrick’), has a majority holding. This core research is supplemented by material from other cases to illustrate a particular point, as appropriate.

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<sup>20</sup> *Voluntary Principles Strategy 2014-2016*, p.1, available at: <[http://www.voluntaryprinciples.org/wp-content/uploads/2014/05/Voluntary\\_Principles\\_Strategy\\_-\\_2014-2016.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2014/05/Voluntary_Principles_Strategy_-_2014-2016.pdf)>.

<sup>21</sup> The Initiative of the Voluntary Principles on Security and Human Rights, Governance Rules, Section III. Governance of the Voluntary Principles Initiative, Paragraph 2.

<sup>22</sup> *Ibid.*, Paragraph 4.

<sup>23</sup> Joint Civil Society Statement to the 17th Session of the Human Rights Council, signed by Amnesty International, ESCR-Net, Human Rights Watch, International Commission of Jurists, FIDH (International Federation for Human Rights), and RAID, available at: <<http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council>>.

## *The companies: Glencore, Barrick and African Barrick Gold(ABG)*

### **Glencore**

Glencore plc remains one of the world's largest natural resources companies, despite a recent crash in global commodity prices. Glencore had a market capitalisation of £44 billion at the end of 2014 and revenue of £141 billion in 2013.<sup>24</sup> However, by October 2015, the company's market capitalisation had fallen to £17 billion.<sup>25</sup> Glencore is headquartered in Baar, Switzerland, registered in Jersey, and is traded on the London Stock Exchange's main market, with secondary listings on the Stock Exchange of Hong Kong and on the Johannesburg Stock Exchange.<sup>26</sup> Glencore has over 150 operations across the globe.

In the DRC, Glencore has majority holdings in Katanga Mining Limited (and the latter's Kamoto Copper Company SARL (KCC) subsidiary) and Mutanda Mining SARL (MUMI), mines which contributed significantly to Glencore's copper and cobalt production.<sup>27</sup> However, in September 2015, copper and cobalt operations at Katanga Mining were suspended as part of measures by Glencore to reduce its debt as commodity prices slumped.<sup>28</sup>

### **ABG (now Acacia) and Barrick**

Barrick Gold Corporation ('Barrick') describes itself as 'the world's leading gold producer', with a market capitalisation of over US\$20.5 billion and revenue of US\$12.5 billion in 2013.<sup>29</sup> By the end of 2014, revenue had fallen to US\$10.2 billion, with the company committing to a \$3 billion debt reduction programme in 2015.<sup>30</sup> Adverse market conditions have caused a fall in the company's share price, with a reduced market capitalisation of US\$9.5 billion in October 2015.<sup>31</sup> Barrick is headquartered and registered in Toronto, Canada, and traded on the New York Stock Exchange and the Toronto Stock Exchange.<sup>32</sup>

The UK-registered and London-listed company African Barrick Gold plc ('ABG') indirectly owns the North Mara gold mine in Tanzania, via its wholly owned subsidiary, North Mara Gold Mine Ltd.<sup>33</sup> Barrick acquired North Mara in 2006.<sup>34</sup>

<sup>24</sup> Figures from London Stock Exchange, <<http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/summary/company-summary.html?fourWayKey=JE00B4T3BW64JEGBXSET0>>, visited 26/11/2014.

<sup>25</sup> Figures from London Stock Exchange, <<http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/summary/company-summary/JE00B4T3BW64JEGBXSET0.html>>, visited 14/10/2015.

<sup>26</sup> <<http://www.glencore.com/investors/shareholder-centre/shareholder-faqs/>>.

<sup>27</sup> Glencore owns 75.2% of Katanga, which in turn owns 75% of Kamoto Copper Company SARL ('KCC'). KCC owns the material assets, including the mining and exploration rights related to the mining assets. State-owned La Générale des Carrières et des Mines and La Société Immobilière du Congo owns the other 25% of KCC (see GlencoreXstrata, Resources and Reserves as at 31 December 2013, p.7, <[http://www.glencore.com/assets/investors/doc/reports\\_and\\_results/2013/GLEN-2013-Resources-Reserves-Report.pdf](http://www.glencore.com/assets/investors/doc/reports_and_results/2013/GLEN-2013-Resources-Reserves-Report.pdf)>). In December 2013, Glencore increased its indirect equity interest in Mutanda to 69 per cent. The remaining equity in Mutanda is held 31 per cent. by a subsidiary of Fleurette Properties Limited (GlencoreXstrata, RNS 9113V, 19 December 2014, 'Increase in indirect equity interest in Mutanda', <<http://otp.investis.com/clients/uk/glencore1/rns/regulatory-story.aspx?cid=275&newsid=382435>>).

<sup>28</sup> Glencore, Press Release, 'Update on Glencore's plans to reduce net debt and adapt the business to the current commodity landscape', 7 September 2015, <<http://www.glencore.com/assets/media/doc/news/2015/201509070800-Update-on-Glencore-plans-to-reduce-net-debt-and-adapt-the-business-to-the-current-commodity-landscape.pdf>>. See also Katanga Mining Limited, Press Release, 'Katanga Mining Announces Suspension of Copper and Cobalt Processing', 11 September 2015, <<http://www.katangamining.com/media/news-releases/2015/2015-09-11.aspx>>; Glencore, Press Release, 'Update on Katanga', 14 September 2015, <<http://www.glencore.com/assets/media/doc/news/2015/201509141100-Katanga-update-14.9.15.pdf>>.

<sup>29</sup> See <<http://www.barrick.com/company/default.aspx>>. At the end of 2013, Barrick had 1,165 million outstanding common shares at a closing price on 31 December 2013 of US\$17.63, giving a market capitalisation of US\$20.5 billion. See Barrick, Annual Report 2013, Shareholder Information, p.158. Revenue figures are given on p.18.

<sup>30</sup> Barrick, Annual Report 2014, respectively, p.21 and p.17.

<sup>31</sup> <<https://www.nyse.com/quote/XNYS:ABX/company>>, visited 15/10/2015.

<sup>32</sup> The Company's head and registered office is located at Brookfield Place, TD Canada Trust Tower, 161 Bay Street, Suite 3700, Toronto, Ontario, M5J 2S1.

<sup>33</sup> NMGML is incorporated in Tanzania and is a 100% owned subsidiary of ABG. See African Barrick Gold, Annual Report 2013, p. 103, available at: <<http://www.acaciainvesting.com/~media/Files/A/Acacia/reports/2014/abg-annual-report-final-2013.pdf>>. According to Barrick's annual filing to the New York Stock Exchange, Barrick Gold Corporation's (Ontario) ownership of African Barrick Gold plc (United Kingdom) is: 43.8% via BGC Holdings Ltd. (Cayman Islands), Barrick Holdings International Ltd. (Cayman Islands) and ultimately via Barrick International (Barbados) Corp. (Barbados); 11.03% via PDG Sona (Cayman) Limited (Cayman Islands) and; 9.11% via PDG Aurora LLC (Cayman Islands), PDG France (Cayman) LLC (Cayman Islands), PDG France SRL (Barbados) and ultimately via PDG Bank Limited (Barbados). ABG ultimately owns the North Mara Mine via North Mara Gold Mine Limited (Tanzania), East African Gold Mines limited (Australian Capital Territory) and BUK HoldCo Limited (United Kingdom). See Barrick Gold Corp, Form 40-F (Annual Report (foreign private issuer)), filed 31 March 2014 for the period ending 31 December 2013, organogram p.19, available via the SEC's EDGAR filings service: <<https://www.sec.gov/Archives/edgar/data/756894/000119312514123835/d693534dex991.htm>>.



ABG was ‘spun-off’ from Barrick in March 2010, although the latter retained a majority interest.<sup>35</sup> In its 2013 annual report, ABG is described as a ‘subsidiary, publicly traded’, at a time when Barrick held a 73.9% interest.<sup>36</sup> Barrick has since reduced its shareholding in ABG to 63.9%.<sup>37</sup> ABG changed its name to Acacia Mining plc in late 2014.<sup>38</sup> As recently as February 2015, Barrick states:<sup>39</sup> ‘Subsequent to the divestment [in Acacia], we continue to retain a controlling interest in Acacia and continue to consolidate Acacia.’ Barrick continues to use the term ‘affiliate’ in relation to ABG (now Acacia).<sup>40</sup> Acacia (formerly ABG) is also described as a ‘subsidiary, publicly traded’ of Barrick.<sup>41</sup> Whilst the change of name to Acacia means that ‘Barrick’ has been dropped from the company’s title, the underlying majority holding of Barrick in Acacia remains unaltered, i.e., Barrick retains exactly the same holding in Acacia as it did in ABG immediately prior to the name change.

*ABG and North Mara Gold Mine, Tanzania* – There have been reports of ‘a long series of killings by police and security forces at North Mara, dating back to 2005 or earlier’.<sup>42</sup> From December 2008 to January 2014, police at North Mara have used lethal force against local people at or in close proximity to the mine site, resulting in at least 16 deaths.<sup>43</sup> Over the same period, at least 11 others have been shot by police and injured.<sup>44</sup> ABG itself refers to a December 2008 incident at North Mara when ‘[o]ne man, who was part of the group of invaders, was shot by police and fatally injured’.<sup>45</sup> The company also notes ‘additional incidents since 2008 involving trespassers...leading to conflict with security personnel and/or police, which have in some cases resulted in injuries and/or fatalities.’<sup>46</sup> Both Barrick and ABG have attributed the shootings to the actions of the police in dealing with incursions.<sup>47</sup>

The summary of claims cited at the beginning of this report concern the proceedings brought by Tanzanian villagers represented by UK-based law firm Leigh Day against ABG and its 100% subsidiary, North Mara Gold Mine Limited (NMGML) on 28 March 2013 in the High Court of England and Wales.<sup>48</sup> The claim was that ‘the companies are liable for the deaths and injuries of local villagers, including through complicity in the killing of at least six local villagers by police at the North Mara mine in Tanzania.’<sup>49</sup> The claimants included

<sup>34</sup> African Barrick Gold, Prospectus, 19 March 2010, p.43, available at:

<<http://www.acaciamining.com/~media/Files/A/Acacia/reports/2010/abg-prospectus.pdf>>.

<sup>35</sup> Barrick Gold Corporation, Press Release, ‘Barrick Announces Pricing of African Barrick Gold plc Initial Public Offering’, 19 March 2010, available at: <<http://www.barrick.com/investors/news/news-details/2010/BarrickAnnouncesPricingofAfricanBarrickGoldplcInitialPublicOffering1121668/default.aspx>>. See also ABG Prospectus, op. cit.

<sup>36</sup> Annual Report 2013, op. cit., p.81.

<sup>37</sup> See African Barrick Gold plc, ‘Completion of Placing by Barrick Gold Corporation’, 11 March 2014, available at:

<<http://www.acaciamining.com/~media/Files/A/Acacia/press-release/2014/completion-of-placing-by-barrick-gold-corporation.pdf>>;

Also Barrick Gold Corporation, Press Release, ‘Barrick Completes Partial Divestment of African Barrick Gold plc Holding’, 11 March 2014, available at: <<http://www.barrick.com/files/press-release/2014/Barrick-Completes-Partial-Divestment-of-African-Barrick-Gold-plc-Holding.pdf>>.

<sup>38</sup> Acacia Mining plc (formerly African Barrick Gold plc), News Release, 27 November 2014, Change of Name and Investor Day, available at: <[http://otp.investis.com/clients/uk/acacia\\_mining/rns/regulatory-story.aspx?cid=286&newsid=459267](http://otp.investis.com/clients/uk/acacia_mining/rns/regulatory-story.aspx?cid=286&newsid=459267)>.

<sup>39</sup> Barrick Gold Corporation, Form 6-K, Filed 02/20/15 for the Period Ending 02/20/15, 4> Divestitures, C) Disposition of 10 percent interest in Acacia, p.124.

<sup>40</sup> For example, the term affiliate, applied to ABG, is used in: Barrick Gold Corporation, Conflict-Free Gold Report for Barrick Gold Corporation, April 2014, available at: <<http://www.barrick.com/files/reporting/Conflict-Free-Gold-Report-April2014.pdf>> and ; Report Boundary and Limitations, <<http://barrickresponsibility.com/2013-performance/about-barrick/>>. (Both pages were visited on 26/03/2015).

<sup>41</sup> Form 6-K, 02/20/2015, op. cit., table, p.110. See also Barrick, Annual Report 2013, op. cit., p.81, on the depiction of ABG.

<sup>42</sup> Geoffrey York, ‘Barrick’s Tanzanian project tests ethical mining policies’, *The Globe and Mail*, 29 September 2011, available at:

<<http://www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article559188/?page=all>>.

<sup>43</sup> RAID, London Mining Network, MiningWatch Canada, and CORE, African Barrick Gold plc: A pattern of abuse: Human Rights at Risk at the North Mara Mine, Tanzania, April 2014, available at: <<http://www.raid-uk.org/sites/default/files/abg-abuse.pdf>>.

<sup>44</sup> Ibid. One of those injured was hit by a tear gas bomb, the others were all hit by bullets. One of the injured was left paralysed.

<sup>45</sup> ABG Prospectus, op. cit., p.15.

<sup>46</sup> Ibid.

<sup>47</sup> See, for example, ABG Prospectus, op. cit., Security, p. 73. See also, for example, Barrick, 7 June 2011, ‘Response to Article on North Mara Mine, Tanzania’, available at: <<http://business-humanrights.org/sites/default/files/media/documents/barrick-response-re-sakura-saunders-7-jun-2011.pdf>> and; African Barrick Gold plc, ‘Update on North Mara’, 30 May 2011, available at: <<http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2011/North-Mara-update-final-30511.pdf>>.

<sup>48</sup> Magige Ghati Kesabo and 13 others v African Barrick Gold Plc, North Mara Gold Mine Ltd, Case No: HQ13X02118, High Court of Justice Queen’s Bench Division, 28 March 2013. The 13 other claimants subsequently reduced to 11.

<sup>49</sup> Leigh Day, ‘Tanzanian villagers sue London-based African Barrick Gold for deaths and injuries’, 30 July 2013, available at:

<<http://www.leighday.co.uk/News/2013/July-2013/Tanzanian-villagers-sue-London-based-African-Barri>> (visited prior to out-of-court settlement of the claim; web page now taken down).

the relatives of six men who were killed at the mine-site and one man who has been left paraplegic.<sup>50</sup> The deaths and injuries were all suffered between 2 July 2010 and 7 May 2012, to include an incident on 16 May 2011 when five of the deceased in the claim were killed (hereinafter, the ‘May 2011 shootings’).

When the claim was filed, ABG stated:<sup>51</sup> ‘ABG believes that these proceedings are without merit, and intends to vigorously defend its interests.’ ABG also stated: ‘we will not compensate illegitimate claims or lawsuits’.<sup>52</sup> The company has since settled the claim out of court, although it has not commented publicly on the settlement nor released any details about its nature or magnitude.<sup>53</sup>

### *The May 2011 shootings*

In May 2011, operations by ABG’s North Mara Gold Mine Limited (NMGML) to enlarge pits at North Mara caused gold-rich rock to be deposited. This rock attracted the attention of prospectors. The company requested the deployment of Tanzanian police to the mine.<sup>54</sup>

According to the claim against ABG and NMGML, on days immediately preceding the 16 May incident, the police allowed prospectors to enter onto the mine site to gather rocks, sometimes in return for payment.<sup>55</sup> However, the police also fired at prospectors or into the air and asked prospectors to leave the site. On 16 May, a large number of prospectors entered the mine site, some after making payments to the police, whilst others were allowed to enter without payment;<sup>56</sup> the police then sought to evict the prospectors from the mine site.<sup>57</sup> In the ensuing confrontation, the police advanced upon prospectors and opened fire.<sup>58</sup>

Both ABG and Barrick stated:<sup>59</sup>

On May 16, a large group of intruders, many of them armed with machetes, stones and mining implements, stormed the ore stockpile at North Mara, with the intent of stealing ore. Initial reports put this number at 800, but following further reviews, the number is likely to have been more than 1,500. Given the extremely large number of aggressive intruders and the escalating threat of violence, ABG contacted the Tanzanian police for protection. Faced with over a thousand armed intruders, the mine’s main duty was to ensure the safety of its employees.

The Tanzanian police report that upon arriving at the scene, they tried to contain the situation. Police fired warning shots into the air and used tear gas to try to stop the attackers from advancing; however, the organized mob of armed intruders refused to turn back. A violent confrontation ensued as the intruders engaged in a sustained attack on police. A number of intruders were injured in the confrontation, several fatally. The police have also reported that five intruders were killed and a number of their officers were injured in the confrontation.

In respect of the May 2011 shootings, ABG stated: ‘ABG security was not involved in these fatal incidents and, generally, does not deal with incursions of this magnitude and level of organization.’<sup>60</sup> However, submissions made in

<sup>50</sup> Ibid. See also Leigh Day, International Claims, Tanzania, Case against African Barrick Gold, available at: <<http://www.leighday.co.uk/International-and-group-claims/Tanzania>> (visited prior to out-of-court settlement of the claim; web page now revised).

<sup>51</sup> ABG, ‘Statement Regarding Legal Claim’, 30 July 2013, available at: <<http://www.acaciamining.com/media/press-releases/2013/a2013-07-30.aspx>> (visited prior to out-of-court settlement of the claim; web page now taken down).

<sup>52</sup> The Observer, 19 July 2014, ‘Killings at UK-owned Tanzanian gold mine alarm MPs’, available at: <<http://www.theguardian.com/world/2014/jul/19/killings-uk-owned-gold-mine-tanzania-concern>>.

<sup>53</sup> Leigh Day has stated: ‘In 2013, a number of Tanzanian claimants represented by Leigh Day initiated proceedings against African Barrick Gold plc (now Acacia Mining plc) and its subsidiary, North Mara Gold Mine Limited (NMGML), in the English Courts in relation to injuries and fatalities at the North Mara mine. The claims were denied by Acacia Mining and NMGML. The litigation and further claims have been settled out of court.’ See <<http://www.leighday.co.uk/International-and-group-claims/Tanzania>>. See also, Reuters, 6 February 2015, ‘Acacia settles with Tanzanian villagers over mine fatalities’, available at: <<http://uk.reuters.com/article/2015/02/06/uk-acacia-settlement-idUKKBN0LA23D20150206>>

<sup>54</sup> Magige Ghati Kesabo and 13 others v African Barrick Gold Plc, North Mara Gold Mine Ltd, op. cit., Particulars of claim, paragraphs 83 – 84.

<sup>55</sup> Ibid., paragraphs 88, 91 – 92.

<sup>56</sup> Ibid., paragraphs 93 and 95.

<sup>57</sup> Ibid., paragraphs 98 ff.

<sup>58</sup> Ibid., paragraph 106.

<sup>59</sup> Both ABG and Barrick issued press releases, with these paragraphs in common. See Barrick, ‘Recent Police Action at North Mara, Tanzania’, <<http://www.barrick.com/investors/news/news-details/2011/Recent-Police-Action-at-North-Mara-Tanzania/>>; ABG, ‘Update on North Mara’, 30 May 2011, op. cit.

<sup>60</sup> ABG, ‘Update on North Mara’, 30 May 2011, op. cit.

court refer to video footage showing that ABG personnel were present and observed events in May and July 2011 as these unfolded.<sup>61</sup> According to Acacia, ‘the confrontation [on 16 May 2011] was between the trespassers and the Tanzanian Police. At no stage did Acacia or NMGML exercise or seek to exercise any control or direction over the Tanzanian Police or their operations. The decisions as to how and when to use force in response to the substantial threat posed by the aggressive mob of trespassers were made by the Tanzanian Police. The CCTV footage is entirely supportive of the above description.’<sup>62</sup>

In June/July 2014, RAID and MiningWatch Canada interviewed more than 30 victims of alleged abuses and their family members at North Mara.<sup>63</sup> Most of the victims had been shot by police or assaulted by the mine’s own security guards within the last five years. During the visit, MiningWatch Canada and RAID also had meetings with ABG staff at the mine and with its NGO partner, Search for Common Ground.

In addition, based on data collected from health staff in local medical facilities, over the two month period immediately preceding the NGOs’ visit, at least ten victims allegedly died from fatal gunshot wounds at the mine.<sup>64</sup> ABG issued a statement in February 2015:<sup>65</sup> ‘We also strongly dispute the allegations in relation to the number of fatalities in the period referenced by MWC [Mining Watch Canada] and RAID.’

RAID does not condone violence or the threat of violence by any party, whether armed police, security personnel or other persons, including prospectors.

*The death of Eric Mutombo at the KCC mine site, Katanga, DRC* – Another opening quote in RAID’s current report refers to the death of Eric Mutombo Kasuyi, who, on 15 February 2014, took a short cut across the KCC concession on his way home.<sup>66</sup> He and a friend, John Kawel Kabulo, had been to another mining concession to seek work. The young men were intercepted by a KCC security patrol in a jeep, which was responding to an incursion onto the site by a group of artisanal miners. Mutombo and his friend were chased by the guards and police in riot gear. They ran in different directions, trying to find a place to hide. John Kabulo hid in a pool of stagnant water, but was caught by police and two G4S contractors (who provide a portion of the security services at the mine). He alleged that a policeman, accompanied by G4S contractors, beat him with the butt of a gun.<sup>67</sup> He managed to escape. However, Mutombo, a 23-year old father of two young children, was apprehended.<sup>68</sup> Available information, including post mortem examinations and court testimony, indicates that Mutombo Kasuyi died on the KCC site after being severely beaten.<sup>69</sup> Despite the post mortem results and medical testimony, a military tribunal concluded on 29 August 2014 that ‘his death was unquestionably due to a fall on uneven ground arising from [his] reckless running away in his fear to escape arrest by the security agents’.<sup>70</sup>

KCC’s parent company, Glencore, maintains that Mutombo was apprehended by a sub-team of two mine policemen operating in a KCC Security Team – part of the DRC police force over which Glencore says it has no control – and that ‘KCC and G4S staff operated in line with company policies and did not infringe human

<sup>61</sup> As part of pre-action disclosure, Leigh Day received 5 hours of CCTV footage recording the incidents on 16 May and 14 July 2011 at the North Mara mine site. See Magige Ghati Kesabo and 11 others v African Barrick Gold Plc, North Mara Gold Mine Ltd, Case No: HQ13X02118, High Court of Justice Queen’s Bench Division, 23 October 2013, [2013] EWHC 3198 (QB), 2013 WL 5338256, paragraphs 36 and 59. See also Particulars of Claim, describing police shooting prospectors at North Mara mine on 16 May 2011, paragraph 116: ‘The Mine manager and other Mine employees remained present throughout these event [police action against prospectors]...’

<sup>62</sup> Acacia Mining plc, letter to RAID, 7 March 2016.

<sup>63</sup> RAID and MiningWatch Canada, ‘Violence Ongoing at Barrick Mine in Tanzania: MiningWatch Canada and RAID (UK) Complete Human Rights Assessment’, 5 August 2014, available at: <<http://www.raid-uk.org/sites/default/files/pr-barrick-mara-violence.pdf>>.

<sup>64</sup> Ibid.

<sup>65</sup> Acacia Mining’s (formerly African Barrick Gold) response regarding allegations on its grievance mechanism in Tanzania, 12 January 2015, available at: <[http://business-humanrights.org/sites/default/files/documents/Acacia%20Mining%20re%20Tanzania%20Grievance%20Mechanism\\_0.docx](http://business-humanrights.org/sites/default/files/documents/Acacia%20Mining%20re%20Tanzania%20Grievance%20Mechanism_0.docx)> .

<sup>66</sup> Bread for All, Fastenopfer and RAID, PR or Progress? Glencore’s Corporate Responsibility in the Democratic Republic of the Congo, 4.2.2. The death of Eric Mutombo Kasuyi, pp. 53 ff., June 2014.

<sup>67</sup> Ibid., p.53.

<sup>68</sup> Ibid.

<sup>69</sup> *Intra*, fn 351.

<sup>70</sup> *Jugement*, Case RP 521/14, *Affaire Ministère Public contre les prévenus Mujinga Tshimboji et Makombo Mudianga*, Tribunal Militaire de Garnison de Kolwezi et Lualaba, 29 August 2014, p.12: son décès est du sans conteste a une chute dans un endroit accidenté du fait qu’il s’est engagé dans une course effrénée de peur qu’il ne soit tombe sous le verrou des éléments de la sécurité».

rights.<sup>71</sup> The mine policemen have been tried and acquitted by a court in the DRC, yet the circumstances of Mutombo's death remain unclear.

## The case studies and the endorse-assure-manage-remedy framework

Unanswered questions – see *intra* p.54, on chains of command, the in-house exoneration of company employees, parallel investigations without due safeguards - remain in the Mutombo case, which occurred on a KCC mine site where security is provided by a complex mix of company, contracted and state security. Similarly, shootings at the North Mara mine continued despite the existence of a memorandum of understanding (MoU) between the company and the Tanzanian police force. Yet it is precisely in such complex situations that both GPs (by seeking to minimise the potential for violations linked to a company's operations through its relationship with the state) and the VPs (by setting out principles governing a company's relationship with both public and private security) are meant to safeguard human rights.

The current paper will add substance to the endorse-assure-manage-remedy framework by examining both the shootings at North Mara and the death of Eric Mutombo at the KCC site alongside the human rights policies and remedy programmes of the companies concerned, which have been developed and deployed in the context of the GPs and VPs.

It will be argued that **endorsement** of both the VPs and the GPs allow companies to privatise and control the implementation of human rights. This is particularly important when alleged human rights abuses come to light: a company deflects criticism – and, potentially, even legal liability – if it can demonstrate that it has undertaken human rights due diligence and assessed the risk of human rights impacts to offer **assurance**; sought to use its influence to **manage** relationship with other business and host states (to include the provision of security) and; offered **redress** under its own grievance mechanism, as specified in the relevant principles. In other words, a company that follows the underlying principles thereby legitimises its actions in dealing with human rights impacts.

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<sup>71</sup> Respectively, GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014 and; Glencore response to Key Findings and Questions, presented by Bread for All, the Swiss Catholic Lenten Fund and RAID, 17 June 2014, available at: <http://www.glencore.com/assets/media/doc/news/2014/201406170700-Response%20to%20BFA,%20RAID%20and%20Fastenopfer,%20June%202014.pdf>.

# 1. Endorse

There are two senses of endorsement: firstly, to refer to the collective process by which the GPs or VPs were adopted and through which they gain normative legitimacy and; secondly, the way in which an individual company ‘signs up to’ or declares its commitment to the instrument.

## Universal human rights

A standard or code that is universally agreed and adopted has immense legitimacy. The archetypal human rights instrument is the Universal Declaration of Human Rights, adopted by all member states of the United Nations in 1948.

John Ruggie, the former UN Special Representative on Business and Human Rights, points out that the Guiding Principles are unique in that they are the first ‘authoritative guidance’ issued by a UN body on business and human rights and; because it was the first time that governments endorsed a normative text that they had not negotiated themselves.<sup>72</sup> This claim to normative legitimacy is a powerful one. The former Special Representative is signalling that the GPs are valid and legitimate because they have the full weight and authority of the UN behind them. At the same time as the former Special Representative appeals to legitimisation by governments, he also moves beyond them, in much the same way as the GPs themselves apply human rights standards – albeit within a framework of carefully prescribed parameters – beyond state actors to businesses and companies. If anything, the GPs – endorsed but not negotiated by governments – have a wider legitimacy because they were formulated after consultations with companies and other stakeholders.<sup>73</sup>

However, the consensus underpinning the GPs, portrayed as encompassing all stakeholders, cannot be sustained if it were to be conceded that certain of the parties consulted during the drafting process were more powerful than others and hence the GPs reflect their views in unequal measure. Leading human rights organisations criticised the GPs prior to their endorsement by the Human Rights Council, sparking an exchange with the Special Representative and supporters of the GPs, covered widely elsewhere.<sup>74</sup> Minimally, the normative legitimacy accorded the GPs by virtue of the ‘thick stakeholder consensus behind their provisions’ fails to recognise civil society disquiet.<sup>75</sup> The NGOs stated that the GPs ‘do not adequately reflect or address some core issues, including extraterritorial obligations and responsibilities, the need for more effective regulation, the right to remedy and the need for accountability, in a manner fully consistent with international human rights standards.’<sup>76</sup>

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<sup>72</sup> John G. Ruggie, Keynote Remarks at Annual Plenary Voluntary Principles on Security & Human Rights, Ministry of Foreign Affairs, The Hague, Netherlands, 13 March 2013, pp.1 – 2, available at: <[http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/John\\_Ruggie\\_Speech\\_-\\_2013\\_Annual\\_Plenary\\_Meeting.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/John_Ruggie_Speech_-_2013_Annual_Plenary_Meeting.pdf)>.

<sup>73</sup> See, for example, John Ruggie, Progress in Corporate Accountability, Institute for Human Rights and Business, 4 February 2013, available at: <<http://www.ihrb.org/commentary/progress-in-corporate-accountability.html>>. In his presentation of the Guiding Principles to the UN Human Rights Council, Ruggie refers to 47 international consultations and more than 20 site visits to business operations and communities, to endorsement of the GPs by governments, intergovernmental organisations, business associations, companies, corporate law firms, institutional investors and trades unions, and to the somewhat qualified recognition of progress by human rights organisations. See Presentation of Report to United Nations Human Rights Council, Professor John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva, 30 May 2011, available at: <[http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011\\_Remarks\\_Final\\_JR.pdf](http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf)>.

<sup>74</sup> <<http://business-humanrights.org/en/critiques-of-guiding-principles-by-amnesty-intl-human-rights-watch-fidh-others-debate-with-ruggie>>.

<sup>75</sup> Ruggie refers to ‘thick stakeholder consensus’ in Progress in Corporate Accountability, op. cit. Cf. the criticisms voiced in the Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights, January 2011, issued by Amnesty International, CIDSE, ESCR-Net, Human Rights Watch, International Commission of Jurists, FIDH (International Federation for Human Rights), and RAID, available at: <[https://www.fidh.org/IMG/pdf/Joint\\_CSO\\_Statement\\_on\\_GPs.pdf](https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf)>. The statement was later endorsed by 49 additional organisations.

<sup>76</sup> Joint Civil Society Statement to the 17th Session of the Human Rights Council, signed by Amnesty International, ESCR-Net, Human Rights Watch, International Commission of Jurists, FIDH (International Federation for Human Rights), and RAID, available at: <<http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council>>.

## principled PRAGMATISM

Recently, a new UN proposal to initiate negotiations aimed at imposing regulation on the conduct of multinational corporations was narrowly passed:<sup>77</sup> ‘The home countries of the vast majority of the world’s transnational corporations were opposed. The European Union and the United States not only voted against the resolution, describing it as polarizing and counterproductive; both also stated that they would not participate in the negotiating process.’<sup>78</sup>

The Guiding Principles exhibit several characteristics: they are non-binding and cannot be imposed directly on any company that refuses to recognise them; there is no body that monitors whether or not a company adheres to the Principles; redress – one of the central pillars of the GP framework – is to be achieved, in part, through company and operational level grievance mechanisms that are not subject to scrutiny or oversight. A need for pragmatism underlies each of these elements: businesses and their home governments would not have accepted any binding instrument, or monitoring body or an independent grievance mechanism.

The approach to formulating the Guiding Principles is therefore one of ‘principled pragmatism’, described as ‘an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people.’<sup>79</sup>

It is obvious that strengthening support for human rights is a laudable aim, but it is equally obvious that this pragmatism sets the limits to what is required of companies when it comes to respecting human rights and offering redress. One criticism of binding regulation in the form of an all-encompassing business and human rights treaty is that, because it is improbable, it abandons people in the real world.<sup>80</sup> The problem with principled pragmatism is that it purports to deal in the achievable – a case of accepting, from a position of unequal bargaining power, what companies are prepared to offer, which may fall woefully short when it comes to delivering fair redress for victims of abuse, let alone real justice.

## Committing to the GPs

The GPs make it clear that ‘[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure’. The GPs go on to state (GP 15):

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

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<sup>77</sup> General Assembly, United Nations, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Human Rights Council, Twenty-sixth session, 25 June 2014, A/HRC/26/L.22/Rev.1. The resolution was adopted by the Human Rights Council by a vote of 20 to 14, with 13 abstentions (see A/HRC/RES/26/9).

<sup>78</sup> John G. Ruggie, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors, Commentary, 9 September 2014, available at: <<http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>>

<sup>79</sup> Economic and Social Council, United Nations, Promotion and protection of human rights, Interim report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Commission on Human Rights, Sixty-second session, 22 February 2006, E/CN.4/2006/97, paragraph 81.

<sup>80</sup> See, for example, John Ruggie, International Legalization in Business and Human Rights, Harvard Kennedy Law School, 11 June 2014, available at: <[http://business-humanrights.org/sites/default/files/media/documents/ruggie\\_-\\_wfls.pdf](http://business-humanrights.org/sites/default/files/media/documents/ruggie_-_wfls.pdf)>. Ruggie remarks: ‘The debate...is about carefully weighing the extent to which different forms of legalization are capable of yielding practical results where it matters most: in the daily lives of people around the world—and in the here and now, not some far-off idealized state of being. From the vantage of victims, an all-encompassing business and human rights treaty negotiation is not only a bad idea; it is a profound deception. In contrast, international legal instruments as precision tools, reinforcing and building upon foundations that have been painstakingly established, offer far greater promise.’

Therefore, although an individual company does not join or formally sign up to or adopt the GPs, there is an expectation that the policy commitment to respect human rights goes hand-in-hand with due diligence and remediation: ‘Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place.’<sup>81</sup> Although the GPs do not spell out that a company should state its commitment to the GPs *per se*, in order to commit to respect human rights and to benefit from showing that they comply with the GPs, it is often simplest for a company to state that it endorses the GPs.

## Endorsing the Voluntary Principles

At the end of 2000, the United Kingdom and US governments, along with seven companies and nine NGOs (three with a pro-business orientation), agreed the VPs. As of February 2016, 30 energy, oil and mining companies are participants in the initiative, alongside 10 NGOs and 9 governments.<sup>82</sup> Although several large extractive companies endorse the VPs, the overall number of corporate participants represents a minority of companies in the sector. Moreover, multi-stakeholder endorsement – measured by the number of NGO and government participants – remains at a low level. Prominent NGOs, including Amnesty International, Human Rights First, Safer World and Oxfam, have left the initiative. Amnesty cited ‘the failure of the initiative to develop robust accountability systems for member companies’ whilst Oxfam expressed ‘frustration at the lack of meaningful progress in independent assurance’.<sup>83</sup>

In contrast to the GPs, joining the VP initiative is a formal process. Admission is sought on the basis of an action plan, completed by the applicant, which details the company’s current policies and codes on security and human rights and how it would implement the VPs.<sup>84</sup> The application will be approved if there is consensus in the Steering Committee, which is made up of representatives from three pillars: NGOs, governments and corporates.<sup>85</sup> If there is no consensus, there is an open vote.<sup>86</sup> Provided existing company and government representatives vote in favour, a company will always be admitted, even if NGOs vote against. Voting records are not published, making it impossible to ascertain if there have been situations where NGOs opposed to an admission have been outvoted.

The VPs are ill-equipped to make a determination on an applicant’s record either before or after admission. No questions are asked concerning verified or alleged violations. Moreover, it is difficult to see how the Steering Committee would have the capacity to determine the credibility of an Action Plan, even in its heavily circumscribed form; the Steering Committee has no mandate to consider a company’s actual human rights record, something that is omitted entirely from the application form.

Whilst there are certain mechanisms for seeking information from members, considering complaints from other members, and suspension or expulsion, all are highly circumscribed:<sup>87</sup> see *intra*, p.72. Suspending or expelling a company after it has joined is a much more politically charged decision and one that is likely to be shied away from.<sup>88</sup>

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<sup>81</sup> GP 15, Commentary.

<sup>82</sup> < <http://www.voluntaryprinciples.org/>>, participants listed under ‘For Companies’, ‘For NGOs’, ‘For Governments’.

<sup>83</sup> Respectively, Amnesty International, ‘Amnesty International withdrawal from the Voluntary Principles on Security and Human Rights’, Public Statement, AI index: IOR 40/003/2013, 3 June 2013,

<<https://www.amnesty.org/download/Documents/16000/ior400032013en.pdf>>; Oxfam America, ‘Oxfam leaves Voluntary Principles for Security and Human Rights multi-stakeholder initiative,’ 17 April 2013, available at:<<http://business-humanrights.org/en/oxfam-leaves-voluntary-principles-for-security-and-human-rights-multi-stakeholder-initiative>>.

<sup>84</sup> Governance Rules, *op. cit.*, Annex 1: Company Action Plan.

<sup>85</sup> Governance Rules, *op. cit.*, Section V. Entry Criteria and Admission Process. Paragraph 1(a) states the admission of new companies, referring to Appendix 3.1 – Framework for the Admission of New Companies. Under the latter, paragraph 2.1 specifies the submission of an Action Plan.

<sup>86</sup> Appendix 3.1. *op. cit.*, 1.3. The vote must be by at least three-quarters of the members of each pillar. Each pillar on the Steering Committee has four votes.

<sup>87</sup> See Governance Rules, Section VII. Dispute Resolution. Further details about the dispute process are given in Appendix 2 – Participation Criteria, p.31, under the ‘In Addition’ bullets. Information requests by one participant to another are dealt with under Appendix 2, point 7, p.31.

<sup>88</sup> See Governance Rules, Section XIII. Expulsion and Inactive Participants. Declaring a participant ‘inactive’ broadly equates to suspension, though the latter term is not used. It is the Plenary body, made up of all VP participants, that decides on whether a participant should be expelled or declared inactive, preferably by consensus, but if necessary by a vote (Governance Rules, Section III,

The VPs therefore have an inherent bias towards admission and continued inclusion. The credibility of this approach can only be tested by examining a successful applicant's subsequent track record *outside* of the self-reporting that takes place within the VPs. However, this scrutiny frequently comes to rely upon the sheer determination of victims to overcome multiple barriers to raise their concerns and upon under-resourced, but highly motivated NGOs, bringing violations to public awareness. Moreover, the fact that such external scrutiny is required speaks volumes about the inadequacy of self-reporting under the VPs (see *intra*, p.26) in those very circumstances where human rights are under threat.

## STEP 1 – Endorse the standards

It is good business to make a strong policy statement endorsing the GPs or joining the VP initiative as it signals that a company respects human rights. Important elements of implementation – exercising leverage over business partners, undertaking human rights impact assessments and providing a grievance mechanism – are under corporate control and help a company manage potentially problematic human rights situations. To benefit from this approach, the first step is to endorse the standards.

### Glencore

Glencore states that it supports the UN Guiding Principles on Business and Human Rights and that its human rights policy is based upon and 'was developed with close reference to the UN principles'.<sup>89</sup>

Glencore announced that it had joined the VP initiative on 18 March 2015.<sup>90</sup> Prior to its formal admission, Glencore was already 'aligning its practices with the Voluntary Principles on Security and Human Rights'<sup>91</sup> and had stated: 'we use the Voluntary Principles on Security and Human Rights (VPs) to guide our use of private security forces and our interaction with public security providers (such as police), right across our organisation.'<sup>92</sup>

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Paragraph 3, (a)The Plenary, 1.f and 1.k). There is a very high threshold if action is to be taken against a recalcitrant company, requiring that three-quarters of corporate members and governments, alongside NGOs, all vote affirmatively (Section III, Paragraph 3, (a) The Plenary, 2.a and 2.b).

<sup>89</sup> Glencore, Human Rights, available at: <<http://www.glencore.com/sustainability/our-approach-to-sustainability/human-rights/>>.

<sup>90</sup> Glencore, 19 March 2015, 'Glencore joins the Plenary of the Voluntary Principles,' available at: <<http://glencore.com/assets/media/doc/news/2015/201503191015-Glencore-joins-the-Plenary-of-the-Voluntary-Principles.pdf>>

<sup>91</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>92</sup> Glencore, Human Rights, available at: <<http://www.glencore.com/sustainability/our-approach-to-sustainability/human-rights/>>.

Xstrata, the Anglo-Swiss mining company with whom Glencore merged in 2013, was a member of the VPs. The Swiss government confirmed that Glencore issued a letter of intent to join the Voluntary Principles initiative in July 2013, and the company refers to its application for admission in a May 2014 release announcing publication of its sustainability report. See, respectively:

<<https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/human-rights/human-rights-policy/business-human-rights/voluntary-principles.html>>.

GlencoreXstrata, News Release 15 May 2014, '2013 Sustainability Report published',

<<http://www.glencore.com/assets/media/doc/news/2014/201405151225-2013%20Sustainability%20Report%20published.pdf>>



## ABG (now Acacia) and Barrick

In November 2010, Barrick announced itself to be ‘the first Canadian mining company to join the Voluntary Principles on Security and Human Rights’.<sup>93</sup> ABG (now Acacia) ‘through our majority shareholder, Barrick Gold Corporation’ declares itself a signatory to the VPs.<sup>94</sup>

Under its Human Rights Compliance Program, Barrick states:<sup>95</sup> ‘we strive to abide by the provisions of the Voluntary Principles on Security and Human Rights’ and the VPs are credited with guiding Barrick’s approach to security and are referenced numerous times under the company’s Security Management System:<sup>96</sup> ‘Barrick is firmly committed to the Voluntary Principles on Security and Human Rights, and is a formal signatory and member of the Voluntary Principles Plenary.’

Barrick also endorses the GPs:<sup>97</sup> ‘We strive at all times to be consistent with industry best practices, including the U.N. Guiding Principles on Business and Human Rights.’ Barrick states that its human rights program ‘maintains consistency with the UN Guiding Principles on Business and Human Rights (GPs), though adherence to the GPs is not in itself our goal; it is instead a byproduct of seeking to implement an effective human rights compliance program that fulfils and exceeds our objective of respecting all internal and external stakeholders impacted by our operations.’<sup>98</sup> Barrick also recognises that ‘an important aspect of our program – as reflected in the GPs – is operational due diligence to obtain a full understanding of our human rights risks and impacts on a site-by-site basis.’<sup>99</sup>

Both Barrick and Acacia, as members of the World Gold Council, also agree to implement the Conflict-free Gold Standard, which declares support for the UN Guiding Principles.<sup>100</sup> Acacia (formerly ABG) states that its grievance mechanisms at each mine site ‘are designed to comply with the effectiveness criteria set out in the United Nations Guiding Principles on Business and Human Rights.’<sup>101</sup>

## Endorsement and violations

The death of Mutombo at the KCC site occurred after Glencore/KCC declared its commitment to the GPs. Moreover, Glencore had already aligned its security policy with the VPs while it awaited formal admittance and has since joined the initiative.

Of the 16 deaths at North Mara from December 2008 to January 2014, 10 of those shot at the North Mara mine were killed while ABG was a wholly owned subsidiary of Barrick, whilst 6 men (the deceased in the legal claim) were killed after ABG became separately listed in March 2010, though Barrick was at the time, and remains, a majority controlling shareholder.<sup>102</sup> In 2009, prior to becoming a signatory of the VPs, Barrick

<sup>93</sup> Barrick Gold Corporation, Press Release, ‘Barrick Joins Voluntary Principles and Announces New Corporate Social Responsibility Initiatives’, 19 November 2010, available at: <[http://www.barrick.com/files/docs\\_pressrelease/2010/Barrick-Joins-Voluntary-Principles-and-Announces-New-Corporate-Social-Responsibility-Initiatives.pdf](http://www.barrick.com/files/docs_pressrelease/2010/Barrick-Joins-Voluntary-Principles-and-Announces-New-Corporate-Social-Responsibility-Initiatives.pdf)>.

<sup>94</sup> ‘Acacia, through our majority shareholder, Barrick Gold Corporation, is a signatory to the Voluntary Principles on Security and Human Rights’. See Acacia Mining, External Charters, Voluntary Principles on Security and Human Rights, available at: <<http://www.acciamining.com/sustainability/our-approach/external-charters.aspx>>.

<sup>95</sup> Barrick Gold Corporation, Human Rights Compliance Program, p.6, available at: <<http://www.barrick.com/files/governance/Barrick-Human-Rights-Compliance-Program.pdf>>.

<sup>96</sup> Barrick Gold Corporation, Barrick Security Management System, p.3, <<http://www.barrick.com/files/security/Barrick-Security-Management-System.pdf>>.

<sup>97</sup> Barrick Gold Corporation, Human Rights, Human Rights Approach, available at: <<http://www.barrick.com/responsibility/human-rights/2013/default.aspx>>.

<sup>98</sup> Barrick Gold Corporation, Human Rights Compliance Program, op. cit., p.2.

<sup>99</sup> Ibid., p.6.

<sup>100</sup> World Gold Council, Conflict-Free Gold Standard, Declaration on Mining and Armed Conflict, paragraphs 1 and 2. Members approved and agreed a draft of the Standard in March 2012, prior to final adoption in October 2012. See <<https://www.gold.org/sites/default/files/documents/Conflict-Free-Gold-Standard-English.pdf>>

<sup>101</sup> Acacia, Grievance Mechanism, available at: <<http://www.acciamining.com/sustainability/our-material-areas/community-relations/grievance-mechanism.aspx>>.

<sup>102</sup> Raid et al., African Barrick Gold: A pattern of abuse, op. cit. The deaths listed are: on 11 December 2008, a man was fatally shot; on 21 January 2009, a villager prospecting for gold at the mine was shot dead; on 2 June 2009, two prospectors were killed; on 8 July 2009, one of the villagers was shot and killed by police while they were chasing prospectors from the mine; on 15 October 2009, a

nonetheless declared that it incorporated the VPs and was guided by them.<sup>103</sup> It repeated this endorsement of the VPs to Amnesty International when the latter was critical of police brutality around the Porgera Gold Mine in Papua New Guinea, operated by Barrick subsidiaries.<sup>104</sup>

The shootings and violations at the North Mara mine include those that occurred in the period after Barrick had joined the VPs in November 2010: moreover, the May 2011 shootings took place just one month before the GPs were finalised and the ensuing company investigation and in-house redress occurred after the GPs had been endorsed at the UN.

Throughout, ABG has adhered, and continues to adhere, to the VPs through Barrick. During 2011, Barrick issued statements alongside ABG on the human rights situation at North Mara, and agreed human rights policies and impact assessments, to include ABG's operations at North Mara.<sup>105</sup>

A fundamental question is therefore how these violations could have arisen and, in the case of a pattern of abuse at North Mara, have persisted, when Glencore, KCC, Barrick and ABG (now Acacia) all endorse both sets of principles, which are supposedly formulated to promote respect for human rights by giving practical guidance?

The occurrence of human rights violations could suggest that the VPs or GPs are not relevant to the situations at North Mara and KCC and lack useful content. Or else the companies have not abided by the GPs or VPs, which do not have an effective mechanism for their implementation. Or else both sets of principles are something else entirely; a way for business to promote and assure on compliance, by carrying out risk assessments and human rights due diligence, by seeking to use influence over errant state security (blamed for the violations), and to control any fall-out from violations that do occur by using in-house investigations and redress to contain the situation.

The current report, in connecting the initial texts, will explore further the links between Barrick, ABG and the principles (Guiding and Voluntary) they endorse, including the ways in which the principles have allowed the companies to manage complicit relationships and carefully control the redress on offer.<sup>106</sup> In the case of Glencore, the focus is upon its control of aspects of the investigation into Mutombo's death and the way in which both the GPs and VPs legitimise 'crucial' security relationships with the state, even when these give rise to violations. In other words, both sets of principles are a pragmatic solution for companies in dealing with their human rights impact, but that is not to say they offer a solution that brings fair settlement or justice to the victims.

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prospector was shot in the back by police and died; on 2 February 2010, four people were killed at or in close proximity to the Mine site by police; on 16 May 2011, 5 people were shot dead; on 7 May 2012, one prospector was shot in the chest and killed. On Barrick's shareholding in ABG, see *intra*, p.6.

<sup>103</sup> Barrick Gold Corporation, 2009 Responsibility Report, available at <<http://www.barrick.com/files/responsibility-report/2009/Barrick-2009-Responsibility-Report.pdf>>, p.27: 'Although we are currently not a signatory participant to the Voluntary Principles on Security and Human Rights [VPSHR], Barrick has developed a security management system which incorporates the Voluntary Principles, is guided in our approaches and actions by the VPSHR, and includes our commitment to respect people and their rights.' See also p.67: 'The Porgera mine is committed to upholding the Voluntary Principles on Security and Human Rights...'

<sup>104</sup> Amnesty International, *Undermining Rights - Forced Evictions and Police Brutality around the Porgera Gold Mine, Papua New Guinea*, 2010, available at: <<https://www.amnesty.org/download/Documents/36000/asa340012010eng.pdf>>. See pp. 11 - 12, pp.16 - 17 and fn 41.

<sup>105</sup> For details of these statements, see *intra*, fns 47, 228, 478 and Annex 2, pp.87ff..

<sup>106</sup> See *intra*, p.28, on the meaning of complicity, as used in the GPs.

## 2. Assure

### Assessing risks to provide assurance

The foundational principles that underlie the corporate responsibility to respect human rights are grounded through operational principles that encompass human rights due diligence (GP17) and remediation (GP22). The focus in this section is upon the former. The VPs also include a main section on risk assessment and provisions on due diligence.

It is the utility of the GPs that is emphasised. The Special Representative describes a situation where ‘stakeholder-related risks’, including those associated with a lack of respect for human rights, are seldom aggregated, thereby masking their significant cost to companies.<sup>107</sup> ‘This is a lose-lose-lose situation: human rights are adversely impacted, serious corporate value erosion occurs and disclosure requirements and directors’ duties may be breached. Clearly, better internal control systems and oversight are necessary.’

There is therefore an economic rationale for companies to manage human rights risks. Yet, having forwarded this argument, the Special Representative then warns against seeing human rights risk management as a technical exercise that loses sight of the fact that it involves real people or ‘rights holders’.<sup>108</sup> The Special Representative, whilst recognising that human rights due diligence offers ‘strong protection’ against shareholder claims of mismanagement should allegations of violations arise, adds the proviso that it may not ‘automatically and fully absolve a company from Alien Tort Statute or similar liability’.<sup>109</sup>

However, having advocated the utility of human rights risk management in terms of protecting a company’s reputation, insuring against claims, and managing problems to avoid their escalation – all of which, ultimately, protect profits by reducing costs – it is difficult to see how, pragmatically, the GPs can ensure that ‘rights holders’ remain at the heart of the exercise. Rather, there is evidence to suggest that human rights risk assessment, due diligence and company-based grievance mechanisms are being used technically – perhaps cynically – to minimise risks without necessarily delivering the positive change in the daily lives of affected individuals that was meant to be achieved through ‘principled pragmatism’. A critique of Barrick’s human rights impact assessment (*intra*, below, p.24) exemplifies how human rights are emptied of human beings.

### STEP 2 – Undertake risk assessments for internal use only

In order to benefit from ‘strong protection’ against shareholder claims of mismanagement should allegations of violations arise, companies will need to undertake human rights due diligence to assess the risk of human rights impacts. However, one test of whether such assessments can form the basis of a genuine dialogue with those impacted by operations or demonstrate a commitment to public accountability is the degree of transparency accorded to these assessments. The absence of such transparency lends credence to the argument that these reports are compiled as a compliance exercise. Both the GPs and VPs encourage and legitimise this approach as neither instrument specifically requires the publication of detailed human rights reports or impact assessments – see *intra*, p.22 and p.26, for further critique.

#### GPs and VPs

The GPs specify that a business enterprise should have in place a human rights due diligence process (GP

<sup>107</sup> General Assembly, United Nations, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework’, Human Rights Council, Fourteenth session, 9 April 2010, A/HRC/14/27, paragraph 73, p.15.

<sup>108</sup> *Ibid.*, paragraph 85, p.17.

<sup>109</sup> *Ibid.*, paragraph 86, pp. 17 – 18.

15(b)). This process should include ‘assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed’ (GP 17). As part of due diligence, business enterprises should: (GP 18) ‘identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships’ (including with security contractors and the state); (GP 19) ‘integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action’; (GP 20) ‘track the effectiveness of their response;’ and (GP 21) ‘[i]n order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally’. However, this latter provision is far from categorical and fails to specify what should be published.

The VPs advocate the use of risk assessments that consider, *inter alia*: the identification of security risks, the potential for violence, the human rights records of public and private security forces, the legal system’s capacity to hold accountable those responsible for human rights abuses; and the capability of public and private entities to respond to situations of violence in a lawful manner. No provision is made for the publication of risk assessments.

### **Glencore**

In accordance with the GPs and VPs, Glencore has been engaged in conducting human rights risk assessments as part of a due diligence and compliance exercise.

Glencore developed its human rights policy in 2013, for roll out and implementation in 2014.<sup>110</sup> Glencore confirms that the policy ‘addresses the key risks to human rights faced by our operations’ and that, in 2013, it ‘initiated a review of security practices at operations located in regions with a high risk of human rights abuses.’<sup>111</sup> The security review.<sup>112</sup>

‘was to ensure alignment with the Voluntary Principles on Security and Human Rights and formed part of our commitment to formally request admission to the Plenary of the Voluntary Principles.

The review process identified and examined key performance indicators that underpin responsible security management. These include integrating security concerns with general risk assessments, as well as specific training and a commitment to performance monitoring and incident investigation. It is also vital to actively engage with public security forces (in regions where these are deployed) to promote respect for human rights and engage with private security providers to ensure our standards of conduct are met consistently.’

Glencore has not published a dedicated human rights report and the chapter on human rights in its 2013 Sustainability Report is only two pages long and makes no reference whatsoever to the company’s operations in DRC or to any human rights-related incidents in that country. If a detailed human rights risk assessment exists for KCC – which, surely it must – this has not been released.

### **ABG (now Acacia) and Barrick**

Barrick states:<sup>113</sup> ‘As part of our program, in 2011, we began a project of assessing human rights risks and impacts at all of our existing sites and mine projects (HRA Project). The HRA Project is being overseen by Avanzar, a highly respected independent third-party consulting organization. The HRA Project involves assessments over a three-year span at every Barrick operation and advanced project (and more frequent assessments for higher risk sites, or where particular concerns are identified).’ Neither Barrick nor ABG (now Acacia) publish operational level HRAs.

<sup>110</sup> Glencore Xstrata, Sustainability Report 2013, 5.Performance and targets, Human rights, p.16; also 8. Human rights, p.36.

<sup>111</sup> Ibid., p.36 and p.37.

<sup>112</sup> Ibid., p.37.

<sup>113</sup> Barrick, Human Rights Compliance Program, op. cit., p.6.

In respect of the VPs per se, Barrick ensures compliance through several separate assessment channels, both internal and through external consultancies.<sup>114</sup> In its recent, first ever public report on its participation in the VP initiative, Barrick describes how it ‘conducts internal and third party assessments of its conformance to the VPSHR at all medium to high-risk sites’.<sup>115</sup> Two external consultancies, Bureau Veritas and Avanzar, carry out external assessments of Barrick’s conformance to the VPs. Whilst the former carries out company-level audits and assurance work, Avanzar undertakes assessments at each operational site. According to Barrick, ‘Avanzar’s reports are utilized strictly for internal purposes.’<sup>116</sup>

ABG (now Acacia) has always stated its alignment with the VPs via Barrick. Barrick states:<sup>117</sup> ‘Barrick is a member of the Voluntary Principles on Security and Human Rights and its policies and those of ABG are clear.’ In its 2011 Responsibility Report, Barrick issued an ‘Independent Assurance Statement’, which included an ‘[a]ssessment of the company’s implementation of the Voluntary Principles for Security and Human Rights’ to be carried out ‘across regions and mine sites’.<sup>118</sup> Barrick explicitly records how the assessors conducted ‘[i]nterviews and follow-up communication with management staff from Barrick corporate offices in Toronto... and with regional management staff in Dar es Salaam (African Barrick Gold)’.<sup>119</sup> The statement also records a visit (one of five undertaken to operating mines) to Bulyanhulu (Tanzania), an ABG mine. For further details on Acacia (formerly ABG), Barrick and the VPs, see *intra*, Annex 2, p.84.

## Securing authoritative advice

The GPs are pragmatically designed so that there is no authoritative body that provides independent oversight of company due diligence and human rights reporting. Of course, critics might suggest that a company conducting its own endeavours in these areas would lay itself open *ab initio* to the charge that such a process lacks independence and may result in outcomes concerned more with portraying compliance in the most favourable light. Companies have anticipated this criticism by employing consultants and advisers to take on these tasks and provide ‘critical distance’. Indeed, this approach is thorough and sophisticated: in the absence of an authoritative UN body mandated to oversee and interpret the GPs, the cachet of using those individuals, consultancies and legal firms with the right provenance, who can demonstrate direct involvement with or linkages to the GPs, is not lost on corporations.

Certain companies have secured the services of those promoted as being at the heart of the GPs and have deployed them as advisers. The UN Human Rights Council endorsed the GPs on 16 June 2011, marking the end of the Special Representative’s mandate. A month later, on 18 July, the former Special Representative made known his plans to chair the board of a non-profit being established by members of his ‘UN team’ in the posts of president and managing director.<sup>120</sup> At the same time, the former Special Representative also confirmed that he would advise the corporate social responsibility practice of a leading law firm. A week later,

<sup>114</sup> Barrick, Human Rights Compliance Program, p.7: ‘(1) an internal security governance group that focuses primarily on assessments designed to evaluate compliance with the Security Management System and relevant security policies; (2) a third party consultancy who conducts dedicated assessments of compliance with the requirements of the VPs; and (3) a third party consultancy who, connected with assessments required by the International Council on Mining and Metals (ICMM), further assesses VPs compliance and issues a public assurance letter.’

<sup>115</sup> Barrick, *Annual Report on Barrick’s Voluntary Principles on Security and Human Rights Program 2014*, p.4, available at: <<http://www.barrick.com/files/security/Barrick-VPSHR-Annual-Report-2015.pdf>>.

<sup>116</sup> *Ibid.*, p.5.

<sup>117</sup> Barrick, ‘Response to Article on North Mara Mine, Tanzania’, *op. cit.*

<sup>118</sup> Barrick, Responsible Mining – 2011 Responsibility Report, Appendix 3: Independent Assurance Statement, p.94, available at: <<http://www.barrick.com/files/responsibility-report/2011/Barrick-2011-Responsibility-Report.pdf>>.

<sup>119</sup> *Ibid.*

<sup>120</sup> Harvard Kennedy School, ‘UN Secretary-General’s Special Representative for Business and Human Rights, John Ruggie: Post-Mandate Plans’, 18 July 2011, available at: <<http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-post-mandate-plans-18-jul-2011.pdf>>. Ruggie’s biography on Foley Hoag’s website (available at <<https://web.archive.org/web/20130526033729/http://www.foleyhoag.com/pdf/ruggie-john/DCC7D2F00791483BBDC A005107E820B3>>, captured 17 August 2013) stated: ‘John Ruggie advises clients on human rights-related risk and other aspects of corporate citizenship. This includes helping multinational clients to align their policies and practices with the Guiding Principles on Business and Human Rights, which he authored to provide guidance to all stakeholders on managing adverse human rights impacts of business operations.’ Ruggie is no longer listed as an adviser to Foley Hoag on their CSR website.

the law firm in question announced 'Author of U.N. Guiding Principles on Business and Human Rights to Join Foley Hoag':<sup>121</sup>

Foley Hoag LLP will expand its Corporate Social Responsibility Practice with the addition of John G. Ruggie, the recent U.N. Secretary-General's Special Representative for Business and Human Rights...

...

As a senior advisor in Foley Hoag's Corporate Social Responsibility Practice, Ruggie will help multinational companies navigate the Guiding Principles and apply them to their global business practices.

...

"They [corporate clients] can depend on us to consider their business objectives in any solution we propose. To have John Ruggie join us further strengthens this level of service, and will allow us to help clients apply the Guiding Principles and more effectively manage their stakeholder-related risks." [Gare Smith, a Washington-based partner and chair of Foley Hoag's Corporate Social Responsibility Practice]

"Joining Foley Hoag...is a great fit and gives me the opportunity to help companies apply these standards on an international scale," Ruggie said.

Some seven months later, and Barrick Gold announced the inaugural members of its Corporate Social Responsibility Advisory Board, made up of 'distinguished individuals', to 'provide external advice and guidance to Barrick management on the Company's global CSR performance and evolving best practices in CSR.'<sup>122</sup>

One of the Board members is: 'Gare Smith, senior partner at Foley Hoag LLP and former Principal Deputy Assistant Secretary in the U.S. State Department's Bureau of Democracy, Human Rights and Labor.'<sup>123</sup>

The company release continues: 'John Ruggie, author of the U.N. Guiding Principles on Business and Human Rights, will serve as a Special Consultant to the Board as part of his advisory role in the CSR practice at Foley Hoag LLP.'

Barrick, amplifying Foley Hoag's release, not only makes references to the fact that the GPs were 'unanimously endorsed' at the UN, but, likewise, also attributes their authorship directly to Ruggie.

In other words, the Guiding Principles are the universally recognised normative human rights standard for business and Barrick can call upon the author of the Principles to advise them on human rights. When the company offers an interpretation of the GPs, it is assumed that it would have sought the advice of its special adviser before doing so. Indeed, Barrick states:<sup>124</sup>

Professor John Ruggie, UN Secretary General Special Representative on Business and Human Rights, also has agreed to provide advice and guidance on discrete issues associated with the [human rights impact] assessments, on an as requested basis.

Minimally, it can be said that Barrick's pronouncements on the GPs are perceived to carry more weight than they otherwise might have done if the company was not advised by the individual promoted as the author of the GPs. The problem is that the authorship of an instrument reliant on UN endorsement for its authority is not being attributed to the UN, but is instead being concentrated in an individual or with former members of that individual's team. This raises the possibility that many will perceive authorship as giving rise to interpretative authority, which means that the locus for guidance on the GPs shifts from within the UN to advisers in the private sphere.

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<sup>121</sup> Foley Hoag, News release, 'Author of U.N. Guiding Principles on Business and Human Rights to Join Foley Hoag', 26 July 2011, available at: <<http://www.foleyhoag.com/news-and-events/news/2011/july/john-ruggie-foley-hoag>>.

<sup>122</sup> Barrick Gold Corporation, Press release, 'Barrick Announces Inaugural Members of Corporate Social Responsibility Advisory Board', 2 March 2012, available at: <[http://www.barrick.com/files/docs\\_pressrelease/2012/Barrick-Announces-Inaugural-Members-of-CSR-Advisory-Board.pdf](http://www.barrick.com/files/docs_pressrelease/2012/Barrick-Announces-Inaugural-Members-of-CSR-Advisory-Board.pdf)>.

<sup>123</sup> Ibid.

<sup>124</sup> Barrick, Human Rights Compliance Program, op. cit., p.6.

The genealogy between companies and the GPs, via their corporate advisers, continues. The ‘non-profit’ to be chaired by the former Special Representative at the end of his mandate is called Shift. The former Special Representative referred to its establishment by ‘members of his UN team’. The term ‘UN team’ may be an understandable shorthand to refer to the advisors and researchers, in a programme administered by Harvard’s Kennedy School of Government, who assisted the Special Representative, but it also has the effect of extending the legitimising authority of the UN and the Guiding Principles to non-profit consultancies that exist independently of the UN.<sup>125</sup> Shift’s stated purpose is to ‘help governments, businesses and their stakeholders put the UN Guiding Principles on Business and Human Rights into practice.’<sup>126</sup> Shift refers to its credentials: ‘Our team was centrally involved in shaping and writing the UN Guiding Principles and Prof. Ruggie is Chair of our Board of Trustees.’<sup>127</sup> Shift has a Business Learning Program, offering collective cross-industry workshops on business and human rights, but also ‘[t]ailored advice and support to each participant on their main priorities for implementing the UN Guiding Principles’.<sup>128</sup> Shift’s business partners are listed as ABN AMRO, Coca-Cola Company, Ericsson, Fujitsu, H&M, HEINEKEN Group, Hitachi, L’Oréal, NEXT, PepsiCo, Total, Unilever and Volvo Group.<sup>129</sup>

A similar nexus between companies and their advisers exists under the VP initiative.<sup>130</sup> It is Foley Hoag – the same law firm that counted the former Special Representative among its special advisers – that acts as the secretariat for the VPs.<sup>131</sup> As part of its secretariat role, Foley Hoag is to act as mediator in a confidential complaints process under the VPs (albeit, a process limited to participants).<sup>132</sup> It is not inconceivable that Foley Hoag, as a law firm with an active CSR practice, could be called upon to mediate in a dispute under the VPs concerning one of its own private clients.<sup>133</sup> Whilst the rules governing the VPs have not anticipated this circumstance, it is understood that a behind-the-scenes process does exist: ‘Foley Hoag is required to share with the Board of Directors of the Voluntary Principles Association a listing of any clients the firm represents that are also participants in the Voluntary Principles process’.<sup>134</sup> Given considerations of client confidentiality (see below), it must follow that firms represented by the law firm must have agreed to share such information: the list is not made public. Hence the VP Board would know if there was a potential conflict of interest, but even then Foley Hoag ‘could either proceed in the mediation process with the full understanding and explicit consent of the parties or recuse itself from the process’. However, should Foley Hoag recuse itself, it is not apparent who would then act as mediator or secretariat.

It should be recalled that a member of Foley Hoag’s CSR team, as well as the former Special Representative during and after his time with Foley Hoag, sit on Barrick’s CSR board.<sup>135</sup> Barrick is, of course, a participant in the VPs and has also been a member of the Board of Directors of the Voluntary Principles Association, the body set up to administer and manage the finances of the VPs. It is not publicly known whether or not Barrick is a client of the Foley Hoag practice and receives privileged legal advice from the law firm: Foley Hoag is

<sup>125</sup> On Ruggie’s assembly of his team, see John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights*, W. W. Norton & Company Inc., New York 2013, Introduction, The UN Mandate, p.xlvii.

<sup>126</sup> <<http://www.shiftproject.org/page/what-we-do>>.

<sup>127</sup> <<http://www.shiftproject.org/page/who-we-are>>. In their online profiles, no fewer than seven out of twelve Shift team members refer to their work with the Special Representative on the Guiding Principles. See <<http://www.shiftproject.org/page/our-team>> (last visited 03/03/2016).

<sup>128</sup> <<http://www.shiftproject.org/program/business-learning>>.

<sup>129</sup> Ibid., as of 03 March 2016.

<sup>130</sup> Government and Company Participants make an annual contribution towards the cost of running the Voluntary Principles Initiative, but NGOs do not. (See Voluntary Principles Initiative, ‘Frequently Asked Questions from Government’, 2013, available at: <[http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPS\\_FAQs\\_by\\_Governments.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPS_FAQs_by_Governments.pdf)>). In 2013, the contribution from each Government or Corporate Participant was in the region of \$25,000 (ibid.). As there are 28 corporate members and 9 government members (as of 3 February 2015), collectively companies contribute 76% of the of the funding.

<sup>131</sup> Foley Hoag, ‘CSR Practice Selected as Secretariat for Voluntary Principles on Security and Human Rights’, 30 September 2010, available at: <<http://www.foleyhoag.com/news-and-events/news/2010/september/csr-practice-selected-as-secretariat-for-voluntary-principles-on-security-and-human-rights>>.

<sup>132</sup> Governance Rules, op. cit., Section III. Governance of the Voluntary Principles Initiative, Paragraph 3(c) The Secretariat, e; also ibid., Section VII. Dispute Resolution, Paragraph 2.(b); also ibid., Appendix 2 – Participation Criteria, ‘In addition’, final bullet, pp.31-32.

<sup>133</sup> <<http://www.foleyhoag.com/practices/business/corporate-social-responsibility>>.

<sup>134</sup> Letter from Foley Hoag to RAID, 29 February 2016, reproduced *infra*, Annex 1.

<sup>135</sup> It was announced in March 2012 that both Gare Smith (partner and chair of Foley Hoag’s CSR Practice) and John Ruggie (senior adviser to Foley Hoag’s CSR Practice) would serve on Barrick’s CSR board. (See Foley Hoag, ‘Gare Smith, John Ruggie to Serve on Barrick Gold Corp.’s Corporate Social Responsibility Advisory Board’, 5 March 2012, available at: <<http://www.foleyhoag.com/news-and-events/news/2012/march/barrick-csr-board>>). Both Smith and Ruggie continue (as of 3 February 2015) to serve on Barrick’s CSR board, although Ruggie is no longer listed on Foley Hoag’s website as an adviser to the law firm.

ethically prohibited from disclosing the names of its clients without their express permission. Principals at the consultancy that now conducts human rights impact assessments for Barrick (see below) and other corporate clients have a strong background in representing industry groups within the VP initiative.

## Human rights impact assessments: a company, a consultancy and the absence of material information

Barrick's human rights assessment (HRA) program became fully operational in 2013 and is carried out by Avanzar, described as 'an independent consulting organization'.<sup>136</sup> Barrick is quick to emphasise the critical distance:<sup>137</sup> 'This [arrangement] provides third-party assurance and verification that our human rights program is working effectively, and identifies areas where we need to improve.'

However, the relationship between Barrick and Avanzar is one of company to consultant, which is far removed from an independent monitoring of Barrick's human rights record.<sup>138</sup> First and foremost, the consultancy is under contract to provide assessments for Barrick and is paid to do so. Hence it is Barrick that sets the terms of reference. Ultimately, if Avanzar does not produce assessments that meet Barrick's expectations, then the company can hire a new consultant. Secondly, Avanzar is embedded in the business side of corporate social responsibility. The principals, advisor and associate at the consultancy have previously been employed by business advocacy groups, either Business for Social Responsibility (BSR) and/or Canadian Business for Social Responsibility (CBSR).<sup>139</sup> BSR describes itself as a 'business network dedicated to sustainability' whose membership comprises 'more than 250 of the world's most influential companies'.<sup>140</sup> Similarly, CBSR is the 'premier network in Canada to advance corporate citizenship and sustainability' and a 'member-led organization that mobilizes Canadian companies to make powerful business decisions that improve performance and contribute to a better world'.<sup>141</sup> Whilst this background may help in meeting the expectations of businesses with whom the consultancy works, it makes it more likely that the latter will adopt a business-centric position when undertaking assessments for its clients. For its part, Avanzar states:<sup>142</sup> 'We value our professional integrity and the integrity of our reports. We do not compromise on our findings of substance.'

These assertions – that Barrick sets the parameters for its human rights assessment and pays a business-minded consultancy to produce them – are substantiated by examining Barrick's assessment programme.

- Barrick makes it clear that it is the company's Office of General Counsel (OGC), not Avanzar, who has the final say on the content of the HRA.<sup>143</sup> 'The narrative report, risk matrix and proposed action plan are provided to the OGC for its review and revision. The OGC may solicit views from relevant internal personnel to ensure factual accuracy, and then shares the report with FFP [Fund for Peace – which describes itself as a 'non-profit research and educational organization'<sup>144</sup>] for its input. The OGC then may perform a further revision, and shares the final report and proposed action plan with management and other relevant personnel as a basis on which to formulate a final action plan.'
- Barrick also alludes to efficiencies in the HRA process, 'an increased focus on creating synergies and efficiencies between our internal and external assessment processes', citing the example of 'a joint assessment with internal and external assessment teams'.<sup>145</sup> Hence not only does the company have

<sup>136</sup> <<http://barrickresponsibility.com/2013-performance/human-rights/>>. See also Barrick Gold Corporation, Assessing Human Rights Risks & Impacts 2013, op. cit., p.7 and p.11.

<sup>137</sup> <<http://barrickresponsibility.com/2013-performance/human-rights/>>.

<sup>138</sup> Avanzar was selected by Barrick 'based on a competitive proposal and bidding process' (Assessing Human Rights Risks & Impacts 2013, op. cit., p.7).

<sup>139</sup> <<http://avanzar.biz/about.html>> (visited 03/03/2016).

<sup>140</sup> <<http://www.bsr.org/en/about/bsr>>.

<sup>141</sup> <<http://cbsr.ca/>>; also <[https://www.facebook.com/pages/Canadian-Business-for-Social-Responsibility-CBSR/219350940362?sk=info&tab=page\\_info](https://www.facebook.com/pages/Canadian-Business-for-Social-Responsibility-CBSR/219350940362?sk=info&tab=page_info)>.

<sup>142</sup> Avanzar LLC, Letter to RAID, 25 March 2015, op. cit.

<sup>143</sup> Assessing Human Rights Risks & Impacts 2013, op. cit., p.10.

<sup>144</sup> <<http://global.fundforpeace.org/aboutus>>.

<sup>145</sup> Assessing Human Rights Risks & Impacts 2013, op. cit., p.11.



final say over the HRA produced, but the assessments are not necessarily carried out solely by the consultancy in the first place.<sup>146</sup>

- Avanzar ‘pre-identifies’ with whom it will conduct external interviews: those ‘likely to possess a particular knowledge of the subject matter at issue’.<sup>147</sup> Such a selective approach will never access marginal or outsider groups and who determines what ‘particular knowledge’ should be accessed?
- ‘The HRA process also takes into consideration existing engagement processes...to prevent conflicting messages or the creation of false expectations.’<sup>148</sup> In other words, ‘the existing engagement processes’ are those designed and used by Barrick, which has a vested interest in ensuring that it can control the messages and outcomes that emerge.
- Moreover, referring the materials compiled by Avanzar to the OGC affords Barrick the opportunity to claim that ‘[t]he HRAs are held under legal privilege’. The HRAs are kept confidential and Barrick confirms that they will not be disclosed publicly.<sup>149</sup>

Barrick gives a number of reasons for this secretive approach:<sup>150</sup> ensuring Avanzar gains access to all relevant materials, including some already subject to legal privilege; so that all participants ‘feel uninhibited in providing Avanzar with honest feedback’ and ‘to avoid having participants – including Avanzar – face concerns over threats of public disclosure or testimony around information they provide’; and to allow for ‘honest and open feedback about the activities and approaches of host governments without fear of retribution against Barrick, the communities or Avanzar itself.’ Avanzar defends the cover of privilege:<sup>151</sup> ‘If employees or community members were afraid that their comments could end up on the front-page news, we would not have as much access to them nor be able to obtain information from them.’

However, Barrick does not choose to discuss the counter-arguments: that by asserting confidentiality and legal privilege, the need for transparency and accountability is neglected; that the claim to extend legal privilege – which applies to legal advice and to documents produced for the purpose of obtaining legal advice – could be seen as an attempt to imply legal privilege to documents which are not covered. Such an approach could be construed as seeking to hide behind such privilege in order to deflect calls for wider public scrutiny. It is of obvious benefit to Avanzar and Barrick to avoid concerns or threats arising from public disclosure, but it is not so clear how this approach necessarily benefits victims of abuse who often rely upon wider public recognition of their plight to have even the slimmest hope of seeking meaningful redress. *Bona fide* human rights NGOs and legal firms with a track record in bringing claims on behalf of victims are skilled in ensuring that appropriate safeguards are in place to seek to protect those making complaints. The need for openness and international pressure in changing the human rights practices of host governments is not served by failing to voice valid criticisms. On the contrary, such an approach can make companies tacit apologists for recalcitrant regimes with whom they continue to do business.

Barrick’s sensitivity to this issue of confidentiality and legal privilege is betrayed by its appeal to the GPs:<sup>152</sup> ‘That decision [not to publish HRAs] is not inconsistent with the UNGPs. See UN Guiding Principle on Business and Human Rights 23(c).’ The latter states that ‘In all contexts, business enterprises should: (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.’

Barrick cites an article by Sherman, another former member of the Special Representative’s ‘UN team’:<sup>153</sup> where legal advice is required on legal compliance where the risk relates to gross human rights abuse, then it

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<sup>146</sup> ‘Avanzar assessors conducted this assessment in conjunction with the internal Barrick Health and Safety, Community Relations and Environment corporate office audits. This joint assessment was the first of its kind and aimed to reduce the burden of corporate assessments onsite and allow the assessors to collaborate and to leverage each other’s work and findings during the site visit.’ (Ibid., Appendix B: Draft Template for Human Rights Assessment (HRA) Narrative Report, B-3).

<sup>147</sup> Ibid., B-14.

<sup>148</sup> Ibid., p.8.

<sup>149</sup> Ibid., p.9.

<sup>150</sup> Ibid.

<sup>151</sup> Avanzar LLC, Letter to RAID, 25 March 2015, op. cit.

<sup>152</sup> Assessing Human Rights Risks & Impacts 2013, op. cit., p.9, fn 5.

<sup>153</sup> Ibid. See also: John Sherman, ‘Practical Implications for Business Lawyers’, In House Defense Quarterly, Winter 2013, available at: <<http://shiftproject.org/publication/un-guiding-principles-practical-implications-business-lawyers>>. Sherman writes: ‘I was a member of the United Nations mandate team of Harvard Kennedy School Professor John G. Ruggie, UN Special Representative of the Secretary-General for Business and Human Rights from 2005 through 2011.’ As noted, the team supporting the Special Representative was formed outside of the UN.

is appropriate not to publish. (Sherman:<sup>154</sup> ‘In such a case, appropriate assertion of legal privilege and work product would not be incompatible with human rights due diligence.’).

However, the corollary of such logic is that information relating to the most serious, gross abuses is not published, which many would see as undermining transparency and accountability. Moreover, Barrick appears to extend this approach to withholding HRA information across *all* human rights.

Sherman states the problem:<sup>155</sup> ‘Some lawyers may be concerned with the “knowing and showing” part of the human rights due diligence process, which is at the heart of the corporate responsibility to respect human rights. The perceived risk is that this requires businesses to gather and disclose information for the benefit of their adversaries—in court and in public campaigns.’

Once more, the GPs provide latitude for Barrick to avoid saying anything meaningful about its human rights impact or compliance. Again, Sherman declares that GP18 on risk assessment does ‘not mandate making the entire risk assessment public’ and that GP 21 (communication) ‘requires companies to report formally and publicly, but only on the risks of severe human rights impacts—i.e., those that are large scale, large scope, or are irremediable.’<sup>156</sup>

There are several rejoinders on GPs 18 and 21: firstly, while GP 18 does not mandate publication of the entire risk assessment, neither does it state its confidentiality. Perhaps it is a failing of GP18 that it does not explicitly advocate publication of the detail, but then such a provision would never have succeeded in being adopted.

Secondly, GP21, on conceding a narrow range of formal publication only for severe human rights impacts does a disservice to those victims who suffer abuses not characterised in this way by the arbiters of such a hierarchy. The introduction of a severity benchmark into GP21 is juxtaposed to GP12 where it is acknowledged that business can impact ‘virtually the entire spectrum’ of human rights. Thirdly, a contradictory tension is also created by requiring publication of severe abuses under GP21, but allowing for legal privilege to trump publication where advice has been sought in respect of gross abuses under article 23(c). Finally, the reference under GP21 to ‘legitimate requirements of commercial confidentiality’ gives companies all the excuse they need for withholding information on the human rights impacts of their operations. In the absence of any independent body on the GPs or any further elaboration whatsoever in the commentary, it is difficult to see how a ‘commercial confidentiality’ is to be impartially determined.

The GPs, as formulated, allow Barrick, through Avanzar, to produce a summary human rights impact assessment – and then, only available by request – that says very little about specific human rights impacts or abuses that have taken place at its operations and is devoid of detailed cases or actual human beings.<sup>157</sup>

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<sup>154</sup> Sherman, op. cit.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> <<http://barrickresponsibility.com/2013-performance/human-rights/>>: ‘A summary report of the 2013 assessments is available by request to s.jimenez@barrick.com.’

## *Barrick and ABG (now Acacia): the published and the unpublished*

### *The stripping out of human rights violations*

Barrick publishes only a summary of its underlying human rights impact assessments (HRAs). In its 2013 summary report, the company confirms:<sup>158</sup>

In 2013, Avanzar conducted assessments at four higher risk sites (Porgera in PNG, Lumwana in Zambia, Jabal Sayid in Saudi Arabia, and Pueblo Viejo in the Dominican Republic) and one medium risk site (Pierina in Peru). Avanzar also was commissioned by African Barrick Gold to conduct an assessment at the North Mara Mine in Tanzania, which is part of African Barrick Gold's portfolio. High-level issues identified by the 2013 HRAs appear below.

However, there is not one single further reference to any of the higher-risk mines in the entire 2013 summary report. The section on human rights and security – a mere 220 words – says nothing about violations, allegations, complaints or even potential adverse impacts at any of these mines. Indeed, anyone who reads Barrick's summary assessment in isolation would have no knowledge whatsoever of the shootings by police, sexual violence and security-related human rights abuses and how these are being dealt with. There are the mines featured in media reports, at the centre of legal claims (now settled out of court), and the subject of a NGO campaign for redress; and the mines of Barrick's summary report, identified as 'higher risk', but then altogether absent from the pages.

Even the headings are structured to give only a positive spin: *Observed good practice* (there is no corresponding *Observed poor practice*) and *Areas of focus & next steps* (rather than *Specific violations & redress*).

Indeed, a reader might be reassured by 'Barrick's detailed policies and procedures aimed at ensuring that security measures do not infringe on the human rights of stakeholders' and 'extensive audit and assessment work done to validate the approach' or; by the fact that '[p]rograms include training, certification, screening of employees and contractor employees, a willingness to use social solutions to security problems, and ongoing engagement with public security at all operations.'<sup>159</sup>

Yet material information – cases, incidents, people, violations, locations, security contractors, interviewees, medical records, legal cases – is all stripped out from the pages of the summary report. It is also highly probable that such sensitive information is not included in the underlying reports, but rather remains dispersed through documentation that only the company knows about and controls. This can be deduced from Barrick's blueprint for a draft outline HRA, which indicates the parameters within which the assessment is conducted, the extent and limits of the information it provides:<sup>160</sup>

- The fact that the HRA has a legal dimension and is concerned with risk exposure is made clear at the outset: 'The Office of the General Counsel has commissioned this HRA to assess the company's level of risk exposure as defined by its human rights obligations or expectations, actual or perceived'.<sup>161</sup>
- The HRA is privileged and confidential, its distribution list restricted.<sup>162</sup> This reinforces the notion that that the HRA is produced for the dominant purpose of obtaining legal advice or for use in any legal proceedings that arise. In other words, it has little or nothing to do with providing accurate, open information that might be used to improve the human rights situation. **The HRA report is not published.**
- A distinction is drawn between obligations and expectations: 'obligations can be legally required (by national law, lenders, etc.). The expectations can be viewed as aspirational as defined by the IFC, international conventions, the UN Guiding Principles on Business and Human Rights or industry best practice.'<sup>163</sup>
- The GPs are referenced to give added credence: the report uses 'a methodology that is aligned with the United Nations Guiding Principles on Business and Human Rights'.<sup>164</sup>
- The HRAs do provide 'a full listing of interviews conducted (including internal and external stakeholders) and documents reviewed', **but then these are not published.**<sup>165</sup>
- A section of the report presents findings. However, these findings cover only four areas and are given in tabular or matrix form at a very broad-brush level.<sup>166</sup> There appears to be little or no room for individual cases or

<sup>158</sup> Assessing Human Rights Risks & Impacts 2013, op. cit., p.11.

<sup>159</sup> Ibid., p.13.

<sup>160</sup> Ibid., Appendix B: Draft Template for Human Rights Assessment (HRA) Narrative Report, B-1 – B-14.

<sup>161</sup> Ibid., B-3.

<sup>162</sup> Ibid., B-1: the report is marked 'PRIVILEGED AND CONFIDENTIAL'.

<sup>163</sup> Ibid., Objective, B-3.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid., Appendix A, B-9 and Appendix B, B-10.

impacts or, in the words of the Special Rapporteur, ‘creating change where it matters most - in the daily lives of people’. Real human beings do not figure in the equation: ‘For each finding, Avanzar has calculated a risk exposure level and ranking using the Barrick risk assessment methodology and risk matrix....All risks are calculated based on a qualitative assessment of both the likelihood that a specific event will occur and the severity of impact of such an event.’<sup>167</sup> Moreover, notwithstanding the (dehumanised) way in which they are presented, **the findings are not published.**

To put it succinctly, Barrick’s approach and Avanzar’s contractual compliance gives the strong impression that the best form of risk management for the company is to ensure that no concrete information on human rights impacts associated with its operations enters the public domain. Unfortunately, this approach either means the company has something – extent unknown – to hide or it at least gives the impression that it has something to hide.

### *The peculiar status of the North Mara HRA*

Following publication of RAID’s summary of the current report, Acacia and Barrick issued an identical statement:<sup>168</sup>

Acacia operates its own human rights programme, conducts its own assessments, and engages in its own analysis and follow-up activities, entirely independent of Barrick

RAID relies upon statements made by Barrick in its 2013 *Assessing Human Rights Risks & Impacts*:<sup>169</sup>

In 2011, the Office of the General Counsel (OGC) at Barrick launched the company’s formal human rights evaluation process by developing a program to conduct human rights risk and impact assessments (HRAs) at its sites and operations, primarily using an external consultancy.<sup>1</sup>

<sup>1</sup> African Barrick Gold oversees assessments at its sites and projects using the same assessment process. [Foreword, Sybil Veenman Senior Vice President and General Counsel February 2014, p.4]

In 2013, Avanzar conducted assessments at four higher risk sites (Porgera in PNG, Lumwana in Zambia, Jabal Sayid in Saudi Arabia, and Pueblo Viejo in the Dominican Republic) and one medium risk site (Pierina in Peru). Avanzar also was commissioned by African Barrick Gold to conduct an assessment at the North Mara Mine in Tanzania, which is part of African Barrick Gold’s portfolio. High-level issues identified by the 2013 HRAs appear below.

[3. Human Rights Assessments 2013: Process, p.11]

The reference to ABG’s HRA, carried out by the same consultancy (Avanzar), following the same process, and made within Barrick’s own summary assessment; the reference to ABG’s North Mara site, in the context of the same paragraph identifying four other higher-risk sites and; the referral (within the same paragraph) to high-level issues from the HRAs to ‘appear below’, would all suggest that Barrick’s summary assessment included a consideration of ABG’s HRAs.

Moreover, Barrick also refers within its 2013 summary HRA to its 2012 pilot assessment and explicitly identifies North Mara as part of this:

In 2012, Avanzar developed an assessment tool tailored to Barrick’s operations, which was then refined in consultation with the OGC [Office of the General Counsel] and FFP [Fund for Peace]. 2012 served as a pilot year in which the program addressed key process gaps, further refined the HRA tool, developed internal reporting and follow-up mechanisms, and identified risks and impacts through four site visits and one desktop review. The sites assessed in this pilot year were: two higher risk locations, Porgera in Papua New Guinea (PNG) and North Mara in Tanzania...

**If Acacia has an alternative summary HRA, or a more detailed or a more recent HRA, whether compiled under its own or Barrick’s HRA process, RAID would welcome its publication. RAID notes Acacia’s offer, that the**

<sup>166</sup> Ibid., , B-6. The four areas are: Labour and Working Conditions, Land and Property Rights, Community Health, Safety and the Environment, and Security and Human Rights.

<sup>167</sup> Ibid., B-5.

<sup>168</sup> See, Barrick Gold Corporation Response to RAID "Executive Summary", 23 March 2015, opening paragraph, available at: <<http://business-humanrights.org/sites/default/files/documents/Barrick%20Gold%20Corporation%20Response%20to%20RAID%20Executive%20Summary.pdf>>. See also the same statement in Acacia Mining, response to RAID, March 2015, under 'Avanzar Reports', available at: <<http://business-humanrights.org/sites/default/files/documents/Acacia%20-%20Response%20to%20Raid%20-%20March%202015%20%282%29.pdf>>.

<sup>169</sup> The report is not posted online. However, Barrick states: ‘A summary report of the 2013 assessments is available by request to s.jimenez@barrick.com’ (see <<http://barrickresponsibility.com/2013-performance/human-rights/>>, visited 26/03/2015).

company is ‘glad to provide further information related to our human rights assessments, or any other aspect of our human rights program’.

RAID originally put this request to Acacia on 27 March 2015, but, at the time of publication of this report, Acacia still has not provided any HRA as an alternative to Barrick’s summary report.<sup>170</sup>

On the over-arching question of the independence and interdependence of ABG (now Acacia) and Barrick on their approach to human rights, see *intra*, Annex 2, *Barrick and Acacia: control, independence and human rights*.

## Secrecy and the Voluntary Principles

A variation on a company using others to declare on its human rights record is to use what the GPs refer to as ‘industry, multi-stakeholder or other collaborative initiatives’, of which the VPs are one example. There is the prospect that reporting outside of company mechanisms introduces some critical distance, transparency and objectivity. Unfortunately, in the case of the VPs, the secretive way in which the initiative is run and strict confidentiality renders the (self) reporting on implementation of the VPs superficial.

After allowing an applicant to join, the VPs effectively rely upon a company reporting its own performance and there is no external monitoring or verification of whether it is complying with the VPs or not.<sup>171</sup> Whilst companies must submit annual reports on their implementation of the VPs, they are not required to publish these, despite the fact that they author them and have total control over their content.<sup>172</sup> They can *choose* to publish these reports, but few do so.

For example, prior to March 2015, Barrick had not published an annual report on implementation of the VPs, even though, given the generality of the reporting requirements and the company’s final say-so over what is included, it is unlikely that these contained information on detailed instances or implementation at specific sites. For the first time in 2015, Barrick did publish an *Annual Report on Barrick’s Voluntary Principles on Security and Human Rights Program 2014*.<sup>173</sup> However, this 11-page public report does not follow the VP’s Reporting Guidance and specified contents – for example, it does not include a country implementation section. On the one hand, it is therefore unclear to what extent Barrick’s public report differs from information formally and confidentially reported under the VPs. On the other hand, if the public report does constitute Barrick’s formal report under the VPs, this only demonstrates the superficial nature of the latter.

The secretariat also produces an initiative-wide summary annual report at the most generalised level, which is ‘not to reference specific Participants’.<sup>174</sup> The workings of the VPs are otherwise cloaked in secrecy. It is stated that ‘all proceedings of the Voluntary Principles Initiative are on a non-attribution and non-quotation basis’.<sup>175</sup> This includes proceedings of both the Plenary and Steering Committee (although there is some provision for attribution, but only in internal documents).<sup>176</sup> Observers are required to sign a statement acknowledging the confidentiality provisions.<sup>177</sup>

<sup>170</sup> RAID, Clarification sought from Barrick and Acacia, 27 March 2015, available at: <<http://business-humanrights.org/sites/default/files/documents/RAID%20Clarification%20Barrick%20%20Acacia%2027-03-15.pdf>>.

<sup>171</sup> Governance Rules, op. cit., Section VIII. Reporting. Whilst Paragraph 2 specifies that a Participant’s status may be reviewed and they may be declared inactive if they fail to submit an Annual Report that meets specified criteria (set out in Appendix 5 to the Governance Rules), the latter are general in nature: provided relevant sections are completed there is no mechanism for verification. Moreover, it is explicitly stated: ‘[t]he reports are not intended to grade implementation by one Participant against another.’

<sup>172</sup> Governance Rules, op. cit., Section III. Governance of the Voluntary Principles Initiative, Paragraph 4(a)2: ‘All Voluntary Principles Initiative documents are to be considered confidential unless the Plenary or the Steering Committee, in close consultation with the Pillars has approved them for public release. Documents that are primarily related to the activities of a specific Participant are not to be approved for public release without the express permission of that Participant.’ Paragraph 4(a)3 continues: ‘Participants may publish their own Voluntary Principles Annual Reports....’ (the same provision is repeated at Section VIII. Reporting, Paragraph 4).

<sup>173</sup> Available at: <<http://www.barrick.com/files/security/Barrick-VPSHR-Annual-Report-2015.pdf>>.

<sup>174</sup> Governance Rules, op. cit., Section VII. Reporting, Paragraph 3.

<sup>175</sup> Ibid., Section III. Governance of the Voluntary Principles Initiative, Paragraph 4(a), 1.

<sup>176</sup> Ibid., Paragraph 4(a), 1.a.

<sup>177</sup> Ibid., Paragraph 4(a), 4.

All Voluntary Principles Initiative documents are to be considered confidential unless the Plenary or the Steering Committee, in close consultation with the Pillars has approved them for public release.<sup>178</sup> Documents that are primarily related to the activities of a specific Participant are not to be approved for public release without the express permission of that Participant.<sup>179</sup>

It is therefore impossible to know how many company applications to join the VP initiative have been refused or how many concerns have been raised under the dispute process by participants or on how many occasions the Steering Committee has forwarded a complaint for formal consultation under the Secretariat.

It is also unknown whether participants have recommended for other participants to be declared inactive or expelled and how the Plenary has voted on any such occasions.

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<sup>178</sup> Ibid., Paragraph 4(a), 2.

<sup>179</sup> Ibid.

## 3. Manage

### How the Guiding Principles help companies manage complicit relationships

The GPs recognise that primary responsibility for protecting human rights lies with the state.<sup>180</sup> This acceptance creates a conundrum for business: how to operate in a country when the state fails to deliver this protection and, indeed, may violate human rights?

Initially, the GPs provide a strong statement of principle:<sup>181</sup>

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

However, the GPs indicate that '[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.'<sup>182</sup> In other words, although the responsibility to respect is universal or supranational, the enforcement of this responsibility is not, and companies will not, by and large, be held responsible for failing to respect human rights directly under international law. Hence, if companies operate in states where respect for human rights and the rule of law is weak, then it follows that national laws and regulations will not compel them to respect human rights. But in such countries, companies risk being linked to adverse human rights impacts by 'their business relationships, even if they have not contributed to those impacts.' (GP 13(b)). Such business relationships include those with State entities, which must encompass security and police forces protecting mining operations.

The principle is for companies to '[s]eek to prevent or mitigate the adverse human rights impacts that are directly linked to their operations, products or services by their business relationships' (GP 13(b)), but the pragmatism of the GPs soon becomes apparent, to the extent that the principle is itself undermined.

The GPs recognise complicity – 'when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties' – and distinguish between complicity as a non-legal matter, when 'business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party'; and as a legal matter, when 'most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases.'<sup>183</sup> Of course, when complicity concerns a business relationship with a state entity, it follows that the state concerned is unlikely to pursue criminal action. Moreover, whilst the GPs do not spell out the very limited scope of international legal redress for complicity given the barriers that exist to bringing cases in an appropriate forum, they do refer to the high standard of proof required for aiding and abetting:<sup>184</sup> 'knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.'

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<sup>180</sup> Guiding Principles, I. The State Duty to Protect Human Rights.

<sup>181</sup> GP 11.

<sup>182</sup> GP12, Commentary.

<sup>183</sup> GP 17, Commentary.

<sup>184</sup> Ibid.

## STEP 3a – Demonstrate ‘seeking to influence’

Many companies, including those in the natural resources sector, often do business in parts of the world governed by states with a poor human rights record. The GPs and VPs introduce the concept of leverage, so a company can legitimise its continued presence in a recalcitrant state provided that it has used its influence with government to seek to further human rights. The principle of leverage is doubly useful. Firstly, should a situation arise in which violations arise out of a relationship between a company and the state, the notion that a company can exert leverage but cannot control the state is useful in distancing the company from the abuse. In other words, defining the extent of leverage is also a recognition of its limits, but, secondly, these limits are endorsed by the GPs and VPs, which never specify that a company should cease to do business in a particular country (see *intra*, pp.28 ff., on complicity and crucial relationships).

### GPs and VPs

The VPs state that ‘Companies should communicate their policies regarding ethical conduct and human rights to public security providers, and express their desire that security be provided in a manner consistent with those policies by personnel with adequate and effective training.’<sup>185</sup>

The GPs advocate that business enterprises should make a policy commitment to respect human rights, which should, *inter alia*, stipulate ‘the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services’ (GP 16b) and ensure this policy is ‘communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces’ (Commentary). Moreover, GP 19 recognises that appropriate action to prevent and mitigate adverse human rights impacts includes an enterprise using leverage, including in crucial relationships with the state. However, the GPs are also quick to recognise and legitimise the limits of corporate influence, which undermines culpability and redress.

### Glencore

In line with the VPs and GPs, Glencore states that ‘both KCC and MUMI [Mutanda Mining – a jointly-owned DRC subsidiary] Security Departments communicate to public security agencies and officers our policies and expectations of conduct while on site, including with regard to the use of force and respect for human rights.’<sup>186</sup>

### ABG (now Acacia) and Barrick

In terms of transmitting its human rights policies and security principles, Barrick states:<sup>187</sup>

‘Barrick is firmly committed to the Voluntary Principles on Security and Human Rights....Using these principles, Barrick strives to ensure that human rights are preserved in its relations with public security, private security providers, and contractors. Barrick emphasizes the importance of communication, consultation, and monitoring of interactions with public security and government officials. Wherever Barrick operates, security personnel maintain a good relationship with local law enforcement...’

Likewise, Acacia (formerly ABG) states:<sup>188</sup>

<sup>185</sup> Voluntary Principles, Interactions Between Companies and Public Security, Security Arrangements.

<sup>186</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>187</sup> Barrick, Security Management System, 3 Voluntary Principles on Security and Human Rights, p.11, available at: <http://www.barrick.com/files/security/Barrick-Security-Management-System.pdf>.

<sup>188</sup> <http://www.acciamining.com/sustainability/our-material-areas/security-and-human-rights.aspx>, Security and Human Rights, Human Rights.



To our knowledge, Acacia [formerly ABG] is the first and only private company to comprehensively engage with senior Tanzanian government officials and local law enforcement agencies to encourage and support the provision of Voluntary Principles training to these agencies and the adherence to international human rights norms.

Human rights due diligence becomes an exercise in insuring against complicity, which ‘should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse.’ (GP 17, Commentary - even though the GPs recognise that this insurance is not guaranteed). The GPs then introduce qualifying factors by which ‘appropriate action’ by a company depends upon the nature of the adverse impact: when adverse impacts are linked to business relationships – for example, in a country where security forces operate with impunity – the strong principle of universal respect is undermined by the recognition of ‘complexity’, which gives rise to a number of caveats that diminish absolute respect.<sup>189</sup>

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

The GPs advise: in complex situations, to ‘draw on independent expert advice’ and that the business enterprise ‘should exercise’ any leverage it has or, if it lacks leverage, ‘there may be ways for the enterprise to increase it..., for example, offering capacity-building’.<sup>190</sup> Again, this approach can be read as a check-list in what can become a risk-mitigation exercise. Provided expert advice – and the circularity of this advice in reinforcing what a company wishes to hear or portray has been critiqued elsewhere within this report – has been sought or capacity-building offered, then a company has met the stated requirements.

In the matter of complicity, the formulation of the GPs represents a retreat from the principle of universal respect to pragmatic ‘operational’ considerations in the real, complex world. Were the GPs to serve as a reflection of the way in which principles are grounded, it would be telling commentary on the limits to respecting human rights; however, the GPs are not a mirror, but, given their normative basis, *prescribe and legitimise* the persistence of such problematic relationships, provided a company has undertaken due diligence, sought the advice of experts and used whatever leverage it has with recalcitrant states.

When it has no leverage or it is unable to increase leverage, only then do the GPs suggest that an ‘enterprise should consider ending the relationship’, but only after ‘taking into account credible assessments of potential adverse human rights impacts of doing so.’<sup>191</sup> The potential for this to give rise to ‘zero sum’ arguments, when a company will argue that the employment it provides, the tax revenue it generates, the schools and clinics it has built; all contribute to a wide range of social and economic rights. When the GPs are read in this way, to offset abuses by good works to bolster a company’s ‘net contribution’ to human rights, this sits uneasily with commentary elsewhere in the GPs when it is stated that:<sup>192</sup> ‘Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.’

But what if the relationship with a state is ‘crucial’ – as in the example of security provision or policing? In precisely those contexts where the likelihood of human rights violations increases, the advice offered by the GPs becomes weaker and inconsistent: ‘the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a

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<sup>189</sup> GP 19, Commentary.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> GP 11.

decision on whether it should end the relationship.’<sup>193</sup> Yet the GPs have already recognised that crucial relationships cannot be ended. The GPs also state: ‘for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.’<sup>194</sup> The GPs therefore concede that detrimental relationships cannot necessarily be ended, only managed. But it is inevitable in such seemingly intractable situations that management through human rights due diligence, exactly as promoted by the GPs, becomes a compliance exercise: ‘showing that they took every reasonable step to avoid involvement with an alleged human rights abuse’ becomes more important when the likelihood of such abuse is known to exist.

### STEP 3b – Declare the limits of influence

Having complied with the stated principles to communicate human rights policy and otherwise publicise examples of their use of leverage, companies are quick to recognise and declare the limits of their influence – something which is legitimised by the qualifiers that characterise the pragmatic elements to both the GPs and VPs.

#### GPs and VPs

As noted, GP 19 (and Commentary) recognises that in complex environments and in crucial relationships, companies can only have limited influence. The position adopted within the GPs not only accords with business’s interpretation of its influence over public security, but perpetuates an unquestioning acceptance of the parameters of this relationship.

The recognition within the VPs of crucial relationships with public security and the limits to corporate influence are implicit rather than clearly stated. Hence the VP’s recognise the state’s ‘primary role of maintaining law and order, security and respect for human rights’, and ‘detering acts that threaten Company personnel and facilities’.<sup>195</sup> Given the necessity of public security, the VPs constitute guidance to companies on what they should do in their interactions with governments and public security; the limits of influence lie in the qualifiers to the relevant provisions. Companies should (emphasis added):<sup>196</sup> ‘**express their desire** that security be provided in a manner consistent with those policies’; ‘**encourage** host governments to permit making security arrangements transparent and accessible’; ‘use their influence **to promote**...principles with public security’.

#### Glencore/KCC

‘The Mine Police are not contracted out or subordinated to the mines and hence remain outside of the control of the mining companies.’ [Glencore response to Key Findings and Questions, presented by Bread for All, the Swiss Catholic Lenten Fund and RAID, 17 June 2014]

‘KCC has no control or jurisdiction over the DRC Mine Police, and cannot comment on their actions’. [GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014].

#### ABG (now Acacia) and Barrick

Under the heading ‘Relationship of ABG and Tanzanian Police’, Barrick states:<sup>197</sup>

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Voluntary Principles, Interactions Between Companies and Public Security, respectively opening paragraph and under ‘Deployment and Conduct’.

<sup>196</sup> Ibid., under ‘Security Arrangements’ and ‘Deployment and Conduct.’

<sup>197</sup> Barrick, ‘Response to Article on North Mara Mine, Tanzania’, op. cit.

Tanzania is a sovereign country, with a sovereign police force. Police operations in the region are solely the responsibility of the Tanzanian police and ABG has no authority in this area. All decision and directions are made by the Tanzanian police.

### STEP 3c – Retreat from universal principles to domestic jurisdiction

The recognition, under the GPs and VPs, of the state’s primary legislative and regulatory role allows companies, having championed the universality of respect for human rights, to retreat to compliance in the domestic sphere.

#### GPs and VPs

As noted, the commentary to GP11 provides a strong statement of principle – ‘[t]he responsibility [of business] to respect human rights... exists over and above compliance with national laws and regulations protecting human rights’ – but then the commentary to GP12 indicates that ‘[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.’

The VPs refer to the ‘primary role’ of governments in ‘maintaining law and order, security and respect for human rights’ and state that ‘the primary role of public security should be to maintain the rule of law, including safeguarding human rights and deterring acts that threaten Company personnel and facilities.’<sup>198</sup> The VPs do not, therefore, question the underlying nature of national laws, regulations and government policies and the degree of their compatibility with international human rights instruments.

#### Glencore/KCC

In respect of its KCC and MUMI subsidiaries in DRC, Glencore states:<sup>199</sup>

The tasks and responsibilities of public security officers operating within mining concessions *are clearly stipulated by DRC regulation* [emphasis added]; both companies are in full compliance with this. In accordance with regulation, all public security officers respond and report to their own hierarchy and chain of command, and do not report to KCC or MUMI personnel.

*Under relevant DRC legislation* [emphasis added], private operators do not have the mandate and are not entitled to provide training to public security.

Both companies *are in compliance with DRC regulation* [emphasis added] with regard to conduct of arrests, and handling of grievances related to ill treatment or excessive use of force.

#### ABG (now Acacia) and Barrick

‘The MOU [memorandum of understanding] is not an agreement to provide security services to the mine. It establishes a broader role of upholding law and order (the role of the State as per the Voluntary Principles).’ [Barrick, Response to Article on North Mara Mine, Tanzania, 7 June 2011]

<sup>198</sup> Voluntary Principles, Interactions Between Companies and Public Security, respectively opening paragraph and under ‘Deployment and Conduct’.

<sup>199</sup> Glencore response to Key Findings and Questions, op. cit.

## The blame game

By drawing a very clear distinction (GPs 13 and 19) between adverse human rights impacts that a company causes or contributes to and those impacts linked to its operations, but caused by others, including state entities, the GPs inevitably deal in questions of blame and culpability. Of course, there is then an onus upon companies to use leverage with the host state (or other partner in a problematic relationship) to improve the human rights situation, but, ultimately, the GPs recognise that in complex environments and in crucial relationships, companies can only have limited influence (although this portrayal underplays the significance of corporate economic power – many extractive multinationals have turnover vastly in excess of the GDPs of the developing countries in which they operate). The GPs therefore allow such relationships to persist (notwithstanding due diligence, advice, capacity building and the exercise of whatever leverage exists).

The persistence of these crucial relationships with their attendant detrimental effect upon human rights, nevertheless has utility: (i) in certain adverse environments, where there is political instability, insurgent groups or encroachment by artisanal miners and the dispossessed, mining and extractive companies could not operate at all without entering into a nexus with state security; (ii) it provides a mechanism by which companies can apply the distinction within the GPs – between impacts they have directly caused and indirect impacts linked to their operations but caused by others – to distance the actions of their internal (over which they have total control) and contractual (over which they have a high degree of control) security arrangements from those of the state (over which they purportedly have limited control).

### *Mine security arrangements in the DRC: the example of Glencore's KCC mine*

Both the GPs and VPs, despite or perhaps because of their pragmatic approach, posit a simplified schema of private and public actors. The GPs distinguish between direct harm caused by a company and harm resulting from a relationship with others, including the state; the very structure of the VPs is founded on the distinction between public and private security. However, the real world is far more 'messy' than these simple concepts allow and the guidance fails to unpick the nexus that has formed between business, contracted security and the state.

Analysts highlight the nexus between state and private security in the DRC. According to de Goede, in an analysis focused upon Katanga, the province in which KCC operates:<sup>200</sup>

When the situation with the artisanal miners gets out of hand, intervention is sought from armed public security forces, the police, GR [Republican Guard], or FARDC [Forces Armées de la République Démocratique du Congo], not the PSC [private security company] or in-house security. Public and private interests are blurred in the Congo, not in the least in the Katangese mining industry. Good relations with the political and military elite in the province are therefore the basis for support from public security forces for the mining companies.

...

An assessment of security in the mining industry shows that the security providers form a multi-actor web: PSCs, PNC [National Congolese Police], PM [Mine Police], FARDC, GR, OPJ [Judicial Police] and in-house security work in parallel or in cooperation in the same industry

Another commentator, writing on the extractive industry and security in Katanga, notes:<sup>201</sup>

It is part of the strategy of discharge that while nominally the state controls the means of force, companies pay for any services provided by state security forces. The de facto privatisation of the police results in the concentration of most capacities of the Police National and the Mining Police around the mines: for patrolling mining concessions, offices and the houses of senior staff of mining companies.

The security arrangements for Glencore's KCC mine demonstrate how, in dispersed mining communities, the influence, responsibilities and activities of officials, public law enforcement, private security and the mining companies are cross-cutting, complex and structured in a way that obscures accountability for human rights violations:

<sup>200</sup> Meike de Goede, 'Private and public security in post-war Democratic Republic of Congo', Chapter 2, pp.35 - 68, in Sabelo Gumedze (editor), *The Private Security Sector in Africa*, ISS Monograph Series, No.146, July 2008, Institute for Security Studies (ISS), Pretoria, South Africa, p.59 and p.64.

<sup>201</sup> Jana Honke, 'Transnational pockets of territoriality. Governing the security of extraction in Katanga (DRC)', Working Paper Series, No.2, University of Leipzig, 2009, p.16.

*National Congolese Police (PNC)* – The PNC was established as a national force under the regime of President Mobutu in 1985.<sup>202</sup> DRC’s 2005 Constitution included the PNC as one of the state security organs.<sup>203</sup> However, in the absence of elections, an unelected mayor, nominated by the President of the Republic, remains responsible at the local level for the implementation of laws, regulations and maintaining public order.<sup>204</sup> The police are under the Mayor’s de facto control and, when required, the Mayor can call upon the Congolese Armed Forces for additional support.

In 2003, cooperation between the PNC and PSCs was recognised in an agreement.<sup>205</sup> This allowed private security to incorporate armed police assistance into their operations, given that the former cannot be armed under Congolese law. Through hybrid patrols and joint guarding, public security measures are deployed in the private domain.<sup>206</sup>

*Mine Police* – The Mine Police are a department of the National Congolese Police that are deployed solely at mine sites.<sup>207</sup> The Mine Police are an inevitable part of the security mix. Although part of public security, Mine Police are often incorporated into security teams comprising in-house and contracted private personnel and paid a salary by the mining company.<sup>208</sup> Not all Mine Police have the authority to make arrests. Under Congolese law, only the police (including the Mine Police), and neither company employees nor contracted private security, are allowed to be armed.<sup>209</sup> The Mine Police are also known as ‘le police d’intervention’ and are described as ‘robots’ because of how they look in riot gear (helmet and body armour).<sup>210</sup>

Glencore has acknowledged the interaction of its operations with the Mine Police, including ‘material and financial assistance’, although it has not published details of any such arrangements.<sup>211</sup> The Mine Police are deployed on a permanent basis at KCC’s mine sites in DRC.

*Officiers de la police judiciaire (OPJs)* – Many mining companies, including Glencore/KCC, also have Judicial Police Officers on site. A legacy of the State-run mining system, OPJs are employed and paid by the companies, though they are formally appointed by the public prosecutor. Without recourse to the police, OPJs have authority to carry out arrests and interrogate suspects before they are brought to the prosecutor’s office.<sup>212</sup>

*KCC Security* - KCC employs staff directly in its own in-house security department (Department Security KCC – DSK). As noted above, KCC’s security staff also comprise OPJs, two of whom are DSK Commanders.<sup>213</sup> The seniority of OPJs is further evidenced by the fact that they provide human rights refreshment sessions for staff.<sup>214</sup>

<sup>202</sup> Cheryl Hendricks and Takawira Musavengana (editors), *The security sector in Southern Africa*, ISS Monograph Series, No.174, July 2010, Institute for Security Studies (ISS), Pretoria, South Africa, Chapter 4 - Democratic Republic of Congo, pp.59 -80, p.68.

<sup>203</sup> *Ibid.*, p.62.

<sup>204</sup> The legal attributes of the Mayor are set out in *Loi organique n° 08/016 du 07 octobre 2008 portant composition, organisation et fonctionnement des Entités Territoriales Décentralisées et leurs rapports avec l’Etat et les Provinces*. Under Article 41: «Le Maire est l’autorité de la ville. Il est le chef du Collège exécutif urbain. A ce titre:…2. il est officier de police judiciaire à compétence générale». Under Article 42: «... le Maire: 1. veille à l’exécution des lois, des édits, des règlements et des décisions de l’autorité supérieure ainsi que du Conseil urbain; 2. veille au maintien de l’ordre public dans la ville. A cette fin, il dispose des unités de la Police nationale y affectées ( la PNC et l’armée sont de l’exclusivité du gouvernement central art 184 de la constitution) ». (Translation of Article 41: “The mayor is the authority of the town. He/she is the head of the urban executive college. In this capacity...2 the mayor is an officer of the judicial police with general competence.” Article 42 “...The mayor: 1. Supervises the execution of laws, edicts, regulations and decisions of the superior authority and those of the urban Council; 2. Supervises the maintenance of public order in the town. To this end, he/she disposes of appointed units of the Congolese National Police (the PNC [Police Nationale Congolaise] and the army are under the exclusive [control] of the central government Article 184 of the Constitution).”).

<sup>205</sup> *Ordre Ops no 1560, 2003 and Directive no 1538, 2003.*

<sup>205</sup> *Ordre Ops no 1560, 2003 and Directive no 1538, 2003.*

<sup>206</sup> ‘Private and public security in post-war Democratic Republic of Congo’, *op. cit.*, p.49.

<sup>207</sup> *Ibid.*, p.58, p.62.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> See, for example, the description in *Jugement*, Case RP 521/14, *op. cit.*, p.7. For the original French text and English translation, see fn 238.

<sup>211</sup> Glencore response to Key Findings and Questions, *op. cit.*

<sup>212</sup> ‘Private and public security in post-war Democratic Republic of Congo’, *op. cit.*, p.58, p.62.

<sup>213</sup> A report on the incident in which Mutombo was killed, filed by one DSK Commander in his capacity as OPJ, also refers to a second DSK Commander and OPJ in charge of security at the neighbouring Luilu installations. See *Written Report to the Prosecutor* (Procès-Verbal judiciaire n° 002/011/RG047/PIC/KOV/DESK-KCC/2014), by Pascal ILUNGA KITUMBILE, Judicial Police Officer (Officier de Police Judiciaire), Kamoto Security Department, KOV Sector, 16/02/2014 relating the circumstances of the death of an unidentified person, apprehended near the Luilu ponds on 15.02/2014 at about 17.00.

<sup>214</sup> Glencore response to Key Findings and Questions, *op. cit.*

*G4S contracted security* – Moreover, KCC has a contract with G4S ‘to provide a portion of the security services at the mine’.<sup>215</sup>

Glencore/KCC has released few details on how the DSK is organised and run: the company insists its Security Manual ‘contains sensitive information and cannot be made public’.<sup>216</sup> However, the company has confirmed that KCC security teams operate jointly, consisting of KCC employees (including OPJs), G4S contractors and Mine Police.<sup>217</sup>

Taken together, these arrangements – the public/private status of OPJs, company payments to the Mine Police, joint DSK security teams comprising company, contracted and public security – have blurred the distinction between public and private interests. This overlapping complexity paves the way for evading culpability when human rights violations occur.

Referring more widely to the agreement that recognised cooperation between private security and the police in the DRC, de Goede notes:<sup>218</sup>

In the Congo, all the parties are pleased with the current formal arrangement: the PSCs have armed back-up without legal responsibility; the police gain extra income; and the client is assured of rapid armed response. It therefore seems to be unlikely, at least in the short term, that this formal arrangement will be terminated.

This utility is crystallised in a number of real-world situations when companies have entered into complex security arrangements using internal, contractual and external (state) agents, and then used this complexity to obfuscate responsibility for human rights abuses in strategies which inevitably involve the company demonstrating that its own internal or contractual security acted responsibly (given, of course, their adherence to codes governing their conduct) whilst ‘externalising’ blame to state security forces and the police. The GPs confirm the *expectation* that the latter relationship is, ultimately, less amenable to corporate influence.

The VPs recognise that ‘[c]ompanies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights.’<sup>219</sup> There is a premise, therefore, that companies have a role in influencing governments; however, that is not to say that the VPs – like the GPs – advocate what companies should ultimately do when problematic security arrangements with states are crucial to their business.

The VPs too can also read as a checklist that lays out the limits of what is required of a company and what it can achieve in advancing human rights; indeed, the VPs acknowledge that ‘While public security is expected to act in a manner consistent with local and national laws as well as with human rights standards and international humanitarian law, within this context abuses may nevertheless occur.’<sup>220</sup> In other words, the inference within the VPs is that public security is to blame for abuses. The recent VP statement on MoUs between companies and state security is quite unequivocal in this regard:<sup>221</sup> ‘violence and even abuses in and around extractive industry projects have been perpetrated by state security forces.’

Moreover, state security *is* often responsible for violations, but not solely responsible and little account is taken of the extent to which companies pay for, control or influence the state element in security operations and are thereby complicit.

The VPs do not acknowledge this complexity nor any degree of company control or direction of public security, despite recognising ‘In cases where there is a need to supplement security provided by host governments, Companies may be required or expected to contribute to, or otherwise reimburse, the costs of

<sup>215</sup> G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi on KCC mine (DRC) - Feb 2014, 6 June 2014, paragraph 2.3.

<sup>216</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>217</sup> On 15 February 2014, KCC Security Team became aware of a large group of artisanal miners operating illegally at the Luilu Dam....A team, consisting of KCC employees, G4S contractors and Mine Police was dispatched to apprehend these miners.’ See GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>218</sup> ‘Private and public security in post-war Democratic Republic of Congo’, op. cit., p.51.

<sup>219</sup> Voluntary Principles, Interactions Between Companies and Public Security, opening paragraph.

<sup>220</sup> Ibid., Interactions Between Companies and Public Security, second paragraph.

<sup>221</sup> Statement by Voluntary Principles Participants on Memoranda of Understanding Between Companies and State Security Forces, October 2014, available at: <[http://www.voluntaryprinciples.org/wp-content/uploads/2014/10/VPs\\_-\\_Statement\\_on\\_MOUs.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2014/10/VPs_-_Statement_on_MOUs.pdf)>.

protecting Company facilities and personnel borne by public security.’<sup>222</sup> Rather, it is much better for such arrangements to be kept hidden or to be framed by imprecise or fluid provisions that make it difficult to pinpoint responsibility. Neither Glencore nor ABG has published draft or final MoUs drawn up between the police and their respective subsidiaries (Glencore’s KCC and ABG’s NMGML); however, RAID has obtained a copy of the latter MoU (see *intra*, p.40).

Companies often demonstrate that they have sought to use their influence or exert leverage in respect of public security provision by referring to the existence of human rights training programs they support or to MoUs that advocate compliance with human rights standards, including those governing the use of force. For example, the VPs advocate that ‘force should be used only when strictly necessary and to an extent proportional to the threat’ and state that companies ‘should take all appropriate measures to promote observance of applicable international law enforcement principles, particularly those reflected in the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms.’

Yet despite company-supported training programs and the existence of MoUs, public security forces continue to use excessive force, including lethal force, in successive incidents when providing security services for companies. A key question concerns what happens when the standards are not adhered to by public security?

As noted, the GPs appear to concede that companies cannot withdraw from such crucial relationships, but do not give any guidance as to what actions, including penalising misconduct, a company should take (beyond demonstrating ‘its own ongoing efforts to mitigate the impact’).<sup>223</sup> The VPs include a section on ‘Security Arrangements’ with public security, but do not state that companies should draw up agreements or MoUs covering these arrangements (cf. the ‘additional’ voluntary principle and guideline governing private security which advocates, where appropriate, the inclusion of contractual provisions in agreements governing human rights training and the investigation of abusive behaviour). However, as noted, VP Participants have issued a statement on MoUs: viewed very much as a tool to demonstrate compliance with the VPs, the advice is duly silent on what a company should do when the violations by public security – which prompted the MoU in the first place – continue unabated.<sup>224</sup>

## Ambiguity in corporate claims about influence over public security

The way in which a company communicates or portrays its influence or degree of control over public security is often paradoxical. On the one hand, when human rights abuses arise in the context of complex security arrangements involving a component of public security, companies distance themselves from the state element, emphasising their lack of control. However, in terms of political and reputational risk, shareholders are not re-assured by situations in which a company professes to have little influence over state actors or the political elite. Moreover, companies will often demonstrate their considerable beneficial influence in a country.

When criticised for, *inter alia*, failing to ensure respect for human rights at its KCC site, Glencore opened its response by stating:

Glencore is a substantial investor in the DRC. Katanga Mining and Mutanda between them represent an investment of over \$3.7 billion at the end of 2013. This will reach c.\$4.2 billion at the end of 2014.

This investment does many things which Glencore believes are positive contributions to the DRC. These include creating 17,000 good quality, stable employee and contractor jobs at two operations. 95% of these jobs are held by Congolese nationals. In addition the Katanga Mining and Mutanda operations support local businesses, provide substantial revenues to the DRC’s local, provincial and national Governments and contribute to the development of DRC infrastructure, such as roads, bridges and power generation. We also provide microfinance to local entrepreneurs to stimulate the economy, and

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<sup>222</sup> Ibid.

<sup>223</sup> GP 19, Commentary.

<sup>224</sup> Statement by Voluntary Principles Participants on Memoranda of Understanding Between Companies and State Security Forces, *op. cit.*

make voluntary contributions to various projects such as renovating/building schools and hospitals to improve living standards in the local communities.

It should be noted that the majority of Glencore's investment has been via structured loans to KCC, upon which interest must be paid.<sup>225</sup> Moreover, Glencore's recent decision to suspend output at Katanga Mining means that the latter will not be able to generate revenue to meet interest payments, resulting in an accrual of interest owed to Glencore. According to one NGO:<sup>226</sup> 'If there is not a negotiated suspension of the interest on KCC's debt, it would be another nail in the coffin for the long-awaited fiscal benefits -- including significant profit tax and dividends -- of what should be one of the most lucrative mining projects in the country'. Glencore has confirmed that a fifth of staff at Katanga will be laid-off.<sup>227</sup>

Barrick, in the context of the May 2011 shootings at the North Mara mine, emphasises:<sup>228</sup>

As part of Barrick's responsible mining approach, we are committed to maximizing the social and economic benefits of our business to improve quality of life wherever we conduct our business....

ABG also invests in a variety of ongoing programs and initiatives to improve health care and education, to develop the skills of ABG's 4,800 employees (90 per cent of whom are Tanzanian) as well as other Tanzanians to work in mining or become industry suppliers. Along with providing over 1,000 jobs, North Mara purchased \$30 million worth of goods and services from Tanzanian businesses in 2010.

In addition, over 5,000 students in the Mara region have attended school through a one per cent village royalty program at the North Mara mine since 2004. In 2008, Barrick formed the Lake Zone Health Initiative....making it possible for companies, the government, health NGOs and donors to work collaboratively together to enhance services and combat HIV, malaria and TB.

In 2013, Glencore's revenue was \$US233 billion.<sup>229</sup> DRC government revenue (excluding grants) in the same year was estimated at \$US3.9 billion.<sup>230</sup> In 2013, Barrick's revenue was \$12.5 billion and ABG's \$US929 million.<sup>231</sup> Tanzanian government revenue (excluding grants) in the same year was estimated at \$US5.3 billion.<sup>232</sup> Indeed, ABG, having commissioned accountants Ernst & Young to quantify its contribution, describes itself as an 'economic engine' in Tanzania.<sup>233</sup> ABG emphasises, *inter alia*, its \$514 million spend on goods and services, its \$223 million total tax contribution, and its support for tens of thousands of jobs (most of them indirect).<sup>234</sup>

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<sup>225</sup> Tom Wilson, Bloomberg, 1 October 2015, 'Gécamines Backs Glencore Plan to Suspend Congo Copper Output', <<http://www.bloomberg.com/news/articles/2015-10-01/gecamines-backs-glencore-decision-to-suspend-congo-copper-output>>.

<sup>226</sup> Ibid., quoting Elisabeth Caesens, senior technical adviser to the Atlanta-based Carter Center's Extractive Industries Governance Program.

<sup>227</sup> Glencore, 'Update on Katanga', op. cit.

<sup>228</sup> Barrick Gold Corporation, 'Statement from Barrick Gold Corporation concerning the North Mara Mine, Tanzania', 30 May 2011, available at: <<http://www.barrick.com/investors/news/news-details/2011/North-Mara-Mine-Tanzania/default.aspx>>.

<sup>229</sup> GlencoreXstrata, Annual Report 2013, p.6 and p.32, available at: <[http://www.glencore.com/assets/investors/doc/reports\\_and\\_results/2013/GLEN-2013-Annual-Report.pdf](http://www.glencore.com/assets/investors/doc/reports_and_results/2013/GLEN-2013-Annual-Report.pdf)>.

<sup>230</sup> IMF, Democratic Republic of the Congo, Country Report No. 14/301, October 2014, Table 2a, p.18. The IMF estimates total central government revenue (excluding grants) for 2013 at 3,585 billion Congo francs. The exchange rate for 2013 used to convert to \$US is \$US1 = 919 CGF.

<sup>231</sup> See, respectively: Barrick Gold Corporation, Annual Report 2013, Financial Highlights; ABG, Annual Report & Accounts 2013, p.25.

<sup>232</sup> IMF, United Republic of Tanzania, Country Report No. 14/120, May 2014, Table 2a, p.27. The IMF gives a preliminary figure for total central government revenue (excluding grants) for 2013 at 8,443 billion Tanzanian shillings. The exchange rate for 2013 used to convert to \$US is \$US1 = 1600 TZS.

(<[http://data.worldbank.org/indicator/PA.NUS.FCRF?order=wbapi\\_data\\_value\\_2013+wbapi\\_data\\_value+wbapi\\_data\\_value-last&sort=asc](http://data.worldbank.org/indicator/PA.NUS.FCRF?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=asc)>).

<sup>233</sup> 'African Barrick Gold making significant contribution to Tanzanian economy', 3 December 2013, available at: <[http://barrickbeyondborders.com/mining/2013/12/african-barrick-gold-making-significant-contribution-to-tanzanian-economy/#.VOx2c\\_msXTr](http://barrickbeyondborders.com/mining/2013/12/african-barrick-gold-making-significant-contribution-to-tanzanian-economy/#.VOx2c_msXTr)>.

<sup>234</sup> See the underlying report: Ernst & Young, African Barrick Gold's total economic and tax contributions in Tanzania, 2012, prepared for African Barrick Gold, available at: <<http://www.acaciamining.com/~media/Files/A/Acacia/press-release/2012/Report%20-%20ABG%20Total%20Economic%20and%20Tax%20Contribution%202012.pdf>>.



In other terms, it not only runs contrary to the principle of minimising political risk, but also appears as disingenuous, when such powerful actors selectively fall back upon the edict – given sustenance within the GPs – that they have limited leverage on crucial relationships in the human rights sphere. This contradiction – the reassurance of influence versus the absence of any control or leverage – is plain to see. For example, Glencore declares:<sup>235</sup>

It should be noted that the deployment of Mine Police officers on site is done so by the State to protect their interests. The Mine Police are not contracted out or subordinated to the mines and hence **remain outside of the control** [emphasis added] of the mining companies.

Yet in the very same release, Glencore also states:

Regarding the interaction of our operations with the Mine Police, KCC and MUMI are currently drafting a Memorandum of Understanding with the Mine Police, which will address material and financial assistance, as well as **stipulate** [emphasis added] expected standards of conduct.

Which version of reality is to be believed? That Glencore's subsidiaries, despite their material and financial assistance to the Mine Police who operate on their mine sites, have no control over the latter's conduct? Or that KCC and MUMI – presumably because of the financial and material support they provide – are in a position to stipulate how the Mine Police should operate?

### *Security and chains of command at the KCC mine site*

It is DSK (KCC's Security Department) which controls the mine site. Contracted G4S personnel and the Mine Police (resident on-site) operate in joint teams under the direction and supervision of KCC'.<sup>236</sup> Security patrols – tasked, for example, with intercepting creuseurs (diggers) – are instructed by DSK's central despatch office.<sup>237</sup>

The judgement on the two Mine Policemen accused of unintentional killing describes how the Congolese Police Force (PNC) is in charge of the Mine Police, 'under the authority of Senior Deputy Commissioner Paul MBAYO MUTAMBA MWENZE'.<sup>238</sup> However, it is apparent that Mbayo, who was on duty at the mine at the time of the Mutombo incident, considered himself to be subordinate to the DSK Commander. When asked how commands were given to policemen deployed at mine sites, Mbayo confirmed: 'they are transmitted by [the company] that has requisitioned them'.<sup>239</sup> In another statement by a security patrol driver, the DSK Commander is described as being in overall command of KCC's Rapid Intervention Force.<sup>240</sup>

<sup>235</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>236</sup> Note de Plaidoirie des parties civiles, RP 521/KGM 2014, Fait, à Kolwezi, le 25/08/2014: «les prévenus quoi que appelés policiers d'intervention étaient basés dans les installations KCC depuis plusieurs jours et ils y travaillaient sous la direction et la supervision de KCC.»

<sup>237</sup> This command chain was confirmed by a DSK Commander and OPJ. See Procès-Verbal judiciaire n° 002/011/RG047/PIC/KOV/DESK-KCC/2014, op. cit.

<sup>238</sup> *Jugement*, Case RP 521/14, op. cit., p.7 : «C'est à ce titre que la Police Nationale Congolaise ayant en charge la Police Minière et des Hydrocarbure (PMH) Det K'ZI, sous l'Autorité du Commissaire Supérieur Adjoint (ComSupAdj) Paul MBAYO MUTAMBA MWENZE qui, d'initiative a dut déployer de manière permanente sur tous les sites miniers en proie aux troubles et envahissements des personnes non autorisées ses éléments d'intervention dites « **ROBOTS** » pour intervenir en cas de nécessité et urgence dans lesdits sites ou sociétés minières.» (“It is in this capacity that the Congolese National Police Force having responsibility for the Mine and Hydrocarbon Police (PMH), Kolwezi Detachment, under the authority of Senior Deputy Commissioner (ComSupAdj), Paul Mbayo Mutamba Mwenze, who on his own initiative had deployed on a permanent basis on all the mining sites facing problems and invasions by unauthorised people, elements of his intervention force, known as ‘Robots’ to intervene in situations of need or emergency on the aforementioned sites or mining companies.”).

<sup>239</sup> Note de Plaidoirie des parties civiles, op. cit.: «Cela n'est pas surprenant dans la mesure où à la question posée par le Tribunal au renseignant Paul MBAYO, major de la police de Mine et Hydrocarbure, à savoir, sur terrain, les instructions se passent comment ? Ce dernier a affirmé qu'il faut tenir compte des réalités sur terrain c.à.d. les commandements des policiers dans une entreprise minière passent par cette dernière qui l'a réquisitionné. Cela revient à déterminer que réellement les prévenus obéissaient aux instructions et ordres émanant de KCC. »

<sup>240</sup> Statement of Mushid, driver, to Prosecutor 25 February 2014: «Sous la supervision du Commandant Kitumbile nous étions dirigés vers le secteur Lima 17 – c'est là que Kitumbile était resté accompagné des policiers et le G4S.»

Only the two senior KCC security personnel, including the DSK Commander, have the status of OPJs, with authority to arrest and question suspects on the KCC site.<sup>241</sup> Another telling detail demonstrating the Mine Police's lack of autonomy is the fact that they did not file a report on the arrest and subsequent death of Mr Mutombo at the mine site, but that the only official report was written by the DSK Commander, acting in his capacity as a judicial police officer.<sup>242</sup>

Similarly, responses from Barrick and ABG also demonstrate the contradiction inherent in the need to show how risks are controlled versus the distancing effect of denying influence or control.

As noted, on the one hand, Barrick states that 'Tanzania is a sovereign country, with a sovereign police force' how 'Police operations in the region are solely the responsibility of the Tanzanian police' and how 'ABG has no authority in this area.'<sup>243</sup>

On the other hand, Barrick then contends that (emphasis added):<sup>244</sup> '[t]he company's [ABG's] relationship with police is **governed** by clear parameters to which both parties have agreed.' This Memorandum of Understanding (emphasis added):<sup>245</sup>

'**stipulates** that officers providing services in and around the mine operate based on national and international laws, the Voluntary Principles on Security and Human Rights, and the U.N. Convention for Law Enforcement Officials. Under the MOU, the Tanzanian police are **required** to assign officers who receive proper training based on these laws and standards and are **required** to discharge their responsibilities accordingly.'

As referred to earlier, the VP statement on MoUs recognises the inevitable part played by state security in large extractive projects and how human rights abuses are perpetuated by the former.<sup>246</sup> Companies 'can seek to mitigate or even avoid potentially negative outcomes with proper planning and coordination' by using MoUs as a critical tool 'agreed to – in writing' (emphasis added). MoUs are seen in the context of the dialogue, including training, with state security, which 'has become a key way (and best practice) for companies to ensure they are implementing the VPs'.<sup>247</sup> In other words, to comply with the VPs, it is considered enough for companies to show that they have drawn-up MoUs, rather than taking the critical step of ensuring that the agreement is implemented. The VP statement on MoUs is complacent in reinforcing the corporate message that companies are powerless when it comes to state security provision:<sup>248</sup>

...the inappropriate conduct of such forces can have an adverse impact on a company's operations and the neighboring community, yet the forces operate under the command of the sovereign government, not the company. The company's lack of any form of command and control over public security forces reinforces the need for a framework which clearly defines terms of reference for engagement with forces.

MoUs are not put in place to prevent abuse – 'a company's use of such a document may demonstrate a company's lack of control over public security forces, as one of its key purposes is to obtain an assurance by the public security forces of their commitment to human rights principles'<sup>249</sup> – but because such agreements legitimise recourse by companies to the continued use of public security in the unwritten expectation that human rights abuse will continue when securing production in difficult or unstable countries or regions.

<sup>241</sup> Interview with the Procureur de la République, M. Makaba, Kolwezi, 23 March 2013; and Interview with KCC's Head of Security, Kolwezi, October 2013. See also *intra*, fn 213.

<sup>242</sup> Procès-Verbal judiciaire n° 002/011/RG047/PIC/KOV/DESK-KCC/2014, *op. cit.*

<sup>243</sup> Barrick, 'Response to Article on North Mara Mine, Tanzania,' *op. cit.*

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> Statement by Voluntary Principles Participants on Memoranda of Understanding Between Companies and State Security Forces, *op. cit.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

Overall, attributing ‘crucial’ status to public security relationships, legitimising the limits of corporate influence, allowing support for human rights training and MoUs to go a long way towards satisfying the requirement of ‘all appropriate measures’ to further human rights observance, and failing to specify consequences should public security continue to commit violations, leads to the conclusion that the existing framework of human rights principles and corporate practice can actually perpetuate such abuse.

The more fundamental question is this: why has this situation arisen? Companies, by failing to act or saying they cannot act (for example, for reasons of sovereign control over state forces) when abuses are perpetuated, sends the message to public security that the excessive use of force, including lethal force, is acceptable. It could be – returning to the conundrum posed at the beginning of this section – that public security operates in the interests of private companies, allowing their operations to continue in what would otherwise be unstable or insecure environments. In other words, the ‘dirty work’ of imposing security through force is effectively out-sourced.

### *The North Mara MoU*

RAID has obtained a copy of the MoU (‘the North Mara MoU’) dated 8 July 2010 between ABG’s NMGML subsidiary and the Tanzanian police force. Acacia (formerly ABG) has since stated:<sup>250</sup> ‘The Memorandum of Understanding between NMGML and the Tanzanian Police Force was initially entered into on 8 July 2011 (“the MoU”). An earlier MoU (dated 10 December 2008) had been entered into between Barrick Gold Tanzania and the Tanzanian Police. The MOU is reviewed periodically and was most recently revised in 2014.’ Acacia has neither accounted for the discrepancy in the dates of the NMGML MoU (8 July 2011 cf. 8 July 2010); nor has the company indicated that any provisions analysed by RAID have changed in revised versions of the MoU; nor has Acacia/NMGML made a copy of the MoU, including the latest version, publicly available.

Whilst this is the kind of agreement recently endorsed by the VPs, the shortcomings of the North Mara MoU are all too apparent when it comes to preventing human rights abuses, but its very existence undoubtedly helps protect the company by setting out the extent and limits to its influence over state security.

#### *Influence and control: establishing ambiguities*

The North Mara MoU conveys that the company has leverage over the police and control over security at its mine sites in order to demonstrate that it can manage any associated risks. At the same time, the MoU also refers to police autonomy when commanding operations, an attribution which has obvious utility in distancing the company from any human rights violations that occur.

On the one hand, in recognition of national sovereignty, the North Mara MoU states ‘[w]henver Police officers enter the Mine Site compound, they shall observe the laws, rules and regulations of Tanzania’.<sup>251</sup> On the other hand, the MoU states that the police ‘shall also comply with ‘the Voluntary Principles on Security and Human Rights...and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ and observe ‘Company security and safety policies and procedures as well as other Mine Site guidelines to be provided to the Police point of contact’.<sup>252</sup> Nothing in the MoU advises on what should happen if adherence to the VPs and other specified principles and standards conflicts with national rules governing police conduct.

The MoU simultaneously distances the company from command and control – ‘[t]he officers of the Police posted to the Mine Site act under the orders of their hierarchical Police officers’ – yet also states how senior police officers, responsible for ‘issuing assignments to individual Police officers’, will do so ‘in coordination with the Mine Site Security Manager (or his designee)’.<sup>253</sup> Similarly, ‘[i]n providing support to the Police, the Company and the Mine Site have no authority to supervise, direct, or control any mission, assignment, or function of the Police or any member thereof.

<sup>250</sup> Acacia Mining plc, letter to RAID, 7 March 2016, op. cit.

<sup>251</sup> Ibid., 1.1.6; see also 1.1.4: ‘All Police personnel receiving support as detailed in this MOU shall, in discharging their responsibilities, comply with all relevant laws of Tanzania, as well as relevant directives, by-laws and regulations including use of only the minimum force necessary to control any violent situation in accordance with said laws of the United Republic of Tanzania (including, The Penal Code, The Criminal Procedure Act, The Police General Orders, and any other relevant legislation)...’

<sup>252</sup> Respectively, MoU, 1.1.4 and 1.1.6.

<sup>253</sup> Ibid., 1.1.10.

However, to maximize protection and responsiveness to security concerns, the Company shall always be in coordination, cooperation, and communication with the Police regarding security and safety issues, including human rights.<sup>254</sup> Where coordination ends and direction begins is a moot point.

Barrick has confirmed publicly that ABG ‘provides a small amount of support to the police (in the form of a per diem according to rates set by the Tanzanian government for food and accommodation, fuel, the use of vehicles, and certain office supplies).’<sup>255</sup> The MoU details the extent of this support: provision of commercial passenger vehicles, servicing and maintenance of police vehicles, fuel, per diem payments to police officers, furnished accommodation, meals, medical assistance, funeral expenses, the consideration of requests for other support.<sup>256</sup>

The MoU states that ‘[t]he monetary and in-kind support is not being provided in connection with, in furtherance of, or conditioned on any specific assignment the Police may undertake when deployed to the Mine Site or surrounding area’.<sup>257</sup> It is difficult to envisage such arrangements without a corresponding degree of influence. Indeed, Barrick – having earlier emphasised the territorial sovereignty of the state – then confirms that it is ABG who controls access to the mine site: ‘only upon request do the police enter the mine area’.<sup>258</sup>

The MoU states ‘[t]he Police and the Company agree to work together in support of the provision of community policing services through the Tanzania Police Community Policing Unit and other policing and security initiatives in and around the Mine Site’ and, unless requested by ABG managers, ‘it is agreed that all security services provided by the Police shall be outside the perimeter of the Mine Site security fence’.<sup>259</sup> This creates the impression that the provision of police services, supported by the company, is simply an extension of community policing and public law and order. However, it is also apparent that police do provide services to the company, which controls their access to the area within the Mine Site fence.<sup>260</sup> Moreover, it does not follow that incidents beyond the fence have nothing to do with the mine; firstly, policing just outside the perimeter is obviously providing security for the mine; secondly, such a location may be beyond the mine compound, but it is not necessarily outside of land covered by the company’s mining license.<sup>261</sup>

#### *Lack of enforcement of the MoU*

Given the silence of the standards on the question of the private sanctioning of public security, it is not therefore surprising that the North Mara MoU fails to spell out the consequences should public security fail to comply with required human rights standards (beyond provisions to have particular police officers removed at the company’s ‘suggestion’ and to refuse support to individual police personnel who fail to meet the standards set out in the MoU).<sup>262</sup> Moreover, notwithstanding the weakness of penalties within a MoU, there is also the matter of whether they are applied in practice.

- On an individual basis, how many police or military personnel have been suspended or excluded from being posted at company sites, with their attendant benefits of per diems and accommodation?

On an institutional basis, there is little evidence that MoUs provide the means for a company to take action against the police or military, but the North Mara MoU does stipulate that police cannot enter the mine site unless requested to do so by ABG management. ABG states:<sup>263</sup>

Generally, police are only called upon to enter our sites in the case of emergency where police assistance is required to maintain law and order; otherwise access is restricted. In all cases, the MoUs require the police to comply with all relevant laws and international enforcement principles, including the Voluntary Principles.

<sup>254</sup> Ibid., 2.9.

<sup>255</sup> Barrick, ‘Response to Article on North Mara Mine, Tanzania’, op. cit.

<sup>256</sup> North Mara MoU, 2.1 – 2.6; also Annex A, Schedule of monetary and in-kind support to be provided by the company.

<sup>257</sup> Ibid., 2.9.

<sup>258</sup> Barrick, ‘Response to Article on North Mara Mine, Tanzania’, op. cit.

<sup>259</sup> North Mara MoU, 1.1, 1.1.1 – 1.1.2.

<sup>260</sup> Ibid., 1.1.2.

<sup>261</sup> See the Tanzania Mining Cadastre Portal, <<http://portal.mem.go.tz/map/>>, which shows detailed maps of mining licenses. To locate and identify the extent of ABG’s North Mara licenses, enter ‘North Mara Gold Mine Limited’ as the search term.

<sup>262</sup> Memorandum of Understanding between RPC (Tarime-Rorya Special Zone) and successors, Tanzania Police Force, Community Policing Unit (PHQ) and North Mara Gold Mine Limited, concerning Provision of Assistance in Providing Community Policing Services and Maintaining Law and Order in and around the North Mara Gold Mine, 8 July 2010 [hereafter ‘North Mara MoU’], provisions 1.4 and 2.9 respectively.

<sup>263</sup> <<http://www.acaciamining.com/sustainability/our-material-areas/security-and-human-rights.aspx>> (visited 05/03/ 2015).

Yet, in practice, there is no evidence that ABG's requirement of compliance – '[t]he expectations and demands of ABG could not be more clear'<sup>264</sup> – is being met: police have been asked onto the North Mara mine site to assist with security time again and time again, despite multiple incidents, year on year, when they have used excessive and lethal force.

- Why has the company not made alternative provision and curtailed the presence of police on site?
- Is it not the case that the police are called in because the type of security offered by public security cannot be provided by private security, which includes the carrying and use of firearms with live ammunition?
- In referring to the monetary and in-kind support given to the police, what does NMGML mean when it refers to 'Joint security and training initiatives with the ABG use of force options'<sup>265</sup>?

A lawyer acting for victims of the May 2011 shootings at North Mara has stated:<sup>266</sup> 'The mine's own security are not armed with live ammunition; they have teargas and non-live projectiles. But they are commonly accompanied by police who do carry live ammunition, and use it.' Another credible media report refers to the fact that ABG's security guards 'are supposed to be limited to non-lethal force....The police, meanwhile, are equipped with automatic weapons that account for most of the deaths at North Mara.'<sup>267</sup>

Please see Acacia's 7 March 2016 response to RAID for the company's comments on the North Mara MoU and its answers to some of the questions posed above.

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<sup>264</sup> 'Statement from Barrick Gold Corporation concerning the North Mara Mine, Tanzania', 30 May 2011, *op. cit.*

<sup>265</sup> North Mara MoU, Annex A, provision I.

<sup>266</sup> Shanta Martin, partner at the law firm Leigh Day, quote in The Observer, 'Killings at UK-owned Tanzanian gold mine alarm MPs', *op. cit.*

<sup>267</sup> Geoffrey York, 'Barrick's Tanzanian project tests ethical mining policies', *op. cit.*

## 4. Investigate and redress

The third element of the GP framework is redress. The GPs recognise the role of the state in protecting against human rights violations by ‘taking appropriate steps to prevent, investigate, punish and redress such abuse’ and that ‘[e]ffective judicial mechanisms are at the core of ensuring access to remedy’, but also acknowledge legal, practical and procedural barriers to redress:<sup>268</sup> ‘Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise.’

It is because of these barriers that the GPs also provide for non-judicial grievance mechanisms, whether these are administered by the state or by industry or multi-stakeholder bodies.<sup>269</sup> (Although many of the same barriers and controls over victims in the judicial realm are replicated in the non-judicial realm.). The GPs are distinctive in setting out a role for companies in providing remediation through operational-level grievance mechanisms.

The focus here will be twofold: upon the operational level – essentially, these are privatised grievance mechanisms; and upon how the call for grievance mechanisms under ‘industry, multi-stakeholder and other collaborative initiatives’ is playing out in the context of the VPs.

### Why would they want to do that?

One stated purpose of the GPs is to use company-based grievance mechanisms as a means to nip problems in the bud and to prevent them from escalating into human rights violations. The Special Rapporteur asks a rhetorical question about companies establishing voluntary grievance mechanisms:<sup>270</sup>

Why would they want to do that? Because most major human rights violations didn’t start out that way, we discovered – they start out as minor grievances that get ignored, and if a company had a mechanism, a place where the community could come with their grievances, they could head off the escalation of minor grievances into major confrontations that may lead to major human rights violations. There’s a demonstration outside the mine site, the armed forces are called out, people are shot – the next thing you know, the company is accused of complicity in extra-judicial killing. You don’t want to go there, you’d much rather hit this off with a voluntary grievance mechanism – so that’s the company’s side.

However, the lack of specificity in the GPs about how and when they should be used has allowed companies to deploy such grievance mechanisms not to prevent violations occurring, but to deal with violations *after* they have occurred. In this way, even instances of serious abuse are being privatised and dealt with ‘in-house’.

Whether or not the use of grievance mechanisms by companies to transfer and contain abuses in a private sphere that they control represents a subversion of the GPs is a moot point. What is apparent, however, is that the pragmatic GPs were neither created, nor exist, in a vacuum and it is their expressly permissive and legitimising provisions that once again have utility for companies when it comes to packaging their containment of violations as ‘redress’. At the same time, companies are given latitude because the GPs are silent upon, and omit to specify, the limits to company-based (and controlled) grievance mechanisms. Moreover, it is pertinent to recall that the GPs were finalised within the limits that companies would accept in the first place and there is a clear-cut example (*intra*, p.68) of how the ‘effectiveness criteria’ – which set

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<sup>268</sup> Respectively GP 1, GP 26 and Commentary.

<sup>269</sup> GP 27 outlines state-based non-judicial grievance mechanisms; GP 28 concerns non-state-based grievance mechanisms, including those administered by business (operational-level mechanisms under GP 29) and those administered by multi-stakeholder groups (under GP 30).

<sup>270</sup> International Bar Association, Interview with Professor John Ruggie, Special Representative of the UN Secretary-General on business & human rights - transcript, 19 April 2010, available at: <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4B5233CB-F4B9-4FCD-9779-77E7E85E4D83>>.

standards for grievance mechanisms – were watered-down to enable business to retain control over human rights-related complaints.<sup>271</sup>

## Sufficient content to legitimise the privatisation of redress

Prior to the endorsement of the GPs, prominent human rights NGOs expressed their disquiet over redress:<sup>272</sup> the almost exclusive focus under the GPs on grievance mechanisms, ‘with only a single principle (24 [re-numbered 26 in the final text]) dealing with judicial mechanisms, which are necessarily at the core, albeit not the sole modality, of effective remedies under international law’ and; the inadequacy of voluntary mechanisms, including operational level grievance mechanisms, in the absence of any independent oversight or public monitoring. Yet the final text –in the interests of pragmatism – remained largely unaltered.

The GPs, while recognising the problem of obstacles to judicial redress and including a reference in the final text to imbalances between the parties to business-related human rights claims, could have included provisions to further the removal of such barriers, as recommended by NGOs.<sup>273</sup> Instead, the GPs concentrate on the alternative of grievance mechanisms, to include operational-level grievance mechanisms under GP29. It is the latter mechanisms which have been most widely seized upon by companies, with good reason.

In other terms, in order to overcome the obstacles presented to victims by the differential power of companies when it comes to seeking legal remedy – and a recent study by Amnesty International is an object lesson in the prevalence of such obstacles<sup>274</sup> – the solution offered by the GPs is to move redress squarely into the corporate domain by advocating that companies provide redress through mechanisms that they design and control. But what solution is this at all, when the GPs swap imbalances in corporate power for the latter’s total control over the element of redress?

However, what the GPs have specified and permitted – the principle that remedy, even in the case of human rights violations, can be privatised and that companies may legitimately intervene when it comes to providing such redress – is augmented by the lack of specificity (or even silence) of the GPs when it comes to specifying the limits of such interventions or the way in which business-led grievance mechanisms ought to be used or conducted.

## Latitude and self-exoneration in cases of serious violations

Whilst many different approaches – state-based judicial (criminal and civil) and non-judicial processes, non-state-based grievance mechanisms – are referenced by the GPs, there is insufficient guidance upon when a certain type of mechanism should or should not be used. This may appear pragmatic, allowing different solutions to be pursued in different contexts, but the undifferentiated guidance has allowed companies to legitimise their intervention when shifting remediation from the public to the private sphere, even in cases of alleged serious abuse.

The GPs do not prescribe a sub-set of human rights that business should respect but instead appeal to foundational instruments, such as the International Bill of Rights, which covers a wide spectrum of civil, political, social, economic and cultural rights.<sup>275</sup> The GPs recognise that businesses can impact upon the whole spectrum of human rights in different contexts. However, beyond certain specific references to gross human rights violations in conflict situations, the GPs offer no guidance on whether certain rights are more important

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<sup>271</sup> Effectiveness criteria are dealt with under GP 31.

<sup>272</sup> Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights, January 2011, op. cit.

<sup>273</sup> *Ibid.*, point 5), p.3: ‘Lastly, there is currently no guidance for States on measures to assist individuals and communities to overcome obstacles to justice, such as large imbalances in power, resources and information compared with business actors. States should adapt their legal and policy frameworks with a view to ensuring victims can exercise their right to an effective remedy, including by reducing or eliminating financial barriers to access public justice mechanisms, and by making the functioning and decisions of those mechanisms more effective.’ A November 2010 draft of the Guiding Principles is available at: < <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>>.

<sup>274</sup> Amnesty International, *Injustice Incorporated – Corporate Abuses and the Human Right to Remedy*, 2014.

<sup>275</sup> GP 12 and Commentary.

than others or upon what should be considered serious abuses.<sup>276</sup> There is nothing definitive in the GPs to suggest that company grievance mechanisms are unsuited to offering redress even when there are serious, systematic violations, including the killing of people by state and private security at company sites. Not only are these mechanisms being used in exactly these circumstances, but they also have been used to intervene in, or even to curtail, judicial redress.

Beyond broad-brush effectiveness criteria – critiqued later because of a corporate bias in their reformulation – nothing further under GP 29 is specified about the conduct and intended outcome of operational-level grievance mechanisms, allowing wide latitude when foundational principle GP 25 states that remedy ‘may include apologies, restitution, rehabilitation, financial or non-financial compensation’. Moreover, beyond state/non-state and judicial/non-judicial distinctions, the only other defining attribute of a grievance mechanism given is that it is ‘routinized’.<sup>277</sup>

## Tacit approval of in-house investigations

It is difficult to conceive of any grievance mechanism under which redress for an alleged violation is considered without first there being an investigation of the claim and a determination of its validity. Yet the GPs entirely fail to distinguish between investigative, determinative and remedial phases inherent within any grievance mechanism. As a consequence of this, the GPs offer no guidance or prohibitions on how the former two phases are conducted (beyond the generic ‘effectiveness criteria’, which were never formulated to govern investigations in the first place).

An initial and obvious criticism is the total lack of independence and credibility in a process whereby a company investigates itself, determines its own culpability (or exoneration) and then decides what redress (if any) is needed. A second criticism is that such private investigations are invariably kept confidential, depriving victims and the wider public of any powers of scrutiny or a sense of accountability. Any remedy (if offered) is similarly bound up in confidentiality agreements. However, as discussed below, the silence of the GPs on investigation and exoneration in the private (operational-level) realm has serious repercussions in the public realm that may actually reduce or even curtail a victim’s right to justice.

### STEP 4a –Private investigations, public blame

Ultimately, the GPs recognise that there is a *private* element to determining alleged human rights abuses: the GPs legitimise a role for a company in investigating claims of abuse (grievances). In other words, the GPs allow or even facilitate the intervention of companies in instances of abuse concerning their operations.

#### GPs and VPs

Whilst GPs 1 and 25 recognise that states must investigate abuse as part of their duty to protect against human rights violations, GP 29 advocates the establishment of operational-level grievance mechanisms, typically administered by the enterprise itself. However, the GPs fail to explicitly address the investigative phase that will inevitably result from the consideration of a complaint, offering no specific guidance on how the former should be effectively conducted.

The VPs do explicitly refer to the role of a company itself in properly investigating credible allegations of abuse concerning private security providers.<sup>278</sup> Where such allegations are forwarded to the authorities – and

<sup>276</sup> On business and gross human rights abuse, see GP 7 and GP 23(c).

<sup>277</sup> GP 25, Commentary.

<sup>278</sup> Voluntary Principles, Interactions Between Companies and Private Security, paragraph 5.



no guidance is provided as to under what circumstances this should occur – the VPs advocate active monitoring by companies, who should press for proper resolution.<sup>279</sup> This could be read as legitimising continued intervention in external investigations. In respect of public security, the VPs recommend that companies should record and report credible abuses to the authorities, but do not advocate that business should investigate.<sup>280</sup>

### **Glencore/KCC**

Neither Glencore nor KCC have published detailed procedures for dealing with alleged human rights violations. However, in correspondence on the Mutombo case, Glencore refers to an ‘internal investigation by [its]...Human Rights Commission in compliance with the KCC Human Rights Policy’.<sup>281</sup> The Commission is composed of representatives of the legal department and an (unnamed) company human rights advisor. This Commission appears to have powers to review documents and conduct hearings with employees and subcontractors and to reach a determination. However, precise details of how the Commission is constituted or how it operates or reports have not been forthcoming.

### **ABG (now Acacia) and Barrick**

Barrick has in place a procedure (referred to under its *Human Rights Compliance Program*, but not published) for investigating alleged breaches of human rights. This procedure is under tight corporate control. Even when external investigators are used, these are appointed and retained by the company as part of the in-house process:<sup>282</sup>

Another key procedure relates to investigating human rights-related allegations. As that procedure indicates, we require that all allegations of negative human rights investigations must be investigated, though the nature and extent of the investigation may vary depending on the circumstances. Typically, for serious potential human rights breaches, we strive to ensure independence in our investigations. That may be through external investigators that we retain. It also may be through our corporate investigations unit, which is housed at corporate headquarters; the group is jointly supervised by the Office of General Counsel and Vice President, Asset Protection and Risk Management, and the group reports its results to a committee of the board of directors.

ABG’s Grievance Mechanism also refers to an investigative phase:<sup>283</sup> either by a local Grievance Officer who gathers and analyses information or, in cases of ‘potentially serious human rights claims’, the site’s Legal Department, which ‘will ensure those claims are formally and fully investigated.’ Presumably, the Legal Department has recourse to the General Counsel.

It is unclear how either Barrick’s or ABG’s procedure for investigating alleged human rights allegations differs from, or overlaps with, the wider mine investigations policy (MIP) operated by both companies. Again, the MIP is confidential. However, RAID has seen a copy of ABG’s MIP, which covers investigations into, *inter alia*, fatalities and serious injuries, injuries to or deaths of illegal miners or detainees, and the discharge of weapons. For a critique of this MIP, see *intra*, p.49 and p.71.

## **Substituting private exoneration for public justice**

Having made the distinction between direct human rights impacts caused by a company and those caused by ‘business relationships’ (including with state-security), the commentary to GP22 advises in the latter instance

<sup>279</sup> *Ibid.*

<sup>280</sup> Voluntary Principles, *Interactions Between Companies and Public Security, Responses to Human Rights Abuses*.

<sup>281</sup> GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, *op. cit.*

<sup>282</sup> Barrick Gold Corporation, *Human Rights Compliance Program*, *op. cit.*, pp.4 – 5.

<sup>283</sup> ABG Grievance Mechanism, *op. cit.*

‘the responsibility to respect human rights does not require that the enterprise itself provide for remediation, *though it may take a role in doing so*’ [emphasis added].

This is a peculiar permission to give – why should a company remedy the harm caused by another party in a relationship? One explanation is that, starting from the wider, non-legal, definition of complicity, a company may wish to help provide remedy – without accepting culpability – because this best protects its reputation. Another explanation is that, by giving companies leave to provide redress when the harm is ostensibly caused by a business partner (company or state), this effectively further legitimises the intervention of companies in areas traditionally reserved for judicial, or at least public, determination and remediation. A company’s intervention in offering redress becomes a substitute for judicial remedy. The problem is that this process of substitution may be entirely inappropriate, for example, in cases of serious human rights violations when criminal offences may have been committed; and may therefore substitute private redress and compensation for justice because the perpetrators are not bought to account.

Advocating such private interventions also helps conceal a highly detrimental aspect of such redress that has its roots in the failure of the GPs to distinguish between investigation, determination and redress. In order to determine that a human rights violation was caused by a business relationship – for example, a state agent – and not directly by a company, requires that an incident is investigated. But no guidance is given on who is to carry out this investigation and, if more than one party does so, how the investigation is to be managed or sequenced. With perfectly circular logic, GP22, in giving companies leave to provide redress, intrinsically allows companies to make the determination that they are indeed not directly culpable.

Another implication follows: if a company has a legitimate role in investigating a violation and exonerates itself or its sub-contractors, then this loads the dice when it comes to any subsequent investigation by public authorities, especially given the often close relationship between big business and the state.

### *Redress for the actions of others?*

In its original 17 May 2011 short notification of the shootings at the North Mara mine, ABG refers to the actions of the intruders and the FFU (Tanzanian police). ABG states it ‘sincerely regrets any loss of life’, also reassuring investors: ‘There have been no material impacts to the operation or production’.<sup>284</sup>

Having immediately identified the involvement of the Tanzanian police, ABG nevertheless announced an internal company investigation.<sup>285</sup> Just two weeks later, on 30 May, despite describing police and company investigations as ‘underway’, ABG appears to have reached its own conclusions.<sup>286</sup> The company categorically stated that the fatal shootings ‘...involved Tanzanian police. ABG security was not involved in these fatal incidents and, generally, does not deal with incursions of this magnitude and level of organization.’

By the end of September 2011, ABG re-stated that the confrontation, in which ‘five intruders were killed and a number of police officers were injured’, was between ‘police and armed intruders’.<sup>287</sup> Again, this assertion was made in advance of the official inquiry into the incident, which ABG refers to within the same release.

Later in the year, the external Committee of Inquiry report into the incident, prepared for the District Commissioner of Tarime, was eventually completed.<sup>288</sup> The report is deeply flawed. The Committee was given just seven days to complete its investigation and submit its findings. The report does not contain any interviews with the victims of violence, their families or eyewitnesses. Seven of the 24 people interviewed were police or mine security and four were community relations officers paid by the mine (others were customary elders and local officials, who were not present at the

<sup>284</sup> ABG, Security incident at North Mara, 17 May 2011, available at: <<http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2011/security-incident-at-north-mara.pdf>>.

<sup>285</sup> Ibid.

<sup>286</sup> ABG, Update on North Mara, 30 May 2011, <<http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2011/North-Mara-update-final-30511.pdf>>.

<sup>287</sup> ABG, North Mara Update, 30 September 2011, available at: <<http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2011/North-Mara-update-Sept-30.pdf>>.

<sup>288</sup> The United Republic of Tanzania, Office of the Prime Minister, Regional Administration and Local Government, District Commissioner of Tarime, The Report of the Inquiry into the Death of Five People on 16/05/2011 shot by the police at the North Mara mine, 2011. The English translation of the original Swahili report is available at: <<http://www.raid-uk.org/sites/default/files/Commision%20of%20Inquiry%20Report%20%28English%29%20re%20North%20Mara%202011.pdf>>.

incident). None of the report's recommendations relate to use of force by mine security or by police that guard the mine.

In its 30 May release, ABG also refers to its own investigation of<sup>289</sup>

a number of allegations of crimes on our property including corruption, assault and trespass. These also include a number of allegations of sexual assault in and around the mine site allegedly involving both police as well as our own security personnel.

The allegations were initially raised with external personnel (albeit retained by ABG and looking into an unrelated matter). ABG's response was to initiate 'an immediate internal investigation by a highly experienced investigative team'.

ABG confirmed that, 'in accordance with the Voluntary Principles', it promptly notified the Tanzanian police and urged that an investigation be conducted. ABG stated its cooperation and the sharing of pertinent information in support of the police investigation unit deployed at North Mara.<sup>290</sup> However, ABG also reiterated that its own internal investigation would continue and it is unclear whether this meant that the company investigated allegations concerning employees and the police investigated allegations against public security personnel. Certainly, the VPs could be read to support such a division.

Despite its pledges to do so, ABG, beyond a press update where the onus is upon 'moving on' and actions going forward, has never released public reports giving details or the results of its internal investigations either in relation to the corruption, trespass, assault, or sexual assault allegations or the May 2011 shootings.<sup>291</sup>

Companies employ strategies for substituting internal, privatised investigations into in-house and contractual security to pre-empt and seemingly obviate the need for official investigations into these private aspects of operations, leaving space only for the culpability of state actors. The call by a company for the state to then investigate and prosecute any wrong-doing is self-serving in that it distracts attention away from internal and contractual elements involved in an incident, whilst the company gains credibility in being seen to make a stand against impunity.

For example, the VPs set up a dichotomy between how incidents of alleged abuse are to be handled depending upon whether state forces or private security providers are involved. On the one hand, in the case of alleged violations involving state security, the VPs recommend:<sup>292</sup>

'[I]n cases where physical force is used by public security, such incidents should be reported to the appropriate authorities and to the Company'; and

'Companies should record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities. Where appropriate, Companies should urge investigation and that action be taken to prevent any recurrence.'

On the other hand, where private security providers are involved in an alleged violation, the VPs recommend:<sup>293</sup>

'All allegations of human rights abuses by private security should be recorded. Credible allegations should be properly investigated. In those cases where allegations against private security providers are forwarded to the relevant law enforcement authorities, Companies should actively monitor the status of investigations and press for their proper resolution'; and

<sup>289</sup> ABG, Update on North Mara, 30 May 2011, op. cit.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.: 'ABG will continue to conduct its own internal investigation, and will provide public reports on the results of the investigations.' ABG released a further short press release: North Mara Update, 30 September 2011, op. cit.

<sup>292</sup> Voluntary Principles, Interactions Between Companies and Public Security, respectively Deployment and Conduct and Responses to Human Rights Abuses.

<sup>293</sup> Ibid., Interactions Between Companies and Private Security, paragraphs 5 and 8.

‘In cases where physical force is used, private security should properly investigate and report the incident to the Company. Private security should refer the matter to local authorities and/or take disciplinary action where appropriate.’

In other words, the VPs consider it appropriate for the company or private provider to investigate incidents involving private security, and there is no presumption that such allegations should necessarily be forwarded to the authorities. In this way, even where allegations of serious human rights abuses are concerned, the VPs can be read as legitimising private investigation under a company’s control.

The simplistic distinction in the VPs between state and private security provision seldom occurs in practice when arrangements are far more ‘messy’, with a mixture of in-house company, contracted, and state security operating together or sequentially. In such circumstances, the VPs underpin a propensity for investigations to be carved up between the state and the company, paving the way for the company to investigate and declare on its own or contracted security and for the state to deal with the public elements. Not only does this approach fail to deliver the whole picture in terms of who is responsible for what during a violation, it also frequently results in in-house exoneration, followed by trials, often lacking in due process, of police or army personnel, the verdicts of which often cannot be relied upon as sound.

The GPs too allow for ambiguity over what a company is required to report. The commentary to GP22 continues: ‘Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.’ This is hardly a categorical statement that companies must report potentially criminal acts nor is cooperation – or the typical situations in which it is required – further defined.

In the context of a principle that advocates business enterprises should provide remediation, cooperation could legitimise a company’s own in-house investigations running in parallel with public (including criminal) investigations. Cooperation between companies and the public authorities – and, in the context of the Mutombo case, Glencore itself uses the term ‘collaboration’<sup>294</sup> – cannot be left as undefined; nor do the GPs in anyway suggest that it may be inappropriate for companies to intervene or to offer redress when crimes are alleged.

Given the nexus between state/company/subcontracted security and the blurring of the public/private elements in terms of chains of command, payment and intermingled teams, the way in which company investigations are conducted – secretly, to unknown rules, with no reasoned, public outcomes – raises the danger that witnesses may collaborate, evidence may be contaminated or trails allowed to go cold before any public investigation is complete.

### *ABG’s Mine Investigations Policy and the control of information in cases of serious abuse*

ABG uses both its Mine Investigations Policy and the North Mara MoU to exercise control over information.<sup>295</sup> As noted previously, neither the MoU or MIP is published by the company, although RAID has obtained copies of both.

#### *Mine Investigations Policy (MIP)*

In those instances when ‘illegal miners’ or detainees have been injured or killed, ABG seeks to retain strict control of information to protect its interests:<sup>296</sup>

- MIG [Mine Investigations Group] are conducting the investigation on behalf of the company and OGC and NOT the police.
- Any requests by the Tanzania Police Force for assistance OR any documents or other investigative material are to be IMMEDIATELY referred to Legal Counsel

Investigations into deaths at a mine site:<sup>297</sup> ‘MUST be conducted in accordance with the directions of the Office of the General Counsel (OCG)’ [paragraph 5.1.2]; all ‘Category A’ investigations (those concerning, for example, injuries or

<sup>294</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>295</sup> African Barrick Gold (ABG), Mine Investigations Group, Investigations policy, May 2010, [hereafter MIP]. RAID has posted the MIP at: <<http://www.raid-uk.org/sites/default/files/ABG%20Mine%20Investigation%20Policy.pdf>>.

<sup>296</sup> MIP, op. cit., 5.7 Injuries/deaths to illegal miners or detainees, 5.7.1 Specific requirements.

deaths to illegal miners), 'will be undertaken for the dominant purposes of obtaining legal advice and/or preparing for legal proceedings for prosecutions for and on behalf of ABG'. The resulting reports will be labelled 'Confidential and Privileged' [paragraph 5.1.2].

ABG reminds its MIG staff that:<sup>298</sup> their primary purpose is to conduct 'internal investigations into Offences and breaches of Policy and Procedures that are committed on the mine site or by ABG employees'; they 'are not the police and it is not our role to conduct investigations on behalf of the police' (cf. the provision, noted below, for staff to investigate criminal matters) and; that 'MIG MUST not release any material to the police without prior written approval from Legal Counsel and the Group Security Manager.'

The MIP appears to cross a line and begins to take on elements of criminal investigations usually reserved for public law officials; hence, when a company investigator 'intends to commence criminal...proceedings', they are instructed to advise suspects of their rights before conducting interviews; and it is a 'mandatory requirement' that every record of interview contain a '[f]ormal criminal caution'.<sup>299</sup>

In its 7 March 2016 response to RAID, Acacia states:<sup>300</sup> 'Your references to this procedure [the MIP] omit the specific requirement to report any deaths on Acacia Operational Areas as required by regulation as soon as possible to the Tanzania Police Force and Mines Inspector by the General Manager or delegate. Any investigation in relation to injuries or deaths is subject to the overriding direction of the attending Police investigators. It is explicitly stated that the Procedures are subject to any contrary direction or action taken by the attending Police.' RAID notes that, within its reply, Acacia does not provide references to specific paragraphs within the MoU and that special requirements for treating the deaths of employees, contractors or any visitor on the mine site (MIP paragraphs 5.6.1 and 5.6.2 differ from the special requirements relating to injuries/deaths to illegal miners and detainees (MIP paragraphs 5.7 and 5.7.1).

#### *North Mara MoU*

Remarkably, ABG's North Mara MoU with the Tanzanian police goes as far as to invert the reporting relationship, so that the latter serve the company, even when crimes may have been committed.<sup>301</sup>

**In case of any criminal incident, or any impending criminal incident at or around the Mine Site of which the Police become aware or in which the Police takes any action, the Police shall formally report the incident in writing to the Company as soon as possible. The Company may request any such additional information it may require and the Police shall provide such information as requested.**

Please see Acacia's 7 March 2016 response to RAID for the company's comments on the North Mara MoU and the MIP.

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<sup>297</sup> MIP, op. cit.

<sup>298</sup> Ibid., 21 Police and Courts, 21.1 General.

<sup>299</sup> Ibid., 10.4 Suspect interviews and 10.5 Records of Interview, 10.5.1 Introduction.

<sup>300</sup> Acacia Mining plc, letter to RAID, 7 March 2016, op. cit.

<sup>301</sup> ABG, North Mara MoU, op. cit., 2.11.

### *Resisting a determination of abuse*

KCC felt entitled to involve itself in the official post mortem on Eric Mutombo. On 20 February, a post mortem examination, carried out at Mwangeji Hospital, concluded that Mutombo had died from multiple trauma – in all probability the result of a beating.<sup>302</sup> KCC contested the result, claiming that it did not correspond to the KCC's doctors 'preliminary observations'.<sup>303</sup> The death certificate – not produced by KCC until 8 weeks after Mutombo's death – fails to include information that indicates ill-treatment: signed by the KCC doctor, no observations are recorded and the cause of death is 'unknown'. According to the DSK Commander's report, neither did the duty prosecutor observe any signs of physical abuse or injury. The report of the KCC doctor's 'initial findings' has not been released by KCC and was not produced in court.<sup>304</sup> According to Glencore, neither did the duty prosecutor observe any signs of physical abuse or injury.<sup>305</sup>

KCC, dissatisfied with the finding of multiple injuries as the cause of death, insisted on and paid for a second post mortem, which took place on 27 February 2014 at a different hospital. This examination confirmed that Mutombo had died of internal injuries – he had a collapsed lung and serious tissue damage to one side of his chest.<sup>306</sup> The doctors later confirmed to the family that the injuries were consistent with Mutombo having been beaten.<sup>307</sup> Late in the afternoon of 28 February, KCC claimed that the second examination had been carried out on the wrong body.<sup>308</sup> At KCC's insistence the cadaver had once again to be formally identified. The Prosecutor and the family confirmed that it was Mutombo's body.<sup>309</sup>

In late March, more than a month after Mr. Mutombo's death, Glencore, in a blatant attempt to stop NGOs from reporting on the case, was still insisting that 'the second autopsy report confirms the initial findings that there were no signs of beatings or physical abuse.'<sup>310</sup> The company's assertion is contradicted by both post mortems and by court testimony. The medical experts questioned were adamant that the victim did not die from natural causes: 'And from the medical reports, the three Gécamines doctors [who carried out the second post mortem] clearly told the Court that the large bruise on the right side of the chest would have caused the death of the victim within minutes on 15/02/2014. This

<sup>302</sup> The first post mortem of 20 February 2014 at Mwangeji hospital confirms that Mr. Mutombo died of multiple injuries, consistent with having been beaten. Details of the first post mortem are contained in a letter from the Centre d'aide juridico-judiciaire (CAJJ) to the Mayor of Kolwezi, 3 March 2014. The Note de Plaidoirie des parties civiles, op. cit., confirms: «Il est sans conteste que les conclusions apportées à ce rapport [examens post mortem à l'hôpital Mwangeji], relèvent que le feu MUTOMBO KASUYI est décédé d'un polytraumatisme.»

<sup>303</sup> Glencore's denial that Mutombo's body showed signs of beating or physical abuse are made in a letter from Michael Farhbach, Head of Sustainability, Glencore, to Patricia Feeney, RAID, 27 March 2014, op. cit.

<sup>304</sup> KCC Hospital Kolwezi Certificat de Décès, « L'homme apporté mort à l'hôpital KCC/Kolwezi Samedi 15 Février 2014. Cause du décès: inconnue. » Dr Alain Malale Kayindi. According to a date stamp it was received by the Military prosecutor on 6 May 2014.

<sup>305</sup> Letter from Michael Farhbach, Head of Sustainability, Glencore, to Patricia Feeney, RAID, 27 March 2014, op. cit.: '...the body of Mr. Mutombo was examined by a doctor and photographed by the prosecutor at the KCC hospital immediately after the tragic event. The findings of the doctor as well as the photographs show clearly that there were no signs of beatings or physical abuse.' The KCC DSK Commander's report also states that the prosecutor did not observe signs of physical abuse or injury (Procès-Verbal judiciaire n° 002/011/RG047/PIC/KOV/DESK-KCC/2014, op. cit.: «Celui-ci est arrivé à l'hôpital vers 19H00. En présence du médecin MALALE, il a procédé au contrôle du corps du défunt et aucune blessure ni traces de violence physique n'ont été constatées.»

<sup>306</sup> The second post mortem, carried out by doctors from DRC's state mining company, notes several abrasions, contusions and lesions on the head and neck and concludes: 'The death was probably caused by a significant contusion on the right side of the thorax' («Il s'agit d'un cas de décès probablement suite à une contusion importante de l'hémithorax droite»). See GECAMINES Services Médicaux du Groupe Ouest, «Rapport Medico-Legal D'Autopsie, Requisition order No. RPM 29398/PRO24/ KAT », 27 février 2014. According to court documents 'all the experts were adamant that this bruising was a result of blows from a hard object to the victim's body.' See Note de Plaidoirie des parties civiles, op. cit.: «Ceci étant, le tribunal pour s'en convaincre et dissiper tout malentendu est arrivé à poser la question aux différents experts à savoir si cette contusion ne serait pas le fait d'une maladie que pourrait avoir la victime notamment la tuberculose ou autre maladie, tous les experts étaient formels que cette contusion est une émanation des coups dus à un corps dur qu'avaient reçus la victime».

<sup>307</sup> Letter from CAJJ to the Mayor, 3 March 2014, op. cit.

<sup>308</sup> Centre d'aide juridico-judiciaire, Mémoire à Madame Le Maire de Kolwezi concernant le décès de Monsieur Mutombo Kasuyi, Kolwezi 3 mars 2014.

<sup>309</sup> Ibid.

<sup>310</sup> Letter from Michael Farhbach, Head of Sustainability, Glencore, to Patricia Feeney, RAID, 27 March 2014, op. cit. The company required RAID, Bread for All and Action de Carême.us – '[i]n order to avoid subsequent legal issues' – to remove a press release about Mr Mutombo's death and proposed that a 'clarification' (the wording of which had to be coordinated with Glencore) should be distributed. RAID at al stand by the statements made and have published a rejoinder: *Up-date on the Report "PR or Progress? Glencore's Corporate Responsibility in the Democratic Republic of the Congo"*, December 2014, available at: <<http://www.raid-uk.org/sites/default/files/glencore-report-update.pdf>>.

is contrary to what the accused and KCC...wanted the Court to believe that the victim had sustained this injury before the date of the incident.<sup>311</sup>

- Why did Glencore/KCC believe that it was entitled to intervene in the official post mortem?
- Why did the company seek to block or delay the post mortem verdict?
- Why did Glencore persist in denying that Mr. Mutombo's body showed signs of injury abuse when two post mortems stated the opposite?

As noted, the military tribunal, which in August 2014 acquitted two mine policemen of unintentional killing, attributed Mutombo's injuries to a fall on uneven ground (see *intra*, p.55, for a discussion of the anomalies arising from this conclusion).

Of course, companies could refrain from investigating or determining culpability before the state has investigated, but the examples of North Mara and KCC (see boxes) do not demonstrate any such restraint. ABG intervened to conduct its own investigation into the May 2011 shootings and eventually offered remediation, despite its insistence that the Tanzanian police and not the company were responsible for the use of force. Parallel proceedings and company interventions by Glencore/KCC in the Mutombo investigation exemplify how the GPs legitimise such an in-house approach and how they offer no guidance as to when and how such interventions in official inquiries should be constrained or curtailed.

### *Parallel proceedings: Glencore, the internal investigation, the official inquiry and trial*

There have been no less than four parallel inquiries into the circumstances surrounding Mutombo's death: one by the Military Prosecutor – initiated following a complaint by Mutombo's family, but stalled by Glencore; a second by the Public Prosecutor, with whom Glencore cooperated from the outset; a third by Glencore/KCC; and one by G4S. It is apparent that KCC/Glencore has exerted its influence over certain aspects of these inquiries and their sequencing.

#### *The Military Prosecutor*

A first inquiry was initiated by the Military Prosecutor, following a complaint on 17 February 2014 by Mutombo's family against KCC and the security team.<sup>312</sup> The next day, the Military Prosecutor took a statement from Mutombo's companion who had also been apprehended by the security patrol.<sup>313</sup> On 19 February, after failing to get access to management at the KCC site, the Military Prosecutor issued a summons requiring KCC's cooperation in the investigation.<sup>314</sup> Glencore later stated that, on the same day, they had received an official request from the Public Prosecutor to provide him with the names of KCC employees who participated to the intervention and to bring them to his office for hearings.<sup>315</sup> On 24 February, KCC elected to participate in the latter investigation, informing the Military Prosecutor that queries should be directed to the Public Prosecutor.<sup>316</sup>

#### *The unusual transfer of the Mutombo case*

At KCC's request, the case being dealt with by the Military Prosecutor was transferred on 25 February to the existing investigation under the Public Prosecutor.<sup>317</sup> Under Congolese law, military courts and tribunals have competence over

<sup>311</sup> Note de Plaidoirie des parties civiles, op. cit.: « Et de part l'expertise médicale, les trois médecins de la Gécamines ont clairement dit au Tribunal que la contusion importante de l'hémithorax droite, ne pouvait qu'entraîner la mort de la victime dans les minutes qui suivaient cette contusion à la date du 15/02/2014, contrairement au soutènement des parties prévenues et civilement responsable KCC, qui ont bien voulu faire voir au Tribunal que la victime aurait eu ce coût avant la date des événements. »

<sup>312</sup> RAID and Bread for All, Interview with the family, Kolwezi, 11 March 2014.

<sup>313</sup> Statement by John Kawel Kabulo to the Military Prosecutor, 18 February 2014. (Déclaration par John Kawel Kabulo à l'auditeur, 18 février 2014).

<sup>314</sup> Summons to Help with the Investigation sent to KCC by Military Prosecutor, 19 February 2014. (Réquisition aux fins d'enquête, Capitaine Magistrat Dieudonné Kigoma, Premier substitut de l'Auditeur Militaire de Garnison et Officier du Ministère Public près du Tribunal Militaire du Garnison de Kolwezi-Lualaba au Chargé de Sécurité de la société KCC - Kamoto Copper Company, 19 février 2014).

<sup>315</sup> GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>316</sup> Letter from Jean Robert Durand, Manager de la Sécurité KCC to the Premier Substitut de l'Auditeur Militaire de Garnison et Officier du Ministère Public près le Tribunal Militaire de Garnison de Kolwezi-Lualaba, 24 février 2014. See also GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>317</sup> Mémoire à Madame Le Maire de Kolwezi, 3 mars 2014, op. cit.

cases concerning the police.<sup>318</sup> Their competence also extends to civilians accused of being ‘the perpetrator, co-perpetrator or accomplice’.<sup>319</sup> It is therefore seems unusual, in the Mutombo case, for the Public Prosecutor to take control of the case. Indeed, Glencore itself confirms that the handling of cases by the Military Prosecutor ‘is standard procedure for investigations concerning public officials’.<sup>320</sup>

On 8 March, the Public Prosecutor sent notification to the Military Prosecutor, and Glencore was informed on 12 March, that the case had been transferred back to the latter.<sup>321</sup> However, this transfer only happened after the two Mine Policemen (Mujinga Tshimboji and Makombo Mudianga) had been arrested and charged, two days earlier, with ‘deliberately inflicting blows and injuries’ that resulted in ‘the involuntary death’ of the victim;<sup>322</sup> it is also anomalous that the Public Prosecutor – having determined that KCC employees had no involvement Mutombo’s arrest – went on to clear KCC Judicial Police Officers even though the case had already been transferred back to the Military Prosecutor.<sup>323</sup>

KCC’s election to deal with the Public Prosecutor and not the Military Prosecutor, as well as the company’s close cooperation with the latter from the outset, appears to have been a factor in determining how the case was handled.

#### *KCC’s dealings with the Public Prosecutor*

KCC had an established relationship with the Public Prosecutor. It transpired that the Public Prosecutor had been called when Mutombo had died on KCC’s site and had examined the body with a KCC doctor at the mine hospital.<sup>324</sup> KCC state that a dossier was opened by public prosecutor on the same day, 15 February, after he had authorised removal of Mutombo’s body from the KCC hospital.<sup>325</sup>

It should also be recalled that KCC Security Department’s Judicial Police Officers, employed by the company, report to the Public Prosecutor (*intra*, p.34). A KCC JP had made such a report on the Mutombo incident on 16 February.<sup>326</sup>

The Public Prosecutor took statements from KCC staff (including KCC JPs), the Mine Policemen and Mutombo’s Uncle on 24 – 25 February.

According to Glencore, the company had a role in determining whether the incident was a human rights abuse:<sup>327</sup> ‘From the start, KCC provided active support and collaborated with investigating authorities to understand the dynamic of the incident and assess whether a violation of human rights occurred.’ Moreover, given KCC’s direction to deal with the Public Prosecutor, presumably ‘investigating authorities’ means the latter. It remains unclear whether KCC was directly involved in interviewing personnel:<sup>328</sup> ‘Investigating authorities also requested and obtained KCC support to conduct cross-interviews with KCC and contractors’ staff and site visits.’ This reading – KCC participation in the investigation – is backed up by a statement from G4S (the contractor in question), confirming that, as of 6 June 2014, it ‘was not requested by the prosecutor (either Military Prosecutor or the Public Prosecutor) to provide statements’, but they had been interviewed by the KCC investigative Commission (see below).<sup>329</sup>

<sup>318</sup> Under Art. 106, Code Judiciaire Militaire (CJM-2002):

«Sont justiciables des juridictions militaires, les militaires des Forces Armées Congolaises et assimilés.

Par assimilés, il faut entendre les membres de la Police Nationale et les bâtisseurs de la Nation pour les faits commis pendant la formation ou à l’occasion de l’exercice de leurs fonctions au sein du Service National.»

<sup>319</sup> Art. 79, Code Judiciaire Militaire (CJM-2002):

«Lorsque le Code Pénal Militaire définit ou réprime des infractions imputables à des justiciables étrangers à l’armée, les juridictions militaires sont compétentes à l’égard de l’auteur, du co-auteur ou du complice, sauf dérogation particulière.»

<sup>320</sup> GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>321</sup> Communication from le Procureur de la République, Phaniel Macaba Mukoko, to the Auditeur Militaire,

‘Objet: Affaire Mujinga Tshimboji et Makombo Mudianga le 08 mars 2014’ (RMP

29.389/PRO24/KAT/SEC/KOL/2014). See also GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>322</sup> The arrest warrants for the two policemen, Mujinga Tshimboji and Makombo Mudianga -Mandat d’arrêt provisoire - RMP

29.289/PRO24/ KAT 6 mars 2014 – give the charges against them as: Articles 43 3t 48 of the Code Pénal II: ‘coups et blessures volontaires ayant entravés la mort sans l’intention de la donner.’

<sup>323</sup> The company confirms that the Public Prosecutor, following cross-examination on 7 March, ‘determined that KCC employees had no involvement in the arrest, and should not be detained.’ The company also states: ‘the OPJs were reinstated in their duties once cleared by the Prosecutor on 18 March 2014’. See GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>324</sup> GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>325</sup> Letter from Jean Robert Durand to the Premier Substitut de l’Auditeur Militaire. op. cit.

<sup>326</sup> Procès-Verbal judiciaire n° 002/011/RG047/PIC/KOV/DESK-KCC/2014, op. cit.

<sup>327</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>328</sup> Ibid.

<sup>329</sup> G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi, op. cit., paragraphs 4.2.3.1 and 4.2.6.1.



KCC confirms that it met the Public Prosecutor's request, made on 19 February, to ensure that its employees attended hearings at his office, but it appears that the Public Prosecutor did not actually cross-examine the two Mine Police officers concerned and three KCC security employees in the patrol until 7 March, i.e., over two weeks later.<sup>330</sup> By the time of this cross-examination, it transpires that the two Mine Policemen had already been charged the previous day.

#### *Internal investigation*

On 3 March, the KCC management team requested an internal investigation.<sup>331</sup> Glencore is quick to point out that this internal investigation was 'in compliance with the KCC Human Rights Policy', i.e., such procedures are thereby justified. Glencore later, in its public release, states that the internal investigation followed the Public Prosecutor's investigation, but events suggest that both investigations ran in parallel:<sup>332</sup> the KCC internal investigation was initiated before the Public Prosecutor or Military Prosecutor had concluded their respective investigations and before the decision by the Public Prosecutor on whether KCC or G4S staff were to be detained or charged.

Glencore confirms that the Public Prosecutor did not clear the two OPJs (both KCC employees) until 18 March.<sup>333</sup> In other words, the Public Prosecutor's investigation into the KCC employees was not formally concluded prior to that date, yet the KCC internal investigation continued throughout this period.

The very day after the Public Prosecutor cleared the KCC OPJs, the [KCC] Human Rights Commission 'came to the conclusion that the arrest [of Mutombo] was undertaken solely by the officers of the Mine Police, with no involvement of KCC or G4S employees, and that no violation of human rights had been perpetrated by KCC or G4S staff.'<sup>334</sup>

Glencore has confirmed that 'we [KCC/Glencore] interviewed all the staff that took part to the operation directly (KCC and contractors' security staff) and indirectly (dispatch and hospital staff)', but does not state when these events took place.<sup>335</sup> RAID/Bread for All has asked Glencore about what steps KCC took to ensure that there was no opportunity for KCC employees and other members of the patrol to confer before making their statements to the Public Prosecutor and to the KCC internal inquiry, but Glencore has chosen not to answer this question.<sup>336</sup>

Finally, it should be noted that there has been no public scrutiny of the company's internal investigation and its findings. Glencore states: 'Releasing the results of the investigation would infringe on privacy laws, and potentially endanger the individuals involved.'<sup>337</sup>

There are further anomalies and unanswered questions, *inter alia*:

- The fact that only the company interviewed G4S staff and that the Public Prosecutor did not take statements from the latter.<sup>338</sup>
- Glencore's assertion that 'the contractors [G4S] and employees were suspended' while under investigation, whereas G4S reports that 'G4S officers referred to were never missing or in hiding, are currently on duty and have no record of absenteeism'.<sup>339</sup>
- Glencore's statements that: '[a] team [subsequently split into three groups], consisting of KCC employees, G4S contractors and Mine Police was dispatched to apprehend these miners' and;<sup>340</sup> that 'Mr. Mutombo was...driven to the KCC hospital by the team composed by KCC and G4S officers' are at odds with statements from G4S:<sup>341</sup> 'G4S staff was not present during the incident, the full details were not reported to G4S' and 'G4S employees were not part of the Department Security KCC (DSK) patrol team (one of the three groups) at the time of the incident.'<sup>342</sup> While G4S deny that their staff were present, Mutombo's companion, who was also briefly apprehended, stated that he had been beaten by mine police in front of G4S contractors.<sup>343</sup> Moreover, one of the

<sup>330</sup> GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>331</sup> Ibid.

<sup>332</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>333</sup> GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>334</sup> Ibid.

<sup>335</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>336</sup> PR or Progress?, op. cit., Unanswered questions for Glencore/KCC, p.58.

<sup>337</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>338</sup> G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi, op. cit., paragraph 4.2.3.1 and paragraph 4.2.6.

<sup>339</sup> Respectively, Glencore response to Key Findings and Questions, op. cit., and G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi, op. cit., paragraph 4.2.5.1.

<sup>340</sup> GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

<sup>341</sup> Glencore response to Key Findings and Questions, op. cit.

<sup>342</sup> G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi, op. cit., paragraph 4.2.1.1 and paragraph 4.2.6.3.

<sup>343</sup> Statement by John Kawel Kabulo to the Military Prosecutor, 18 February 2014, op. cit.

mine policemen, during the trial leading to his acquittal (see below), referred to ‘the fact that one of the G4S elements, not otherwise identified, carried a sort of wood baton in his hands.’<sup>344</sup>

- Will KCC confirm the make-up of each team in the security patrol, including the team that apprehended Mutombo?
- How did Glencore’s Human Rights Commission arrive at the conclusion that solely the mine police were involved in Mutombo’s arrest?
- According to Glencore, only KCC senior Security staff (OPJs) are permitted to make formal arrests on KCC’s site;<sup>345</sup> yet Glencore state that ‘Mr. Mutombo was apprehended by a team composed solely of officers of the Mine Police’ while also stating that he was arrested.<sup>346</sup> Since he was arrested, does this not strongly suggest that a DSK OPJ was present?
- If the purpose of having joint security teams is to prevent abuse or corruption by Mine Police and others, why did the KCC security team apparently allow unsupervised mine police to go and apprehend suspected creuseurs?

#### *Trial ends in acquittal*

No one has been convicted in relation to Mutombo’s death at KCC’s mine site. The two mine policemen accused of unintentional killing were acquitted by the military court in Kolwezi.<sup>347</sup>

According to the judgment,<sup>348</sup>

‘Regarding the medical reports which the Prosecutor relies on as the basis for the charges against the defendants, the defence counsel explains that there is a serious doubt about the different medical reports of the doctors in so far as they show the ‘PROBABILITY’ of blows to which the deceased had been subjected to.

Thus, in so far as the autopsy of the other reports render the hypothesis of a voluntary blow on the one hand improbable, from the fact that all the injuries are located on the right side of the victim’s body and on the other support the idea of a fall given that the victim was running madly across uneven ground.

...

In the case in point, it is certain that the victim MUTOMBO KASUYI Erick is dead, But this death was not the consequence of a beating undertaken by a third person or persons. The evidence has shown that his death was unquestionably due to a fall on uneven ground arising from the reckless running away in his fear to escape arrest by the security agents.’

A number of anomalies arise from the judgement:

- The tribunal dismissed the doctors’ reasoning that the probable cause of death was due to beating and accepted an argument, put forward by the defence lawyers, that the injuries were caused by a fall. Yet it is a matter of record that none of the statements taken by the prosecutor or given in court had previously mentioned that Mutombo had fallen.

Earlier in the judgement, the tribunal had referred to the statement made by one of the defendants (Makombo).<sup>349</sup>

<sup>344</sup> Reported in *Jugement*, Case RP 521/14, op. cit., p.9 : «malgré qu’un des éléments sécuricors G4S, non autrement cite, détenait une sorte de matraque en bois entre ses mains».

<sup>345</sup> *Intra*, p.39, fn 241.

<sup>346</sup> , Glencore response to Key Findings and Questions, op. cit.; also GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.: ‘On his arrest, Mr Mutombo stated that he was unwell...’

<sup>347</sup> *Jugement*, Case RP 521/14, op. cit. The policemen were acquitted of the charge of inflicting blows and injuries resulting in unintentional killing (Article 48 of the Penal Code).

<sup>348</sup> *Jugement*, Case RP 521/14, op. cit., respectively, p.12 and p.19:

«Par rapport aux rapports médicaux sur lesquels se fonde le Ministère Public comme prévue de l’inculpation des prévenus, la défense précise qu’il s’extrait un doute sérieux à travers les divers rapports médicaux établis par les médecins requis dans la mesure où ils révèlent de « PROBABILITE » des coups desquels le de cujus aurait été victime.

Ainsi, d’autant que l’autopsie de les autres rapports rendent d’une part, l’hypothèse d’un coup volontaire improbable du fait qu’ils situent tous les traumatismes du côté droit du corps de la victime et d’autre part, plausible celle d’une chute étant donné que la victime s’était engagée dans une course folle à travers un terrain accidenté.»

...

«En l’espèce, il est certes que la victime MUTOMBO KASUYI Erick est morte. Mais, cette mort n’a pas été la conséquence des coups mis en action par une tierce personne ou des tierces personnes. Mais, l’évidence a révélé que son décès est du sans conteste a une chute dans un endroit accidenté du fait qu’il s’est engagé dans une course effrénée de peur qu’il ne soit tombe sous le verrou des éléments de la sécurité.»

‘He [Makombo] explained that as regards any beating of the person in question he had not personally seen, nor witnessed either from near or far such an incident, despite the fact that one of the G4S elements, not otherwise identified, carried a sort of wood baton in his hands [and] as is custom having in his possession a tear gas canister otherwise known as ‘Cougar’. So, no one, he concluded, at this stage hit the dead man MUTOMBO KASUYI Erick with the slightest blow of any kind whatsoever.’

However, the case presented to the tribunal by the prosecutor, contradicts this version of events:<sup>350</sup>

‘Whereas KAWEL KABULO [Mutombo’s companion] managed to escape after having been beaten, the unfortunate MUTOMBO KASUYI was overpowered by the two defendants who beat him until he passed out. They summoned the Jeep to take the unfortunate man away but he didn’t stop shouting for mercy in front of his executioners. The latter unmoved by his pleas took him to the Jeep where he was unable to get straight onto the seat in the usual way, he died before reaching the destination, that is to say the bureau.’

The conclusion that Mutombo unquestionably died from a fall is also contradicted by other testimony in court and by evidence from two post mortems (the company, dissatisfied with the finding of multiple injuries as the cause of death, had insisted on the second of these).<sup>351</sup> One court document states:<sup>352</sup>

And from the medical reports, the three Gécamines [DRC state mining company] doctors clearly told the Court that the large bruise on the right side of the chest would have caused the death of the victim within minutes on 15/02/2014. This is contrary to what the accused and KCC...wanted the Court to believe that the victim had sustained this injury before the date of the incident.

The judgement concludes:<sup>353</sup>

‘This affirmation [that his death was not the consequence of a beating, but due to a fall] is confirmed in relation to the defendants’ statements as well as other information that at the time of his arrest, the victim told them that he

<sup>349</sup> *Jugement*, Case RP 521/14, op. cit., p.9: «Il poursuit en précisant, par rapport à une quelconque administration des coups sur ladite personne, qu’il n’avait pas vu personnellement, ni assisté de près ou de loin a un tel scénario, malgré qu’un des éléments sécuricors G4S, non autrement cite, détenait une sorte de matraque en bois entre ses mains, a l’instar de lui-même possédant une lance grenade lacrymogène, autrement appelé COUGAR. Donc, personne conclut-il à ce niveau, n’a porté un moindre coup de quelque nature que ce soit sur le défunt MUTOMBO KASUYI Erick.»

<sup>350</sup> *Jugement*, Case RP 521/14, op. cit., p.11 : «Alors que KAWEL KABULO parvint à s’échapper après avoir reçu des coups, le malheureux MUTOMBO KASUYI fut maîtrisé par les deux prévenus qui lui administrèrent des coups jusqu’à l’épuisement. Ils furent appel à la Jeep pour embarquer l’infortuné qui ne cessait de crier pitié devant ses bourreaux. Que ceux-ci, insensibles à ses cris l’emmenèrent jusque dans la Jeep ou il fut sans droit de se mettre convenablement sur le siège, il succomba avant d’arriver à destination, c’est-à-dire la permanence.»

<sup>351</sup> Glencore’s denial that Mutombo’s body showed signs of beating or physical abuse are made in a letter from Michael Farhbach, Head of Sustainability, Glencore, to Patricia Feeney, RAID, 27 March 2014. The first post mortem of 20 February 2014 at Mwangeji hospital confirms that Mr. Mutombo died of multiple injuries, consistent with having been beaten. Details of the first post mortem are contained in a letter from the Centre d’aide juridico-judiciaire to the Mayor of Kolwezi, 3 March 2014. The Note de Plaidoirie des parties civiles, op. cit., confirms: «Il est sans conteste que les conclusions apportées à ce rapport [examens post mortem à l’hôpital Mwangeji], relèvent que le feu MUTOMBO KASUYI est décédé d’un polytraumatisme.»

The second post mortem, carried out by doctors from DRC’s state mining company, notes several abrasions, contusions and lesions on the head and neck and concludes: ‘The death was probably caused by a significant contusion on the right side of the thorax’ («Il s’agit d’un cas de décès probablement suite à une contusion importante de l’hémithorax droite»). See GECAMINES Services Médicaux du Groupe Ouest, «Rapport Medico-Legal D’Autopsie, Requisition order No. RPM 29398/PRO24/KAT », 27 février 2014. According to court documents ‘all the experts were adamant that this bruising was a result of blows from a hard object to the victim’s body.’ See Note de Plaidoirie des parties civiles, op. cit.: «Ceci étant, le tribunal pour s’en convaincre et dissiper tout malentendu est arrivé à poser la question aux différents experts à savoir si cette contusion ne serait pas le fait d’une maladie que pourrait avoir la victime notamment la tuberculose ou autre maladie, tous les experts étaient formels que cette contusion est une émanation des coups dus à un corps dur qu’avaient reçus la victime».

<sup>352</sup> Note de Plaidoirie des parties civiles, op. cit.: «Et de part l’expertise médicale, les trois médecins de la Gécamines ont clairement dit au Tribunal que la contusion importante de l’hémithorax droite, ne pouvait qu’entraîner la mort de la victime dans les minutes qui suivaient cette contusion à la date du 15/02/2014, contrairement au soutènement des parties prévenues et civilement responsable KCC, qui ont bien voulu faire voir au Tribunal que la victime aurait eu ce coût avant la date des événements. »

<sup>353</sup> *Jugement*, Case RP 521/14, op. cit., p.19: «Cette affirmation se confirme lors qu’on se rapporte aux déclarations des prévenus a l’instar des certains autres renseignements qu’au moment de son arrestation, la victime leur laissait entendre dire qu’il était très fatigué, s’ils pouvaient le pardonner, le laisser partir car, il ne revenait pas plus longtemps de la prison de la KASSAPA purgés ses peines de SPP. »

was very tired, if they could forgive him and let him go because he had only recently finished serving time in the KASSAPA prison.’

- The tribunal, in its judgement, neither fully explains why it believed the defendant’s statement that no beating occurred nor accounts for the stark differences between this version of events and that described by Mr Kawel Kabulo.
- Moreover, the judgement refers to a claim that Mutombo had been in prison – implying, presumably, support for the defence’s (untested and unproven) allegation that Mutombo had been stealing minerals. A previous claim that Mutombo had been at a different prison (Dilala prison in Kolwezi) had already been disproven by the prosecution.<sup>354</sup> However, having changed the location of Mutombo’s supposed incarceration to Kassapa (a prison which is about 50 kilometres from Lubumbashi), the defence still failed to provide evidence to substantiate this assertion.

The prosecutor has filed an appeal against the verdict.

## STEP 4b – Deal with grievances and redress in-house to control fallout

Dealing with grievances in-house has many advantages for companies: they design and control the grievance mechanism; they or their appointed agents investigate the claim; they adjudicate on whether a claim is valid; they determine the type of remedy and – for example, when financial compensation is offered – the level at which it is set. Most importantly, companies access and control all information relating to a claim, from personal details about the victim, through to provisions of any final settlement, invariably bound-up by confidentiality clauses that allow the company to decide what will be made public. The process is less about achieving justice for victims, but about containment to minimise damage to a company’s reputation.

### The GPs and VPs

GP 29 advocates and endorses the setting up of operational-level grievance mechanisms. Notwithstanding a reference to the possible use of an external body, the emphasis is upon direct access to mechanisms within a company, administered by the company, which are remediated directly by the company.

Although the VPs reference company investigations of security-related human rights incidents (see *intra*, pp.48 ff.), they do not cover grievance mechanisms, including those at the company level. However, the VPs do include a dispute resolution process, but one which is not open directly to victims, who must first engage a participating NGO to raise a complaint in a process that is far from transparent and lacking a credible means of independent determination (see *intra*, pp.72 ff., for further critique). The VP process nevertheless falls within the parameters of GP 30, which advocates that industry, multi-stakeholder and other collaborative initiatives ‘should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns’.

### ABG (now Acacia) and Barrick

At the corporate level, Barrick has set up a Corporate Social Responsibility functional group to ensure that all operations have an effective grievance mechanism in place.<sup>355</sup> It appears that the decentralised mechanisms

<sup>354</sup> Procès-Verbal judiciaire n° 002/011/RG047/PIC/KOV/DESK-KCC/2014, op. cit. : «En outre, nous signalons que lors de sa arrestation, il aurait déclaré aux éléments de la PMH qu’il venait à peine de sortir la prison de Dilala. » ( “Furthermore, we draw attention to the fact that during his arrest, he had stated to Mine Police agents that he had just come out of Dilala prison.”).

<sup>355</sup> Barrick, Human Rights Compliance Program, p.4, op. cit.

are centrally devised, even if ‘culturally sensitive’ in their final form. However, Barrick has not provided further details of the blueprint it provides.<sup>356</sup> Barrick refers to ‘a distinct human rights remediation program... developed in response to specific incidents of sexual violence at the Porgera mine in Papua New Guinea’ and state how ‘we have monitored African Barrick Gold plc's remediation approach to specific instances of gender based violence in Tanzania’.<sup>357</sup> In respect of the Porgera remedy framework, Barrick refers to how its ‘design was discussed in detail during a series of meetings and consultations with international NGOs and experts’ including ‘former U.N. Special Representative for Business and Human Rights, John Ruggie’.<sup>358</sup> Barrick pays particular attention to demonstrating its belief that the remedy framework is aligned with the GPs (in particular, GP 29 (operational-level grievance mechanisms) and GP 31 (effectiveness criteria)).<sup>359</sup>

ABG (now Acacia) offers a site-level grievance mechanisms ‘[t]o enable community members to raise concerns about possible negative impacts and to give us the opportunity to address those concerns’.<sup>360</sup> The mechanism is ‘designed to comply with the effectiveness criteria set out in the United Nations Guiding Principles on Business and Human Rights... to resolve grievances through dialogue and consensus, a predictable and accessible process, and a process which both the claimant and the site consider to be fair and transparent. We also aim to ensure that members of vulnerable populations are able to access the mechanism.’

As noted, ABG is quick to involve the site’s Legal Department in potentially serious human rights cases.<sup>361</sup> Barrick has separated out its procedure for dealing with complaints when these concern human rights violations.<sup>362</sup> Here there is an even more significant element of centralised corporate control via the company’s legal counsel and senior executives (see *intra*, pp.59 ff.). As noted, the procedures followed in such cases are not published.

#### Glencore/KCC

Under its Human Rights Policy, Glencore states that it operates ‘grievance mechanisms at all our operations for our stakeholders’.<sup>363</sup> The company’s latest published (2013) Sustainability Report refers to the roll-out of the Human Rights Policy in 2014, including reinforcing its ‘commitment to integrating human rights considerations into all business processes, and to protecting our stakeholders’ right to remedy by reviewing and strengthening the complaints and grievance mechanisms in place.’<sup>364</sup>

In an approach that resonates with the GPs, grievance mechanisms are defined in general by Glencore as: ‘A formal mechanism that local community members or other stakeholders can use to register concern about real or perceived actions by nearby operations, with the objective of resolving problems before they escalate.’<sup>365</sup>

Outside the Human Rights chapter per se, Glencore confirms: ‘the assets we control have grievance and conflict resolution processes for community members and others to make complaints and raise concerns, anonymously if preferred. These include transparent procedures for registering, evaluating and responding appropriately to community concerns.’<sup>366</sup> A review of grievance mechanisms, informed by the company’s

<sup>356</sup> Barrick’s Human Rights Compliance Program refers to how grievance mechanisms are devised under the Community Relations Management System (CRMS), but no further details are given under the latter.

<sup>357</sup> <<http://www.barrick.com/responsibility/human-rights/default.aspx>>, under ‘Grievance Mechanisms and Investigations’.

<sup>358</sup> Barrick, *The Porgera Joint Venture, Remedy Framework*, 1 December 2014, p. 4, available at:

<<http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>>

<sup>359</sup> *Ibid.*, pp. 9 ff.

<sup>360</sup> Acacia (formerly ABG), ABG Grievance Mechanism, available at:

<<http://www.acciamining.com/~media/Files/A/Acacia/documents/sustainability/ABG%20Grievance%20Mechanism.pdf>>.

<sup>361</sup> *Ibid.*

<sup>362</sup> Barrick, Human Rights Compliance Program, op. cit., pp.4 – 5.

<sup>363</sup> Glencore, Human Rights Policy, available at: <<http://www.glencore.com/assets/who-we-are/doc/Human-Rights-Policy-English.pdf>>.

<sup>364</sup> Glencore, Sustainability Report 2013, op. cit., 8.Human Rights, p.39, available at:

<[http://www.glencore.com/assets/sustainability/doc/sd\\_reports/2013-Sustainability-Report-Interactive.pdf](http://www.glencore.com/assets/sustainability/doc/sd_reports/2013-Sustainability-Report-Interactive.pdf)>.

<sup>365</sup> Glencore, Sustainability Report 2013, op. cit., 14.Glossary, p.78.

<sup>366</sup> Sustainability Report 2013, op. cit., 9.Community, p.42. Elsewhere, Glencore refers to ‘operational control’ (see *idem*, Appendix 2, MM7 entry, p.99). Glencore refers to the extent to which grievance mechanisms are used to resolve disputes as one of its reported

newly adopted human rights policy, was designed to ‘to promote accessibility, transparency and accountability to all stakeholders.’<sup>367</sup>

However, despite Glencore’s reference to grievance mechanisms and their reform in light of its human rights policy, the company has failed to provide further details of the process and how it operates at the company’s sites. For example, KCC states that a grievance mechanism has been put in place to address community concerns and complaints quickly and effectively, but neither is this mechanism framed to deal with human rights issues *per se* nor is any further detail given.<sup>368</sup>

## Corporate control of operational-level grievance mechanisms

One reading of the GPs is that they provide universal guidance, but, certainly in the case of operational-level grievance mechanisms, this guidance is grounded at the local level. This emphasis on the local has advantages and disadvantages. In the final analysis, it is also a fiction when faced with the fact of centralised corporate control.

On the one hand, some of the reasons that company-controlled grievance mechanisms under the GPs are ostensibly at the operational-level include the intention to nip grievances in the bud so that they do not escalate; direct access to a process for those in the vicinity of company operations.

Taking the example of Barrick, the company advocates ‘a culturally appropriate and thoughtful approach to remediation’.<sup>369</sup> A priority in its Community Relations Management System (CRMS) ‘has been to ensure that all operations have an effective grievance mechanism in place’ and that ‘all communities where we operate will have access to a simple and culturally sensitive process through which they can provide feedback and seek resolution to legitimate concerns.’<sup>370</sup>

On the other hand, given the universality of human rights, it is important to ensure that ‘culturally appropriate’ remedy, often in situations characterised by extreme poverty and an ineffective legal system, does not fall short of international standards. Moreover, decentralisation requires that companies are mindful of the need to disclose, publish and make accessible all such grievance mechanisms for each operation. Out of its operations, including those in Argentina, Chile, Dominican Republic, Peru, Saudi Arabia and Zambia, Barrick refers only to remediation programmes for the Porgera mine in Papua New Guinea and for Barrick’s ABG affiliate.<sup>371</sup> It is, perhaps, no coincidence that human rights incidents in both cases have been the subject of media coverage and NGO campaigns calling for investigation and disclosure (see below for a critique of these grievance/remediation processes).

Again, however, the rhetoric of decentralised operational-level grievance mechanisms, tailored to the needs of local communities is trumped by a reality in which companies exercise carefully prescribed, centralised, corporate oversight. Rather, ‘operational-level’ refers to the scale at which redress is delivered not to the locus at which it has been devised and from which it is controlled.

Taking the example of Barrick, the company states in its *Human Rights Compliance Program*:<sup>372</sup>

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social performance indicators, although as formulated at the time, this was limited to land use and customary rights of local communities and indigenous peoples.

<sup>367</sup> Ibid.

<sup>368</sup> Katanga Mining, Principles and policies, available at: <<http://www.katangamining.com/corp-respo/principles-policies.aspx>>.

<sup>369</sup> Barrick Gold Corporation, Human Rights Compliance Program, op. cit., p.5.

<sup>370</sup> Ibid., p.4.

<sup>371</sup> See Barrick Gold Corporation, Human Rights, Grievance Mechanisms and Investigations, at:

<<http://www.barrick.com/responsibility/human-rights/default.aspx>>. Also, respectively, The Porgera Joint Venture, Remedy Framework, op. cit.; and Acacia Mining, ABG Grievance Mechanism, available at:

<<http://www.acciamining.com/~media/Files/A/Acacia/documents/sustainability/ABG%20Grievance%20Mechanism.pdf>>.

<sup>372</sup> Barrick Gold Corporation, Human Rights Compliance Program, op. cit., pp.2 – 3.

Vesting the human rights program in the Office of the General Counsel is also consistent with the GPs, and how we view human rights. Principle 23(c) states that companies should “[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.” As that Principle indicates, we consider human rights norms to be legal requirements, and thus mandate their adherence in the same vein as we mandate compliance with other international and local regulatory requirements that apply to our business.

That said, we believe that every functional group, office, and site plays a role in ensuring that we respect human rights....Given the geographic span of our operations, the program, while overseen by the OGC, is largely implemented by the sites and regions, in conjunction with the responsible functional group at the corporate level.

### *Barrick: the division of power between centralised oversight and operational-level delivery*

- As noted, for serious potential human rights breaches at its sites, Barrick has recourse to call in its corporate investigations unit, giving central oversight.<sup>373</sup>
- Supervision of this unit by the Office of the General Counsel and Asset Protection and Risk Management reveal Barrick’s preoccupation with risk control and legal compliance. Where human rights impacts are concerned, autonomy is ceded from the operational level up the corporate hierarchy, with the General Counsel having overall responsibility for the investigation.<sup>374</sup>
- Control over what is discovered and reported reverts to a committee of the Board of Directors.<sup>375</sup>
- Barrick refers to ‘corporate procedural guidelines regarding the internal personnel involved in assessing how remediation of negative human rights impacts will be handled.’<sup>376</sup> However, this corporate-level guidance has not been published.
- Barrick operates a Mine Investigations Policy across all of its operations. The MIP is kept confidential, which prevents scrutiny of the procedures used. However, RAID has seen a copy of ABG’s May 2010 MIP. This policy is marked ‘Approved by: General Counsel’ and ‘confidential’, and includes a Confidential Distribution List and Document Control Record.<sup>377</sup> Moreover, set against Barrick’s recent emphasis on the independent policies of its subsidiaries and affiliates, ABG’s MIP indicates that it is approved by ‘Vice President: Security & Crisis Management (Barrick Gold Corporation)’.

In respect of Glencore, the company asserts that it operates ‘grievance mechanisms at all our operations for our stakeholders’.<sup>378</sup> However, neither Glencore nor its subsidiaries have published further details about the procedures followed or about the relationship between the operational-level and corporate headquarters. However, it is pertinent to note that RAID et al.’s dialogue and correspondence over, *inter alia*, the Mutombo case at KCC, was expressly handled by Glencore rather than by its subsidiary.<sup>379</sup> Moreover, the investigation into the arrest and death of Mutombo, centrally instigated by Glencore, is similarly lacking in detail or transparency in relation to both the process followed and the end result (*intra*, p.54).

<sup>373</sup> Barrick Gold Corporation, Human Rights Compliance Program, op. cit., p.5.

<sup>374</sup> ‘The General Counsel has overall responsibility for the investigation and the decision to bring such an incident to the attention of host-nation authorities, if considered appropriate; for matters not requiring reporting through a Formal Reporting Channel, the Head Country InHouse Legal Counsel, in coordination with the Country Executive Director and the relevant Mine General Manager or Development Project Manager, will have responsibility for direct oversight of the investigation; and the Protection & Crisis Management Group or the Head of Corporate Internal Investigations Group is responsible for providing investigative input and support for the investigation. The investigation may be conducted by internal or external resources, depending on the facts and circumstances. Reports from investigations will be submitted to the General Counsel, and the General Counsel will brief the Co-Presidents and other applicable personnel, as appropriate and necessary. (Barrick Gold Corporation, Human Rights Policy, 6 January 2015, paragraph 15, available at: <<http://www.barrick.com/files/governance/Barrick-Human-Rights-Policy.pdf>>).

<sup>375</sup> Barrick Gold Corporation, Human Rights Compliance Program, op. cit., p.5.

<sup>376</sup> *Ibid.*, p.8.

<sup>377</sup> ABG, MIP, op.cit.

<sup>378</sup> Glencore, Human Rights Policy, op. cit.

<sup>379</sup> Letter from RAID, Bread for All and Fastenopfer to Glencore, 19 March 2014.

## Non-judicial ≠ non-legal: reintroducing obstacles to redress

The fact that companies have successfully diverted elements of even serious cases of abuse away from the judicial realm into private non-judicial mechanisms does not mean abandoning the legal. On the contrary, in serious cases, non-judicial remedy is often administered by a company's legal team and bound up by legal provisions that constrain how victims may access redress, prevent further action against the company, and suppress what can be said about any settlement that is reached. In other words, whilst grievance mechanisms have been promoted in order to overcome barriers to accessing judicial redress, many obstacles – control of information, legal waivers, confidentiality clauses – have been re-introduced. Victims are corralled and channelled through a redress mechanism of a company's making.

### *Legal elements in a non-judicial process*

“If your grievance involves potentially serious human rights claims, the site's Legal Department will ensure those claims are formally and fully investigated.” [ABG Grievance mechanism]

ABG's grievance mechanism is actually a mix of legal and non-judicial elements in order that the company retains maximum control over the process.

Grievance Officers at each mine site are the point of contact for complainants.<sup>380</sup> Within 30 days complainants either receive a response to their grievance or are informed that more time is needed. Proposals for resolving the grievance are discussed between the Grievance Officer and the site's Grievance Management Committee. Proposals are only then put to the complainant for discussion.

Any agreement reached is then ‘memorialised in a Grievance Resolution Agreement’.<sup>381</sup> ABG did not initially publish details of any such agreements, even in sample form, thereby keeping them from scrutiny (see *intra*, p.70 for a critique of transparency). The first agreements came to light as the result of court action against the company, revealing how they contained highly restrictive legal waivers in an attempt to protect the company from further action (see below). ABG, following criticism of these agreements by RAID and MiningWatch Canada, and only after an actual agreement was circulating in the public domain, did eventually release limited excerpts from an ‘Example Grievance Resolution Agreement’ in March 2014.<sup>382</sup> It should be noted that this example agreement differed from the actual agreement signed by certain victims at North Mara, which further restricted their right to bring legal action following settlement (see below).

It has already been noted how, at the outset, in ‘potentially serious human rights claims’, the site's Legal Department becomes involved. Whilst this is a recognition that serious abuses warrant close attention and appropriate expertise, the key question is whether the Legal Department intervenes to bring rigour to the process and to consider whether the grievance mechanism is an appropriate channel, or whether its involvement signals a desire to head-off and contain claims that could otherwise result in legal action against the company? An answer lies in ABG's detailed policies and in its track record.

ABG encourages complainants to seek assistance when using the grievance mechanism and, if financial assistance is required, provides vouchers to help pay for this.<sup>383</sup> However, it is unclear how much these vouchers are worth, whether there are tests to qualify for assistance and how the company administers the scheme: for example, are people whose claims are rejected by the company eligible for vouchers to help pay for legal advice to challenge the company's decision? Questions remain about the availability and quality of local assistance, whether all lawyers or organisations accept the vouchers, and whether there are shortfalls in meeting costs (Acacia has stated that the vouchers are ‘worth four hours of legal advice’).<sup>384</sup> Moreover, cost is only one barrier, as complainants often have a mistrust of, or do not know how to access, lawyers.<sup>385</sup>

<sup>380</sup> ABG Grievance Mechanism, op. cit.

<sup>381</sup> Ibid.

<sup>382</sup> ABG, Letter to RAID and MiningWatch Canada, 11 March 2014, available at: <<http://www.raid-uk.org/sites/default/files/Letter%20from%20ABG%20re%20North%20Mara%2011%20March%202014.pdf>>. Excerpts from the example agreement are available at: <<http://www.acaciamining.com/~media/Files/A/Acacia/documents/sustainability/nmgml-excerpts-example-grievance-resolution-agreement.pdf>>

<sup>383</sup> ABG Grievance Mechanism, op. cit.

<sup>384</sup> Acacia Mining plc, letter to RAID, 7 March 2016, op. cit.

<sup>385</sup> ABG acknowledges this deficiency in its letter to RAID and MiningWatch Canada, 11 March 2014, op. cit.



ABG (now Acacia) states that '[t]he Company has not restricted any claimant's access to assistance from civil society organisations', despite using the qualifier 'in certain cases' with respect to the claimant and the mine choosing to involve such organisations under its grievance procedure.<sup>386</sup>

A retired high court judge is made available by ABG to explain the terms of any Grievance Resolution Agreement before a complainant signs;<sup>387</sup> however, this arrangement – advice by an individual retained by the company – cannot be impartial because of the inherent conflict of interest. Interviewees at North Mara, many of whom are illiterate, confirmed to RAID and MiningWatch Canada that, after receiving this advice, they were encouraged by a mine employee and the judge to sign documents in English (a Swahili version was only given to them a month later).<sup>388</sup>

Contrary to ABG's claim in its letter to MiningWatch Canada and RAID, the remedy program is not widely publicized.<sup>389</sup> Application of the remedy program is both selective and less than impartial. While the company has provided compensation and obtained legal waivers from claimants who had been clients in the law suit brought by London-based law firm, Leigh Day, other victims and their families that were interviewed have not been offered any compensation.<sup>390</sup>

Of particular concern is ABG's use of such legal waivers whereby compensation is dependent on the victims signing away their rights to pursue legal action against the company. Participants in the program interviewed by MiningWatch and RAID not only expressed dissatisfaction with the remedy they had been offered, but also confirmed that they had not understood when they signed the compensation agreements that they had lost the right to pursue their claims in legal proceedings against the North Mara Gold Mine Ltd, ABG and its affiliates.<sup>391</sup>

Please see Acacia's 7 March 2016 response to RAID for the company's comments on the grievance mechanism.

A key question concerns what happens when NGOs are not on hand to draw attention to complaints about human rights violations that progress through an inequitable, non-judicial mechanism controlled by the companies. A key question is whether or not ABG would have revised its legal waivers (see below) if RAID and MiningWatch Canada had not publically criticised their use and raised their concerns with the company. There is no compliance or monitoring body under the GPs. Instead, the former Special Representative has noted:<sup>392</sup> 'Our preference was to broaden access to remedy, in line with fully rights-compatible process requirements. And we counted on civil society to help ensure that those requirements are met in practice.'

But this arrangement relies upon underfunded NGOs, in the face of control of information by companies and a disparity of resources, being able to identify and effectively raise such issues. Moreover, the ABG case demonstrates that revealing such corporate control of redress relies upon those exceptionally rare occasions when detailed information about procedures, confidential agreements and waivers comes to light:<sup>393</sup>

...the Porgera grievance mechanism was forced into the public realm considerably sooner than the mechanism being implemented in North Mara. Barrick did not publicize its remedy framework until months after MiningWatch Canada made public a copy it had received from another source, along with a detailed critique in January 2013.... The North Mara mechanism only became public after a

<sup>386</sup> ABG Grievance Mechanism, op. cit. See also Acacia Mining plc, letter to RAID, 7 March 2016, op. cit.

<sup>387</sup> ABG Grievance Mechanism, op. cit.

<sup>388</sup> RAID and Mining Watch Canada, Violence Ongoing at Barrick Mine in Tanzania: MiningWatch Canada and RAID (UK) Complete Human Rights Assessment, 5 August 2014, pp.2 - 3, available at: <<http://www.raid-uk.org/sites/default/files/pr-barrick-mara-violence.pdf>>.

<sup>389</sup> ABG. letter to RAID and MiningWatch Canada, 11 March 2014, op. cit.

<sup>390</sup> RAID and Mining Watch Canada, Violence Ongoing at Barrick Mine in Tanzania, op. cit.

<sup>391</sup> Ibid.

<sup>392</sup> Quoted in Catherine Coumans, MiningWatch Canada, *Brief on Concerns Related to Project-Level Non-Judicial Grievance Mechanisms*, prepared for the Expert Meeting: "Sharing experiences and finding practical solutions regarding the implementation of the UNGP's effectiveness criteria", The Hague, 3 - 4 April 2014, p. 25, available at: <[http://www.miningwatch.ca/sites/www.miningwatch.ca/files/brief\\_on\\_njgms\\_access\\_meeting\\_april\\_2014\\_final.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/brief_on_njgms_access_meeting_april_2014_final.pdf)>.

<sup>393</sup> RAID and Mining Watch Canada, Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms, Third Annual UN Forum on Business and Human Rights, Palais des Nations, Geneva, 1 December 2014, available at: <<http://www.raid-uk.org/sites/default/files/grievance-mechanisms-briefing-bhr.pdf>>

confidential legal waiver signed by a victim emerged during legal proceedings in High Court in London in December 2013.

Acacia (formerly ABG) states in response to such criticisms:<sup>394</sup>

...the grievance mechanism at North Mara is legitimate and accessible, based on the free and informed consent of those who use it, and designed to resolve grievances through engagement and dialogue.

...

- The grievance mechanism at North Mara is well-publicised...

### *The price of redress: the imposition of legal waivers*

In the course of legal proceedings in the case filed by Leigh Day (since settled out of court), a previously confidential legal “waiver” was forced to light. The waiver relates to the non-judicial project-level grievance mechanism initiated by ABG. The waiver is marked “Strictly Confidential.” It is dated December 16, 2012 and refers to “alleged harm suffered by the Complainant,” a man, as a result of an “incident” which occurred “on the NMGML property.” In return for a “Condolence Disbursement” the Complainant had to agree “**that he will not instigate, encourage or in any way assist other complainants, demands or claims by any other person against NMGML, ABG or their affiliates**” [emphasis added]. The Complainant was also required to sign a “covenant not to sue,” waiving “all and any rights” to be a party to “any proceedings” anywhere in the world against any of the aforementioned business entities.

The waiver appears to constrain the Complainant not only from legal action against the companies in question but also from:

- pursuing legal action against North Mara employees or contractors who may have harmed the Complainant, including security guards, in their individual capacity;
- pursuing claims to the date of the waiver that may be unrelated to the “incident” reported by the Complainant;
- assisting in criminal action that may be brought by a state;
- assisting other complainants, demands or claims by other persons against NMGML, ABG or their affiliates.

Leigh Day stated:<sup>395</sup>

Leigh Day believes that the mine has made offers to people without adequate legal representation in return for those individuals signing away their rights. Aside from foregoing their own rights to legal redress, those individuals are reportedly made to agree not to assist others who sue ABG, possibly preventing valuable witness evidence from being available to the courts. In order to receive the promised payments from the mine in these arrangements, potential claimants have to perform public relations tasks for the mine over a period of years.

The guidance offered by the GPs appears to be clear-cut:

‘They [operational-level grievance mechanisms] should not be used...to preclude access to judicial or other non-judicial grievance mechanisms.’ [GP 29, Commentary]

However, ABG cites an opinion sought from the Office of the High Commissioner for Human Rights (OHCHR): ‘as there is no prohibition per se on legal waivers in current international standards and practice, situations may arise where business enterprises wish to ensure that, for reasons of predictability and finality, a legal waiver be required from complainants at the end of a remediation process’.<sup>396</sup>

<sup>394</sup> Acacia Mining’s (formerly African Barrick Gold) response regarding allegations on its grievance mechanism in Tanzania, op. cit.

<sup>395</sup> Leigh Day, ‘Tanzanian villagers sue London-based African Barrick Gold for deaths and injuries’, 30 July 2013, available at:

<<http://www.leighday.co.uk/News/2013/July-2013/Tanzanian-villagers-sue-London-based-African-Barri>> (visited prior to out-of-court settlement of the claim; web page now taken down).

<sup>396</sup> UN, Office of the High Commissioner for Human Rights, Re: Allegations regarding the Porgera Joint Venture remedy Framework, July 2013, p.8, available at: <[http://www.barrick.com/files/doc\\_downloads/Opinion-of-the-UN-Office-of-the-High-Commissioner-for-Human-Rights.pdf](http://www.barrick.com/files/doc_downloads/Opinion-of-the-UN-Office-of-the-High-Commissioner-for-Human-Rights.pdf)>; see also ABG. letter to RAID and MiningWatch Canada, 11 March 2014, a) Legal waivers *per se*, op. cit., p.7.

ABG does not draw attention to another element of OHCHR's opinion: 'the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism.'<sup>397</sup>

Barrick and ABG have had to revise agreements and legal waivers because of, respectively, public criticism by MiningWatch Canada and EarthRights over their use to redress rape at the Porgera mine in Papua New Guinea and because of interventions by RAID and MiningWatch Canada in relation to North Mara.<sup>398</sup>

ABG has had to clarify that the waiver was 'not intended to extend to criminal matters and was not intended to preclude a complainant from giving evidence as a witness in any proceedings (whether civil or criminal) commenced by any other individual with respect to his or her own claims.'<sup>399</sup>

Following the opinion by the OHCHR, ABG modified its waiver yet again 'to ensure it was narrowly tailored'.<sup>400</sup> Further changes were made to the example waiver at the end of 2013 and the beginning of 2014 'to make it clear it could not preclude claims against individuals (such as employees) or contractors'.<sup>401</sup> The company also wrote to all complainants that had signed agreements in the past to inform them that the legal waivers were not intended to prohibit them from participating in a range of civil and criminal proceedings.<sup>402</sup>

At best, both the GPs and the OHCHR create ambiguity: whilst legal waivers are not explicitly or universally endorsed, neither is their use ruled out. OHCHR's position has been criticised for applying the legal standards attaching to post-conflict state-based remediation programmes to a company-created mechanism and for suggesting that the main factor to be taken into consideration against a waiver is a company's desire for finality.<sup>403</sup> RAID's position is that legal waivers should be avoided as part of any settlement reached in a non-judicial grievance process; the onus should be upon companies to set out a 'special case' for their use in specified circumstances; and then it must be unequivocally verified that claimants are able to access and receive independent and proper legal advice as part of an appropriately benchmarked, fair settlement and that the resulting waivers are narrowly defined.

## Redress at a discount?

Little is known about the level or type of compensation offered by companies under operational-level grievance mechanisms precisely because such processes are opaque. Agreements are kept confidential and often governed by legal waivers. This lack of transparency extends to out-of-court settlements, such as that between Leigh Day's clients and ABG in respect of the claim over the May 2011 shootings at North Mara.

However, certain information has come to light in respect of both redress offered by Barrick's subsidiary in the Porgera case in Papua New Guinea and in respect of certain individuals who have suffered harm as the result of security operations at North Mara.

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<sup>397</sup> Re: Allegations regarding the Porgera Joint Venture remedy Framework, op. cit., p.8.

<sup>398</sup> On criticism of the use of legal waivers at Porgera, see MiningWatch Canada, 'RE: Non-judicial remedy should not be contingent on legal immunity for corporations', letter to the UN High Commissioner for Human Rights, 14 May 2013 (the letter was signed by 77 international organisations, including RAID),

<[http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ltr\\_to\\_unhchr\\_may\\_14\\_2013\\_re\\_porgera\\_sign-on.pdf](http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ltr_to_unhchr_may_14_2013_re_porgera_sign-on.pdf)>; EarthRights, Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and "Training" in Exchange for Waiving Legal Rights, 21 November 2014, available at: <<http://www.earthrights.org/media/survivors-rape-barrick-gold-security-guards-offered-business-grants-and-training-exchange>>

<sup>399</sup> ABG. letter to RAID and MiningWatch Canada, 11 March 2014, b) Scope of Legal Waivers, op. cit., p.8.

<sup>400</sup> Ibid.

<sup>401</sup> Ibid., pp. 8 – 9.

<sup>402</sup> NMGML has felt it necessary to write to all complainants who signed agreements similar to the 2012 Agreement to inform them that the legal waiver 'was intended to be narrow and was not intended to prohibit them from: (a) initiating or participating in any criminal action; (b) giving evidence as a witness in any proceedings or investigations commenced by any other individual; (c) seeking money damages against any individuals or third parties (including any security personnel, government officers or officials, or third party contractors); or (d) making a claim against NMGML or any other entity or individual for complaints that are not related to the incident that was the subject of the Agreement.' (Ibid., p.9).

This implies that the original agreement could have been read as precluding all of (a) - (d).

<sup>403</sup> See S. Knuckey and E. Jenkin, 'Company -created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?', *The International Journal of Human Rights*, 2015 Vol. 19, No. 6, pp. 801-827.

## *Compensation for abuses at Porgera and North Mara*

### *Porgera*

EarthRights has reported:<sup>404</sup>

Approximately 200 women who survived brutal rapes by Barrick Gold's security guards in Papua New Guinea were asked to waive their legal rights in exchange for small "business grants" and "business training," a reparations process that human rights and women's rights advocates are criticizing as inadequate....

As documents released today show, the benefits packages were largely made up of a "business training" program set up by Barrick, after which the women could get a "business grant" of 15,000 kina – about [US]\$6000. With other small elements, such as fees for children's education and a "financial supplement" of up to 5,000 kina ([US]\$2000), the value of almost every package came to the same figure – 21,320 kina (about [US]\$8500). No exceptions were made to the mandatory business training program – not even for an 87-year-old woman.

In exchange, documents show, the women – mostly highly impoverished, traumatized, and often illiterate – had to promise never to sue Barrick.

In its response, Barrick does not dispute the figures – after all, they are derived from actual Reparations Package Proforma Agreements – but, *inter alia*, states:<sup>405</sup>

A majority of the participants in the remedy program have expressed satisfaction with the process, and with the remedies they have received.

...

The Framework has been upheld as compatible with the UN Guiding Principles on Business and Human Rights by the UN High Commissioner for Human Rights.

...

Claims packages were developed on a case-by-case basis based on discussions between the independent assessment team and the claimants themselves.

...

The value of remedy packages is in the upper range of civil damage awards provided in comparable cases in Papua New Guinea.

...

...if claimants accept a final remediation package they are required to agree that they will not pursue further compensation claims or civil action against Barrick or the Porgera Joint Venture for the specific incident they are being compensated for....

In December 2014, Barrick published further details about the Porgera Remedy Framework, confirming that 120 claimants had settled, with an average package value of 23,630 Kina (about US\$9500).<sup>406</sup>

In April 2015, Barrick Gold Corporation and EarthRights International, representing 14 victims of alleged violence concerning the Porgera Mine in PNG, reached an out of court settlement of the claims.<sup>407</sup> Eleven of the individuals concerned are women with claims alleging acts of sexual violence, including rape.<sup>408</sup> According to MiningWatch

<sup>404</sup> EarthRights, Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and "Training" in Exchange for Waiving Legal Rights, op. cit.

<sup>405</sup> Barrick, Response to EarthRights International, 27 November 2014, available at: <<http://www.barrick.com/files/porgera/Response-to-EarthRights-International.pdf>>.

<sup>406</sup> Barrick Gold Corporation, The Porgera Joint Venture Remedy Framework, 1 December 2014, pp. 12 – 13, <<http://www.barrick.com/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf>>. Barrick does not give a US\$ equivalent; instead, for consistency, the approximation used by EarthRights of 1 \$US = 2.5 Kina is applied to all amounts given in Kina.

<sup>407</sup> Statement from Barrick Gold Corporation and EarthRights International, 3 April 2015, available at: <<http://www.barrick.com/investors/news/news-details/2015/Statement-from-Barrick-Gold-Corporation-and-EarthRights-International/default.aspx>>.

<sup>408</sup> Ibid.

Canada, the eleven women rejected the packages offered through Barrick's 'remedy program' and were prepared to take legal action.<sup>409</sup> A joint statement by Barrick and EarthRights confirmed the women would receive not only compensation under the Porgera Remedy Framework, but also an additional payment as a result of the negotiated settlement.<sup>410</sup>

According to a press report:<sup>411</sup>

Eleven women and girls who were raped, gang-raped or violently molested in the Papua New Guinea Highlands have reached an out-of-court settlement with the world's biggest gold miner, having refused to accept the "insulting" compensation paid to 120 fellow victims of the company's security guards.

...

But the women reached an undisclosed settlement which is likely to be well above the 21,320 kina (AUS\$10,430) they say Barrick offered most of them.

MiningWatch Canada stated:<sup>412</sup> 'This case proves once again that victims...require truly independent legal counsel to ensure their legal and human rights are protected'.

Later in 2015, the true extent of the disparity between the women who settled under Barrick's Remedy Framework and those who benefitted from independent legal representation by EarthRights came to light, with the former appearing to receive a settlement worth only a quarter of that received by the latter. According to MiningWatch Canada, in respect of the EarthRights-negotiated settlement, 'it is now widely reported in Porgera that the total amount received by these women is around 200,000 Kina [US\$80,000].'<sup>413</sup> MiningWatch Canada asked Barrick to confirm – after the company received complaints from among the 120 recipients of its remediation package – that it upped its supposedly final settlement (on average, 23,630 Kina (US\$8,500)) by a further 30,000 Kina (US\$12,000).<sup>414</sup> In its September 2015 letter to Barrick on the disparity in compensation, MiningWatch Canada asks the company:<sup>415</sup>

**Can you please explain why you would not provide the 120 women who participated in your remedy program the same amount of compensation for the sexual assaults that they endured that you provided the 11 women who were represented by ERI and who suffered similar harm?**

Beyond the statement agreed with EarthRights, Barrick has not issued a media release in response to the coverage of the settlement, although its Vice President, communications, is reported as saying that Barrick took action at all of its mines around the world after the Porgera allegations came to light, and it had 'zero tolerance' for human rights abuses.<sup>416</sup> At the time of writing, Barrick is understood not to have responded to MiningWatch Canada's September 2015 letter concerning equity of settlement.

#### *North Mara*

RAID has seen information on the compensation offered to victims of violence resulting from the use of force at North Mara. This redress was agreed just prior to or around the time of the filing of the legal claim in the UK and is before, and outside of, the February 2015 out-of-court settlement. In the case of the agreement brought to public attention as a result of the UK legal claim, not only is the compensation package (for a person shot in the knee) dependent on waiving rights to sue the company, but it is also conditional on the victim carrying out certain tasks for Barrick and upon employment terms, that if breached, could result in loss of benefits.<sup>417</sup>

<sup>409</sup> MiningWatch Canada, 3 April 2015, 'Barrick Settlement on Rapes and Killings in Papua New Guinea Proof that Victims Need Independent Legal Counsel', available at: <<http://www.miningwatch.ca/news/barrick-settlement-rapes-and-killings-papua-new-guinea-proof-victims-need-independent-legal-cou>>.

<sup>410</sup> Statement from Barrick Gold Corporation and EarthRights International, op. cit.: 'Pursuant to the terms of the settlement, the women will receive compensation under the Porgera Remedy Framework, and a payment in connection with their participation in the mediation process which led to the resolution of their claims.'

<sup>411</sup> Rick Feneley, The Sydney Morning Herald, '200 girls and women raped: now 11 of them win better compensation from the world's biggest gold miner', 4 April 2015, available at: <<http://www.smh.com.au/world/200-girls-and-women-raped-now-11-of-them-win-better-compensation-from-the-worlds-biggest-gold-miner-20150403-1m7ibq.html>>.

<sup>412</sup> 'Barrick Settlement on Rapes and Killings in Papua New Guinea Proof that Victims Need Independent Legal Counsel', op. cit.

<sup>413</sup> Letter from MiningWatch Canada to Barrick Gold Corporation, 23 September 2015, 'Re: Lack of equity in settlements for victims of sexual assault at the Porgera Joint Venture gold mine in Papua New Guinea'.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> Andy Lloyd, Barrick Vice-President, Communications cited in '200 girls and women raped: now 11 of them win better compensation from the world's biggest gold miner', op. cit.

<sup>417</sup> Letter from RAID and MiningWatch Canada to African Barrick Gold plc, 25 February 2014, Annex, available at: <<http://www.raid-uk.org/sites/default/files/Letter%20to%20ABG%20re%20North%20Mara%2024%20Feb%202014.pdf>>.

The “Condolence Disbursement,” totalling 8,780,000 TZS [approximately 5,400 USD] consists of two years employment in a company in the town of Nyamongo near the mine site, as well as remuneration for “participating in NMGML’s campaign to create awareness in the local community of the hazards of trespassing on the mine site.” The terms of employment will be provided by the local employer and failure by the Complainant to adhere to these terms “will result in the automatic termination of benefits to which the Complainant is otherwise entitled under the terms of this Agreement and Release.” In return for attending monthly Awareness Meetings “upon invitation by a representative of NMGML, the Complainant shall be paid an attendance fee by NMGML.” Failure to attend an Awareness Meeting will result in loss of payment. Finally, the Complainant can also “forfeit” benefits related to the “Agreement and Release” if the “Complainant is found to have trespassed on the NMGML mine site.”

Other examples concerning incidents at North Mara from agreements made in late 2012/2013 include:

Person shot in the knee whose leg had to be amputated:	~Tshs 14,000,000(~US\$ 8,750) <sup>418</sup>
Death of husband:	~Tshs 28,000,000(~US\$ 17,500)
Death of son:	~Tshs 8,000,000 (~US\$ 5,000)

ABG has commented on aspects of compensation agreements at North Mara:<sup>419</sup>

Remedies for human rights grievances are tailored to each individual and may include, for example, construction materials, various types of rehabilitation, training and education, involvement in alternative livelihood programs, livelihood assistance and/or financial assistance...

ABG (now Acacia) has not revealed the precise formula it uses to arrive at remediation packages or financial assistance. Interviews with victims confirm that they have been offered different compensation for ostensibly the same harm suffered:<sup>420</sup> this implies an arbitrary scheme, which does not accord with the claim by ABG (now Acacia) that it benchmarks compensation ‘against Tanzania’s Workers Compensation Act and civil damage awards from Tanzanian courts’, i.e., a standardised scheme.<sup>421</sup> Moreover, without disclosure by ABG, it is impossible to determine the degree to which ‘benchmarked’ compensation differs from awards arising out of legal claims or out of court settlements whereupon legal action is dropped.

A pattern is emerging at North Mara, whereby victims represented by Leigh Day have successfully concluded a settlement, whereas those within the company’s remediation programme claim their redress packages have been curtailed and support contracts ended early, leading to a protest and a two-day occupation of the Community Relations Office at the mine in July 2015 by those who consider themselves to have been treated unfairly. In response, Acacia states: ‘we categorically deny that any beneficiaries of the remedy program have seen their redress packages curtailed and support contracts ended early, in fact the contrary has occurred.’<sup>422</sup> There is clearly a dispute over what the protesters and Acacia believe settlement to have entailed, which needs to be resolved.

## ‘Effective’ redress for whom?

A central criticism – that in-house grievance mechanisms allow companies to investigate, determine culpability, exonerate, decide the type and level of redress (if any), waive victims’ rights, and keep the results confidential – was, to an extent, anticipated under the formulation of the GPs, but never convincingly

<sup>418</sup> The average 2013 exchange rate of Tshs 1600 = US\$1 has been used.

<sup>419</sup> ABG, Letter to RAID and MiningWatch Canada, 1 July 2014, p.2, available at: <<http://www.raid-uk.org/sites/default/files/Letter%20from%20ABG%20re%20North%20Mara%201%20July%202014.pdf>>.

<sup>420</sup> RAID et al., interviews with victims, during human rights assessment at North Mara, conducted between late June and mid- July 2014.

<sup>421</sup> ABG, Letter to RAID and MiningWatch Canada, 1 July 2014, p.2, op. cit.

<sup>422</sup> Acacia Mining plc, letter to RAID, 7 March 2016, op. cit.

addressed.<sup>423</sup> GP 31 sets out ‘effectiveness criteria’ for non-judicial grievance mechanisms. Such mechanisms should be legitimate, accessible, predictable, equitable, rights-compatible, and transparent. In addition, operational-level mechanisms should also be based on dialogue and engagement with stakeholder groups. The ‘effectiveness criteria’ were drafted to anticipate and counter the criticism that such grievance mechanisms, if they were not properly conducted, would lose credibility. Again, there is a preoccupation with utility, a concern that the one power stakeholders retain is to choose not to use a prescribed mechanism (although for those living in poverty, compensation in hand is tempting when pursuing justice through other means appears impossible).<sup>424</sup> ‘Effectiveness’ does not convey a central concern with equality of arms or a deep sense of justice.

However, there are considered provisions within the stated criteria that nonetheless could form a basis upon which manifestly unfair grievance mechanisms could be challenged.

For example, principle (31(f)) states that non-judicial mechanisms should be: ‘Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights’. Citing this criterion could be used when seeking an end to legal waivers, which undermine the right to remedy or freedom of speech. But, as noted in the ABG case, different provisions within the GPs can be deployed to legitimise their retention: hence the need for companies to co-opt interpretive authority.

GP 31(h) holds forth the prospect that stakeholders should at least be consulted over the design of operational-level grievance mechanisms (although consultancies and not-for-profits increasingly act as intermediaries in this regard) and the commentary recognises that ‘a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome’. But having conceded that this danger exists within corporate-controlled redress, the solution offered is weak in the extreme: ‘these mechanisms should focus on reaching agreed solutions through dialogue’. Businesses are more than happy to portray a settlement, not as imposed, but as the result of a dialogue, but victims remain an unequal party in this dialogue, which is company-led, company-controlled, retains legal elements and is bound up in confidentiality.

The commentary (paragraph (h)) to GP31 finally adds that ‘[w]here adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.’ In this regard, the next section examines and notes some of the shortcomings of multi-stakeholder grievance mechanisms, but any proviso in the commentary has been overtaken by events: firstly, companies are already determining complaints in-house and the GPs have given them a means to legitimise this practice; secondly, an independent, third-party monitoring body with powers of adjudication could have been established as part of the GP framework, but business and their home-state governments were opposed to any such implementation.

There is another criticism of the ‘effectiveness criteria’ that stems from the power of business to shape their content and wording in the first place. Indeed, it is evidence that the stated ‘thick stakeholder consensus’ behind the provisions masks the fact that the content and purpose of the GPs was, and remains, contested.

## Corporate redrafting and its material effect

In May 2011, the UN Human Rights Council published the results of a project initiated by the Special Representative ‘to pilot the grievance mechanism principles with companies and their stakeholders at the

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<sup>423</sup> General Assembly, United Nations, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum, ‘Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned’, Human Rights Council, Seventeenth session, 24 May 2011, A/HRC/17/31/Add.1, paragraph 3(b): ‘Operational-level grievance mechanisms face particular challenges given that companies themselves are closely involved in their design and administration, which can make the mechanisms vulnerable to critiques of being biased or illegitimate sources of remedy for harms.’

<sup>424</sup> The Commentary to GP31 shows awareness of this concern: ‘Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it’ (under (a)); and ‘In order for a mechanism to be trusted and used...’ (under (c)) and; ‘For an operational-level grievance mechanism, engaging with affected stakeholder groups... can help to ensure that it meets their needs, that they will use it in practice...’ (under (h)).

operational level, in order to test their practical applicability in a range of contexts.<sup>425</sup> Three business organisations collaborated on the project and four companies volunteered to take part.<sup>426</sup>

Stakeholders were not asked to participate nor were NGOs consulted. Undoubtedly aware that their omission might give rise to the criticism of bias in the project, there is the reassurance that:<sup>427</sup> ‘These four pilot projects involved collaboration with the companies and, through them, with their local stakeholders to design or amend grievance procedures in line with the principles.’ The price to be paid for this selective approach is an undermining of the ‘thick stakeholder consensus’ upon which the legitimacy of the GPs is promoted. What would have been the response of business if their views were only indirectly canvassed by talking to those adversely affected by company operations? If this is an unlikely question, it is because operational-level grievance mechanisms do not exist in isolation from the companies that design, operate and control them, whilst it is feasible that such mechanisms can exist with little or no input from stakeholders (provided they can be persuaded to use the process – hence the concern that they will not do so).

The ‘effectiveness criteria’ were re-formulated at the end of the pilot project. The results matter because the re-worded criteria were then incorporated into the Guiding Principles, the ‘authoritative global reference point’. And this authoritative guidance concerning the criteria *per se* has since been cited by companies (for example, ABG) in concrete cases.

Changes to three of the criteria are considered here.

### *Legitimate*

Initial formulation:<sup>428</sup> ‘having a clear, transparent and sufficiently independent governance structure to ensure that no party to a particular grievance process can interfere with the fair conduct of that process’.

Final formulation: ‘enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes’.

Transparency, independence and non-interference have been lost. All these very specific requirements have been replaced by a much vaguer notion of enabling stakeholder trust. Yet trust, like faith, is required when the veracity of a process cannot be otherwise tested, but in the context of a grievance mechanism under the GPs, why not have a transparent process that is open to scrutiny? To whom is the grievance mechanism accountable, especially when an independent governance structure has been discarded?

### *Transparent*

Initial formulation:<sup>429</sup> ‘providing sufficient transparency of process and outcome to meet the public interest concerns at stake and presuming transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes’.

Final formulation: ‘keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake’.

Initially, transparency is explicitly required, with an emphasis upon public interest concerns and a presumption of transparency wherever possible. Each of these elements is changed in the final formulation: the presumption of transparency is dropped and the public interest element – formerly requiring an explicit

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<sup>425</sup> , ‘Piloting principles for effective company/stakeholder grievance mechanisms’, op. cit., paragraph 4.

<sup>426</sup> The business organisations who collaborated were the International Organisation of Employers (IOE), International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD. The four companies taking part in the field study were Carbones del Cerrejón Ltd. in Colombia – a coal mining joint venture of Anglo American, BHP Billiton and Xstrata Coal; Esquel Group in Hong Kong – piloting a mechanism at its apparel facility in Viet Nam; Sakhalin Energy Investment Corporation in the Russian Federation – an oil and gas joint venture of Gazprom, Royal Dutch Shell, Mitsui & Co. Ltd. and Mitsubishi Corporation; and Tesco Stores Ltd. – a major United Kingdom supermarket working with a group of its fruit suppliers in South Africa.

<sup>427</sup> Ibid., paragraph 6.

<sup>428</sup> Ibid., A. Legitimacy, paragraphs 22 – 29.

<sup>429</sup> Ibid., F. Transparency, paragraphs 53 – 57.



consideration of process and outcome – is reduced, to undefined ‘performance’. Moreover, introducing the concept of the ‘parties to a grievance’ and the need to keep them ‘informed’ (with nothing more on what this entails) about the progress of a claim, allows companies to claim that information should remain confidential. The shift is from expected, specified transparency in the public interest to restricted information for participants and vague ‘performance’ indicators in the public domain.

Moreover, under GP 29, addressing individual grievances is only one key function; the other is ‘the identification of adverse human rights impacts as a part of an enterprise’s ongoing human rights due diligence’ so that trends and patterns in complaints can be analysed to identify systemic problems and adapt company practices. This provision – whether unwittingly or not – justifies the way in which companies aggregate, anonymise, sanitise and strip-out human beings from grievances, bolstering their contention that this is all that is required to fulfil the criterion of transparency in the public interest and withhold the results of in-house investigations and settlements.

### *Equitable*

Initial formulation.<sup>430</sup> ‘ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms.’

Final formulation: ‘seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.’

The definitive ‘ensuring’ becomes ‘seeking to ensure’; and the terms on which this is done are no longer ‘fair and equitable’ but ‘fair, informed and respectful’.<sup>431</sup> Who is to inform the aggrieved party? Is the respect mutual and who decides on what is disrespectful? Why is the explicit reference to ‘equitable terms’ dropped?

Under both formulations, the concept of ‘reasonable’ is susceptible to narrow interpretation in a process controlled by companies who can invoke ‘commercial sensitivity’, confidentiality, and legal privilege.

The commentary (d) to GP31 proposes that, when affected stakeholders have much less access to information and expert resources, ‘[w]here this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions’. However, this wisdom can be turned on its head: a ‘durable’ solution can be achieved for the company precisely because the company not only has greater control over the process, but also uses confidentiality clauses, legal waivers and the superiority of its PR machine to ensure that unfairness does not come to light.

Textual analysis of the initial and final formulations of the effectiveness criteria is revealing, but is it material? Allowing companies to change the words (see below, the exchanges with ABG over its handling of redress in the North Mara case) has allowed companies to change their practices in a way that has been to the detriment of people whose human rights have been violated.

### *The transparency principle and African Barrick Gold*

ABG seizes upon and explicitly refers to GP 31(e) – the product of company-led pilot project and pragmatic re-drafting – to further justify the lack of transparency in its grievance mechanism at North Mara mine. ABG writes in response to RAID and MiningWatch Canada:<sup>432</sup>

...transparency in the context of a grievance mechanism means providing information to complainants about how their complaints are being handled, providing information to affected stakeholders, and in certain circumstances to other stakeholders, about how well the mechanism is working.

We do not believe that transparency in that context means providing information about specific grievances to the

<sup>430</sup> Ibid., D. Equitability, paragraphs 44 – 48.

<sup>431</sup> Initial formulation: ‘ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms’.

<sup>432</sup> ABG. letter to RAID and MiningWatch Canada, 11 March 2014, a)Transparency, p.10.

public at large, as you seem to suggest.

The perfectly circular logic by which companies have adapted the GPs to suit how they would like to run grievance mechanisms in practice is completed when ABG calls upon the very same testing to justify its position at North Mara.<sup>433</sup>

Indeed, the report of the pilot projects on grievance mechanisms conducted for the UN Special Representative on Business and Human Rights warned that it can be "inappropriate to provide transparency about the specific detail of some outcomes; for instance, where doing so can lead to the identification of complainants who wish to remain anonymous, or when revealing levels of financial compensation would compromise individuals and legitimate processes."

RAID and MiningWatch, supporting those whose rights have been violated at North Mara, do not agree:<sup>434</sup> 'While we, of course, share a concern for the safety of victims, answers to the questions we pose about the mechanism itself, and regarding the compensation victims of harm may receive, do not compromise the safety of the victims.'

Unfortunately, ABG's restrictive interpretation of transparency is lamentably predictable: the writing was on the wall when the 'effectiveness criteria' were diluted to suit company interests. ABG's use of confidentiality clauses in final agreements and its own invasions of victims' privacy (*intra*, below) in an attempt to control information about abuse do not sit well with its championing of a victim's right to privacy. The ABG agreement and legal waiver that was forced into the open by the UK legal claim required that:

6.1 – The Parties shall keep the terms of this Agreement and Release strictly confidential...

Only after public exposure and criticism did ABG concede that the confidentiality provision 'might be unnecessarily strict' and made the clause optional in future agreements and retrospectively binding only on the company under existing agreements.<sup>435</sup>

### *The equitable principle, privacy, and the command of information*

The equitable principle unquestionably deals with access to, and control of, information, advice and expertise.

Elements of ABG's investigations into security incidents at the mine – which are governed by a Barrick-approved MIP – constitute a gross invasion of privacy.<sup>436</sup> Injured persons go first to the Mine Medical Centre to undergo a thorough examination so that a written report of their injuries, relative significance and possible cause can be produced.<sup>437</sup> The injured person is then photographed - nothing in the procedures specify that consent should be sought - but this must only be done by a member of the Mine Investigations Group (MIG).<sup>438</sup> When the injured person is able to be interviewed, they are required to make a witness statement, which is digitally recorded. Instances reported to RAID and MiningWatch suggest that ABG investigators are given regular access to the medical records of victims of violence at the hands of mine police. Investigators routinely question and photograph seriously injured people awaiting treatment in nearby hospitals and clinics, as well as their family members.<sup>439</sup>

The MIP also seeks to exercise and retain control over information to protect the interests (legal and otherwise) of the company:<sup>440</sup> when an incident occurs, the policy governs the gathering of evidence, the taking of statements from witnesses and suspects (who do not get copies, unless the company allows), and the filing of details within a secure database.<sup>441</sup> In the most serious cases (Category A) – for example, involving fatalities – documents and records are strictly controlled by the Office of General Counsel.<sup>442</sup> Even within the secure database, minimal details are recorded.

<sup>433</sup> Ibid.

<sup>434</sup> RAID and MiningWatch Canada, letter to ABG, 22 April 2014, Ongoing Lack of Transparency, p.2, available at: <<http://www.raid-uk.org/sites/default/files/Letter%20to%20ABG%20on%20North%20Mara%2022%20April%202014.pdf>>.

<sup>435</sup> ABG, letter to RAID and MiningWatch Canada, 11 March 2014, op. cit.

<sup>436</sup> As noted, ABG's MIP is marked 'Approved by: Vice President: Security & Crisis Management (Barrick Gold Corporation)'.

<sup>437</sup> ABG, MIP, section 16.2.

<sup>438</sup> Ibid.

<sup>439</sup> RAID and Mining Watch Canada, Violence Ongoing at Barrick Mine in Tanzania, op. cit.

<sup>440</sup> ABG, MIP, op. cit.: see *intra*, p.49.

<sup>441</sup> ABG, MIP, respectively, sections 6.7 Gather the evidence, 10 Interviews, 6.9 Recording investigations on Secure Base.

<sup>442</sup> Ibid., 5.1.1 Reporting for Category A investigations and 5.1.2 Specific Requirements.

The MIP stipulates:<sup>443</sup> ‘UNDER NO CIRCUMSTANCES is a witness or any other person except Legal Counsel to be given a copy of any Category A or commissioned investigation statements.’ Staff involved in investigations are told that they should ‘where documents are involved, always obtain the original and not a copy’ and MIG is tasked with ensuring that no-one else takes pictures or video of a deceased person.<sup>444</sup> In investigations into the death or serious injury of ‘illegal miners or detainees’, MIG must take photographs of the person and all injuries.<sup>445</sup> Under a strict protocol, all images are deleted from the camera once transferred to USB stick, which is then locked in a safe. Only one copy of the photographs is to be printed and all hard copies and the images on the USB stick must ultimately go to the Legal Counsel for safe keeping.<sup>446</sup>

## The call for multi-stakeholder grievance mechanisms: the example of the VPs

GP 30 advocates that industry, multi-stakeholder and other collaborative initiatives ‘should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments [to human rights-related standards] in question have not been met. The legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms.’

The VPs represent precisely the kind of collaborative initiative referred to in GP 30. This section briefly examines both the extent to which the VPs, in their current form, allow for the consideration of grievances and also proposed developments under the initiative, intended as a response to GP30.

The VPs include a dispute resolution process under which concerns can be raised ‘regarding sustained lack of efforts to implement the Voluntary Principles’.<sup>447</sup> However, the process is so hamstrung by its inaccessibility and lack of transparency to render it totally ineffective as a *bona fide* grievance mechanism.

The greatest obstacle is that only participants can raise concerns about the conduct of other participants. This means that the victims of abuse are unable to make a direct complaint under the VPs.

It is extremely difficult for impoverished victims, often in remote locations and coming under pressure from a company and/or local elites to desist from pursuing a complaint, to find a NGO participant to act as an intermediary.

Even if such allegations are raised by NGO participants on the behalf of victims, the dispute resolution process is not geared towards resolving specific instances *per se* but on whether or not ‘participation criteria’ – broad requirements to promote and implement the VPs, attend meetings, submit reports, provide certain information – are met.<sup>448</sup> Only after the participants have failed to resolve an issue in direct dialogue with each other can they call upon the Steering Committee to become involved. However, the Steering Committee must first decide ‘that the Voluntary Principles Initiative would be strengthened by further consultations’ before asking the Secretariat to facilitate formal consultations between the interested Participants.<sup>449</sup> To put it bluntly, considering specific allegations of human rights abuse may be deemed more likely to bring the VPs into disrepute or alienate corporate members under a voluntary process.

Whether or not a complaint is passed on, all consultations between the parties are kept confidential.<sup>450</sup> Whilst it is apparent that the Secretariat cannot determine a complaint, there are no published procedures on how consultations are handled. The potential conflict of interest that arises when the Secretariat is also a private law firm who may have clients amongst the participants has already been noted.

<sup>443</sup> Ibid., 10.2 Category A Witness statements.

<sup>444</sup> Ibid., respectively 6.7 Gather the evidence and 5.6 Specific Requirements for Investigations - Fatalities, Product Theft, Illegal Miner fatalities, Weapons Discharge, 5.6.2 Special requirements.

<sup>445</sup> Ibid., 5.7 Injuries/deaths to illegal miners or detainees 5.7.1 Specific requirements.

<sup>446</sup> Ibid.

<sup>447</sup> The dispute resolution process is outlined in the Governance Rules, op. cit., Section VII Dispute Resolution, Paragraph 2.

<sup>448</sup> See *ibid.*, Appendix 2 – Participation Criteria, pp.10 ff.

<sup>449</sup> *Ibid.*, p.11.

<sup>450</sup> *Ibid.*

The participants can present the matter to the Plenary. The Plenary can make recommendations, although again the qualifier ‘that strengthen and/or support implementation of the Voluntary Principles’ applies. It is therefore highly unlikely that the Plenary would reach a determination of non-compliance: even if it did so, it could not enforce compliance under a voluntary mechanism, although it can – once a participant’s efforts to implement any recommendation have been reviewed – vote to render those who categorically fail inactive.<sup>451</sup>

To date – and this is not officially recorded or confirmed – it is understood that there has only been one case where a dispute between participants has resulted in formal consultations under the Secretariat. This concerned a complaint raised by Oxfam over allegations of serious rights abuses by police and private security forces hired to protect Yanacocha gold mine in Peru, a joint-venture majority owned by Newmont Mining Corporation (‘Newmont’).<sup>452</sup>

According to a paper prepared by the secretariat to the VPs, the Oxfam complaint against Newmont gave rise to a number of problems.<sup>453</sup> First, there was disagreement whether sufficient efforts had been made to resolve concerns through ‘direct dialogue’. Second, once the Secretariat had become involved, there was a lack of a clear timeline requiring the company to respond. Thirdly, in the event of third-party mediation, there were no guidelines regarding conflicts of interest, responsibility for costs, and how to resolve disagreement over the choice of mediator. Finally, both Oxfam and Newmont expressed confusion as to the final status of Oxfam’s complaint: whether it had been resolved or had been withdrawn. A complaints process that leaves both parties unsure as to its outcome is, by definition, of questionable utility.

Because of the unknown nature of consultation and the confidentiality that surrounds complaints, unless the participants agree to release details – how ever constrained, as in the Oxfam/Newmont case – then nothing is officially acknowledged about the existence, nature of the complaint, the parties involved or the outcome. Given the barriers to accessing the mechanism via an intermediary who is a participant in the initiative, this lack of transparency, coupled with peer review in a plenary two-thirds dominated by companies and governments, makes it unlikely that victims of human rights abuse would pursue a complaint under the VPs complaints mechanism in its current form. This is borne out by the fact that, following dissatisfaction over the outcome of the Oxfam/Newmont case, no other complaints seeking redress for victims have surfaced in the public domain.

Oxfam described its complaint against Newmont as ‘a critical first test of the complaints mechanism of the voluntary principles’.<sup>454</sup> In April 2013, Oxfam announced that it was leaving the VP initiative, citing ‘frustration at the lack of meaningful progress in independent assurance....We believe that independent assurance – as a condition of membership – is essential to building and maintaining the credibility of the VPs...’.<sup>455</sup>

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<sup>451</sup> Ibid.

<sup>452</sup> Oxfam America, ‘Oxfam calls on mining company to respect human rights’, 1 July 2009, <<http://www.oxfamamerica.org/press/oxfam-calls-on-mining-company-to-respect-human-rights/>>. Yanacocha is South America’s largest gold mine and is a joint venture between Newmont (51.35%), Minas Buenaventura (43.65%) and the International Finance Corporation (5%). For more information, see <<http://www.newmont.com/operations-and-projects/south-america/yanacocha-peru/overview/default.aspx>>.

<sup>453</sup> Secretariat, Gare Smith, Sarah Altschuler and Amy Lehr, *The Voluntary Principles on Security and Human Rights: a gap analysis of structure, policies and procedures*, 20 September 2010, p.9.

<sup>454</sup> ‘Oxfam calls on mining company to respect human rights’, op. cit.

<sup>455</sup> ‘Oxfam leaves Voluntary Principles for Security and Human Rights multi-stakeholder initiative’, 17 April 2013, available at: <<http://business-humanrights.org/en/oxfam-leaves-voluntary-principles-for-security-and-human-rights-multi-stakeholder-initiative>>.

## Concluding observations and recommendations

The endorsement of the United Nations Guiding Principles on Business and Human Rights in June 2011 was an important milestone in the fight to ensure that rights are protected in context of business operations. The GPs provide a clear global framework, in which critical concepts such as the responsibility to respect and corporate human rights due diligence are embedded.

Almost 5 years after the adoption of the GPs it is time to consider where there may be gaps or limitations in the text. The report has highlighted the way that formal compliance with the principles in the framework can mask actions that undermine the human rights of victims of serious violations.

The Voluntary Principles on Security and Human Rights too can help extractive companies maintain the safety and security of their operations within a functioning framework that encourages respect for human rights. However, the VPs' assumption that public state security forces are solely responsible for human rights abuses not only exonerates a company from all responsibility but may also misrepresent the reality on the ground. Memoranda of Understanding (MoUs) around security can be viewed as allowing the relationship between the company and state security to continue in the face of repeated human rights violations.

The rhetoric of decentralised operational-level grievance mechanisms tailored to the needs of local communities is trumped by a reality in which companies exercise carefully prescribed, centralised, corporate oversight. In particular, in the absence of robust oversight, company involvement in the redress process can result not in remedy but in an additional violation of human rights.

The recent cases in the DRC and Tanzania examined in RAID's report demonstrate that there are significant omissions and gaps in the GPs and VPs which urgently need to be addressed in order to prevent their misuse and misapplication.<sup>456</sup>

### 1. Endorsement

Companies that claim to endorse or abide by the GPs must demonstrate their compliance by welcoming external scrutiny. The VPs must scrutinise and test applications, including ensuring that a company's recent human rights record is not at odds with its stated action plan. By publishing the names of applicants and the timetable for admission, the VPs should invite comments from any interested NGOs, affected people, governments and other bodies on the application. A rationale for admission or refusal should be published in each case. Companies with a problematic record should be given probationary status until they can publicly demonstrate how their actions are improving compliance.

### 2. Human rights assessments

- a) There needs to be much greater transparency and independent scrutiny of human rights impact assessments: these are of limited value if they are produced by consultants only for the internal consumption of the company in question as part of a legal compliance exercise.
- b) All fatalities and serious injuries at company facilities and mine sites, from whatever cause, should be immediately and publicly reported.
- c) To avoid an obvious conflict of interest, consultants and organisations that advise a company on human rights or provide training under the GPs or VPs should not also be involved in the monitoring or investigation of incidents.

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<sup>456</sup> See also MiningWatch Canada and RAID 'Violence Ongoing at Barrick Mine in Tanzania: MiningWatch Canada and RAID (UK) Complete Human Rights Assessment' 5 August 2014, <<http://www.raiduk.org/sites/default/files/pr-barrick-mara-violence.pdf>>; and MiningWatch Canada and RAID 'Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms' December 2014, <<http://www.raid-uk.org/sites/default/files/grievance-mechanisms-briefing-bhr.pdf>>.

### 3. Managing complicit relationships

- a) The GPs and VPs should not be misused to encourage companies to enter into, or continue to operate in, unstable situations where their security is dependent on public law enforcement bodies which routinely perpetrate human rights violations and where the rule of law is weak.
- b) The concept of leverage needs to be clarified: a company should not be able to justify maintaining flawed security arrangements where excessive use of force by public law enforcement agents is prevalent and recurring and a culture of impunity prevails.
- c) MoUs and contractual arrangements with public and private security providers should be disclosed, including information on what steps a company will take in the face of breaches of the agreement.

### 4. Redress

- a) Governments should make clear that operational-level grievance mechanisms are not an appropriate mechanism for dealing with cases of gross human rights violations, serious crimes such as torture, rape and killings, or for violations of international human rights or humanitarian law, which should be reported to the appropriate national competent authorities and international human rights bodies.
- b) Guidance is required to govern the nature and timing of company inquiries into human rights violations when the state or other legitimate authorities are also conducting investigations. Governments should ensure that companies' own investigations do not interfere with criminal investigations or *bona fide* human rights examinations. There is also a role for home governments to ensure that companies head-quartered, listed or operating out of their countries are clear on the requirement to desist from interference.
- c) The GPs' failure to distinguish between investigative, determinative and remedial phases inherent within any grievance mechanism should be rectified.
- d) Further guidance is urgently needed to set standards governing how corporate officers, including a company's general counsel and legal department, should act when investigating, determining and remedying complaints of human rights violations. Limits must be established on the use of legal waivers, confidentiality clauses and the extension of legal privilege. The use of legal waivers should be avoided as part of any settlement reached in a non-judicial grievance process; the onus should be upon companies to set out a 'special case' for their use in specified circumstances; and then it must be unequivocally verified that claimants are able to access and receive independent and proper legal advice as part of an appropriately benchmarked, fair settlement and that the resulting waivers are narrowly defined.

## **Annex 1**

### **Selected correspondence**



## Rights and Accountability in Development

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25 February 2016

Professor John G. Ruggie  
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Cambridge, MA 02138

Via email: <John\_Ruggie@hks.harvard.edu>

Dear John,

As you are aware RAID intends to publish a full version of its report, *Principles without justice: the corporate takeover of human rights*, an outline of which was published in advance in March 2015. You responded publicly to the outline report, posted on the website of the Business & Human Rights Resource Centre.

The full report includes further analysis. RAID would like to give you a chance to respond to the following statements and questions.

- Barrick refer to you as a current Special Consultant to its Corporate Social Responsibility Advisory Board, the former U.N. Secretary General's Special Representative for Business and Human Rights and as author of the United Nations Guiding Principles on Business and Human Rights. Are you happy with this description?
- Do you think that there is a danger that people will conflate your comments on the GPs with Barrick's view of the GPs and vice versa, and have you found it necessary to take any steps to avoid this happening?
- Do Barrick's statements about the GPs, their use, and interpretation have greater authority because it is known that you are a special consultant to the company?
- To ensure the Porgera Remedy Framework aligned with the Guiding Principles, Enodo note in their January 2016 assessment *Pillar III on the Ground*, that you were consulted by Barrick 'at least twice, with detailed Framework drafts, and given the opportunity to provide substantial feedback' (p.52). Has Barrick, Acacia Mining or anyone else ever discussed with you the human rights situation or grievance mechanism at mines which are part of Acacia Mining?
- Have you advised Barrick and/or Acacia Mining on the use of legal waivers when reaching settlement under operational-level grievance mechanisms?
- In July 2011, Foley Hoag announced that you would be joining its Corporate Social Responsibility Practice as a senior advisor. It is our understanding that you have since left the CSR Practice: please will you confirm when this happened? Will you provide further details of the work you undertook whilst acting as a senior advisor, including a list of companies you helped advise? We have also put these questions directly to Foley Hoag.
- On what basis, in your view, can developments under the GP framework outside the UN by not-for-profits and consultancies, often working in partnership with companies and



corporate law firms, derive legitimacy? The Shift consultancy refers to the background of several employees in 'shaping and writing' the GPs as part of the central team supporting you in your work as the Special Representative: as chair of Shift's board of trustees, do you see this as a way of linking current work to the work carried out on the GPs under the mandate of the Special Representative?

- In your book, *Just Business: Multinational Corporations and Human Rights*, you refer to the advisors and researchers, in a programme administered by Harvard's Kennedy School of Government, who assisted you in your role as Special Representative. Would it be accurate or inaccurate to describe these advisors and researchers as employed by the UN or as part of a UN team?
- There is growing criticism that operational-level grievance mechanisms are being used to deal with serious human rights violations, including rape, sexual assault, shootings and excessive violence, for example by security and police at mine sites. How do you view such criticism and do you think that operational-level grievance mechanisms are suited to resolving claims of serious human rights abuse?

Our publication date for the full report is planned for the week beginning 7 March. We would welcome any initial response that you would like to make and will give it our full consideration (bearing in mind that we will require sufficient lead time to allow us to reflect your response, as necessary).

Yours sincerely,

A handwritten signature in black ink that reads "Patricia Feeney". The signature is written in a cursive, flowing style.

Patricia Feeney  
Executive Director



February 29, 2016

Tricia Feeney  
Executive Director  
Rights & Accountability in Development  
E-mail: [tricia.feeney@raid-uk.org](mailto:tricia.feeney@raid-uk.org)

Dear Tricia,

Thank you for the opportunity to comment. Forgive the brevity, but I am under an extremely tight deadline for finishing up the draft of a major public report on the steps FIFA must take to embed respect for human rights across its global activities and relationships, in line with the UN Guiding Principles on Business and Human Rights (UNGPs). You may have seen extensive references to this project in the press since it was announced in December.

As is true of all UN human rights mandate holders, during my six years as the UN Secretary-General's Special Representative on Business and Human Rights I was not an employee of the UN. I received no UN salary. I was allocated one half of the time of one OHCHR staff member and very limited travel funds. That is how the so-called special procedures under the Human Rights Council work. I was and remain a professor at Harvard University.

Therefore, I had to raise funds to support the rest of my team who worked directly for me at Harvard, and for the nearly fifty international consultations I convened, several of which you attended. The funding came from governments and foundations. One government, one company, and for a time one leading NGO, seconded a staff member to assist with the mandate. I neither sought nor received corporate funding.

What made the UNGPs official, of course, was the unanimous endorsement of them by the Human Rights Council in June 2011.

Since the end of my UN mandate, alongside my Harvard day job I held a part-time advisory position with the CSR practice at the law firm Foley Hoag for a little over two years, until September 2013. As you note, I also advise the CSR Board of Barrick Gold. Both have always been matters of public record.

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In addition, I am asked regularly for advice by a range of other organizations – governments, businesses, civil society groups, international organizations, National Human Rights Institutions and law societies – about the interpretation and implementation of the UNGPs. That fact should not come as a surprise, insofar as I developed and wrote them. In many cases across the different categories of actors I am asked to do this on a confidential basis. The views I provide are my own; they are not offered on behalf of the UN. Likewise, any position such organizations adopt is their own.

As I made clear at the end of my mandate, the endorsement of the UNGPs by the UN Human Rights Council was merely the end of the beginning. It will take a great deal of effort by a large number of actors to more fully drive them into practice and to build on them where gaps remain. Shift, whose Board of Trustees I chair, is a non-profit organization working with government, business, international agencies and civil society organizations to do just that. Shift is led by individuals who, along with the other members of my former team, have deep insight into the history, content and application of the UNGPs. Non-profit organizations like Shift and the Institute for Human Rights and Business (the International Advisory Board of which I also chair) have a crucial role to play alongside many other committed individuals and organizations to advance the business and human rights agenda.

The UNGPs are explicit that operational-level grievance mechanisms are just one part of a wider system of remedy of which state-based mechanisms should form the foundation while operational-level mechanisms can provide early stage recourse and resolution (see the commentary to GP 25) provided they meet certain criteria (GP 31). They also make clear, in the commentary to GP 22, that situations where crimes are alleged will typically also require the involvement of judicial mechanisms. However, where the courts themselves are corrupt or otherwise ineffective, serious efforts are needed to ensure that victims are not left without remedy altogether. The Office of the High Commissioner for Human Rights has elaborated at some length on the issue of legal waivers as part of a settlement between victim and company, stressing among other things that they must not foreclose pursuing criminal charges against individual perpetrators.

Best regards,

A handwritten signature in black ink, appearing to be 'John Ruggie', written over the text 'Best regards,'.



Rights and Accountability in Development

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25 February 2016

Gare A. Smith  
Foley Hoag LLP  
1717 K Street, N.W.  
Washington, D.C.  
US 20006-5350  
Via Email: [gsmith@foleyhoag.com](mailto:gsmith@foleyhoag.com)

Dear Gare Smith,

RAID intends to publish a full version of its report, *Principles without justice: the corporate takeover of human rights*, an outline of which was published in advance in March 2015 and posted on the website of the Business & Human Rights Resource Centre. The outline report makes brief reference to the role of Foley Hoag in housing the Secretariat of the Voluntary Principles on Security and Human Rights (VPs), and to your role as a member of Barrick Gold Corporation's Corporate Social Responsibility (CSR) Advisory Board.

The full report will include further analysis, as outlined below. Before publication RAID, would like to give Foley Hoag a chance to respond to the following statements and questions.

- As part of its secretariat role, Foley Hoag is to act as mediator in a confidential complaints process under the VPs. It is not inconceivable that Foley Hoag, as a law firm with an active CSR practice, could be called upon to mediate in a dispute under the VPs concerning one of its own private clients. Is it the case that the rules governing the VPs have not anticipated this circumstance?
- You are described as the founder of, and a key contact for, Foley Hoag's CSR team, as well as a member Barrick's CSR board. Barrick is, of course, a participant in the VPs and is also a member of the Board of Directors of the Voluntary Principles Association, the body set up to administer and manage the finances of the VPs. Beyond your membership of Barrick's CSR board, it is not known whether or not Barrick has, or has had, any other relationship with Foley Hoag or is, or has been, a client of Foley Hoag.
- In July 2011, Foley Hoag announced that Professor John Ruggie, the former U.N. Secretary General's Special Representative for Business and Human Rights, was to join its CSR Practice as a senior advisor. It is our understanding that Professor Ruggie has since left the CSR Practice: please will you confirm when this happened? Will Foley Hoag provide further details of the work undertaken by Professor Ruggie whilst acting as a senior advisor, including a list of companies he helped advise? We have also put these questions directly to Professor Ruggie.

Please provide us with any response you wish to make before our publication date in the week beginning 7 March (bearing in mind that we will require sufficient lead time to allow us to reflect your response, as necessary).

Yours sincerely,

Patricia Feeney  
Executive Director

February 29, 2016

Ms. Patricia Feeney  
Executive Director  
Rights and Accountability in Development Limited  
1 Bladon Close  
Oxford, UK  
OX2 8AD

Re: Response to Inquiry

Dear Ms. Feeney,

Thank you for your letter of February 25, which raises important issues regarding transparency and ethical conduct. I admire your commitment to these principles and am happy to respond to your questions.

(1) Confidential Complaints Under the Voluntary Principles Initiative

As the Secretariat of the Voluntary Principles on Security and Human Rights (“Voluntary Principles”), our law firm could be called upon to act as a mediator in a confidential complaints process. It is also conceivable that the firm could be asked to mediate a dispute involving one of our clients. Considerable attention was paid to such conflict of interest possibilities at the time Foley Hoag was selected to serve as the Secretariat. As a consequence, a process was established to provide the utmost transparency and guard against a potential conflict of interests. Pursuant to this process, Foley Hoag is required to share with the Board of Directors of the Voluntary Principles Association a listing of any clients the firm represents that are also participants in the Voluntary Principles process. Accordingly, should the firm be asked to mediate a complaints process, it would be immediately apparent whether there was a potential conflict of interest. In such a case, Foley Hoag could either proceed in the mediation process with the full understanding and explicit consent of the parties involved or recuse itself from the process.

(2) Relationship with Barrick Gold and the Voluntary Principles Association

As your letter indicates, I am a partner in Foley Hoag’s Corporate Social Responsibility Practice and serve as a member of Barrick Gold’s Corporate Social Responsibility Advisory Board. Barrick is a corporate participant in the Voluntary Principles process and was at one time on the Board of Directors of the Voluntary Principles

Association. You ask if it is known whether, in addition to my service on Barrick's Corporate Social Responsibility Advisory Board, Barrick is, or has been, a Foley Hoag client. As noted in response to your first question, the Voluntary Principles process is committed to transparency and avoiding potential conflicts of interest. As a consequence, Foley Hoag is required to share with the Board of Directors a listing of any clients the firm represents that are also participants in the Voluntary Principles process. Accordingly, if Barrick were a Foley Hoag client at any time during the course of the firm's service as Secretariat, that relationship would be reported to the Board.

(3) Professor John Ruggie and Foley Hoag

Professor Ruggie served on a part-time basis as a Senior Advisor to Foley Hoag's Corporate Social Responsibility Practice from July, 2011 until September, 2013. During that period he advised clients in the public and private sectors regarding implementation of the U.N. Guiding Principles on Business and Human Rights and with respect to other human rights matters. Foley Hoag is ethically prohibited from disclosing the names of its clients, including the clients for which Professor Ruggie provided guidance, without their express permission.

I hope that this information is helpful. Please feel free to call me if you would like to follow up with respect to any of these questions.

Kind regards,



Gare A. Smith

## Annex 2

### Barrick and Acacia: control, independence and human rights

#### Introduction

In their responses to the March 2015 outline of RAID's current report, Acacia Mining plc (formerly African Barrick Gold) and Barrick Gold Corporation asserted the independence of the two companies, albeit in an identically worded paragraph (which is a striking coincidence, given their stated independence).<sup>457</sup> RAID's rejoinder (in light of Barrick's continuing controlling interest in Acacia), highlighting statements from both companies that show their interdependence over time, is also publicly available.<sup>458</sup>

Further to its initial response to RAID's March 2015 outline report, Barrick has since confirmed that:<sup>459</sup>

Although Barrick has in the past provided advice on various aspects of Acacia's programs, including in relation to human rights, Acacia has its own human rights policy, and operates its own human rights program wholly independent of Barrick. Likewise, neither Barrick's human rights assessment program, nor Barrick's annual report on that program, include Acacia. To the extent past statements have been unclear on this point, we will review those statements and clarify them as needed, and seek to ensure clarity going forward.

Acacia has stated:<sup>460</sup>

...since the IPO [initial public offering, when ABG listed in London] we have amended certain policies, implemented new policies or kept in place legacy Barrick policies. As this has happened over a period of time there are legacy documents and statements on both Barrick and Acacia's websites which were accurate at the time of writing, but may no longer be so. We are both committed to reviewing our online materials to ensure that the websites are fully accurate.... To be clear, all of our policies and programmes, including our human rights assessments programmes, are independently managed and overseen by our independent Board and Management team, notwithstanding the fact that our human rights related policies remain fully aligned with those previously adopted from Barrick.

ABG's 2010 IPO (the event that Acacia refers to in establishing independence from Barrick) occurred before the 2011 human rights violations at North Mara documented in RAID's report, yet Barrick commented repeatedly and collaboratively with ABG on the situation as it developed. This must demonstrate that ABG was not so independent at the time. Moreover, RAID highlights statements from both companies demonstrating that human rights policies and assessment procedures were jointly formulated and agreed between Barrick and ABG.

As a result of request by RAID, Acacia has now posted a copy of its human rights policy. This policy is **identical** to Barrick's previous human rights policy (issued July 2011), bar a different effective date, an

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<sup>457</sup> Barrick Gold Corporation Response to RAID "Executive Summary", 23 March 2015, opening paragraph, available at:

<http://business-humanrights.org/sites/default/files/documents/Barrick%20Gold%20Corporation%20Response%20to%20RAID%20Executive%20Summary.pdf>>. See also Acacia Mining plc, response to RAID, March 2015, available at: <http://business-humanrights.org/sites/default/files/documents/Acacia%20-%20Response%20to%20Raid%20-%20March%202015%20%282%29.pdf>>.

<sup>458</sup> RAID, Clarification sought from Barrick and Acacia, 27 March 2015, available at: <http://business-humanrights.org/sites/default/files/documents/RAID%20Clarification%20Barrick%20%20Acacia%2027-03-15.pdf>>.

<sup>459</sup> Barrick Gold Corporation, Letter to RAID, 30 March 2015, available at: <http://business-humanrights.org/sites/default/files/documents/Regarding%20Barrick%20Gold%20and%20Acacia%20Mining%27s%20response%20to%20RAID%20%282%29.pdf>>.

<sup>460</sup> Acacia Mining plc, statement, March 2015, available at: <http://business-humanrights.org/sites/default/files/documents/Acacia%20-%20Clarification%20of%20Independence%20-%20March%202015.pdf>>.

anomaly in paragraph numbering and the replacement of ‘Barrick’ by ‘Acacia’.<sup>461</sup> On the one hand, Acacia’s policy is dated November 2014, four years after ABG’s IPO: how is it that a company, which makes a point of emphasising its independence on human rights issues, has not been able to formulate its own human rights policy in all that time? On the other hand, it is stated that the policy is ‘effective from 1 December 2011’. Is it therefore the case that ABG (now Acacia) simply followed Barrick’s human rights policy as an affiliate and subsidiary of the latter? The scope of Barrick’s human rights policy, at the time of the human rights violations at North Mara detailed in RAID’s report, applied to affiliates and subsidiaries, of which ABG (now Acacia) was one. Add to this the fact that Barrick was regularly making contemporaneous statements on the human rights situation at North Mara – and this is fully documented in RAID’s report – and it is clear that Barrick cannot use the current emphasis on independence to distance itself from events at the time.

Whilst Barrick and Acacia assert that ‘Acacia operates its own human rights programme, conducts its own assessments, and engages in its own analysis and follow-up activities, entirely independent of Barrick’, it is confirmed elsewhere by Barrick that Acacia uses the same consultancy as Barrick to carry out the assessments, under an identical human rights policy, to the same methodology (Avanzar, the consultancy concerned, has issued its own response to RAID’s report).<sup>462</sup> Moreover, why would Barrick in its summary human rights report refer, as it does, to assessments conducted at ABG’s North Mara mine, if asserting the latter’s independence in this area is considered to be so important?

### *Degrees of separation and control*

The dilemma for Barrick is this: how can it retain control over the human rights situation – through assessment, reporting, investigation, redress – at its ABG affiliate, whilst at the same time maintaining a distance from damaging allegations and violations? Barrick states:

The failure to conduct security operations in accordance with these standards [on the use of force and human rights] can result in harm to employees or community members, increase community tensions, reputational harm to Barrick and its partners or result in litigation, criminal and/or civil liability for the Company, ABG or their respective employees and/or financial damages or penalties.

The corporate relationship between Barrick and ABG is portrayed as ambiguous in terms of control and separation. Certain facts underline Barrick’s influence.

In a regulatory filing to the United States Securities and Exchange Commission (SEC), dated 20 February 2015, Barrick states:<sup>463</sup>

**Subsequent to the divestment [in Acacia], we continue to retain a controlling interest in Acacia and continue to consolidate Acacia.**

Barrick uses the term ‘affiliate’ in relation to ABG (now Acacia).<sup>464</sup> Acacia (formerly ABG) is also described as a ‘subsidiary, publicly traded’ of Barrick.<sup>465</sup> As noted previously, ABG was 73.9 percent owned by Barrick,

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<sup>461</sup> Compare Acacia’s and Barrick’s (July 2011) Human Rights Policies, respectively:

<<http://www.acamiining.com/~media/Files/A/Acacia/documents/corporate-policies/acacia-human-rights-policy.pdf>> and <<https://web.archive.org/web/20130116035748/http://barrick.com/files/governance/Barrick-Human-Rights-Policy.pdf>>. Two other very minor differences include a single reference by Barrick to its Community Relations Management System (absent from Acacia’s list of policies) and the direction of questions to the General Counsel (Acacia) cf. Office of the General Counsel (Barrick).

<sup>462</sup> Avanzar LLC, Letter to RAID, 25 March 2015, available at: <<http://business-humanrights.org/sites/default/files/documents/Response%20to%20RAID%20report%20March%2025%202015.pdf>>.

<sup>463</sup> Barrick Gold Corporation, Form 6-K, Filed 02/20/15 for the Period Ending 02/20/15, 4> Divestitures, C) Disposition of 10 percent interest in Acacia, p.124.

<sup>464</sup> For example, the term affiliate, applied to ABG, is used in: Barrick Gold Corporation, Conflict-Free Gold Report for Barrick Gold Corporation, April 2014, available at: <<http://www.barrick.com/files/reporting/Conflict-Free-Gold-Report-April2014.pdf>> and ; Report Boundary and Limitations, <<http://barrickresponsibility.com/2013-performance/about-barrick/>>. (Both pages were visited 26/03/2015).

<sup>465</sup> Form 6-K, 02/20/2015, op. cit., table, p.110. See also Barrick, Annual Report 2013, op. cit., p.81, on the depiction of ABG.



though this has recently fallen to 63.9 percent.<sup>466</sup> Whilst the change of name to Acacia means that ‘Barrick’ has been dropped from the company’s title, the underlying majority holding of Barrick in Acacia remains unaltered, i.e., Barrick retains exactly the same holding in Acacia as it did in ABG immediately prior to the name change.

Prior to the reduction of its equity interest, Barrick appointed 3 directors to ABG’s 10-strong board, appointing the same number to a 12 member board following its divestment.<sup>467</sup> The chairman of ABG’s board is Co-President of Barrick.<sup>468</sup> Barrick states:<sup>469</sup>

Our two Co-Presidents execute on Barrick’s operating plans and strategic priorities: Kelvin Dushnisky, formerly Senior Executive Vice President responsible for Corporate and Government Affairs and Chairman of Acacia, and Jim Gowans, formerly Executive Vice President and Chief Operating Officer. The new structure emphasizes the critical importance of joint responsibility and accountability for the management of operations and our key relationships with host governments and local communities that afford the company its license to operate; the CoPresidents are responsible for the seamless execution of both functions at all times.

In its latest available annual report to the SEC, Barrick describes how it is organised into ‘ten operating units’ which include ‘Barrick’s 63.9% equity interest in African Barrick Gold plc (“ABG”)’.<sup>470</sup> Barrick continues: ‘Barrick’s chief operating decision maker reviews the operating results, assesses performance and makes capital allocation decisions for each of these business operations at an operating unit level. Therefore, these operating units are operating segments for financial reporting purposes.’

On Barrick’s website devoted to corporate social responsibility (CSR), Barrick’s 63.9% equity interest in African Barrick Gold plc (ABG) is currently described as a Barrick operating unit and ‘Barrick (including ABG)’ is described as having 17 ‘wholly-owned mines’ at the end of December 2013: the list unequivocally includes North Mara.<sup>471</sup>

In the same annual report to the SEC, Barrick also states: ‘ABG has a greater amount of independence in comparison to Barrick’s operating units’, referring to its London listing and to the existence of a relationship agreement ‘to ensure that ABG is capable of carrying on its business independently of Barrick’.<sup>472</sup> Barrick’s recognition that ABG’s assertion of its independence poses risks for Barrick is also recognition that the two entities are, in fact, related when it comes to the latter’s reputation or even its liability:<sup>473</sup>

...the minority shareholders of ABG represent an important stakeholder group that is required to be considered in ABG’s corporate governance and decision-making. Given the potential divergence in stakeholder interests, there is a risk that actions undertaken by ABG could differ from actions that would have been taken by Barrick and in certain circumstances could adversely affect Barrick’s reputation and/or result in potential civil or criminal liability for the Company.

### *Human rights and security*

The initial applicability of Barrick’s human rights policies and practices to ABG has recently given way to moves by Barrick to distance itself and such policies and practices from ABG (and vice versa). Whether

<sup>466</sup> See Barrick Gold Corporation, ‘Barrick Completes Partial Divestment of African Barrick Gold plc Holding’, op. cit.; also African Barrick Gold plc, ‘Completion of Placing by Barrick Gold Corporation’, op. cit.; also, *intra*, p.6.

<sup>467</sup> See respectively, Barrick Gold Corporation, Annual Information Form, For the year ended December 31, 2012, Dated as of March 28, 2013, p.23; Annual Information Form, For the year ended December 31, 2013, Dated as of March 31, 2014, p.25.

<sup>468</sup> See <<http://www.acaciaminging.com/about-us/our-leadership/board-of-directors.aspx>> and <<http://www.barrick.com/company/management/default.aspx>> (both visited 26/03/2015). Kevin Dushnisky is listed, respectively, as Chairman of the Board at Acacia and Co-President of Barrick.

<sup>469</sup> Form 6-K, 02/20/2015, op. cit., p.30.

<sup>470</sup> Barrick Gold Corporation, Form 40-F, Filed 03/31/14 for the Period Ending 12/31/13, op. cit., Operating Units, p.22.

<sup>471</sup> <<http://barrickresponsibility.com/2013-performance/about-barrick/>> (visited 26/03/2015).

<sup>472</sup> Form 40-F, 03/31/14, op. cit., respectively, p.22 and p.25.

<sup>473</sup> *Ibid.*, Holding of African Barrick Gold, pp. 121 – 122.

coincidentally or not, this distancing has occurred in the context of continued human rights concerns at Acacia's (formerly ABG's) North Mara gold mine.

The version of Barrick's Human Rights Policy, effective from 18 May 2012, defines the extent of its applicability:

## 2. SCOPE

This Policy applies to all Barrick entities and all Barrick operations, whether operated by Barrick, an affiliate, or a subsidiary. It applies to all employees of Barrick, Barrick's affiliates, or Barrick's subsidiaries.

It should be recalled that Barrick has described ABG as both a subsidiary and an affiliate.

The version of Barrick's Human Rights Policy, effective from 6 June 2014, redefines its scope:

## 2. SCOPE

This Policy is applicable to every employee of Barrick, including senior executive and financial officers, and to members of the Barrick Board of Directors.

On the one hand, Barrick previously expressed a closeness and affiliation with ABG:

Barrick issued a statement on North Mara, at the time of the May 2011 shootings, and over a year after ABG's listing:<sup>474</sup>

Barrick is unwavering in its commitment to eradicate human rights violations at all of its operations and those of its affiliates.

Under a stated 'Commitment to Protecting Human Rights', Barrick describes how ABG initiatives 'to improve the security function and strengthen support to the community at North Mara' are to be undertaken '**with Barrick's assistance**' [emphasis added];<sup>475</sup> *inter alia*, the development of an 'appropriate remedy program for victims of sexual assault, aligned with international human rights norms' and to '[e]xamine alternatives to existing arrangements with public security providers at North Mara'.

It is explicitly stated that:<sup>476</sup> 'Barrick will also: Commit to conducting human rights assessments at Barrick operations and projects, including those of its affiliates and subsidiaries. ABG sites will be included in this process.' This has been borne out and Barrick's summary human rights assessment makes specific reference to assessments carried out at North Mara.<sup>477</sup>

In a September 2011 update on North Mara, released by Barrick, it is stated:<sup>478</sup>

African Barrick Gold (ABG) and Barrick Gold Corporation have undertaken a series of initiatives to ensure respect for human rights, strengthen security and improve relations with local communities near the North Mara mine. The following provides an update on the status of these actions, which reflect company commitments made in a May 30, 2011 statement.

...

### **Strengthening global human rights compliance**

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<sup>474</sup> Barrick Gold Corporation, 'Statement from Barrick Gold Corporation concerning the North Mara Mine, Tanzania', 30 May 2011, op. cit.

<sup>475</sup> Ibid.

<sup>476</sup> Ibid.

<sup>477</sup> *Assessing Human Rights Risks & Impacts 2013*, op. cit., p.7 and p.11. Also *intra*, Barrick and ABG (now Acacia): the published and the unpublished, p.24.

<sup>478</sup> Barrick Gold Corporation, North Mara Update – September 2011, available at: <<http://www.barrick.com/files/north-mara/North-Mara-Update-Sept-2011.pdf>> (visited 26/03/2015).

Barrick has adopted a new corporate human rights policy based on international best practices and is now implementing a global human rights compliance program. Progress is underway in numerous areas, including:

...

- Human rights assessments to be conducted by third-party experts at all Barrick operations and projects, including those of its affiliates and subsidiaries, encompassing leading human rights indicators, including sexual violence.

At the same time, in September 2011, ABG issued an almost identical release. ABG stated:<sup>479</sup>

ABG is partnering with Barrick in implementing a new corporate human rights policy based on international best practices and is now implementing an updated human rights compliance programme.

Similarly, in its 2011 Responsibility Report, Barrick stated:<sup>480</sup>

Both Barrick and ABG are unwavering in our commitment to respect human rights at all operations and we have a zero-tolerance approach to human rights violations. This applies not only to our employees, but also affiliates or any third party acting on our behalf. ABG and Barrick introduced a number of initiatives in 2011 to underline this commitment and further progress our existing policies and procedures.

Such statements must indicate that ABG and Barrick worked jointly on a human rights policy.

On the other hand, and more recently, Barrick posits a separation:

On its corporate website, Barrick now states:<sup>481</sup> ‘These [human rights] commitments are limited to Barrick-operated mines. For information on Acacia Mining plc’s human rights approach, see [www.acaciamining.com](http://www.acaciamining.com).’ Moreover, in relation to security arrangements, Barrick states:<sup>482</sup> ‘Acacia Mining plc is an independent company, with separate policies, procedures and systems.’

If Acacia now has its own human rights policy, none is currently posted on its website. RAID would invite the company to disclose it. Moreover, numerous references are made in successive ABG Annual Reports from 2011 onwards to the company’s Human Rights Policy, but RAID is unaware of its public disclosure.<sup>483</sup>

However, this separation is far from unambiguous. Information on the activities of ABG continue to appear on Barrick’s corporate social responsibility (CSR) website under eight separate sections, including in the areas of law and order, human rights and security.<sup>484</sup>

It appears that Barrick has recently added the following disclaimer to its CSR website:<sup>485</sup>

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<sup>479</sup> African Barrick Gold plc, North Mara Update, 30 September 2011, available at:

<<http://www.africanbarrickgold.com/~media/Files/A/African-Barrick-Gold/Attachments/press-releases/2011/North-Mara-update-Sept-30.pdf>> (visited 26/03/2015).

<sup>480</sup> Barrick, Responsible Mining – 2011 Responsibility Report, op. cit., Appendix 3: Independent Assurance Statement, p.65.

<sup>481</sup> <<http://www.barrick.com/responsibility/human-rights/default.aspx>> (visited 26/03/2015).

<sup>482</sup> <<http://www.barrick.com/responsibility/security/default.aspx>> (visited 26/03/2015).

<sup>483</sup> Reference to Acacia’s Human Rights Policy is made within the company’s Code of Business Conduct and Ethics, which is available online.

<sup>484</sup> Searching <<http://barrickresponsibility.com>> for references to ABG produces 8 results under headings concerning, *inter alia*, Community Safety and Security <<http://barrickresponsibility.com/additional-information/society/community-safety-and-security/>>, Artisanal Mining <<http://barrickresponsibility.com/additional-information/society/artisanal-mining/>>, Resettlement <<http://barrickresponsibility.com/additional-information/society/resettlement/>>, Social and Economic Development <<http://barrickresponsibility.com/2013-performance/social-and-economic-development/>>, Security and the Voluntary Principles <<http://barrickresponsibility.com/additional-information/governance/security-and-the-voluntary-principles/>>, and Human Rights <<http://barrickresponsibility.com/2013-performance/human-rights/>>. All pages were visited on 26/03/2015.

<sup>485</sup> <<http://barrickresponsibility.com/>> (visited 26/03/2015).

African Barrick Gold plc (ABG) is an independent company listed on the London Stock Exchange that owns gold mines and exploration properties in Africa. Barrick holds a 63.9% equity interest in ABG. All content regarding ABG programs referred to by Barrick anywhere on this website, or in any documentations accessible from this website, is provided and approved by ABG. Furthermore, all such ABG programs are managed exclusively by ABG and any commitments or representations related to such programs are made solely by ABG (and not Barrick). For information on ABG, please see [www.africanbarrickgold.com](http://www.africanbarrickgold.com).

An internet archive, which records snapshots of webpages on specific dates, returns a webpage for <http://barrickresponsibility.com/> dated 5 August 2014 that does not include this disclaimer.<sup>486</sup>

Moreover, the appended disclaimer on ABG is at odds with the substantive text on the webpages, which often makes no clear distinction between ABG and other Barrick operating units when presenting material.<sup>487</sup>

For its part, Acacia (formerly ABG) currently states:<sup>488</sup>

The ‘Voluntary Principles on Security and Human Rights’ are central to our security management system. These are a set of guidelines by which companies in the extractive sector can maintain the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. Our majority shareholder, Barrick Gold Corporation, is a signatory participant. Our security management system is aligned to this commitment and to respecting human rights and the fundamental freedom of individuals overall.

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<sup>486</sup> <https://web.archive.org/web/20140805145043/http://barrickresponsibility.com/> (visited 26/03/2015).

<sup>487</sup> To cite examples from two sections: ‘In-migration is a concern at only a few of our [emphasis added] 21 operations. These include ABG’s North Mara mine in Tanzania....In an attempt to reduce frequent incursions by illegal miners, we [emphasis added] began to install additional perimeter fencing and walls at North Mara and Porgera in 2013’ and; ‘In the past year, we [emphasis added] also looked at opportunities to continue building the human rights capacity of important external stakeholders, including local police forces....And, in Tanzania, Search for Common Ground (an international NGO) provided human rights training to ABG security trainers and the Tanzanian police.’ (Respectively, in the Community Safety and Security section, under ‘In-migration’ and ‘Illegal Mining’, <http://barrickresponsibility.com/additional-information/society/community-safety-and-security/> and; in the Human Rights section, under ‘Our performance in 2013’, <http://barrickresponsibility.com/2013-performance/human-rights/> (both pages visited 26/03/2015)).

<sup>488</sup> Acacia, Human Rights, <http://www.acaciaminging.com/sustainability/our-material-areas/security-and-human-rights.aspx>. (Visited 26/03/2015). See also ABG, Information Memorandum, op. cit., p.14.