



Rights and
Accountability
in Development

Principles without justice

The corporate takeover of human rights

Executive Summary
Conclusions and Recommendations
March 2015

EXECUTIVE SUMMARY

Introduction

The purpose of this report is 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 ‘authoritative’ 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** the standards
- **Assure** by undertaking human rights risk assessments (for private consumption only)
- **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 in order to distance the company from abuses blamed on state security
- **Redress** complaints through in-house 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). 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 (VPSHR). The briefing summarizes RAID’s forthcoming report, *Principles without justice: the corporate takeover of human rights*.

Many reports demonstrate failures by businesses to adhere to these standards, but little has been said about how companies, even while following the steps advocated in the Guidelines and Principles, can exonerate themselves when human rights violations occur.

Prominent human rights organisations, including RAID, have long 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.’¹

Throughout the report, reference is made to two prominent cases of alleged human rights violations concerning two companies:

- Swiss-based and London-listed natural resources company Glencore plc and its Congolese subsidiaries.
- Acacia Mining plc, formerly African Barrick Gold (referred to in this report as ‘ABG’), operating in Tanzania, in which the Canadian transnational Barrick Gold Corporation (‘Barrick’), has a majority holding.

¹ 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

Why are companies willing to endorse the GPs? A standard or code, such as the Universal Declaration of Human Rights, that has been universally agreed and adopted, has immense legitimacy. The UN Secretary-General's Special Representative on Business and Human Rights has often stated that the GPs are unique in that they are the first 'authoritative guidance' from a UN body on this issue and the first normative text to have been endorsed, but not negotiated, by governments. But do the GPs have the 'thick stakeholder consensus' attributed to them? As the RAID report shows, during the drafting process, much greater importance was given to the views of companies, while the misgivings of leading human rights NGOs (on issues such as right to remedy and the need for effective regulation) were dismissed. In another departure from usual practice, the authorship of the GPs is personally attributed to the former Special Representative, Professor John Ruggie, in a way that other human rights instruments are not.

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 a first sleight of hand, the supporters of the Guiding Principles make such a great play of their consensual and universal endorsement precisely because this distracts attention away from the fact that the GPs are in reality the 'take it or leave it' result of unequal negotiating power. The second sleight of hand is in claiming that their pragmatism is about the possible, delivering real change in people's lives, when actually this pragmatism is about the limits to what companies will do when it comes to respecting human rights and offering redress.

Established in 2000, the VPSHR pre-date the Guiding Principles. Whereas the GPs encompass the full range of human rights that companies can impact, the VPSHR focus upon impacts arising from security arrangements. Given the GPs' over-arching status, increasingly there are calls to fully align the VPSHR with the GPs.

CASE STUDY ~ 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. 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.² Over the same period, at least 11 others have been shot by police and injured.³ Of the 16 deaths, 10 of those shot

² RAID, , MiningWatch Canada, London Mining Network 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>>.

³ *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.

⁴ 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 the settlement; web page now taken down).

⁵ Respectively, 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 the settlement; web page now taken down); and 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>>.

at the North Mara mine were killed while ABG was a wholly-owned subsidiary of Barrick, whilst 6 men were killed after ABG became separately listed, though Barrick remains a majority controlling shareholder. Barrick/ABG has attributed the shootings to the actions of the police in dealing with incursions. There have also been allegations, which surfaced in May 2011, that local women had been raped and sexually assaulted by police and ABG's security personnel at the mine.

In March 2013, a legal action was bought in the UK against ABG and its 100% subsidiary, North Mara Gold Mine Limited (NMGML), claiming 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.'⁴ ABG stated that the proceedings were without merit and 'we will not compensate illegitimate claims or lawsuits'.⁵ 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.⁶

Step 1 – Endorse

Both the GPs and VPSHR allow companies to capitalise on the normative endorsement of the instrument concerned: it is good business to make a strong policy statement endorsing respect for universal human rights. However, both instruments are ultimately pragmatic in that they 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, assessed the risk of human rights impacts, sought to use its influence upon recalcitrant states, and offered redress under its own grievance mechanism, as specified in the relevant principles. In other words, a company that follows the GPs or VPSHR thereby legitimises its actions in dealing with human rights impacts. To benefit from this approach, the first step is to endorse the standards.

Endorsement of the principles often occurs only after exposure in the media about human rights violations at company-controlled assets. In the case of Barrick, it was only after numerous reports about police brutality and rape at its Porgera Gold Mine in Papua New Guinea that it joined the VPSHR.⁷ ABG, at the same time, declared its adherence to the VPSHR through its affiliation with Barrick.⁸ Glencore issued a letter of intent to join the Voluntary Principles initiative in July 2013 after its listing on the London Stock Exchange put human rights abuses at its mining operations in Colombia and the Democratic Republic of the Congo (DRC) under intense media scrutiny.⁹

⁶ 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>>.

⁷ Amnesty International 'Undermining Rights: Forced evictions and Police Brutality around the Porgera Gold Mine, Papua New Guinea', January 2010.

⁸ Acacia Mining, External Charters, Voluntary Principles on Security and Human Rights, available at: <<http://www.acaciaminging.com/sustainability/our-approach/external-charters.aspx>>.

⁹ BBC *Panorama*, "Billionaires behaving badly?", 16 April 2013.

CASE STUDY ~ Glencore's KCC mine site in Katanga, DRC : the death of Eric Mutombo

Eric Mutombo Kasuyi was killed on 15 February 2014 after taking a short cut across the Kamoto Copper Company SARL concession on his way home.¹⁰ He and a friend 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. Mutombo, a 23-year old father of two young children, was apprehended. Available information, including post mortem examinations and court testimony, indicates that Mutombo Kasuyi died on the KCC site after being severely beaten.

KCC's parent company, Glencore, maintains that Mutombo was apprehended by a sub-team of two mine policemen – part of the DRC police force over which Glencore says it has no control – and that 'KCC and G4S staff [the latter subcontracted to provide security] operated in line with company policies and did not infringe human rights.'¹¹ The mine policemen have been tried and acquitted by a court in the DRC.¹² Those responsible for Mutombo's death have not been brought to justice.

Undoubtedly companies gain credibility by joining the VPSHR, but the mechanism is ill-equipped to make a determination on an applicant's human rights record before admission. Most worrying is a situation when police violence and killings continue, as they have done at ABG's North Mara Gold Mine, after endorsement of the VPSHR and GPs. The report tries to explain this apparent paradox.

The occurrence of human rights violations could suggest that the VPSHR 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 VPSHR, 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 its compliance, by carrying out risk assessments and human rights due diligence, and to control any fall-out from violations that do occur by using in-house investigations and redress to contain the situation. Hence the danger inherent within the formulation of the GPs lies not in the possibility of their rejection, but in the all-encompassing way that they have been adopted by companies.

Step 2 – Assure

If it were simply the case that the GPs had no mechanism for their implementation, then they could be more easily dismissed. However, the GPs are to be monitored and implemented, but *by the companies themselves*. This is the pragmatic solution in the face of opposition to any

¹⁰ 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, available at: <<http://www.raid-uk.org/sites/default/files/glencore-report-June2014.pdf>>.

¹¹ 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>>.

¹² Case RP 521/KGM 2014, *Affaire Ministère Public contre les prévenus Mujinga Tshimboji et Makombo Mudianga*, Tribunal Militaire de Garnison de Kolwezi, 6 June – 30 Aug 2014. The policemen were acquitted of the charge of inflicting blows and injuries resulting in unintentional killing (Article 48 of the Penal Code).

regulatory body and is perhaps the reason why so many companies are keen to endorse the GPs.

The foundational principles that underlie the corporate responsibility to respect human rights are grounded through operational principles that include human rights due diligence (GP17): companies need to assess their operations, so that they can offer assurance that they respect human rights. The VPs include a main section on risk assessment and provisions on due diligence.

Transparent reporting or exercises in risk management?

The GPs offer companies a way in which to manage human rights risks. Given that the GPs advocate 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 they can ensure that 'rights holders' remain at the heart of the exercise. Rather, there is evidence to suggest that human rights impact assessments (HRIAs), due diligence and company-based grievance mechanisms are being used technically – perhaps cynically – to minimise risks without necessarily delivering the positive change in the lives of affected individuals that the Special Representative advocates.

The VPSHR have elements in common with the GPs: they are voluntary and do not impose binding regulation directly on companies; they cannot be enforced, although a company can – theoretically at least – be expelled from the initiative; and they call on companies to undertake human rights risk assessments. Moreover, whilst there is a requirement for companies (and other participants) to report on their implementation of the VPSHR, these reports are produced by the companies themselves, remain confidential (unless a company decides to publish) and are not independently verified.

Beyond a summary annual report at the most generalised level, which is 'not to reference specific Participants', the workings of the VPSHR are cloaked in secrecy: 'all proceedings of the Voluntary Principles Initiative are on a non-attribution and non-quotation basis'. All Voluntary Principles Initiative documents are to be considered confidential and 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. It is therefore impossible to know how many company applications to join the VPSHR initiative have been refused or how many complaints have been raised under a dispute process (discussed later) by Participants.

There is a danger that HRIAs are compiled as a compliance exercise and are internalised solely for consumption by the company itself. Both the GPs and VPSHR encourage and legitimise this approach, as neither instrument specifically requires the publication of detailed human rights reports or impact assessments.

CASE STUDY ~ Confidential: reporting on human rights without reporting violations

Barrick publishes neither its operational level HRIAs nor its annual reports on implementation of the VPSHR. The operational-level HRIAs are confidential and legally privileged. Barrick has produced only a vacuous summary human rights report – and then, only available by request – that says nothing whatsoever about actual human rights impacts or abuses that have taken place at its operations.

The company's 2013 summary report, having confirmed that a human rights assessment was conducted at the mine, makes not one single further reference to North Mara. The section on human rights and security – a mere 220 words – says nothing

about violations at the Tanzanian mine. Indeed, anyone who reads Barrick's summary assessment in isolation would have no knowledge whatsoever of the shootings, sexual violence and security-related human rights abuses at North Mara. There are two mines at North Mara: the one 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 North Mara of Barrick's summary report, identified as 'higher risk', but then altogether absent from the pages.

Human Rights Impact Assessments – bias and an absence of material information

The GPs and VPSHR are pragmatically (and deliberately) designed to ensure that there is no independent oversight of company due diligence and human rights reporting. But a company assessing its own record will be perceived as biased. This criticism has been anticipated by employing consultants and advisers to take on these tasks and provide 'critical distance'.

Barrick's human rights assessment is carried out by Avanzar, described as 'an independent consulting organization'.¹³ 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. Barrick sets the parameters for the HRIAs. It is the company's Office of General Counsel (OGC) which has the final say in the content of the HRIA; all material compiled by Avanzar is held under legal privilege; and the HRIAs are kept confidential.

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 benefits victims of abuse who often rely upon wider public recognition of their plight in order to have any chance of redress.

Barrick's sensitivity to this issue of confidentiality and privilege is betrayed by its inevitable appeal to the GPs:¹⁴ 'That decision [not to publish HRIAs] is not inconsistent with the UNGPs.'

It is a failing of GP 18 that it does not mandate publication of the entire risk assessment. GP 23(c) allows for legal privilege to trump publication where advice has been sought in respect of gross abuses. Finally, the reference under the GPs recognising 'legitimate requirements of commercial confidentiality' gives companies all the excuse they need for withholding information on human rights impacts.

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 at least gives the impression that it has something to hide.

Securing the most 'authoritative' advice

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.

Seven months after the end of his mandate, the former Special Representative joined Barrick Gold's Corporate Social Responsibility (CSR) Advisory Board. Moreover, Barrick states:¹⁵

¹³ Barrick Gold Corporation, *Assessing Human Rights Risks & Impacts 2013*, p.7 and p.11. Available from the company by request. See <<http://barrickresponsibility.com/2013-performance/human-rights/>>.

¹⁴ *Ibid.*, p.9, fn 5.

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.

Another member of Barrick's CSR Advisory Board is from the law firm Foley Hoag and chairs the latter's CSR practice. The interconnections continue: the same law firm had earlier announced 'Author of U.N. Guiding Principles on Business and Human Rights [John Ruggie] to Join Foley Hoag'.¹⁶ Foley Hoag also houses the Secretariat of the VPSHR. Barrick is, of course, a participant in the VPSHR 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 VPSHR.

A not-for-profit consultancy called 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.'¹⁷ Shift has a Business Learning Program and gives 'tailored advice and support to each participant on their main priorities for implementing the UN Guiding Principles'.¹⁸ Shift's business partners are listed as ABN AMRO, Anglo American, Coca-Cola Company, Ericsson, Gap Inc, H&M, Hitachi, Kosmos Energy, L'Oréal, RWE, Total and Unilever.¹⁹

A troubling nexus has therefore formed between organisations and consultancies responsible for advising companies on human rights and carrying out human rights impact assessments on their behalf. Herein lies the danger in deliberately attributing the authorship of the GPs to individuals and a team rather than the UN *per se*: the former can be engaged by companies in an attempt to monopolise interpretation of the 'authoritative guidance'.

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?

The GPs and VPSHR are enabling in two ways: firstly, as noted, they allow continued business in a country by undertaking human rights risk assessments at the outset; secondly, they introduce the concept of leverage, so a company can legitimise its continued presence in a recalcitrant state provided that it has sought to use its influence with government to seek to further human rights.

Managing complicit relationships

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;

¹⁵ Barrick Gold Corporation, Human Rights Compliance Program, p.6, available at:

<<http://www.barrick.com/files/governance/Barrick-Human-Rights-Compliance-Program.pdf>>.

¹⁶ 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>>.

¹⁷ <<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 15 March 2015).

¹⁸ <<http://www.shiftproject.org/program/business-learning>>.

¹⁹ *Ibid.*, as of 3 February 2015.

however, 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, as long as a company can show that it has undertaken due diligence, sought expert advice, engaged in capacity-building and exercised whatever leverage it has. The GPs and VPSHR never specify that a company should cease to do business in a particular country.

The persistence of these crucial relationships with their attendant detrimental effect upon human rights nevertheless has great utility for companies: (i) in certain adverse environments – such as 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 and contractual security arrangements (over which they have complete control or at least a high degree of control) from those of the state (over which they purportedly have limited control).

Both the GPs and VPSHR, 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 VPSHR 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 complex arrangements that have formed between business, contracted security and the state.

Overall, the existing framework of human rights principles and corporate practice

- attributes ‘crucial’ status to public security relationships
- legitimises the limits of corporate influence
- allows support for human rights training and memoranda of understanding (MoUs) with state security to go a long way towards satisfying the requirement of ‘all appropriate measures’ to further human rights observance
- fails to specify consequences should public security continue to commit violations.

It is hard to escape the conclusion that this framework can actually perpetuate human rights abuse.

CASE STUDY ~ Glencore’s shifting influence

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 public security, companies distance themselves from the state element, emphasising their lack of control. However, companies are all too eager to stress to shareholders and their home governments their considerable beneficial influence in host countries.

In 2013, Glencore’s revenue was \$US233 billion.²⁰ DRC government revenue (excluding grants) in the same year was estimated at \$US3.9 billion.²¹ When criticised

²⁰ 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.

for, *inter alia*, failing to ensure respect for human rights at its KCC site, Glencore opened its response by stating:²²

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 contradiction – the reassurance of influence versus the lack of any control or leverage (a notion given sustenance within the GPs) – is apparent. For example, Glencore declares:²³

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 the companies – presumably because of the financial and material support they provide, let alone their contribution to the national economy – are in a position to stipulate how the Mine Police should operate?

CASE STUDY ~ ABG and the North Mara Memorandum of Understanding with police

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.

ABG's North Mara MoU was not published by the company, but only became available as a result of court proceedings in London.²⁴ It is apparent that the MoU, while advocating compliance with the VPSHR, which themselves require a company to promote the observance of the United Nations Basic Principles on the Use of Force and Firearms, fails to spell out the consequences or course of action that the company will take should public security providers breach these standards.

Despite the MoU, there have been numerous incidents of shootings by police at North Mara: nothing in the MoU compels the police to change their behaviour. Such MoUs

²¹ 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.

²² Glencore response to Key Findings and Questions, 17 June 2014, *Op. cit.*

²³ *Ibid.*

²⁴ 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. 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.

therefore allow a company to claim that it took measures to address police conduct, even though a pattern of continued abuse suggests that the ineffectiveness of such arrangements is well known. MoUs can, therefore, be viewed not as a safeguard or preventative, but as enabling the relationship between the company and state security to continue in the face of violations.

Step 4 – Redress

The third element of the GP framework is redress. 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.

It is the latter option which has 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, 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 companies' total control over the corporate element of redress?

- The GPs have established 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.
- Beyond broad-brush effectiveness criteria – critiqued in RAID's full report 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.

The GPs have allowed companies to deploy such grievance mechanisms not to prevent violations occurring, but to deal with violations *after* they have occurred.

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. In this way, even instances of serious abuse are being privatised and dealt with 'in-house'. 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.

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.

Self-investigation

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 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.

Substituting private exoneration for public justice

The worry is that a company’s intervention in offering redress becomes a substitute for judicial remedy. GP22, in giving companies leave to provide redress, intrinsically allows companies to make the determination that they are indeed not directly culpable. 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.

Of course, companies could refrain from investigating or determining culpability before the state has investigated, but the examples of North Mara and KCC do not demonstrate any such restraint. Barrick/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.

CASE STUDY ~ Parallel proceedings: Glencore, the internal investigation and the official inquiry

There have been no fewer than four parallel inquiries into the circumstances surrounding Mutombo’s death on KCC’s mine site on 15 February 2014: 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 (subcontracted to provide elements of security at the mine site).

It is apparent that KCC/Glencore has exerted its influence over certain aspects of these inquiries and their sequencing. According to Glencore, the company had a role in determining whether the incident was a human rights abuse.²⁵ ‘From the start, KCC provided active support and collaborated with investigating authorities to understand

²⁵ Glencore response to Key Findings and Questions, 17 June 2014, *Op. cit.*

the dynamic of the incident and assess whether a violation of human rights occurred.’

On 3 March, the KCC management team requested an internal investigation. Glencore is quick to point out that this internal investigation was ‘in compliance with the KCC Human Rights Policy’. 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: the KCC internal investigation was initiated before the Public Prosecutor or Military Prosecutor had concluded their respective investigations.

Glencore confirms that the Public Prosecutor did not clear the two of its senior judicial officers (both KCC employees) until 18 March. 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 employees, the KCC internal inquiry ‘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.’²⁶ Previously, on 6 March, two Mine Policemen had been arrested and charged with ‘deliberately inflicting blows and injuries’ that resulted in ‘the involuntary death’ of the victim.²⁷

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.²⁸ 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.

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.’²⁹

No one has been convicted in relation to Mutombo’s death at KCC’s mine site. The two policemen accused of unintentional killing were acquitted by the military court in Kolwezi.³⁰ Both the Prosecutor and Mutombo’s family have filed an appeal against the verdict. At the time of writing, RAID has been unable to obtain a copy of the judgment.

Centralised corporate control of operational-level grievance mechanisms

Operational-level grievance mechanisms are presented as offering two benefits: they nip grievances in the bud so that they do not escalate and they offer potential victims direct access to a remedy process close to the company operations.

²⁶ GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014.

²⁷ 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.’

²⁸ Glencore response to Key Findings and Questions, 17 June 2014, Op. cit.

²⁹ *Ibid.*

³⁰ Case RP 521/KGM 2014, Affaire Ministère Public contre les prévenus Mujinga Tshimboji et Makombo Mudianga, Tribunal Militaire de Garnison de Kolwezi, 6 June – 30 Aug 2014. The policemen were acquitted of the charge of inflicting blows and injuries resulting in unintentional killing (Article 48 of the Penal Code).

But in the case of ABG's North Mara mine and KCC, 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 and not to the locus at which it has been devised and from which it is controlled.

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.

Whilst grievance mechanisms have been promoted as overcoming barriers to accessing judicial redress, many obstacles – control of information, legal waivers, confidentiality clauses – have been re-introduced. Instead of being blocked from accessing redress, victims are corralled and channelled through a redress mechanism of a company's own making.

'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 anticipated, but never convincingly addressed.

The GPs set out 'effectiveness criteria' for non-judicial grievance mechanisms. Such mechanisms should be legitimate, accessible, predictable, equitable, rights-compatible and transparent. GP 31 holds forth the prospect that stakeholders should at least be consulted over the design of operational-level grievance mechanisms and 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 GPs offer a solution that 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 and company-controlled, retains legal elements and is bound up in confidentiality.

The commentary to the GPs finally adds that '[w]here adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.' Yet 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.

The full report also touches upon and critiques the final alternative, that of multi-stakeholder grievance mechanisms, such as the complaints process under the VPSHR, under which participants accept a dispute resolution process should other participants raise concerns about their performance. But 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. It is also a process lacking in transparency and closed to public scrutiny.

CONCLUSIONS AND RECOMMENDATIONS

The endorsement of the United Nations Guiding Principles on Business and Human Rights (GPs) 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. The Voluntary Principles on Security and Human Rights (VPSHR) 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 VPSHR's 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) can be viewed as allowing the relationship between the company and state security to continue in the face of repeated human rights violations. In particular, in the absence of robust oversight, company involvement in the remedy processes can result not in remedy but in an additional violation of human rights.

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. The recent cases in the DRC and Tanzania examined in RAID's report³¹ demonstrate that there are significant omissions and gaps in the GPs and VPSHR which urgently need to be addressed in order to prevent their misuse and misapplication.

1. Endorsement

Companies that claim to endorse or abide by the GPs must demonstrate their compliance by welcoming external scrutiny. The VPSHR must scrutinise and test applications, including ensuring that a company's recent human rights record is not at odds with its stated action plan. Companies with a problematic record should be given probationary status until they can 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 assessments: such assessments 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 companies on human rights or provide training under the GPs or VPSHR should not also be involved in the monitoring or investigation of incidents.

³¹ 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.raid-uk.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 VPSHR 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 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) Companies should facilitate but not interfere with criminal investigations or human rights examinations.
- c) The GPs' failure to distinguish between investigative, determinative and remedial phases inherent within any grievance mechanism should be rectified.
- d) Further guidance about the limits of the role of corporate officers, in particular, the general counsel, in the investigation of serious human rights incidents and in remedy programmes is urgently needed, including with regard to the use of legal waivers, confidentiality clauses and the extension of legal privilege.