



Violations and the Security Nexus

Acacia's North Mara Gold Mine and Glencore's Kamoto Copper Company

Submission for the Working Group's thematic report concerning the human rights impact of private military and security companies (PMSCs) operating in the extractive industry

Introduction

Rights and Accountability in Development (RAID) is a UK based non-governmental organization that exposes corporate human rights abuses in Africa and works with victims to hold companies to account. Our goal is to strengthen international regulation of companies and bring justice for victims of corporate abuse. RAID's focus is on the extractives sector in Africa, including how security operations adversely impact human rights. RAID links its knowledge of individual cases it has documented to national and international policy debates to press for the development of fair and just policies.

This submission is structured according to the guiding questions provided by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination. However, RAID focuses upon those issues where we have sufficient knowledge, based upon our research, and hence not all guiding questions are addressed. A summary of the guidance or part-guidance is set out at the beginning of each main section, followed by the substantiating information that RAID can provide.

This submission includes the following sections:

1. **Context:** An introduction to the cases of two extractive companies, Acacia Mining's North Mara Gold Mine Limited (NMGML), in Tanzania, and Glencore's Kamoto Copper Company (KCC), in the Democratic Republic of Congo, which RAID draws upon to consider the use of Private Military and Security Companies (PMSCs).
2. **Analysis:** In examining the relationship between PMSCs and the extractive industry, it is apparent from RAID's analysis of these cases that PMSCs form part of a nexus with not only in-house security within the mining company, but also state forces. Paying the police to provide security, governed by agreements that are akin to contracts, blurs the distinction between public security and PMSCs and the same personnel and arrangements often transfer seamlessly between in-house and subcontracted security.
3. **Individual incidents:** When it comes to alleged human rights abuses, in a series of incidents since at least 2005 to 2018 onwards, local people have been shot or seriously injured at NMGML as the result of joint security operations by private security and the Tanzanian police. In the case of KCC, information is presented on the violent death of Eric Mutombo Kasuyi, a young father who died on 15 February 2014 after being apprehended by mine

police and a security patrol comprising KCC and G4S personnel. According to the results of a post-mortem he died after being severely beaten.

4. **International instruments and company-level measures:** the focus in this section is upon how the United Nations Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights have allowed companies to privatise the monitoring, reporting, investigation of, and redress for, human rights violations. The use of operational grievance mechanisms are not only controlled by the companies themselves, but, in RAID's experience, help ensure that neither private nor public security is held accountable for violations.
5. **Recommendations:** RAID sets out recommendations on: transparency; the clear demarcation of the functions and powers of security providers; the avoidance of complicity with state forces; careful consideration of what constitutes a security risk; the independent investigation of human rights violations by extractive companies and their security agents; and independent redress that goes beyond company-controlled grievance mechanisms.

1. Context

This section provides information that covers:

- a. *The number, nature, and location of operations of extractive companies that use private security services, whether these are international or national companies, and/or whether private security is embedded in the extractive company or is provided by an external company.*
- b. *The functions that PMSCs perform and the types of services they provide in extractive industries.
The main security challenges facing extractive companies that lead them to seek the services of PMSCs.*

a. Number, nature, location

RAID is not in a position to provide an international, regional or national overview of the use of PMSCs by extractive companies. Rather, we focus in this submission on two cases where we have relevant knowledge:

- *Acacia Mining's North Mara Gold Mine Limited (NMGML) in Tanzania. UK-registered and London-listed Acacia Mining plc owns the North Mara gold mine in Tanzania, via its wholly owned subsidiary, North Mara Gold Mine Ltd.¹*
- *Glencore's Kamoto Copper Company SARL (KCC), a copper/cobalt mine in the Democratic Republic of Congo. Glencore's Toronto-listed Katanga Mining Limited owns 75% of KCC with, Gécamines, a Congolese state owned entity, owning the remaining 25%.*

¹ NMGML is incorporated in Tanzania and is a 100% owned subsidiary of Acacia. See Acacia Mining, Annual Report 2017, Notes to the consolidated financial statements, 1. General information, p.116, available at: https://www.acciamining.com/~/_media/Files/A/Acacia/reports/2018/2017-acacia-annual-report-accounts.pdf.

Acacia Mining plc

Canadian mining giant Barrick Gold acquired North Mara in 2006, operated under African Barrick Gold ('ABG').² ABG was 'spun-off' from Barrick in March 2010, although the latter retained a majority interest.³ ABG changed its name to Acacia Mining plc in late 2014.⁴ Barrick retains a 63.9% holding in Acacia.⁵ In 2018, Randgold and Barrick Gold merged to create the largest gold mining company in the world with a market capitalisation of over \$23 billion.⁶

Glencore plc

Glencore plc is one of the world's largest natural resources companies, with a market capitalisation of £43 billion and reported revenue of \$220 billion in 2018.⁷ Glencore is headquartered in Baar, Switzerland, registered in Jersey, and is traded on the London Stock Exchange, with a secondary listing on the Johannesburg Stock Exchange.⁸ Glencore has majority holdings in Katanga Mining Limited (and the latter's Kamoto Copper Company SARM (KCC) subsidiary) and wholly owns Mutanda Mining SARM (MUMI).⁹

In this submission to the Working Group, RAID draws upon field research and our published reports on both cases. Furthermore, RAID has corresponded with Acacia and Glencore and makes reference to any response received.

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. A joint briefing was published in August 2014.¹⁰ Between late October and early November 2015, RAID and MiningWatch Canada undertook a second human rights fieldwork assessment around the 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 support the findings that both security arrangements and the company remedy programme for victims of human rights abuse remained flawed and inadequate. RAID and MiningWatch issued a press release on their findings and concerns, which elicited a response from Acacia.¹¹

² African Barrick Gold, Prospectus, 19 March 2010, p.43, available at:

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

³ Barrick Gold Corporation, Press Release, 'Barrick Announces Pricing of African Barrick Gold plc Initial Public Offering', 19 March 2010, available at: <<https://www.barrick.com/news/news-details/2010/Barrick-Announces-Closing-of-African-Barrick-Gold-plc-Initial-Public-Offering/default.aspx>>. See also ABG Prospectus, op. cit.

⁴ 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>.

⁵ See African Barrick Gold plc, 'Completion of Placing by Barrick Gold Corporation', 11 March 2014, available at:

<<http://www.aciamining.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>>.

⁶ <<https://www.barrick.com/English/news/news-details/2019/barrick-randgold-merger-consummated-as-trading-starts-in-new-companys-shares/default.aspx>>.

⁷ Market capitalisation figure is from the London Stock Exchange,<

<https://www.londonstockexchange.com/exchange/prices-and-markets/stocks/summary/company-summary/JE00B4T3BW64JFGBXSET1.html>>, visited 14/03/2019. The company market capitalization reflects the London listed element of Ordinary and Preference shares only and is approximate. Revenue figure from Glencore's 2018 Annual report, p.156, available at:

<<https://www.glencore.com/dam/jcr:b4e6815b-3a2c-43ca-a9ef-ef606bb3c1/glen-2018-annual-report-.pdf>>.

⁸ <<http://www.glencore.com/investors/shareholder-centre/shareholder-faqs/>>.

⁹ Glencore owns 86.3% of Katanga, which in turn owns 75% of Kamoto Copper Company SARM ('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 Glencore, Resources and Reserves as at 31 December 2018, p.6,

<https://www.glencore.com/dam/jcr:ae4466b4-7ef4-4407-ae00-6ca55b694028/GLEN_2018_Resources_Reserves_Report-.pdf>). In February 2017, Glencore increased its equity interest in Mutanda to 100% (see

<<https://www.glencore.com/index/media-and-insights/news/glencore-purchases-stakes-in-mutanda-and-katanga>>).

¹⁰ <<http://www.raid-uk.org/sites/default/files/pr-barrick-mara-violence.pdf>>.

¹¹ More information on the fieldwork can be found at: <<http://www.raid-uk.org/content/african-barrick-gold-and-north-mara>> and

<<https://miningwatch.ca/news/2015/11/17/broken-bones-and-broken-promises-barrick-gold-fails-address-ongoing-violence>>. Acacia's response is at:

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

In 2017, a number of the victims of human rights violations instructed UK-based lawyers Deighton Pierce Glynn, and filed legal cases saying Acacia has been unwilling to adequately compensate them. RAID and Mining Watch Canada have been in regular contact with these and other victims. RAID undertook a further field mission to North Mara in June 2018 to document the experience of victims who had gone through Acacia's revised grievance mechanism. On 21 June 2018, RAID also met with key members of the mine's complaints investigations team at Acacia's London office to discuss how complaints about human rights violations were investigated and the company's security arrangements. At the end of October 2018 and again in early December 2018, RAID supported victims and their families through the company's problematic grievance mechanism. These cases are yet to be concluded. During these same visits, RAID met with families who told us about additional human rights violations at the mine during 2018.

In June 2014, RAID and NGO partners Bread for All and Fastenopfer jointly published *PR or Progress? Glencore's Corporate Responsibility in the Democratic Republic of the Congo*, which included reference to human rights issues at the KCC mine.¹² The joint 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, including the death of Eric Mutombo after an encounter with a security patrol on the KCC concession, were discussed extensively with Glencore, which made a number of public responses.¹³ Human rights concerns at KCC were expressly handled by Glencore rather than by its subsidiary.¹⁴ RAID and the other NGOs issued an update to the original report in December 2014, taking into consideration Glencore's responses.¹⁵

Both NMGML and KCC have sub-contracted certain security functions to PMSCs; however, in both cases, security arrangements are complex and involve embedded mine security within the company, sub-contracted security and state police. It is therefore often difficult to make a clear-cut distinction between the functions and types of services provided by each. Furthermore, there is also a difference between how arrangements are set out in principle compared to actual practice when security operations are underway.

b. Challenges, functions and services

At Acacia's Tanzanian mines

According to Acacia, the challenges it faces include 'operational security and theft,' designated in its annual report as a principal risk to its business, its people (employees) and its relationships, including with local communities.¹⁶ Acacia ranks operational security and theft as its fifth highest risk. Acacia states:¹⁷

¹² *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>>.

¹³ Glencore response to Key Findings and Questions, 17 June 2014, available at: <https://www.business-humanrights.org/sites/default/files/media/documents/company_responses/glencore_response_to_bfa_raid_fastenopfer_jun_e_2014.pdf>

¹⁴ Letter from RAID, Bread for All and Fastenopfer to Glencore, 19 March 2014.

¹⁵ Glencore, e-mail to RAID, 2 December 2014: 'We looked into it [the update] and don't see the need to alter our position we issued back in June this year.' 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>>.

¹⁶ Acacia Mining, 2017 Annual Report, pp. 16 – 17, available at: <<https://www.acciamining.com/~media/Files/A/Acacia/reports/2018/2017-acacia-annual-report-accounts.pdf>>.

¹⁷ *Ibid.*, p.28.

We face risks to our businesses in relation to gold thefts and wider security-related matters relating to trespass, vandalism and serious security-related incidents on our operations, and illegal mining in areas covered by the Group's exploration and mining licences, all of which may have an adverse effect upon Group operations and financial condition.

While Acacia acknowledges that the potential adverse impact of security risk is high, it is noted in the company's 2017 annual report that 'controls over operational security and theft have improved and that the residual risk in that area has decreased.'¹⁸ Acacia reports:¹⁹

The number of times that the police and mine security were required to respond to security threats, violence and theft by intruders on our mine sites continued its year-on-year decline. The number of illegal incursions onto the mining lease (including waste dumps) at North Mara decreased by 20% in 2017, compared with 2016....Incursions into the active mining areas remained flat year on year.

While Acacia attributes this reduction in security incidents to its 'security management system,' the company makes only a broad distinction between the police and 'mine security guards,' but does not set out that it uses both in-house security and two security subcontractors. While Acacia does not distinguish the different security functions of different providers, RAID, through its research, understands that:

- Security operations are conducted jointly, so that in-house mine security (and, more recently, subcontractor G4S) will operate alongside the police.
- Mine security guards, including those that are now subcontracted, control checkpoints and also operate CCTV cameras that, over time, offer wide and increasing coverage of the mine site. CCTV is used to direct security patrols.
- The police are armed with guns and live ammunition and have shot, injured and killed intruders.
- Mine security guards, whose employment has recently transferred from in-house to a security subcontractor, are referred to locally as 'robots' because of their body armour and can be authorised to use non-lethal weapons and ammunition, including teargas.
- A private subcontractor was engaged to undertake some higher-level security management, including assessing security arrangements.
- The same subcontractor was also responsible for leading investigations into complaints made under NMGML's operational grievance mechanism, although this function has recently transferred back in-house.

Acacia Mining plc

It is important to place companies' statements regarding security risks in context. Acacia and its North Mara gold mine provides a helpful illustration of why this is so.

First, such statements tend to ignore the causes of the security risks. The North Mara gold mine is built in the middle of seven villages in a relatively impoverished, remote area of Tanzania. Those whom Acacia accuse of 'trespassing' are often simply seeking a way to supplement their meagre income so as to be able to clothe, feed and educate their

¹⁸ Ibid., p.24.

¹⁹ Ibid., p.59.

families. Companies that profit by acquiring rights to resources or areas to which community members once had access, particularly where there are few other opportunities available, need to be careful about framing those members who seek access to such areas as ‘security risks’. Doing so is likely only to perpetuate the risks and undermine efforts to achieve the social license to operate.

Second, such statements often ignore the fact that those guarding the mine may be complicit in contributing to ‘security risks.’ RAID understands that, in many cases, police and/or mine security have accepted bribes to permit local people to enter the mine site to search for scraps of gold.

Third, and relatedly, companies rarely if ever acknowledge the extent to which they exacerbate ‘security risks’ and damage relationships with local communities: the excessive violence meted out by mine security and police guarding the mine; the company’s failure to provide adequate redress to victims of such violence in a demeaning process where the company relies upon an imbalance of power (critiqued in section 4b).

As Acacia and its North Mara mine exemplifies, while companies may face security risks, their identification of such risks, and indeed their characterisation of them as ‘security risks,’ must be contextualised and scrutinised carefully.

At Glencore’s Congolese mines

Glencore acknowledges that its assets that are located in countries identified as having a high potential risk of security-related human rights impacts.²⁰ Katanga Mining, which majority owns the KCC concession, sets out security-related risks:²¹

Katanga faces the challenge of illegal intrusions into its concessions by artisanal miners, due to the current significant attractiveness of cobalt, driven by the need of supply for batteries and electric vehicles. These may interfere with work on Katanga's properties and present a potential security threat to its employees, contractors and communities. There is a risk that operations of the Corporation may be delayed or interfered with, due to the conditions of political instability, violence and the occupation of the properties by artisanal miners. Katanga uses its best efforts to maintain good relations with the local communities and authorities and to invest in alternative models for sustainable livelihoods in order to minimize such risks.

No assurance can be given that Katanga will be able to maintain effective security in connection with its assets or personnel in the DRC where civil war and conflict have disrupted exploration and mining activities in the past and may affect Katanga's operations or plans in the future.

Further information on KCC’s security arrangements is set out below.

2. The relationship between PMSCs and the extractive industry

RAID’s focus is upon security provision at the North Mara Gold Mine and the KCC concession. Based upon these two cases, this section provides information that covers:

- ☐ *Relations and cooperation between extractive companies, private security personnel and State security services.*
- a. The security nexus*
 - The use and role of sub-contractors, joint ventures and other commercial arrangements for the provision of security to the extractive industry.*
 - The role of the State in regulating the relationship between private security actors and the extractive industry*

²⁰ Glencore, Sustainability Report 2017, p.49, available at:

<https://www.glencore.com/dam/jcr:f3e8dd81-97b4-4b96-925c-ab3b6ea13c4a/Glencore%20Sustainability%20Report%20FINAL%202.pdf>.

²¹ Katanga Mining Limited, Annual Information Form for the Year ended 31 December 2017, published 31 March 2018, p.25, available at: http://www.katangamining.com/~/_media/Files/K/Katanga-mining-v2/investor_relations/annual-info-forms/aif-2017/aif-2017.pdf.

a. **The nexus between company in-house, subcontracted and state security**

KCC's security arrangements in DRC

Analysts highlight the nexus between state and private security in the DRC, including in the former province of Katanga, in which KCC operates:²²

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:²³

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.

Glencore/KCC has released few details on how its in-house security (Department Security KCC – DSK) is organised and run: the company insists its Security Manual 'contains sensitive information and cannot be made public'.²⁴ However, the company has confirmed that KCC security teams operate jointly, consisting of KCC employees (including OPJs), G4S contractors and Mine Police.²⁵

- National Congolese Police (PNC) – The PNC was established as a national force under the regime of President Mobutu in 1985.²⁶ DRC's 2005 Constitution included the PNC as one of

²² 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.

²³ 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.

²⁴ Glencore response to Key Findings and Questions, op. cit.

²⁵ On 15 February 2014, KCC Security Team became aware of a large group of artisanal miners operating illegally at the Lululu Dam....A team, consisting of KCC employees, G4S contractors and Mine Police was dispatched to apprehend these miners.'(GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014).

²⁶ 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.

the state security organs.²⁷ 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.²⁸ 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.²⁹ 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.³⁰

- Mine Police – The Mine Police are a department of the National Congolese Police that are deployed solely at mine sites.³¹ 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.³² 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.³³ 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).³⁴

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.³⁵

- Officiers de la police judiciaire (OPJs) – Many mining companies, including KCC, also have Judicial Police Officers (OPJs) on site. A legacy of the State security system, OPJs can be employed and paid by companies, though they are formally appointed by the public prosecutor.³⁶ OPJs therefore have attributes of state and 'embedded' security, attesting to the fact that real-world arrangements cannot necessarily be easily captured by standard categories. Without recourse to the police, OPJs have authority to carry out arrests and interrogate suspects before they are brought to the prosecutor's office.³⁷

²⁷ Ibid., p.62.

²⁸ 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).").

²⁹ Ordre Ops no 1560, 2003 and Directive no 1538, 2003.

³⁰ 'Private and public security in post-war Democratic Republic of Congo', op. cit., p.49.

³¹ Ibid., p.58, p.62.

³² Ibid.

³³ Ibid.

³⁴ See, for example, the description in *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.7.

³⁵ Glencore response to Key Findings and Questions, op. cit.

³⁶ During 2013 and 2014 field missions, RAID confirmed such arrangements with the Public Prosecutor's office.

³⁷ 'Private and public security in post-war Democratic Republic of Congo', op. cit., p.58, p.62. Organic Law 11/013 of 11 August 2011 reformed the organization and functioning of the Congolese National Police.

- Embedded security - KCC employs staff directly in its Department Security KCC (DSK). As noted above, KCC's security staff also comprise OPJs, two of whom are DSK Commanders.³⁸ The seniority of OPJs is further evidenced by the fact that they provide human rights refresher sessions for staff.³⁹
- G4S contracted security – Moreover, KCC has a contract with G4S 'to provide a portion of the security services at the mine'.⁴⁰

G4S plc

G4S plc is a parent company incorporated in England and Wales, with its primary listing on the London Stock Exchange.⁴¹ In 2017, its revenue was £7.8 billion. According to G4S, it is 'the world's leading global, integrated security company specialising in the delivery of security and related services across six continents.' It has subsidiaries and joint ventures in over 90 countries. In 2017, the G4S Group was structured into seven geographical regions, including Africa, where it is the 'largest provider of integrated security solutions,' with operations in 23 African countries. G4S plc owns G4S Secure Solutions (Tanzania) Ltd and G4S (DRC) Sarl. In Congo, the company runs seven operational offices with a workforce averaging 8000 guards, providing manned security for access control and patrol, surveillance and response services.⁴² G4S describes itself as 'one of the few preferred suppliers of Manned Guarding in Tanzania,' employing over 2,000 people on a full time basis, with five branch offices.⁴³ It refers to specialising in the protection of assets, with the mining industry among its clients.

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:⁴⁴

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.

Acacia's NMGML in Tanzania

NMGML relies upon in-house, contracted and state security. The company publishes almost no details about the responsibilities of these different providers and how they interact, including chains of command. However, RAID has either been given by the company, or has obtained, internal company documents that shed some light on these arrangements. Furthermore, RAID met

³⁸ 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.

³⁹ Glencore response to Key Findings and Questions, op. cit.

⁴⁰ G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi on KCC mine (DRC) - Feb 2014, 6 June 2014, paragraph 2.3.

⁴¹ Unless otherwise indicated, information on G4S plc is from the company's Integrated Report and Accounts 2017. available at: <https://www.g4s.com/-/media/g4s/global/files/annual-reports/integrated-report-extracts-2017/g4s_integrated_report_2017.ashx?la=en&hash=3B86994C2BF424F8CFBCC0E00A3F7480>.

⁴² <<https://www.g4s.com/en-cd/who-we-are>>.

⁴³ <<https://www.g4s.com/en-tz>>.

⁴⁴ 'Private and public security in post-war Democratic Republic of Congo', op. cit., p.51.

with members of the mine's complaints investigation team at Acacia's London office in June 2018, who provided additional details about security at NMGML. Security is provided by:

- The Tanzania Police Force (TPF) – NMGML has in place an agreement (Memorandum of Understanding, MoU) with 'the Tanzanian Police Force (and together with the RPC of Tarime-Rorya Special Police Zone), the "Police"', which the company recognises as 'an organ of the United Republic of Tanzania.' The MoU sets out how 'the company intends to support the police, on a voluntary basis, with reasonable monetary and in-kind support, solely in its responsibility of maintaining law and order in and around the Mine Site and developing community policing capacity around or servicing the Mine Site.' Such arrangements, by which state police are paid to provide security by a private company, blurs meaningful distinctions between PMSCs and public security forces based on whether or not the relationship is transactional.
- Embedded security – Acacia also employs security personnel directly at its subsidiary mines in Tanzania, which, until recently have ranged from senior managers to security guards (see also below, on a change to subcontracted security). As well as securing the mine site, in-house security also has a role in investigating any incidents that occur, including the discharge of weapons, detentions, serious injuries, and deaths. A Mine Investigations Group (MIG) is charged with securing and locking down any information relating to such incidents and acts solely in the interests of the company. NMGML also has a Human Rights Investigations Team (HRIT), who also investigate incidents that may involve human rights violations. However, it is clear that the MIG takes precedent over the HRIT when it comes to investigations and the control of information. Indeed, while Acacia situates its Investigations and Community Engagement Team within its Community Grievance Process (CGP, critiqued below), RAID's view is that they serve a security function by dealing with security-related incidents. Overall security policies and procedures fall within the remit of Acacia's board-level Environmental, Health, Safety & Security Committee. Acacia's security-management hierarchy includes, *inter alia*, the Head of Legal and Compliance (or General Counsel), Country Lead Counsel, Chief Security Advisor, Regional Security Manager, and Mine Site Security Manager. However, as Acacia does not disclose details of how security is managed, some responsibilities are likely to have transferred to subcontractors.
- Sub-contracted security – Acacia has been subcontracting certain security-related functions since at least November 2014 when Assaye Risk, a small UK private security comprising mostly ex-military advisors, was contracted to manage human rights investigations. A company memorandum refers more generally to the outsourcing of 'security management' to Assaye Risk at the end of 2015 and preparations 'to outsource the Security staff below management level to G4S.'⁴⁵ According to Acacia, the new arrangements were to take effect at North Mara from 1 September 2017. The interchangeability of personnel between in-house and subcontracted security is apparent and the same staff often move seamlessly between the two.

Acacia have confirmed to RAID that police are always accompanied by mine security and that joint operations are referred to in the MoU between the company and the police.⁴⁶ The only caveat was that in certain confrontational situations the 'better equipped' police may proceed on their own.

⁴⁵ Acacia (Buzwagi Gold Mine), Internal Memo, Proposed Outsourcing of Security Function, 15 May 2017.

⁴⁶ Meeting between RAID and leaders of the Investigations and Community Engagement Team at North Mara, held at Acacia's London office, 21 June 2018. Acacia's legal representative sat in on the meeting.

Acacia told RAID that, although there could be incidents that mine security did not know about, for example when an injured intruder was carried away by others or in remote areas, by and large, the operations room at the mine kept abreast of everything going on through CCTV and monitoring radio transmissions.⁴⁷ Mine security had its own frequency, but the police could (and did) use this frequency too (although they could also use their own frequencies). Acacia informed RAID that no sudden ‘step-change’ in CCTV coverage had occurred, but this had incrementally improved and now was much better and more comprehensive.⁴⁸ RAID understands that the operations room will use CCTV to direct security operations, which will include joint operations with the police.⁴⁹

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)’.⁵⁰ 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. 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.’⁵¹ Where coordination ends and direction begins is a moot point, but it is clear that Acacia controls access to the mine site by the police: ‘Unless requested by ABG [Acacia] through the ABG [Acacia] Regional Security Manager,...or the Mine Site Security Manger, it is agreed that all security services provided by the Police shall be outside the perimeter of the Mine Site’.⁵²

b. Contracts, agreements and transparency

A key concern when it comes to the outsourcing of security is a lack of transparency around not only the awarding of contracts, but also the content of the contracts and associated agreements and protocols. It is often difficult to even find public confirmation of the identity of any subcontractors.

Often, the need for commercial confidentiality is cited as the reason for non-disclosure, but this should not prevent confirmation or the release of other details set out in contract provisions, for example, on human rights training, adherence to human rights standards and other codes, the use of force, how complaints are dealt with, and disciplinary measures. Without disclosure, there is a suspicion that such provision is not included within the contract itself.

Non-disclosure is also common when it comes to embedded, ‘in-house’ security and public security. This inevitably leads not only to an overall a lack of accountability, but also to obfuscation of where responsibility lies should a human rights violation occur.

In respect of the case-study companies, what is disclosed or withheld is detailed below.

Acacia

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ North Mara MoU, 1.1.10.

⁵¹ North Mara MoU, 2.9.

⁵² North Mara MoU, 1.1.2.

Acacia does not publish, in full or in part:

- Contracts or agreements with security subcontractors, Assaye Risk and G4S. Acacia indicated to RAID that it would be willing to set up a meeting with the Assaye Risk manager responsible for human rights investigations in the latter part of 2016.⁵³ In January 2017, Acacia said that ‘Although Assaye Risk continues to provide security management services to Acacia, it is no longer in charge of investigating human rights claims for the Mine.’⁵⁴ Acacia has not provided RAID with any part of any security agreement.
- The Memorandum of Understanding between its NMGML subsidiary and the Tanzanian Police Force. On request, Acacia provided RAID with a version of this MoU dated August 2014, which we were told was to be replaced at the end of July 2016.⁵⁵ However, despite repeated requests, Acacia has not provided RAID with an updated MoU.
- Any details of how in-house, embedded security is organised and how it relates to, and interacts with, other security providers.
- Investigations Policy, which concerns how the company’s Mine Investigations Group operates. RAID has obtained a 2010 version of this policy; at the June 2018 meeting with RAID, the company confirmed that its Investigations Policy was being revised, but said that the existing policy was still in use. In January 2017, Acacia said it would ‘be willing to share the MIP with you [RAID and MiningWatch Canada] on a confidential basis’ and ‘would consider releasing as appropriate any parts of the MIP that are relevant to human rights investigations for consultation and comment....’⁵⁶ However, Acacia has not provided, in full or in part, any revised policy.
- RAID knows of no readily accessible document or posting in which Acacia publicly identifies who provides security at its mine sites.
- Acacia claims that the Voluntary Principles on Security and Human Rights (VPs) are ‘central to our security management system’. However, Acacia is not a direct participant in the VPs, clarifying: ‘Our majority shareholder, Barrick Gold Corporation, is a signatory participant.’⁵⁷ However, Barrick has sought to distance itself from the human rights situation at North Mara, stating that ‘Acacia Mining plc is an independent company, operating with its own management team and an independent Board of Directors’ and ‘operates its own human rights program...entirely independent of Barrick.’⁵⁸ In its recent annual report to the VP plenary, Barrick makes no reference to Acacia or the latter’s subsidiaries.⁵⁹ RAID has raised human rights violations at Acacia with Barrick, which, as the majority 64% shareholder in Acacia, should press the latter to account for its poor human rights record and offer fair redress to the victims. At the 2019 Mining Indaba, Mark Bristow, the chief executive officer of newly merged Barrick was asked about human rights violations at North Mara mine and what he would do to address it. He responded:⁶⁰ ‘The historic problem of Barrick in

⁵³ Email, copied to RAID, from Katrina White, Head of Legal Services and Compliance, Acacia Mining, 21 June 2016.

⁵⁴ Letter from Peter Geleta, Head of People, to RAID and MiningWatch Canada, 17 January 2017.

⁵⁵ Email, copied to RAID, from Katrina White, Head of Legal Services and Compliance, Acacia Mining, 29 June 2016.

⁵⁶ Letter from Peter Geleta, Head of People, to RAID and MiningWatch Canada, 17 January 2017.

⁵⁷ <<https://www.acciamining.com/sustainability/our-material-areas/security-and-human-rights.aspx>>, under the ‘Human rights’ link.

⁵⁸ Barrick Gold Corporation, ‘Response to RAID “Executive Summary”’, 23 March 2015, available at:

<<https://www.business-humanrights.org/sites/default/files/documents/Barrick%20Gold%20Corporation%20Response%20to%20RAID%20Executive%20Summary.pdf>>.

⁵⁹ RAID has checked the most recent available report for 2016. Barrick’s 2017 report is marked ‘coming soon’ on the VPs website.

⁶⁰ <<https://twitter.com/MiningIndaba/status/1092713817149194240>>.

Tanzania was that no one embraced the communities [around the mine].... It will definitely change.’

KCC

For KCC, Glencore does not publish, in full or in part:

- Contracts or agreements with security subcontractor G4S.
- The Memorandum of Understanding between KCC and the Congolese Police Force, which RAID understands was drawn up in 2015.
- Any details of how in-house, embedded security is organised and how it relates to, and interacts with, other security providers. Glencore’s responses to RAID’s raising of the Mutombo case is the only information that RAID is aware of that – albeit, in a limited way – addresses such matters.
- RAID knows of no readily accessible document or posting in which Glencore publicly identifies who provides security at its mine sites.
- No annual reports by Glencore are posted on the Voluntary Principles website, so it is assumed that the company has decided not to publish these.⁶¹

3. Alleged human rights abuses by private security actors in the extractive industry

RAID’s focus is upon security provision at the North Mara Gold Mine and the KCC concession. Based upon these two cases, this section provides information that covers:

- a. Details of alleged cases of human rights abuses perpetrated by private security actors in the extractive industry, and
- b. if available, the handling of allegations, including in relation to investigations, prosecutions and remedies for victims.

a. Human rights abuses

Acacia Mining’s North Mara Gold Mine

There have been reports of ‘a long series of killings by police and security forces at North Mara, dating back to 2005 or earlier’.⁶² 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.⁶³ Over the same period, at least 11 others have been shot by police and injured.⁶⁴ ABG (now Acacia) 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’.⁶⁵ The company also notes ‘additional incidents since 2008 involving trespassers...leading to conflict with security personnel

⁶¹ Checked by RAID on 14 March 2019. Reports by participants to the VP plenary are voluntary.

⁶² 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>>.

⁶³ 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>>.

⁶⁴ 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.

⁶⁵ ABG Prospectus, op. cit., p.15.

and/or police, which have in some cases resulted in injuries and/or fatalities.’⁶⁶ Both Barrick and ABG have attributed the shootings to the actions of the police in dealing with incursions.⁶⁷

In March 2013, proceedings were brought by Tanzanian claimants represented by UK-based law firm Leigh Day against ABG (now Acacia) and its NMGML subsidiary in the High Court of England and Wales.⁶⁸ 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.’⁶⁹ The claimants included the relatives of six men who were killed at the mine-site and one man who was left paraplegic.⁷⁰ The deaths and injuries were all suffered between 2 July 2010 and 7 May 2012, and 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:⁷¹ ‘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’.⁷² 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.⁷³

In June/July 2014, RAID and MiningWatch Canada interviewed more than 30 victims of alleged abuses and their family members at North Mara.⁷⁴ 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.⁷⁵ Acacia issued a statement in February 2015:⁷⁶ ‘We also strongly dispute the allegations in relation to the number of fatalities in the period referenced by MWC [Mining Watch Canada] and RAID.’

⁶⁶ Ibid.

⁶⁷ 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: <<https://www.acaciaming.com/~media/Files/A/Acacia/press-release/2011/North-Mara-update-Sept-30.pdf>>.

⁶⁸ 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.

⁶⁹ 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).

⁷⁰ 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).

⁷¹ ABG, ‘Statement Regarding Legal Claim’, 30 July 2013, available at: <<http://www.acaciaming.com/media/press-releases/2013/a2013-07-30.aspx>> (visited prior to out-of-court settlement of the claim; web page now taken down).

⁷² 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>>.

⁷³ 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>>

⁷⁴ 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>>.

⁷⁵ Ibid.

⁷⁶ 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> .

Overall, RAID and MiningWatch Canada documented at least 22 people killed and 69 injured, many by bullets, at or near the mine between 2014 and 2016.⁷⁷ In March 2017, after much pressure from RAID and other NGOs, Acacia acknowledged in its annual report published in March 2017 that 32 ‘trespasser-related’ deaths had occurred at its mine between 2014 and 2016, with an additional 2 such deaths in 2017.⁷⁸ The death toll may be even higher. A 2016 parliamentary inquiry into complaints at North Mara mine received reports of 65 killings and 270 people injured by police jointly responsible for mine security.⁷⁹ RAID interviewed families at North Mara who told us about six new cases of violations that happened in 2018.

In its reporting, Acacia seeks to differentiate between security-related deaths of ‘intruders’ and deaths from other causes. Hence, in 2014, 2016 and 2017, Acacia’s annual reports record, respectively, 3, 2 and 1 deaths relating to the use of force against intruders and/or police involvement (no such deaths are recorded for 2015). The number of ‘intruder fatalities’ attributed to other causes (14, 9, 4 and 1 in each respective year from 2014 – 2017) are attributed to ‘fall from height’, ‘infighting’, ‘drowning’, ‘rockfall’, ‘vehicle accident’, and ‘other’. In our June 2018 meeting with the company’s investigations team, RAID raised the anomaly in Acacia’s 2017 annual report of a chart showing 17 complaints about security/human rights, but the text only referring to 13 such complaints.⁸⁰ The explanation given by the team was that four health and safety cases were included in the chart under security/human rights because there was no separate category for health/safety cases.

The annual reports provide information on injuries to mine employees as part of health and safety reporting. However, no information is provided on injuries to ‘intruders’, which is anomalous given the high incidence of injuries referred to by the parliamentary inquiry and the number of serious and life-changing injuries reported to RAID.

Furthermore, although Acacia attributes ‘intruder fatalities’ to ‘police involvement,’ it is notable that of the 13 security/human rights complaints referred to in its 2017 annual report, Acacia states that ‘eight grievances related to the treatment of intruders on the mine site by the Tarime police responding to security emergencies and five related to mine security personnel.’⁸¹ In 2016, Acacia reported 30 grievances relating to use of excessive force by the police, but 7 more alleging use of excessive force by private security.⁸² In 2015, corresponding figures for use of excessive force by police and private security respectively were 58 and 16.⁸³ The number of complaints about excessive force is not reflected in the very low number of police officers or mine security personnel who face action over such violations (please see, *intra*, under ‘Prosecutions and legal remedy,’ below).

In July 2018, as agreed follow-up to RAID’s June 2018 meeting with North Mara’s investigations team, RAID wrote to Acacia’s Head of Legal and Compliance seeking clarification of the statistics on ‘intruders’. Answers were sought, *inter alia*, on the cause of each security-related death; on how many intruder deaths reported as non security-related occurred while security operations were

⁷⁷ <http://www.raid-uk.org/sites/default/files/adding_insult_to_injury_north_mara.pdf>.

⁷⁸ Respectively, Acacia’s annual reports for 2016 and 2017, available at: <<https://www.acaciaminging.com/investors/reports/>>.

⁷⁹ A summary of the inquiry report was presented locally, but the full report has not been published. See:

<https://www.theglobeandmail.com/report-on-business/international-business/african-and-mideast-business/police-killed-65-injured-270-at-tanzania-n-mine-inquiry-hears/article32013998/>; and

<http://www.raid-uk.org/sites/default/files/pr_100s_of_claims_of_violence_at_acacias_north_mara_mine.pdf>.

⁸⁰ Acacia’s Annual Report 2017, pp. 60 – 61.

⁸¹ *Ibid.*, p.61.

⁸² Acacia’s Annual Report 2016, p.58.

⁸³ *Ibid.*

underway; and the number of intruders injured on the mine site for each reported year and how the injury was caused.⁸⁴ Acacia said it would review the material and revert to RAID, but it has not done so.⁸⁵ The company's statistics on intruder deaths and injuries remain unelaborated.

The death of Eric Mutombo at the KCC mine site, Katanga, DRC

On 15 February 2014, Eric Mutombo Kasuyi died on his way home when taking a short-cut across the KCC concession.⁸⁶ 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. Mr 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.⁸⁷ He managed to escape. However, Mr Mutombo, a 23-year old father of two young children, was apprehended.⁸⁸ Available information, including post mortem examinations and court testimony, indicates that Mr Mutombo died on the KCC site after being severely beaten.⁸⁹ 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'.⁹⁰

KCC's parent company, Glencore, maintains that Mr 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 rights.'⁹¹ The mine policemen have been tried and acquitted by a court in the DRC, yet the circumstances of Mr Mutombo's death remain unclear. Please see the case material below, under 'The privatisation of remedy and its adverse impact upon justice,' on KCC's interventions in respect of the post mortem on Mr Mutombo and in parallel proceedings.

b. Investigations, prosecutions and remedies for victims

The Working Group's guidance refers, where available, to the submission of information on the handling of allegations, including in relation to investigations, prosecutions and remedies for victims. RAID's work in this area, presented in *Principles without justice: The corporate takeover of human rights* (2016), has sought to understand the relationship between private companies and the State when investigating alleged abuses and providing remedy, viewed in the context of the United Nations Guiding Principles on Business and Human Rights ('GPs').⁹² Endorsed by the UN Human Rights Council in June 2011, the GPs provide guidance to ground and implement the protect-respect-remedy framework:

⁸⁴ <http://www.raid-uk.org/sites/default/files/follow-up_questions_from_raid_to_acacia_mining_july_2018.pdf>.

⁸⁵ Charlie Ritchie, Head of Legal and Compliance, Acacia Mining, e-mail to RAID, 6 July 2018.

⁸⁶ 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.

⁸⁷ Ibid., p.53.

⁸⁸ Ibid.

⁸⁹ *Intra*, fn 155.

⁹⁰ *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 tombé sous le verrou des éléments de la sécurité».

⁹¹ Respectively, GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014 and; Glencore response to Key Findings and Questions, op. cit.

⁹² <http://www.raid-uk.org/sites/default/files/principles_without_justice.pdf>.

- 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.

The focus in this section of the submission is upon the element of remedy in the framework. The GPs lack both a mechanism to enforce compliance and any independent body to even monitor compliance. Consideration is also given to the Voluntary Principles on Security and Human Rights ('VPs'), which grew out of recognition that 'the extractive sector often operates in countries or areas of elevated security risk.'⁹³ The VPs, formulated in 2000 by a group of businesses, certain NGOs, and governments, focus upon impacts arising from security arrangements at the operations of extractive and energy companies. While 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.⁹⁴ The VPs, as their name suggests, are also non-binding. Further consideration of the concrete application within companies of both the GPs and VPs is given in section 4a. Within the current section, the scope for remedy, as set out in both the GPs and the VPs is once more grounded in the NMGML and KCC case studies, although Acacia's operational grievance mechanism at North Mara is critiqued in more detail in section 4b.

The privatisation of remedy and its adverse impact upon justice

While many different approaches to remedy – 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.

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.

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

⁹³<

https://web.archive.org/web/20170712142904/https://www.voluntaryprinciples.org/wp-content/uploads/2015/05/Corporate-Pillar-Verification_Framework-May-2015.pdf >. (The webpage was originally visited in March 2016, but the link has since been removed. The link given now is to an archived version).

⁹⁴ 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: <<https://web.archive.org/web/20170712143542/http://www.voluntaryprinciples.org/wp-content/uploads/2014/04/Guaqueta-VPs-talk-March-2014-FINAL.pdf>>. The contemporaneous vision for the VPs stated: 'The U.N. Guiding Principles on 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.' (*Voluntary Principles Strategy 2014-2016*, p.1, available at:

<https://web.archive.org/web/20160407071103/http://www.voluntaryprinciples.org/wp-content/uploads/2014/05/Voluntary_Principles_Strategy_-_2014-2016.pdf>).

redress. In order to determine that a human rights violation was caused by a business relationship – for example, with a PSMC or 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.

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.

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:⁹⁵

‘[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:⁹⁶

‘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

‘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 – as exemplified at both NMGML and KCC – 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 adjudicate, often behind closed doors, on its own or contracted security. More often than not, states fail to pursue

⁹⁵ Voluntary Principles, *Interactions Between Companies and Public Security, respectively Deployment and Conduct and Responses to Human Rights Abuses*.

⁹⁶ *Ibid.*, *Interactions Between Companies and Private Security*, paragraphs 5 and 8.

any action against police implicated in abuse, as has been the case at North Mara. Indeed, the situation at NMGML is even more anomalous in that the company will consider complaints and remedy when the police are responsible for human rights violations at the mine, but the company refuses to openly acknowledge this in guidance to complainants (see section 4b, below). On rare occasions, trials of police or army personnel, as in the Mutombo case, are conducted, but when these are lacking in due process, the verdicts 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’⁹⁷ – cannot simply be left as undefined; nor do the GPs in any way 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.

Extractive companies often have influence with state actors that individual citizens and communities affected by those companies’ operations do not. However, as evidenced by the cases of NMGML and KCC, where a company uses state actors – generally the police – as security providers in a systemic manner, it institutionalises that influence. The company becomes a source of funding and other benefits for the police, which they risk losing if they act counter to the company’s interests. The police, moreover, can conduct security operations not only with force that company personnel would not be authorised to use, but with greater confidence in their impunity as members of the same institution(s) ostensibly providing oversight.

Thus, the police, which should provide protection to victims of human rights violations by those acting on behalf of the companies, instead become the perpetrators of or otherwise complicit in those violations; in this way, they become a particularly powerful and unaccountable form of ‘private’ security provider. Moreover, along with subverting state institutions, the result in many instances is that the company represents victims’ best and perhaps only chance for redress, exacerbating the power imbalance between it and local community members. Put another way, the ‘privatisation’ of state police as security providers does more than undermine accountability; it undermines local people’s faith in institutions supposedly constituted and mandated to protect them, while enhancing the power of the company relative to those affected by its operations.

⁹⁷ Glencore response to Key Findings and Questions, op. cit.

Acacia's Investigations Policy and the control of information in cases of serious abuse

Acacia uses both its Mine Investigations Policy and the North Mara MoU to exercise control over information.⁹⁸ As noted previously, neither the MoU or Investigations Policy is published by the company, although RAID has obtained copies of both. RAID was told in a June 2018 meeting at Acacia's London office that the Investigations Policy was being revised, but had not been replaced.

Mine Investigations Policy (MIP)

In those instances when 'illegal miners' or detainees have been injured or killed, Acacia seeks to retain strict control of information to protect its interests:⁹⁹

- MIG [Mine Investigations Group] are conducting the investigation on behalf of the company and OGC [Office of the General Counsel] 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:¹⁰⁰ 'MUST be conducted in accordance with the directions of the Office of the General Counsel (OGC)' [paragraph 5.1.2]; all 'Category A' investigations (those concerning, for example, injuries or 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].

Acacia reminds its MIG staff that:¹⁰¹ 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 [Acacia] 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 Investigations Policy 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'.¹⁰²

In its 7 March 2016 response to RAID, Acacia states:¹⁰³ 'Your references to this procedure [the Investigations Policy] 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 (Investigations Policy paragraphs 5.6.1 and 5.6.2 differ from the special requirements relating to injuries/deaths to illegal miners and detainees (Investigations Policy paragraphs 5.7 and 5.7.1).

North Mara MoU

Remarkably, Acacia'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:¹⁰⁴

In case of any criminal incident, or any impending criminal incident at or around the Mine Site of which the Police became [sic] 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.

⁹⁸ 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>.

⁹⁹ MIP, op. cit., 5.7 Injuries/deaths to illegal miners or detainees, 5.7.1 Specific requirements.

¹⁰⁰ MIP, op. cit.

¹⁰¹ Ibid., 21 Police and Courts, 21.1 General.

¹⁰² Ibid., 10.4 Suspect interviews and 10.5 Records of Interview, 10.5.1 Introduction.

¹⁰³ Acacia Mining plc, letter to RAID, 7 March 2016, available at:

<https://www.acciamining.com/~media/Files/A/Acacia/documents/sustainability/Acacia%20Response%20to%20MWC%20and%20RAID%20-%20M arch%202016.pdf>.

¹⁰⁴ ABG, North Mara MoU, op. cit., 2.11.

Please see Acacia's 7 March 2016 response to RAID for the company's comments on the North Mara MoU and the Investigations Policy.¹⁰⁵

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 (now Acacia) 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.

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 the public Mwangeji Hospital in Kolwezi, concluded that Mr Mutombo had died from multiple trauma – in all probability the result of a beating.¹⁰⁶ KCC contested the result, claiming that it did not correspond to the KCC's doctors 'preliminary observations'.¹⁰⁷ The death certificate – not produced by KCC until 8 weeks after Mr 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.¹⁰⁸ According to Glencore, neither did the duty prosecutor observe any signs of physical abuse or injury.¹⁰⁹

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 Mr Mutombo had died of internal injuries – he had a collapsed lung and serious tissue damage to one side of his chest.¹¹⁰ The doctors later confirmed to the family that the injuries were consistent with Mr Mutombo having been beaten.¹¹¹ Late in the afternoon of 28 February, KCC claimed that the second examination had been carried out on the wrong body.¹¹² At

¹⁰⁵ Acacia Mining plc, letter to RAID, 7 March 2016, op. cit.

¹⁰⁶ 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, Note de Plaidoirie des parties civiles, RP 521/KGM 2014, Fait, à Kolwezi, le 25/08/2014, 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.»

¹⁰⁷ 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.

¹⁰⁸ 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.

¹⁰⁹ 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.»

¹¹⁰ 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».

¹¹¹ Letter from CAJJ to the Mayor, 3 March 2014, op. cit.

¹¹² Centre d'aide juridico-judiciaire, Mémoire à Madame Le Maire de Kolwezi concernant le décès de Monsieur Mutombo Kasuyi, Kolwezi 3 mars 2014.

KCC's insistence the cadaver had once again to be formally identified. The Prosecutor and the family confirmed that it was Mr Mutombo's body.¹¹³

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.'¹¹⁴ 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 [from the state-owned mining company, 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 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.'¹¹⁵

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

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

There have been no less than four parallel inquiries into the circumstances surrounding Mr 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 Mr Mutombo's family against KCC and the security team.¹¹⁶ The next day, the Military Prosecutor took a statement from Mr Mutombo's companion who had also been apprehended by the security patrol.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ On 24 February, KCC elected to participate in the latter investigation, informing the Military Prosecutor that queries should be directed to the Public Prosecutor.¹²⁰

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.¹²¹ Under Congolese law, military courts and tribunals have competence over cases concerning the police.¹²² Their competence also extends to civilians accused of being 'the perpetrator, co-perpetrator or accomplice'.¹²³ It therefore seems unusual, in the Mutombo case, for the Public Prosecutor to take

¹¹³ Ibid.

¹¹⁴ 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 – '[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>>.

¹¹⁵ 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. »

¹¹⁶ RAID and Bread for All, Interview with the family, Kolwezi, 11 March 2014.

¹¹⁷ Statement by John Kawel Kabulo to the Military Prosecutor, 18 February 2014. (Déclaration par John Kawel Kabulo à l'auditeur, 18 février 2014).

¹¹⁸ 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).

¹¹⁹ GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

¹²⁰ Letter from Jean Robert Durand, Manager of 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.

¹²¹ Mémoire à Madame Le Maire de Kolwezi, 3 mars 2014, op. cit.

¹²² 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.»

¹²³ Art. 79, Code Judiciaire Militaire (CJM-2002):

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'.¹²⁴

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.¹²⁵ 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;¹²⁶ it is also anomalous that the Public Prosecutor – having determined that KCC employees had no involvement in Mr Mutombo's arrest – went on to clear KCC Judicial Police Officers even though the case had already been transferred back to the Military Prosecutor.¹²⁷

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 Mr Mutombo had died on KCC's site and had briefly examined the body with a KCC doctor outside the mine hospital.¹²⁸ KCC state that a dossier was opened by public prosecutor on the same day, 15 February, after he had authorised removal of Mr Mutombo's body from the KCC hospital.¹²⁹

It should also be recalled that KCC Security Department's Judicial Police Officers, employed by the company, report to the Public Prosecutor. A KCC JP had made such a report on the Mutombo incident on 16 February.¹³⁰

The Public Prosecutor took statements from KCC staff (including KCC JPs), the Mine Policemen and Mr 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:¹³¹ '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:¹³² '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).¹³³

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.¹³⁴ By the time of this cross-examination, it transpires that the two Mine Policemen had already been charged the previous day.

Internal investigation

«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.»

¹²⁴ GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

¹²⁵ 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.

¹²⁶ 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.'

¹²⁷ 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.

¹²⁸ GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

¹²⁹ Letter from Jean Robert Durand to the Premier Substitut de l'Auditeur Militaire. op. cit.

¹³⁰ Procès-Verbal judiciaire n° 002/011/RG047/PIC/KOV/DESK-KCC/2014, op. cit.

¹³¹ Glencore response to Key Findings and Questions, op. cit.

¹³² Ibid.

¹³³ G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi, op. cit., paragraphs 4.2.3.1 and 4.2.6.1.

¹³⁴ GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

On 3 March, the KCC management team requested an internal investigation.¹³⁵ 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:¹³⁶ 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.¹³⁷ 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 Mr 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.’¹³⁸

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.¹³⁹ 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.¹⁴⁰

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.’¹⁴¹

There are further anomalies requiring explanation, *inter alia*:

- The fact that only the company interviewed G4S staff and that the Public Prosecutor did not take statements from the latter.¹⁴²
- 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’.¹⁴³
- 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;¹⁴⁴ 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:¹⁴⁵ ‘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.’¹⁴⁶ While G4S deny that their staff were present, Mr Mutombo’s companion, who was also briefly apprehended, stated that he had been beaten by mine police in front of G4S contractors.¹⁴⁷ Moreover, one of the 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.’¹⁴⁸
- An explanation as to how Glencore’s Human Rights Commission arrived at the conclusion that solely the mine police were involved in Mr Mutombo’s arrest.

¹³⁵ Ibid.

¹³⁶ Glencore response to Key Findings and Questions, op. cit.

¹³⁷ GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

¹³⁸ Ibid.

¹³⁹ Glencore response to Key Findings and Questions, op. cit.

¹⁴⁰ PR or Progress?, op. cit., Unanswered questions for Glencore/KCC, p.58.

¹⁴¹ Glencore response to Key Findings and Questions, op. cit.

¹⁴² G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi, op. cit., paragraph 4.2.3.1 and paragraph 4.2.6.

¹⁴³ 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.

¹⁴⁴ GlencoreXstrata, letter to RAID and Bread for All, 25 March 2014, op. cit.

¹⁴⁵ Glencore response to Key Findings and Questions, op. cit.

¹⁴⁶ G4S, Internal Memorandum - Death of Eric Mutombo Kasuyi, op. cit., paragraph 4.2.1.1 and paragraph 4.2.6.3.

¹⁴⁷ Statement by John Kawel Kabulo to the Military Prosecutor, 18 February 2014, op. cit.

¹⁴⁸ 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».

- According to Glencore, only KCC senior Security staff (OPJs) are permitted to make formal arrests on KCC's site;¹⁴⁹ 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.¹⁵⁰ 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, an explanation as to why the KCC security team apparently allowed unsupervised mine police to go and apprehend suspected creuseurs.

Trial ends in acquittal

No one has been convicted in relation to Mr Mutombo's death at KCC's mine site. The two mine policemen accused of unintentional killing were acquitted by the military court in Kolwezi.¹⁵¹

According to the judgment,¹⁵²

'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 Mr Mutombo had fallen.

Earlier in the judgement, the tribunal had referred to the statement made by one of the defendants (Makombo):¹⁵³

'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

¹⁴⁹ Interview with the Procureur de la République, M. Makaba, Kolwezi, 23 March 2013; and Interview with KCC's Head of Security, Kolwezi, October 2013.

¹⁵⁰ , 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...'

¹⁵¹ *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).

¹⁵² *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.»

¹⁵³ *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.»

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:¹⁵⁴

‘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 Mr 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).¹⁵⁵ One court document states:¹⁵⁶

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:¹⁵⁷

‘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 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 Mr Mutombo had been in prison – implying, presumably, support for the defence’s (untested and unproven) allegation that Mr Mutombo had been stealing minerals. A previous claim that Mr Mutombo had been at a different prison (Dilala prison in Kolwezi) had already been disproven by the prosecution.¹⁵⁸ However, having changed the location of Mr 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.

¹⁵⁴ *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 où il fut sans droit de se mettre convenablement sur le siège, il succomba avant d’arriver à destination, c’est-à-dire la permanence.»

¹⁵⁵ 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 Mwangaji 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 Mwangaji], 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».

¹⁵⁶ 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. »

¹⁵⁷ *Jugement*, Case RP 521/14, op. cit., p.19: «Cette affirmation se confirme lors qu’on se rapporte aux déclarations des prévenus à 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. »

¹⁵⁸ 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.”).

4. International, national and company-level regulations, mechanisms and procedures

RAID's focus is upon security provision at the North Mara Gold Mine and the KCC concession. Based upon these two cases, this section provides information that covers:

- a. *The concrete application within companies of international, regional and national initiatives that promote compliance by private security actors involved in the extractive industry with international human rights standards and principles (e.g. UN Guiding Principles on Business and Human Rights, Voluntary Principles on Human Rights and Security).*
- b. *Operational-level grievance mechanisms and legal remedy*
 - ┌ *The availability and effectiveness of reporting mechanisms, institutions, company-level grievance mechanisms, and/or community level mechanisms and responses to enable victims, community members and/or civil society organisations to file complaints in case of alleged human rights abuses. National or international mechanisms to prosecute and/or facilitate and support claims by victims regarding alleged abuses committed by private security actors; and accessibility of associated remedial mechanisms.*

a. International instruments promoting compliance

Both Acacia and Glencore have explicitly endorsed the UN Guiding Principles on Business and Human Rights and adhere to the Voluntary Principles on Security and Human Rights, although only Glencore is a participant in the initiative. Acacia Mining claims adherence to the VPs by virtue of Barrick (its majority shareholder) being a signatory and member of the Voluntary Principles Plenary.

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 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 NMGML 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. 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.

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. Firstly, 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. Secondly this nexus allows extractive companies to 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).

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. This complexity then obfuscates responsibility for human rights abuses in strategies which inevitably involve the company demonstrating that its own internal or contracted 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.’¹⁵⁹ 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.’¹⁶⁰ 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:¹⁶¹ ‘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 relationship between an extractive company and state security have many elements that parallel the company’s relationship with PMSCs.

¹⁵⁹ Voluntary Principles, Interactions Between Companies and Public Security, opening paragraph.

¹⁶⁰ Ibid., Interactions Between Companies and Public Security, second paragraph.

¹⁶¹ Statement by Voluntary Principles Participants on Memoranda of Understanding Between Companies and State Security Forces, October 2014, available at:

<https://web.archive.org/web/20170712142805/http://www.voluntaryprinciples.org/wp-content/uploads/2014/10/VPs_-_Statement_on_MOUs.pdf>

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 protecting Company facilities and personnel borne by public security.’¹⁶² 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 Acacia has published MoUs drawn up between the police and their respective KCC and NMGML subsidiaries; however, as noted, Acacia provided RAID with its 2014 MoU (RAID had already obtained a 2010 version), although it has not responded to RAID’s request for any revised version (as, noted the MoU was due to be replaced in July 2016).

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.¹⁶³

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 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:¹⁶⁴

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, presumably because of the financial and material support it provides, is in a position to stipulate how the Mine Police should operate?

Similarly, Acacia states that the Tanzanian police ‘are directed by and responsible only to the State’ and ‘NMGML does not and cannot control the State’s police force or the State’s response to alleged human rights violations.’¹⁶⁵ Yet the company also contends that the MoU **commits** [emphasis

¹⁶² Ibid.

¹⁶³ Statement by Voluntary Principles Participants on Memoranda of Understanding Between Companies and State Security Forces, op. cit.

¹⁶⁴ Glencore response to Key Findings and Questions, op. cit.

¹⁶⁵ Respectively, Letter from Peter Geleta, Head of People, to RAID and MiningWatch Canada, 17 January 2017; and North Mara Gold Mine Limited, ‘Response to an April 2018 NGO “ Assessment and Recommendations” regarding the Community Grievance Process at the North Mara Gold Mine,

added] the police’ to conducting themselves in accordance with international security and human rights standards, adding ‘Acacia seeks to **enforce** [emphasis added] these undertakings by the police through various protocols that are set out in the MoU and agreed with the Inspector General of Police (“IGP”).’¹⁶⁶

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.¹⁶⁷ 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.’¹⁶⁸ 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:¹⁶⁹

...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’¹⁷⁰ – 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.

Extractive 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 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, but with a greater distance placed between the company and security agents than it would have been had security been solely provided by a PMSC under contract.

In its Human Rights Policy, Acacia sets out how it will seek to adhere to the requirements of the Voluntary Principles on Security and Human Rights in its dealings with, *inter alia*, private and public security providers.¹⁷¹ But its dealings with such providers are caveated and qualified. Acacia will perform ‘reasonable due diligence’ and require that ‘human rights terms and conditions be

Tanzania,’ 18 April 2018, available at:

<<https://www.acaciamining.com/~media/Files/A/Acacia/documents/grievance/NMGMI-response-RAID-LHRC-assessment-20180418.pdf>>.

¹⁶⁶ Letter from Peter Geleta, 17 January 2017, op. cit.

¹⁶⁷ Statement by Voluntary Principles Participants on Memoranda of Understanding Between Companies and State Security Forces, op. cit.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ <<https://www.acaciamining.com/~media/Files/A/Acacia/documents/corporate-policies/acacia-human-rights-policy.pdf>>.

included in contracts’ and ‘periodic human rights reporting and certifications’. However, any such terms and conditions are not further defined and no details are provided in the frequency of independence of reporting. Only ‘**certain** third party service providers **may** be required to receive human rights training’ [emphasis added]. Even when a contractor is implicated in, or fails to report, human rights violations or serious criminal acts, they ‘will be expected to take appropriate remedial actions and/or **may** have their contracts re-evaluated or terminated, **depending on the circumstances**’ [emphasis added]. Such discretionary provision falls short of unequivocal action.

b. Operational-level grievance mechanisms and legal remedy

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:¹⁷² ‘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.’

The GPs could have included provisions to further the removal of such barriers, as recommended by NGOs.¹⁷³ Instead, the GPs concentrate on the alternative of non-judicial grievance mechanisms, whether these are administered by the state or by industry or multi-stakeholder bodies.¹⁷⁴ The GPs are distinctive in setting out a role for companies in providing remediation through operational-level grievance mechanisms.

Operational-level grievance mechanisms have been the most widely seized upon by companies, with good reason, because this enables them to control all aspects of redress, from accessibility, admissibility, through investigations and the control of information, to adjudication and deciding whether to offer redress (including the level of any compensation on offer).

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 study by Amnesty International is an object lesson in the prevalence of such obstacles¹⁷⁵ – 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. An imbalance in corporate power in the judicial realm becomes total corporate control over the element of redress.

Acacia’s operational grievance mechanism at North Mara

RAID has written extensively on Acacia’s original and revised operational grievance mechanism at NMGML. Although the new process has been in operation since at least December 2017, Acacia still characterises it as ‘piloting’. RAID’s existing analysis is referenced in endnotes and the purpose in this submission is to be succinct and highlight key problems with the grievance process, both in

¹⁷² Respectively GP 1, GP 26 and Commentary (<http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>).

¹⁷³ *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>>.

¹⁷⁴ 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).

¹⁷⁵ Amnesty International, *Injustice Incorporated – Corporate Abuses and the Human Right to Remedy*, 2014.

formulation and practice. RAID intends to submit information in response to the request by the UN Office of the High Commissioner for Human Rights to feed into its Accountability and Remedy Project currently focusing on enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse.¹⁷⁶

Acacia has sought to redress the human rights violations at North Mara through an operational-level grievance mechanism. Since 2014, RAID and other civil society groups have raised concerns about a mechanism lacking independence, permitting total company control over investigations, pressurising claimants to sign settlements they did not understand, using legal waivers to stop claimants turning to the courts, and offering inadequate compensation for the small minority of victims who made it through the process.¹⁷⁷

Following public pressure, Acacia acknowledged there were problems and began revising the grievance mechanism. Beginning around August 2017, it presented a new draft mechanism to a number of local communities, attended by local leaders and chiefs, near its North Mara mine. Those who attended the presentations were requested to provide comments, though the process by which feedback was collected and considered was not clear. Acacia has not published any feedback it received from these meetings.

In December 2017, Acacia posted a new draft mechanism on its website. This version is called the Community Grievance Process. Acacia has produced a handbook for complainants, accompanied by a technical document detailing the standard operating procedures, alongside other reference documents concerned with security and human rights standards, and establishing remedy.¹⁷⁸ The Handbook is notable for the removal of much of the human rights language from the earlier version, which was presented very differently to local communities. RAID and other civil society groups have raised significant concerns about the new mechanism, and Acacia has posted these critiques and their response in its website.¹⁷⁹

The revised grievance mechanism sets out two steps to resolve a complaint. The first step is to identify if an 'adverse impact' involving the mine or a linked third party has occurred. If such an impact is confirmed, the second step is to identify and agree remedy. The revised grievance mechanism also has an appeals process through a Grievance Committee. Victims can ask for the Grievance Committee to review their complaint if either a complaint has been rejected on the grounds that there was 'no adverse impact'; or when there is disagreement over the remedy offered. The latter also permits for a review of how an agreed remedy is being delivered.

Key problems

The hurdle of admissibility – For the vast majority, the complaints process ends before it has even begun. Statistics in Acacia's 2016 annual report show the Mine decided that over 90% of complaints against it were 'unsubstantiated or inconclusive'. Many who fill out a complaint form never hear from the Mine again. The Mine does not explain why a claim has been rejected.

¹⁷⁶ <https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx>.

¹⁷⁷ <http://www.raid-uk.org/sites/default/files/memorandum_to_acacia_revised.pdf>.

¹⁷⁸ <<https://www.acaciaminging.com/sustainability/grievance-process/gp-english.aspx>>.

¹⁷⁹ RAID and the Legal and Human Rights Centre prepared a joint report: *Acacia Mining's Revised Operational Grievance Mechanism at North Mara Gold Mine, Tanzania: Assessment and Recommendations*, April 2018, available at:

<http://www.raid-uk.org/sites/default/files/raid_lhrc_assessment_of_acacia_ogm.pdf>. See also RAID's 1 May 2018 letter and Key concerns over Acacia's revised Community Grievance Process, available at:

<http://www.raid-uk.org/sites/default/files/raid_letter_to_acacia_mining_1_may_2018.pdf>. The company's responses can be found on Acacia's website: <<https://www.acaciaminging.com/sustainability/grievance-process/gp-english.aspx>>.

Lack of support for victims – Victims who complain are on their own. Most complainants do not have an adviser or lawyer and have no help to complete complex forms, gather evidence, or argue their case at dialogue meetings or appeal hearings. Even when claimants are told about company vouchers, these pay for just a few hours' worth of advice. Complaints are often about the most serious human rights violations, including killings by police guarding the Mine, but victims are effectively denied any further advice.

Applicability to the police – The company is reluctant to confront police violence. Despite their record of violations at the mine, the company does not clearly state that it will consider complaints against the police. It omits to do so in circumstances where the Mine calls upon, coordinates with and pays, armed police to provide security. Allegations about police brutality and killings go to the heart of this relationship. The Mine is disinclined to challenge evidence provided by the police, even when weak or blatantly biased. Investigations are one-sided.

Lack of independent investigation – Victims must face a team of investigators, all employed by the Mine, who decide whether they have suffered an impact. Victims without advisers, many of whom cannot read, have been presented with investigation reports in a foreign language they do not speak the evening before dialogue is due to begin. The same team offers to gather evidence on behalf of the victims, but in doing so controls their access to information held by the Mine about an incident. There is a fundamental conflict of interest when company investigators weigh evidence they choose to rely upon to decide if the Mine has a case to answer. Victims receive from the Mine only the information it chooses to share with them and have no means to enforce disclosure of evidence harmful to the Mine's case.

Appeals are subject to company control – If victims disagree with the Mine's findings, they can appeal to a supposedly independent committee. Even on paper, the company has significant control over the appointment of two out of three members of this appeals body. In practice, it currently appoints all three. Ultimately, the company calls the shots, including intervening in proceedings.

Compensation is low and arbitrary – If, against the odds, the Mine agrees to provide some compensation, victims must fill out complex remedy forms, evidence their claims, and decide whether any offer made to them is fair. It is unfeasible for victims, without proper advice, to have any chance of arriving at a decent settlement. As a final hurdle, the company will dock the amount awarded if it alone decides that victims were engaged in 'criminal' behaviour.

Maintaining dignity in a demeaning process – Victims are forced to go to the company responsible for their losses to seek redress. They must rely on the Mine for access to essential evidence, and have no alternative but to accept partial advice and assistance with basic tasks, even when concerning sensitive areas, like giving statements. Victims can be made to wait months to hear of progress, despite urgently needing medical treatment, all the while at risk from police reprisal and accusations of criminality. Throughout, the extreme power imbalance between victims and the Mine is driven home, requiring great resilience and strength of character on the part of complainants.

Prosecutions and legal remedy

Acacia says that RAID has ‘wrongfully attributed human rights and legal obligations to the companies that are rightly those of the Tanzanian State’ and that ‘the CGP specifically admits grievances involving allegations regarding human rights violations by the police, but only as a measure until or unless members of the North Mara community start effectively accessing State-based remedy and accountability mechanisms and receive comprehensive remedies from the State for human rights violations by the police.’ Acacia states that the company ‘does not and cannot control the State’s police force or the State’s response to alleged human rights violations’.

RAID’s view is that the Tanzanian state has the primary responsibility for holding to account those responsible for the dozens of serious human rights abuses at North Mara Gold Mine. RAID, alongside other NGOs, in October 2017 wrote an open letter to the Tanzanian president, urging the government to act on this matter of apparent impunity. But we believe Acacia omits two crucial points. Firstly, powerful corporates have leverage over States and the UN Guiding Principles on Business and Human Rights requires them to use that leverage. The current negotiations between Barrick and the Tanzanian government about Acacia’s future operations is a prime opportunity to do just that. Secondly, NMGML has a very close working relationship with the Tanzanian police, who they pay to provide security at the Mine in joint operations with the Mine’s own security teams. It is the company who controls access to the Mine and who calls the police in. In such considered circumstances, state forces take on many of the characteristics of PSMCs.

As civil society NGOs have repeatedly highlighted, the Tanzanian state has to date offered no effective redress for the victims of mine-related violence and that the Tanzanian police have largely acted with impunity. To date, RAID is not aware of any police officer having been held to account for the unlawful use of force or other serious human rights violations at North Mara mine and, to our knowledge, not a single perpetrator of abuse has been charged or convicted.

At our June 2018 meeting at Acacia’s London office, RAID raised the issue of justice in holding the perpetrators of abuse, including the police and private security personnel, to account. The team told us that all allegations against the police were forwarded to the police by Acacia. Such reports (in writing) from Acacia went to both the RPC (Regional Police Commander) and OCD (Officer Commanding District). However, when pressed on action taken, the team referred to the arrest of one police officer in 2017 for shooting a colleague, an incident that was later determined to be an accident. When asked about powers to identify and exclude perpetrators of abuse under the MoU, the team confirmed that one police officer had been removed from site and added to a register of police officers with previous allegations against their name. The team said that they could provide RAID with figures for the number of police officers who had been reported/entered onto the register, but this information has not been forthcoming.

RAID also asked the investigations team about not only reporting misconduct to the police, but about the need for the company to exercise its leverage by following up on: the status of a cases where abuse had been alleged; what action had been taken; whether there had been arrests, prosecutions or convictions. Acacia’s legal representative, also present at the meeting, said that the company recognised the importance of leverage, as set out in the UN Guiding Principles. While the company did intervene at a high level with the Commissioner of Police, Acacia’s view was that pushing for the authorities to take action and improve the accountability of the police force was a difficult and complex area. Acacia has also stated publicly:¹⁸⁰

¹⁸⁰ Letter from Peter Geleta, Head of People, to RAID and MiningWatch Canada, 17 January 2017 op. cit.

Acacia is reluctant to publish information relating to fatalities and injuries and disciplinary sanctions at a time when a number of disciplinary and criminal investigations are believed to be ongoing, while the Tanzanian Government currently is looking into the sensitive issue of the conduct of its forces and the company is assisting the Government in this effort. At this time we believe that most criminal inquiries conducted by the Government have concluded with a determination by the Attorney General's Office that the accused police officer's use of force or firearms against intruders on the Mine was reasonable, proportionate and an exercise of self-defence, defence of another or defence of property pursuant to Section 18 of the Tanzanian Penal Code.

The lack of adequate remedy for the harm suffered is part and parcel of an overall lack of justice. Acacia has a responsibility, in accordance with the GPs, to use its leverage to press the Tanzanian government to hold all perpetrators of abuse, including the police, to account. If such pressure proves to be ineffective, and there are no meaningful controls to prevent police abuses, Acacia will need to consider whether it should continue to use the police for joint security operations at its mine sites. Moreover, the Mine must take action against any employees or subcontractors who are responsible for violations, including referring them to the authorities. In its 2016 annual report, Acacia said it had fired one employee for excessive use of force, but did not say what the perpetrator did or if the individual faced justice. This dismissal was raised with the investigations team, who told RAID that the individual had discharged soft ammunition and they had CCTV footage of the incident. The case had gone to court, but the person had been cleared because the court put more weight on witness evidence rather than the actual CCTV footage.

Victims of abuses have become increasingly frustrated with the lack of accountability. Reference has been made to the initial 2013 claim bought in the English courts and Acacia's subsequent 2015 out-of-court settlement with ten claimants. Dozens of other victims received little or no compensation, many after signing legal waivers in English, which few understood, without a lawyer to represent them. As also noted previously, a number of the victims instructed UK-based lawyers Deighton Pierce Glynn, and filed legal cases in 2017 saying Acacia has been unwilling to adequately compensate them. Victims have turned to the UK judicial system since this is where Acacia is registered. However, the obstacles in bringing such claims cannot be over-emphasised and there is a massive disparity of arms compared to well-resourced companies when it comes to engaging lawyers, meeting legal costs, and liaising with clients. RAID's experience, however, is that without the threat of legal action, complaints are seldom taken seriously under company grievance mechanisms, let alone satisfactorily resolved.

Without those responsible for unlawful killings and abuse being held to account, there can be no justice and there is a strong likelihood the human rights violations that have blighted Acacia's operations at North Mara will continue. This will affect Acacia's already difficult community relations, undermine its social license to operate, and negatively impact its operations.

5. Recommendations

- a. Transparency** – greater transparency in relation to all aspects of extractive companies' relationships with their security providers, whether in-house, third party companies or state forces is necessary to ensure greater accountability and avoid disadvantaging victims by depriving them of access to relevant information. It should extend to:

- the arrangements, contractual or otherwise, between the extractive company and its security provider(s);
 - the use of force that is authorised, by whom and in what circumstances;
 - individual incidents that occur at the hands of security providers and their investigation and handling by the company, third party companies and/or state authorities;
 - annual reporting that includes detailed information regarding the number and nature of incidents, and the involvement of security providers.
- b. Clear demarcation of functions and powers** – blurring of responsibilities and roles can be exploited by companies and their security providers to avoid accountability, leaving victims without redress. Such demarcation is particularly important where security provision is provided by multiple actors in relation to the same operations.
- c. Avoid use of state forces on ongoing basis** – where state forces are contracted to provide security on an ongoing basis, state actors lose their independence. The interests of state actors and the company become ever more closely aligned, and recourse to justice or other state-based redress is undermined.
- d. Greater use of contractual arrangements** – currently, extractive companies appear to be using contractual arrangements to avoid accountability by expressly divesting themselves of responsibility. However, contractual arrangements provide one of the strongest mechanisms by which such companies can ensure that security provision is provided in a manner that is accountable, transparent and sensitive to local circumstances and should be used for such ends.
- e. More narrowly defined ‘security risks’** – it is not clear that companies define what constitute ‘security risks’ as part of their security arrangements, but their public statements indicate that they construe such risks broadly, for example by encompassing all ‘trespassers.’ These definitions should be more narrowly constructed, in consultation with civil society, as their characterisation has important consequences for how challenges will be perceived and addressed. Otherwise a security-centric approach may result in exacerbating rather than reducing risks to the company and local people.
- f. Independent and adequate investigations** – proper investigations into incidents involving security personnel are essential to ensuring adequate redress for victims, accountability by wrongdoers and better practices. To these ends, they should be independent, free from control and interference by the company, and should complement rather than impede or seek to influence parallel investigations by public authorities. They should ensure access to all relevant information.
- g. Processes to ensure accountability** – operational-level grievance mechanisms are not appropriate for serious human rights violations, which require independent oversight from a neutral body, such as a national human rights commission if an independent judicial process is unavailable. At a minimum, any grievance mechanism should:
- be independent both in the investigation and determination of complaints;
 - guarantee preservation of and access to relevant information, including information detrimental to the company’s case;

- be transparent in relation not just to relevant information concerning the incident at issue, but to information concerning reasons for decisions, and the mechanism’s process and performance;
 - ensure that imbalances of power are redressed, including where appropriate provision for adequate legal representation;
 - provide for means by which there is independent oversight to which victims may have recourse in circumstances where the mechanism infringes principles of fairness.
 - When complaints concern security-related human rights violations by businesses or their agents, these must be decided by an independent body entirely separate from the company.
- h. Limits to linkages to human rights violations** – companies are able to avoid or downplay responsibility for serious human rights violations where they are ‘linked’, but do not technically cause or contribute to, them by claiming that they have insufficient leverage. In countries or regions where such human rights violations are systemic, companies should cease doing business until reforms to stop abuse are implemented.
- i. Legally binding obligations** – companies are able to abide by the GPs and VPs or not as they choose, and to benefit from positive associations by professing adherence to them without concern that there are effective enforcement mechanisms. Particularly in matters such as security provision, in which the stakes are so high and victims of irresponsible practices need and are so often deprived of appropriate remedy, legally binding obligations upon companies are necessary at both the domestic and international level.

Endnotes