

# MINING AND



# HUMAN RIGHTS

AN INVESTOR PERSPECTIVE

Local  
Authority  
Pension  
Fund  
Forum



Resolution Copper mine, Arizona, USA



Oyu Tolgoi mine, Gobi desert, Mongolia

# LAPFFs GLOBAL MINING ENGAGEMENTS



Córrego do Feijão mine, Brumadinho, Brazil



Germano Samarco mine, Mariana, Brazil



Brockman mine, Juukan Gorge, Australia



Cerrejón mine, La Guajira, Colombia



Panguna mine, Bougainville, Papua New Guinea

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# Executive Summary

The international human rights law framework has traditionally applied directly to States and only indirectly to business enterprises, including multinational corporations. While this relationship between international human rights law, States, and businesses largely holds today, there have been significant developments in respect of business responsibilities to respect human rights.

These developments have stemmed primarily from the UN Guiding Principles on Business and Human Rights (UNGPs) and the subsequent inclusion of many UNGP provisions in other international standards such as the OECD Guidelines for Multinational Enterprises. Consequently, business enterprises – including international mining companies – are more likely to have their responsibilities to respect human rights enforced, if not through legislation or courts of law, through civil society or investor action.

The UNGPs set out a human rights due diligence process that businesses should follow to prevent, mitigate, and remediate their adverse human rights impacts. Although the UNGPs are voluntary from a legal perspective, they are being complemented by a range of legal developments that affect the mining sector. Specifically, a number of States and the European Union either have developed or are drafting mandatory human rights and environmental due diligence laws that apply to businesses, including mining companies.

There are also a number of human rights cases against companies that are increasingly successful, such as the Milieudefensie case in the Netherlands and the Vedanta and Okpabi cases in the UK, or that are breaking down barriers to prosecuting companies for human rights abuses, such as the Nevsun case in Canada. Therefore, in an increasing number of situations, the corporate responsibility to respect human rights set out in the UNGPs is moving toward a corporate obligation at law. This context is useful as a means of assessing the human rights performance of mining companies, many of which have been subject to the aforementioned litigation.

This report looks in particular at LAPFF's view of the human rights performances by Anglo American, BHP, Glencore, Rio Tinto, and Vale based on LAPFF engagement both with these companies and with communities affected by these operations. It sets out LAPFF's human rights concerns related to, for example, the destruction of Juukan Gorge in Australia, cultural heritage and water concerns associated with the Resolution Copper project in Arizona, USA, social

and environmental damage stemming from tailings dam collapses in Mariana and Brumadinho, Brazil, and environmental and worker concerns about the Cerrejón thermal coal mine in Colombia, among other examples.

These concerns are assessed through the lens of international human rights law and the UNGP human rights due diligence framework. In LAPFF's view, these assessments suggest that companies are falling short on their human rights responsibilities as set out in the UNGPs. A subsequent assessment of how the conduct of five companies in particular conform with international human rights law standards and the human rights due diligence procedure set out in the UNGPs exposes serious gaps in both the environmental and social areas, including the right to water, the right to a clean and healthy environment, and free, prior and informed consent.

It also sets out how the failure to implement the UNGP human rights due diligence framework is an industry-wide problem that is leading to negative financial consequences for both mining companies and investors, and lack of accounting for business risks of which these companies and investors should be made aware. These social and environmental accountability and implementation gaps point to corporate governance shortcomings, specifically in relation to board knowledge of and accountability for corporate human rights impacts, corporate culture, and joint ventures. Significant gaps in the accounts presented by the companies and about affected communities also raise significant concerns for investors.

LAPFF and other investors can, therefore, focus on at least these five main questions when engaging mining companies on human rights:

- **How does your board engage on human rights? Does the chair get involved and are human rights treated as a strategic issue?**
- **Is input from affected community members heard at board level and integrated into board decision-making, including joint ventures? If so, could you provide examples?**
- **Does the company undertake independent human rights impact assessments by credible experts and disclose the findings publicly?**
- **Are the findings of these impact assessments integrated into company decision-making? Can you provide a couple of examples?**
- **How do you assess the financial materiality of your human rights impacts, including through joint ventures?**

# Acknowledgments

LAPFF would like to acknowledge a number of parties who contributed to the drafting of this report.

Many thanks to the leadership of the LAPFF Executive Committee for supporting this work on mining and human rights. This support has grown exponentially in the last three years and has facilitated the LAPFF research and engagement team in the production of this report.

Thank you also to the companies in the report. They were provided two opportunities to review the report, and it must have been difficult reading. Yet they took time to comment and did so with respect and helpful detail. They have also been increasingly open to engagement with LAPFF on human rights issues, and these discussions have been very useful in understanding both the continued shortcomings in this area and the areas in which improvements are being made.

Thanks go to the many affected community members who have agreed to speak with LAPFF and who have agreed to their images being displayed publicly. Their patience in repeating their stories over and over again for more and more investors on webinars and multiple meetings, despite the fact that this communication can cause significant trauma to resurface, has helped LAPFF members to gain a much better understanding of their suffering and what areas need to be targeted for improvement. Their continued engagement with LAPFF is greatly appreciated.

Finally, many thanks to Lara Blecher of PIRC and Professor Robert McCorquodale for their contributions in writing this report.

# Introduction

This report is written from an investor perspective, with the analysis conducted through the lens of international human rights law. It therefore opens with an overview of international human rights law, including an explanation of what human rights are, who they apply to, and how their compliance is monitored, before describing how this framework applies to businesses. The report reflects LAPFF's views based on its own engagement with five mining companies and a number of communities affected by these companies' operations.

**Section Two** evaluates more specifically how international human rights law applies to the mining sector, with reference to domestic legislative initiatives and case law relevant to this area, as well as prominent industry initiatives. This section then identifies specific human rights that are likely to be affected by mining operations with case studies to provide a fuller understanding of the industry's human rights and environmental impacts.

**Section Three** covers the human rights and environmental impacts of five mining companies – Anglo American, BHP, Glencore, Rio Tinto, and Vale – that represent in aggregate the largest LAPFF holdings. Vale is included in this analysis, even though LAPFF members hold fewer shares in the company than they hold in the other four, because it is in joint ventures with some of the other companies that are widely held by LAPFF members. These companies' impacts are evaluated in terms of operational, reputational, legal, and financial risks to each of the five companies. The analysis highlights areas of human rights and environmental vulnerabilities for each company.

**Section Four** presents an industry perspective on human rights impacts by evaluating the main environmental, social, and governance (ESG) impacts found through LAPFF engagement with the five companies and affected communities, applying elements of the international human rights law framework most relevant to the mining sector. Examples of human rights and environmental impacts from each of the five focus companies are provided in relation to the main ESG concerns identified.

**Section Five** summarises the report findings and provides recommendations for LAPFF members and other investors, companies, and governments, regulators, and policy makers. The importance of the relationship between human rights and climate change is noted through analysis and recommendations regarding a fair and just transition to a zero-carbon economy.

# Context

LAPFF first began engaging with communities affected by mining company operations in late 2018. In a meeting that lasted two and a half hours, LAPFF heard from a number of community members affected by the Samarco tailings dam collapse in Mariana, Brazil on 5 November 2015. The community members spoke about their ongoing struggles to regain their lives and livelihoods, the physical and psychological damage inflicted on them by this disaster, and their frustrations in trying to make their needs heard by BHP, Vale, and Samarco, which are the companies with stakes in the collapsed dam.

The disparity between the affected community account of events and reparations and the company accounts LAPFF had heard was striking. What was particularly worrying was the fact that the affected community members told LAPFF they had warned the companies about the fear they had in relation to the dam, that many fish were dying and that former employees who were also residents of the community distrusted the way the company dealt with the structure – this account was supplemented by an assessment by the dam designer in a criminal complaint about worrying cracks in the dam – and the companies had not acted on this information. While LAPFF cannot verify this, had BHP and Vale put in place appropriate consultation and reporting processes, as is expected under the UNGPs – to which both companies are publicly committed – it is LAPFF’s view they would have been in a good position to prevent the collapse. If they had, at least 19 lives would have been saved and untold social and environmental damage would have been prevented. Furthermore, this prevention would have come at a fraction of the financial cost that companies and investors have borne, and are continuing to incur, more than six years later.

Then the Córrego do Feijão dam owned by Vale collapsed at Brumadinho, Brazil on 25 January, 2019. A number of major investors, led by the Church of England Pensions Board and the Swedish Council of Ethics to the AP Funds, immediately established an Investor Initiative on Tailings Dam Safety to highlight the scale and scope of improvements that need to be made in tailings dam safety worldwide. LAPFF acted as the stakeholder engagement liaison to this initiative by communicating regularly with affected individuals. LAPFF also arranged to have community representatives speak at investor updates, or spoke on their behalf if they could not attend, to inform the investor participants of community needs and input in devising a solution to the tailings dam safety problem.

On 24 May 2020, it was reported that Rio Tinto had set off explosives that destroyed two 46,000 year old caves at Juukan Gorge in Western Australia against the will of the Puutu Kuntji Kurrama and Pinikura peoples (PKKP) and other Indigenous groups in the area. LAPFF immediately began to liaise with affected communities and other investors to determine an appropriate course of action. Through investor engagement with affected community members, it was decided that the CEO and two other senior executives should step down and company engagement was directed toward that goal. These three executives did leave under pressure from investors and affected communities, and the Rio Tinto Chair subsequently indicated he would leave his position as a means of accepting accountability for the destruction of the caves. Poor conduct can also be severe and sector wide. For example, RAID produced a report alleging that deaths and assaults of local communities can be linked to the conduct of Barrick Gold in Tanzania.

LAPFF is continuing to engage regularly with community members affected by the Mariana and Brumadinho dam collapses. After Juukan Gorge LAPFF has expanded its community engagement activities to include US, Australian, Colombian, Madagascan, Mongolian, and Papua New Guinean communities affected by Anglo American, BHP, Glencore, Rio Tinto, and Vale operations. These communities include Indigenous communities and other communities, such as workers and settled towns, affected by mining operations. All types of communities have provided LAPFF with important insights into their needs and financial considerations for mining companies and investors.

This expanded engagement reflects LAPFF’s realisation through speaking with affected communities that there is a human and environmental imperative to speak with affected groups, and that these communities have needs and insights into mining operations that companies and investors must consider. This realisation is also reflected in a useful report from the Australian Council of Superannuation Investors (ACSI) released in December 2021. These considerations must be from both a human rights and environmental perspective, and from a business and investment perspective. In short, the social and environmental impacts of mining activities can have significant financial implications for companies and investors. It is in this context that LAPFF has chosen to publish this report on mining and human rights.

<sup>1</sup> Ministério público federal, procuradoria da república nos estados de minas gerais e espírito santo – força tarefa rio doce’, p. 130, 135.

<sup>2</sup> RAID. ‘New killings and assaults at Barrick Gold’s Tanzania mine shatter company’s radical improvement claims.’ Marcy 14, 2022, available at: <https://www.raid-uk.org/barrick-gold-tanzania-mine-north-mara-police-violence>.

<sup>3</sup> ACSI. ‘Company Engagement with First Nations People.’ December 2021, available at: <https://acsi.org.au/wp-content/uploads/2021/12/Company-Engagement-with-First-Nations-People.Dec21final.pdf>.

# Report Methodology

The information sources considered in this report include:

- a. **International human rights law;**
- b. **Case law;**
- c. **Soft law;**
- d. **Industry standards;**
- e. **Company reporting materials;**
- f. **LAPFF perspectives on engagement meetings with companies;**
- g. **News and academic reports of affected community concerns;**
- h. **LAPFF engagement meetings with affected communities; and**
- i. **Company and community feedback on the draft report.**

LAPFF has a unique engagement style whereby its asset owner members engage directly with investee companies. Once engagement meetings have taken place, the LAPFF engagement services team sends detailed notes to the company representatives for comment to ensure there is a mutual understanding of the issues discussed at these meetings. The meeting notes then provide the basis for future discussions between LAPFF representatives and companies in which LAPFF members invest.

A similar engagement approach was adopted for this report. LAPFF engaged with both investee companies and community members affected by the activities of these companies, drafting notes on all of these meetings. The information obtained during these meetings was used as the basis for this report. Further, to promote good faith, understanding, and learning between all parties, LAPFF circulated the

draft report to both affected community members with whom LAPFF has engaged and the five companies with which LAPFF has engaged for their comments.

All five companies responded in varying degrees of detail. LAPFF asked for any factual inaccuracies to be corrected and noted that the companies were welcome to include other feedback, such as their own opinions, which would be reflected in the final report where appropriate and relevant. Most affected community groups with whom LAPFF has engaged also responded in varying degrees of detail, and their input was also incorporated into the report, as appropriate and relevant.

In revising the draft report, LAPFF first made sure that any factual inaccuracies were amended. Then, it assessed whether any of the additional information provided should be included, for example to provide balance to the assessment. This balance is important as one of the main findings of LAPFF's multistakeholder engagement is that company and community accounts of human rights impacts are often very different. In most instances, LAPFF is not in a position to determine which account is accurate. However, it is important to hear and take seriously both accounts in order to understand better what questions to ask of both parties. It is also important to recognize the power imbalances between multinational mining companies and affected workers and communities. This multistakeholder engagement approach has allowed LAPFF members to gain a much fuller understanding of their investment risks and opportunities than they would have had if LAPFF had engaged with only companies or only communities.



# 1 THE INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

A rally at the Oak Flat  
Campground in the Tonto National  
Forest near Superior, Arizona. A home  
to the San Carlos Apache tribe



# Part I: The International Human Rights Law Framework

There have been protections of human rights in national laws for centuries. These include references in national constitutions in most States in the world and there are usually specific pieces of legislation in many States concerning a human right, such as for the protection of children. However, as most breaches of human rights are caused by a State acting against its own nationals or others living in its territory, and where remedies for these breaches are not available within the State, this has led to the creation of an international human rights legal framework. This framework is beyond the national legal system in order to afford redress to those whose human rights are infringed and to provide an international standard by which States can be compared.

The major development in the creation of this international legal framework for the protection of human rights was the United Nations Charter 1945, developed immediately after the end of the Second World War. It begins with these words:

**‘We the Peoples of the United Nations determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’.**

This acknowledgement of the importance of human rights by all States has done much to stimulate the large amount of international law protecting human rights now in place. While there were some international treaties (being agreements between States) which protected human rights prior to 1945, such as on labour rights and rights of minorities, the development of the protection of human rights in international law has generally been subsequent to the United Nations Charter.

Today, international human rights law (IHRL) is contained within international human rights treaties (including regional treaties) and customary international law. International human rights treaties place legal obligations on all States which are party to them, i.e. State parties are those States that have

“ratified” by a statement to an international body, such as the UN, that the State is willing to be legally bound; it is not about whether or not the State has implemented the treaty in national legislation. All States (out of the 193 States which are members of the United Nations) are party to at least one international human rights treaty.<sup>4</sup> This does not mean that any State implements its treaty obligations fully (see below), but it does mean that they accept that there are international human rights legal standards which apply to them.

Human rights that are part of customary international law legally bind every State as they are all members of the international community. The International Court of Justice (ICJ), being the only international court open to all State disputes, has confirmed this when it held:

*Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.*<sup>5</sup>

Above all, human rights are accepted as being a matter of international law, as States have acknowledged that “the promotion and protection of all human rights is a legitimate concern of the international community,”<sup>6</sup> so human rights are not just a matter of national interests.

## What are Human Rights?

What are human rights has been debated by philosophers and others for centuries. A common idea is that human rights arise out of the protection of human dignity. However, for our purposes, the focus is on how law, especially international law, has defined and clarified human rights. The core premise in international law is that the rights of humans do not depend on an individual’s nationality and so the protection of these rights cannot be limited to the jurisdiction of any one State.

It can be tempting to draw up a hierarchy of human rights. This would place some rights as being more important than other rights. For example, many people consider that the right to life is the most important right. However, under IHRL, the right to

<sup>4</sup> See Office of the High Commissioner of Human Rights, <https://indicators.ohchr.org>.

<sup>5</sup> *United States Diplomatic and Consular Staff in Tehran*, ICJ Judgment, ICJ Reports 1980, p.3.

<sup>6</sup> Vienna Declaration and Programme of Action on Human Rights 1993, Article 4.

life is essentially the right not to be deprived of life rather than a right to existence. There may be other human rights, such as the right to water, the right to food, the right to shelter and the right to an adequate standard of living, which could be considered more important as they enable someone to live. Others may consider that the right to a fair trial is more important, as without it then none of the other rights can be effective. In essence each human right is interrelated with other rights and any particular right is important for the person who seeks to have it protected for them. The United Nations (UN) has made this clear.

*[A]ll human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.<sup>7</sup>*

So, a hierarchy of rights is not consistent with the international legal protection of human rights.

While there is no hierarchy of rights, the main IHR treaties (which often have a range of names for a treaty, such as Convention, Covenant and Protocol) tend to categorise human rights. While these categories are not clearly differentiated, some examples of the key ones are the following:

#### **Civil Rights**

These are rights which protect a person's physical and mental integrity, such as the right to freedom from torture and the right to privacy.

#### **Cultural Rights**

These are rights which enable people to express their own cultural heritage, such as the protection of rights of minorities to enjoy their own culture and to use their own language.

#### **Economic Rights**

These are rights related directly to economic activities, such as the right to safe and healthy working conditions and the right to join a trade union.

#### **Political Rights**

These are rights which enable political participation in the broadest sense, such as the right to freedom of expression and the right to assembly.

#### **Social Rights**

These are rights which enable social development, such as the right to education and the right to health care.

#### **Group Rights**

Not all human rights are individual rights, so there are rights which protect a group as a group, such as the right to freedom from genocide and the right to self-determination.

#### **Cross-Cutting Rights**

There are some rights which apply with all other human rights, such as the right not to face discrimination and the right to equality.

Some treaties cover many categories of rights, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Other treaties are limited to specific human rights, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and some treaties focus on the human rights of a specific group, such as the Convention on Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). There are also treaties which are restricted to regions, such as the European Convention on Human Rights (ECHR), the European Social Charter (ESC) the Inter-American Convention on Human Rights (IACHR) and the African Charter of Human and Peoples' Rights (ACHPR).

The human rights which are most often included as being part of customary international law are the right to non-discrimination, the right to life, the right to freedom from slavery, the right to freedom from torture, the right to freedom from genocide, and the right to self-determination.<sup>8</sup>

## **Human Rights Obligations**

The IHR treaties all place similar obligations on States which are party to the treaty. For example, the CRC, which has 196 States parties (including 4 States which are not members of the United Nations and with the absence of the United States of America as a party), sets out the primary implementation obligations on States in Article 4:

*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*

This indicates that each State should take a range of measures to implement the rights, including by legislation and other practices. Some rights must be **immediately implemented**, such as rights about prohibitions (on torture, slavery, non-discrimination) and others require **steps to be taken** over time due to resources constraints, such as the right to health and the right to a fair trial. Depending on a State's constitution, customary international human rights may automatically be implemented into domestic law.

Who is the "State" for the purposes of these obligations? It includes all organs of the State, such as the executive, legislature, judiciary, police and military. It also includes sub-State entities, such as all parts of a federal or devolved State, and all gov-

<sup>7</sup> UN General Assembly Resolution 60/251 of 15 March 2006, which established the Human Rights Council of the UN.

<sup>8</sup> Most of these customary international law rights may be *jus cogens* i.e. a more binding international law, which is similar to most State's constitutional principles, as compared to their legislation or court-made law.

ernmental bodies, including local government and most public bodies. This is often evident in a State's constitution or main legal documents, such as which bodies are subject to legislation on human rights. It is probably the position that the human rights obligations on a State would include a local authority in relation to its activities.

These legal obligations are sometimes considered obligations to respect, protect and fulfil rights. This means that a State must not take measures which would result in a breach of a human rights, must be proactive to ensure that there are no human rights violations, and must implement human rights and provide remedies.

These obligations do not mean that a State can never take action to limit the enjoyment of any human right. Most human rights have limitations on them which are to protect society in general and to prevent the infringement of other human rights. Therefore, a State can act to restrict freedom of movement in a pandemic and can limit freedom of expression where someone's privacy is likely to be infringed (such as defamation).

There can be occasions when two human rights seem to conflict, perhaps where a protest (being an exercise of the right to freedom of assembly) is about a religious practice (the right to freedom of religion). In those instances, the approach is to try to ensure that each right is protected to the widest extent possible, perhaps by changing the route of the protest away from a religious building. In addition, the bodies which monitor compliance with the IHR treaties (see below) make clear that any limitations on human rights must be narrowly construed to ensure the broadest possible enjoyment of every human right. However, there are a few human rights for which there are no circumstances when a State can limit them, such as the prohibition on torture. The right to life does have limitations on it, such as in self-defence (being protecting another's right to life) and in armed conflict.

States can place restrictions on their obligations under IHR treaties. Such restrictions, called **reservations**, are allowed in certain circumstances and must be made at the time the State becomes party to a treaty. Reservations reflect the diversity of social, economic, cultural and political contexts of States. For example, a State may place a reservation on a treaty obligation under the CRC to have separate adult and children's detention facilities, where to do so would inhibit the possibilities of a child's parents visiting that facility due to distance. However, a reservation which goes to the core of the object and purpose of a treaty, such as a reservation that severely limits the protection of all women under CEDAW, would usually be seen as of no legal effect. There is also an expectation on all States that they will withdraw their reservations as soon as possible.

In addition, where there is a situation of extreme emergency which threatens the life of a State, then it can place a **derogation** (or restriction) on the application of specific human rights. For example,

the UK placed a limitation on the right to a fair trial immediately after a series of bombings in Northern Ireland. There is also an expectation on all States that they will withdraw their derogations as soon as the state of emergency is no longer in existence.

## Monitoring of Compliance

Each of the major international and regional human rights treaties have monitoring bodies which check that States are complying with them. The regional human rights treaties tend to have courts, with legally binding powers, while the international human rights treaties have Committees, which have strong influential powers, in that they are the body which all State parties to that treaty have agreed to confer monitoring or supervisory jurisdiction.

These international human rights Committees include the Committee Against Torture (under the CAT), the Human Rights Committee (under the ICCPR) and the Committee on Economic, Social and Cultural Rights (under the ICESCR). They usually undertake period reviews (usually every 5 years) of State reports on their compliance with the treaty and issue "concluding observations" on such compliance. They can accept complaints from individuals and groups about specific human rights actions and issue their views as to whether there has been a violation by a State. They also issue "General Comments", which set out their clarifications of what specific rights require of States in order for them to comply with that human right.

What these monitoring bodies show is that **every human right is justiciable**, i.e., able to be considered by a legal body, and that there can be a remedy for a violation of a human right. Enforcing that remedy and ensuring that the victim/s obtain a remedy, though, is usually not easy. In many instances the interpretation and enforcement of a human right may occur at domestic level after an international or regional monitoring body has considered the issue.

When bringing a complaint to any of these bodies, there are usually some legal requirements which must be met before a complaint can be heard. A key one of these is that the individual or group must first exhaust all effective domestic remedies. This means that a complaint to an international or regional monitoring body can normally only be accepted by that body if the person or group have first brought a case before the courts in the relevant State. The rationale for this is that the State itself must have the first opportunity to resolve the matter through its legal system. There are instances where this is not needed, for example, where there are no relevant legal processes within the State for the type of complaint.

While States might appear to consider that a decision of a court is more legally binding, the determinations of the treaty Committees can lead to changes by a State of its laws and practices. Other States and civil society can also place pressure on a

State to comply with the views of the treaty monitoring bodies, including using financial and other sanctions. For example, the government of Peru did eventually re-join a key part of the Inter-American Convention on Human Rights after international and national pressure. However, there are still many instances in which States do not comply with these determinations by human rights treaty monitoring bodies.

There are also some monitoring bodies within the United Nations (UN) system which can be used, especially where there is an allegation of a breach of customary international law (i.e., not based on a treaty provision). These bodies operate under the special procedures of the UN Human Rights Council and include Special Rapporteurs (independent investigators) on specific human rights (e.g. Special Rapporteur on the rights of persons with disabilities), on thematic human rights issues (e.g., the Special Rapporteur on Disappearances) and on particular issues on States (e.g., the Special Rapporteur on Human Rights Situation in Belarus), as well as fact-finding missions. There is also a general complaints procedure to the UN Human Rights Council, where the allegations concern consistent patterns of gross and reliably attested violations of all human rights, though this is rarely used.

## Human Rights and Business

The IHR treaties create obligations on States alone. While it is generally accepted that these human rights legal obligations may extend to international organisations created by States, such as the UN organisation itself, the general view is that **businesses are not directly subject to any of these treaty-based obligations**. Of course, a State may implement a treaty or customary international law obligation into their domestic law, and then create obligations on businesses but the IHR legal obligation is not directly applicable to businesses.

It may also be the position that a State has, for example, instructed, directed or controlled a business, in which case the State is accountable if that business acts in a way which impacts on human rights. In addition, there is a range of case law by which a State is found to have violated its human rights obligations through its lack of regulation of a business activity. For example, in a case concerning the human rights impacts of oil pollution in Nigeria, the African Commission on Human and Peoples' Rights held:

*Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards,*

*its practice falls short of the minimum conduct expected of governments.<sup>9</sup>*

In that case, the State was held to be in breach of its human rights obligations to its people by not acting to protect them from the actions of the oil companies.

However, there have been some significant developments which have indicated that businesses do have their own human rights responsibilities (as opposed to legal obligations) and not just responsibilities which are dependent on a State's obligations and legislation. The most authoritative foundation for this is the **UN Guiding Principles on Business and Human Rights** (UNGPs). This was accepted by the UN Human Rights Council in 2011 and has since been included in major documents, such as the OECD Guidelines on Multilateral Enterprises 2011 (OECD Guidelines), the International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2017 and the International Finance Corporation's (part of the World Bank) Sustainability Performance Standards 2012.

The UNGPs are based on three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and access to effective remedies. The State duty to protect human rights largely reinforces the existing international human rights legal obligations on States set out above. The core aspect of the corporate responsibility to respect human rights is that business enterprises have a responsibility to:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.<sup>10</sup>*

This provision establishes that business enterprises have a responsibility not to infringe human rights by their own actions and a responsibility to exercise 'leverage' over those with whom they have business relationships to prevent them from infringing human rights.<sup>11</sup> It further clarifies that:

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

- (a) A policy commitment to meet their responsibility to respect human rights;*
- (b) A human rights due diligence process to*

<sup>9</sup> *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria* (2001, ACommHPR), para 58.

<sup>10</sup> Guiding Principle 13.

<sup>11</sup> See Commentary to Guiding Principle 19.

*identify, prevent, mitigate and account for how they address their impacts on human rights;*  
*(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.*<sup>12</sup>

A key element of this corporate responsibility to respect human rights is that a business undertakes human rights due diligence. There are four essential components of **human rights due diligence**:

- **assessing actual and potential human rights impacts;**
- **integrating and acting upon the findings;**
- **tracking responses; and**
- **communicating how impacts are addressed.**<sup>13</sup>

The UNGPs highlight that human rights due diligence should cover not only the company's own adverse human rights impacts which it has caused or contributed to, and those which may be directly linked to its operations, products or services by its business relationships, including its suppliers. Human rights due diligence is an ongoing process which will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.<sup>14</sup> It is thus distinct and different to normal business due diligence, which is usually one-off and focusses on the direct risk to the business, while human rights due diligence focusses on the impact on human rights of those affected by the business' activities, though this then carries risks to the business in terms of reputational, operational, litigation and other risks.<sup>15</sup>

There are also requirements on businesses to ensure that, in order to gauge the relevant human rights risks to the rights holders, they should draw on internal and independent external human rights expertise. They should also undertake:

*[M]eaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.*<sup>16</sup>

This **consultation** is especially important as businesses should not predetermine the human rights risks to stakeholders (including employees and the community) and should put in place **operational grievance mechanisms**. These grievance mechanisms should be independent of the business and should enable disputes to be raised and remediated. Related to this, States should ensure that there is the ability of those who have had their human rights impacted by businesses to have access to judicial remedies.<sup>17</sup>

The UNGPs, and most of the international instruments which have incorporated them such as the OECD Guidelines, are not legally binding, though they are authoritative and have been influential in international regulation, national law, legal cases and business practices. For example, they are being used as the basis for national and regional legislation, such as the French Duty of Vigilance Act 2017, the Netherlands Child Labour Due Diligence Act 2019 and the proposed European Union Directive on Corporate Human Rights Due Diligence.

<sup>12</sup> Guiding Principle 15.

<sup>13</sup> See Guiding Principle 17.

<sup>14</sup> Guiding Principle 17.

<sup>15</sup> See Jonathan Bonnitcha and Robert McCorquodale 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28 *European Journal of International Law* 899.

<sup>16</sup> Guiding Principle 18.

<sup>17</sup> Guiding Principle 26.



## 2

# INTERNATIONAL HUMAN RIGHTS LAW AND THE MINING SECTOR

A firefighter sits full of mud and cries at the edge of the rescue work after the Brumadinho dam burst in 2019.



# Part II: International Human Rights Law and the Mining Sector

## The Mining Sector and the UNGPs

The UNGPs, and all the international documents subsequent to the UNGPs, make clear that they apply to all types of businesses. Guiding Principle 14 states:

*The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.*

Therefore, the responsibility to respect human rights applies completely and equally to all business enterprises, including those in the mining sector. This responsibility applies irrespective of whether a business enterprise is, for example, publicly listed, privately owned, a joint venture or has a non-incorporated structure, such as a partnership.

The UNGPs expressly apply this responsibility to State-owned enterprises, and they make clear that where a State controls a business enterprise then a State will also have a duty to protect human rights impacted by the State-owned enterprise (GP 4). Indeed, the Office of the High Commissioner for Human Rights (OHCHR), in its authoritative Interpretive Guide of the Corporate Responsibility to Respect Human Rights 2012 (Interpretive Guide), refers expressly to the mining sector in clarifying the application of the UNGPs to businesses of all sizes:

*In many instances, the approaches needed to embed respect for human rights in a smaller enterprise's operations can mirror the lesser complexity of its operations. However, size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity of its actual and potential human rights impact will be the more significant factor. For instance, a small company of fewer than 10 staff that trades minerals or metals from an area characterized by conflict and human rights abuses linked to mining has a very high human rights risk profile. Its policies and processes for ensuring that it is not involved in such abuses will need to be proportionate to that risk.<sup>18</sup>*

Another relevant document is the OECD Guidelines, which were revised in 2011 to take direct account of the UNGPs. In the OECD's Due Diligence Guidance for Responsible Business Conduct 2018 (OECD RBC Guidance), which interprets the OECD Guidelines, the mining sector is used as a specific example to understand one of the key issues as to when a business is "directly linked" by a business relationship to an adverse human rights impact. The example given is:

*(I) If an enterprise sources cobalt mined using child labour which is then used in its products the enterprise can be directly linked to the adverse impact (i.e. child labour). In this case, the enterprise did not cause or contribute to the adverse impact itself, but nevertheless there still can be a direct link between the enterprise's products and the adverse impact through its business relationships with the entities involved in its sourcing of the cobalt (i.e. with the smelter, minerals trader, and mining enterprise using child labour).<sup>19</sup>*

Accordingly, it is clearly the case that the mining sector, across its breadth of activities and businesses, is intended to be included within the corporate responsibility to respect human rights under the UNGPs and more generally. This is also borne out in the subsequent legislation and case law, which are considered in the next two sections.

## Relevant Legislation

There are currently four pieces of national legislation which specifically seek to apply aspects of the UNGPs and OECD Guidelines. These are the French Duty of Vigilance Act 2017, the Netherlands Child Labour Due Diligence Act 2019, the German Corporate Due Diligence in Supply Chains Act 2021, and the Norwegian Transparency Act 2021, though these are not all yet in force. In addition, there are other pieces of national legislation, which are relevant to business and human rights and were passed after the UNGPs, such as the UK Modern Slavery Act 2015, the Australian Modern Slavery Act 2018 and the New South Wales Modern Slavery Act 2018.<sup>20</sup> The European Union (EU) also passed the Non-Financial Reporting Directive 2014,<sup>21</sup> which requires all publicly listed businesses to report on, amongst other things, human rights and

<sup>18</sup> p. 20.

<sup>19</sup> p. 71.

<sup>20</sup> There are also some other relevant pieces of legislation passed on business and human rights prior to the UNGPs, such as the Brazilian "Dirty List" of slave labour, South African Broad-Based Black Economic Empowerment Act 2003, the Indian Companies Act 2013 (section 135) and the California Transparency in Supply Chains Act 2010.

<sup>21</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

environmental issues, and it has been implemented in all EU Member States (and the UK).<sup>22</sup> There are also the EU Timber Regulation 2010 and the EU Conflict Minerals Regulation 2014. On 23 February 2022 the European Commission released a proposal for a Corporate Sustainability Due Diligence Directive.<sup>23</sup>

All mining sector businesses domiciled in these States must comply with these pieces of legislation, many of which require reporting only. However, none of these are specifically focussed on the mining sector, so only the French Duty of Vigilance will be considered in any depth here, as it is in force and has given rise to issues relevant to the mining sector. Nevertheless, the likelihood of further legislation in this area is highly likely, both by the EU and in other States, with the former considered below.

### **French Duty of Vigilance Act 2017**

The French Duty of Vigilance Act 2017 (Vigilance Act)<sup>24</sup> is the only legislative example to date which imposes a general mandatory due diligence requirement for all human rights and environmental impacts. Businesses within the scope of the Vigilance Act have to establish a vigilance plan setting out:

*[R]easonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are related to this relationship.*<sup>25</sup>

In order to discharge their legal duty, companies need to implement a “vigilance plan” which should include reasonable measures to identify risks and prevent serious violations of human rights.<sup>26</sup> The Vigilance Act expressly adds environmental harms as part of the action plan on human rights impacts needed to be undertaken by business.

The businesses covered by the Vigilance Act are only those French companies which have 5,000 employees in France or 10,000 employees globally. It also includes within its coverage both a company

and the activities of “companies it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship”, as well as French registered subsidiaries of foreign companies. This legislation uses a threefold definition of the concept of “control”: legal, de facto, or contractual, as linked to consolidated and group management reports.<sup>27</sup> In addition, the Vigilance Act does not refer directly to subcontractors and suppliers within the supply chain but relies on established commercial relationships as being the key factor. The Vigilance Act does not have a specific monitoring body, but it does provide for civil liability under tort law where the company breaches its own vigilance obligations,<sup>28</sup> and there are criticisms of the lack of effective monitoring of the legislation.<sup>29</sup>

As this legislation has only been in effect for a short period, only a few legal actions have commenced in French courts. Of these legal actions, it has been noted:

*All of the companies targeted [in the legal claims] had published a vigilance plan in 2019, but these plans were dissimilar in their length and comprehensiveness. In every case, these plans were deemed unsatisfactory by the [claimants]. Their allegations are focused on the impacts generated by the activities of the companies (Total, climate change; XPO), and/or that of their subsidiaries abroad (Teleperformance; EDF; and Total, Uganda) and that of subcontractors with an alleged established commercial relationship (for part of the activities under scrutiny for Total, Uganda).*<sup>30</sup>

These cases are of particular relevance here, as two of the cases involve one large French extractive company, Total.<sup>31</sup>

It appears that an effect of the Vigilance Act could be in forcing businesses, including mining companies, to ensure that their vigilance plans are accurate, that they reflect what is done on the ground and not just in corporate policy, and that their business relationships act on the policy. In addition, the Vigilance Act has certainly had a global effect in its focus and momentum by indicating that such

<sup>22</sup> See GRI, Policy & Reporting: Member State Implementation of Directive 2014/95/EU (2018), [https://www.globalreporting.org/resource/library/NFRpublication%20online\\_version.pdf](https://www.globalreporting.org/resource/library/NFRpublication%20online_version.pdf).

<sup>23</sup> Corporate sustainability due diligence (europa.eu).

<sup>24</sup> French Law No. 2017-399 of March 27, 2017 - Commercial Code, article L. 225-102-4.-I - on the 'Duty of Care of Parent Companies and Ordering Companies'.

<sup>25</sup> Ibid.

<sup>26</sup> Note that the terminology of the Vigilance Act refers to “reasonable vigilance measures” [*mesures de vigilance raisonnable*], rather than the UNGPs “human rights due diligence” terminology. While the vigilance obligations under the Act share commonalities with the UNGPs human rights due diligence process, which influence is acknowledged, it has been asserted that they are not considered to be identical: see Stéphane Brabant, Elsa Savourey and Charlotte Michon, ‘The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law’, *International Review of Compliance and Business Ethics/Revue Internationale de la Compliance et de l’Ethique des Affaires*, December 2017, 4.

<sup>27</sup> Vigilance Act, Article L. 233-16.-II.

<sup>28</sup> Ibid, Art. 225-102-5.

<sup>29</sup> Julien Collinet, ‘Due diligence: has France really laid the foundations to end corporate impunity?’ *Equal Times*, 19 February 2020, <https://www.equaltimes.org/due-diligence-has-france-really?lang=en#.XmqB2m52t9A>.

<sup>30</sup> Stéphane Brabant and Elsa Savourey, ‘All Eyes on France’, available at [https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/#\\_edn13](https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/#_edn13). See also Elsa Savourey and Stéphane Brabant, ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption’ (2021) *Business and Human Rights Journal*.

<sup>31</sup> See, for example, France: French High Court allows case in Total Uganda oil case to go on - Business & Human Rights Resource Centre ([business-humanrights.org](https://business-humanrights.org)).

legislation is possible.<sup>32</sup>

### Conflict Minerals

There are some pieces of relevant legislation on business and human rights which are directed to the mining sector. These include the US Dodd-Frank Wall Street Reform and Consumer Protection Act 2010,<sup>33</sup> which, under section 1502, requires companies to disclose annually whether certain minerals are sourced from the Democratic Republic of Congo (DRC) or adjoining States, and to describe the measures of supply chain due diligence that were taken. This legislation was introduced prior to the UNGPs.

The main legislation which has occurred after the UNGPs in this area is the EU Conflict Minerals Regulation 2014 (EUCMR).<sup>34</sup> The EUCMR only entered into force on 1 January 2021, so its effect cannot yet be determined. It requires EU importers of tin, tantalum, tungsten and gold to follow a five-step framework to: establish strong company management systems; identify and assess risk in the supply chain; design and implement a strategy to respond to identified risks; carry out an independent third-party audit of supply chain due diligence; and report annually on supply chain due diligence. These requirements are similar to those of the UNGPs, albeit using some different terminology. Being an EU Regulation, its enforcement is in the hands of national legal systems, and both its standards and enforcement have been criticised as being too weak.<sup>35</sup>

### EU Corporate Sustainability Due Diligence Proposal

There have been repeated calls in recent years for an EU-level legislation on mandatory human rights and environmental due diligence across sectors and across commodities within the EU. These have come from civil society and businesses.<sup>36</sup>

The European Commission (EC) commissioned an extensive study on human rights due diligence.<sup>37</sup> This included a survey of over 300 businesses, which showed that a large majority (75.37%) of business respondents considered that any EU-level regulation would benefit business through providing a 'single, harmonised EU-level standard (as opposed to a mosaic of different measures at domestic and industry level)'. Interestingly, this study also showed that the majority of businesses considered that the

new regulation would improve or facilitate leverage with third parties by introducing a non-negotiable standard, without reducing competitiveness or innovation. This finding is consistent with other studies of informed business responses to regulation in relation to human rights due diligence.<sup>38</sup>

As a direct consequence of this study, the European Justice Commissioner announced that the EC would introduce draft legislation in 2021, though this was delayed to February 2022.<sup>39</sup> In the meantime, the European Parliament (EP) has produced proposed legislation in this area, which was overwhelming approved by the EP.<sup>40</sup> The key elements of the proposal on Corporate Sustainability Due Diligence Directive are:

- A requirement to undertake human rights and environmental due diligence in substantially the same terms as the UNGPs and OECD Guidelines;
- It will cover all internationally recognised human rights;
- It will cover all internationally recognised environmental protections;
- It will cover climate change, to the extent that business policies should be compatible with limiting global warming to 1.5 °C in line with the Paris Agreement;
- It will extend to all EU limited liability companies with more than 500 employees and more than EUR150m in net turnover worldwide;
- It will extend to those EU limited liability companies with more than 250 employees and more than EUR40m in net turnover worldwide, where they are operating in specific sectors, which specifically includes the extractive sector (Article 1(b)(iii));
- It will extend to those non-EU companies active in the EU with turnover threshold as above where that turnover is generated in the EU;
- It applies to a company's own operations, their subsidiaries and their value chains, where there is a direct or indirect established business relationship;
- It creates national administrative authorities in each EU State, which responsibility for supervising these new rules and may impose fines in case of non-compliance.

<sup>32</sup> Antonella Angelini, 'The Carrots and Sticks of Due Diligence' *Fair Observer*, 17 December 2019.

<sup>33</sup> US Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) 12 USC 5301.

<sup>34</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *OJ L 130, 19.5.2017, p. 1–20* ('EU Conflict Minerals Regulation').

<sup>35</sup> Lena Partzsch, 'The new EU Conflict Minerals Regulation: Normative Power in International Relations?' (2018) *Global Policy* 479.

<sup>36</sup> European Coalition for Corporate Justice ("ECCJ"), 'Civil Society Calls for Human Rights and Environmental Due Diligence Legislation', 3 October 2019, <http://corporatejustice.org/news/16785-civil-society-calls-for-human-rights-and-environmental-due-diligence-legislation> and Fern, 'Chocolate companies and MEPs call for EU Due Diligence Regulation', 10 April 2019, <https://www.fern.org/news-resources/chocolate-companies-and-meps-call-for-eu-due-diligence-regulation-954/>

<sup>37</sup> Lisa Smit, Claire Bright, Robert McCorquodale et al, *Study on Due Diligence Requirements Through the Supply Chain*, 24 February 2020, [EC Study] at p.142, <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/%20language-en>, at p.142. Only 9.7 per cent of business respondents surveyed disagreed with this proposition.

<sup>38</sup> See Lise Smit et al, 'Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies' (2020) 5 *Business and Human Rights Journal* 261.

<sup>39</sup> EU Parliament Working Group on Responsible Business Conduct, 'Speech by Commissioner Reynders in RBC webinar on due diligence', 30 April 2020, <https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/>.

<sup>40</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Texts adopted - Corporate due diligence and corporate accountability - Wednesday, 10 March 2021 (europa.eu); Draft Report to the Committee on Legal Affairs, [https://www.europarl.europa.eu/doceo/document/JURI-PR-657191\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf); and European Parliament adopts key report with recommendations to EU Commission on mandatory due diligence & corporate accountability - Business & Human Rights Resource Centre (business-humanrights.org).

- It expects that EU States will enable victims to take legal action for damages that could have been avoided with appropriate due diligence measures; and
- It expands directors' duties of companies to include to the implementation of due diligence and to integrate it into the corporate strategy, and directors must take into account the human rights, climate change and environmental consequences of their decisions.<sup>41</sup>

This proposal is now out for discussion with EU States and it is not yet known when it will become law. However, it is expected that the core elements of this proposal will remain in place.

What can be derived from this development, is that the momentum is very strong towards more national and regional legislation on mandatory human rights due diligence, with liability attached to it. This legal framework will apply to the mining sector.

## Case Law

There has been an increasing number of cases before national courts – in both common law and civil law jurisdictions – that have sought to identify the appropriate circumstances in which to impose a duty of care (which is a tort doctrine concerning issues such as negligence). Most of these cases have concerned parent companies, as these companies are domiciled (i.e., incorporated or have their headquarters) in the State where the cases are brought (home State), on the basis that the place where the damages occurred (the host State) lacks sufficient capacity or an effective rule of law to enable remedies for the victims.

This section will consider those cases which are either specifically about the mining sector or are of direct relevance to the mining sector. As a large proportion of mining companies are incorporated or headquartered in Australia, Canada, the UK and the US, these jurisdictions are considered, though there have been cases in other jurisdictions.<sup>42</sup>

### Australia

Other than an early case against BHP,<sup>43</sup> there had been few cases brought in Australia against companies for adverse impacts on human rights until recently.<sup>44</sup> In 2017 in *Kamasae v Commonwealth*<sup>45</sup> the claim concerned the actions of private security

contractors to the Australian government in relation to human rights abuses in the immigration detention facilities in Manus Island off the coast of Papua New Guinea. The case was settled by a payment by the Australian government of AUD\$70m plus costs of AUD\$20m. In *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)*,<sup>46</sup> the Federal Court of Australia held that a duty of care did arise for an oil company where there were oil spills, as it was reasonably foreseeable that an uncontrolled release of hydrocarbons (oil) from the well could cause harm in areas on or near the coast where the claimants (seaweed farmers) were located. These cases are relevant to the mining industry because mining companies often engage private security contractors and undertake activities that can cause social and environmental harms to workers and communities.

### Canada

There have been more cases on this area in Canada, most of which have concerned mining companies. In a number of cases, the Canadian courts have indicated that a parent company could in principle be liable in respect of damage caused by its subsidiary's activities, though they have not always then found that they had jurisdiction on the facts of the cases. These decisions include claims against the Canadian parent of a Guyanese mining company, in respect of environmental damage caused by the bursting of a dam at an effluent treatment plant,<sup>47</sup> and against a Canadian mining company in respect of violence alleged to have been perpetrated by security personnel working for one of its subsidiaries in Guatemala.<sup>48</sup>

In *Nevsun Resources Ltd v Araya*,<sup>49</sup> the Supreme Court of Canada directly applied customary international law to a claim against a Canadian mining company operating (as part of a joint venture with an Eritrean State business) in Eritrea. The majority of the court held that customary international law's prohibitions against slavery, forced labour, crimes against humanity and cruel, inhuman and degrading treatment are automatically adopted into Canadian law.<sup>50</sup> They went further to decide that:

*Since these claims [against Nevsun] are based on [customary international law] norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development*

<sup>41</sup> On this, see Robert McCorquodale and Stuart Neely, 'Director's Duties and Human Rights: A Comparative Approach', (2022) *Journal of Corporate Law Studies* (Full article: Directors duties and human rights impacts: a comparative approach (tandfonline.com)).

<sup>42</sup> See, for example, *Jabir and others v. KIK Textilien und Non-Food GmbH* Case No. 7 O 95/15, Regional Court (Landgericht) of Dortmund, Germany.

<sup>43</sup> See *Dagi v Broken Hill Proprietary Co Ltd (No 2)* [1997] 1 VR 428, Supreme Court of Victoria. In that case, BHP had a claim against it for polluting the Ok Tedi River and adjacent land in Papua New Guinea. The parties settled. The only other relevant case is *Pierre v Anvil Mining Management NL* [2008] WASC 30, which did not progress past an initial application for pre-action discovery.

<sup>44</sup> On this issue, see Gabrielle Holly, 'Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: *Kamasae v Commonwealth* (2018) 19 *Melbourne Journal of International Law* 52.

<sup>45</sup> *Kamasae v Commonwealth* SCI 2014 06770, 7 July 2017.

<sup>46</sup> *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237, Federal Court of Australia.

<sup>47</sup> *Recherches Internationales Québec v Cambior Inc* [1988] OJ No 2554.

<sup>48</sup> *Choc v Hudbay Minerals Inc* 2013 ONSC 1414.

<sup>49</sup> *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

<sup>50</sup> *Ibid* para 116.

*of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.*<sup>51</sup>

Accordingly, the Court allowed the claim against the mining company to proceed without needing a new tort to be determined. This is an interesting development, and it is to be seen how it will operate in practice. In the *Nevsun Resources v Araya* case the parties reached a settlement after the Supreme Court's decision.

### The Netherlands

There have been a series of cases brought in the Netherlands against Royal Dutch Shell (RDS), which is a dual Dutch/UK incorporated company. Five interrelated cases were brought before the Dutch civil courts by four Nigerian farmers from the villages of Goi, Oruma and Ikot Ada Udo, together with a Dutch NGO (Milieudefensie) against RDS, and its Nigerian subsidiary, SPDC, for environmental damage caused by a leak from the latter's oil pipeline in Nigeria.<sup>52</sup> The claimants were also asking the Court to decide that RDS should remedy the soil and water pollution, and make provision for the prevention of new leakages and environmental damage.

In a series of decisions by the Court of Appeal at The Hague, it has been held, first, that RDS could be liable for pipelines operated by its subsidiary (SPDC), and second, in a decision in 2021 on whether a duty of care had been breached, it held that SPDC was liable for damage caused by oil spills in most parts of the claim.<sup>53</sup> The Court ordered payment of damages to the claimants (the amount to be determined) and ordered both SPDC and RDS to install a leak detection system in the key pipelines.

The case of *Esther Kiobel v Royal Dutch Shell PLC* (2019)<sup>54</sup> offers a further example of the Dutch Courts being willing to impose liability on a parent for the conduct of a subsidiary company (or at least not dismiss a claim at a preliminary stage). The claim also concerned the liability of RDS for the actions of SPDC in Nigeria, albeit in relation to alleged human rights violations rather than using tortious liability. Mining companies with similar corporate structures and activities would presumably also be subject to liability in these situations in the Netherlands. This compares with a different approach by US courts in a similar case (see below).

In June 2021, the Dutch Courts held in *Milieudefensie v Royal Dutch Shell*,<sup>55</sup> that Shell must reduce its carbon emissions by net 45% by the end of 2030 based on its 2019 emissions. In its interpretation of the legal duty of care of Shell, the court expressly relied on the UNGPs and the OECD Guidelines, and on human rights.

### United Kingdom

The courts in England and Wales in the UK have been prepared for many years to apply the tort principles of negligence to cases involving human rights claims against UK companies, including in relation to parent companies in limited circumstances.<sup>56</sup> The case law on this area has been comprehensively altered by a decision of the UK Supreme Court in *Vedanta Resources v Lungowe*.<sup>57</sup> This was a claim by a group of Zambian farmers against a UK company, who argued that the negligent release of toxic pollution by a copper mine operated by a subsidiary (incorporated in Zambia) of Vedanta caused environmental damage and human rights impacts. The Supreme Court unanimously decided that there could be a duty of care by the parent company in these circumstances, and this was within the normal bounds of the existing common law of negligence. The Court noted that the duty of care can arise in a range of situations in relation to a subsidiary, both where active steps are taken by the parent company (such as by training, supervision and enforcement), and where it had omitted to act:

*Even where group-wide policies [of a parent company] do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.*<sup>58</sup>

In regard to what might be representations by a parent company as to its actions, the Court relied on the various published statements by Vedanta in the

<sup>51</sup> *Ibid.*, para 128.

<sup>52</sup> See *Eric Bariza Dooh of Goi and others v Royal Dutch Shell Plc and Others*, 200.126.843 (case c) + 200.126.848 (case d), 18 December 2015, ECLI:NL:GHDHA:2015:3586 and *Akpan v. Royal Dutch Shell Plc et al.*, C/09/337050 / HA ZA 09-1580, January 30, 2013. See also Axel Marx, Claire Bright, and Jan Wouters, Access to legal remedy for victims of corporate human rights abuses in third countries' (study requested for the European Parliament), [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).

<sup>53</sup> *Four Nigerian Farmers and Milieudefensie v Royal Dutch Shell*, Court of Appeal at The Hague, ECLI:NL:GHDHA:2021:132, ECLI:NL:GHDHA:2021:133, ECLI:NL:GHDHA:2021:134, Shell Nigeria liable for oil spills in Nigeria. See Lucas Roorda, Wading through the (polluted) mud: the Hague Court of Appeals rules on Shell in Nigeria | Rights as Usual.

<sup>54</sup> *Esther Kiobel v Royal Dutch Shell PLC* ECLI:NL:RBDHA:2019:4233.

<sup>55</sup> *Milieudefensie v Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339, Rechtbank Den Haag, C/09/571932 / HA ZA 19-379 (engelse versie) (rechtspraak.nl) [in English].

<sup>56</sup> See, for example, *Lubbe v. Cape plc*, [1998] C.L.C. 1559, [1998] EWCA Civ. 1351 (Eng.). See also, Richard Meeran, 'Liability of Multinational Corporations: A Critical Stage in the UK, in Menno T. Kamminga & Saman Zia-Zarif (eds) (2000) Liability of Multinational Corporations under International Law 251 and Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases', (2001) 50 ICLQ 1.

<sup>57</sup> *Vedanta Resources v Lungowe* [2019] UK Supreme Court 20.

<sup>58</sup> *Ibid.*, para 53.

company's annual report and other corporate documents. This case has since been settled.

In 2021, the Supreme Court confirmed its decision in another Shell case: *Okpabi v Shell*.<sup>59</sup> This case concerned oil pollution by RDS's subsidiary SPDC in Nigeria, similar to the Dutch cases considered above. The Court, though, indicated that there should not be too much focus on the notion of "control" by a parent company of a subsidiary, as "control of a company and de facto management of part of its activities are two different things".<sup>60</sup> It is the latter test that must be satisfied.

However, whether the duty of care has actually been breached by a company is still relevant, as is illustrated by the case of *Kadie Kalma v African Minerals Ltd*.<sup>61</sup> In that case, the Court of Appeal of England and Wales held that African Minerals, a company incorporated in the UK, did not owe a duty of care to the relevant Sierra Leone communities near the company's iron ore mine in relation to the adverse human rights harms alleged caused by the Sierra Leonean police. The Court held that, although the damage was foreseeable, the relationship between the company and the police was not a close enough one in that the police forces were operationally independent and not under the command and control of the company, and that it would not be fair, just or reasonable to impose 'this potentially wide duty upon the respondents in order to protect a large group of inhabitants of Sierra Leone from their own police force'.<sup>62</sup> Nevertheless, mining companies have been direct subjects of human rights-related litigation in the UK, with new legal developments suggesting they face increasing legal risk in relation to human rights for their activities around the world.

### United States

In the US, most lawsuits against businesses that allege harms as a result of violations of human rights protected by international law have proceeded in U.S. federal courts under the federal Alien Tort Claims Act (ATCA) for violations of customary international law or occasionally under state tort law.<sup>63</sup> After a series of cases, which seem to indicate that companies might be sued successfully under ATCA, the matter came to the US Supreme Court in *Kiobel v. Royal Dutch Petroleum Co*.<sup>64</sup> The Court held that the presumption against the extraterritorial application of US law applies to ATCA, which can only be overcome if the claim "touches and concerns" the United States "with sufficient force." This decision was reinforced in *Jesner v Arab Bank*,<sup>65</sup> where the US Supreme Court limited the scope and reach of ATCA by indicating that it cannot be used against non-US companies.

Therefore, while the US was once considered a jurisdiction of interest for victims seeking to hold companies, including mining companies, to account for their adverse human rights impacts around the world, the recent trajectory of litigation suggests this might not be the case any longer.

### Summary

In summary, existing case law demonstrates that many jurisdictions have determined – even taking account of the particular factual matrix of the cases before them - that parent companies of mining companies (and related sectors) may owe a duty to exercise care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection. Most of these cases are initial decisions to determine if the courts have jurisdiction to decide on damage occurring in another State, and most of these cases have settled once that jurisdiction is found. Indeed, the Dutch Court of Appeal case in 2021 was the first time that there has been a final decision for claimants on the merits (i.e. on the determination of the facts of the case). All other comparable cases have been dismissed, settled or are still being litigated.

It might be thought that these decisions suggest that parent companies might be wise not to take any actions that indicate any link between them and their subsidiaries in any decision-making. In particular, it may seem to be a disincentive for parent companies to put in place group-wide policies on health and safety, labour, environment and other human rights issues. However, there is a risk that, should these actions occur, the parent company might then be found to have failed in its duty of care by not taking any action to prevent the human rights impact. There is also the reality that many States have company legislation which requires some disclosure of human rights and environmental matters,<sup>66</sup> and there will be other external pressures for a company to take effective actions.

### Industry Standards

Industry standards are valuable as they can indicate the best practices in a sector and how companies can approach particular issues. However, it is also important to note that these standards are not legally binding and can be prone to manipulation and misuse by companies.

A number of industry groups have been formed which have included an aim of engagement with human rights issues. In the mining sector, there are

<sup>59</sup> *Okpabi v Shell* [2021] UKSC 3.

<sup>60</sup> *Ibid.*, para 147.

<sup>61</sup> *Kadie Kalma v African Minerals Ltd* [2020] EWCA Civ 144.

<sup>62</sup> *Ibid.*, paragraph 147.

<sup>63</sup> See Rachel Chambers, 'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court', (2020), *University of Pennsylvania Journal of International Law*.

<sup>64</sup> *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

<sup>65</sup> *Jesner v Arab Bank, PLC* 138 S Ct 1386 (2018).

<sup>66</sup> For example, sections 172 and 414C of the UK's Companies Act.

two main bodies which are relevant: the International Council on Mining and Metals (ICMM)<sup>67</sup> and IPIECA, the global oil and gas industry association for environmental and social issues.<sup>68</sup> For example, the ICMM has adopted ten principles on sustainable development of mining, including human rights, and has issued guidance materials, including on human rights due diligence and on operational grievance mechanisms, which are expressly linked to the UNGPs.<sup>69</sup> IPIECA has published good practice guidelines, including a human rights training toolkit and human rights sustainability reporting indicators linked to the UNGPs.<sup>70</sup> In addition, this has led to important research on compliance with the UNGPs.<sup>71</sup>

These industry sector standards are directly applicable to those companies which are members of them. There are 28 mining companies (as well as commodity standard associations) which are members of ICMM; these include all five of the companies for which there is a specific focus (focus companies) in this paper, being Anglo American, BHP, Glencore, Rio Tinto and Vale. Corporate members of IPIECA total 38 companies (as well as associate members and others), with just BHP of the focus companies a member of IPIECA. While ICMM includes most of the major mining companies, there are a large number of mining companies which are not members.

Membership of these bodies does carry with it certain requirements. As ICMM states:

*As a membership commitment, every ICMM company member adheres to our Mining Principles, which incorporate comprehensive environmental, social and governance requirements, robust site-level validation of performance expectations and credible assurance of corporate sustainability reports with annual disclosure. Applicant companies undergo a rigorous admission process, with scrutiny by an independent expert review panel.<sup>72</sup>*

These are all important commitments, though these industry bodies do not state whether any member has been removed from membership due to non-compliance.<sup>73</sup> However, even if a mining company is not a member of one of these bodies, if it expressly relies on that body's standards then it could be seen as representing that it will comply with the standards of that body. For example, in a UK case

the Intervenor stated:

*[Although neither] of the Appellants is a member [of ICMM], but: (i) as set out below, Vedanta publicly states that its "sustainable development agenda" has been "developed in line" with the standards set by the ICMM; and (ii) the guidelines produced by this sector-specific body in any event, offer a benchmark against which the conduct of an international mining enterprise may reasonably be assessed.<sup>74</sup>*

This sense of benchmarking is confirmed in the annual reports of the Corporate Human Rights Benchmark (CHRB).<sup>75</sup> The methodology of CHRB is based on the public information disclosed by companies about their own policies, processes, practices and responses to serious allegations in relation to human rights impacts, with a strong foundation on the UNGPs and OECD Guidelines. One of the sectors considered in the CHRB is the extractives sector. In its 2020 Report, the CHRB considered 57 companies in the extractive sector, of which all of the focus companies other than Vale are included.<sup>76</sup> It found that the three best scoring extractive companies on the benchmark were Eni, Rio Tinto and BP, with the lowest scoring being Surgutneftegas and Saudi Aramco.<sup>77</sup> There is, though, a specific statement by the CHRB about Rio Tinto in relation to Juukan Gorge.<sup>78</sup> This statement by the CHRB is important in deciding on the weight to be given to human rights benchmarks:

*This incident [in Juukan Gorge] emphasises the limitations that come with assessing the human rights performance of companies based on their policies and procedures with reference to corporate statements. CHRB does take into account third-party information on allegations of human rights abuses and assesses how companies respond to these allegations, but the methodology review [of CBHR] invites stakeholders to discuss whether this is sufficient. In addition, the current static nature of the benchmark involving a once-a-year review, does not accommodate incorporating real-time impacts into the framework as a measure of assessing actual corporate performance.<sup>79</sup>*

<sup>68</sup> See IPIECA, The global oil and gas industry association for advancing environmental and social performance | IPIECA.

<sup>69</sup> See, for example, ICMM • Mining Principles and ICMM • Integrating human rights due diligence into corporate risk management processes.

<sup>70</sup> See Human rights | IPIECA.

<sup>71</sup> See Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitche, Antony Crockett and Audley Sheppard 'Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles' (2013) 6 *Journal of World Energy Law and Business* 1. See also the Association of International Petroleum Negotiators (AIPN), Home - AIPN.

<sup>72</sup> ICMM • About us.

<sup>73</sup> In contrast, the Ethical Trading Initiative (ETI) suspended Levi Strauss from its membership after the corporation refused to commit to a living wage standard required under the ETI Code of Conduct: Maquila Solidarity Network, 'Levi's drops from 1st to 5th place in ethical ranking', January 29, 2007. <http://en.maquilasolidarity.org/node/416?SESS89c5db41a82abcd7da7c9ac60e04ca5f=mrdvpcutw>.

<sup>74</sup> Intervention by the International Commission of Jurists and CORE Coalition, Statement-in-Intervention-ICJ-CORE-.pdf (corporate-responsibility.org) before the UK Supreme Court in *Vedanta v Lungowe* (above), paragraph 19.

<sup>75</sup> Home | Corporate Human Rights Benchmark (corporatebenchmark.org) and now Corporate Human Rights Benchmark WBA (worldbenchmarkingalliance.org).

<sup>76</sup> Vale was included in the 2017 and 2018 CHRB but has not been since.

<sup>77</sup> WBA-2020-CHRB-Key-Findings-Report.pdf (worldbenchmarkingalliance.org), p. 27.

<sup>78</sup> CHRB response to Rio Tinto destruction of Aboriginal site at Juukan Gorge - 09July2020.pdf (corporatebenchmark.org).

<sup>79</sup> *Ibid* p.2.

Therefore, these industry sector bodies can offer clear statements on a range of relevant human rights issues. Their guidance can be very helpful as a standard by which to determine whether a particular mining company is adopting best or even appropriate practice in relation to human rights. It may also even be of relevance in terms of general reputation and even liability in litigation. Yet their standards are sometimes deficient, and they are still limited in their means of enforcement.

### Other Standards

There may be other standards to which mining sector companies could be linked. For example, many mining companies have signed the Voluntary Principles on Security and Human Rights (Voluntary Principles).<sup>80</sup> These were developed as part of a multi-stakeholder initiative composed of governments, international non-governmental organizations and companies in the extractive, energy and resources industries, of which about 30 are companies. All five of our focus companies are members of the Voluntary Principles. The Voluntary Principles are aimed expressly at the protection of human rights in contexts where protective security is required, and covers three areas: risk assessment, relations with public security and relations with private security. Implementation is supported by working groups and training but there is no direct enforcement as such, as:

*The application of the Voluntary Principles by companies supports improved practices at the project level. The Voluntary Principles provide a framework for companies to conduct an assessment of human rights risks associated with security, including an assessment of whether company actions might heighten or mitigate risk; engage appropriately with public and private security providers; institute human rights screenings for private security forces and encourage the screening of public security forces; take steps to promote the observance of best practices relevant to human rights and security; and develop company systems for reporting and investigating allegations of human rights abuses.*<sup>81</sup>

Nevertheless, despite the clear terminology that these are “voluntary”, a UK court has stated that: “something more than lip-service to those principles

is demanded” on a mining company.<sup>82</sup>

Another standard to which mining companies may be linked is the Extractive Industry Transparency Initiative (EITI).<sup>83</sup> The aim of EITI is to promote the open and accountable management of oil, gas and mineral resources by the disclosure of information all along the extractive industry value chain, including to government. It is not, though, specifically about human rights issues. There are currently 40 mining and metals companies who are “supporters” of the EITI, including all five of our focus companies, and all members of the ICMM.<sup>84</sup> Other programmes, such as the Initiative for Responsible Mining Assurance (IRMA),<sup>85</sup> have been developing guidelines to try to improve transparency and effectiveness of the above-mentioned initiatives. Anglo American is a member of this initiative.

Finally, many mining companies are aware of the growth of Environmental, Social and Governance (ESG) approaches. Human rights are included in the ‘S’ part of ESG.<sup>86</sup> There is some evidence that this is beginning to make a difference as to how companies, including mining companies, may be approaching human rights issues.<sup>87</sup> These issues are considered later.

### Human Rights Issues in the Mining Sector

The UNGPs made clear that all **companies have the same responsibility to respect all internationally recognised human rights**.<sup>88</sup> However, as the Office of the High Commissioner for Human Rights (OHCHR) made clear in its authoritative Interpretive Guide of the Corporate Responsibility to Respect Human Rights 2012:

*[A]n enterprise’s sector and its operational context will typically determine which human rights it is at greatest risk of having an impact on in the normal course of its operations.... An enterprise’s operational context can also make a significant difference.... If the area is affected by, or prone to, conflict, there may be particular risks with regard to security, the right to life and ethnic discrimination. If the region suffers from water scarcity, then the risk of adverse impact on the right to safe water will be high. If the affected communities include indigenous peoples, then their rights, including their cultural rights, may be at particular risk.*<sup>89</sup>

<sup>80</sup> The Voluntary Principles on Security and Human Rights: Voluntary Principles on Security and Human Rights.

<sup>81</sup> Why implement the Voluntary Principles on Security and Human Rights: Voluntary Principles on Security and Human Rights.

<sup>82</sup> *Vilca & ors v Xstrata Ltd* [2016] EWHC 389 (QB), para 25.

<sup>83</sup> See Extractive Industries Transparency Initiative | (eiti.org).

<sup>84</sup> Stakeholder Mining and metals companies | Extractive Industries Transparency Initiative (eiti.org).

<sup>85</sup> See <https://responsiblemining.net/>.

<sup>86</sup> See John Ruggie, (2020) ‘Corporate Purpose in Play: The Role of ESG Investing’ in Herman Brill, Georg Kell, Andreas Rasche (eds), *Sustainable Investing: A Path to a New Horizon* 173.

<sup>87</sup> See, for example, The growing importance of ESG in Mining - Decipher, and ESG Insights: What does ESG mean for the Mining industry? (slrconsulting.com).

<sup>88</sup> UNGPs, Guiding Principle 12. This is expressed to include, at least, the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work.

<sup>89</sup> OHCHR, Interpretive Guide, Question 15, pp.20-21.

Thus, some sectors can impact on human rights more due to their particular activities and locations. In addition, prior to the drafting of the UNGPs, the Special Representative on business and human rights, John Ruggie, conducted considerable research into the human rights impacts of companies. In his report to the UN Human Rights Commission, he states:

*Drawn from more than 300 reports of alleged corporate-related human rights abuses, it makes a critical point: there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner. Therefore, companies should consider all such rights. It may be useful for operational guidance purposes to map which rights companies have tended to affect most often in particular sectors or situations. It is also helpful for companies to understand how human rights relate to their management functions - for example, human resources, security of assets and personnel, supply chains, and community engagement. Both means of developing guidance should be pursued, but neither limits the rights companies should take into account.<sup>90</sup>*

This shows how business should respond to human rights impacts in their sector. Part of the statement above was expressly based on a report by ICMM, the industry body considered above as a key standard setting body for the mining sector which is especially relevant for the focus mining companies. That report by ICMM was a study conducted by it - prior to 2008 - of 38 cases of allegations of human rights or related abuses involving mining companies, which uncovered widespread human rights impacts in the mining sector.<sup>91</sup>

While there are clearly many human rights which are impacted by the mining sector, this section will focus on a **few indicative examples**. This is not intended to diminish in any way the other human rights which are impacted by the mining sector, as all rights are equal, and all can affect different individuals and groups. The human rights examples given are chosen to reflect a range of human rights and mining sector contexts around the world, and to reflect LAPFF's engagements with representatives of affected communities and mining companies.<sup>92</sup> However, deliberately, none of the examples include any of the focus mining companies.

## Right to Liberty and Security

Articles 9 and 10 of the International Covenant on

Civil and Political Rights (ICCPR) protects the right to liberty and security of a person from unlawful or arbitrary arrest or detention of any kind. It includes protection from physical and mental injury, and whether or not the person is detained. In some situations, it is linked to the right to life.

Another human right which is often relevant to the right to liberty and security of a person is the **right to non-discrimination**. This includes discrimination on the basis of his, her, or their colour, gender, religion, ethnic, social or national origin, political or other opinion, property, birth, or other status.<sup>93</sup> This right to non-discrimination is a cross-cutting human right which applies to all other human rights.

A company might be acting contrary to this human right if, for example, it facilitates the unlawful detention of a person on behalf of a government's security forces and if it - or a contracted private security company - threatens their employees or the local community with violence. In relation to business and human rights issues, a particular concern has been about gender discrimination and gendered impacts of corporate activity.<sup>94</sup>

### Case Study: Monterrico mining in Peru

A subsidiary of a UK mining company began operating a mine in northern Peru. As soon as it began, there was a dispute with the local community, who stated that the company did not have their approval for the mine, as is required under Peruvian law. There were a series of protests by the community and marches to the mine site. At one of these protests at least twenty-eight people were held for over seventy-two hours on the company's property. The claimants alleged that during their captivity, two women were sexually assaulted and all of them were beaten, bound, forced to eat rotten food, and threatened with violence, rape, and death. The company disputed this.

The claimants brought a case in the UK against the parent company for breach of their human rights using the tort law of negligence. They claimed, amongst other claims, that the company either detained them or did nothing in regard to the police or private security forces to prevent them being detained, subjected to violence and the threat of violence, and the women being sexually assaulted. The UK court allowed the case to proceed, and it was eventually settled.<sup>95</sup> This case highlights the legal and financial risks to companies for failing to consider their human rights impacts adequately and failing to consult with the local communities.

<sup>90</sup> Report of the Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights A/HRC/8/5 - E - A/HRC/8/5 -Desktop (undocs.org), paragraph 52.

<sup>91</sup> Ibid, footnote 37.

<sup>92</sup> A number of the case studies are taken from OHCHR, *Human Rights Translated 2.0* (2017), HRT\_2\_0\_EN.pdf (ohchr.org) and from Gwynne Skinner, Robert McCorquodale, Olivier De Schutter and Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR, 2013), Microsoft Word - The Third Pillar - A4 Final Text, rough design.docx (corporatejustice.org).

<sup>93</sup> The "other status" definition has been shown to be extensive. For example, it includes sexuality: *Toonen v Australia* (1994), Toonen v. Australia, Communication No. 488/1992, 4 April 1994; Australia | International Commission of Jurists (icj.org).

<sup>94</sup> See UN Working Group on Business and Human Rights, Report on Gender Dimensions in the UNGPs (2019), G1914608.pdf (un.org).

<sup>95</sup> *Guerrero v. Monterrico Metals plc* [2009] EWHC 2475.

## Right to an Adequate Standard of Living

Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right to an adequate standard of living, which includes adequate **food, water, clothing, housing** and the continuous improvement of living conditions. It is usually considered that the right requires that the standard be adequate, available, accessible and culturally appropriate.

Related rights are **environmental rights**, which aim to protect the right to a healthy environment. This includes the protection of land use, trees and potable water, and to protect against desertification and similar damage.<sup>96</sup> Climate change matters are linked to environmental rights and human rights, as seen in the *Milieudefensie v Shell* case referred to above.

Companies can affect this bundle of rights if it provides inadequate housing for its employees and relocates communities, and if it pollutes, harms or interferes in the supply of, or access to, food and water. This right is applied to both employees of a company and the communities impacted by the company's activities.

### Case Study: Vedanta mining in Zambia

A subsidiary of a UK mining company operated a copper mine in Zambia. The local community, of about 2,000 people, complained that the mine was sending toxic waste into the local river, which was their water supply as they drank from it and ate its fish. They also claimed that they could no longer farm there or live there, as their properties were adversely affected, and they experienced health problems, including lung pain and skin diseases. The company disputed this.

After a being unable to bring a case in Zambia, the claimants brought a case in the UK against the parent company. They claimed that the parent company had a duty of care towards them due to their subsidiary's actions. The UK court accepted the claim, and the company later settled the claim and paid money to the claimants.<sup>97</sup> This case highlights the legal and financial risks stemming from an inadequate consideration of human rights and environmental damage by companies.

## Labour/Employment Rights

Article 7 of the ICESCR guarantees the right to **just and favourable conditions of work** in employment and other work contracts. This is linked with the International Labour Organisation's (ILO) protections, which include the Declaration on Fundamental Principles and Rights at Work, and the right not to be subjected to **slavery, servitude or forced labour**

under Article 8 of the ICCPR and freedom of association under Article 22. Article 8 of the ICESCR protects the right to **form a trade union and to join a trade union** of choice, and the right to strike.

Another human right, which can also be relevant to labour rights is **the right to assembly**, under Article 12 of the ICCPR, which is a right to assemble and gather peacefully. Like most human rights (though not the prohibition on slavery or torture), it can be limited in certain restricted circumstances, such as to protect the rights of others, or to protect the general interest of the community to public order, security and health (such as with Covid).

Company actions may impact on these rights if they prevent union membership or restrict employees' rights to participate in union activity or peaceful assembly, including through use of technology. A company may be acting contrary to these rights if it employs or makes use of forced labour, slaves, prison labour and child labour, including if the company benefits from such labour which is supplied by other companies with which they have a business relationship, including State-owned businesses.

### Case Study: Nevsun mining in Eritrea

A Canadian mining company had an interest in a gold, copper and zinc mine in Eritrea, through a subsidiary and under a joint venture with an Eritrean State company. Workers at the mine claimed that they were forced to work there for little money and under harsh conditions, including cruel punishments, as part of their indefinite conscription to the Eritrean military. They claimed that this treatment was forced labour, slavery and cruel, inhuman and degrading treatment. The company denied this.

The claimants brought a case against the Canadian parent company on both tort and customary international law grounds. The Canadian court upheld their claim, and the company later settled the claim and paid money to the claimants.<sup>98</sup> This outcome points to the legal, reputational, and financial consequences for companies that do not consider human rights adequately, wherever they occur.

## Indigenous Rights

Indigenous rights protection can be found in a number of locations under the ICCPR and the ICESCR. These include Article 1 of both treaties, which protects the group **right to self-determination** in economic, cultural, political and social contexts, and Article 27 of the ICCPR which recognises the individual **rights of members of ethnic, religious or linguistic minorities** to enjoy their own culture, to practise their religion, and to speak their

<sup>96</sup> See OHCHR, Framework Principles on Human Rights and the Environment (2018), A/HRC/37/59 - E - A/HRC/37/59 - Desktop (undocs.org).

<sup>97</sup> *Lungowe v Vedanta Resources* [2019] UK Supreme Court 20 – see section B.3.d above.

<sup>98</sup> *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 – see section B.3.b above.

language. In addition, there are **specific Indigenous rights**, which reflect their distinct identities and histories, protected under international law in the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention 169. The rights of Indigenous peoples are expressly referred to in the UNGPs.<sup>99</sup> A key component of Indigenous rights is the right to free, prior and informed consent to be obtained from Indigenous peoples where they could be affected by an activity.

There are also **cultural rights** protected by Article 15 of the ICESCR. This recognises the right of everyone to take part in the cultural life of society, to enjoy the benefits of scientific progress, and to receive protection for the moral and material interests resulting from their scientific, literary or artistic works. This includes the rights of individuals and groups, including Indigenous peoples, to pass on their unique values, customs, language, religion and culture, and to preserve, protect and develop their traditional knowledge systems and cultural expressions.<sup>100</sup>

Company actions may impact on these rights if they operate a mine or build facilities on an area of Indigenous property or where it has significance to Indigenous people, and do so without consulting with them and without their consent. They may also impact on these rights if their activities have an effect on traditional or cultural use of the land or water for hunting and fishing, as well as when the company is not active in ensuring diversity in their workforce.

### Case Study: Beowulf mining in Sweden, Finland and Norway

A UK mining company sought to mine for iron ore in northern Sweden, arguing that it would bring economic benefits. The Sami community, who are the Indigenous community of the region, were concerned about the impact on their traditional activities, including regular travelling across the region and reindeer herding.

The Sami people protested against the initial exploratory operations for the mine and the company responded that it had conducted an environmental impact assessment, which the community felt was inadequate. Eventually, the Swedish government refused the company a licence for the mine.<sup>101</sup> This outcome demonstrates the adverse legal, operational, and financial impacts of companies' failures to consider human rights adequately.

### Right of Access to Remedy

Article 2 of the ICCPR expressly includes the right of access to a remedy, and it is implied in Article 3 of

the ICESCR, and there is the cross-cutting right of equality, including **equality before the law**. Access to an effective remedy is also a core aspect of the UNGPs. What is considered an effective remedy in the business and human rights context is clarified in the UNGPs:

*Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.<sup>102</sup>*

Companies have specific responsibilities under the UNGPs to put in place operational grievance mechanisms (OGMs). Guiding Principle 31 sets out 8 criteria for an effective corporate OGMs. These are: legitimacy; accessibility; predictability; equitable; transparency; rights-compatible; a source of continuous learning; and based on engagement and dialogue. The Commentary to this Guiding Principle notes that:

*A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.*

Therefore, in every circumstance, a company can impact on human rights if it does not have an OGM which is compliant with these criteria. The company could also have a human rights impact if it acts in such a way as to prevent access to remedy by rightsholders to other means of redress, such as the courts.

### Case Study: Barrick mining in Papua New Guinea

A Canadian mining company operated a gold mine in Papua New Guinea. An OGM was created in response to accounts of systemic sexual violence committed by the mine's private security people. The OGM was intended to adjudicate sexual violence

<sup>99</sup> See UNGPs, Commentaries to General Principles 3, 12 and 26.

<sup>100</sup> See OHCHR, Human Rights Translated 2.0, op cit, p. 115.

<sup>101</sup> Beowulf Mining plc, Ibid, p.79; The reindeer herders battling an iron ore mine in Sweden - BBC News; Questions to Beowulf - London Mining Network; and <https://www.reuters.com/world/europe/un-advisers-urge-sweden-stop-mine-home-indigenous-sami-2022-02-10/>.

<sup>102</sup> UNGPs, Commentary to Guiding Principle 25

claims and determine individual remedies, and there was some independent management of the mechanism.

An independent report found that, while some claimants had received remedies, too many were not protected appropriately, received no remedy, were refused the right to external legal actions, and were 'left disaffected, stigmatised and abused'.<sup>103</sup> While the mechanism was introduced in an attempt to deal with serious issues, it failed to comply with the criteria set out in the UNGPs. This example points to potential reputational, operational, legal, and financial risks for companies that do not establish human rights monitoring and implementation mechanisms.

## Overview

The above sections set out a few examples, and case studies, of how some human rights can be affected by the activities of mining companies. There are many other human rights which can be adversely impacted by the mining sector. Some of these are seen in the case law referred to above. Other internationally recognised human rights not referred to above include:

- right to freedom of movement;
- right to a fair trial, including of non-citizens;
- right of legal recognition as a person;
- right to privacy;
- rights to freedom of thought, conscience and religion;
- right to freedom of opinion and expression, and right to freedom from incitement to hatred;
- rights to have a family and to marry;
- rights of a child;
- rights of women;
- right to participate in public life;
- right to work;

- right to social security;
- right to health;
- right to education; and
- rights of disabled persons.

There have been examples of companies acting in ways which have impacts on each of these human rights. There are also human rights issues which arise from climate change, which are considered below.

The mining sector has particular aspects of its operations which does mean that there are some human rights which are more likely to be of concern. One aspect is the fact that mining operations will be located where the natural resources are located and cannot simply move locations, and also that many mining operations are likely to be in conflict zones or fragile States. Therefore, as the OHCHR Interpretive Guide reminds companies:

*These factors of sector and operational context are therefore especially relevant, or salient, in determining which human rights are at greatest risk from a particular enterprise's operations. As stressed above, this does not mean they should become its exclusive focus. But they will likely need to be the subject of the most systematized and regular attention.*<sup>104</sup>

This reminder of the need for **systematised and regular attention to human rights impacts** is part of the requirement of good human rights due diligence practice. This practice includes undertaking regular human rights impact assessments, integrating human rights matters into all corporate actions, tracking of human rights impacts and corporate responses, and communicating all actions taken.

The Report will now consider the practices in relation to human rights of the five focus mining companies, being Anglo American, BHP, Glencore, Rio Tinto and Vale.

<sup>103</sup> Atelier Aftab, *Assessment of Barrick Gold Grievance Mechanism* (2015), Assessment of Barrick Gold Grievance Mechanism – Atelier Aftab.

<sup>104</sup> OHCHR, *Interpretive Guide*, op cit, Question 15, p.21.



# 3

# A LAPFF ASSESSMENT OF HUMAN RIGHTS PRACTICES OF FIVE GLOBAL MINING COMPANIES

Maria Eugenia Palmezano presents cracks in her house, claimed to be caused by the detonations of the coal mine Cerrejon in the municipality of Hatonuevo, Colombia



# Part III: A LAPFF Assessment of Human Rights Practices of Five Global Mining Companies

## Background

This part deals specifically with those human rights concerns that have surfaced through engagement with the mining companies that represent LAPFF's largest mining holdings, and those companies most of concern because of wider industry impacts. These companies are Anglo American, BHP, Glencore, Rio Tinto, and Vale.

Each company is discussed separately below through setting out LAPFF's engagement, any relevant incidents or concerns that prompted the engagements, and the human rights implications of the companies' conduct. This information is analysed in terms of operational, reputational, legal, and financial risks. An assessment of each company's human rights performance is then presented in the context of the UNGP human rights due diligence framework.

The analysis is based primarily on engagement meetings with the companies and affected communities, though specific meeting content will not be quoted for reasons of confidentiality. This assessment is not meant to be an empirical study but merely an accounting of LAPFF's experience and views to date after engaging with these companies, affected communities, and other stakeholders, on mining and human rights.

## Anglo American

LAPFF has engaged with Anglo American on climate change for a number of years and has recently begun engaging more with the company in relation to human rights issues, including a just transition to a net zero carbon emissions economy. Specifically, LAPFF was approached by Brazilian community members in relation to Anglo American's Minas Rio project in Minas Gerais state, Brazil. The affected community members are concerned about the tailings dam at the project, especially in light of the serious tailings dam collapses in Brazil that have taken place since 2015. Although the dam is a downstream construction and a water retaining dam with different earthworks, so is considered safer than upstream dams both upstream and downstream, and Anglo American states that it engages with the affected

community on dam safety, the affected community members would like more assurances of the dam's safety, including safety testing that is respectful of their needs.

In neighbouring Colombia, Anglo American has been a joint venture partner with BHP and Glencore in the Cerrejón thermal coal mine. Anglo American has faced reputational, operational, and financial risks and impacts because this mine has experienced human rights problems for a number of years, both in relation to workplace problems and concerns from the surrounding communities. In fact, in 2020, workers went on strike for 91 days leading to a 52 percent drop in production from 2019, according to Anglo American's 2020 Annual Report.<sup>105</sup> Both workers and affected community members spoke of their concerns on LAPFF webinars during 2021. Community groups have also initiated an OECD complaint<sup>106</sup> against both the mine operator, Cerrejón, and the joint venture partners. However, both Anglo American and BHP have now sold their stakes in the mine to the third joint venture partner, Glencore.

From a legal risk perspective, Anglo American has faced at least two class action suits pertaining to human rights and environmental impacts, most recently in relation to a historic operation in Zambia that led to lead poisoning of many women and children.<sup>107</sup> There could be up to 100,000 claimants in this litigation.<sup>108</sup> Prior to the Zambian case, Anglo American faced a class action suit for silicosis amongst its miners in South Africa.<sup>109</sup>

LAPFF has engaged with both the Chair and the CEO of Anglo American to discuss the company's approach to engagement with affected community members. While Anglo American's SEAT programme, which has developed into the Social Way 3.0,<sup>110</sup> has long been held out as an exemplar in the industry, based on engagement with the company, LAPFF is concerned that the company's board is not sufficiently engaged with communities affected by Anglo American projects. For example, the CEO has visited Cerrejón and non-executive board members have met with community leaders at the project site, but non-executive board members do not appear to have had meaningful engagement with community leaders or members at either this Anglo American project

<sup>105</sup> See Anglo American 2020 Annual Report, <https://www.angloamerican.com/-/media/Files/A/Anglo-American-Group/PLC/investors/annual-reporting/2021/aa-annual-report-full-2020.pdf> (p. 87).

<sup>106</sup> See <https://www.abcolombia.org.uk/wp-content/uploads/2022/01/Parent-Companies-FINAL.pdf>.

<sup>107</sup> See <https://www.theguardian.com/environment/2020/oct/21/anglo-american-sued-over-alleged-mass-lead-poisoning-of-children-in-zambia>.

<sup>108</sup> Anglo American provided this estimate of claimants.

<sup>109</sup> See <https://www.reuters.com/article/uk-safrica-mining-silicosis-idUSKCN2AU1FX>.

<sup>110</sup> According to Anglo American, 'The Social Way 3.0 is fundamentally different from SEAT. SEAT was a toolbox only and was guidance about good practice. The Social Way 3.0 is our integrated social performance management system which details what is expected from all of our sites and how these requirements should be implemented. We have also tried to comprehensively integrate social performance considerations into the processes and planning of many of the technical areas.' See <https://socialway.angloamerican.com/en>.

or others. The company's view is that it would be more constructive for community issues to be raised through Executive leaders and social management systems, such as complaint and grievance mechanisms. However, LAPFF's view is that community input provides strategic information that should be heard and accounted for at board level.

In LAPFF's view, this is a gap in the company's strategic approach as, in accordance with the UNGPs, meaningful and effective engagement with affected community members can help to identify many human rights and business risks before they become problems for either communities or companies.

LAPFF also raised the issue of joint ventures with Anglo American, noting that the governance structures of these entities raised accountability concerns in relation to environmental, social, and governance impacts. Specifically, joint venture partners that are not operating partners consistently tell LAPFF that the operating partner is responsible for the ESG impacts of the project, not the non-operating partner.

The results of this accountability gap are highly visible at Cerrejón, where workers talk about a 'death shift' and affected community members refer to significant environmental damage from the mine and detrimental social impacts stemming from resettlements. Anglo American states there is no evidence of environmental damage caused by Cerrejón, though this is contrary to the views of workers and communities consulted by LAPFF. Although Anglo American has stated that it seeks to influence joint venture partners to raise their social performance management standards, LAPFF confirmed at the Anglo American AGM in 2021 that the company's Social Way 3.0 programme does not apply directly to Anglo American's non-operated joint venture projects, including Cerrejón.<sup>111</sup> This means that Anglo American does not exercise direct control over environmental and social practices at Cerrejón, though direct control is not required under the UNGPs for Anglo American's responsibilities for human rights impacts to arise.

There are also concerns about Anglo American's human rights and environmental impacts of divesting from Cerrejón because there is always this concern upon leaving a project with social and environmental challenges, and Glencore's record in this area is not good. Although Cerrejón management is currently carrying out a third human rights impacts assessment (HRIA) and Anglo American has facilitated a Social Way assessment of Cerrejón's performance, LAPFF would expect both BHP and Anglo American to conduct a human rights impact assessment to determine the impact of their divestment from the Cerrejón joint venture.

In respect of the human rights due diligence process set out in the UNGPs, as described in Part II above, LAPFF has a number of concerns about Anglo

American's human rights approach and practices.

Although Anglo American states that the Board receives various updates on worker and community input, at the policy level, there is concern that important information from workers and affected communities might not be reaching board level decision-makers. Instead, LAPFF picked up a heavy emphasis by the company on technological solutions for example through the company's FutureSmart Mining<sup>112</sup> approach, without adequately connecting these solutions to human rights and environmental impacts. This communication gap might be affecting Anglo American's ability to identify and assess its actual and potential human rights impacts to the greatest extent possible.

This shortcoming might in turn be affecting the company's ability to integrate relevant human rights information into the way the company operates and takes decisions, thus compromising its ability to act on its findings and track its responses to adverse human rights impacts, both potential and actual. This is despite the fact that Anglo American states that the company has Social Performance Management Committees at each site.

Without full information, Anglo American is not in a position to communicate fully its human rights impacts to stakeholders, nor is it in a position to remediate these impacts effectively.

There is also concern that Anglo American is assessing primarily risks to the business in evaluating its human rights impacts rather than assessing the company's impacts on affected communities and human rights more broadly in order to determine the business risks. This approach is not in line with the human rights due diligence process set out in the UNGPs and often leads not only to poor human rights outcomes but also to missed risks to the business. This orientation is suggested by the fact that the company reports on the production losses stemming from the 2020 strike at Cerrejón but does not really describe all the relevant working conditions that led to the strike.<sup>113</sup> Nor is there a detailed description of the community concerns raised in relation to Cerrejón. The company agrees that this focus on human rights impact rather than business risk has been deficient in the past, so this focus was built into its Social Way 3.0 but that it 'remains a work in progress'.

Furthermore, there is a concern that Anglo American could implement its Social Way 3.0 programme so as not to apply to joint ventures where the company is the non-operating partner. This implementation raises concerns about a strategy to avoid liability for Anglo American rather than to take accountability for third party impacts the company causes, to which it contributes, or to which it is directly linked.

<sup>111</sup> LAPFF notes that Anglo American and BHP are no longer joint venture partners in Cerrejón. Also, Anglo American has clarified that it does 'apply the Social Way at JVs when we have management control (eg Los Bronces) or by agreement with JV partners (eg Debswana and Namdeb). Where we do not manage, we seek to influence the adoption of comparable standards, but we are not legally able to require joint ventures to adopt policies where we do not exercise control.'

<sup>112</sup> See, for example, <https://www.angloamerican.com/futuresmart/stories>.

<sup>113</sup> In response to this report, Anglo American clarified that, 'The 2020 strike was triggered as a result of a failure to reach agreement through collective bargaining negotiations, and there was particular concern over the introduction of a new working roster. The roster is commonly used across the extractive sector in Colombia. Cerrejón management carried out a careful assessment before introducing this roster and it was not considered to be an impingement on human rights.'

## BHP

LAPFF has been engaging with BHP, most recently with the Chair and CEO, Mike Henry, on human rights since the Samarco tailings dam collapse in Brazil on 5 November 2015.<sup>114</sup> Samarco is the operating partner in a joint venture partnership between BHP and Vale, and in a meeting just following the dam collapse, LAPFF raised the issue of joint ventures with BHP. The ESG governance problems associated with joint ventures has been a recurring topic of discussion during these engagements.

Unlike its international mining counterparts, BHP has a specific operating unit devoted to non-operated joint ventures (NOJV).<sup>115</sup> The company reports that in 2021, after a review of the governance of the non-operated joint ventures, BHP created two NOJV asset teams within Minerals Americas. One of the teams is accountable for BHP's interest in Samarco and supporting the work of the Renova Foundation, which was created to carry out compensation, reparations, and resettlements in the sake of the Samarco dam collapse. The other team is accountable for its interests in the Antamina, Resolution Copper, and Cerrejón joint ventures.<sup>116</sup>

Non-operated joint ventures are projects in which BHP invests, but another corporate entity – for example, Samarco – operates the asset. LAPFF is concerned that this joint venture arrangement leaves an accountability gap on environmental, social, and governance issues. BHP has also recognised this gap and has stated that it created its Non-Operated Joint Ventures Group to address these gaps. However, subsequent meetings with BHP and other mining companies have done nothing to alleviate LAPFF's concerns about the ESG failings of joint ventures.

While BHP appears to have reasonably robust accountability mechanisms for ESG performance at its directly operated projects, this accountability does not appear to extend to NOJVs. This accountability gap appears to exist despite BHP's appointment of board members to NOJV boards and subject-matter experts to serve on joint venture board sub-committees, and the company's assertion that it seeks to influence ESG performance at non-operated joint ventures. For example, discussions with affected community members have revealed frustration that communities often do not know who at the company to contact if they have a problem or a concern about a project's impact.

In terms of impact, all of BHP's NOJVs – Antamina in Peru, Cerrejón in Colombia,<sup>117</sup> Samarco in Brazil, and Resolution Copper in the US – have serious ESG concerns associated with them<sup>118</sup> that have had and continue to have significant financial implications for the company (as noted below).<sup>119</sup>

The Renova Foundation, while not strictly a joint venture, is a partnership agreed with Brazilian public authorities, BHP, and Vale and has many of the ESG failings of joint ventures, both in terms of accountability and impacts. It is also listed on BHP's website under the company's joint venture heading. Human rights concerns include negative impacts on workers, communities, water, and the right to a clean environment.

In engagement meetings, LAPFF has repeatedly raised this concern and has repeatedly heard from BHP that the operating partner, not BHP, is responsible for ESG issues. However, there is now some evidence that BHP is beginning to take more steps to influence joint venture ESG standards. For example, the company is seeking to engage directly with the San Carlos Apache Tribe in relation to cultural heritage concerns related to the Resolution Copper joint venture, and the company arranged a meeting for LAPFF and the Renova Foundation to push reparations and resettlements forward in relation to the Samarco tailings dam collapse.

Not surprisingly, human rights impacts related to joint ventures are a concern for most major mining companies. BHP lists its joint venture partners as: Anglo American, Glencore, Mitsubishi, Newmont, Rio Tinto, Teck, and Vale. Therefore, by their very nature, joint ventures affect the entire mining industry.

As far as LAPFF can tell, there are two major models of joint ventures, both of which raise ESG concerns. The first is where major mining companies are joint shareholders in a project and there is a smaller, local operator of the project. The second is where one of the major mining companies is also the operating partner in the project. The first type of joint venture appears to be falling out of favour on the expectation that the major mining companies will act more responsibly. However, it is not clear that this is in fact the case.

BHP has repeatedly conveyed to LAPFF in relation to non-operated joint ventures that the company seeks to influence the joint venture partners at board level to influence ESG conduct of the operators, but it is ultimately the responsibility of the operators to undertake appropriate ESG conduct. Nonetheless, BHP is left with operational, reputational, legal, and financial consequences when there are ESG failures at these non-operated joint ventures.

For example, Samarco had to cease operations following the failings of the Fundão tailings dam and only re-started in December 2020. Samarco's re-opening has also invoked significant criticism from affected community members who ask why the operations have re-started when community members have not received adequate reparations and

<sup>114</sup> See <https://www.bbc.co.uk/news/business-55924743>.

<sup>115</sup> See <https://www.bhp.com/about/operating-ethically/non-operated-joint-ventures>.

<sup>116</sup> Non-operated joint ventures | BHP.

<sup>117</sup> Though BHP, along with Anglo American, has now sold its 33.3 percent share in Cerrejón.

<sup>118</sup> This is despite the response by BHP that each of its NOJVs have commitments to respect human rights and that the NOJVs (and all of BHP's operated assets) complete HRIAs to understand potential human rights risks/exposures and develop controls to manage these risks.

<sup>119</sup> Human rights concerns at Cerrejón, Samarco, and Resolution Copper are covered in detail in this report. Communities around Antamina have alleged that the project's spills led to water contamination.

compensation from the tailings dam collapse which took place over six years ago.<sup>120</sup>

BHP is facing continued reputational fallout from its association with Vale over five years after the Samarco dam collapse, albeit with further reputational consequences stemming from Vale's Brumadinho tailings dam collapse in 2019. LAPFF is repeatedly approached by affected communities to push BHP and Vale on housing and resettlement reparations. BHP, Vale, and the communities report that in relation to the Bento Rodrigues resettlement, the school and health centre, along with 47 houses, have been completed in Bento Rodrigues. However, according to affected community members with whom LAPFF has spoken only 47 of 579 houses have been rebuilt in communities affected by the Samarco tailings sludge.<sup>121</sup> In contrast, according to BHP, of the 553 cases across the region - these are houses/plots for construction, refurbishment and solutions through cash payment - 96 have been completed (houses, plots and cash payment).

BHP is also facing a multi-billion dollar lawsuit in the UK in relation to Samarco.<sup>122</sup> The case had initially been dismissed by the UK courts but is now on appeal, likely in light of the UK's *Vedanta* and *Okpabi* rulings covered in Part II of this analysis. There has also been securities litigation in the US on this dam collapse that alleged false and misleading statements provided by Samarco, BHP, and Vale in relation to the disaster.<sup>123</sup> There is ongoing and developing litigation in Brazil pertaining to Samarco, including creditor litigation claiming that BHP and Vale have supported a restructuring plan for Samarco that favours the companies as shareholders and unloads most of the cost onto creditors.<sup>124</sup>

Costs continue to pile up for BHP and Vale in relation to the Samarco dam collapse due to reparations, as well as fines and penalties for failing to undertake the reparations in a timely and adequate manner.<sup>125</sup> In fact, in the US securities litigation 'Randal Fonseca ("Fonseca"), the owner of Rescue Training International Consulting ("RTI Consulting") explained that the devastation caused by the dam break could have been avoided if Samarco had spent \$1.5 million to institute the plan.<sup>126</sup> BHP notes that this assertion was made in the context of a US case that was dismissed by the courts, but that qualification does not negate the validity of the assertion itself. Investors will not be pleased to compare

this amount to the (as yet) untold billions that the companies are paying to provide compensation and reparations after the dam collapsed.

One of the main areas of criticism from the Samarco affected communities in Mariana, Brazil with whom LAPFF has engaged, concerns the Renova Foundation.<sup>127</sup> Notwithstanding the fact that the Renova Foundation was set up as an agreement between BHP, Vale, and Brazilian authorities, it appears to be a partnership with governance concerns akin to those of joint ventures in that the board is heavily comprised of BHP and Vale representatives and the structure lacks adequate accountability for ESG issues. The Renova Foundation was established with the express aim of providing communities affected by the Samarco dam collapse with appropriate compensation, reparations, and resettlement arrangements. Over six years on from the dam collapse, the community members with whom LAPFF has spoken have complained about the fact that insufficient reparations have been made, particularly in relation to housing, and those that have been made were paid without adequate consultation and decision-making capacity from affected communities.

This lack of communication is highlighted by a LAPFF exercise to establish the number of houses that still need to be re-built after the Samarco dam collapse. The community number has stayed constant at 579, while the number provided by the companies and the Renova Foundation continues to fluctuate. BHP and Vale state that the reason for the fluctuation in the number of houses is due to the entry of new family cores, migration between modalities or divergence of attendance with the necessary corrections after analysis of family rights. The companies and communities do agree, though, that only 47 houses out of 255 have been built in one affected community over six years after the dam collapse.<sup>128</sup>

These community members are now calling for the Renova Foundation to be disbanded and for a new entity to be established to administer compensation and reparations in a way that incorporates communities in decision-making. Yet BHP continues to state that Renova is responsible for reparations.<sup>129</sup> This issue is currently subject to litigation regarding whether the Renova Foundation should be disbanded.

LAPFF has had a similar experience engaging with BHP in relation to the company's joint venture

<sup>120</sup> According to BHP, 'One of the conditions for licensing, and from the shareholders for Samarco's restart was that it had the support of the community. A requirement from the Brazilian authorities for the granting of Samarco's licence was through community consultation. Several public hearings took place through this process to assess the level of community support for the restart of operations. The restart of operations was authorized by the public authorities (regulators) following all necessary procedures, including several public hearings.'

<sup>121</sup> See <https://lapfforum.org/engagements/housing-update-samarco-tailings-dam-collapse-reparations/>. BHP, Vale, and Renova Foundation report another six houses built in rural areas of Mariana and Barra Longa and eight in the 'familiar resettlements'.

<sup>122</sup> See <https://www.reuters.com/business/energy/london-judges-re-open-69-bln-brazil-dam-lawsuit-against-bhp-2021-07-27/>.

<sup>123</sup> See [https://static.bbg.gov/doc/Vale\\_Consolidated%20Amended%20Class%20Action%20Complaint.pdf](https://static.bbg.gov/doc/Vale_Consolidated%20Amended%20Class%20Action%20Complaint.pdf) According to BHP, 'This paragraph refers to allegations made in the US litigation. BHP rejected those allegations, none of which have been substantiated.'

<sup>124</sup> See <https://www.reuters.com/article/us-vale-samarco-bankruptcy-idUSKCN2DR2G0>. According to BHP, 'The case in relation to Samarco's bonds was dismissed by the courts in March 2021 and the other case was settled without any admission of liability.'

<sup>125</sup> Affected community members have reported to LAPFF that BHP and Vale are facing fines of Reais one million a day for each day complete reparations for the Samarco disaster are not made.

<sup>126</sup> *Banco Safra v. Samarco*, p. 11, para. 11.

<sup>127</sup> See <https://www.fundacaorenova.org/en/the-foundation/>.

<sup>128</sup> See <https://lapfforum.org/engagements/housing-update-samarco-tailings-dam-collapse-reparations/>.

<sup>129</sup> BHP states that, 'communities have generally expressed support for Renova's improved payment of indemnities and for the implementation of the Novel system...'

with Rio Tinto, Resolution Copper. Resolution Copper is facing opposition from a local Native American tribe, the San Carlos Apache, who claim that the mine will destroy a cultural site deemed sacred by their tribe and others.<sup>130</sup>

This claim comes alongside Rio Tinto's destruction of culturally significant rock shelters at Juukan Gorge in Western Australia, a failure for which Rio Tinto will pay for the foreseeable future in reputational, operational, legal, and financial terms (discussed below). Yet BHP's response was hands off, as the company deferred to Rio Tinto (the operating partner) and Resolution Copper for any ESG-related questions about the project. However, there are signs that BHP is starting to take a more active role in this project. The company has stated that it has sought to engage with the affected Arizona Tribes as part of its due diligence process, as stated by Chair Ken MacKenzie at the 2021 BHP AGM and reiterated by CEO Mike Henry to LAPFF.<sup>131</sup>

There was a suggestion in one meeting with a BHP representative that the Resolution Copper model of joint venture would be one more commonly used, in part as it was likely to yield more positive ESG outcomes. However, LAPFF sees no evidence of that outcome to date. The suggestion seems to be that if BHP partners with credible multinationals, ESG governance of joint ventures will be suitable. However, it is difficult to reconcile this conclusion with Rio Tinto's behaviour at Juukan Gorge. This approach also comes despite the fact that Rio Tinto continues to face considerable criticism for its ESG and community engagement practices globally (as seen below).

Therefore, LAPFF has significant concerns that BHP does not adequately recognise the risks or take appropriate accountability for the ESG impacts at its non-operated joint venture projects and that this failure is creating not only adverse human rights impacts, but also investment risks for LAPFF members and other investors. Instead, it appears that BHP is primarily concerned about limiting its own liability and avoiding appropriate responsibility for its human rights impacts (and ESG impacts more broadly) to third parties, even when paying reparations.

In respect of the UNGPs, LAPFF's view is that BHP has not done enough to support its policy of ensuring that board-level, or even company decision-makers in the context of joint ventures, are considering input from communities affected by the company's operations. Because of BHP's general hands-off approach to joint ventures, the company appears to be missing significant actual and potential human rights impacts that in turn have a severe impact on the company's performance and reputation.

It is also not clear, therefore, that BHP integrates community input sufficiently into how it structures

its joint venture governance or governance for the BHP Group. This view is compounded by the concern that some decision-makers at the company are not very familiar with the international human rights law standard of free, prior and informed consent (FPIC).

Consequently, LAPFF is concerned that BHP has severe blind spots, such as those that led to the collapse of the Samarco tailings dam.

LAPFF does not see that BHP's new approach to joint ventures will give the company sight of such actual and potential human rights risks and impacts given that it continues to take a generally hands-off approach to joint ventures.

It appears, therefore, that BHP either cannot or will not integrate or act on findings from any human rights impact assessments associated with joint ventures in any meaningful way.

While BHP staff within the NOJV asset do appear to engage with some community members and to track community sentiment regarding the company to some extent, it is not clear that they speak to all relevant affected stakeholders. Affected community members with whom LAPFF has engaged note that the Renova Foundation, which is a partnership between various Brazilian governments, BHP, and Vale, has a particularly opaque governance structure that effectively appears to exclude affected communities from decision-making around compensation, reparations, and resettlement.

To the extent there is community engagement, it is not clear how this feedback is tracked and integrated into BHP's decision-making procedures. For example, LAPFF spoke to affected community members who noted they reported their concerns about the Samarco dam to Samarco, the operating partner to BHP and Vale, but the companies allegedly did nothing. Consequently, because BHP does not appear to accept appropriate responsibility for human rights impacts in their NOJV projects and does not appear to act appropriately on community input, company reporting is necessarily lacking.

An area of great concern given BHP's approach to joint ventures is the lack of responsibility and accountability for human rights impacts through these governance structures. BHP's generally hands-off approach to joint ventures directly contradicts the call in the UNGPs for companies to use leverage in respect of adverse human rights impacts to which they contribute or are directly linked (such as through a joint venture) in order to influence a better human rights outcome.<sup>132</sup>

According to the commentary to UNGP 19, companies should use the leverage which they have and "there may be ways... to increase..." the leverage which they are currently not using in respect of adverse human rights impacts to which they contribute or are linked. It is LAPFF's view that BHP, as

<sup>130</sup> See <https://www.reuters.com/world/us/us-house-committee-moves-block-rio-tintos-resolution-mine-2021-09-10/>.

<sup>131</sup> BHP has noted that, "We have also stated that our funding decisions in relation to Resolution Copper will be contingent upon the project satisfying commercial considerations and alignment with our values, policies and practices concerning the rights of Indigenous peoples. We have also stated that we recognize that the Resolution Copper project area has cultural significance for Native American Tribes, and their members."

<sup>132</sup> BHP has noted that, "We have also stated that our funding decisions in relation to Resolution Copper will be contingent upon the project satisfying commercial considerations and alignment with our values, policies and practices concerning the rights of Indigenous peoples. We have also stated that we recognize that the Resolution Copper project area has cultural significance for Native American Tribes, and their members."

a non-operating joint venture partner, could substantially increase its leverage within joint ventures to prevent, mitigate, and remediate negative human rights impacts associated with these projects. While there are recent signs that BHP is seeking to increase its leverage in its non-operated joint ventures, in many instances, adverse human rights impacts to which BHP contributes or to which the company is linked appear to continue to go unacknowledged and therefore unremediated.

## Glencore

LAPFF has been engaging with Glencore on human rights over the last couple of years, primarily in relation to effective stakeholder engagement and also recently on the company's new climate change plan. LAPFF engagement has also sought to have Glencore commission an independent assessment of the company's internal controls, a request that stemmed from a collaborative engagement spearheaded by Sarasin Partners.

Glencore only went public in 2011 and seems to acknowledge that it has taken time to develop a public company culture, including transparency. It was the last FTSE 100 company to have no women on the board, a position it rectified in 2014 when it appointed Patrice Merrin as a board member.<sup>133</sup> This transformation continues with a recent overhaul of the board, including a new CEO – Gary Nagle<sup>134</sup> - to replace longstanding CEO, Ivan Glasenberg, and an announcement that Tony Hayward, the longstanding Chair, has been replaced by Kalidas Madhavpeddi, a member of Glencore's board since February 2020.<sup>135</sup>

There are also now three women on the board, including the former Anglo American CEO, Cynthia Carrol, and a former South African anti-apartheid activist, Gill Marcus.<sup>136</sup> That said, there is the sense based on LAPFF engagement that Glencore is still a very traditional mining company culturally with a traditional mindset in relation to business and human rights; namely, business interests appear to trump human rights interests.

Glencore has had challenges in relation to bribery and corruption allegations.<sup>137</sup> These allegations have created significant reputational and operational risks for Glencore, particularly in relation to the Democratic Republic of Congo (DRC). However, in

LAPFFs discussions with the company, it is concerning that the main decision-makers do not perceive human rights to be compliance consideration, even though it is well-known that anti-bribery and corruption are closely associated with human rights abuses. This relationship is a particular concern for Glencore in terms of legal risk as it is facing high profile bribery and corruption charges in relation to its operations in Katanga in the DRC.

In addition to facing litigation on bribery and corruption in relation to DRC, Glencore is facing a couple of OECD complaints in relation to its Badila operations in Chad<sup>138</sup> and Cerrejón in Colombia (see above with Anglo American and BHP). The company has also faced allegations of adverse human rights and environmental impacts in relation to its operations in Katanga.<sup>139</sup> Additionally it faces allegations of severe human rights abuse in relation to artisanal mining at its Kamoto Copper operations in Democratic of Congo.<sup>140</sup>

With Badila, Glencore is accused of spillage into a local river from Glencore's operations. The company has said there has been little spillage and it has caused no environmental damage, but this assertion has been challenged by local communities affected by the spillage, as set out in some detail in the OECD complaint. A recent allegation of a similar nature has been lodged against Glencore in Peru where Glencore's mine in Espinar is alleged to be releasing toxic discharge into drinking water and adversely affecting the health of local communities.<sup>141</sup> Glencore has accepted that there has been discharge but the company's view is that the water is naturally undrinkable.

The company has now also become full owner of the Cerrejón thermal coal mine in Colombia; this had been a joint venture between Anglo American, BHP, and Glencore.<sup>142</sup> This mine has historically created operational and reputational risks for the three joint shareholders, so Glencore is likely to retain full attribution for these risks as it claims full ownership of the mine. There are also climate change considerations in relation to Cerrejón, which is a thermal coal mine.

From a financial risk perspective, there are concerns about Cerrejón becoming a stranded asset if governments move more quickly than anticipated to regulate on carbon emissions. Additionally, apart

<sup>133</sup> See <https://www.theguardian.com/business/2014/jun/26/glencore-male-board-patrice-merrin-woman>.

<sup>134</sup> See <https://www.reuters.com/business/energy/glencore-enters-new-era-under-gary-nagles-stewardship-2021-07-01/>.

<sup>135</sup> See <https://www.proactiveinvestors.co.uk/companies/news/954075/all-change-at-the-top-at-glencore-as-ex-bp-man-hayward-retires-954075.html>.

<sup>136</sup> See <https://www.glencore.com/who-we-are/our-leadership>.

<sup>137</sup> Swiss prosecutors launch Glencore criminal probe over Congo, Serious Fraud Office investigates Glencore over suspected bribery (UK), Glencore hit by yet another investigation (US), Glencore's growing legal troubles with Katanga mining (Canada).

<sup>138</sup> See <https://www.raid-uk.org/sites/default/files/glencore-report-June2014.pdf>.

<sup>139</sup> See <https://www.oecdwatch.org/complaint/raid-et-al-vs-glencore-uk/>.

<sup>140</sup> See Calls for sustainable mining after 43 artisanal miners killed in DRC landslide | IndustriALL (industrialunion.org)

<sup>141</sup> See <https://terra-justa.org/resource/transnational-mining-in-espinar-structural-problems-and-the-presence-of-glencore/>.

<sup>142</sup> See <https://im-mining.com/2021/06/28/anglo-set-complete-thermal-coal-exit-glencore-cerrejon-transaction/>.

from the fact that Gary Nagle, the new CEO, has the same nationality and professional training as the former CEO, Ivan Glasenberg, and lacks experience in the trading side of Glencore's business, LAPFF has some concerns about Mr. Nagle's move from head of Glencore's coal business to CEO. As has been pointed out by the company, this experience places Mr. Nagle in a good position to wind down the coal business. However, although Glencore has suggested it will undertake such a wind down with Cerrejón, it remains to be seen when and how this is done.

The situation is particularly precarious at Cerrejón given the labour and community concerns about the project. This confluence of climate and social concerns at Cerrejón raise questions about how the project can be managed and wound down in line with the principles of a fair and just transition, or the idea that negative impacts on workers, communities, consumers, and other social groups must be considered and avoided or mitigated alongside climate impacts in transitioning to a zero-carbon economy. Based on conversations with Glencore representatives, it does not appear that decision-makers at the company are overly familiar with the idea of a fair and just transition, despite its statement in its Climate Report 2021<sup>143</sup> that it supports a just transition.

In terms of a UNGP human rights due diligence analysis, LAPFF has a number of concerns in relation to Glencore.

It appears that Glencore decision-makers do not have the expertise or inclination to embed human rights or ESG issues into corporate culture, corporate policy, and strategy. This culture and strategic outlook might change with the new Chair and CEO; LAPFF will monitor developments in this regard.<sup>144</sup>

The current blind spot regarding human rights and ESG issues more broadly raises concerns that Glencore is not able to assess or identify actual or potential human rights impacts it has on third parties that could then affect its business performance, and consequently investor returns. This concern was heightened in a recent conversation with the former Chair about whether the human rights and environmental issues raised in relation to Badila and Cerrejón should be within the scope of the company's compliance activities. It appeared that Glencore did not believe they should be. LAPFF believes they should be.

Because there appears to be a lack of culture and strategic thinking around human rights and ESG, this raises concerns about a lack of adequate identification and assessment of company human rights risks and impacts, and so it follows that LAPFF has concerns about Glencore's ability to integrate material human rights factors into the company's decision-making and operations. Consequently, if Glencore tracks any of its human rights impacts and responses, these are likely to be incomplete, as it is unlikely that the company tracks all material impacts

and responses.

LAPFF's conversations with company representatives, the divergent opinions of Glencore and affected community members in the OECD complaints, and a lack of coverage of the company's human rights risks and impacts in its reporting suggest that Glencore has some work to do in communicating its human rights performance publicly. Furthermore, the OECD complaints, the bribery and corruption cases, and the associated human rights and environmental concerns suggest that Glencore's accountability for and remediation of all of these issues needs to be improved.

## Rio Tinto

LAPFF began engaging extensively with Rio Tinto after the company destroyed a 46,000-year-old culturally significant rock shelters at Juukan Gorge in Western Australia.<sup>145</sup> LAPFF tried to obtain one on one meetings with the Rio Tinto Chair on Juukan Gorge three times between August and December 2020 but was unable to do so until January 2021. At the same time, the Chair agreed to meet with investors consistently – including LAPFF – on climate change. Consequently, LAPFF issued a number of press releases between June and December 2020 to pressure the company into taking its actions seriously and into implementing proportionate remedies.

LAPFF also spoke to Australian Indigenous leaders and Australian investors to obtain their views on Rio Tinto's conduct. The overwhelming view from both affected communities and investors was that the Rio Tinto CEO was responsible for cultural failings at the company that had led to destruction at Juukan Gorge. Therefore, from a corporate governance perspective, replacing the CEO appeared to be the first priority of Rio Tinto's stakeholders.

The company appeared to be reluctant to take this measure and appeared to downplay both the destruction of the caves and the role of the CEO in their destruction. After both an internal inquiry at Rio Tinto into the incident and an Australian parliamentary inquiry,<sup>146</sup> the company eventually began to capitulate. To begin with, it reduced the variable pay for the CEO and the two other senior executives deemed to have responsibility for the destruction. However, both affected communities and many investor parties were clear with Rio Tinto that this response was not sufficient.

Therefore, in September 2020, it was announced that the CEO and the other two executives would be leaving the company. Both the timeframes and terms of departure were deemed too lenient by many external stakeholders. Over the course of events, investors – including LAPFF – also raised significant doubts about the competence of Rio Tinto's Chair to lead the necessary cultural change at the company. At the end of December 2020, Rio Tinto's Chair took accountability for the destruction of the rock shelters

<sup>143</sup> See <https://www.glencore.com/dam/jcr:ad341247-c81e-45b4-899d-a7f32a9d69a0/2021-Climat-Change-Report-.pdf>, p. 23.

<sup>144</sup> See also Rights Groups Say Glencore's Sustainability Report Lacks Credibility | Raid ([raid-uk.org](http://raid-uk.org)).

<sup>145</sup> See <https://www.theguardian.com/australia-news/2021/oct/19/failures-at-every-level-changes-needed-to-stop-destruction-of-aboriginal-heritage-after-juukan-gorge>.

<sup>146</sup> See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Northern\\_Australia/CavesatJuukanGorge/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Report).

at Juukan Gorge and pledged to step down.

Since the new Rio Tinto CEO took office in January 2021, there are initial signs of positive cultural change within the organisation based on conversations with affected communities and investors, as well as the new CEO himself and other staff within the organisation. However, it is as yet unclear whether these changes are translating into more positive human rights outcomes. This finding is corroborated in a recent investigation into Rio Tinto's workplace culture, a report that LAPFF welcomes, and LAPFF applauds Rio Tinto for its transparency in commissioning and releasing the report publicly.<sup>147</sup> There is also a recent Australian government discussion paper about the cultural heritage of Aboriginal and Torres Strait Islanders circulated by Rio Tinto to stakeholders that calls for a commitment to truth-telling and notes the power imbalance between companies and many affected communities.<sup>148</sup>

Additionally, LAPFF has heard from San Carlos Apache community representatives in Arizona in the US about concerns regarding a Rio Tinto – BHP joint venture, Resolution Copper,<sup>149</sup> and the companies' alleged failure to engage meaningfully with its community in relation to this project. LAPFF has recently received communication from Rio Tinto that indicates that at least some San Carlos Apache community members support Resolution Copper, including many who work for the company. For those community members who do not support the project, there are concerns that the companies are not acting on the principle of free, prior and informed consent (FPIC) in gaining stakeholder support to move forward with the project.

Based on LAPFF's engagement with affected community representatives, this problem with FPIC is two-fold. First, although the company has reached out to various affected local tribes, there is a suggestion that company communications are not always conducive to building trust with the affected communities. Therefore, some tribes choose to engage with the US government to press for corporate regulation rather than engage with the company in relation to the project.

LAPFF has also heard from a Hopi member and Mayor of Superior, Arizona who support the Resolution Copper project,<sup>150</sup> with the mayor pointing to an improved approach to community relations by Rio

Tinto as of January 2021. However, the Hopi member was an employee of a Rio Tinto contractor, and it appears that the current administration of Superior perceives that the town has few economic development opportunities outside of Resolution Copper, so there is a possibility that both stakeholders are in positions where they might not feel free to express the full extent of concerns they might have about the project. Furthermore, while Rio Tinto has suggested that all tribes but the San Carlos Apache support Resolution Copper, a community representative with whom LAPFF has been in contact states that none of the tribes officially support the project. He provided a letter from the Hopi Chair and 15 other tribal leaders to this effect<sup>151</sup>. There is also a recent newspaper report from Arizona that suggests 74 percent of likely Arizona voters do not support the mining project.<sup>152</sup> This number contrasts with a similar survey conducted by Rio Tinto which suggests 56 percent support for the mine.<sup>153</sup>

There are additional concerns about the impact of Resolution Copper on water resources in the region, with an NGO report pointing to the fact that the project partners failed to identify a subterranean river system at the proposed mining site.<sup>154</sup> The San Carlos Apache Tribe has also commissioned a study that has suggested that Resolution Copper will have severe impacts on water quality and availability in the surrounding areas.<sup>155</sup> Furthermore, there is community concern that the block cave mining approach proposed has failed in Mongolia and will destroy a cultural heritage site of the San Carlos Apache<sup>156</sup>; these concerns evoke the destruction of the caves at Juukan Gorge. There are also concerns of excessive reliance on a new technology at the expense of effective stakeholder engagement. Again, there are initial signs that new management within Rio Tinto responsible for this project is an improvement on past management, but LAPFF is continuing to monitor actual human rights impacts associated with the project.

Furthermore, there are concerns that Rio Tinto's shortcomings on engagement with affected communities extend globally. It is hoped that recent changes to the company's Communities and Social Performance function will improve its global reach on community issues, but it remains to be seen whether this will be the case. For example, LAPFF has been approached

<sup>147</sup> Elizabeth Broderick & Co. 'Report into Workplace Culture at Rio Tinto.' February 2022.

<sup>148</sup> First Nations Heritage Project Alliance and Australian Government Department of Agriculture, Water, and Environment. Modernisation of Aboriginal and Torres Strait Islander cultural heritage protections. made available 15 March 2022 at: Discussion Paper - Modernisation of Aboriginal and Torres Strait Islander cultural heritage protections (awe.gov.au).

<sup>149</sup> See <https://fronterasdesk.org/content/1737887/apache-elders-urge-sen-mark-kelly-stop-oak-flat-copper-mine>.

<sup>150</sup> When LAPFF spoke to the mayor of Superior, she suggested that the town is heavily dependent on mining. However, affected community representatives have suggested that Superior does have other economic development opportunities that have been ignored after being persuaded to do so by Rio Tinto.

<sup>151</sup> LAPFF is in receipt of statements, either in the form of letters or tribal resolutions, from 16 Arizona tribes and signed by the tribal leaders, predominantly tribals chairs and presidents, that recognise Oak Flat as sacred land and call for preventing its destruction through support for the Save Oak Flat Act, among other requests. On this basis, these letters and resolutions oppose the land exchange necessary to undertake the Resolution Copper project.

<sup>152</sup> See <https://eu.azcentral.com/story/news/local/arizona/2021/10/10/oak-flat-mines-opposition-water-consumption/6012369001/>.

<sup>153</sup> Ibid.

<sup>154</sup> See [http://azminingreform.org/wp-content/uploads/2018/10/Arizona\\_Mining\\_Reform\\_Coalition\\_Report.pdf](http://azminingreform.org/wp-content/uploads/2018/10/Arizona_Mining_Reform_Coalition_Report.pdf).

<sup>155</sup> See [https://s3.documentcloud.org/documents/21079388/2021\\_09\\_10\\_jwells\\_2021\\_hydro\\_report\\_draft.pdf](https://s3.documentcloud.org/documents/21079388/2021_09_10_jwells_2021_hydro_report_draft.pdf).

<sup>156</sup> See <https://eu.azcentral.com/story/news/local/arizona/2021/10/10/oak-flat-mines-opposition-water-consumption/6012369001/> and this concern was raised through meetings with community representatives.

by an organisation concerned about the toxicity of Rio Tinto's mine tailings in a local lake at the company's QMM mine in Madagascar. LAPFF also heard from communities in Mongolia and Papua New Guinea about the company's failure to engage with them in relation to mining projects. Rio Tinto has now agreed to an independent assessment of damage caused at its legacy asset in Bougainville,<sup>157</sup> and affected community members and representatives are keen to ensure that the company acts on the findings of the assessment.

This development followed an OECD complaint<sup>158</sup> filed in 2020 by affected community members in Papua New Guinea. Mining agreements from 1971 and 1987 stipulate that mining activities at Panguna had to be undertaken with a view to re-use and rehabilitate the land, but a Human Rights Law Centre report suggests that '...the company was doing little to plan for eventual closure and rehabilitation of the mine site, despite its obligations.'<sup>159</sup>

Rio Tinto also had to cease operations at its project in Richard's Bay, South Africa, due to tensions with surrounding communities that have led to violence against staff members at the site.<sup>160</sup> Understanding the challenging political climate in the area, LAPFF wonders about the effectiveness of the project management's approach to community engagement.

Finally, LAPFF heard from community members in Mongolia affected by Rio Tinto's Oyu Tolgoi mine. There are numerous factors threatening the mine's viability, but based on the community testimonials, failure to engage properly with affected communities is one of these factors.

In this context, LAPFF has a number of human rights concerns in relation to Rio Tinto based on its engagement with the company, other investors, and affected communities.

Notwithstanding Rio Tinto's policies and procedures on human rights, the board and senior management to date have not been seen to be sufficiently involved in and have not had sufficient oversight of human rights policy development, including policies related to engagement with affected stakeholders.

The board and senior management do not appear to have the necessary expertise to identify, assess, and implement measures to respect, track, remediate, or report on Rio Tinto's human rights impacts. There are particular concerns about how Rio Tinto approaches both environmental and human rights impact assessments.

While Rio Tinto has taken a number of steps to rectify the failings it has admitted to in its community and social programme, based on conversations with investor groups and community representatives, there are mixed messages about whether the company culture is shifting sufficiently to prevent another major human rights failing, although with the new

CEO in post for just over a year it might be too soon to tell. The company has helpfully put LAPFF in touch with community members who support Resolution Copper, for example, but the company does not appear to be engaging meaningfully with dissenting voices, notwithstanding some efforts to do so.

Therefore, while there are some promising signs of progress at Rio Tinto, some points of concern remain, especially in respect of Rio Tinto's human rights due diligence process.

Despite stated identification and management of outbound risks (i.e., to communities from company actions), in terms of impact to third parties, LAPFF's conversations with senior company representatives suggest that the company appears to assess primarily risks to the business in assessing its human rights impacts rather than assessing the company's impacts on affected communities and human rights more broadly in order to determine the business risks. This approach is not in line with the human rights due diligence process set out in the UNGPs and often leads not only to poor human rights outcomes but also to missed risks to the business.

These approaches appear to have led to deficiencies cited by affected communities in relation to Rio Tinto's self-assessment of its failings at Juukan Gorge. For example, the Australian Parliamentary inquiry outcomes in relation to Juukan Gorge were much more robust than Rio Tinto's and indicated a wider and more systemic assessment of the company's human rights failures than the company's internal assessment.

There were also significant omissions in the company's account of what happened that surfaced later in the Parliamentary inquiry, such as the level of knowledge the CEO had about the incident, and the framing of the company's reporting was very much, in LAPFF's view, to protect certain individuals who turned out to be culpable. However, there is some hope that Rio Tinto is now taking a more objective approach to human rights impact assessment, with the independent assessment of the Panguna mine in Papua New Guinea as an example. It is also hoped this more independent approach to assessment will rectify the lack of transparency Rio Tinto demonstrated in its reporting on Juukan Gorge and Resolution Copper. In relation to Panguna and Oyu Tolgoi, there is nothing in Rio Tinto's annual report about the views of affected individuals and community members regarding Rio Tinto's projects and operations at those sites.

The assessment and reporting deficiencies highlight a major problem pertaining to accountability for the Juukan Gorge and other adverse human rights impacts. Based on LAPFF's interaction with Rio Tinto, investors, and affected community members, it appeared that there were repeated attempts to

<sup>157</sup> See <https://www.theguardian.com/world/2020/apr/01/rio-tinto-accused-of-violating-human-rights-in-bougainville-for-not-cleaning-up-panguna-mine>.

<sup>158</sup> See <https://www.oecdwatch.org/complaint/human-rights-law-centre-vs-rio-tinto/>.

<sup>159</sup> See <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5e7d7c7f816da86005f/1585282297310/AfterTheMineRioTintoDeadlyLegacy.pdf> (p. 50).

<sup>160</sup> See <https://www.mining-journal.com/bulks/news/1414348/rio-tinto-to-shut-furnace-at-richards-bay>.

downplay the company's culpability for the Juukan Gorge incident and to deflect accountability from the relevant parties.

At times, it even appeared that Rio Tinto was trying to place blame on the affected communities. In relation to Juukan Gorge, LAPFF heard early on from the company that affected community members had not conveyed to the company a desire that Juukan Gorge not be used for mining purposes, apparently a change in their original position.

In relation to Resolution Copper, it also appeared that both Rio Tinto and Resolution Copper representatives were trying to undermine the Apache claim to land that is subject to a land swap, in order to bolster the company's position. This approach is not in line with what LAPFF understands to be free, prior and informed consent, nor is it honest and open communication with affected community members and investors.

This lack of communication with affected stakeholders meant that Rio Tinto was not only failing to identify and assess its actual and potential human rights impacts and failing to act on any findings, but the company was clearly not tracking responses from affected stakeholders, and it then fudged its failed response in communications to other stakeholders. This string of failures suggests an unwillingness to take accountability for the company's adverse human rights impacts.

To the extent the company did accept accountability for the destruction of the rock shelters at Juukan Gorge, the company took only limited measures by reducing the pay of the three senior executives in question, which was deemed by LAPFF and some other investors to be a woefully inadequate and disproportionate response. It took concerted community and investor pressure for the company to accept a more proportionate level of accountability.

The lack of accountability appears to have led to a lack of remediation to date. It was only through consistent and collective pressure from affected communities and a wide range of investors that Rio Tinto eventually capitulated and took remediation measures more commensurate with its impacts. In sum, LAPFF continues to be concerned that the appropriate governance and accountability structures are lacking within the company, notwithstanding the measures that have been taken and are being taken to rectify the problems. This concern is corroborated in the recent workplace culture report on Rio Tinto.<sup>161</sup> LAPFF is concerned about the implications of this lack of accountability in terms of Rio Tinto's global operations, not just Juukan Gorge and Australia.

## Vale

LAPFF first began to engage with Vale on human rights after the Brumadinho tailings dam collapse in Brazil on 25 January 2019.<sup>162</sup> There have subsequently been four board level meetings between the LAPFF

Chair and members of the Vale board. The first meeting was with the former Chair of Vale, who was also CEO of Previ, one of Vale's largest investors. LAPFF then met twice with a now former independent board member who specialises in corporate governance.

Most recently, LAPFF has met with the new Chair, who was CEO of Samarco a number of years before the Samarco tailings dam collapse. His appointment came after criticism from LAPFF and other investors that the Vale board needed to demonstrate a more credible governance structure and composition.

LAPFF has also attended a number of Vale webinars on the company's plans to ensure tailings dam safety and ramp up its risk assessment and management programme. The company has had significant reputational damage over the last few years for the devastating collapses of two tailings dams in Brazil: the Samarco dam which it co-owns through a joint venture with BHP, and the Córrego de Feijão dam in Brumadinho which is wholly owned by Vale.

The first dam collapse – known as the Samarco collapse – took place in Mariana, Brazil in November 2015, killing 19 people and leaving untold social and environmental devastation. Although the death toll was not high compared with the 272 deaths caused by the Brumadinho collapse, community representatives report that the mud slide caused by the dam continues to create social and environmental problems for at least 44 communities along the Doce river basin in two different Brazilian states, Minas Gerais and Espírito Santo. These impacts include water contamination, loss of housing, loss of infrastructure, loss of community, forced resettlement, psychological trauma, and various other social ills stemming from these immediate social impacts.

LAPFF has also heard from affected community members in relevant communities that Vale stopped providing community support in October 2020 and has revoked temporary housing for these affected community members. According to community members with whom LAPFF has spoken about the Samarco tailings dam collapse, Renova stopped providing emergency financial assistance to the communities of the Doce river basin in October 2020. Community members with whom LAPFF has spoken are also concerned that Vale has been cutting the treatment of animals of small farmers who are still unable to resume production.

LAPFF has been engaging with affected community members for nearly three years now to understand their perspective on the collapse and the companies' responses. Not only have there been severe reputational consequences to Vale's failings, but there have been significant operational consequences too.

Vale states that an audit was carried out in July 2015, to comply with federal legislation 12.334 / 2010, Ordinance 416/2012 of the National Department of Mineral Production (DNPM) and state legislation DN

<sup>161</sup> Elizabeth Broderick & Co. 'Report into Workplace Culture at Rio Tinto.' February 2022.

<sup>162</sup> See <https://www.bbc.co.uk/news/world-latin-america-51220373>.

87/2005 of the Environmental Policy Council (Copam) and showed that the Fundão dam was stable. The company also states that an independent study pointed to a combination of several factors that led to the failure. However, in LAPFF's first meeting with affected community members, the community members noted that they had warned Samarco about concerns they had with the dam prior to the Samarco collapse, but that Samarco, BHP, and Vale had not acted on their warnings.

This allegation was also made by another party in the securities litigation filed with the New York courts, with one contractor suggesting that it would have cost only \$1.5 million to fix the dam's problems and prevent the collapse. It then would have prevented Samarco's shut down until December 2020. The concern is also raised in a criminal complaint through testimony from the dam designer, who noted structural concerns with the dam in 2014, over a year before the dam collapsed.<sup>163</sup> He noted substantial cracking that was of concern.<sup>164</sup> While LAPFF cannot verify this, had BHP and Vale put in place appropriate consultation and reporting processes, as is expected under the UNGPs - to which both companies are publicly committed - in LAPFF's view, they would have been in a good position to prevent the collapse.

There has clearly been severe legal risk created, with both Vale and BHP staff being subject to criminal litigation<sup>165</sup> – including a murder charge against the former Vale CEO<sup>166</sup> – and mounting fines and penalties associated both with the dam collapses and the companies' failure to make timely and adequate reparations. This legal risk has created contingent financial risk.

Brazilian prosecutors have suggested reopening a \$27 billion lawsuit against both companies for failing to carry out adequate and timely reparations and compensation stemming from the Samarco dam collapse.<sup>167</sup> Furthermore, LAPFF has been concerned during investor meetings with the company that Vale often does not mention the Samarco collapse, despite the fact that so few reparations have been made, particularly in relation to housing. Instead, the company tends to emphasise its view that the compensation and reparations in Brumadinho are going well and should be emulated with Samarco, despite the very different natures of the impacts from the two disasters.<sup>168</sup> However, LAPFF's conversations with community members affected by the Brumadinho collapse suggest that the compensation and reparations that have been determined are woefully inadequate.

Part of the problem appears to be that the affected community members do not feel as though they have been adequately consulted in the

reparations process, or that their views have been integrated into the process. Furthermore, they have pointed out that it is impossible to compensate for lives lost.

It is important to note in relation to both the Mariana and Brumadinho collapses that even though the compensation is a core issue, from a human rights perspective it is also critical to put in place meaningful and effective human rights due diligence to prevent potential and future adverse human rights impacts, so there is effective learning (tracking) for all future projects. According to the affected community members with whom LAPFF has spoken, the dams still at risk have led to the evacuation of many communities, such as Macacos/Nova Lima, Barão de Cocais, Antônio Pereira and many others. The community of Macacos has also reportedly been suffering because of the emergency work done by Vale on the dam. Specifically, the community representative with whom LAPFF spoke reported that a big wall was built that, according to the company, would divert the mud slide in case of a dam burst. However, now in the rainy season the wall acts more like a hydroelectric dam, which has caused the community to flood and makes access to exit routes completely impossible. If the dam were to break in this scenario, the families would have no way out of their community. This again raises concerns that technical solutions are trumping effective community engagement at times.

Generally, meetings with Vale include an overview of the processes the company has established to ensure the safety of its tailings dam stock but fail to address the company's human rights impacts. The presentations at these meetings have not covered engagement with affected communities. In fact, during one meeting, when LAPFF raised a question about engaging with affected communities, not only did the company representatives not answer the question, but they tried to shut down this aspect of the conversation altogether.

Although Vale states that as a company it does not blame the lack of progress on reparations on the affected community members, in some meetings, some Vale representatives have tried to blame the lack of progress on reparations on the community members, stating that community members keep changing their minds about what they want and make unreasonable demands for small details that are not feasible. Conversely, affected community members claim that the reparations process has taken so long and has been so uninclusive that their needs have changed over time and that they are being bullied into compensation, resettlements, and housing options they do not want.

A number of community members have also reported severe negative impacts on their ability to

<sup>163</sup> Ministério público federal, procuradoria da república nos estados de minas gerais e espírito santo – força tarefa rio doce, p. 88.

<sup>164</sup> Ministério público federal, procuradoria da república nos estados de minas gerais e espírito santo – força tarefa rio doce, p. 130, 135.

<sup>165</sup> See <https://www.theguardian.com/business/2016/oct/20/bhp-billiton-employees-face-charges-on-brazil-dam-disaster>.

<sup>166</sup> See <https://www.reuters.com/article/us-vale-disaster-investigation-analysis-idUSKBN1Z0ZCM>.

<sup>167</sup> See <https://www.reuters.com/article/us-brazil-mining-lawsuit-idUSKBN26M719>.

<sup>168</sup> In Mariana, although 19 people died, the wider impact was environmental. In Brumadinho, 272 lives were lost, and although there are continued environmental impact, the primary impact appears to be the loss of human life.

maintain livelihoods, such as dairy farming, and severe impacts on their water resources. Vale states that the Doce River has returned to its pre-collapse levels and that its water can now be consumed. The company also points to the Renova Foundation's community engagement activities in response to the Samarco collapse. However, the affected community members with whom LAPFF has spoken have expressed that they believe Vale has not taken necessary steps to rectify their situations and that their concerns are not being heard or addressed. In short, there does not appear to be any constructive communication between the company and the affected community members with which LAPFF has engaged.

This lack of communication is highlighted by a LAPFF exercise to establish the number of houses that still need to be re-built after the Samarco dam collapse. The community number has stayed constant at 579, while the number provided by the companies and the Renova Foundation continues to fluctuate. BHP and Vale state that the reason for the fluctuation in the number of houses is due to the entry of new family cores, migration between modalities or divergence of attendance with the necessary corrections after analysis of family rights. The companies and communities do agree, though, that only 47 houses out of 255 have been built in one affected community over six years after the dam collapse.<sup>169</sup>

The companies and Renova state that the change in housing numbers reflects the fact that a large number of affected community members have taken advantage of alternative housing and resettlement options, and increases in other reparations and compensation reflect the fact that a large number of affected community members have taken advantage of a new simplified indemnification programme that administers 'rough justice' for people who are struggling to make formal claims. Vale has stated that the simplified, and flexible indemnity system allowed the inclusion of thousands of people affected who were unable to prove their damage and caused an acceleration in the payment of indemnities throughout the affected territory. However, a number of community members with whom LAPFF has spoken have expressed the view that the compensation and reparations involved in this new programme come nowhere near to the levels of compensation and reparations needed by the community members.

Community members from rural communities also state that rural community members have been marginalised from the reparations process to an even larger extent than other communities. There is little indication based on company engagements to date that anyone on the operational side of Vale's activities who is responsible for human rights and reparations at Vale understands the need for and role of community engagement in the reparations process.

There is some suggestion that the new chair and some newly appointed executives understand the importance of hearing input from affected communities, but it is not clear yet that the chair under-

stands the need to build this input into company decision-making, or that he will be able to create the cultural change needed for Vale to improve its human rights practices. In fact, while a few newly appointed Vale executives provide some hope of an improved approach to engagement with affected communities, the rest of the Vale staff engaged seems to be completely resistant to the idea of meaningful engagement with affected communities, insisting that this engagement is already happening. Meanwhile, LAPFF has had no real assurances that the company's tailings dams are appreciably safer than they were before the Samarco and Brumadinho collapses occurred.

In terms of the UNGP human rights due diligence guidance, LAPFF has concerns about Vale.

To date, the Vale decision-makers have taken no leadership in recognising the importance of building human rights and environmental considerations into company strategy and decision-making, especially input from affected community members. Therefore, these issues do not appear to have been prioritised properly within Vale's policies and processes.

Furthermore, Vale's emphasis on building processes without identifying and assessing human rights impacts adequately does not create assurances that the company has addressed any of the concerns arising from the Samarco and Brumadinho dam collapses. This concern is exacerbated by company representatives' seeming resistance to engaging meaningfully with affected stakeholders, including community members affected by the dam collapses, in seeking to integrate and act on their input to change the company's decision-making and practice around human rights and the environment. Although Vale states that it does not blame community members for the delayed reparations process, rather than accepting the community input conveyed by LAPFF, some company representatives consistently pushed back and even sometimes blamed community members for being difficult and holding up reparations.

This response does not suggest that the company incorporates community input into its operations and decision-making, nor does it suggest that the company tracks its human rights impacts. In fact, on a number of occasions, both the company and the Renova Foundation appear to have been completely surprised by community accounts shared with them by LAPFF. To not even be aware of such severe human rights and environmental concerns from affected community members suggests that the company is neither tracking its human rights impacts and responses nor communicating with relevant stakeholders on its human rights and environmental performance.

Finally, these interactions suggest to LAPFF that Vale is not taking adequate accountability for its human rights and environmental impacts. The fact that the Samarco compensation and reparations work is still far from complete is also evidence of the com-

<sup>169</sup> See <https://lapfforum.org/engagements/housing-update-samarco-tailings-dam-collapse-reparations/>.

pany's failure to remediate properly. Consequently, in relation to both Samarco and Brumadinho, the compensation and reparations programmes have been robustly criticised by affected communities, and the company continues to face significant operational, reputational, legal, and financial risk in relation to both dam collapses as a result.

## Conclusion

LAPFF engagements with Anglo American, BHP, Glencore, Rio Tinto, and Vale have raised a number of human rights concerns for the mining industry. Not least of these concerns is the great disparity between company and community accounts on a number of serious human rights issues. These concerns will be explored in more detail in Part IV of this report.



# 4 HUMAN RIGHTS CONCERNS IN THE MINING INDUSTRY

Panning gold in the polluted Jaba river  
flowing from Panguna copper mine.  
Autonomous Region of  
Bougainville, PNG



# Part IV: Human Rights Concerns in the Mining Industry

## Background

This part will summarise the findings in relation to international human rights law and voluntary standards, namely the UNGPs, within the mining industry. It will do so within the framework of the environmental, social and governance (ESG) approach. The ESG approach is a dominant investment approach for those investors who are concerned about these issues and is a framework often encountered by LAPFF members. It is notable that the aforementioned ACSI report has very similar findings, particularly in relation to free prior and informed consent, albeit more specifically in the Australian context.

## Environmental Issues

Environmental impact assessments have been a required part of mining operations for many years, at national, regional and international levels. There is a real concern about a lack of effective enforcement by governments of these environmental impacts with, for example, the European Court of Human Rights considering that some governments had a “passive attitude” to regulation and enforcement in regard to environmental damage.

These issues will be increasingly highlighted now that the right to a clean and healthy environment has been accepted by the United Nations as a human right which should be protected by governments, and with the increasing global focus on climate change.

### *Right to a Clean and Healthy Environment*

There appears to be less than full compliance by mining companies with environmental matters. Anglo American is currently facing lawsuits about lead poisoning, and the company, along with BHP and Glencore, is cited in an OECD complaint regarding Cerrejón in relation to pollution of the local environment. BHP and Vale’s Samarco project has led to lasting damage in the Brazilian state of Minas Gerais, where LAPFF is continuing to hear from affected community members that their homes, environments, livelihoods, and cultures have been destroyed by the 2015 tailings dam collapse. Rio Tinto’s and BHP’s anticipated impact on Oak Flat

in Arizona through their Resolution Copper joint venture is expected to include a two-mile-wide crater where the affected communities and the companies believe the mine will cave in.<sup>170</sup> These impacts carry operational, reputational, legal and financial risks to mining companies and investors, as well as affected community members. There is a further concern that companies are implementing technological solutions without assessing their social impacts.

### *Right to Water*

The impact of mining companies on water resources appears to be a significant problem based on LAPFF’s engagement with both mining companies and affected communities, including no effective or appropriate environmental impact assessments. In the US, affected community representatives have shared on a LAPFF webinar significant concerns about the impact of the Resolution Copper joint venture between BHP and Rio Tinto on the area’s water resources, particularly given that it is an arid area prone to drought and fires. The US Forestry Service Final Environmental Impact Assessment (FEIS) designed to assess the acceptability of the project states expressly that it will not be able to regulate project effects on private land and consequently does not appear to fully cover land areas designated for privatisation under the proposed project plans.<sup>171</sup> Therefore this methodology is incomplete and inadequate to determine the full project impacts on social and environmental factors related to the project. There is no evidence of company environmental impact assessments that cover water to the extent that the FEIS fails to do so. There are also affected community concerns about on-going impacts of Rio Tinto operations on local water sources in Madagascar and Papua New Guinea.

In Colombia, the OECD complaint against the three Cerrejón joint venture partners alleges that apart from the massive amount of water the mine consumes (24 million litres a day) it dumps 578 million litres of waste – including mercury and lead – into the nearby Rancheria River on an annual basis. The Arroyo Bruno River has also been diverted.<sup>172</sup>

<sup>170</sup> The expectation that this crater will form is contained in the federal environmental impact assessment issued by the US Forestry Service in early 2021 but which has now been withdrawn until further notice. The Oak Flat Federal Parcel would leave Forest Service jurisdiction. Several GDEs were identified on the Oak Flat Federal Parcel, including Rancho Rio Canyon, Oak Flat Wash, Number 9 Wash, the Grotto (spring), and Rancho Rio spring. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Minerals Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS [National Forest Service] surface resources; this includes these GDEs. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources. [FEIS, Vol. II, p. 403, 456, 538, 735, etc.]

<sup>171</sup> The Oak Flat Federal Parcel would leave Forest Service jurisdiction. Several GDEs were identified on the Oak Flat Federal Parcel, including Rancho Rio Canyon, Oak Flat Wash, Number 9 Wash, the Grotto (spring), and Rancho Rio spring. The role of the Tonto National Forest under its primary authorities in the Organic Administration Act, Locatable Minerals Regulations (36 CFR 228 Subpart A), and Multiple-Use Mining Act is to ensure that mining activities minimize adverse environmental effects on NFS [National Forest Service] surface resources; this includes these GDEs. The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources. [FEIS, Vol. II, p. 403, 456, 538, 735, etc.]

<sup>172</sup> Global Legal Action Network. *Non-Compliance with the OECD Guidelines for Multinational Enterprises: BHP, Anglo American, and Glencore*. 19 January, 2021. Although Anglo American and BHP are no longer shareholders in Cerrejón, BHP states that it continues to engage in the OECD NCP process in good faith.

In Brazil, victims of the Mariana tailings dam collapse have expressed concern about the impact of the dam collapse on the Doce River, both in terms of reducing access to clean drinking water and in terms of the impact on community members' livelihoods. These matters are exacerbated by evidence that a number of representatives of these companies appear resistant to engaging meaningfully with affected stakeholders about environmental impacts.

Therefore, environmental damage such as a reduction in access to natural resources and water pollution from mining companies is causing serious human rights impacts to affected communities, particularly related to the rights to a clean and healthy environment and the right to water. These impacts carry operational, reputational, legal and financial risks to mining companies and investors, as well as affected community members, in the form of fines, compensation, and reparations to victims, as well as compromising resources that companies themselves could use to either profit or ensure sustainable financial performance. The fair and just transition implications of these impacts and developments will be discussed as a policy point at the end of this section of the report.

### Social Issues

For many years it was not always clear what would be included within "social" issues, with labour/employment matters often included and not much else. This framing has changed with the worldwide acceptance of the UNGPs, and subsequent national, regional and international regulation applying it. Consequently, there is now an international standard of internationally recognised human rights, which should be included in the "social" aspect of ESG.

These standards expect all businesses, including mining companies, to have systematized and regular attention to human rights impacts as part of the requirement of good human rights due diligence practice. This expectation includes regular human rights impact assessments, integration of human rights matters into all corporate actions, tracking of human rights impacts and corporate responses, and communication of all actions taken.

These standards require that there be evidence of appropriate consultations with relevant stakeholders. It also means that businesses should not predetermine the human rights risks to stakeholders (including employees and the community) and should put in place effective and independent operational grievance mechanisms.

In addition, a number of industry sector bodies, including in the mining sector, are increasingly providing guidance on a range of relevant human rights issues. The mining sector has particular aspects of its operations which mean that there are likely to be some human rights which will be of recurring concern. This includes the fact that mining opera-

tions are where the natural resources are located and cannot simply move locations, and also that many mining operations are likely to be in conflict zones or fragile States.

The evidence suggests that, in LAPFF's view, the five mining companies have not generally been complying with these human rights standards, with limited evidence of transparent and appropriate human rights due diligence, free, prior and informed consent in consultations with stakeholders, or of effective and independent grievance mechanisms. The international human rights standards, together with industry and other benchmarks, can be considered by investors, such as LAPFF members, as a minimum standard by which to check whether a particular mining company is adopting best and appropriate practice in relation to human rights.

### Human Rights Due Diligence

The UNGPs set out a process for human rights due diligence that companies should follow in order to ensure that they carry out their responsibility to respect human rights. An assessment of how mining companies perform in relation to the UNGP human rights due diligence standard suggests they are usually falling short at every point in the process, as set out below.

#### Identifying and Assessing Human Rights Impacts

In relation to identifying and assessing human rights impact, there are particular concerns in relation to free prior and informed consent (FPIC) and the failure to execute appropriate, accurate, and thorough human rights impact assessments. This concern around FPIC has also been stressed by ACSI in its report.<sup>173</sup> Some concerns related to the FPIC standards will be set out below.

#### Free, Prior and Informed Consent

There are a number of concerns in relation to free prior and informed consent across all companies engaged, and indeed throughout the entire industry. These concerns are of fundamental importance because they impact on other elements of companies' abilities to identify and assess their human rights impact, such as appropriate, accurate, and thorough human rights impact assessments. Again, there are concerns with all of the companies in respect of all components of this standard.

#### Free

In relation to the 'free' component of the standard, a number of affected individuals with whom LAPFF has spoken have expressed that they have not been allowed to make their choices unencumbered in respect of mining activities. For example, community members affected by the Samarco tailings dam collapse have noted that they do not feel able to choose freely whether or not they receive newly

<sup>173</sup> Global Legal Action Network. Non-Compliance with the OECD Guidelines for Multinational Enterprises: BHP, Anglo American, and Glencore. 19 January, 2021. Although Anglo American and BHP are no longer shareholders in Cerrejón, BHP states that it continues to engage in the OECD NCP process in good faith.

re-built houses or are allocated existing houses. They have had to wait so long for housing that they do not believe they will have their new houses built in the locations of their choices, so they feel forced into choosing an alternative housing option.

The Australian Parliamentary inquiry and engagement with community members affected by the explosions at Juukan Gorge have noted that the community members have to date been subject to ‘gag clauses’ contractually prohibiting them from expressing their human rights concerns in the lead up to project decisions by companies. Some companies, including BHP and Rio Tinto, have committed to not enforcing these clauses, but the fact that these clauses continue to exist is a problem, in LAPFF’s view. Affected communities at Cerrejón noted to LAPFF that they were not free to take decisions about where they lived, given the negative social and environmental impacts the mine has had on their lives and the decisions the companies have taken in relation to the mine’s operation.

#### **Prior**

In relation to the ‘prior’ component of the standard, there are also a number of examples of mining companies failing to consult affected communities early enough in the process to prevent negative outcomes. Juukan Gorge is the most egregious example, even though there is evidence in the Parliamentary Inquiry that affected communities had made their objections to the explosions known to the company beforehand. However, Rio Tinto claims that it did not know sufficiently before the blast procedures were put into place, that the affected communities had changed their minds about the blasts going ahead. In either case, there was clearly inadequate provision made for prior consent in this situation.

In relation to Resolution Copper, there are concerns about prior consent in relation to the swap of federal land to private companies to take place without prior consent from affected communities, and without having done adequate feasibility studies to determine whether or not the project is even viable. Consequently, no one knows whether the expected destruction of a cultural heritage site or the expected impact on water resources will even result in a viable project. It has also been suggested by affected community representatives that the required ore could be mined from existing mine sites in the area without resorting to an entirely new project, that being Resolution Copper. However, Rio Tinto has stated that all other mines in the area are large open pits with lower copper grades, and they could not supply the projected future copper demand. The company states further that many of these mines are located closer to existing communities and the San Carlos Apache Tribe and consume more water than Resolution per tonne of copper. It is not clear, though, whether they would raise similar concerns from a cultural heritage perspective.

In relation to the Mariana tailings dam collapse,

the Samarco operations appear to have resumed in December 2020 without adequate prior consent from the affected communities and without adequate reparations having been made after the dam collapse four years prior. Affected community members with whom LAPFF engaged expressed dismay at this lack of respect from the companies involved. Affected community members near Cerrejón have also reported to LAPFF that certain measures related to resettlement have been undertaken by the companies without their prior knowledge or consent.

#### **Informed**

It is clear that the communities affected by Juukan Gorge were not adequately informed of Rio Tinto’s intentions to destroy the rock shelters. There is testimony in the Parliamentary Inquiry that indicates a Rio Tinto employee suggested to the affected communities that the rock shelters would not be destroyed.

At Resolution Copper, because the companies do not appear to have done feasibility assessments of the project, none of the parties are adequately informed about the likely social or environmental impacts of the mine. At Cerrejón, in relation to the so-called ‘death shifts’ and resettlements, workers and affected communities were reportedly not adequately informed about company plans regarding either decision.

#### **Consent**

The ‘consent’ element of the FPIC standard is very worrying. There are reports from affected community members that mining companies systematically move forward with their plans without obtaining consent from the affected communities to do so.

Most commonly, the companies focus on the fact that they have consulted with affected communities – though often with the company appearing to cherry-pick (i.e., be very selective in their choices) some communities and community members – and that this consultation gives them license to move forward with their plans. There is no evidence that companies accept the refusals by communities to what the company wants to do. This seemingly selective approach to community engagement might suggest that companies should do a better job of stakeholder mapping in determining which communities need to be engaged.

This problem is most starkly exemplified by the destruction of the rock shelters at Juukan Gorge. The affected communities were clearly opposed to the blasting, but the company went ahead anyway. Similarly, many affected community members did not want Samarco operations to re-open without appropriate reparations being made with the Mariana dam. Yet the companies re-opened the project anyway. At Cerrejón mine, affected communities expressed opposition to the project from the start, but it went ahead anyway.

It does not help that the mining industry body, ICMM, makes inadequate – and somewhat disingenu-

ous – mention of free, prior and informed consent in its guidance on mining and human rights.<sup>174</sup> Additionally, its COO has stated publicly that if there is community opposition to a project, companies should take the community views on board and move ahead with the project.<sup>175</sup>

#### **Integration of Human Rights Impact Assessments**

The UNGPs require that human rights impact assessments be integrated into a company's decision-making and operations at all levels. In company engagements, there have been concerns from companies that LAPFF is listening only to dissenting voices.

LAPFF chooses to do this because (a) the companies do not appear to be doing so; and (b) listening to dissenting voices has brought to light a litany of operational, reputational, legal, and financial risks to companies that LAPFF members need to be aware of as investors. In fact, the Australian Parliamentary Inquiry into Juukan Gorge notes claims that mining companies sometimes fund the establishment of rival community groups to allow for their compliance with project development requirements. This claim has been corroborated by affected community representatives in other countries where LAPFF has engaged.

In relation to Juukan Gorge, if Rio Tinto had had an appropriate process for integrating community input, it could have prevented the destruction of the 46,000-year-old culturally significant rock shelters. In relation to the Samarco tailings dam collapse, as noted above, LAPFF was told that affected community members had notified the companies involved about their concerns with the dam, but the companies did not listen. It appears that if the companies had listened to the communities and other third parties, and had acted on their input, the dam could have been fixed for about \$1.5 million; however, the companies are subsequently continuing to pay billions of dollars without an end in sight to the reparations or compensation for affected communities.

In the case of Resolution Copper, company representatives seemed to suggest to LAPFF that the cultural heritage site in question – Oak Flat – is not actually of cultural significance to the San Carlos Apache Tribe; yet, in speaking to affected community representatives, LAPFF learned that the San Carlos Apache are comprised of a number of different cultural groups and traditions, some of whom see Oak Flat as sacred and some of whom do not. Instead of recognising this diversity of opinion, LAPFF is concerned that in relation to Oak Flat some project representatives have taken the view that the site has no cultural significance.<sup>176</sup> The company appears to have cherry-picked community voices to serve its needs.

At Cerrejón, affected community members and workers have told LAPFF that basically from the start

of the project until now, their concerns have not been heard and integrated into the project's operations, from complaints about work shifts to resettlement plans.

#### **Tracking of Human Rights Impacts**

The tracking component of human rights due diligence points to a need for appropriate corporate systems to ensure that human rights violations are not occurring and, if they are, that they are mitigated and remediated. This systemic approach by mining companies to preventing, mitigating, and remediating their human rights impacts appears to be lacking.

In respect of Juukan Gorge, Rio Tinto has stated itself that the company at the time had no appropriate system in place to track its engagement with the affected communities and take on board community feedback. As the Australian Parliamentary Inquiry found, the company failed to track and therefore act on new information. If such a system had been in place, the destruction of the rock shelters would likely not have occurred.

The Renova Foundation, BHP, and Vale do not appear to be liaising appropriately with affected community members in tracking reparations for the victims of the Samarco tailings dam collapse. Over the last year, LAPFF has contacted Renova every month for updates on the number of houses that have been re-built for people who lost houses because of the dam collapse. Each month, Renova sends different numbers of people who need houses built, and this number is consistently lower than the number identified by the community representatives (while this latter number is consistent). Renova has stated that the numbers change and drop because community members have accepted alternative accommodation through a new compensation programme that is working well, but community members with whom LAPFF has spoken state that people are accepting this alternative accommodation only because they believe that over six years after the tailings dam collapse their houses will never be built.

At Brumadinho, affected community members have told LAPFF that Vale has not included certain people affected by the tailings dam collapse as victims who deserve compensation and/or reparations as these people fall outside a very narrow parameter of who is a victim according to the company. Therefore, these individuals are not tracked within Vale's system as victims and have stated they have not received any kind of compensation or reparation, including an apology.

#### **Communication of Human Rights Impacts**

The UNGPs are clear that communication of corporate human rights impacts can take place in a number of ways. LAPFF has engaged with corporate

<sup>174</sup> <https://www.icmm.com/en-gb/social-performance/human-rights/respect-indigenous-peoples>. There appears to be no reference to the fact that companies rarely, if ever, choose to halt projects if Indigenous communities oppose them. ICMM's Mining Principles might be part of the problem – Paragraph 3.7 asks companies merely to 'work toward' free prior and informed consent rather than requiring them to obtain it. There is also no elaboration on the definition in these Principles. Furthermore, although the international standard on FPIC covers only Indigenous peoples and not affected communities more broadly, LAPFF has found that engaging with and incorporating the input of all affected communities into corporate decision-making is vital to prevent and mitigate operational, reputational, legal, and financial risks.

<sup>175</sup> London School of Economics event, 2012.

<sup>176</sup> One community representative has noted that Oak Flat is listed by the US government as a sacred site.

communications on human rights primarily through company reporting, company engagement meetings, and company AGMs. In LAPFF's view, there are reporting deficiencies in relation to human rights through all three company communications channels.

Rio Tinto has acknowledged openly a number of its shortcomings in relation to cultural heritage, particularly in its last annual report and accounts and also through meetings with investors and through other media. However, there is a concern that the company's human rights reporting is primarily limited to cultural heritage considerations in Australia. In fact, LAPFF has heard from community members in Papua New Guinea, Mongolia, Madagascar, and the US about a range of human rights impacts and concerns linked to Rio Tinto projects. It is understandable and appropriate that Rio Tinto is reporting extensively on its impact at Juukan Gorge; however, it would be valuable for investors to see the company's broader human rights impacts at a global level.

Rio Tinto has recently released a report on updates to its community and social programme (CSP) following its destruction of the caves at Juukan Gorge. Again, this document does not make much reference to Rio Tinto's operations and impacts beyond Australia, and it is not clear that the company will adhere to free prior and informed consent. The inclusion of stakeholder views is positive, but only four of ten groups invited to respond did so; it would be helpful to know why. Also, it is not clear who responded, so there is additional concern about the company's cherry-picking of community responses. Indeed, the Australian Parliamentary Inquiry stated in relation to Juukan Gorge that "What was missing from Rio's decision-making process was the voice of Aboriginal and Torres Strait Islander people."<sup>177</sup> Again, this omission suggests a need for improved stakeholder mapping. Finally, there is little reporting on the financial implications of Rio Tinto's human rights impacts available for investors, including both positive and negative impacts.

BHP has been open to engagement with LAPFF and, by all accounts, with other investors too. Yet LAPFF has found some of BHP's framing of human rights considerations to be unhelpful, and at times incorrect in respect of the nature of human rights impacts. This was a particular problem in relation to BHP's rebuttal to a 2020 shareholder resolution on cultural heritage, where it claimed that the resolution would undermine affected communities' right to self-determination. This statement was clearly not in line with international human rights law and was, in LAPFF's view, an inaccurate framing of the situation.

LAPFF has also had concerns in investor meetings about BHP's tendency to refuse to take accountability and responsibility for negative human rights impacts caused by, contributed, or linked to its non-operated joint venture projects. BHP's position and communication on this issue, that as a non-operated joint venture partner it has limited leverage, is not

consistent with the UNGPs' guidance that companies use or seek to gain leverage to improve human rights impacts.

Anglo American's written communications on the company's human rights activities tends to be comprehensive in some respects but in LAPFF's view is quite process-focused, and technology-focused, rather than outcome-focused. For example, the company spends a great deal of time talking about the processes of its Social Way 3.0 programme rather than talking about its human rights impacts. Given the impact-oriented focus of the UNGPs, LAPFF would welcome more reporting on Anglo American's human rights impacts. LAPFF's view is that, while Anglo American does share some detail on its human rights impacts, it is not disclosing enough information for investors to understand the financial materiality of its activities.

Glencore reports to date have very little information on the human rights impacts of the company's activities, particularly on affected communities. Senior company officials at Glencore have displayed little awareness of the importance of human rights, both intrinsically and in terms of financial materiality for the company and its investors. Given Glencore's recent board and executive changes, this awareness might grow; LAPFF will continue to engage with the company to assess its progress in this area.

Vale's communication of human rights issues has been a particular concern for LAPFF. The company's written communications are very vague and process-oriented with little recognition of the company's human rights impacts. This approach extends to engagement meetings where LAPFF has found the company to be evasive when community engagement issues are raised. There is a great concern that the company rarely, if ever, makes reference to its Samarco tailings dam collapse, preferring only to make reference to the Brumadinho tailings dam collapse and on-going reparations work. While LAPFF has yet to attend a Vale AGM, there are concerns with the remaining four companies that community questions at the AGMs are sometimes not answered directly or fully.

Overall, while it is understandable that companies want to frame themselves in the most positive light possible, cherry-picking community voices and offering limited information on human rights impacts to share with investors is not in line with the communication guidance set out in the UNGPs. It also does not provide the companies or their investors with the information they need to achieve positive human rights outcomes. Therefore, appropriate stakeholder mapping and wider engagement with affected stakeholders, and better reporting on these activities, is advisable.

Finally, a failure by mining companies to implement the UNGP human rights due diligence process means that both the companies and investors are not able to understand the negative financial consequences of companies' failing to uphold their

<sup>177</sup> Para. 1.30, Australian Parliamentary Enquiry.

responsibilities to respect human rights, nor are these parties able to enact measures to prevent financial loss stemming from human rights violations.

As noted above, in LAPFF's experience, mining companies' human rights due diligence processes tend to be deficient in all respects, with particular issues being:

- **In relation to the identification and assessment of human rights impacts, there is a particular concern about these companies' failures to undertake free prior and informed consent and impact assessments in a manner consistent with international human rights law and standards.**
- **In relation to integration of human rights impact assessments, there is a particular concern about the companies' selection of certain convenient community voices to inform their assessments. There also appears to be a failure to have the most senior company representatives, including company boards, consider human rights impacts as being strategically important to the companies.**
- **In relation to tracking human rights impacts, there is a particular concern that these companies are excluding relevant data and are deflecting their accountability and responsibility for human rights impacts to other parties rather than taking steps to prevent, mitigate, and remediate those impacts to the greatest extent their leverage allows them in line with international human rights law.**
- **In relation to the communication of corporate human rights impacts, there is a particular concern that reporting is incomplete and does not adequately communicate corporate human rights impacts to either affected communities or investors. There is also inadequate reporting on the financial consequences of the companies' failure to respect human rights.**

### Governance Issues

Governance of companies has long been a focus of investors, especially shareholders. Good governance of mining companies requires that the board and senior management are making strategic, operational and other decisions based on full and appropriate information.

The evidence above shows that there are many instances where mining companies are missing important business risks. These include lack of appropriate human rights due diligence to identify, prevent and mitigate human rights impacts of their activities. For example, as mentioned, there is concern that mining companies are cherry-picking community input to support their positions rather than undertaking appropriate stakeholder mapping and a more rigorous human rights impact assessment in line with the UNGPs to inform their operations and decision-making. In some cases, company

representatives, if not the companies themselves, have even blamed affected communities for failure to redress negative human rights impacts.

This approach to community input raises concerns about board decision-making and the capacity of directors to understand and incorporate human rights considerations into company strategy and operations in a helpful way. The governance concerns arising from mining companies' approaches to human rights will be explored below.

### Board Accountability for Human Rights

In LAPFF's engagements with all five companies, there were concerns that the boards, and particularly the chairs, were detached from the concerns which affected communities have about their companies' impacts on human rights. Specifically, it took LAPFF some time to gain meetings with board chairs about the impacts of their companies on affected communities; at the same time, these chairs were granting meetings readily on climate change. All of the companies do seem to be granting chair-level meetings with LAPFF on human rights at this point, however.

The board chairs often seemed unaware of community concerns and unwilling to engage directly with affected community members or to acknowledge that affected communities could have information of strategic importance to their companies. There was repeated deflection of questions to more junior staff in the companies and there was no explanation of what evidence, if any, from affected communities had been integrated into board decision-making. LAPFF has concerns about whether boards have members with adequate human rights knowledge and skill bases. There are therefore concerns that human rights issues, including affected community issues, are not being considered and integrated at appropriately high levels within companies, as suggested by the UNGPs.

### Company Culture

LAPFF questions whether there is a corporate culture of concern for human rights and environmental impacts at mining companies. The issue of corporate culture is a particular concern because across all of the projects and companies engaged, affected community members expressed their views that there is a failure by companies to adhere to and implement effectively legal rulings against them.

### Failure to Implement Legal Rulings

For example, the Australian Parliamentary Inquiry into Juukan Gorge noted that Rio Tinto had exhibited a failure to adhere to the spirit of agreements<sup>178</sup> and cites conflicts of interest and regulatory capture<sup>179</sup> as creating permissive environments for corporations to abdicate from adhering to their human rights responsibilities. Brazilian communities with whom LAPFF has engaged report similar examples in relation to the Mariana and Brumadinho tailings dam collapses. A representative of affected communities in Arizona

<sup>178</sup> p. 18, paras. 2.38 to 2.45.

<sup>179</sup> para. 2.107 to 2.110.

has suggested that in the US companies can buy their way out of legal obligations too.

Furthermore, there is a general concern about how mining companies undertake contracting, from implementing ‘gag clauses’ on communities to failing to negotiate in good faith or in consideration of the balance of power between companies and communities. There is even a new concern that some mining companies are seeking to move their headquarters to jurisdictions that are less favourable to extraterritorial human rights claims against them on the basis of their business partners’ or subsidiaries’ conduct.

Four of the five companies are also facing OECD complaints in various countries in relation to human rights and environmental impacts related to their operations. Corporate responses to these legal and quasi-legal proceedings suggest cultures of impunity in respect of human rights.

#### **Focus on Business Risks rather than Human Rights Risks and Impacts**

There is concern that mining companies are conducting assessments to determine only business risks, and not human rights risks and impacts to rights holders. This process does not align with the UNGPs approach to human rights impact assessments and means that companies may miss many business risks, as well as failing to use their leverage to prevent, mitigate, and remediate adverse human rights impacts. The Australian Parliamentary Inquiry into Juukan Gorge noted a move at Rio Tinto from understanding communities to ‘managing’ communities as being a negative cultural shift at the company.<sup>180</sup>

LAPFF has found that there is repeatedly conflicting information from companies and affected communities regarding the human rights and environmental impacts of mining projects, which is likely to be linked to a lack of appropriate consideration by companies of risks to rights holders. Because company boards do not appear to be aware of or knowledgeable about human rights considerations and are considering primarily business risks not human rights impacts of their companies, it is not clear that they are able to establish corporate cultures that respect human rights. It is further not clear that these companies can then understand how their human rights risks and impacts in turn create business risks.

#### **Joint Ventures**

Joint ventures are corporate structures that allow independent companies to come together to share costs and avoid certain liabilities in undertaking projects. They are used often in the mining industry.

There is a concern that joint ventures by mining companies are contributing to accountability gaps that are resulting in adverse human rights impacts and that there is not sufficient involvement from mining company boards to prevent, mitigate, and remediate these adverse human rights impacts, as

the mining companies claim that a joint venture is beyond their control. All of the mining companies covered in this report are in joint ventures, sometimes with each other, and all of them have environmental, social, and governance concerns associated with their joint ventures.

There is a further concern that mining companies in part are entering into some joint ventures as non-operating partners specifically to evade their human rights and environmental responsibilities. This problem with joint ventures accentuates concerns around how mining companies can use contracts to evade their human rights responsibilities.

In short, lack of board leadership on human rights, suspect corporate cultures, problematic project structures, and a lack of understanding of the importance of full and appropriate information on social and environmental risks by mining companies indicate concerns over governance matters. This lack of board oversight in relation to corporate human rights impacts raises concerns that mining companies are not adequately building human rights impacts into their business risk assessments, which as evidenced above can have severe financial consequences for their businesses.

## **Policy Considerations**

### **Just Transition**

Climate change knowledge has increased the focus on the impacts of mining companies on the global environment. This has included developments of a fair and just transition towards a zero-carbon emissions economy.

In the past couple of years, human rights commentators have begun to assess more rigorously the human rights implications of climate change and the transition to a zero-carbon economy. Therefore, climate change and just transition considerations cross all of the environmental, social, and governance areas, and must be addressed at a policy level to allow for an enabling environment for human rights in a zero-carbon economy.

There is also an increasing amount of litigation against mining companies and others for contribution to climate change, with there already being successful litigation in the Netherlands against an oil company, Shell. It is important to note that the Shell climate case was ruled on human rights grounds, thus underlining the importance of a fair and just transition approach to addressing the climate catastrophe.

Litigation has extended to financial companies for a lack of inclusion of climate change risk in their reports and may extend further to pension funds in relation to their investments in companies considered to contribute to climate change. An increased focus on climate change, including in relation to human rights, provides clear reasons for investors, such

<sup>180</sup> para. 4.111.

as LAPFF members, to raise their concerns about climate and fair and just transition matters to mining companies.

### Conclusion

Human rights concerns in the global mining industry are not restricted to just one or two companies. These concerns are industry-wide and span the range of international human rights law and voluntary standards, specifically the UNGPs.

The analysis above sets out some of LAPFF's major human rights concerns for the industry based on its engagements with Anglo American, BHP, Glencore, Rio Tinto, and Vale. In respect of environment, there are particular concerns related to the right to a clean and healthy environment and the right to water.

In respect of social impact, there are particular concerns related to free prior and informed consent and consequently deficient human rights impact

assessments. These findings are exemplified by the repeatedly inconsistent accounts of corporate human rights impacts by companies and affected communities. This disconnect appears to stem from inappropriate stakeholder mapping and companies' tendencies to cherry-pick community voices to further their business purposes. Corporate focus solely on business risk rather than on corporate human rights impacts as a means of informing business risk appears to be a large part of the problem.

These environmental and social shortcomings are exacerbated through corporate governance concerns, including lack of board skills, knowledge, or engagement on human rights and lack of corporate cultures embracing human rights, which mean that boards cannot and do not often integrate human rights considerations appropriately, if at all, into their decision-making. To the extent they do, there is additional concern that they set up corporate structures such as joint ventures to evade their human rights responsibilities.



# Part V: Recommendations

As set out in the report, there are a number of human rights challenges facing mining companies with much room for improvement in addressing these challenges. Companies, investors, and governments must all play a role in rectifying human rights abuse in the mining industry. Recommendations for all of these parties are set out below, with a particular focus on the role of investors. LAPFF can also commend the helpful recommendations set out in the ACSI report on corporate engagement with First Nations communities.<sup>181</sup>

To begin with, LAPFF and other investors can focus on at least these five main questions when engaging mining companies on human rights:

- How does your board engage on human rights? Does the chair get involved and are human rights treated as a strategic issue?
- Is input from affected community members heard at board level and integrated into board decision-making, including joint ventures? If so, could you provide examples?
- Does the company undertake independent human rights impact assessments by credible experts and disclose the findings publicly?
- Are the findings of these impact assessments integrated into company decision-making? Can you provide a couple of examples?
- How do you assess the financial materiality of your human rights impacts, including through joint ventures?

## Recommendations for Investors, Companies, and Governments

This report on mining and human rights has shown that human rights impacts, including environmental and climate change aspects, by mining companies are legitimate matters of concern to LAPFF members and other investors, as well as companies, governments, regulators, and policy makers. Recommendations to all of these parties are set out below.

### *LAPFF and Other Investors*

- Engage with company boards, and chairs in particular, to drive home the importance of human rights as a strategic consideration for companies.
- Work with companies and regulators to close gaps in ESG accountability stemming from joint venture structures. In particular, encourage these parties to use their leverage in line with international human rights law.

- Engage with affected community members, as well as companies, in determining companies' human rights impacts, both to hold companies to account and to account accurately for the financial materiality of human rights impacts to the business and to you as an investor.
- Encourage companies to undertake appropriate stakeholder mapping to identify all affected stakeholders that need to be heard in considering how companies should undertake or progress with a given project or activity.
- Encourage companies to hear and integrate all affected community voices into decision-making, not just those they tend to cherry-pick to further their business objectives.
- Where affected communities do not want projects to proceed, work with companies and communities to determine if there are viable alternatives and accept that a project should not proceed if there are no viable alternatives that adequately protect human rights and the environment.
- Request or commission independent human rights impact assessments that cover environmental impacts from credible human rights experts where your research and engagement raise areas of human rights concern.
- Work with local investors and partners to gain access to relevant affected communities and to understand better the community needs and the relevance of their input to investee companies.
- Encourage companies to focus and report on their human rights impacts as a means for all stakeholders to understand their human rights and business risks more fully.
- Encourage companies to build human rights considerations into their business contracts to create an enabling environment for adhering to corporate responsibilities to respect human rights throughout the company's supply chain and value chain.
- Request that companies prevent, not just mitigate and remediate, human rights violations that they cause, or to which they contribute or are directly linked, both for human rights reasons and for reasons of financial materiality.
- Press regulators to enact an enabling environment for businesses to respect human rights, including through full consultations with communities, so that their voices can be heard.

<sup>181</sup> ACSI. 'Company Engagement with First Nations People.' December 2021, available at: <https://acsi.org.au/wp-content/uploads/2021/12/Company-Engagement-with-First-Nations-People.Dec21final.pdf>.

- Press companies and regulators to consider the human rights implications of their efforts to mitigate and adapt to climate change, in line with a just transition.

In order to identify adverse human rights impacts of mining companies, LAPFF members and other investors can undertake the following:

- Access reports of human rights impacts of mining companies by, for example, the United Nations and other international organisations, independent national and regional bodies (such as National Human Rights Institutions), investor organisations, and respected civil society organisations and reputable media.
- Access summaries of key national, regional and international legislation and cases concerning mining companies and human rights.
- Engage with local communities.

LAPFF members and other investors can Engage directly with senior management of mining companies on the following issues:

- Provision of an accessible human rights policy.
- Provision of evidence that they are undertaking appropriate human rights due diligence.
- Provision of evidence that they have undertaken appropriate consultation with all stakeholders (and full, prior and informed consent with Indigenous peoples).
- How they are dealing with particular issues of human rights concern (which may be due to a particular case, instance, report, etc.).
- How their senior management and Board consider human rights within their decision-making.
- Provision of training on the UNGPs and performance objectives for all workers across the company to include human rights and environmental impacts.
- Ensure that the ‘E’ and ‘S’ of ESG are fully considered and report on how they affect the ‘G’ element.

There are also ways in which human rights issues can be escalated by LAPFF and other investors in the consideration of investment objectives:

- Where companies are persistently refusing to engage effectively on these issues, raise questions at shareholders meetings.
- Bring or support shareholder resolutions in support of human rights objectives to company annual general meetings.
- Collaborate with other pension funds and asset owners to discuss these issues with the companies.
- LAPFF’s position is to engage with companies on ESG issues, but individual funds and investors could consider divestment as a last resort if the view is taken that all methods of engagement are not effective.

#### **Companies**

- Ensure that company boards have at least one member with an awareness of and expertise

in human rights with the authority to help develop a culture of respect for human rights at board level and throughout the company, whilst respecting the wider diversity challenge.

- Engage the board chair on human rights, especially affected community issues, to drive home the strategic importance of human rights and the environment, including in relation to climate change and a fair and just transition.
- Undertake appropriate stakeholder mapping to identify all affected stakeholders that need to be heard in considering how companies should undertake or progress with a given project or activity. For example, this input might include co-designing land use plans or cultural heritage plans with affected Indigenous people and settled communities.
- Carry out assessments aimed at identifying and assessing human rights and environmental impacts related to your business conduct rather than just identifying and assessing business risks related to human rights violations. These assessments should be carried out in consideration of company efforts to mitigate and adapt to climate change.
- Guarantee access to the full text of the environmental impact studies, escape routes, emergency plans, etc., on the internet or on the company’s own platform for this purpose.
- Engage meaningfully with communities affected by your company’s operations as an evidence and impact check on new technology deployed to monitor social and environmental impacts or to create more sustainable operating procedures.
- Embed human rights and community input in board and company decision-making in line with international human rights and environmental law, particularly through adhering to the principle of free prior and informed consent (FPIC) even if it means not going ahead with a project in some cases. In the latter case, work with affected community members, business partners, and investors to determine viable alternative project plans.
- Integrate affected worker and community input into operational-level grievance mechanisms, including how to develop appropriate responses to grievances.
- Do not blame affected community members for the shortcomings of your human rights approach and impacts.
- Draft contracts with business partners and affected communities to allow for compliance by all contracting parties with corporate human rights and environmental responsibilities.
- Engage openly and honestly with all community members affected by your company’s operations, either directly or indirectly, instead of cherry-picking engagement, and build their input into corporate decision-making.

- Adhere to and implement legal rulings within the spirit of the rulings and in line with the rule of law.
  - Take accountability for ESG impacts in joint ventures, even if you are a non-operating joint venture partner and demonstrate with evidence participation in resolving ESG concerns.
  - Communicate to investors the financial consequences of adverse human rights and environmental impacts.
- Governments, Regulators, and Policy Makers*
- Implement effective mandatory human rights and environmental due diligence regulation that creates clear obligations for mining companies to have responsibilities to respect human rights. There should also be incentives for mining companies to uphold these responsibilities which are both positive financial outcomes and effective enforcement mechanisms where companies do not uphold their human rights responsibilities. For example, laws should not create an incentive for mining companies to proceed with projects where there are human rights violations that cannot or will not be prevented and/or mitigated through the project plans and implementation. To this end, project and amendment permits should only be issued once human rights impact assessments have been agreed between communities and companies.
  - Ensure that this mandatory human rights and environmental due diligence regulation incorporates the full, prior and informed consent, and input, of affected communities, defined here as both Indigenous communities and more broadly those communities affected by mining operations.
  - Ensure that this mandatory human rights and environmental due diligence regulation is aligned with state and corporate efforts to mitigate and adapt to climate change, in line with a fair and just transition.
  - Assess whether your corporate law frameworks – such as laws on joint ventures - create incentives for companies to commit human rights violations, and reform the corporate law where this is the case.
  - Include requirements for all public procurement to include human rights and environmental due diligence as a prerequisite for a company to apply, with evidence of human rights and environmental impact assessments and actions taken by companies consistent with those assessments.
  - Ensure enforcement of laws and legal judgments, including those statements by OECD National Contact Points, against businesses where they have been found to be violating human rights or environmental law and where they have been told to cease and remediate these violations.
  - Recognise that there will not always be a business case for corporations to respect human rights, and draft law and policy in a way that prioritises human rights and environmental protection so as to create a baseline of protection in line with international human rights and environmental law.
  - Guarantee access to environmental information, especially considering comparative data from different enterprises that affect the same location.

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