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MINERS, GUNS AND LAWYERS: TRACING CORPORATE LIABILITY FOR BREACHES OF HUMAN RIGHTS BY MINING COMPANIES IN CONFLICT-AFFECTED AREAS*

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1. Introduction

To say that society has a difficult relationship with miners is no small understatement. On the one hand, society requires miners and the minerals they yield to sustain and improve the lives of its members. Civilizations have constantly relied on miners for its development and progress. Indeed, early societies have been defined by their relationship with metals, from the Bronze Age to the Iron Age and beyond. Today, we are increasingly reliant on different types of minerals and metals to support our standard of living. To use an often-cited example, the average smartphone alone contains forty different minerals.[1]

Yet, for all our reliance on minerals and the miners that procure them, there are still many who view miners with scorn for the damage they are seen to inflict on the environment and on the human rights of individuals. Mining companies, like all other commercial enterprises, can and do have a wide impact on the communities in their areas of operation. In particular, a mining company has the potential to affect a wide range of human rights, including the right to enjoy just and favourable working conditions, the right to freedom of assembly and freedom to associate, the right to health and the right to privacy (to name but a few examples). However, given the nature of the mining industry and its reliance on security forces to protect people and assets, there is a greater risk of mining and other extractive companies being implicated in human rights violations of the most severe nature, such as genocide, slavery, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention – violations that are referred to as gross human rights violations.

This complex relationship between society and miners is particularly evident in the context of Western-based mining companies operating abroad, particularly in politically challenged areas deemed hostile or conflict-affected. The mining sector can play a very positive role in the economic development of regions plagued by violence or weak governance regimes. In fact, the mining sector is

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[1] Fairphone, 'Mining: Providing Alternatives for Miners in Conflict-Affected Regions' <https://www.fairphone.com/roadmap/mining/> accessed 28 September 2015.

often a key sector in helping to foster the required level of economic support to eventually break the conflict cycle in an affected community. Yet, it is in conflict-affected areas ("**CAA**") that mining companies are especially vulnerable to becoming entangled in human rights abuses, precisely because governance structures have collapsed (or are non-existent), leading to a gap in governance that leaves local communities vulnerable to the worst forms of human right abuses.[2] In these areas, a state may be unable, or even unwilling, to regulate a company involved in human rights abuses, particularly where the government itself is causing the abuses.

This paper aims to assist mining companies, along with their legal advisors, operating in CAA by firstly examining the risks – in particular the legal risks – of becoming implicated in gross human rights abuses while operating in these areas. It will then examine what human rights obligations a mining company has and the steps that a company can take to mitigate human rights-related risks.

2. What are 'conflict-affected areas' and why do mining companies operate there?

Before examining the risks of operating in CAA, it is important to understand what is meant by the term 'conflict-affected areas'. Although there is no single definition of 'conflict-affected area', the term is broader than its name might suggest. In particular, CAA are not necessarily characterised by active armed hostilities; rather, they include countries, regions or areas: (a) that are not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely; (b) in which there are serious concerns about abuses of human rights and civil and political freedoms, but where violent conflict is not currently present; (c) that are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organised violence; (d) that are currently in transition from violent conflict to peace (these are sometimes referred to as 'post-conflict'; however, transition contexts remain highly volatile and risk reverting back into a state of violent conflict).[3] Hence, the term CAA does not apply only to war zones, but extends the concept of 'conflict' to include areas defined by weak governance and human rights abuses, in addition to other factors that can lead to armed conflict or, in another sense, impact those areas transitioning away from armed conflict.

This definition is relevant and worth stressing for a number of reasons. Firstly, CAA are not discrete areas, but represent a significant part of the world. According to recent estimates made by the World Bank, more than 1.5 billion people (that is, one in four of the world's population) live in fragile and

[2] Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 Hastings International & Complicity Law Review 339.
[3] UN Global Compact and PRT, *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas* (UN Global Compact Office 2010) 7.

conflict-affected countries or in countries with a high degree of criminal violence.[4] Secondly, given the sizable populations living in CAA, it is only logical to assume that there are more companies operating in CAA than may appear at first blush. While many companies may take comfort in the idea that their operations are not located in areas with active armed violence between warring parties, this is perhaps a false comfort, given that violence is only one factor in determining whether an area is a CAA. Apart from the fact that operations in CAA with no violent conflict can quickly become areas plagued by violence, working in CAA, as we shall see below, makes companies more susceptible to becoming embroiled in human rights abuses. This should, in turn, have an impact on how mining companies operating in difficult areas address this risk.

Given the risks of operating in CAA, why do so many mining companies operate in such areas? For one, the nature of mining and other extractive companies requires operating where the raw materials are located. Hence, geography is the driving factor in determining the location of operating sites for extractives.[5] In terms of geographical considerations, many exciting, under-explored mining prospects are located in CAA. Secondly, given all the risks involved in mining (from geology to production, to transport, to macro- and micro-economic factors and access to financing), the mining industry is particular good at risk management. Yet, even within the mining industry, some companies have a higher risk tolerance than others. In many high-risk environments, companies are typically smaller, less-established companies (or "juniors") that tend to invest in higher-risk projects that offer their investors potentially high returns.[6] While the "de-risking" of an early stage mining project generally involves drilling and testing results from exploration activities, in the case of CAA, it also means ensuring a degree of political stability. If a project proves to be sufficiently de-risked, a junior will often look to a major to acquire the project for further development. In this way, the extractive industry has its own model of subcontracting out risk whereby the majors will often subcontract the bulk of their exploration (including in CAA) to juniors.[7] Finally, miners do not necessarily choose to operate in CAA. For some, due to the long project timeframes of a mining project, a mining company can simply find itself operating in an area that, over time, becomes a CAA; for others, they may be operating in CAA without being fully aware of it.

3. What are the risks for miners operating in conflict-affected areas?

While mining companies can have a positive economic impact in their areas of operation, their

[4] The World Bank, *World Development Report 2011: Conflict, Security and Development* (World Bank 2011) 2.
[5] Brandon Prosansky, 'Mining Gold in a Conflict Zone: The Context, Ramifications, Lessons of AngloGold Ashtani's Activities in the Democratic Republic of the Congo' (2007) 5(2) Northwestern Journal of International Human Rights 236, 237.
[6] John Bray, 'The Role of Private Sector Actors in Post-Conflict Recovery' (2009) 9(1) Conflict Security and Development 1, 10.
[7] 'Some Countries seem simply too violent or chaotic to do business in. But brave firms can profit where others tremble to tread' *The Economist* (Bogota, Lagos and Luanda 18 May 2000) <http://www.economist.com/node/334329> accessed 27 August 2015.

presence will undoubtedly have significant social and environmental implications. Such an impact can and does lead to conflict between extractive companies and the communities in the areas of operation.[8] For this reason, security is an essential feature at all stages of a mining project – from exploration through to development, production and closure.

Company-community conflict gives rise to a number of risks for a mining company. Apart from the adverse publicity associated with company-community conflict, there is increasing data on the costs of conflict from the point of view of operational and financial loss. In a study entitled, 'Costs of Company-Community Conflict in the Extractive Sector', authors Davis and Franks identified various conflict-related costs affecting companies in the extractive industry.[9] These include costs associated with project modification, risk management (including higher insurance costs), material damage to property or infrastructure, lost productivity (due to diversion of management focus, temporary shutdown of operations, missed opportunities for future expansion or new projects), capital costs (in terms of loss of the value of the property and inability to raise new capital) and personnel costs (including staff injuries and arrests, low retention rates and inability to recruit new staff).[10]

In addition to the associated business risks of reputational, operational and financial loss, companies also face a significant legal risk when engaged in a community conflict. As a community conflict escalates, the risks of a mining company becoming involved in human rights abuses increases. While a company's involvement can be direct (as in the case of forced labour), it is more likely to be indirect such as when security forces (whether private or public) engaged by the miner are involved in breaches of human rights. In the case of company-community conflict in CAA, there is a heightened risk of a company being implicated in gross human rights violations.

4. Understanding the legal risks when operating in conflict-affected areas

To date, it has been very difficult to hold companies legally liable for gross human rights violations. One of the key reasons for this is the underlying principle of corporate law that a corporation is a legal entity separate and distinct from its owners. In the case of Western companies operating overseas, this principle operates to protect parent companies against any actions or omissions of their overseas subsidiaries. Only in very exceptional circumstances would a court 'lift the corporate veil' and hold a parent entity liable for the misconduct of its subsidiaries. It is even more difficult to apply legal liability to companies operating in CAA, where access to justice locally is inherently problematic.

[8] Rachel Davis and Daniel Franks, 'Costs of Company-Community Conflict in the Extractive Sector' (CSR Initiative Harvard Kennedy School, SHIFT, The University of Queensland Australia, 2014), 11 <http://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf> accessed 27 August 2015.
[9] Davis and Franks (n8).
[10] Davis and Franks (n8) 15.

Notwithstanding these legal obstacles, the law is developing in ways that can hold companies legally liable for human rights violations. At the heart of these developments is the concept of 'corporate complicity'. As a legal concept, complicity is a form of liability aimed at parties who, themselves, are not the actual perpetrators of a crime, but who may otherwise be indirectly involved in the offence by knowingly assisting the principle perpetrator.[11] Corporate complicity is an adaption of the complicity theory and applies to situations where companies are implicated as collaborators in human rights violations perpetrated by others.[12] In this way, the concept of corporate complicity has been developed and can be used to impose legal liability on non-human actors, such as corporations, for offences resulting directly from state or third party action.[13] For mining companies, which rely on third party security providers as part of their operations, this can lead to liability for gross breaches of human rights law by its security provider, even if the security provider is not identified or held legally accountable.[14]

(a) Corporate Complicity – International Criminal Law

The foundations for the principle of corporate complicity were laid down during the Nuremburg trials following the Second World War. The trials included the prosecution of a number of individual businessmen on the basis of their role in supporting and facilitating the Nazi war effort. These cases, referred to as the Industrialist Trials, examined the connection between the industry and the Nazi war effort, ultimately establishing a path towards corporate legal accountability for gross human right violations.[15] Later international tribunals[16] have built on this concept and, while none of these tribunals have had jurisdiction over corporations, through its jurisprudence they have formalised the link between business activities and gross human rights violations, with specific reference to those who aid and abet in the commission of international crimes.[17]

The case of Charles Taylor, the former President of Liberia, is particularly illustrative of this point. Taylor was indicted by the Special Court for Sierra Leone ("**SCSL**") for war crimes during the Sierra

[11] International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability: Volume 2 Criminal Law and International Crimes* (International Commission of Jurists 2008) 17.
[12] Robert Thompson, Anita Ramasastry and Mark Taylor, 'Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes' (2009) 40 The George Washington International Law Review 841, fn 71.
[13] Jennifer Zerk, 'Towards a Fairer and More Effective System of Domestic Law Remedies: A Report Prepared for the Office of the UN High Commissioner for Human Rights' (OHCHR, 2014), 24 <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> accessed 28 September 2015.
[14] Clapham and Jerbi (n2) 342.
[15] Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Randoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20(1) Berkley Journal of International Law 91, 104.
[16] Such tribunals include: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chamber in the Courts of Cambodia and the International Criminal Court.
[17] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20(1) Berkeley Journal of International Law 45, 74.

Leone civil war. He was ultimately convicted by the SCSL for crimes that included aiding and abetting in committing mass human rights atrocities due to his involvement in the diamond trade, for providing military personnel and operational support to hostile rebel forces (including communications, housing for the rebels, and transport).[18] While Taylor was a political leader, the activities he was engaged in and convicted of are, in many ways, the kinds of activities that a business employing a security company can become involved in, as the case of Anvil Mining demonstrates. In October 2004, following a rebel attack near its mining operations in the Democratic Republic of the Congo ("**DRC**"), Anvil Mining, a Canadian mining company with a head office in Australia, sought the assistance of the DRC armed forces to counter the rebel attack. The DRC armed forces were alleged to have illegally detained and killed individuals, in addition to engaging in rape, torture and looting. Anvil Mining was implicated in these alleged crimes and faced a series of legal actions for its involvement in human rights violations perpetrated by the military. This involvement included providing the armed forces with logistical support in the form of access to company vehicles and aircrafts, providing food and contributing to the payment of soldiers.[19]

To date, no international criminal tribunal has had direct jurisdiction over a corporation. That being said, there is nothing to prevent future tribunals from including corporate entities within the scope of their mandate. Indeed, the Office of the Prosecutor of the International Criminal Court, a permanent body with no formal jurisdiction over corporations, has asserted its commitment to investigate business institutions responsible for contributing to gross human rights violations, namely war crimes, genocide and crimes against humanity.[20] In suggesting this jurisdictional extension to business agents, it is worth noting that international criminal tribunals do have jurisdiction over an individual's criminal responsibility (for example a director or manager).[21]

(b) Domestic Criminal Jurisdiction

While corporations themselves have not been subject to international criminal tribunals, they are liable under domestic law for an increasing number of criminal and quasi-criminal offences ranging from health and safety-related offences to crimes relating to bribery and corruption. In a number of jurisdictions, including Australia, Canada, the Netherlands, the United States and the United

[18] *Prosecutor v Charles Ghankay Taylor* (Judgement) SCSL-03-01-T-1281 (18 May 2012) [5843]–[6149], [6924].
[19] Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11(1) Yale Human Rights and Development Journal 127, 132-133; see also 'Anvil Mining Lawsuit (re Dem.Rep.of Congo)' Business & Human Rights Resource Centre (1 August 2013) <http://business-humanrights.org/en/anvil-mining-lawsuit-re-dem-rep-of-congo> accessed 27 August 2015; *Anvil Mining v Canadian Association Against Impunity* (2012) CoA Quebec 500-09-021701-115.
[20] Fatou Bensouda, 'International Corporate Liability in Conflict Zones' (Paris Conference, 21 March 2013) <http://www.globaldiligence.com/icc-prosecutor-reaffirms-commitment-to-investigating-the-link-between-business-and-international-crimes-at-the-paris-conference-on-international-corporate-liability-in-conflict-zones-21-march-2013/> accessed 25 August 2015.
[21] Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press 2013) 590.

Kingdom, corporate criminal responsibility is recognised as a general principle under their respective domestic penal codes.[22] Additionally, in some jurisdictions like Australia, Canada, the Netherlands and the United Kingdom, legislation has been adopted to criminalise serious violations of human rights, namely genocide, crimes against humanity and war crimes. As domestic statutes do not make a distinction between natural and legal persons, these jurisdictions include corporations and other legal persons in their web of liability.[23] Moreover, in countries like Australia, Canada, the Netherlands and the United Kingdom (home jurisdictions for many mining and extractive companies), the concept of 'universal jurisdiction' is also recognised.[24] Under universal jurisdiction, states can claim jurisdiction over a person for violations of serious international criminal laws no matter where the crime has been committed.[25]

While domestic criminal law has remained largely untested as an avenue for holding companies accountable for involvement in gross human rights violations,[26] it is argued that corporations can be subjected to domestic criminal law for complicity in cases of grave breaches of international criminal law.

(c) Domestic Civil Proceedings: The US Alien Tort Claims Act and Developments outside the US

Notwithstanding – or indeed due to – the structural limitations of pursing corporations through criminal law, victims of gross human rights abuses, and those acting on behalf of such victims, have turned to civil law for compensation and 'justice' against corporations.[27] Again, this development owes a great deal to the concept of corporate complicity.

In the United States, the Alien Tort Claims Act (the "**ATCA**") has raised the profile of business and human rights issues internationally[28] and has provided district courts with jurisdiction over any "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[29] Since its ground-breaking judgement of *Filártiga v Peña-Irala* in 1980, the ATCA has been used as an instrument to promote international human rights,[30] and its application has been further

[22] Zerk (n13) 32.
[23] Anita Ramasastry and Robert C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (FAFO 2006), 15-16.
[24] FAFO 2006 (n23) 16.
[25] Sara L Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining' (2008) 11(1) Yale Human Rights and Development Journal 177, 193 (emphasis added).
[26] For application of these laws against individuals domestically, see: *Public Prosecutor v Van Anraat* (NL 2007) ILDC 753; Danzer Group lawsuit (re Dem.Rep.Congo)' *Business & Human Rights Resource Centre* (1 August 2013) <http://business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo#c86298> accessed 27 August 2015). For an in-depth analysis of why domestic criminal law has not been enforced, see: Zerk (n13) 63-103.
[27] Zerk (n13) 43.
[28] Robert Thompson, Anita Ramasastry and Mark Taylor, 'Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes' (2009) 40 The George Washington International Law Review 841, 842.
[29] ATCA (1789) 28 USC §1350.
[30] *Filártiga v Peña-Irala* (2nd Cir, 1980) 630 F 2d 876.

extended through case law to claims of torture, genocide and war crimes directly against individuals.[31] The ATCA has been a particularly important instrument in advancing the theory of corporate complicity with cases, often targeting extractive companies and their alleged involvement in human rights abuses caused by public and private security forces.[32]

While the 2013 US Supreme Court decision of *Kiobel v Royal Dutch Petroleum Co.* has called into question the use of the ATCA in cases of corporate complicity involving overseas gross human rights,[33] recent developments show that the ATCA can still be utilised as an instrument to hold Western companies – or at least those with a sufficient nexus to the United States – accountable for gross human rights violations abroad, and mining companies should not discount the ATCA as a legal threat. [34]

Outside of the United States, other jurisdictions have also been advancing the business and human rights agenda as a matter of domestic civil law. Canada, home to many mining companies, has of late been at the forefront of these developments. In *Choc v Hudbay*, Hudbay Minerals Inc, a Canadian company, along with its Guatemalan subsidiary, is being sued for, among other things, negligently failing to prevent human rights abuses carried out by its military and security personnel contracted for its Fenix project in Guatemala.[35] This case has already garnered a degree of attention, not least because the Court in this case has ruled that it would be willing to hear the novel argument that parent companies owe a duty of care with respect to the operations of their subsidiaries. If this argument is accepted in trial, it would represent a significant civil law development based on the theory of 'direct negligence'.[36]

In addition to the *Hudbay* case, two other civil law matters are being litigated in Canada in connection with mining companies involved in human rights abuses abroad; namely, cases against the mining companies Tahoe Resources (for alleged human rights abuses in Guatemala) and Nevsun Resources

[31] *Filártiga v Peña-Irala* (2nd Cir, 1980) 630 F 2d 876; *Kadić v Karadzic* (2nd Cir, 1995) 70 F 3d 232; *Sosa v Alvarez-Machain* (2004) 542 US 692.
[32] Rae Lindsay and others, 'Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles' (2013) 6(1) Journal of World Energy Law and Business 1, 57. For case law, see: *John Doe I et al v Unocal Corp et al* (9th Cir, 2002) 395 F 3d 932, [939]; *Khulumani v Barclay National Bank Ltd* (2nd Cir, 2007) 504 F 3d 254; *Presbyterian Church of Sudan v Talisman Energy* (2nd Cir, 2009) 582 F 3d 244.
[33] *Kiobel v Royal Dutch Petroleum Co* (2013) 133 S Ct 1659, [1669].
[34] *Lungisile Ntsebeza v Ford Motor Company* and *Sakewe Balintulo v Ford Motor Company (Re South African Apartheid Litigation)* (2014) 02 MDL 1499 SAS; *Al Shimari v CACI* (2014) in Sarah Altschuller, 'Alien Tort Case Developments: Fourth and Eleventh Circuits Apply Kiobel's "Touch and Concern" Standard' (Foley Hoag LLP, 1 August 2014) <http://www.mondaq.com/unitedstates/x/332072/Corporate+Governance/Alien+Tort+Case+Developments+Fourth+And+Eleventh+Circuits+Apply+Kiobels+Touch+And+Concern+Standard> accessed 27 August 2015; *John Doe I v Exxon Mobil Corporation* (2015) US Dist of Columbia 01-1357.
[35] *Choc v Hudbay Minerals Inc* (2013) ONSC 1414.
[36] *Choc v Hudbay Minerals Inc* (2015) ONSC, [19].

Limited (for the use of forced labour in Eritrea by its sub-contractor).[37] While it remains to be seen what the final outcomes of these cases will be, the implications for mining companies are clear: the legal risks being involved in violations of human rights is growing and, despite the limited success of convictions or actions against corporations for their involvement in human rights abuses, the area is not a "law free zone".[38]

5. Understanding human rights obligations

While the previous section of this paper explained corporate complicity as a legal theory, it is important to note that the term 'corporate complicity', as used by society, is understood to be wider than the legal meaning. In this sense, corporate complicity includes a broader range of activities or, in the case of silent complicity, omission that may not cover the scope of legal complicity.[39]

With uncertainty regarding the parameters of corporate complicity, against a backdrop of enhanced public scrutiny on adverse corporate impact on internationally accepted human rights standards, there has been a growing movement to provide companies with better guidance and support in this area. This guidance has emerged through non-legally binding or 'voluntary' codes of behaviour.[40]

(a) Guiding Principles on Business and Human Rights

Over the years, there has been a proliferation of voluntary codes ranging from United Nations-backed initiatives (such as the draft UN Code of Conduct for Transnational Corporations) to industry associations such as the Equator Principles Association and the Prospectors and Developers Association. In 2005, the UN Commission on Human Rights established the office of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (the "**SRSG**"), whose initial two-year mandate was to identify and clarify standards relating to corporate human rights responsibility and accountability. This mandate was extended to six years in total, during which time the SRSG presented its "Protect, Respect and Remedy Framework" (the "**UN Framework**"), followed by the Guiding Principles on Business and Human Rights (the "**GPs**"), the latter of which detail how the UN Framework is to be implemented.

The UN Framework itself comprises three pillars: firstly, a state's duty to protect against human right

[37] *Adolfo Agustin García v Tahoe Resources Inc* (2014) BCSC dossier No S-144726; *Gize Yebeyo Araya v. Nevsun Resources Ltd* (2015) BCSC 1209.
[38] Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights: Further Steps Towards the Operationalization of the "Protect, Respect and Remedy" Framework' (9 April 2010) UN Doc A/HRC/14/27, [66].
[39] Clapham and Jerbi (n2).
[40] Scott Jerbi, 'Assessing the Roles of Multi-Stakeholder Initiatives in Advancing the Business and Human Rights Agenda' (2012) 94(887) International Review of the Red Cross 1027, 1031-1032.

abuses by third parties; secondly, a corporate responsibility to respect human rights; and thirdly, the need for greater access to effective remedies, both judicial and non-judicial, by victims.[41] The obligation of companies to respect human rights, as set out in the UN Framework, is defined as a responsibility to "avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[42] This responsibility to respect "is a global standard of expected conduct for all business enterprises wherever they operate".[43]

The GPs were created in an effort to promote and 'operationalise' the UN Framework as well as to provide businesses with further clarity on their responsibility to respect human rights. While the GPs do not constitute a prescriptive set of rules, they provide a "principled but pragmatic framework" that seeks to assist companies as they tackle complex issues and make difficult judgements in order to fulfil their responsibility to respect all internationally recognised human rights.[44] Although relatively new, the GPs represent a broad consensus on how to tackle the issue of business and human rights.[45] The GPs were unanimously endorsed by the UN Human Rights Council in June 2011 and have received support from business, NGOs, unions and other relevant groups.[46] One of the key successes of the GPs has been establishing a level of expectation that, as noted above, governments and civil society have converged upon. The GPs have also informed a greater standardisation of society's expectations for corporate conduct.

(b) Complicity under the Guiding Principles

The concept of complicity forms a key part of the UN Framework, under which a company's responsibility to respect human rights requires, among other things, businesses to "avoid infringing on the human rights of others"[47] and, specifically, to avoid complicity in human rights violations.[48] Under the UN Framework and GPs, 'complicity' is understood in its broadest sense – that is, both legal and non-legal. As stated in the UN Framework, "[t]he concept has legal and non-legal pedigrees,

[41] Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Protect, Respect and Remedy: A Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5 (UN Framework Report 2008).
[42] Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 march 2011) UN Doc A/HRC/17/31, 13 (GP on Business and Human Rights 2011).
[43] GP on Business and Human Rights 2011 (n42) 13.
[44] Lindsay and others (n32) 26.
[45] Rachel Davis, 'The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities' (2012) 94(887) International Review of the Red Cross 961, 962.
[46] Davis (n45) 962. See also, on 20 July 2015, the Fédération Internationale de Football Association (or FIFA) Executive Committee announced that it would recognise the provisions of the GPs and make it compulsory for both contractual partners and those within the supply chain to comply with it (Fifa Executive Committee, 'FIFA Executive Committee sets Presidential Election for 26 February 2016 and Fully Supports Roadmap for Reform' (20 July 2015) <http://www.fifa.com/about-fifa/news/y=2015/m=7/news=fifa-executive-committee-sets-presidential-election-for-26-february-20-2666448.html> accessed 27 August 2015).
[47] GP on Business and Human Rights 2011 (n42) 13.
[48] UN Framework Report 2008 (n41) [73].

and the implications of both are important for companies. Complicity refers to indirect involvement by companies in human rights abuses - where the actual harm is committed by another party, including governments and non-State actors."[49]

By combining both the legal and non-legal spheres of complicity, specific definitions of what constitutes complicity in any particular situation becomes impossible.[50] Accordingly, the SRSG adopts a case-by-case approach to defining complicity. Such an approach reflects the notion that there are a myriad number of ways that a company can be considered complicit in violations of human rights, a fact that is amplified by widening the boundaries of this concept to include non-legal aspects.

So, how does a corporation avoid being complicit in human rights violations from both a legal and non-legal perspective? For the SRSG, the answer rests with the concept of 'due diligence'.

(c) The Guiding Principles and Due Diligence

Having established that avoiding complicity is part of a company's responsibility to respect human rights, and having accepted a broad definition, the SRSG offers due diligence as a way for companies to manage this risk. Indeed, the notion of due diligence features in the GPs generally, and is a key concept in guiding companies to respect for human rights. As the UN Framework succinctly states, "[d]ue diligence can help a company avoid complicity".[51]

In business, due diligence is a term generally associated with processes of investigation and inquiry made before a commercial transaction, such as the underwriting of a loan or investment or the purchase of property, including in connection with a merger or acquisition. In this sense, the term is used to refer "more broadly, to any set of voluntary processes undertaken by a business to identify and manage financial risks to the business".[52] But the term due diligence also has a more formal legal meaning and refers not just to a voluntary set of processes but also to a *standard* of conduct. In contemporary international law, the due diligence standard is used to define and qualify the extent of an actor's responsibility for the actions and conduct of third parties.[53]

In general, the GPs refer to 'due diligence' as a set of voluntary processes. For example, under the heading "Human Rights Due Diligence", Guiding Principles 17 through 21 set out various processes and procedures that businesses should follow. There are, however, other instances when the SRSG's use of the term due diligence contemplates it as a standard. For example, the introduction to the GPs

[49] UN Framework Report 2008 (n41) [73].
[50] UN Framework Report 2008 (n41) [76].
[51] UN Framework Report 2008 (n41) [73].
[52] Jonathan Bonnitcha and Robert McCorquodale, 'Concept of "Due Diligence" in the Guiding Principles Coherent?' (2013), 3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588> accessed 27 August 2015.
[53] Bonnitcha and McCorquodale (n52) 14.

provides that "business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved".[54] Indeed, the definition of due diligence adopted by in the OHCHR Interpretative Guide supports this dual meaning.[55]

The implications of a dual meaning of due diligence are that, while the process can assist companies, due diligence will not necessarily do so. As per the GPs, "business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[56] Moreover, to view due diligence as merely a set of processes would, it is argued, miss the broader point made in the GPs: that the responsibility to respect is not merely a negative duty to avoid human rights abuses but, in fact, a positive one, requiring positive actions on the part of the company to discharge this duty.[57] Due diligence, in turn, is the instrument by which a company can "discharge the responsibility to respect".[58]

Given this positive duty, a company's human rights due diligence obligations are not insignificant – indeed, they require "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks".[59]

(d) The Intersection between the Guiding Principles and Conflict-Affected Areas

The scope of due diligence responsibilities under the GPs varies depending on the circumstances of any given situation.[60] Therefore, it is inherently difficult to establish the requisite limits of due diligence under the GPs to fulfil the responsibility to respect human rights. The application of due diligence as contemplated under the GPs is even more complex in the case of CAA.

The GPs do make a special note of businesses operating in CAA, particularly as the risk of gross human rights abuses is heightened in such areas.[61] While the GPs do not prohibit companies from operating in CAA, they do raise a very prominent red flag by directing them to treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue.[62] Despite the

[54] GP on Business and Human Rights 2011 (n42) 4.
[55] OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (HR/PUB/12/02, United Nations 2012), 6 <http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf> accessed 28 August 2015.
[56] GP on Business and Human Rights 2011 (n42) 16-17.
[57] Sabine Michalowski, 'Due Diligence and Complicity: A Relationship in Need of Clarification' in Surya Deva and David Bilchitz (eds), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect (CUS 2013), 221.
[58] UN Framework Report 2008 (n41) [56].
[59] Human Rights Council, 'Clarifying the Concepts of "Sphere of Influence" and "Complicity": Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie' (15 May 2008) UN Doc A/HRC/8/16, [71].
[60] GP on Business and Human Rights 2011 (n42) 10, 21.
[61] GP on Business and Human Rights 2011 (n42) 21.
[62] GP on Business and Human Rights 2011 (n42) 21 (emphasis added).

heightened risk of being involved in gross human rights violations, the GPs do not provide very much in the way of specific guidance to companies operating in CAA.[63] Instead, the GPs encourage companies to use external tools and solicit third party assistance in fulfilling their responsibility to respect human rights in CAA.[64]

6. Supporting tools for mining companies operating in conflict-affected areas

One of the most important tools for mining companies to address their human rights due diligence obligations is the Voluntary Principles of Security and Human Rights (the "**VPs**"). The VPs are a set of transnational human rights guidelines directed specifically to oil and gas and mining companies.[65] Launched in 2000, the VPs were largely a response to various allegations of human rights abuses attributed to security forces engaged by US and UK-based extractive companies operating overseas. The guidelines are intended to bring together major companies in the extractive and energy sector, governments and NGOs to "guide companies in conducting a comprehensive human rights risk assessment in their engagement with public and private security providers to ensure human rights are respected in the protection of company facilities and premises."[66] The VPs, as the full title suggests, are focused on security-related risks and, as such, serve as an important instrument for companies in managing the risk of becoming complicit in the human rights abuses of their security providers.

Implicit in the VPs is the understanding that, while extractive companies will require public or private security to protect people and personnel, this presents risks to the safety and well-being of local communities. Therefore, the primary focus of these principles is getting members to put in place systems, procedures or arrangements to respect international human rights standards and, in exchange, mitigate the risk of becoming complicit in such violations. To manage this risk, the VPs establish principles divided into three groups: (a) risk assessment; (b) interactions between companies and public security; and (c) interactions between companies and private security forces.

Despite being developed before the GPs, the VPs are consistent and, indeed, complementary to the main ideas of the GPs.[67] For one, the VPs clearly address the crucial gap between security-related risks and human rights identified by the GPs. Secondly, the VPs are aimed specifically at addressing the risk of complicity in human rights abuses perpetrated by third parties, namely public and private

[63] Joanna Kyriakakis, 'Developments in International Criminal Law and the Case of Business Involvement in International Crimes' (2012) 94(887) International Review of the Red Cross 981, 987; Lindsay and others (n32) 24.
[64] GP on Business and Human Rights 2011 (n42) 21.
[65] Tanja A Börzel and Jana Hönke, 'From Compliance to Practice: Mining Companies and the Voluntary Principles on Security and Human Rights in the Democratic Republic of Congo' (DFG Research Center 2011), 13 <http://www.sfb-governance.de/en/publikationen/working_papers/wp25/SFB-Governance-Working-Paper-25.pdf> accessed 28 August 2015.
[66] 'Voluntary Principles on Security and Human Rights' <http://www.voluntaryprinciples.org/wp-content/uploads/2014/05/VPs_Fact_Sheet_-_May_2014.pdf> accessed 27 August 2015.
[67] John G Ruggie, 'Voluntary Principles on Security & Human Rights, Ministry of Foreign Affairs' (Keynote Remarks at Annual Plenary, The Hague Netherlands, 13 March 2013) <http://voluntaryprinciples.org/files/John_Ruggie_Speech_-_2013_Annual_Plenary_Meeting.pdf> accessed 18 August 2015.

security providers. Finally, the VPs are also consistent with the GPs to the extent they recognise human rights in the same broad sense and stress the importance of risk assessment.

7. Risks associated with voluntary codes

It has already been suggested that voluntary codes, like the GPs and the VPs, emerged to help companies navigate the risks of human rights violations. Today, voluntary codes are widely used by companies. A recent survey, entitled 'Risk and Return: Foreign Direct Investment and the Rule of Law', found that the vast majority of respondents (composed of 301 senior decision-makers at Forbes 2000 companies with global annual revenues of at least US $1 billion) adopted at least one voluntary code on labour and human rights practices such as the 2000 OECD Guidelines for Multinational Enterprises (85 per cent) or the GPs (73 per cent).[68]

Despite this high acceptance by corporations, voluntary codes do have their critics. Among the critiques is the observation that there is a degree of incoherence within voluntary codes, as they have been developed chiefly by activists, NGOs and businesses (each according to their own self-interest),[69] and they lack clarity on fundamental issues such as what constitutes an international crime or a human right.

In many ways, the GPs were developed to address these criticisms and, while it remains to be seen whether these principles will solve these issues, available evidence suggests that the emergence of the GPs have resulted in a degree of coherence to various codes of conduct, especially as other business and human rights standards converge around the GPs.[70] The convergence of such standards is evident in numerous amendments to incorporate the GPs in the OECD Guidelines for Multinational Enterprises in 2011, the International Organization for Standardization ISO 26000 Guidance on Corporate Social Responsibility, the International Finance Corporation's Sustainability Framework and Performance Standards, and the Equator Principles (the "**EPs**") applied by private banks.[71]

Perhaps the more fundamental criticism of voluntary codes, as they apply to business and human rights, is their 'voluntary' label. In considering the several aspects of this criticism, the first asserts that codes on human rights norms should not be voluntary.[72] To the extent that such codes address behaviour falling within the scope of international norms (for example, those involving prohibitions

[68] Hogan Lovells, Bingham Centre and the British Institute of International and Comparative Law, 'Risk and Return: Foreign Direct Investment and the Rule of Law' (Hogan Lovells 2015), 11 <http://www.biicl.org/documents/625_d4_fdi_main_report.pdf> accessed 28 August 2015 (Risk and Return Survey).
[69] Simon Chesterman, 'Oil and Water: Regulating the Behavior of Multinational Corporations Through Law' (2004) 36 New York University Journal of International Law and Politics 307, 324.
[70] Davis (n45) 963.
[71] Davis (n45) 963.
[72] Stephens (n17) 80.

against forced labour or torture), there should be nothing voluntary about abiding by such norms. Put differently, companies should adhere to human rights as a matter of law, not choice. Again, the GPs seek to address this by clearly stating that corporations are required to respect human rights – voluntarism in this context is no longer acceptable. Moreover, the treatment of involvement in gross human rights obligations as a "legal compliance issue" by the SRSG is, it is argued, an acknowledgement of a significant non-voluntary component of the GPs.

Market pressures are also making voluntary codes more mandatory. The Risk and Return Survey reveals that over 80 per cent of respondents viewed adherence to codes (such as the GPs) as a "very important" or "somewhat important" factor in selecting business partners (with only 2 per cent of all respondents indicating that it was not a factor at all).[73] For mining companies, particularly juniors seeking to partner, sell to or otherwise deal with senior mining companies, this should be a particularly significant finding. Moreover, mining companies are under pressure from other suppliers of capital, namely third party financiers, to report on various non-financial risks to projects, including specifically social and human rights-related risks. For projects with potentially adverse, as well as limited adverse, environmental and social risks, companies are required to adhere to the EPs in connection with project finance loans.[74] In certain high-risk circumstances (which should include CAA), the EPs assert that a company may be required to undertake human rights due diligence as understood under the GPs.[75] For those companies seeking financial support from development funding institutions with experience in CAA, including members of the World Bank, these lenders are increasingly requiring companies operating in CAA to provide assurances that they conform to various codes such as the VPs.

Fuelling these market pressures is the proliferation of legislation and regulation in this area. Recent legislative enactments to this end include the EU non-financial reporting directive that will require all large public interest EU entities (including companies listed in the EU) to disclose in a management report information relating to, among other things, the entity's respect for human rights.[76] In addition, the United Kingdom has enacted the *Modern Slavery Act 2015* which requires commercial companies (wherever incorporated) with a total turnover of £36 million[77] that carry on business anywhere in the United Kingdom to report that there is no slavery or human trafficking involved in their supply chain

[73] Risk and Return Survey (n68) 11.
[74] Equator Principles, 'The Equator Principles' (June 2013), Principle 1 Category A-B <http://www.equator-principles.com/resources/equator_principles_III.pdf> accessed 28 August 2015.
[75] Equator Principles (n74).
[76] Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards Disclosure of non-financial and diversity information by certain large undertakings and grounds [2014] OJ L 330.
[77] Home Office, 'Modern Slavery and Supply Chains Government Response; Summary of Consultation Responses and Next Steps' (July 2015), 16 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response__final__2_pdf.pdf> accessed 28 August 2015.

by providing a statement as to how they know this.[78] The Canadian government has also introduced its enhanced Corporate Social Responsibility Strategy aimed at strengthening Canadian mining companies' corporate social responsibility practices as well as maximising local benefits of such investments when Canadian companies operate abroad. As part of this strategy, the policy requires companies to include as benchmarks the GPs and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[79]

In addition, some stock markets (including the Singapore Exchange, the São Paulo Stock Exchange and the Johannesburg Stock Exchange) are also requiring companies to report on their human rights impact or explain why they have not done so. The Sustainable Stock Exchanges (the "**SSE**") initiative also looks for ways for global exchanges to engage investors, regulators and companies to enhance corporate transparency on environmental, social and corporate governance issues as well as encourage responsible long-term approaches to investment. Co-organised by various UN groups, including the UN Global Compact Office, the SSE partner exchanges include the Borsa Istanbul Stock Exchange, the Bombay Stock Exchange, the Colombian Securities Exchange, Deutsche Börse, the Johannesburg Stock Exchange, the Lima Stock Exchange, the London Stock Exchange Group, the Mexican Exchange, NASDAQ, the Nigerian Stock Exchange, the New York Stock Exchange and the Stock Exchange of Thailand.

Stated simply, whether due to market pressure or regulation, the adoption of codes and standards has become less voluntary and, in fact, more mandatory than it once was.

A third aspect of this criticism purports that voluntary codes of conduct lack legal teeth and, as such, may be perceived as more of a public relations effort than any real attempt to respect human rights. Regardless of how companies may view voluntary codes, there is increasing evidence that such codes give rise to their own independent obligations and, moreover, that companies adopting such codes put themselves at significant legal risk if they do not properly educate themselves and ensure internal and external compliance.

Firstly, companies may be held legally responsible for false or misleading statements under domestic legislation such as consumer protection and marketing legislation. While this may be less of a concern for upstream extractive companies without a downstream market presence, many of these companies, due to the capital-intensive nature of their business, have securities that are publicly traded on one or more of the world's main stock exchanges. Domestic securities legislation and market rules of

[78] Modern Slavery Act 2015 s 54.
[79] Foreign Affairs, Trade and Development Canada, 'Doing Business the Canada Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad' (November 2014) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> accessed 28 August 2015.

reputable exchanges will, in turn, have rules and penalties, civil and, in some cases, criminal, for material misrepresentations.[80] Whether or not compliance with codes meets the materiality threshold is beyond the scope of this paper, but suffice it to say that such market rules impose discipline on listed companies to ensure the accuracy of their public representations. Secondly, standards advocated in various codes can be incorporated into contracts between companies and private parties[81] or included in investment contracts made between companies and host states.[82] Such measures would allow enforcement of standards through private contract.[83]

Thirdly, and perhaps most significantly, voluntary standards can come to establish the level of conduct expected of those companies that accept to be bound by them.[84] Voluntary standards are even more likely to become mandatory standards where the level of participation is high enough or where industries encourage their participants to follow the same standards. This is one of the key issues to be considered in the *Hudbay* case, where the Court noted that Hudbay had stated publicly that it adhered to the GPs and the VPs. As the Court notes, "[Hudbay] made public representations concerning its relationship with local communities and its commitment to respect human rights, which would have led to expectations on the part of the plaintiffs."[85]

Consequently, regardless of the intentions of companies when adopting codes – whether it be regarding public relations, market pressures or enlightened self-interest – the adoption of codes of conduct carry with them specific obligations, beyond the general responsibility to respect human rights, that can amount to actual legal consequences.

8. Conclusion

Mining companies have long known and enjoyed the rewards of working in CAA. What is more, given the important economic role they can play in helping develop such areas, mining companies should be encouraged to invest in these regions. Nevertheless, economic rewards do not come without risks. The risks for mining companies operating in CAA is that they have a greater chance of becoming embroiled in community conflict which, in addition to the public relations, operational and financial risks, also give rise to significant legal risks. While these risks may have been deemed acceptable (or indeed non-existent) in the past, it is clear that corporations today cannot overlook its

[80] While it is beyond the scope of this paper to address this issue with any detail, in general, material misrepresentations are considered to be those that have a significant impact on the market price of the company's securities.
[81] Liesbeth F H Enneking, Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (Eleven International Publishing 2012) 400.
[82] Linday C Nash, 'Adam McBeth, Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11(1) Yale Human Rights and Development Journal 167, 173.
[83] Nash goes even further by proposing that contracts with government development funding bodies such as the World Bank investment arms include third party rights to permit communities to bring actions for breaches of standards (Nash (n82) 173).
[84] Enneking (n81) 399. See also Jerbi (n40) 1032.
[85] *Hudbay Minerals* 2013 (n35) [69].

responsibilities to respect human rights.

In light of these developments, how does a mining company navigate through this web of potential legal liability and, in this context, how should lawyers advise such companies?

As a necessary first step, a company should undertake a comprehensive human rights due diligence as proscribed by the GPs. Such a process can be summed up by the UN Framework as being:

> An ongoing risk management process that a reasonable and prudent company needs to follow in order to identify, prevent, mitigate and account for how it addresses its adverse human rights impacts. It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.[86]

As part of this due diligence assessment, companies and their advisors should give greater consideration to where their operations are being conducted and, in particular, whether these operations – or proposed operations – involve a CAA. This consideration must be achieved through a proper, considered and honest assessment of the political, social and economic environment where the company is operating or seeks to invest in. For operations taking place in areas that fall within the scope of CAA, companies must be extra vigilant against the risks of involvement in gross human rights abuses, whether directly or indirectly. As noted earlier in this paper, the absence of violent conflict is only one consideration in determining a CAA. For many business leaders, acknowledging that they are operating in a CAA is difficult – if only because of the stigma of doing so. Companies and their directors must, therefore, not turn a blind eye to this reality and accept that some (if not all) of their operations may be active in CAA.

Moreover, where security forces are engaged, a company should assume greater oversight over its security providers, whether they are public or private forces. For some companies, this service can be contracted out to private security companies; for others, they are obliged to rely on local forces to maintain a sufficient level of security. In either case, a company would be mistaken in believing that third party security forces are beyond its responsibility. As noted, security is a feature of virtually every stage of a mining project and can represent the most visible face of the company to a community. Hence, how a security force interacts with a community will have a significant impact on the relations between a company and the broader community where it is operating. Add to this the heightened risk of companies becoming complicit in the human rights violations perpetrated by their security providers, and the reasons for such oversight become ever clearer. While the security function often falls within the scope of the duties of a country manager, the boards of mining

[86] SHIFT and Mazars, 'UN Guiding Principles Reporting Framework: With Implementation Guidance' (Shift 2015), 109 <http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf> accessed 28 August 2015.

companies and their advisors should, as part of their broad responsibility to respect human rights, assume greater control and oversight. On a most basic level, this function should entail undertaking an assessment of the security forces, confirming whether they have the requisite understanding and training to respect human rights and putting in place a system of monitoring and capacity building to ensure that the security providers continue to respect the human rights of community members.

To assist companies, amidst reports of abuses involving private security providers (such as Blackwater Security Consulting), private security companies and governments have come together to create the quality management standard ANSI/ASIS PSC.1-2012. This standard includes requirements for conforming to human rights norms and international humanitarian law. Hence, the standard provides a tangible means for private security companies (and the companies that hire them) to demonstrate their commitment, conformance and accountability to objectives including respect for human rights. It does this by providing criteria that can be measured and audited and provides guidance that supports its objectives. By requiring security firms to be certified against an objective standard, mining companies (especially those working in CAA) can help guard against complicity in a way that is measurable and demonstrable. This private regulation, therefore, represents a significant advancement in security and human rights due diligence for mining companies and, moreover, helps them mitigate risks when operating in CAA.

As we have seen above, the adoption of codes of conduct such as the VPs is another important step for companies in effectively managing the risk of becoming complicit in gross human rights violations. While such codes are instrumental in terms of assisting companies manage risks and demonstrate a commitment to respecting human rights (not to mention the growing market pressures on companies to adopt such codes), these codes should not be adopted blindly. As described in this paper, these codes can carry legal obligations for a company. It is, therefore, incumbent on a company to ensure that it understands what it is agreeing to and, based on this, is putting in place the correct controls and mechanisms to ensure compliance with is the specific requirements.

While many codes are drafted in a language that is accessible to most readers, they are often deceptively complex in practice. For example, the principles advocated in the VPs do fulfil the due diligence requirements set out in the UN Framework and GPs, but the VPs require a high degree of skill and knowledge in different areas of security and human rights generally and, specifically, in terms of their application in CAA. This was a point that was stressed in the World Bank's Compliance Advisor/Ombudsman 2005 report into the allegations of involvement by Anvil Mining in gross human rights violations in the DRC. Among other things, the report criticised Anvil Mining for

failing to understand the implications of implementing the VPs.[87] It is, of course, unlikely that any corporation – let alone a junior exploration and development company – would have all the resources available in-house to meet its commitments. Therefore, companies should consult with third parties in each of the three principle areas. For example, with respect to risk assessments, companies should examine information from all relevant stakeholders whether civil society (such as NGOs), home and host governments or local judiciary and security providers.[88] Regarding its interactions with public and private security providers, a company must have access to expertise in security, human rights and international humanitarian law. For this reason, compliance with the VPs is not a task to be taken lightly, particularly in light of rising litigation claims.

Another important consideration for companies is to secure appropriate legal advice. As described in this paper, mining in CAA is fraught with significant legal risks. In the case of companies operating in CAA, the risk of being involved in gross human rights violations is, as the SRSG noted, a legal compliance issue and must be treated as such. Even though abuses can take place in seemingly 'lawless' states, it does not mean that it is a lawless area – international and domestic criminal and civil laws exist and can be applied against companies in many national jurisdictions. Moreover, it has also been noted that lawyers, and the legal privilege they afford clients, can play a critical role in limiting litigation risks by offering companies a degree of confidentiality when conducting human rights due diligence and otherwise seeking to address its human rights responsibilities.[89]

Finally, and most importantly, there must be a genuine commitment from companies to respect human rights. While many companies – including mining companies – invest heavily in various corporate social responsibility and community relations programmes, more effort is required to effectively address this risk. Stated simply, corporate social responsibility does not equal corporate responsibility. What is required from companies to embrace its corporate responsibility is a corporate cultural shift, one that allows for a wider acknowledgement of corporate responsibility – namely, the responsibility to respect human rights. As the evidence from the Economist Intelligence Unit Report discloses, the changing attitudes of companies on this subject are encouraging. Companies are starting to accept that human rights are no longer the sole responsibility of states and that companies have a role to play in

[87] CAO, 'CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver mining Project in The Democratic Republic of the Congo: Final Report' (November 2005), 22 <http://www.cao-ombudsman.org/cases/document-links/documents/DikulushiDRCfinalversion02-01-06.pdf > accessed 28 August 2015.

[88] Bennett Freeman, Maria B Pica and Christopher N Camponovo, 'A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights' (2001) 24 Hastings International and Comparative Law Review 423,437.

[89] Yousuf Aftab, 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness For Extractive-Sector Companies' (December 2014), 27 <https://static1.squarespace.com/static/50c2b14ae4b0ceeebffc64d3/t/550c3da5e4b0f4bee7a5f7a6/1426865573891/YAftab%2C+AI60%2C+ch+19+%282014+Final%29.pdf> accessed 28 August 2015.

their protection.[90] This role will undoubtedly increase as market and regulatory pressures in the fields of corporate human rights requirements and reporting escalate. However, in order to sufficiently address the risk of being implicated for human rights violations (and consequently comply with regulatory and market requirements), it is simply not enough for management to delegate this function down the corporate chain of command or to outside experts. What is required, instead, is an integration of the obligation to respect human rights into a corporation's wider risk, compliance and management systems. This, in turn, requires proper oversight and accountability from the board of directors and senior management in addition to training and compliance on all levels. It is only in this way that companies can address these risks – and for mining companies operating in CAA, the consequences of getting it wrong are simply too high.

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[90] Economist Intelligence Unit, 'The Road from Principles to Practice: Today's Challenges For Business In Respecting Human Rights' (2015) <http://www.economistinsights.com/business-strategy/analysis/road-principles-practice> accessed 28 August 2015.