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EXTRATERRITORIAL OBLIGATIONS IN THE GOVERNANCE GAP

WHAT SOUTH AFRICA'S MINE CLOSURES CAN TEACH US ABOUT THE UTILITY OF BINDING INTERNATIONAL LEGAL FRAMEWORKS

The year 2021 marked the tenth anniversary since the United Nations Human Rights Council (HRC) unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs seek to provide a global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.[1] They also represent a consensus between state governments, the business community, and human rights defenders.

A decade later, however, access to justice for the victims of human rights violations and grave environmental damage remains mostly elusive, building a more compelling case for a different approach in international law. It was against this backdrop that, in 2014, South Africa and Ecuador initiated the adoption of resolution 26/9 to elaborate on an international legally binding instrument (LBI) to regulate transnational corporations (TNCs) and other business enterprises at the United Nations HRC. While the UNGPs have had an undeniable impact in seeking common clarity between states, companies, and civil society, the governance gaps and lack of compliance by TNCs, especially in the Global South, still allow for human rights abuses and serious environmental damage that threatens the human rights of others.

For example, South Africa's gold "sunset industry", although a contested term, is characterized by unprofitability, a decline in outputs since the 1990s, and job losses.[2] It is also defined by derelict and unrehabilitated mines, where there is increased difficulty in tracking and tracing the owners of historic mine dumps, investigating, or assigning responsibility for the required remedial measures, especially in environmental rehabilitation as required by law. Consequently, the victims of unrehabilitated mine sites who suffer irreversible illnesses and violations of their human rights are without access to remedy.

This paper aims to illustrate that the emphasis placed by the UNGPs on states to protect and remedy human rights violations does not account for the governance gaps faced by some states like South Africa. In addition, the paper recommends that a state's extraterritorial obligations (ETOs), together with mutual legal assistance that can be implemented through the Binding Treaty on Business and Human Rights, offers victims an opportunity to better access remedy for human rights violations linked to business activity.

This argument is in line with the increasing recognition among scholars that while a state may be *unwilling* to enforce and monitor legislation, it is also possible that a state is *unable* to do so due to capacity constraints and weak governance.[3] In the case of South Africa, scholars concede that the mine closure legislative framework is comprehensive, yet that its enforcement and monitoring is in part ineffective, thus creating a governance gap.[4]

In addition, insolvency laws further exacerbate the existing governance gap, which makes it difficult for victims to access remedy.[5] This leads one to conclude that the South African government is *unable* to enforce the mine closure legislative framework due to capacity constraints. Moreover, while a closer study into South Africa may conclude that this is a case where a government may be both unable and unwilling to implement the mine closure legislative framework, it is beyond the scope of this paper to explore the latter.

BACKGROUND

There is increasing recognition that economic globalization exposes governance gaps in the domestic and international arena. Arguably, it is even more elusive at the international level as there are no real structures of decision-making and implementation. Instead, there are a variety of actors at this level who adopt multiple negotiated decisions, and do this through some form of interdependence which translates into soft law such as the UNGPs.[6] The consequence is fragmentation that leads to issues of accountability especially for those actors, such as TNCs, which are capable of operating across borders.

There is also an increase in global trade that is marked by a fragmentation of business production processes, the development of complicated supply chains, and an increased number of people potentially affected by such activities.

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The direct or indirect impact of global trade includes human rights violations upon the communities in which TNCs operate. These may come in the form of forced labour, human trafficking, a lack of access to healthy and clean water, or the use of data supplied by internet and technology companies to repressive governments to enable them to track and harass political dissidents.[7]

The negative impacts of trade have also been the lived reality of some South African communities, including several cases of unrehabilitated mines that have affected the health of locals in the form of high incidences of lung and stomach cancers, leukaemia, and birth defects.[8] This is a violation of section 24 of the South African constitution, which provides that "everyone has the right to an environment not harmful to their health or wellbeing".[9] The right to an environment is associated with the rights to food, water, health, land, and dignity.

Sudden and forced gold mine closure is associated with poorly rehabilitated tailings storage facilities, which affect surrounding communities. As reported in a 2016 Human Rights Commission report, most mining-affected communities in South Africa complain about increased levels of dust, deteriorating health, water pollution, and food insecurity.[10]

Many of the country's gold mines have closed or are expected to close over the next decade.[11] This comes at a time when, according to Earthlife Africa, a South African non-profit, Johannesburg is currently the most uranium-contaminated city in the world — a consequence of gold mining.[12] The impacts of uranium mining also have negative consequences on the environment, including reduced land and ecosystem viability, which affect the livelihoods and food security of local communities.

This is an indication that the state is falling short of its duty to uphold its international, regional, and domestic business and human rights commitments. At the international level, these include treaties such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

In addition, in terms of voluntary initiatives, South Africa also endorsed the UNGPs, which set out existing international law and best practice.[13] The UNGPs represent the final output of the mandate of Professor John Ruggie, former UN Assistant Secretary-General for Strategic Planning, to operationalize the UN "Protect, Respect and Remedy" framework, a document adopted by the HRC in 2008.[14] These two UN documents are based on Ruggie's three-pronged structure: the state's *duty to protect* against human rights abuses by business enterprises (pillar I), the corporate responsibility to *respect* human rights (pillar II), and the need for greater access by victims to effective remedy (pillar III).[15]

SOUTH AFRICA'S MINE CLOSURE LEGISLATIVE FRAMEWORK: COMPREHENSIVE LEGISLATION WITH CONSTRAINED CAPACITY

South Africa's mine closure system is deeply flawed, mainly due to the government's reluctance to issue closure certificates.[16] In a 2015 departmental joint report, it became apparent that the state is reluctant to issue closure certificates due to capacity constraints to monitor and enforce legislation throughout the lifecycle of mining operations.[17]

The other side of the coin, as argued by Mbalenhle Mpanza, Elhadi Adam, and Raeesa Moolla,[18] is the poor articulation of the Companies Act 61 of 1973, which creates an opportunity to avoid rehabilitation upon insolvency. The Department of Mineral and Energy Resources (DMRE),[19] as it is currently known, is not listed as a creditor during insolvency proceedings despite an existing requirement for a closure certificate to be sought before such a process. Therefore, the DMRE cannot access the funds for rehabilitation once the process of insolvency has begun, leaving mining communities to bear the brunt. This policy gap should be rectified. However, the challenge of policy implementation remains.

There are reasonable legislative measures, such as the National Environmental Management Act 62 of 2008 (NEMA) and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which exist to protect the right to a sustainable ecological environment.

As conveyed in the study by the International Federation of Human Rights (FIDH) and Lawyers for Human Rights (LHR), the guidance provided by NEMA mandates that mining right holders "rehabilitate the environment as far as reasonably practicable to its natural state or to a land use which conforms to the generally accepted principle of sustainable development, set aside a financial provision — which only the state can access — to ensure such rehabilitation occurs; and retain liability for environmental damage even after closure of the operation".[20]

In addition, the MPRDA also provides guidance with respect to mine closure in terms of powers and processes that must be undertaken to ensure that environmental issues are properly addressed. These obligations include the requirement for mining rights holders to rehabilitate the land affected by the operation to its natural or predetermined state, or to land use which conforms to generally accountable principles of sustainable development.[21]

While insolvency laws expose gaps in the mine closure legislative framework, the environmental and mining legislative frameworks arm the state with a wide range of powers to both prevent and remedy them as part of their international duties to protect. These powers include the state's responsibility to issue a closure certificate, environmental rehabilitation before such certificate is issued, imputing criminal liability to directors of entities that cause pollution, and rehabilitating the environment at mining operations themselves where the relevant entity fails to comply.[22] However, the implementation of these processes is hampered by capacity constraints within the relevant departments.

For example, capacity constraints are reflected in the availability of inspectors to conduct planned and unplanned inspections. These capacity constraints raise questions about monitoring. This means that statutory provisions governing the rehabilitation duties do not promote lifecycle responsibility or "cradle to grave" obligations for remediating environmental harm, environmental justice, and accountable, transparent, and participatory environmental management.[23]

Moreover, a report by Mashudu Masutha unearthed severe capacity constraints in the DMRE.[24] This includes a critical knowledge and skills gap in the department, hampering its effective functioning. This is true especially regarding its ability to assess environmental requirements during mining licence applications, and to understand the impact of the required environmental assessment procedures: on the environment, on post-mining land use, and on an overall understanding of the mining industry.[25]

There is also high staff turnover in government departments, which affects institutional ability to ensure continuity. In addition, there is a lack of communication and cooperation between the various government departments responsible for the mining and environmental legislative framework, resulting in an overlap of mandates, policies, and procedures which may cause confusion during implementation. As a consequence, the report concludes that mining companies' environmental practices are not always enforced to the degree that they should be.[26]

Problems with monitoring are further exacerbated by gaps in environmental coordination between the DMRE and the Department of Environment, Forestry and Fisheries (DEFF). The Centre for Environmental Rights (CER) argues, *inter alia,* that the DEFF is in a better position to manage all environmental authorization applications, which in the case of mining — as before an appeal — are currently located within the DMRE.[27] The fragmentation in the implementation of policy between national, provincial, and local also exacerbates existing coordination challenges to effectively monitor legislation.[28]

Therefore, capacity constraints in relevant government entities make it difficult to achieve successful mine closure that considers the government's duty to protect human rights and the socio-economic impacts thereof. This has especially been the case when closure is sudden and as more and more gold mining companies opt for liquidation.[29]

Post-closure, rehabilitation costs end up being passed onto government, which is reluctant to issue closure certificates especially because it has no legislative power to force a company to remedy the mine site once such a certificate is issued.[30] For example, in 2012–2013 the Department of Mineral Resources (DMR, as it was known prior to the merger with the Department of Energy) rehabilitated 13 derelict and ownerless mines at a cost of 69.9 million South African rand, and plans to spend an additional 326.6 million to rehabilitate 120 mines were also underway.[31]

THE MINTAILS CASE: A FLAWED MINE CLOSURE SYSTEM

The systemically flawed mine closure process was further illustrated by the case of Mintails Mining South Africa (Pty) Ltd., an Australian-listed firm, and its several related companies that announced their liquidation and an overnight closure of the mine in 2015. The company was thus unable to fulfil its rehabilitation liabilities due to a lack of funds — as well as its decision to prioritize investors.[32] The company averted the cost of rehabilitation, estimated to be about 330 million rand, by making only 25.6 million rand provision for mine closure. Furthermore, the Mintails case illuminates another common trend which Mariette Liefferink, an activist and Chief Executive of the Federation for a Sustainable Environment, describes as "pass the parcel", in which abandoned, unprofitable large mines are later transferred to new owners as shell companies, before being forced to abandon them.

As a consequence of the sudden closure, thousands of people lost their jobs, environmental mitigation measures were immediately halted, and "the mine's closure certificate was neither sought nor issued".[33] The impact of the improper closure of this mine was felt by some 6,000 villagers living near the mine.[34] This occurred in a context where, between 2011 and 2016, zero large-scale mines in Gauteng were granted mine closure certificates.[35]

When looking at systemic improper mine closure, the Mintails case is no exception, as is illustrated by cases such as that of the Blyvooruitzicht Gold Mining Company.[36] These cases and others highlight the lack of enforcement by the DMRE throughout the mine closure process. It also highlights how mining companies use "business rescue" or winding-up processes to opt out of their obligations in what has become a "trend".[37]

Crucially, the Federation for a Sustainable Environment (FSE) has attempted to obtain, through litigation, company accountability for the rehabilitation of the environment. However, this has been the only avenue explored, and thus far has met with no success.[38] Exploring an alternative jurisdiction may offer an opportunity for company accountability.

HOW THE BINDING TREATY ON BUSINESS AND HUMAN RIGHTS OFFERS OPPORTUNITIES FOR REMEDY

John Ruggie's "Protect, Respect, Remedy" framework is operationalized through the enactment of laws at the national level that can be achieved through the implementation of national action plans. As argued by Bilchitz, this framework recognizes state obligations in the enactment and implementation of law.[39] Several states such as France, Germany, and Norway have also adopted legislative measures as envisaged by the UNGPs to ensure that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

For example, the 2017 French *Loi de Vigilance* (corporate duty of vigilance law) makes it mandatory for large companies to take steps to identify and avoid the risk of harm to human rights and the environment. A debate concerning the adoption of a mandatory environmental, social, and governance due diligence framework by the European Union is also currently underway. These laws represent significant global progress in business and human rights standards.

However, the emphasis by the UNGPs on state obligations when protecting against corporate human rights abuses does not recognize instances where a state is unable to act against a corporation in weak governance zones. The combination of weak governance and complex corporate structures leads to the problem of access to remedies for victims of corporate human rights violations.[40]

In this context, the paper argues that the Binding Treaty on Business and Human Rights offers an opportunity to address governance gaps at the domestic and international level. Specifically, that ETOs have the potential to improve access to remedy.[41] ETOs reinforce the idea that human rights obligations are not always confined to a state's territory.[42] This affords victims the opportunity to seek remedy and the enforcement thereof from home states that have more effective institutions, which are characterized by capacity, transparency, and accountability.

Survivors of human rights violations face significant challenges when seeking remedy in the form of investigation, prosecution, and reparations as in the South African mine closure case. ETOs offer an opportunity to hold companies liable for their business activities, especially those of a transnational character, through the required cooperation of states to investigate and enforce remedies.[43] In this way, ETOs can broaden victims' access to justice for instances of harm inflicted by TNCs in their home state where they are incorporated or have the most assets, or where the pro-

tection provided by the host state where the subsidiary or subcontractor is located is limited.[44]

Notwithstanding how the UNGPs have made considerable efforts to bridge a gap between governments, the business community, and human rights defenders, some scholars concede that they lag far behind in terms of ETOs of states.[45] For example, the UNGPs provide that states "should set out clearly the expectation that all business enterprises *domiciled in their territory and/or jurisdiction* respect human rights throughout their operations" (emphasis added).[46]

According to Olivier De Schutter,[47] in contrast to this position, the UN treaty bodies have repeatedly expressed that states should implement measures to prevent business human rights violations that occur abroad and are incorporated under their laws, or those that have their main operations under their jurisdiction. The Committee on Economic, Social, and Cultural Rights is one such example that affirms the international duty of states, by way of legal or political means, to prevent third parties from violating such rights under the International Covenant on Economic, Social and Cultural Rights in accordance with the UN Charter and applicable international law.[48] The committee further states that in preventing such violations, states must do so without infringing upon the sovereignty or diminishing the obligations of host states under the Covenant.

In addition and against this backdrop, De Schutter argues that the UNGPs adopt a more cautious approach to ETOs, which may unfortunately lead to states that are reluctant to accept such obligations being encouraged to challenge the interpretation of human rights bodies despite the support these positions have received from civil society, legal doctrines, and international courts.[49] Indeed, at the seventh session of the open-ended intergovernmental working group (IGWG) held in October 2021, some states such as Brazil, Iran, and China reiterated the importance of the political independence of states and non-interference in the domestic affairs of other states in order to maintain territorial integrity. This points to a possible concern about ETOs infringing on the political and territorial independence of states.

Further, De Schutter argues that the weak formulation of ETOs by the UNGPs necessitates a legally binding instrument to clarify the content of the duty of states to protect human rights extraterritorially, and that a binding treaty must dispel the confusion the UNGPs have created to reinforce inter-state cooperation and mutual trust in respective legal systems.[50]

Moreover, in support of the arguments made above, Sigrun Skogly argues that the focus on the role of the domestic state as the only party which has obligations in its territory negates the direct role of business in committing human rights violations.[51] In addition, he argues that the fixation on the role of the state prevents a more nuanced approach to obligations in a complex globalized world. The 2011 Maastricht Principles — which deal with states' extraterritorial obligations in the area of economic, social, and cultural rights — are an example of how international law increasingly recognizes the changing territorial obligations of states.

A GLIMPSE INTO A WORLD OF ETOS: NIGERIA AND THE NETHERLANDS

In 2008, a case was filed by four Nigerian farmers against Royal Dutch Shell, a Nigerian Shell subsidiary, where the company's headquarters are located, in the Netherlands. Under Nigerian law, Shell escaped liability because of a weak governance zone, a gap in the law that states that the company cannot be held liable for leaks caused by sabotage. This defence was used by Shell for the oil spill in the Niger Delta farmland, which affected the food security of the local community and livelihoods of the farmers.[52] Oil spills also contaminate water systems such as rivers and ponds, which thus inadvertently compromise the health of surrounding communities.[53] As in the South African case, the pollution in the Niger Delta also comes with the risk of respiratory illnesses.

Shell challenged the jurisdiction of the Dutch Court to hear the case against its Nigerian subsidiary, a common measure used by TNCs to evade accountability and where foreign courts evoke the doctrine of *forum non conveniens* — a technicality that allows courts to dismiss a matter that should instead be heard in the appropriate jurisdiction, in this case where the violation occurred.[54] However, in January 2021, the Dutch Court of Appeal ruled in favour of the Nigerian farmers, finding Shell Nigeria liable for damages in the form of compensation and environmental rehabilitation to remedy the effects of the oil spills.[55]

Nigeria does not have a strong legal and institutional environmental framework to regulate against oil pollution in the form of gas flare-ups and oil spills.[56] As stated by Uchenna Jerome Orji, "the environmental laws in Nigeria … lack the enforcement and sanctioning strength to ensure compliance; but they also lack clarity as to communicating the exact intentions of the enactment".[57]

Furthermore, the Nigerian government has close ties with Shell Nigeria, which also affects the regulation and enforcement of existing legislation against pollution.[58] Thus, this is a case where the government is not only *unable* to enforce legislation but is also *unwilling*. Companies, especially those with immense economic power, are able to leverage power over governments and effectively put rights holders at risk of losing their fundamental protections and access to justice.

In the context of these governance gaps, it was necessary to seek remedy from the home state where the capacity to investigate and enforce remedy for victims cannot be easily hindered by institutions with a patronage equilibrium that falls in favour of politicians, traditional leaders, military officials, and cronies.[59]

The Dutch case is an example of how a TNC like Shell Nigeria was held accountable through the consideration of ETOs in existing international law and existing voluntary initiatives such as the UNGPs. The case also occurred against the backdrop of a mandatory due diligence bill tabled before the Dutch parliament in March 2021 and set to be passed in 2022. Despite this small win in international law, a more binding approach is still needed to ensure that standards to act in the interests of victims are applied coherently across all states.

Interestingly, the Dutch bill also promises to be even more progressive with the establishment of institutional mechanisms through a regulator, for which complaints can be lodged from other jurisdictions and then investigated.[60] The bill provides for a six-month remediation period, failing which, the complaint can be taken to a Dutch court. This will make the process of lodging a complaint less costly for victims from other jurisdictions and broadens the possibility of justice for victims.

ETOS AND THE THIRD REVISED BINDING TREATY ON BUSINESS AND HUMAN RIGHTS

As it stands, the Third Revised Draft of the LBI has provisions for access to remedy and mutual legal assistance to enable victims to access remedy in an adequate, timely, and effective manner. It also requires state parties to provide their courts and state based non-judicial mechanisms with the necessary competence in accordance to the LBI.

The IGWG for an LBI held in October 2021 included proposals from states that will ensure access to information through international cooperation. Together with other proposed articles including guaranteeing the rights of victims to be heard in all stages of proceedings and removing legal obstacles such as the doctrine of *forum non-conveniens,* the LBI will be able to address the current gap in international law in accessing remedy for corporate human rights violations.

This means that the current draft allows for cases to be brought to relevant jurisdictions, including but not limited to where the human rights violations occurred. For example, cases can be brought to where the legal or natural persons alleged to have committed the human rights abuse, including of a transnational character, are domiciled, as in the case of Shell Nigeria.

The third revised draft also clarifies the obligations for mutual legal assistance and for international judicial cooperation in conformity with any treaties states are party to, and with domestic and international law, in initiating and carrying out "effective, prompt, thorough and impartial investigations, prosecutions, judicial and other criminal, civil or administrative proceedings in relation to all claims covered by this (Legally Binding Instrument), including access to information and supply of all evidence at their disposal that is relevant for the proceedings."[61]

With all the institutional challenges faced in implementing the mine closure legislative framework in South Africa, an LBI that not only clarifies but also binds states to fulfil their ETOs and ensure mutual legal assistance is important for broadening access to justice.

CONCLUSION

There are governance gaps that exist in the Global South as illustrated by the South African mine closure legislative framework. South Africa is no exception, however, as similar weak governance zones present themselves in countries endowed with natural resources like Nigeria, Zimbabwe, and Botswana.

In the South African mine closure legislative framework, these gaps manifest as insolvency laws and the lacklustre manner in which mine closure certificates are issued due to challenges in monitoring the implementation of legislation. This leaves the victims of unrehabilitated mines without recourse for human rights violations committed by TNCs, with the state incurring rehabilitation costs and companies filing for insolvency to prioritize investors. This was illustrated in this paper by the Mintails case where attempts to obtain accountability in South Africa have been mostly unsuccessful.

The UNGPs, endorsed by South Africa, seek to provide a global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.[62] However, they are a softer regulatory regime, which means they are not grounded in an authoritative source.[63] This causes incoherence in the adoption and implementation of human rights standards.

ETOs, clarified in an LBI, offer an opportunity to broaden access to justice for victims from other jurisdictions who may be unable or unwilling to seek such justice, especially as it relates to business activities that are transnational in character. Without clarifying ETOs, the efforts of states with constrained capacities and weak governance zones will yield limited results in the tracking, investigation, and remediation of these violations.

Tipping institutional scales to become victim-centred will take decades. This is why, despite a gradual normative shift in business and human rights standards due to voluntary initiatives like the UNGPs and state-to-state capacity-building initiatives, ETOs clarified in a legally binding international instrument offer a better opportunity for remedy for victims, and a level playing field through a more coherent implementation of human rights standards.

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