ENVIRONMENTAL AND HUMAN RIGHTS ACCOUNTABILITY GAPS IN MINING

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FROM NEW 'CONSTITUTIONAL MOMENT' TO CORPORATE CAPTURE

In the lead up to the Rio +20 Earth Summit in 2012, there was great concern that global capitalism had overreached planetary boundaries and the world was reaching critical tipping points.[1] The Rio +20 Earth summit was seen as offering the opportunity to create frameworks that would contain and reverse this process as governments assessed the world's progress towards achieving 'sustainable development'. This was preceded by a review process of the Millennium Development Goals (MDGs), the flagship project of the the late former Secretary General of the United Nations Kofi Annan, which had already facilitated the entry of corporations as development partners through the Global Compact on Human Rights, Labour and Environment in 1999. The Global Compact had been created as a platform to enable voluntary forms of mitigation of corporate violations of human rights, labour and the environment 'to give a human face to the global market'.[2] The Global Compact has been followed by the 2011 United Nations Guiding Principles on Business and Human Rights[3] which also creates voluntary guidelines for businesses and states to operationalise ensuring human rights abuses are prevented, and where they do occur voluntary measures are taken. However, since these are voluntary mechanisms, they do not hold transnational corporations and their subsidiaries to account.

A model for international governance for an inclusive and participatory approach to policymaking is the World Committee on Food Security. The Committee does not only create space for expert-led, and politically informed processes that ensure business interests have access to policy makers, but also communities affected by food insecurity. Olivier De Schutter, assessing reform of the Committee on World Food Security in the aftermath of food riots in 2007-2009[4], argues that

it largely succeeded in creating policy coherence between trade, development, agriculture and climate change. However, despite this success, Schutter concludes that this merely facilitates the functioning of the uneven international economic order.

Meanwhile, in January 2012, UN special rapporteurs wrote an open letter [5] to the heads of state which drew attention to calls from the scientific community for the need for a 'new constitutional moment' and an 'environmental equivalent of the security council'. The special rapporteurs called for human rights to be understood as being 'interdependent and mutually reinforcing' in line with existing frameworks governing the right to safe and clean water and the right to food. They also called for an international review process akin to the Universal Periodic Review of Human Rights, alongside a national accountability mechanism citing the South African Human Rights Commission as an example. [6]

CORPORATE ACCOUNTABILITY IN EXTRACTIVISM

The uneven integration of economies in the Global South into the world economy poses the challenge of also creating conditions that can enable diversification of economies. The pursuit of structural transformation remains a prevailing concern as part of a broader strategy to improve standards of living by rebuilding domestic economies which remain underdeveloped or even unviable colonial constructs. The extractivist nature of economies in Africa and the centrality of mining operations in this is revealed in the fact that transnational corporations are deeply complicit in illicit financial flows which effectively drains resources which could be utilised for diversifying economies and building much needed social and physical infrastructure.

The African Unions (AU) flagship policy framework of Agenda 2063, and specifically its minerals strategy in the African Mining Vision (AMV), integrates these critical perspectives on the need for structural transformation and diversification of African economies. A key prerequisite for the latter aim is to ensure African peoples are able to wield sovereignty over land and natural resources to achieve developmental goals. This has implications for securing the right to life and wellbeing, decent work, food sovereignty, access to clean and safe water and environmental protection in contexts where there are contestations over the impact of mining operations.

The African Mining Vision [7] recognises the principle for Free Prior and Informed Consent (FPIC), which means communities affected by mining operations must be consulted *before* exploration or *any other* phases in the lifecycle of the mining project. This means communities affected by mining can reject the setting up of or expansion of existing operations. It also means that extensive and meaningful consultations are needed before projects take off. In practice, the construction of consent where transnational corporations, governments and traditional leaders wield uneven sources of power and where the dominant power centre is likely to support vested interests to permit mining projects, creates tensions that can turn lethal for activists who resist this imposition. The assassination of mining activists such as Fikile Ntshangase, a mining activist in KwaZulu-Natal[8], and Bazooka Radebe, of the Amadiba Crisis Committee in Xolobeni, highlight this distressingly. The 'Right to say No and Consent' before, during and when mining operations close down, are important as emphasised by Nonhle Mbuthuma and Papiki Shawn Lethoko in this issue, Mining Affected Communities United in Action and Women Affected by Mining United in Action and Women in Mining.

An accountability mechanism must ensure that conditions exist for FPIC to be a meaningful process where communities can hold corporations to account. Protection of human rights and environmental destruction in Africa while not grappling with structural conditions in the minerals sector that continues to erode the quality of life, wellbeing and disrupts the ecological balance between nature and capitalist expansion will erode livelihoods and damage the self-reliance and autonomy of communities.

BINDING TREATY AS A GLOBAL ACCOUNTABILITY PROCESS

Intensified economic globalisation since the 1990s was characterised by rapacious extractivism during the decade long minerals commodity boom of the 2000s. In this period, civil society networks and organisations across the world intensified campaigns to hold corporations accountable for human rights and environmental abuses. In September 2013, during the Human Rights Council assessment of transnational corporations, Ecuador alongside other member states proposed that there should be a legally binding instrument.

Ensuring that there is a framework for accountability that is binding is critical in the fight to achieve natural resource sovereignty. This would mark a decisive shift from voluntary mechanisms and ensure there are punitive actions to be taken against the abuses by transnational corporations and their subsidiaries. At present, only states where transnational corporations are based can demand mining companies reporting on investments in their home countries and across the world. Canada, for instance, requires this while Australia lags behind on such a reporting mechanism. However, this does not ensure that corporations are held liable for activities in host countries-i.e. foreign countries where multinationals have decided to invest. The need for a cross border accountability framework is therefore urgent and clear.

The campaign against an Australian titanium mining giant led by the Amadiba Crisis Committee in Xolobeni, Eastern Cape of South Africa where activists have been killed and have received death threats[9] poignantly emphasises the urgency for a legally binding instrument. This instrument would have arguably prevented this violence. On 26 June 2014, a resolution to establish an Open-Ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business enterprises was adopted by the Human Rights Council. The OEIGWG has held six sessions so far, with keen engagement and mobilisation by civil society networks across the globe, alongside regional powers such as the European Union. The second revised draft of the Binding Treaty negotiations was deliberated in October 2020. However, in the lead up to this, a civil society coalition, the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, raised a number of serious concerns.[10] These concerns are outlined below.

Firstly, the Global Campaign notes the omission of obligations for transnational corporations to respect human rights.[11] Under the 'Statement of purpose' in Article 2, the focus appears to be on states' responsibilities to respect human rights. Article 9 'Adjudicative Jurisdiction' refers to the extent to which there will be domestication of the Binding Treaty with domestic courts taking up cases where human rights abuses are committed, or where corporations are domiciled. It does not, however, create an international court that specifically deals with transnational corporations that have complex ownership structures and connections with subsidiaries. This potentially ensures the biggest players and those most likely to be guilty of human rights abuses are free from scrutiny.

Additionally, there is no consideration of global value chains and their implications for how the operations of transnational operations impact human rights. For instance, trade unions and corporate accountability initiatives are attempting to map out and analyse rare earth minerals extraction and the supply chains for batteries to inform regulation of minerals that includes artisanal mining.

There are also ineffective mechanisms to implement the Binding Treaty and the lack of prioritisation of human rights law above trade and investment agreements. The second revised version of the treaty has such a broad remit on all forms of business enterprises that it effectively dilutes it substantially. This has led to the Global Campaign to Reclaim People's Sovereignty to conclude that the treaty had 'lost its soul'. [12]

Perhaps the most important weakness of the treaty is its failure to deal with one of the most dominant forces to emerge out of the neoliberal period, namely, the corporate capture of states and multilateral institutions. This corporate capture has a greater impact when there is no accountability mechanism at a global or a regional level that can hold corporations to account. Thus far, the mechanisms at a regional level hold states to account for human rights violations at best. There is no provision for environmental crimes to be brought before a court which can not only preside over cases but also impose penalties that can be binding for states to enforce. Instead, what exists are voluntary processes that enable corporations to report and ostensibly 'self-regulate' which in practice has enabled an atmosphere of impunity. Given that countries where corporations are based are able to mandate reporting on environmental and human rights impacts, cases can be taken to countries which dominate the extractives sector in the Global North. However, the accessibility of these court processes for impoverished and disenfranchised communities raises immense hurdles. On a regional mechanism on a corporate mining giant rooted in Africa opens up the possibility for a mechanism that is contextually appropriate to shape the kind of regulatory framework we need for African self-reliance and autonomous development that can be environmentally sustainable and even socially transformative. In the next section, we briefly assess the kinds of questions and violations that arise when assessing a mining giant that is historically rooted in the African continent.

THE MAKING OF ANGLOGOLD ASHANTI

AngloGold Ashanti has a long history of operations in Ghana and South Africa and can therefore provide insights into how mining capital has evolved from the late 19th to 21st centuries. In Ghana, the concern for sovereignty over natural resources prevailed in the Nkrumah era and persisted until the neoliberal turn of the 1980s. By 1994, the Government of Ghana had already sold half its majority shares in Anglo Gold Company (AGC), the oldest gold mining firm initially established in 1897 by indigenous entrepreneurs.

In 2004, under the stewardship of CEO Sam Jonah, AGC lost out in risky hedge funds, becoming bankrupt. As a result, it was forced to open negotiations for mergers or acquisitions. This was and continues to be a contentious issue in Ghana where concerns have been on the loss of a national asset and therefore further erosion state sovereignty over natural resources after two decades of market reforms. After numerous challenges to the deal, on 26 April 2004, the High Court of Ghana ruled in favour of the merger of AngloGold and Ashanti Goldfields Company (AGC) to form the global gold producer now known as AngloGold Ashanti (AGA).

In South Africa, the colonial and apartheid era provided the foundations upon which a cheap labour system was extracted out of African and indentured labour from Asia to accumulate profits for mining giants such as Anglo American. The transition to liberal democracy in 1994, opened up the mining sector to pressure from the global market. This led to conglomerates being pressed to have a narrower focus on their asset profile so that shareholders could extract more value.[13] This trend had an impact on a corporate giant like AngloAmerican. By 1998, AngloAmerican repositioned itself in the liberalised South African economy, by offloading its gold assets under an independent company, AngloGold.

AGA is therefore a product of an era of financialisation and as a transnational corporation based in Africa enables us to ponder again on what kind of developmental paradigm can ensure meaningful and transformative resource sovereignty. A core concern has been the manner that extractives, dominated by corporate mining, has had a disproportionate impact on the social, environmental and economic conditions while generating profits for corporations especially during mineral commodity booms. The following cases highlight some of the environmental and human rights abuses which a regional accountability mechanism ought to provide a route to address.

Although Tanzania is one of the top gold producing countries on the continent and has a fast-growing economy this is not reflected in the socio-economic indicators of the country. This disparity is a result of years of inadequate policies. The Tanzanian government needed development finance and the interest of foreign direct investors to invest in the mining sector. New mining laws passed in 1998 attracted foreign investors, since then the mining sector has been dominated by foreign companies, however, the mining sector continues to not contribute much to the socio-economic of the country. In 2017, under President Magufuli, new laws were introduced to ensure that the mining sector became a bigger contributor to the revenues, beneficiation and local procurement.[14]

AGA's largest gold mine in Tanzania is the Geita mine. Due to the accommodating legislation, many foreign companies signed highly favourable mining agreements. The poor local procurement rates provided an opportunity for AGA to implement local procurement strategies before the government. In 2014, AGA launched a five year local procurement plan, which showed great results in the first year but soon drastically dropped in the following years. It was also later determined that the numbers of the local procurement successes did not reflect on the ground. When the government introduced new laws in 2017, AGA launched arbitration activities to prevent the Geita mine from being affected.[15] The government stuck to its laws and they reached an agreement with AGA in 2020, details of which have not yet been made public.

THE INTERNALLY DISPLACED OF SOPHIATOWN, TANZANIA

AngloGold Ashanti's history in Tanzania is more recent, with the expansion of the mining sector being a relatively recent trend. Primarily an agrarian based economy, as is the case in Ghana, mining did not feature strongly during the early phases of the post-independence period. Alluvial gold mining was a supplementary form of livelihood activity for farmers in pre-colonial Tanzania, as is the case in many other parts of the continent. Also, there is a history of inter-regional gold mining and trade that connected the Great Zimbabwe and the Indian Ocean trading routes. However, large-scale mining which began in 1894 is closely associated with German colonialism. Operations in Geita and Musoma, north-western Tanzania, began in the 1913, and later under British rule, expanded with further discoveries in Mwanza. Prior to World War II, there was a boom in the

minerals commodities, unfortunately, the mining sector underwent significant decline that led to closure of the mines in the 1960s and 1970s. It was until 1991, when the government sought to revive the sector through mining reforms to encourage private sector investment. [16]

In 2000, AngloGold (a subsidiary of AngloAmerican) and Ashanti Goldfields Corporation re-commenced the Geita Gold Mine in the Mwanza region of Tanzania as a joint venture. Four years later, the two companies merged to become AngloGold Ashanti (AGA). An investigation carried out in 2013 by the Integrated Regional Information Networks (IRIN) (now "The New Humanitarian") exposed how farmers and villagers in the area were forcibly evicted by the Tanzanian government to the outskirts of Geita. Two hundred and fifty-eight villagers from the Mtakuja Village were initially forcibly relocated by the Tanzanian police in July 2007 and placed in a single room abandoned building. The Christian Council of Tanzania stepped in and provided the villagers with tents, which became their new home. The new settlement was given the name "Sophiatown" because of its resemblance to a refugee camp.[17] The people of Mtakuja claimed they had either not been compensated while those who were had been disappointed since the compensation did not compare with what they had lost. In one case, a farmer was paid 400,000 Tanzanian shillings (US$239) for his half-acre land with a house, banana trees and cassava.[18i]

According to the Land Act,[19] the people of Mtakuja have a right to be compensated for the loss of occupancy and the responsibility lies with the government. Furthermore, the Land and Compensation Regulation provides that the government has the discretion to decide what form the compensation will take, as long as it is comparable to what was lost. AGA claims that during the initial sale of the land, which happened in 1999, it gave full agreed-upon compensation to the government between 1998 and 2000. AGA states that at this point, according to Tanzanian legislation, the responsibility to compensate and resettle the residents rests with the government. The claims were taken to court by the villagers, however, the court ruled that the villagers had no legal rights to the land and ordered their eviction. There has not been transparency as to how much had been transfered to the government by AGA, and how these funds had been used by the government. What is known is that compensation had been paid by AGA to the government, but the villagers did not receive adequate compensation, if any.[20] Despite the villager's attempts to take legal action, they also claim there was collusion between their lawyer and the judge.[21] This is a reminder that a regional accountability gap is not only in accessing courts but is also potentially open to weaknesses in their operations.

OBUASI MUNICIPALITY, GHANA

Obuasi is a municipality in the middle belt of Ghana. Primarily a rural area, the main source of livelihood is agrarian based. The people around the Obuasi mine have expressed various ways in which they have been discriminated against as a result of the Obuasi mine in their region. Many are farmers but have had their farms confiscated as mining territory and have had to turn to criminalised artisanal small-scale mining as a means to survive.[22] As a result of the income gap between peasant farmers and AGA employees the people find themselves having to compete with the prices targeted at AGA employees. Research has shown that the prices in Obuasi for staples like yam are more expensive than in the capital, Accra.[23]

Just like in Tanzania, the issue of compensation of displaced and dispossessed people is also a problem in Obuasi. A chief in one of the communities claimed that after AGA destroyed 10-hectare farmland, he was only given 200 Ghana Cedi (about US$34) in compensation. The Land Com-

pensation Office uses two methods to calculate compensation. The first is using a passbook to determine how much land is owned by each person, however, if they do not have a passbook, the office counts the number of trees on the property and multiplies it by the size of the land.[24]

Due to an unemployment crisis, many have turned to artisanal mining. Very recently a guard from AGA was involved in the killing of an artisanal miner who was shot 16 times as he fled from the mine. According to Coyle, there have been direct threats made by the management of AGA to the artisanal miners in the area, that they would be "smoked out like rats" from the mines. Moreover, the Commission on Human Rights and Administrative Justice (CHRAJ) has had multiple instances where they have discovered "private detention facilities" on the territory of the mining company.[25]

In 2009, research was carried out by the Wassa Association of Communities Affected by Mining (WCAM) has shown that there were excessively high pollutants in the water bodies close to the mines. These pollutants included arsenic, manganese and mercury. Medical practitioners in the area have also stated that the biggest cause of some of the more common diseases suffered in the area is as a result of pollution. They have attributed high levels of malaria to the increase of mosquitoes in polluted waters. Some have even been advised to stop drinking the water in the area, but have no other alternative.[26] Likewise, two villages in Tanzania, Nyakabale and Nyamalembo, suffer from contaminated water supplies. The villages are the closest to the AGA's Geita Mine. Nyakabale is 500 meters east and Nyamalembo is 2 km west of the mine, both communities have complained of various environmental issues caused by mining that is affecting their daily lives.

For instance, Nyakabale has experienced disruption of its water supply. Both AGA and the village rely on water pumped from Lake Victoria. Since mining began, villagers have complained that their water sources have either been contaminated or confiscated because they were located within the mining location area. AGA said they have provided domestic points to collect water, however, the villagers have complained of the reliability of the water supply as they do not have water tanks to store water in the village and most times can only collect water when AGA is pumping their water supply, usually at night.[27] On the other hand, Nyamalembo was not afforded any alternative water supplies. Both villages were not given alternative water supplies for their animals, as a result, there have been a few instances of animals wandering into unfenced mining land and drinking water from the mining tailings leading to their death.

SILICOSIS: CHOKING WORKERS FOR GOLD (SOUTH AFRICA)

For decades there has been the issue of miners contracting silicosis in the gold mines because they were forced to work in poor working conditions. Silicosis is an incurable lung disease caused by the inhalation of dust that contains free crystalline silica. Once miners have contracted the disease, mining companies, including AGA, would retrench these miners without compensation. This would lead to many households that were dependant on one income becoming destitute. One miner depicted some of the conditions they were forced to work under. He described that once the mine was blasted with explosives, the miners were sent in without a mask and were then exposed. [28]

In 2006, a former mine employee of AGA, Thembekile Mankayi, took his claim to the High Court for the right to sue AGA for compensation. At the time the legislation only allowed for a former

miner to claim compensation if they were suffering from six specific lung infections and even then, they were only entitled to a lump sum based on the level of impairment and not for financial and emotional damages.[29] It was under the Occupational Diseases in Mines and Works Act 78 of 1973 that AGA gave Thembekile R16 320 in compensation after 15 years of work and losing his ability to walk.

Both the High Court and Supreme Court ruled against Thembekile. However, in 2011 the Constitutional Court overturned the judgement and allowed him to claim for compensation. Unfortunately, Thembekile died six days before the judgement was passed by the High Court. Despite the tragedy, this case allowed human rights lawyers to claim a class action for all families that have suffered similar fates.[30] As a result of this victory, a further three years of negotiations between mining companies and miners resulted in an agreement that miners could register for compensation if they suffered from scoliosis or tuberculosis as a result of the work in the mines.[31] A settlement of R5-billion was approved by the High Court in 2019. Miners who claimed compensation started receiving their settlements in March of this year.[32]

This article has highlighted the dire conditions that working people and communities affected by mining have to contend with. Many are dying waiting for justice within the broader context of frustrated human and social progress which contrasts sharply with the profits and wealth generated by corporate giants and their shareholders. The pervasiveness of corporate impunity, the complicity and weakness of state institutions to hold corporations accountable has maintained a condition of underdevelopment in Africa and undermined the exercise of sovereignty in the spirit of self-reliance and autonomy. A regional accountability mechanism that takes this into account and proposes socially embedded systems that are accessible and can arrive at resolutions that are binding and punitive on corporations, can be the way forward. These accountability mechanisms should be implemented by state institutions. It is to this end that the IFAA is leading a transnational research project on environmental and human rights violations of AGA in South Africa, Tanzania and Ghana with our partners Mining Affected Communities United in Action (MACUA) and National Association of Artisanal Miners (NAAM) (in South Africa), HakiMadini (in Tanzania) and the Centre for Social Impact Studies (CeSIS) (in Ghana).

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