

**OPEN: POLICY**

# **THE SARW LAW AND POLICY SCHEME, AND QUALITY ASSURANCE FRAMEWORK**



**SARW**

Southern Africa Resource Watch

This is a composite of two documents: a document identifying key law and policy normative and technical approaches for SARW's substantive human rights work; and a related quality assurance framework for the organisation's research and advocacy operations.

**More specifically, this composite document:**

- clarifies international legal responsibilities and obligations of states and corporates, germane to the substantive work of SARW;
- reviews approaches, methods, and good practice in the use of international, regional and national norms and standards to advance SARW's work;
- frames SARW and broader civil society rights and responsibilities in holding corporates to account; and
- proposes a quality assurance framework for SARW researchers, advocates, campaigners, and partners to utilise in order to enhance SARW's programmatic effectiveness, and to mitigate against organisational legal, pecuniary, and reputational risk.

# SOUTHERN AFRICA RESOURCE WATCH POLICY IN BRIEF

This policy has been developed as a quality assurance guide for civil society work involving natural resources, business and human rights: a mandate that SARW uses to monitor corporate conduct in the extraction and beneficiation of natural resources in Africa. In particular, SARW assesses the extent to which business enterprises uplift the socio-economic conditions of the region's communities. In this context, African states are obligated to strengthen the transparency, governance, institutional capacity and regulatory environment of natural resource exploitation.

SARW has established that the negative environmental impacts of extractive industry operations fall on local communities,[1] who are also the poorest. The communities often absorb the social and environmental burden of mining activities. They are displaced from their land and are poorly compensated for that. The long history of mining has left behind irreparable environmental damage characterised by biodiversity loss, pollution, abandoned mines and tailing dams.[2] The poor management and regulation of negative social and environmental impacts of resource extraction are at the centre of the sustainable livelihoods struggle of local communities. SARW is concerned about the expansion of mining at a time when states are unable to protect citizens and the environment from the negative impacts of mining activities.[3]

In addition to these challenges, community activists and civil society members advocating for public participation and involvement in mining decisions often face harassment or threats of being silenced by corporations. Often, this harassment takes the form of intimidation through lawsuits, also known as strategic litigation against public participation (SLAPP).

This policy document sets out a quality assurance guide that SARW believes will assist civil society to ensure that businesses respect human rights in the resource sector

## **In particular, the policy asserts that civil society must:**

- Employ best practices on the use of national, regional, and international law, standards, and norms to investigate and present evidence on adverse human rights impacts arising from the conduct of business enterprises operating in the extractive sector.
- Lobby African states to legislate mandatory public disclosure of and access to financial, social, environmental, and regulatory compliance information in the extractive sector.
- Ensure that civil society approaches and methods are used to help communities to enjoy access to effective legal and non-legal remedy.
- Support civil society and community activists against SLAPPs.

# THE DUTY OF AFRICAN STATES TO PROTECT HUMAN RIGHTS: FOSTERING BUSINESS RESPECT FOR HUMAN RIGHTS

In terms of international law and standards, states have an obligation to protect against human rights abuse by business enterprises within their territories. According to the UN Guiding Principles on Business and Human Rights: Implementing the Remedy to 'Protect, Respect and Remedy' Framework[4] (Principle 12), the responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights[5] and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. This policy is therefore grounded in international human rights law, norms, and standards, in particular the UN Guiding Principles on Business and Human Rights and the rule of law. SARW believes that international human rights principles, together with domestic laws and standards, provide quality assurance against push-backs by states or business enterprises.

## **In particular, this policy argues that states must:**

- Implement the UN Guiding Principles to ensure that business enterprises respect human rights and comply with national laws and standards protecting human rights.
- Ensure that human rights laws and principles are implemented in a non-discriminatory manner, addressing the needs of vulnerable or marginalised population groups such as women, children, and indigenous populations.
- Ensure that effective steps are taken to prevent, investigate, punish, and redress human rights abuse through effective policies, legislation, regulations, and adjudication.
- Apply climate justice principles to ensure a "just transition"[6] in the extractive resources sector.

## **States should implement the above obligations through the following levels of interventions:**

- Enforce the rule of law, including by providing for adequate accountability, legal certainty, and procedural and legal transparency in the context of natural resource governance. Periodically, states must assess the adequacy of such laws and address any gaps.
- Put in place specific mechanisms to ensure that all extractive sector business enterprises domiciled in their territory or jurisdiction respect human rights throughout their operations.

- Implement domestic measures to regulate the extra-territorial activities of resource sector businesses operating within African countries,[7] including requirements on “parent” companies to report on regional operations of the entire enterprise.[8]
- Adhere to the principle of a just transition and ensure that the extractive sector contributes to nationally determined decarbonisation targets in terms of the UN Framework Convention on Climate Change (UNFCCC).

SARW calls on African states to implement measures to meet their international human rights, humanitarian, and environmental law obligations. In respect of remedies, the countries must develop model laws and standards for protection against SLAPPs. (See the section on “[Access to Remedy](#)” below.)

## RELEVANT SARW POSITIONS

SARW recognises the rights and dignity of communities interested in or affected by mineral exploration, exploitation and decommissioning activities. Mineral wealth must benefit local communities. It must result in overall socio-economic justice and development, including environmental sustainability. SARW advocates for African states to implement the Extractive Industries Transparency Initiative (EITI) Standard. [9]

Economically, transparency and disclosure of revenue flow and expenditure is important.[10] In this regard, two key challenges are faced by African countries. Firstly, revenue-sharing agreements between host countries and investors are poorly designed. Secondly, collection and management of mining revenue has not been optimal, especially for public benefit. For these and other reasons, SARW has invested in programmes that maximise transparency and accountability in mineral resource governance.[11] There must be public disclosure of mining contracts, terms of licenses, and revenue sharing records.[12] SARW believes that local content issues[13] must be part of investment agreements to foster local economic development. This relates to preferential access to procurement opportunities for the supply of goods and services; upskilling of the local workforce and promotion of entrepreneurship; technology transfer; value addition; and market linkages.

SARW advocates for secure and sustainable mining practices, including accelerated climate action in the context of the UNFCCC principle of common but differentiated responsibilities and respective capabilities. Africa is rich in mineral resources. The exploration and mining of fossil fuels – oil, gas and coal, all major drivers of greenhouse gas (GHG) emissions – is on the rise. This includes exploration for shale gas fracking[14] in South Africa. Decarbonisation is leading to increased reliance on green hydrogen[15] and biomass over metallurgical coal. Furthermore, a surge is evident in the demand for critical minerals used as raw materials for the manufacture of technologies that are at the centre of the energy transition from fossil

fuels to renewable sources.[16] These minerals include lithium, nickel, cobalt, manganese, and graphite – critical minerals that are essential to battery performance and storage and the manufacture of electric vehicles, wind turbines and solar photovoltaics. There is therefore an expansion of mining activity at a time when states are already failing to adequately enforce mining legislation and regulations governing licensing in general, and environmental permitting in particular.

In the above context, SARW is calling for a “just transition”: one that focuses on community resilience, socio-economic development, and respect for human rights.

## **THE CONDUCT OF BUSINESS ENTERPRISES: CORPORATE ACCOUNTABILITY**

This policy places extractive industries within a broader natural resources governance framework.[17] The framework recognises that it is the role of states to harness extractive industries for development at every critical stage along the decision chain. [18] In this sense, extractive industries are linked to local economies in a number of ways, and they are expected to provide employment, enterprise development, revenues, infrastructure, and sustainable development. The experience of African governments shows, that left to themselves, extractive industries fail to optimise corporate social responsibility (CSR) principles to meet public expectations.

This policy recognises that business enterprises have a responsibility to avoid causing or contributing to adverse human rights impacts.[19] They must prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[20]

### **In order to meet their responsibility to respect human rights, businesses operating in the extractives sector must:**

- Develop and put in place policies and processes appropriate to their size and circumstances.
- Specifically develop a policy commitment to meet their responsibility to respect human rights and the environment.
- Put in place a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights.
- Introduce mechanisms and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Civil society must monitor and report on whether or not businesses operating in the extractive industries sector are complying with the above principles. Through business enterprises’ human rights due diligence reports, civil society should be able to further investigate or uncover risks of non-legal (or perceived) as well as legal complicity to bring the corporates to account.[21] (See the section on “Access to Remedy” below).

## **Further, business enterprises must adopt the following operational principles:**

- Express their commitment to meet their human rights responsibility through a publicly available “Statement of Policy”. The policy must be duly authorised and reflected in the standard operating procedures of the business.
- Carry out periodic human rights due diligence exercises to identify human rights risks (including risks to rights holders) that the business may cause or contribute to in its operations, products or services. The diligence should be carried out as early as possible (e.g. as part of the Environmental Impact Assessment or EIA) and be incorporated at the stage of structuring commercial contracts or agreements. In terms of UN Guiding Principles on Human Rights 18 (b), meaningful consultation with potentially affected groups and other relevant stakeholders must take place. In jurisdictions such as South Africa, the process of public participation is regulated under the National Environmental Management Act 107 of 1998 (NEMA). [21] The principle of EIA and public involvement is legally recognised across the African continent with various degrees of regulatory enforcement.
- Where actual or adverse human rights impacts occur, the business enterprises must undertake remediation measures.

This policy calls for civil society to use international law and standards as monitoring tools with regards to the responsibility of businesses to respect human rights. In order to enhance the quality assurance intention of this policy, SARW recognises the use of specific and general multi-stakeholder initiatives that have taken the form of human rights-related standards to monitor the conduct of businesses operating in the extractive industries.[22] For the purpose of this policy, the Extractive Industries Transparency Initiative (EITI) standard is recognised.

## **The Extractive Industries Transparency Initiative (EITI) Standard**

EITI principles were established in 2003 by governments, companies, industry groups, international organisations, civil society organisations and investors for the good governance of oil, gas and mineral resources. SARW considers the standard as an important mechanism that aims to improve financial transparency in the extractive sector, focusing on disclosure of project-level payments to governments.

This policy is in support of the continued use of the EITI standard for financial and other disclosures for all EITI-supporting businesses in Africa’s resource sector. In addition to the EITI, a number of voluntary standards are used as part of sustainability reporting. Together, these standards hold promise for improved public participation to protect human rights and to achieve consistent measures to challenge extractive sector businesses, ensuring that communities benefit from the exploitation of natural resources and that the environment is protected.

## Environmental, Social, and Governance (ESG) Standard

This policy recognises that responsible and sustainable mining is a key foundation for the respect of human rights by all business enterprises. The use of soft law standards such as ESG is critical and complementary to standards such as the EITI discussed above. In Africa, ESG is playing a core role as investors, consumers and other stakeholders are placing greater trust in businesses that show a long-term interest in these standards.[23] Key factors informing ESG and relevant to this policy are briefly presented below.

**Environmental:** The ESG factors include an environmental pillar, a framework for assessing the contribution that a business makes to environmental management, including climate risk. For the extractive sector, environmental factors include land use, negative impacts on air, water, biodiversity, etc.

SARW argues that the legal and regulatory regime regularly fails to manage the decommissioning phase of mining operations as a legacy of toxic waste that poisons communities for generations is evident. For example, in South Africa studies reveal that gold[24] and coal[25] mining companies escape regulatory compliance due to weak enforcement controls by authorities.

In the context of mining and climate change, SARW is concerned with how mining companies approach climate risk disclosures. (See the section on “Climate Change and Business Enterprises” below.)

**Social:** The social dimensions of ESG include human rights factors; labour standards in the supply chain (including illegal child labour); workplace health and safety issues; local content; and inclusive participation of interested and affected communities. Mining companies must obtain a “social license” based on community consent. Vulnerable groups must be subjected to a process of informed consultation and participation.[26] SARW recognises free, prior and informed consent (FPIC) of indigenous peoples as a right recognised in international human rights law[27] that must be respected by businesses. The communities have the right to give or withhold consent to a mining project and are enabled to negotiate and agree on project design, implementation and decommissioning.[28] Specific UN instruments have elaborated further on the rights of individuals in the following groups:

- Indigenous peoples: The United Nations Declaration on the Rights of Indigenous Peoples.[29]
- Women: The Convention on the Elimination of All Forms of Discrimination against Women.
- Children: The Convention on the Rights of the Child.
- Persons with disabilities: The Convention on the Rights of Persons with Disabilities.
- Migrant workers and families: The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Specific human rights infringements against these groups need to be investigated based on the conventions cited above and other relevant instruments. SARW considers that extractive industries must also report periodically on the positive human rights impact concerning vulnerable groups.

**Governance:** ESG factors under this category refer to good corporate governance. Included in the ESG framework are issues of diversity and inclusion e.g., the composition of a mining company's Board of Directors in respect of women, youth, race, and cultural diversity. It is SARW's position that diversity and inclusion must be part of mining companies' sustainability approach. In Africa, the widely used standard is the King IV's Report on Corporate Governance.[1] According to the report, corporate governance should be concerned with ethical leadership, attitude, mindset and behaviour. Its focus is on transparency and targeted disclosures.

The three ESG metrics summarised above must be integrated in informing civil society's assessment of the human rights performance of extractive industry businesses. For investment processes, ESG is critical in informing investors or financiers about social and environmental factors when making decisions.[30]

## **Social Justice and Artisanal and Small-scale Mining (ASM)**

SARW has gathered considerable evidence on the situation of artisanal and small-scale mining (ASM).[31] This sector involves artisanal miners who participate on the fringes of a large variety of minerals value chains. The miners engage in informal minerals marketing, often characterised by illegal, unsafe and unhealthy operations. The artisanal miners are particularly vulnerable, lacking access to basic human rights such as access to healthcare, potable water, housing and food. To the extent that they are not formalised or subject to licensing regulatory oversight, ASM operations cause massive environment degradation.

In the interest of social justice, SARW recognises the ASM sector and advocates for the formalisation of ASM and the extension of government assistance to ensure that they grow their operations or diversify out of ASM.

### **In order to assist artisanal and small-scale miners, civil society must:**

- Facilitate community dialogue to promote alternative livelihoods for artisanal miners.
- Monitor and lobby for fair trade involving ASM to avoid corruption and conduct facilitative of smuggling, illicit financial flows, and financing of organised crime.
- Monitor the role of multilateral agencies such as the World Bank in respect of their emergency responses as part of programmes to promote ASM formalisation.[32]
- Monitor and seek to influence the role and performance of the Extractives Global Programmatic Support (EGPS) Multi-Donor Trust Fund in assisting ASM.

## Climate Change and Business Enterprises

Climate change is now a key area of responsibility for businesses and human rights. SARW monitors the role of the mining industry in the transition to a low-carbon economy in Africa. Fossil fuels will continue to play an important role as part of the global energy mix and transition. In Africa, coal, oil and gas remain vital for energy security. Several countries in Africa are endowed with huge coal, oil and gas deposits which are either being exploited or recently discovered (e.g. Angola, Mozambique, Namibia, South Africa, Tanzania and Zimbabwe). But the production of oil and gas releases GHG responsible for air pollution and global temperature rise.

Activities such as gas flaring<sup>[33]</sup> cause air pollution that is detrimental to human health and the environment. Communities living next to flares at oil refineries, or gas and oil production facilities are most vulnerable. In South Africa, for example, the South Durban Community Environmental Alliance (SDCEA) has highlighted the negative effects of flaring activity.<sup>[34]</sup> Flaring produces many toxic gases, including sulphur dioxide and hydrogen sulphide. These gases affect human health, in particular the respiratory system, and can cause and aggravate asthma and bronchitis. Continued exposure in pregnant women can result in babies being born with a pre-condition to asthma and reduced lung function accompanied by such symptoms as wheezing, chest tightness, or shortness of breath.<sup>[35]</sup>

This policy recognises that clean air is a human right. Pollution caused by extractive industries (resulting in poor air quality and respiratory diseases) is a violation of the right to a healthy environment enshrined in constitutions, legislation, and various regional treaties to which African states are parties. For example, the Bill of Rights for both South Africa and Zimbabwe protects this right.<sup>[36]</sup>

In Africa, coal-based energy production is still on the rise. However, the transition to cleaner energy sources means that at some point in time, coal mines will have to be closed. Mining communities will be affected, especially mineworkers and local economic activity. They will be displaced from jobs, including those earning their living in non-mining parts of the coal value chain. The labour market effects go beyond mineworkers. This policy recognises the inevitable transition away from coal and how this will affect entire economies in Africa.<sup>[37]</sup> African states must invest in adequate planning and stakeholder consultation to inform phase-out plans of coal mining assets.

## **Mining and the Critical Materials Required for the Transition to a Low-Carbon Economy**

In this policy, SARW is concerned with the expansion of the mining sector in response to the demand for critical materials required as raw materials for energy transition technologies.[38] Critical materials include important ingredients for building batteries for electric vehicles (lithium, nickel, cobalt, manganese and graphite); for wind turbines and electric vehicles (rare earth elements); and for photovoltaic components and electricity networks (copper, silicon, silver and aluminium). In the absence of these metals, the global energy transition might stall. Two-thirds of the world's cobalt deposits are found in the Democratic Republic of Congo (DRC), which, ironically, is one of the world's poorest countries due to mineral resource misgovernance. The DRC has witnessed serious social costs in the mining of cobalt. These include armed aggression, notorious issues of child labour, and corruption. Children as young as 10 are involved in cobalt mining, earning as little as US\$3.50 a day for the dangerous and dirty work,[39] which can involve digging underground, carrying very heavy sacks, and washing the mined cobalt in the river. (See also social issues covered under the "Environmental, Social, and Governance" section above).

This policy calls SARW to advocate for the development of regulations and standards to protect the rights of indigenous groups and communities interested in and affected by the mining of critical materials for the transition to clean energy. In addition, SARW will support the promotion of sustainable solutions such as standards for re-use through a combination of regulatory and voluntary industry standards. These must be promoted by states to reduce further violation of human rights and damage to the environment through mining. (See also the section on Promotion of Circular Economy Waste Management" below.)

## **Promotion of Circular Economy Waste Management Systems**

This policy argues for manufacturers of energy transition technologies to reduce over-dependence on underground minerals extraction in favour of the creation of a circular economy waste management system. By creating a circular economy, critical materials will be re-used in the manufacturing of batteries. For example, in 2018, China issued a provisional regulation on the recycling and re-use of traction batteries from new energy vehicles (specifically including lithium ion batteries).[40] The regulation mandates strict guidelines across the entire battery lifecycle from design, manufacture, sale, maintenance, collection and transport to, finally, reuse and recycling. This forward-looking policy makes car manufacturers (or importers) responsible for the collection, sorting, storage, and transportation of the batteries. According to the regulation, car manufacturers must develop a take-back network for spent batteries wherein they can use market-based mechanisms (buy-back, new-for-old or subsidies) to encourage electric vehicle users to return their spent batteries. The European Union has mandated collection targets through a directive on waste

batteries. [41] This has been promoted through tradeable certificates for waste electronic and electrical equipment. The system obligates producers (manufacturers and importers) of electrical and electronic equipment to finance the reprocessing of a specified amount of waste equipment.[42]

In respect of the creation of a circular economy, SARW must ensure that its programmes advocate for the development of circular economy policies and strict standards for the extractive industry. This includes supporting the strengthening and implementation of end-of-life regulations. Africa should take a leaf from the book of the European Union which has developed a comprehensive circular economy policy.

**With regards to mining and climate change, business enterprises must:**

- Adopt and implement effective sectoral emission reduction programmes, in line with targets set in the Paris Agreement nationally determined contributions (NDCs) for jurisdictions in which they are operating.
- Include critical materials as factors in their ESG reporting standards.
- Implement technologies that promote carbon capture, use, and storage (CCUS) [43] as part of the energy transition, highlighting, for example, carbon capture and storage technologies for mining enterprises operating in fossil-based industries such as oil and gas mining, processing, and distribution.
- Monitor and engage with the work of the Zero Routine Flaring by 2030 initiative led by the World Bank.[44]
- Improve flare monitoring activities in partnership with communities and local authorities.
- Litigate against businesses that release hazardous gases near residential areas.

## **ACCESS TO REMEDY**

In all contexts, business enterprises must comply with all applicable laws and respect internationally recognised human rights.[45] When faced with conflicting standards, it is internationally recognised principles that must prevail.[46] However, business enterprises are often driven by profit motives. For this reason, individuals in groups, communities and civil society must have access to judicial and non-judicial remedies. The right to an effective remedy is well established under international human rights law. SARW's position is that civil society must stand in solidarity with indigenous organisations and communities, especially in finding remedy when their rights have been violated and getting their messages across to corporations and public authorities.

## Legal Liability and Public Interest Litigation

In the extractives sector, there is a real risk of businesses causing or contributing to gross human rights abuses. This is a legal compliance issue. A growing ambit of corporate liability arising from extra-territorial civil claims attests to this risk.[47] Further, the incorporation of the Rome Statute of the International Criminal Court in some African jurisdictions has opened public interest litigation founded on corporate criminal responsibility or, for corporate directors, individual liability, for acts that amount to gross human rights abuses.

### **Domestic Courts**

Legal liability largely remains defined by national law provisions in relevant jurisdictions[48] and states must always ensure that judicial, administrative and legislative means are available and accessible to provide effective remedy from wrongful acts that violate human rights.[49] In this respect, civil actions may arise when corporations are alleged to be the cause of or contributor to adverse human rights abuse or harm. In Africa, civil society has relied on state-based judicial means to engage in public interest litigation. A counter to this remedy has been the abuse of courts by mining companies through intimidation law suits. SARW has been a target of such abusive law suits, hence the need for this quality assurance guide in the area of business and human rights.

### **Protection of Civil Society From Abusive Lawsuits**

This policy specifically addresses the need for quality assurance to protect SARW and civil society from abusive law suits. Often the work of SARW puts it at odds with some mining companies who do not take well any constructive criticism made against their operational practices, particularly on matters relating to the impact of their activities on the environment and on adjacent communities. For instance, the Canadian mining company, First Quantum Minerals (FQM) brought a SLAPP lawsuit against SARW and two of its members Claude Kabemba and Edward Lange in the Gauteng High Court of South Africa in Johannesburg. The lawsuit challenged adverse findings in respect of a poor record of the corporate social responsibility (CSR) of FQM in Solwezi District in the Northwestern Province of Zambia.[50]

This lawsuit against SARW is typical of a SLAPP or intimidation lawsuit used by corporates to stifle healthy debate by targeting those who advocate for public interest issues in order to silence and harass them. The filers of SLAPPs do not approach courts to seek justice or win a lawsuit. Rather, their litigation strategy is to intimidate or cripple the activities of their targets by i) draining their financial resources ii) raising the cost of directors' and officers' liability insurance iii) sending a chilling message to human rights defenders in general. SLAPP lawsuits are widespread. In Europe, Greenpeace International revealed that about 92.8 per cent of SLAPPs are presented as defamation lawsuits.[51]

In South Africa, a recent landmark court decision ruled that "SLAPP suits constitute an abuse of process and [are] inconsistent with... constitutional values" of South Africa. [52] The Western Cape High Court confirmed that a new defence (called a SLAPP defence) is available in circumstances where a lawsuit is brought with the intention of silencing critics and opponents. Such a defence can now be raised when litigation has been launched that is not aimed at vindicating legitimate rights, but is part of a broad and purposeful strategy to intimidate, distract and silence public criticism.[53] This decision is the first judicial recognition of SLAPP suits in South Africa's legal history, and the new defence represents a positive development of the common law and human rights jurisprudence in favour of human rights defenders, community based organisations and civil society in general. The matter was appealed and heard in South Africa's Constitutional Court in April 2022 and the outcome holds legal significance not only for South Africa but for the entire African continent too. In this policy, civil society must be supported to avoid SLAPPs through legislative reforms that promote freedom of speech and participation.

#### **With regards to SLAPPs, African states must:**

- Pass anti-SLAPP laws by allowing for defendants to raise exceptions on grounds that the case involves protected speech on a matter of public concern. In this regard, the burden then shifts to the plaintiff to show the probability that they will prevail, failing which the suit is dismissed.[54]
- States must develop an Africa-wide anti-SLAPP legislation or model law.

#### **As for quality assurance to avoid SLAPP law suits, this policy states that SARW (and more broadly civil society) must:**

- Increase support for the gathering of credible evidence (written or audio-visual) on human rights breaches or violations to initiate or support legal claims. This evidence will diminish the possibility of SARW being sued.
- Join matters as amicus curiae whenever a strong interest is present in a matter involving respect for human rights in the extractive sector.
- Campaign for anti-SLAPP regulations to be grounded on international and regional principles protecting human rights such as freedom of expression and freedom of speech.[55]
- Set up an anti-SLAPP legal fund.

## **Universal Jurisdiction**

In conflict-affected environments or where the judiciary is compromised, the risk of corporates being complicit in gross human rights abuses committed by other actors is high. The violators, for example, may be security forces or state-sponsored militia groups. In these circumstances, access to remedy may be found through the use of universal jurisdiction – this is a legal principle that allows states or international –

organisations to claim criminal jurisdiction over an accused person regardless of the place where the crime was committed, or the accused's residence. This is because crimes prosecuted under universal jurisdiction are considered serious crimes against all.

In the USA, the Alien Tort Claims Act (ATCA) under 28 USC 1350 – a provision of the 1789 Judiciary Act – provides universal civil jurisdiction over actions that occurred abroad to foreign plaintiffs.[1] In the mid-1990s, the ATCA started to be used against corporations for complicity in human rights violations and for environmental crimes in the oil and gas sector. In *Wiwa v. Royal Dutch Petroleum Co.* (1995), the Second Circuit permitted Nigerian émigrés in the USA to sue two foreign holding companies for their alleged participation in human rights abuses committed against the Ogoni people of Nigeria by Nigerian government forces. The case also involved allegations of coercive land appropriation and claims of air and water pollution. The matter was settled out of court in 2009 for \$15.5 million.

In the United Kingdom, in *Okapi and others v. Royal Dutch Shell plc and another* (2021) UKSC 3, the court held that the vertical corporate structure of the Royal Dutch Shell DS, when the corporate veil is lifted, indicates a delegation of authority that can be connected with decisions made at its subsidiary, the Shell Petroleum Development Company of Nigeria Ltd (SPDC), including on operational safety and environmental responsibility. This established the duty of care in respect of Royal Dutch Shell.

#### **In terms of the use of universal jurisdiction, civil society must:**

- Support the right of communities to participate in litigation to hold corporations accountable in jurisdictions in which their parent companies are based.
- Use universal jurisdiction to sue transnational companies involved in abuse of human rights in Africa's extractive sector.

In addition, SARW takes the use of remedial functions such as international and regional human rights mechanisms as complementary to national level, and state-based, judicial mechanisms. In the UN system, these mechanisms take the form of treaty-based bodies and charter-based bodies. This policy recognises the relevance of the Human Rights Council (HRC) Universal Periodic Review mechanism as an option available for the monitoring of human rights abuses in the extractive sector. Additionally, the HRC's Special Procedures mechanism makes use of independent human rights experts who report and advise on country situations or thematic issues in all parts of the world. Business and human rights investigations in the extractive industries, especially on the rights of indigenous populations, have been a subject of this mechanism before[56] and civil society in Africa can use such approaches in addressing adverse human rights situations.

## Internal SARW Protocols and Ways of Working

In order to use the above norms, standards and frameworks effectively, SARW must implement the following at governance, management and substantive levels.

### At a governance level:

- Clarify the impact of SARW engagements on Board oversight and fiduciary responsibilities.
- Clarify the implications of planned advocacy actions, in broad strategic terms to distinguish this responsibility from an operational one, for SARW's positioning and mandate.
- Clarify the balance of engagement across key result areas, in order to understand the risk appetite of SARW at any given moment.
- Deepen the nature and levels of Board specialisation and competence on risk areas for SARW, to facilitate stronger oversight and review (e.g., have a Board sub-committee on programme risk oversight that closely advises the ED of SARW).
- Develop the Board's role in media and communications, to better position SARW publicly, and also to defend SARW effectively during legal or other crises that may be occasioned by SLAPPs or retaliatory or intimidatory corporate legal or other action.
- Consider the implications for the strategic composition of the Board, including for instance bringing on board a practising lawyer with experience in extractives, and/or a human-rights oriented ex-company in-house counsel.

### At a management level:

- Increase SARW staff's knowledge base and intellectual leadership on business and human rights norms and standards, and on strategic litigation.
- Strengthen SARW's communications and media, including distilling the essentials of this policy into bite-sized training materials to be used in training new and existing SARW staff on the use of media, including representation of their advocacy against corporates, and covering not just traditional but also social media.
- Reorganise skill-sets and ways of working to include anticipatory understanding of corporate retaliation, intimidation, and negative legal suits.
- Prepare, in the organisation's annual plans, for both reactive and proactive strategic litigation on the content of SARW's work.
- Earmark, and if need be fundraise for, a specific budget for litigation and legal defense, promoting it to prospective funders as, effectively, their investment in SARW's capability to be strategic, courageous, and principled in its work of promoting and protecting human rights in the extractive sector in Africa.
- Reframe the SARW monitoring and evaluation system to include review and learning on strategic litigation, legal defense, and SLAPPs.

### At the substantive programme level:

- Develop an in-house, law-and-policy sign-off protocol for all SARW research products, with ultimate accountability resting with the ED.
- Incorporate into ongoing programme plans advocacy for norms and standards canvassed herein to be recognised, embraced, fully adopted, and implemented by states, as an offensive strategy for SARW self-protection and self-preservation.
- Provide, for each SARW research report or commentary that makes significant adversary claims against a corporate or a state or an individual, a right of reply or right of comment in advance of publication, and not use a possible reply so generated as a dissuasion from publication, but incorporate it into the final product, providing readers an opportunity to make their own judgments.

**END**

## GLOSSARY OF KEY TERMS AND CONCEPTS

- **Affected stakeholder:** An individual whose human rights have been or may be affected by a company's operations, products or services. In this policy, this term applies to both individuals and communities affected by extractive industry business enterprises.
- **Actual human rights impact:** An "actual human rights impact" is an adverse impact that has already occurred or is occurring.
- **Adverse human rights impact:** An "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights. This policy refers to an impact within the context of extractive industries.
- **Business activities:** Everything that a company does in the course of fulfilling the strategy, purpose, objectives and decisions of the business. This may include activities such as mergers and acquisitions, research and development, design, construction, production, distribution, purchasing, sales, provision of security, contracting, human resource activities, marketing, conduct of external or government relations (including lobbying), engagement with stakeholders, relocation of communities, social investment, and the activities of legal and financial functions.
- **Business relationships:** Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain, and any other state or non-state entity directly linked to its business operations, products or services. These include indirect business relationships in the value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.
- **Business partner:** Entities with which a company has some form of direct and formal engagement for the purpose of meeting its business objectives. This includes, but is not limited to, contractual relationships. Examples include joint venture partners, vendors, franchisees or licensees, business customers, clients, governments, suppliers, contractors, and consultants.
- **Civil society organisation (CSO):** Non-state, not-for-profit, voluntary entities formed by people in the social sphere that are separate from the state and the market. CSOs represent a wide range of interests and ties. They can include community-based organisations (CBOs) as well as non-governmental organisations (NGOs). In this policy, the position taken by the UN Guiding Principles Reporting Framework – that CSOs do not include business or for-profit associations – is adopted.
- **Complicity:** Complicity means being implicated in a human rights abuse that another company, government, individual or other group is causing. The risk of complicity in a human rights abuse may be particularly high in areas with weak governance or where human rights abuse is widespread.[17]
- **Disclosure:** All information released by a company for the purpose of informing shareholders or other stakeholders. (See also the "Environmental, Social and Governance Standard" section below.)

## GLOSSARY OF KEY TERMS AND CONCEPTS

- **Human rights performance:** The extent to which a company achieves the objective of effectively preventing and addressing negative human rights impacts with which it may be or has been involved. (See the "Access to Remedy" section.)
- **Human rights:** Basic international standards aimed at securing dignity and equality for all. Every human being is entitled to enjoy these rights without discrimination. They include the rights contained in the International Bill of Human Rights – meaning the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. They also include the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.
- **Human rights due diligence:** 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.
- **Mitigation:** The mitigation of an adverse human rights impact refers to actions taken to reduce the extent of that impact. The mitigation of a human rights risk refers to actions taken to reduce the likelihood that a potential negative impact will occur.
- **Public commitment to respect human rights:** A high-level and widely available statement by a company that sets out its intention to respect human rights with the expectation of being accountable for achieving that aim.
- **Remediation or remedy:** Refers to both the process of providing remedy for a negative human rights impact and the substantive outcomes that can counteract, or make good, the negative impact. These outcomes may take a range of forms such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.
- **Responsibility to respect human rights:** The responsibility of a company to avoid infringing on the human rights of others and to address negative impacts with which it may be involved. (See the section on "The Conduct of Business Enterprises: Corporate Accountability" below).
- **Sustainability report:** A generic term for a company report that provides information about a company's performance on a number of sustainability dimensions such as economic, social, environmental, and corporate governance issues, including human rights. (See the sections titled "Extractive Industries Transparency Initiative" and "Environment, Social and Governance" below.)

## GLOSSARY OF KEY TERMS AND CONCEPTS

- **United Nations Guiding Principles on Business and Human Rights:** A set of 31 principles that set out the respective roles of states and companies in ensuring that companies respect human rights in their business activities and through their business relationships. The Guiding Principles were endorsed by the UN Human Rights Council in 2011. See also the United Nations Global Compact (UNGC) initiative and its principles on human rights, labour, the environment and anti-corruption.
- **Value chain:** A company's value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the company's own products or services or (b) receive products or services from the company. In this policy, the value chain relates to business activities in the natural resource sector, including extractive industries.

## Endnotes

- [1] See SARW, *Press Release: Increasing Mining Activities in South Africa Must Not Happen at the Expense of Mining Communities' Rights to Live in a Clean Environment*.
- [2] *Ibid*
- [3] *Ibid*
- [4] See United Nations, "Guiding Principles on Business and Human Rights: Implementing the Remedy to 'Protect, Respect and Remedy' Framework." (New York and Geneva, 2011).  
[https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- [5] On 10 December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) which forms the bedrock of international human rights law. Two international treaties, the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), were adopted by the assembly on 16 December 1966. The UDHR and the two Covenants are collectively referred to as the International Bill of Human Rights.
- [6] According to the International Labour Organisation, "In order to tackle pressing environmental challenges like climate change, pollution and plummeting biodiversity, nations and businesses need to transition towards greener, resilient and climate-neutral economies and societies. A Just Transition means greening the economy in a way that is as fair and inclusive as possible to everyone concerned, creating decent work opportunities and leaving no one behind. A Just Transition involves maximising the social and economic opportunities of climate action, while minimising and carefully managing any challenges – including through effective social dialogue among all groups impacted, and respect for fundamental labour principles and rights."
- [7] Human rights treaty bodies recommend that home states take steps to prevent abuse of human rights abroad by business enterprises within their jurisdiction.
- [8] This includes soft law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development.
- [9] In Chapter I, the EITI protocol "Participation of civil society" sets out requirements and expectations regarding civil society participation in EITI implementation.
- [10] See EITI Principle 3 and 4.
- [11] See EITI Principle 6-9. Also see Publish What You Pay.
- [12] SARW subscribes to the ideals embedded in the Africa Mining Vision (AMV): "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development."
- [13] SARW has consulted stakeholders on local content regulation at a regional level and in five African countries (the Democratic Republic of Congo, Mozambique, Zambia, Zimbabwe and South Africa. For more see <https://www.sarwatch.co.za/local-content-in-southern-africas-mining-sector-summary/>
- [14] The practice of extracting shale gas using the hydraulic fracturing method is opposed by communities and civil society activists considering the risk of both surface and underground water contamination, air pollution and environment-related adverse impacts. In South Africa, civil society is opposed to shale fracking, against the wishes of the government and mining companies.
- [15] See BusinessTech, "South Africa could be sitting on its next gold rush – green hydrogen" (Business Tech, 07 Apr 2022). Green energy is a by-product that is produced from water electrolysis using energy from renewable sources such as solar, wind, and hydropower and is applicable in fuel cells to generate electricity, or power and heat.
- [16] According to the International Energy Agency (IEA), the demand for critical minerals is expected to skyrocket by about 400-600 percent over the next several decades. For more see EIA report "The Role of Critical Minerals in Clean Energy Transitions."
- [17] See UN Global Compact Principle 2 available at <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>

## Endnotes

- [18] See Natural Resource Governance Institute's 2021 Resource Governance Index.
- [19] According to the Natural Resource Governance Institute, transparency and accountability must be at every stage of decision-making: applying from exploration and pre-competitive geological surveys; to negotiating contracts and licensing; regulation of all aspects of the social and environmental performance of companies; to managing the revenue streams.
- [20] UN Guiding Principles on Business and Human Rights, Principle 13 (a) n 4.
- [21] Ibid, Principle 13 (b).
- [22] See UN Guiding Principle on Business and Human Rights [ibid] Principle 18.
- [23] According to Section (2)(4)(f) and (o) of the National Environmental Management Act 107 of 1998 (South Africa), the participation of all interested and affected parties (I&APs) in environmental governance must be promoted and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured. The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.
- [24] UN Guiding Principle on Business and Human Rights, Principles 15, 16 and 30. at n 4.
- [25] See Simone Liedtke, "Mining Indaba to explore ESG practices, opportunities for Africa" (Mining Weekly, 12 April 2022).
- [26] See Harvard Law School International Human Rights Clinic report, "The Cost of Gold: Environmental, Health, and Human Rights Consequences of Gold Mining in South Africa's West and Central Rand." The report finds that South Africa has not fully complied with constitutional or international law.
- [27] See "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga." This report chronicles the failure of government to ensure that mining companies comply with laws and regulations. The consequences are found in unprecedented environmental degradation and chronic health problems in Mpumalanga.
- [28] See Equator Principles EP4 July 2020. The Equator Principles are a financial industry benchmark for determining, assessing and managing environmental and social risk in projects.
- [29] United Nations Human Rights, "Free, Prior and Informed Consent of Indigenous Peoples" (Office of the High Commissioner for Human Rights, September 2013)  
<<https://www.ohchr.org/Documents/Issues/ipeoples/freepriorandinformedconsent.pdf>> accessed 5 May 2022. Also see IFC Performance Standards of Environmental and Social Sustainability: Standard 7 paragraphs 13-17.
- [30] This is also embedded within the universal right to self-determination.
- [31] The declaration addresses both the human rights of indigenous individuals and the collective rights of Indigenous peoples.
- [32] In South Africa, Johannesburg Stock Exchange listed companies must apply all King IV Report and Code. This means mining companies listed on the stock exchange must adhere with the standard.
- [33] The investment community also use the other soft law instruments along ESG metrics. Examples are the Equator Principles and International Finance Corporation (IFC) Performance Standards as benchmark standards for identifying and managing environmental and social risk. Also King IV Report on Corporate Governance is widely used in South Africa and contains both principles and recommended practices aimed at achieving governance outcomes.
- [34] See for example SARW press release: The Status of Artisanal and Small-scale Gold Mining in Nathenje, Malawi at <https://www.sarwatch.co.za/press-release-the-status-of-artisanal-and-small-scale-gold-mining-in-nathenje-malawi/>
- [35] The following Africa countries have been part of the World Bank's programme to support artisanal mining communities: Sierra Leone, the Democratic Republic of Congo, Tanzania, Ghana, Mongolia, Papua New Guinea and Ethiopia. SARW should take an interest in African components of the initiative being DRC and Tanzania.

## Endnotes

- [36] The word flaring is used to describe a naked (open) flame that is burning off excess gas. During oil production, natural gas is produced from the reservoir together with the oil. Each year, about 150 billion cubic meters (bcm) of natural gas is flared, emitting 400 million tons of CO<sub>2</sub>-equivalent emissions and other pollutants, including methane (more than 80 times more powerful than carbon dioxide over a 20-year period) and black carbon (soot).
- [37] Suresh Ramsuroop, 'Flaring at oil refineries in south Durban and Denmark' (August 2008) at [https://www.researchgate.net/publication/343671921\\_Flaring\\_at\\_oil\\_refineries\\_in\\_south\\_Durban\\_and\\_Denmark](https://www.researchgate.net/publication/343671921_Flaring_at_oil_refineries_in_south_Durban_and_Denmark)
- [38] Ibid
- [39] See Section 24 of the Constitution of South Africa 1996. It provides that everyone has the right to a healthy environment, and also the right to have the environment protected from pollution. Zimbabwe's Constitution 2013, s73 states that every person has the right to an environment that is not harmful to their health or well-being and measures must be taken to prevent pollution.
- [40] A new report by the World Bank, Global Perspective on Coal Jobs and Managing Labour Transition out of Coal, finalised December 2021, used the lens of five countries to discuss challenges of transitioning away from coal. The study draws from past lessons on how United States and Poland transitioned away from coal.
- [41] According to the World Bank, May 11, 2020 "Mineral Production to Soar as Demand for Clean Energy Increases" critical materials are projected to rise by up to 500 percent by 2050 to power electronics (like laptops and cellphones) and clean energy technologies.
- [42] See Sean Fleming, 'The hidden cost of the electric car boom – child labour' (The World Economic Forum, 24 September 2018).
- [43] See Linda Gaines and Others, 'Key issues for Li-ion battery recycling' (MRS Energy & Sustainability, Volume 5, 2018)
- [44] See European Commission, 'DIRECTIVE 2006/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC' Official Journal of the European Union 26 September 2006 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0066&from=EN>)
- [45] See European Commission, 'Tradable Certificates for Recycling of Waste and Electrical and Electronic Equipment (WEEE)' Environmental Resource Management at <https://www.environmental-expert.com/articles/tradable-certificates-for-recycling-of-waste-electrical-and-electronic-equipment-weee-1725/full-article>
- [46] In respect of the Role of Carbon Dioxide Removal (CDR), according to the Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming, all the emission pathways will require the removal of large volumes of CO<sub>2</sub> from the atmosphere using Carbon Removal to achieve net-zero emissions. Carbon capture, use, and storage (CCUS) is the process of capturing carbon dioxide (CO<sub>2</sub>) emissions from fossil power generation and industrial processes for storage deep underground or re-use.
- [47] Developed by the World Bank and launched in 2015 by the UN, World Bank and several governments, along with oil companies and development institutions, the Zero Routine Flaring initiative is designed to end an oil industry practice that has existed since oil production first began more than 150 years ago.
- [48] UN Guiding Principles on Business and Human Rights Principle 23 (a) at n 4
- [49] Ibid 23 (b)
- [50] Ibid 23 (c)
- [52] Ibid
- [53] UN Guiding Principles on Business and Human Rights Principle 25 at n 4.

## Endnotes

- [54] See Friends of Mining Watch Canada, “SARW Opposes Attempts by First Quantum Minerals to Silence It Through Court Action First Quantum Mineral” (18 May 2021). In particular, the lawsuit by FQM challenged a SARW report titled “Living in a Parallel Universe: FQM versus communities,” published on February 5, 2019. The report focused on the plight of communities around FQM’s Kansanshi mine which concluded that its CSR programme as not transforming the lives of mining communities and lacking commitment towards sustainable, inclusive development and social justice. FQM disputed the findings of the report, and eventually, the parties mutually agreed that SARW would undertake a second study, with FQM committing to avail themselves to their research team. The second report titled “First Quantum Minerals Corporate Governance and Social Responsibility: KANSANSHI MINE” confirmed initial findings.
- [55] In Andre van Wyk, “South Africa: ‘SLAPP’ Suit to Define Legal Landscape in Environmental, Mining Cases Forever? (All Africa, 10 July 2020).
- [56] See Mineral Sands Resources (Pty) Ltd v Reddell [2021] ZAWCHC 22.
- [57] See article by environmental law group, Centre for Environmental Rights, “Mineral Sands Resources & Zamille Qunya v Christine Reddel, Tracey Davies and Davine Cloete (SLAPP exception application)” (CER website, 9 February 2021).
- [58] Jurisdictions such as Australian, Canada, European Union and the United States have passed anti-SLAPP laws. In Australia, the Protection of Public Participation Act 2008 is an example. The Act protects conduct intended to influence public opinion or promote action in relation to an issue of public interest. In 2021, the European Union was considering adopting an anti-SLAPP directive to protect the freedom of speech of European citizens.
- [59] Campaigns in Europe, led by the Coalition Against SLAPPs in Europe (CASE), have contributed to the European anti-SLAPP directive.
- [60] The ATCA grants access to U.S. federal courts, providing original jurisdiction over any civil action brought on account of four elements: (1) a civil action; (2) by an alien; (3) for a tort; (4) committed in violation of the law of nations or a treaty of the United States. There are however limitations that SARW has to consider when considering claims against corporations using ATCA. For more see *Khulumani v. Barclay National Bank Ltd* (02-MDL-1499) (S.D.N.Y. 2008) and *Kiobel v. Royal Dutch Petroleum Co.*, 569 US 108 (2013).
- [61] See James Anaya (2009), “UNHRC Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples”. chrome-extension://efaidnbmnnnibpcaglgblefindmkej/https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41\_en.pdf





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