

Submission to the 2011 United Nations Universal Period Review of Australia, by the Australian Corporate Accountability Network (ACAN)¹

1. Introduction

1.1 ACAN is concerned with the frequency with which Australian corporations are involved in the violation of human rights beyond Australia's territorial boundaries and the lack of accountability under law to date for such violations. This submission details recent cases where Australian businesses have been involved in serious human rights abuses, committed in connection with their extraterritorial operations, and briefly outlines what steps the Australian Government should be taking to combat similar incidents in the future.

2. Australian Corporate Misconduct Overseas

2.1 Due to submission length requirements, this submission focuses on two cases of overseas Australian corporate misconduct, however several other prominent cases could have also been included.² These two examples illustrate the need for greater regulatory oversight by the Australian government of its corporate nationals in their overseas operations, in the interests of improving the protection of human rights and accountability for their abuse.

2.2 ***Philippines – OceanaGold Corporation***³

2.3 Background: *OceanaGold Corporation* (OceanaGold), an ASX listed, Melbourne based mining company, wholly owns *Australasian Philippines Mining Inc* (APMI). Since 2006 APMI has operated a gold and copper mine in Didipio, Nuevo Vizcaya, North Luzon, Philippines. However, the mine has never been fully operational. Since December 2008, the mine has been put into 'care and maintenance' while OceanaGold/AMPI locate additional sources of finance.

2.4 Main issues of concern: *Forced Land Acquisition & Illegal Demolition of People's Houses*

2.5 To make way for the extraction phase of the mining project *OceanaGold/AMPI* have needed to relocate residents of Didipio. At the time they were acquiring land the Company compensated villagers through a process it called Surface Rights Acquisition (SRA). The SRA process has been very controversial. SRA gave residents an offer for compensation determined unilaterally and without the possibility of negotiation. If residents refused they were repeatedly visited by Company officials with the same offer, sometimes accompanied by armed security personnel.

2.6 The Provincial Chief of the Philippine Department of Environment and Natural Resources (DENR) has been charged with abuse of authority, by the Office of the Ombudsman, in connection with intimidation against local people who refuse to sell their land to the Company.⁴

2.7 If residents persisted with their refusal the Company submitted them to the Panel of Arbitrators of the Mines and Geosciences Bureau to seek authorisation to enter their land and remove their property without

¹ Dominic Renfrey, on behalf of the Working Group of ACAN. For further information please contact corporate.accountability.network@gmail.com. Particular thanks to Joanne Kyriakakis for reviewing an earlier draft.

² Most notably that of Freeport McMoRan (by virtue of Anglo-Australian mining giant Rio Tinto's stake in the operation) in Indonesia. For a thorough review of human rights violations in relation to one significant event at the mine see: *Development Aggression: Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas With Recommendations*, by the Robert F Kennedy Memorial Center for Human Rights. Available at: http://rfkmemorial.mediathree.net/human_rights/1993_Bambang/Development_Aggression.pdf. There are also many prominent cases of overseas corporate misconduct by Australian legal persons that have been thoroughly documented by Oxfam Australia's Mining Ombudsman. See: www.oxfam.org.au/explore/mining/our-work-with-communities

³ For full information about the involvement of OceanaGold in Didipio see Oxfam Australia, 'Mining Ombudsman case report: Didipio Gold and Copper Mine' 2007 (address n 2 above), PIPLinks Joint Submission to the UN Special Rapporteurs on the situation of IP, Housing & Torture, August 2009. Available from www.piplinks.org, Rights and Natural Resources Center-Kasam sa Kalikasan: www.Ircksk.org & Business and Human Rights Resource Centre: www.business-humanrights.org/Categories/Individualcompanies/O/OceanaGold

⁴ Philippine Inquirer, 'Antimining residents sue DENR Vizcaya chief' 20 February 2008. Available at: <http://newsinfo.inquirer.net/inquirerheadlines/regions/view/20080220-119553/Antimining-residents-sue-DENR-Vizcaya-chief>

permission. The Company received authorisation to do this in many cases. The process has been criticised as the Panel is not a judicial body and, as many Didipio residents are illiterate and the arbitration panel hearing cases sat a long way from the village, it was practically very difficult for people to participate in the hearings.⁵

- 2.8 The destruction of homes also occurred without due notice being given to locals and without a court order.⁶ Often this lack of notice resulted in demolition teams destroying peoples' possessions within their homes. For example in the case of Romeo Guimbangan, he was away from his property when his house and personal possessions were destroyed.⁷
- 2.9 This policy of forced land acquisition was distressing for local people. A local, Mr Antonio Dingcog, rhetorically asked a public forum, held by the National Commission on Indigenous Peoples, "[C]an we... sleep without fear of having our houses demolished?" Mr Dingcog says that this fear, grounded in the experiences of people like Alfredo Bahnig, who was reportedly asleep in his house at the time the company started to demolish it, had affecting his ability to earn a living, since he had barricaded his house and didn't leave for work, worried that if he did his house would be destroyed.⁸
- 2.10 Personnel from Sagittarius Security Agency (SSA) – OceanaGold/AMPI's contractor for the demolitions – have used an inappropriate level of force to evict residents. For example, the demolition team sent to Didipio on 22 March 2008 were escorted by 100 armed men. The population of Didipio is approximately 180.⁹
- 2.11 This high level of armed personnel accompanying demolition teams has led to violence. On the March 22 resumption of housing demolitions, a local resident, Mr Pumihic, was shot at close range by, Mr Whitney Kitan Dongiahon, an SSA employee. Mr Pumihic was shouting at the demolition team to stop demolishing the house of his neighbour, Mr Bidang, since Mr Bidang was sleeping in the house at the time. In his testimony, Mr Pumihic was asked by local police, "[I]n your own belief, if you did not struggle and tried to free yourself, is there a possibility that you might be hit on your chest?" Mr Pumihic answered, "[Y]es, sir...because the gun is pointed in the level of my chest, sir".¹⁰
- 2.12 The process of using the Panel of Arbitrators' decisions after Dec 2007 to justify the Company's forcible eviction was adjudged illegal in late February 2008 by a Regional Trial Court (RTC). The RTC decided this on the basis that there was no court order permitting the actions, no hearing was conducted prior to the demolitions and the residents were not given a reasonable time to clear out their homes.¹¹ The demolitions were not attended by a court sheriff.¹² The residents whose homes were totally destroyed were not compensated for their losses, and no suitable relocation site was ever provided for by the company.
- 2.13 On February 27th, 2008, the RTC in Nueva Vizcaya issued a Temporary Restraining Order (TRO) against the Company, describing its actions as "tainted with irregularity and contrary to law".¹³ The TRO has since been made into a Writ of Preliminary Injunction, which is still in effect. The Company is pursuing legal avenues to overturn the court's rulings, but has so far failed.¹⁴ The Company has also filed for operational losses against the residents.¹⁵

⁵ Oxfam Australia, 'Mining Ombudsman case report: Didipio gold and copper mine' (September 2007) p. 29. Available at: <http://www.oxfam.org.au/campaigns/mining/ombudsman/cases/didipio/docs/2007-Didipio-Case-Report.pdf>

⁶ Legal Rights and Natural Resources Center-Kasam sa Kalikasan 'LRC/KSK', 'Big Brother OceanaGold Mining Company Evicting Residents in Brgy. Didipio – Demolishes Indigenous Peoples Houses', 13 February 2008.

⁷ Gascon, M. 'Antimining villagers bare threats from gunmen', *Philippines Daily Inquirer*, February 23, 2008.

⁸ Philippine National Commission on Indigenous Peoples, Minutes from a public forum held in Didipio, 08.04.08, p. 9.

⁹ Nueva Vizcaya provincial census data cited in Gobrin, G. & Andin, A. *Development Conflict: The Philippine Experience*, by Minority Rights Group International, 2002, pg. 5. www.minorityrights.org/download.php?id=76

¹⁰ Emilio Puhimic, Sworn police testimony, March 24th, 2008. Copy obtained from the Nueva Vizcaya Police Office.

¹¹ In line with Rule 39, Sec. 10(d), Revised Rules of Court

¹² In line with the Supreme Court's decision in *City of Baguio v. Nino*, G.R. No. 161811, April 12, 2006.

¹³ Gregorio, R.A. Press Release of the Legal Rights and Natural Resources Center, Luzon Regional Office, 'Ifugaos Applaud Court of Appeals Junking of OceanaGold Petition', 03/03/2010. Available at: <http://www.minesandcommunities.org/article.php?a=9977>

¹⁴ Teague, El. 'Philippines: mining company banned from demolishing homes of indigenous peoples', *Independent Catholic News*, 27/03/2010. Available at: <http://www.indcatholicnews.com/news.php?viewStory=15893>

¹⁵ Gascon, M. 'Mining firm wants villagers to pay for its losses', *Philippine Daily Inquirer*, 05/03/2008. Available at: <http://newsinfo.inquirer.net/inquirerheadlines/regions/view/20080305-123001/Mining-firm-wants-villagers-to-pay-for-its-losses>

2.14 **Democratic Republic of Congo (DRC) – Anvil Mining**

- 2.15 Early on October 14th, 2004, a small group of poorly equipped armed men – reportedly no more than 10 – from a hitherto unknown group called the Revolutionary Movement for the Liberation of Katanga ('MRLK' in French)¹⁶, attempted to take control of the town of Kilwa, in Katanga Province, southeast Democratic Republic of Congo (DRC). The incursion, and people's fears of the possible repercussions, triggered approximately 90% of Kilwa's residents to flee.¹⁷
- 2.16 At the time Anvil Mining, (a Western Australian based mining firm that is incorporated in Canada) operated a copper and silver mine operation close to Kilwa, called the 'Dikulushi' mine.¹⁸ After hearing of the MRLK's incursion, staff from Anvil Mining spoke with a leader of the MRLK. The leader told the Anvil staff they had no intention of taking control of the mine. Soon after, Anvil Mining evacuated its staff to Lubumbashi, except for 2 expatriate and 2 locals, using charter planes.¹⁹
- 2.17 On the return journey back to Kilwa from Lubumbashi, Anvil Mining confirmed that at least 150 soldiers were flown back on the plane and that Anvil vehicles were used by DRC Government aligned soldiers – the *Forces armées de la République démocratique du Congo* (FARDC) – but maintained that it had no choice in the matter.²⁰
- 2.18 The FARDC soldiers launched a military response against the MRLK. A UN report by MONUC (United Nations Organisation Mission in the DRC) into the affair revealed in the FARDC counter-attack, in order to "dislodge" the approximately 10 "badly organised and poorly armed" rebels, 73 people were confirmed killed (28 of whom were allegedly summarily executed). The MONUC team revealed that FARDC soldiers "were responsible for acts of looting, extortion and illegal detention".²¹
- 2.19 The MONUC report went on to say that the planes Anvil charter were also later used by FARDC to transport suspected rebels to Lubumbashi. "MONUC was able to confirm that three of Anvil Mining's drivers drove the company's vehicles used by the FARDC [footnote: 'MONUC's information according to which an international security officer of Anvil was also in the vehicles used by the army was denied by Anvil']".²² Anvil had also reportedly informed MONUC that they placated FARDC soldiers with food rations and had also "contributed to the payment of a certain number of soldiers".²³
- 2.20 In October 2006 nine soldiers faced charges of *inter alia*, war crimes, torture and murder, in a military court. Three expatriate Anvil staff (a Canadian and two South Africans) were charged with aiding and abetting the FARDC.²⁴ The men were accused of having "voluntarily failed to withdraw the vehicles placed at the disposal of the 62nd Brigade" for their counter attack on Kilwa, and "knowingly facilitated the commission of war crimes".²⁵ The Court made clear that the three employees, not Anvil Mining as a legal person, who were being charged.

¹⁶ MONUC final report: 'Rapport sur les conclusions de l'enquête spéciale sur les allégations d'exécutions sommaires et autres violations de droits de l'homme commises par les FARDC à Kilwa le 15 octobre 2004', paragraph 3, released in September 2005. "The insurrection was orchestrated by fewer than 10 people, who were apparently naive and poorly equipped and who claimed that they belonged to the Revolutionary Movement for the Liberation of Katanga (MRLK). This movement was not known before the attack on Kilwa". Available at:

http://abc.net.au/4corners/content/2005/MONUC_report_oct05.pdf.

¹⁷ MONUC Special Investigations Unit (SIU), 'Report of the Special Investigation in Kilwa 22-24 October 2004, Lubumbashi', 10 November 2004, paragraph 13.

¹⁸ Gilfenbaum, E & Lawrence, S. 'The World Bank in the Democratic Republic of Congo', *Environmental Defense Fund* (2005). p. 2. Available at:

http://www.edf.org/documents/5061_World%20Bank%20and%20DRC%20update%20July%202005.pdf

¹⁹ Anvil Mining Limited, 'Advice on rebel activity in village of Kilwa, DRC', Press release, 15.10.04.

²⁰ MONUC final report, paragraph 36. See also: Australian Broadcasting Corporation *Four Corners* program on the Kilwa incident where Anvil CEO, Bill Turner, confirmed that Congolese military personnel used Anvil vehicles and planes at the time. Available at: <http://www.abc.net.au/4corners/content/2005/s1386467.htm>

²¹ MONUC final report, paragraph 2.

²² Ibid.

²³ Ibid.

²⁴ Rights and Accountability in Development (RAID), *Kilwa Trial: a Denial of Justice – A Chronology October 2004 – July 2007*, pg. 8-9. Available at: http://www.globalwitness.org/media_library_detail.php/560/en/

²⁵ Décision de renvoi, Colonel Magistrat Eddy Nzabi Mbombo, Auditeur Militaire Supérieur près la Cour

- 2.21 In February 2007 the Military Prosecutor was replaced, despite protestations from the UN and NGOs. After a second replacement was assigned to the case, proceedings resumed in May 2007. On May 16 the Court announced it would relocate to hear the case in Kilwa. Lawyers for the victims were unable to travel to Kilwa, further undermining the already increasingly dubious proceedings. In late May MONUC trial observers called the impartiality of the Presiding Judge into question, citing his cajoling manner with prosecution witnesses, and his refusals to call key prosecution witnesses cited by victims' lawyers.²⁶
- 2.22 Despite challenges with the trial, some witnesses did testify in Kilwa. One prosecution witness stated that he had managed to escape execution. He alleged that he was one of 15 people taken to be executed in an Anvil Mining company jeep, driven by an Anvil Mining staff member. Many similar testimonies supported this account of the situation.²⁷
- 2.23 In June 2007 the Military Court found all defendants not guilty of any crimes. The Court's view was that people were killed as a result of 'fierce fighting'²⁸ between the 10 or so rebels and the approximately 150 FARDC soldiers. The court rejected that a place MONUC identified as a mass grave was such, stating instead that it was a cemetery. The court, in acquitting the Company as well as the employees (contrary to the original charge that only the employees were on trial), gave its view that Anvil Mining's vehicles and logistical support were requisitioned.²⁹ Finally, the court criticised human rights organisations for "trying to turn a humanitarian issue into a judicial affair".³⁰
- 2.24 A unique legal procedure in Congolese law prevented there being any chance of the appeals court reconsidering all elements of the case.³¹ Anvil Mining has never faced any legal action concerning its involvement in Kilwa in Australia, despite there being clear flaws in the Congolese legal attempts to hold them accountable³², and in light of significant changes that were made to Australian law two years prior to the Kilwa incident (see below).
3. Australia's Criminal Code and What it Could Do For Overseas Corporate Governance
- 3.1 Australia has, since 2002, criminalised grave corporate human rights misconduct committed overseas, including genocide, war crimes and crimes against humanity. This protection is the result of the *International Criminal Court (Consequential Amendments) Bill 2002* (Cth), which incorporated international crimes into Division 268 of the *Criminal Code Act 1995* (Cth)(Aust.) (the Australian Criminal Code).
- 3.2 According to section 12.1(1) of the Australian Criminal Code, all crimes contained within the Code are applicable to "bodies corporate in the same way as [they apply] to individuals". Furthermore s. 12.1(2) states that "a body corporate may be found guilty of any offence, including one punishable by imprisonment". The extension of criminal liability for the Division 268 offences to include corporations is a result of a legislative commitment in Australia to a robust corporate criminal liability scheme.³³

Militaire du Katanga, 12 October 2006, as quoted in Rights and Accountability in Development (RAID), *Kilwa Trial: a Denial of Justice – A Chronology October 2004 – July 2007*

²⁶ RAID report, pg 23.

²⁷ Testimonies included in RAID's report, pg. 19.

²⁸ RAID report, pg 25.

²⁹ Global Witness, *The Kilwa Appeal – A Travesty of Justice*, Briefing Document 05/05/08. Available at: http://www.globalwitness.org/media_library_detail.php/645/en/the_kilwa_appeal_a_travesty_of_justice

³⁰ Transcript of an audio recording by Radio Okapi of the judgment in the Kilwa trial, as read out in court on 28 June 2007 (English translation by RAID/Global Witness): "...tenter de transformer un dossier humanitaire en dossier judiciaire".

³¹ Global Witness, *The Kilwa Appeal – A Travesty of Justice*, Briefing Document 05/05/08

³² In addition to the aforementioned formal complaints by MONUC during the case, Louise Arbour, then UN High Commissioner for Human Rights, issued a statement after the case closed saying that she was "concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations". In addition, the use of a military trial for civilians was questioned.

³³ Kyriakakis, J. 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code', (2007) 5 *Journal of International Criminal Justice*, 809, 815-816.

- 3.3 The international crimes contained in Division 268 of the Australian Criminal Code are subject to universal jurisdiction, which means that the law criminalises Australian corporate complicity in certain grave human rights abuses, whether they are committed on Australian territory or overseas. As illustrated in the case studies outlined below, there have been a number of situations since the introduction of the Division 268 offences implicating the wrongful involvement of Australian corporations in such crimes, committed in connection with their extraterritorial operations.³⁴
- 3.4 Australia is just one of a growing number of states that has enacted legislation that criminalises various forms of human rights misconduct committed by corporations.³⁵ Australia's law is particularly significant, given its capability for basing a corporation's criminal liability on its corporate culture.³⁶ The potential impact that such laws could and should have on the governance of extraterritorial corporate human rights abuses is profound. The United Nations Special Representative on business and human rights has described such legislation as 'the most consequential legal development' in addressing the current misalignment between economic forces and their governance in the global economy.³⁷
- 3.5 However, while the Division 268 offences in the Australian Criminal Code and their application to corporate conduct overseas can rightly be described as a progressive step toward covering a significant governance gap, it is likely to remain largely inactive. The reason for this is that any prosecution under Division 268 requires the express written consent of Australia's Attorney General.³⁸ As Kyriakakis has written on the matter; "a prosecution against a TNC, incorporated in Australia or otherwise, for extraterritorial harms may impact in any number of ways upon international relations and business investment, which are likely to deter political will to prosecute...In the absence of political will, prosecution is hence impossible".³⁹
4. Recommendations
- 4.1 We commend the Australian Government for introducing the Division 268 offences into the Australian Criminal Code, and applying them to Australian corporate conduct overseas. However, Australia should apply these laws where sufficient evidence indicates that they may have been violated.
- 4.2 There is substantial evidence that these laws may have been violated by the companies involved in the two case studies outlined above. We strongly encourage member countries of the Human Rights Council, especially victims of grave Australian corporate misconduct, to submit questions to the 'troika' that is compiling questions for the Australian Government's UPR in Feb 2011. In particular, we urge member countries to enquire as to why Australia has so far not utilised its existing extraterritorial human rights protections, contained in the Australian Criminal Code, to investigate grave overseas Australian corporate misconduct.
- 4.3 We strongly urge the Australian Government to remove s. 268.121 (1) from the *Criminal Code Act 1995 (Cth)*. This action would rightfully remove undue political interference from future decisions of the Federal Public Prosecutor to pursue criminal charges of grave human rights abuses committed by Australian companies overseas.

³⁴ *Criminal Code Act 1995 (Cth)* s. 268.117(a). This section states that "Section 15.4 (extended geographical jurisdiction-Category D) applies to genocide, crimes against humanity and war crimes", while Section 15.4 states that "if a law of the Commonwealth provides that this section applies to a particular offence, the offence applies: (a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia".

³⁵ For a full discussion detailing the nuances of each states particular legislative developments in corporate criminality see: A Ramasastry and R C Thomas, *Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries* (2006, Fafo).

³⁶ See *Criminal Code Act 1995 (Cth)* sub-ss. 12.3 and 12.4.

³⁷ **John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, [84], UN Doc A/HRC/4/035 (2007).**

³⁸ *Criminal Code Act 1995 (Cth)* s. 268.121(1): "Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent".

³⁹ Kyriakakis, J. 'Freeport in West Papua: Brining Corporations to Account For International Human Rights Abuses under Australian Criminal and Tort Law', (2005) 31 *Monash University Law Review*, 95, 109.