



CESR

CENTER FOR ECONOMIC AND SOCIAL RIGHTS

A Human Rights Critique

of the IIED & World Business Council for Sustainable Development
Mining, Minerals and Sustainable Development Report

MARCH, 2003



SUMMARY RECOMMENDATIONS

The report needs to be re-worked to integrate an inclusive, comprehensive understanding of human rights which includes economic, social and cultural rights.

Chapter 6 needs to explicitly recognize the importance of trade unions and the right to join a trade union within the section on employee development and safety at work.

The importance of trade unions should be expressly recognized within the section on “conditions of employment” in Chapter 6.

Mining companies should be responsible for the work conditions of workers employed by sub-contractors. They should also be responsible for environmental impacts of sub-contractors.

International conventions are only binding on states and we recommend that there should be an international instrument which creates binding legal obligations on mining companies which require respect for human rights. Voluntary Principles are insufficient.

The discussion on land in Chapter 7 should include a section which recognizes regional specific land issues, such as the movement for agrarian reform in Latin America.

We recommend the explicit inclusion and discussion of the right to an adequate standard of living as enunciated in the International Covenant on Economic, Social and Cultural Rights in the discussion about land.

Any independent body established to decide on compensation should include representatives from communities and NGOs active in mining issues.

The discussion around resettlement should be re-written to adequately reflect the right to housing as enunciated in the ICESCR, article 11. It should include the concept of “forced eviction” and recommendations around the maintenance of traditional lifestyles.

Chapter 9 should explicitly refer to the right to health as enunciated in international covenants and include a discussion of mental health and environmental health issues.

The discussion of free and informed consent should utilize international law and declarations particularly in reference to indigenous communities. We submit that respect for the right of communities to prior informed consent is vital to any mining operation.

We are concerned that while the report recognizes the drastic impact of resettlement on people’s right to an adequate standard of living, right to culture and right to housing, it does not recommend any strong measures for ensuring that these human rights are respected. We recommend that forced eviction, violating article 11 of ICESCR should be avoided.

We recommend that there be a clear recognition that communities have frequently not had access to trustworthy dispute resolution and that there is a power differential between communities and mining companies which effects this.

We propose that the report should suggest negotiation models which will take into account power differences between mining companies and communities.

We recommend that the link between women’s right to water and the environmental effects of mining using vast quantities of water should be made.

Chapter 10 should include the right to water as enunciated in international treaties and agreements. It should refer to Agenda 21 and recognize that right to drinking water of people must be prioritized in any decisions around the use of water.

Chapter 14 should be corrected to properly reflect the functioning of international law and treaty monitoring bodies.

About CESR

The Center for Economic and Social Rights (CESR) was established in 1993 to promote social justice through human rights. CESR works with social scientists and local partners in affected communities to document rights violations, advocate for changes in policies that impoverish and exploit people, and mobilize grassroots pressure for social change. As one of the first organizations to challenge economic injustice as a violation of international human rights law, CESR believes that **economic and social rights** — binding on all nations — can provide a universally accepted framework for strengthening social justice activism.

What is the Global Mining Campaign?

The Center for Economic and Social Rights (CESR) is a member of the Global Mining Campaign (GMC). This is a network of non-governmental organizations (NGOs), community based organizations and activists from around the world that work together through collaborative initiatives and individual actions to hold mining companies accountable for their performance on human rights, environmental impacts and economic and social issues in mining. It was launched in December 2001 and regionally in Latin America in February 2002. CESR provides a human rights analysis and perspective within the campaign.

One of the reasons for launching the GMC was to provide a mechanism for strengthening NGO work around mining issues.

What is the Global Mining Initiative?

In the last 3 years the industry became more organized with its own agenda for mining. In 1998 at a meeting of mining CEOs at the World Economic Forum in Davos Switzerland, a new industry-sponsored project called the Global Mining Initiative¹ was launched. Some of the key sponsors included Sir Robert Wilson of Rio Tinto and Hugh Morgan of Western Mining Corporation². Industry leaders in explaining the rationale for the formation of the GMI have referred to the low public regard of the mining industry.

The three main tenets of the GMI were:

- 1) an industry review of the objectives, effectiveness, and costs of its global trade associations
- 2) a global study to assess the contribution that mining can make to sustainable development; and
- 3) an industry event to announce its plans and the research results at, or before the World Summit on Sustainable Development in August/September 2002.

In each of these areas the GMI was active. The GMI recognized that their trade associations were inadequate and that members were frequently unaware of companies' positions and activities. A new trade association and lobby group has been formed called the International Council for Mining and Metals.

The research project on sustainability issues has now been completed and was conducted by the International Institute for Environment and Development. The report which was issued is called the Mining, Minerals and Sustainable Development Report (MMSD). This is the report which the GMC has critiqued and which this booklet also critiques.

In fulfillment of the third goal, a public event was held in Toronto Canada in May 2002 called "Resourcing the Future" at which the MMSD report and future action were discussed. In a press statement issued on the 15th May 2002, the chair of the GMI, Sir Robert Wilson of Rio Tinto formally acknowledged the finalisation of the GMI and the creation of the new body the International Council for Mining and Metals.

The MMSD report

The MMSD report was finalized in May 2002 and is available at <http://www.ied.org/mmsd/finalreport/index.html>. It is over 400 pages long but can be viewed in sections.

On their website, the International Institute for Environment and Development state that the "Mining, Minerals and Sustainable Development (MMSD)³ was an independent two-year process of consultation and research with the objective of understanding how to maximise the contribution of the mining and minerals sector to sustainable

development at the global, national, regional and local levels. Through this process, MMSD has proposed a clear agenda for global change in the minerals sector, that is based on careful analysis, that is understood and supported by many key stakeholders, and that identifies mechanisms for moving forward.” Some NGOs have questioned the independence of the report as it was commissioned by the World Business Council for Sustainable Development. While it claims to be a multi stakeholder process, many key NGOs did not participate in the process for various reasons, and thus question this claim also.

“The general objectives of MMSD, as explained in the Scoping Report prepared by IIED for the WBCSD in 1999, were as follows:

- First, to assess global mining and minerals use in terms of the transition to sustainable development. This would cover the current contribution — both positive and negative — to economic prosperity, human well-being, ecosystem health and accountable decision-making, as well as the track record of past practice.
- Second, to identify how the services provided by the minerals system can be delivered in accordance with sustainable development in the future
- Third, to propose key elements of an action plan for improving the minerals system
- Fourth — and crucial for long-term impact — to build platforms of analysis and engagement for ongoing cooperation and networking among all stakeholders”⁴

Why did CESR write a critique of the MMSD report?

Some members of the Global Mining Campaign decided it was important to make some critique of the MMSD report and a committee was formed to undertake this task. Due to the large size of the report, particular aspects of the critique were divided amongst members according to their areas of expertise and knowledge. CESR offered to contribute to a human rights critique of the report. At a time when the mining industry seeks to improve its practice and image, it is vital that it be called to account for the work that it is undertaking and a rigorous approach taken to its study.

Throughout the following critique, we refer to some examples drawn from our work in Honduras and Central America. CESR has been active in assisting local Honduran NGOs and communities who are concerned about existing gold mines. CESR documented human rights violations at 2 gold mines and submitted this report to the UN Committee on Economic, Social and Cultural Rights. The Committee made recommendations about mining activity in response to CESR’s report. Since then CESR has educated community members and NGOs about a human rights perspective in mining issues as well as around the concluding observations of the UN Committee.

A Human Rights Critique of the MMSD Report

One of the primary aims of the Mining, Minerals, and Sustainable Development (MMSD) Report is to move the mining industry towards greater protection of human rights. The report acknowledges both that human rights groups have exerted powerful political pressure on the industry by exposing to the public the ways in which mining conflicts with a human rights agenda, and that human rights protection is a necessary component of any sustainable development agenda. Yet the MMSD incorporates human rights into the report only by mentioning in some places that various rights exist and should be considered in the movement towards sustainable development. The report does not accurately use the language, principles, or standards of international human rights law either to describe the wrongs industry is currently perpetrating or to develop a vision of an industry that might more faithfully uphold human rights.

Economic, Social and Cultural Rights are human rights

International human rights law guarantees civil and political freedom—through the human rights to life, physical integrity, free speech and belief, and due process of law—as well as economic and social well-being—through the human rights to an adequate standard of living, housing, work, education, food, health, and a healthy environment. The founding document of human rights law, the Universal

Declaration of Human Rights⁵ (UDHR), established the fundamental vision and principles of the new human rights regime by recognizing the interdependence and indivisibility of all human rights—civil, political, social, economic, and cultural rights. Over the past 50 years, economic, social, and cultural rights (ESCR) have been elaborated through a wide range of international treaties, laws, and principles and have been affirmed at world conferences such as the Rio Conference on Environment and Development and the Copenhagen Conference on Social Development. Also, ESCR have been incorporated both into regional law through organizations such as the European Union, and into the domestic law of many countries in the form of constitutional rights and national legislation.

We commend the MMSD report for at times acknowledging the existence of not only civil and political rights, but also of economic, social, and cultural rights (ESCR). For instance, in **Chapter Nine** (Page 199) the report states that,

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“Whatever is agreed to (or not, as the case may be), mining activities must ensure that the basic rights of the individual and communities affected are upheld and not infringed on. These may include the right to control and use land; the right to clean water, a safe environment, and a livelihood; the right to be free from intimidation and violence; and the right to be fairly compensated for loss.”

Additionally in **Chapter 4, (page 75)** there is a reference to the Universal Declaration of Human Rights and the right to an adequate standard of living which falls within ESCR.

However, at other times the report describes the human rights system as a limited one that encompasses only civil and political rights. Box ES-3, (page xvi) in the **Executive Summary** describes the four dimensions of sustainable development principles: the economic sphere, the social sphere, the environmental sphere, and the governance sphere. Human rights are mentioned amongst these principles, but only as part of one of the four dimensions of the social sphere of sustainable development. The fact that protecting human rights is separated out from other spheres such as environmental spheres suggests that the environment

is irrelevant to human rights. Yet the right to a healthy environment is clearly recognized in Article 12 of the International Covenant on Economic, Social, and Cultural Rights⁶ (ICESCR)

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Social Sphere

- *fair distribution of the costs and benefits of development for all those alive today*
- *Respect and reinforce the fundamental rights of human beings, including civil and political liberties, cultural autonomy, social and economic freedoms, and personal security*
- *Seek to sustain improvements over time; ensure that depletion of natural resources will not deprive future generations through replacement with other forms of capital.*

On page 24 of **Chapter 1** in the box on the principles for sustainable development in the “Social sphere” section, the report refers to human rights but then uses the language of “civil and political liberties” and “social and economic freedoms”. Economic, Social and Cultural rights are rights just as civil and political rights are human rights. The language used reveals a limited understanding of human rights which is contrary to the concepts of indivisibility and universality of human rights found in the Universal Declaration on Human Rights and the International Covenant on Economic, Social and Cultural rights.

In **Chapter 6, (page 120)** there is a box titled “Selected Mining Company Actions for Sustainable Development” about the readiness of mining companies to take action in relation to sustainable development. It states

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“for a growing number of large-scale mining multinationals, sustainable development is an umbrella concept covering health and safety, risk management, emergency preparedness, environmental management, community relations, relations with indigenous peoples, and in some cases, human rights.”

The way this is stated reveals an implicitly limited concept of human rights which sees human rights as only civil and political rights and not including economic, social and cultural rights. Relations with indigenous peoples and environmental management involve human rights issues and are not separate from human rights issues.

Most importantly, economic and social rights are not fully recognised in the section titled “Promoting and Protecting Human Rights” (**Chapter 8**, Page 189). The only reference to economic, social and cultural rights is in the following passage.

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“A third change, which is gradually pervading many civil society groups, is the idea of rights-based development – the notion that people should be able to claim health services, say, or schooling not as a gift from a government or corporation but as a right. This new atmosphere is presenting mining companies with difficult and complex challenges.”

This section focuses on some key human rights criticisms of mining companies: that they collude with security forces, violate labour rights, and work with ‘pariah regimes.’ (page 190) The rights discussed as human rights refer only to civil and political rights. We disagree with this analysis and submit that accurately employing human rights principles and standards requires acknowledging that many current mining practices violate ESCR.

Some of the most contentious issues concern land rights, which are addressed in Chapter 7. But a human rights perspective is not brought to these issues.

Chapter 6-workers’ rights as human rights

In the Box on page 120 of **Chapter 6**, there are 2 sections titled employee development and safety at work.

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Employee development

- *Building environmental and social competencies by providing training on*

sustainability issues for employees and contractors

- *Improving understanding of human rights issues*
- *Encouraging respect among employees for each other, and for local communities and their traditional knowledge and customs*

Safety at work

- *Making a commitment to reduce injuries, incidents, and occupational illnesses*
- *Including safety accountabilities in job descriptions*
- *Ensuring businesses and sites have safety management systems and safety improvement plans*
- *Actively seeking to prevent accidents by disseminating experiences learned*
- *Ensuring high standards for incident reporting and fitness at work*
- *Encouraging cooperation between management and the work force on safety issues*
- *Supporting research and development with regards to safety, health, environmental issues, and technology to minimize impacts*
- *Developing and testing emergency response plans*

Neither of these sections refers to the importance of trade unions and the right to join a trade union which is recognized in ILO Conventions and also Article 6 of the International Covenant on Economic, Social and Cultural Rights.

Page 124 of the discussion in **Chapter 6** refers to the need for corporate contributions to sustainable development to be negotiated on a case by case basis but states that there are 3 requirements of a government structure to enable this to be done effectively.

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“All these caveats regarding the real-world situation today leave the following problem: rather than recognizing a social cost or obligation and building it into the financial decision-making process, the expense can be minimized or done away with altogether.

Making sure that does not happen requires a government structure that:

- is transparent, not corrupt, and committed to consensual decision-making;*
- has the technical capability to understand and critically evaluate the options presented by the mining company from an independent perspective; and*
- is not so desperately poor that development on any terms is seen as desirable.”*

Those 3 requirements do not include adherence to international law, nor respect for human rights. We submit that the respect for, and understanding by a government for human rights is critical to the success of attempts to make companies responsible for the effects of mining. The decision of whether or not proceed with a mine, cannot be properly made unless the full effects and human rights implications are taken into account.

Under the section “conditions of employment” on page 125, there is no reference to the importance of workers having the right to join a trade union.

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- Conditions of employment – Good, safe, healthy, and enjoyable working conditions are the best way for companies to attract and retain human capital. Competitive remuneration, reasonable working hours, opportunities for personal career development and training, sensitivity to local culture and traditions, attention to health and safety regulations, and open and participatory management structures are all important in providing a congenial work place and reducing absenteeism and staff turnover.*

While the right to join a trade union is addressed in a later section titled “the Role of Trade Unions”, it should be included under the section “Conditions of employment”. While mining companies have a track record of dismissing workers who have attempted to unionise (for example, at the San Andres mine in Honduras an attempt to unionise resulted in all the workers being dismissed) international human rights law has long recognized the right of workers to unionise and this is not controversial within law. The ILO Conventions 87 and 98 and the International Covenant on Economic, Social and Cultural Rights clearly recognize this right. We submit that a right to organize should be included within the conditions of employment recommendations.

We commend the inclusion of the section “The Role of Trade Unions” on page 126 and its comment that

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“Observance of the standards in these two treaties and the eight core ILO conventions could provide a solid rights-based foundation for company interaction with its employees and affected communities. It could, in future, be a key indicator of whether a company is seriously contributing to the social pillar of sustainable development.”

But rather than delaying the measuring of fulfillment of these standards into an undetermined “future” we recommend that they become the basis for measuring a companies contribution to sustainable development now.

An issue of prime concern is the use of sub contractors both for its effects on employment conditions and also on the environment. While a mining company may endorse the recommendations issued by this report, they may well continue to use sub contractors with the aim of avoiding these responsibilities. We submit that mining companies should be responsible for subcontractors’ compliance with their meeting human rights standards. This includes respect for employees rights as well as environmental safeguards. (for example, in a gold mine in Honduras, run by Entre Mares, the mining company subcontracted individuals from the area to extract sand, and currently water. When they are criticized for not abiding by their environmental requirements, the

mining company states it is not responsible for the actions of its subcontractors. As a result, water supplies are being drained as there is no effective control of the amount of water being taken.)

Health and safety concerns

We submit that an additional area of concern is the hours worked by some of those working at the mine. While services are supplied by sub-contractors, hours worked can exceed both ILO Convention regulated hours, as well as domestic prescriptions. The mining company can avoid legal responsibility for these excessive hours as it has not contracted these workers directly. However as they work at the mine, the company should be vigilant of the work and safety issues of these workers also. (San Andres mine Honduras, the security workers work 12 hour shifts and on Sundays 16 hour shifts and are contracted by a subcontractor)

We commend the report for its recognition of the extension of temporary contracts within mining work (page 126). We are concerned at the impact of greater use of temporary contracts which tend to undermine working conditions and worker health and safety.

We note that while the report comments on the extent of ILO instruments (page 131), these instruments directly bind only governments/states rather than mining companies.

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Laws and Regulations

At the international level, a number of ILO instruments – including conventions, codes of conduct, and recommendations – aim to improve worker health and safety in mines. ILO Convention 176⁷, which is relevant to health and safety for the mining sector, has been ratified by 18 countries. Governments ratifying this convention undertake to adopt legislation for its implementation, including the provision for inspection services and the designation of a competent authority to monitor and regulate the various aspects of occupational health and safety in mines. The treaty also sets out procedures for reporting and investigating disasters, accidents,

and dangerous occurrences related to mines and for compiling relevant statistics. Both workers' and employers' rights and responsibilities are set out.

Companies are bound to abide by national law and governments must ensure that national law covers the state's international obligations. Governments of states are held accountable for companies' failures to comply with the law. In this way, mining companies are bound by international law. We recommend that there should be a directly binding international instrument which would regulate working conditions provided by mining companies. Most developing countries who need foreign investment do not act vigilantly to enforce working conditions.

We recommend that standards in themselves are insufficient and that mining companies should be bound by law to abide by health and safety concerns as enunciated in the various ILO Conventions.

Financial sector

The report, at page 136, states that developing country national governments will take

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"appropriate action to protect national interest and respond to public concern if mining companies fail to meet the national expectations of economic, environmental and social responsibilities."

This assumes there is one national interest, represented by the government. In reality, communities interests' may be very different from the government's interests. It also assumes a highly functioning and uncorrupt state. Many developing countries are under great pressure from their debt load to increase their foreign investment. Where this is the case, they may overlook any breaches of a company that is not complying with its environmental and social responsibilities.

Chapter 7-Land

We commend the broad and interesting discussion on land, land rights and land use and ownership. Specifically we note with approval the concepts of consultation and the importance of those being consulted having access to information in order to form an informed opinion. We also note the concepts of tenure which are discussed and those communities/people who see themselves as stewards of land and not individual owners.

On page 144 of the chapter, we submit that the report would have been strengthened by the insertion of a paragraph which recognizes the specific movements for agrarian reform in Latin America, arising out of the latifundio system of land tenure which has contributed to land being concentrated in the hands of very few. These historical and ongoing struggles for land shape communities' attitudes to the use of land for mining.

On page 147 of the chapter there is a discussion of the liberalization of mining codes which have facilitated the grant of mining concessions.

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Most countries, in the race for investment, have liberalized their mining codes – strengthening private mining rights and security of tenure, streamlining procedures, and minimizing state intervention. These changes, along with relaxed laws on the repatriation of profits and foreign ownership, have encouraged multinational players to reinvest in many countries previously ignored.

The advantages discussed include the emphasis in many mining codes on prompt decisions and a minimum of delay, discretion and corruption. In practice this has operated to give mining companies clear access to concessions and communities very little capacity to participate in the process, and to be adequately consulted. An example of this is the General Mining Law 1999 in Honduras. This law provides 15 days only in which a community may oppose an application for a mining concession. However the only way in which a community will know there is an application is if they read the newspaper in which it is advertised. This newspaper does not get delivered to many of the communities who are potentially affected.

At page 147 of the report there is a discussion of the need for clear rules and trustworthy dispute resolution mechanisms.

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There is nothing wrong with wanting the clear rules, trustworthy dispute resolution mechanisms, and prompt decision-making often required by the new codes, as long as these respect the rights of stakeholders to be involved. Until they do, it will be difficult to reach decisions that they accept and trust. A lack of trust, in turn, will undermine the security of investment that mining code reform has sought to achieve.

We are concerned that in the draft report there was a recognition that many communities do not have access to trustworthy decision-making while “the economic power of mineral investors has given them the leverage to insist on these things”. This statement has been deleted in the final report. It is weakened to the need to “respect the rights of stakeholders”. We recommend that there be a clear recognition that communities have frequently not had access to trustworthy dispute resolution and that there is a power differential between communities and mining companies which effects this. Corruption is well recognized in the judiciary of many countries and complaints or denunciations are frequently dismissed without proper hearing or delayed inordinately.

At page 148 of the report, it currently states:

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For companies, explicit recognition of the right of communities to know about proposed developments and respect for the principle of prior informed consent freely given and arrived at democratically would make significant inroads into addressing the mistrust that many communities and, in particular, indigenous landowners have of mining companies.

We commend the report's “recognition of the right of communities to know about proposed developments” but are concerned at the diluting of language between the draft report and final report in respect of “the right of prior consent”. In the draft report there was a clear recognition

of “the right of prior consent as [a] principle [] of industry practice” whereas in the final report it states only that “respect for the principle of prior informed consent would make inroads”. We submit that respect for the right of communities to prior informed consent is key to any mining operation.

In the final report (page 148) the recognition that “some governments do not extend to such communities the right of decision-making over their own land”, is also deleted. This conflict between national governments and local communities is highly important. We are concerned at the omission of this statement.

We also commend the recognition within the report at page 149 that lack of clarity around land ownership and use may reflect longstanding inequalities in the distribution of wealth and political power.

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The lack of clarity around compensation systems and land rights may be only one expression of a broader inequality within some societies and a reflection of unequal distributions of wealth and political power. For example, in many countries substantial numbers of people have no legal right to occupy any land. A focus on compensation to ‘legal owners’ leaves millions of people out of the equation.

We commend the recognition that focusing only on legal owners will leave “millions of people out completely”.

In the discussion of cash compensation for land being used for mining purposes, we note the importance of the right to an adequate standard of living. (article 11 of ICESCR) While the discussion focuses on the impact of cash on women or on those living in subsistence economies (page 149 of the report), we would also highlight the destruction of traditional ways of life, even for those who are not indigenous. Cash compensation is insufficient for the loss of community life and the particular style of life. A clear example of loss of community life is in San Miguel Honduras. Community members are currently being offered money to leave their houses and no provision is being made for their community to be rebuilt anywhere else. They are expected to find

somewhere else to live, anywhere in Honduras. Effectively this spells the end of that community. These issues are not addressed adequately within the report. While compensation is being offered however, the communities affected should have some input into determining the process, and amount of compensation.

We commend the recommendation that a clear and neutral body be established to determine compensation. (page 150 of the report)

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Part of the issue of arriving at fair compensation is that there must be some system, some neutral party or institution, that is trusted by those concerned to set compensation. It must operate according to fair and intelligible rules. If there is no such opportunity, and if the owners know that ultimately they will have to accept some offer from a company without any trusted alternative forum in which to be heard, the landowners are unlikely to feel fairly treated. They are likely to be bitter and angry about the experience, which can colour the whole future relationship between the company and the community.

We would further recommend that this include representatives from communities and active NGOs on such a body to give it credibility and value. (page 150 of **Chapter 7**)

Resettlement and the Right to an Adequate Standard of Living

We are concerned at the substantial dilution of this section of the report between draft report and final report. While there is recognition in the report of the substantial detrimental effects of involuntary and voluntary resettlement, communities’ right to decide on their location is no longer considered paramount. (page 168 of the report) While we commend the report for suggesting that there should be “deep involvement of affected people in design of the resettlement plan” (page 168) we note that the involvement of affected people in design of the resettlement plan is required by international law.

To simply state that “companies need to be creative in trying to avoid resettlement”, (page 168) is clearly insufficient knowing the drastic impacts that resettlement has on communities. In the draft report it was recognized that “It is hard to find many cases of involuntary resettlement that have clearly preserved or enhanced the well-being of those resettled” (page 23/chapter 7 of the draft report) In the final report, this observation has been deleted.

We are concerned that many of the other policies that the MMSD report points towards are not based upon the language, principles or standards of human rights law. In terms of language, the different words used by the MMSD report and human rights bodies for the same phenomenon reflect their strikingly different attitudes toward the harm suffered. The MMSD phrase “involuntary displacement” downplays the pressure involved in driving someone out of her home and masks the agency of those inflicting the displacement, whereas the term “forced evictions,” currently used by most human rights bodies, suggests a violent uprooting that may better explain the actual experience. The MMSD report also uses the umbrella term “resettlement” to cover voluntary and involuntary displacement, thereby focusing on the establishment of a new home rather than on the process of uprooting a community, which the word “eviction” evokes.

In the draft report, it stated “Involuntary displacement is to be avoided”. (page 23 of draft report). The final report does not make such a clear statement but rather states “The ideal is to create conditions of resettlement that will be voluntarily accepted by the affected peoples.” (page 168 of report). Additionally the draft report included a large section on how to avoid negative outcomes. It stated

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Negative outcomes are not preordained. The essential prerequisites to avoid them are:

- *a policy that recognizes these effects and the necessity of mitigating them;*
- *practices in place to ensure that locals are net beneficiaries by their own criteria, not those imposed from outside;*
- *mechanisms for ensuring that planning can be acted upon; and*

- *stakeholder involvement in decision-making among the resettled community, the host community where there is one, and any others likely to be affected.*

(page 24/chapter 7 of draft report).

We are concerned at the substantial dilution of this section and at the clear resiling from the position that communities should be the key stakeholders who decide “what is good for them”. Similarly those who do not have legal rights to land are not properly recognized in the final report.

The MMSD report defines appropriate resettlement as creating new living conditions that are comparable to the pre-project conditions, but this is not consistent with the standards of human rights law. The report calls for governments to ensure that mechanisms are in place to allow “due consideration to the provision of alternative land of equal value and equal income-generating opportunity to the land lost” (**Chapter 7**, Page 168). This policy therefore permits people who are living in inadequate conditions to continue to live in inadequate conditions, but a human rights approach would guarantee people with an adequate standard of living. Moreover, if we look beyond basic instruments like the ICESCR, *The Expert Seminar’s Guidelines on Development-Based Displacement* notes that “No affected persons, groups, or communities shall suffer detriment.” It later adds, “nor shall their right to the continuous improvement of living conditions be subject to infringement.” (Guidelines for Development-Based Displacement, para. 28(d). See also Article 11 of the ICESCR for the right to continuous improvement of living conditions.) The MMSD report recognizes at page 160, that

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Although people continue to be relocated, the goal of rehabilitation remains exceedingly difficult to achieve, and the preferred goal of sustainable development – with people better off than they were before resettlement – has seldom been achieved.

We are concerned that while the report recognizes the drastic impact of resettlement on people’s right to an adequate standard of living, right to culture and right to housing, it does not recommend any strong measures for ensuring that these human rights are respected.

These questions regarding when it is determined to what extent the community benefits leads to the next criticism. Restoring land and income opportunities of equal value, and even making communities net beneficiaries at the time the project commences, often leads neither to improvement or restoration of living standards, but to actual detriment. Development itself often raises land values between the time the compensation is agreed upon and the time of dislocation. Plus, as the mines open and begin to operate, they take away land, pollute nearby land, and leave much local land without access to water. Also, numbers of people coming into the areas near the mine often increase. All of these factors further contribute to dramatically increased demand for and thus price of arable land.

Not only will the compensation originally agreed upon probably not be adequate even to restore communities to their previous standards of living, the community may not have been able to predict the various negative effects of the area's increased development and of its relocation.

The MMSD policy thus also fails to provide standards for losses that cannot easily be valued or compensated in monetary terms. But these losses are also relevant to the right to an adequate standard of living and are often experienced when communities are displaced. For instance, when the Honduran community of San Andrés was relocated after the opening of a gold mine there, the company built 124 houses, one for each family, but the layout of the village was no longer in accordance with traditional patterns and the houses were built along lines rather than around a central square. The lack of a backyard in which to grow corn and supplement food and have an area for animals also disrupted the traditional lifestyle of the community. Even the World Bank Operational Policy on Involuntary Resettlement recognizes the importance of upholding traditional lifestyles and states that “attempts are made to establish access to equivalent and culturally acceptable resources and earning opportunities, such as access to public services, customers and suppliers, or to fishing, grazing or forest areas” (World Bank OP 4.12, footnote 12). While the final report includes this at page 158, the importance of these principles are excluded from the final recommendations at page 168. The World Bank policy has been criticized for not defining the standards for

such “attempts”, but we are concerned that the MMSD does not include some type of similar provision. Furthermore, the MMSD should require that one aspect of obtaining informed consent involves making communities aware of their potential incommensurable losses, such as the loss of being able to have their homes constructed in traditional patterns or of being able to have household grazing land.

In the final section including recommendations at page 168 of the final report there is no longer respect for free and prior informed consent. The report states

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Control is a key issue: those most affected, wherever possible, should decide what is good for them.

The disclaimer “wherever possible” is unacceptable. In the draft report it stated at page 34 / chapter 7,

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Companies must avoid pursuing projects where the design depends on involuntary resettlement. Support for this principle and practice must be clearly expressed by the industry. Where relocation is accepted by the community, it should only occur when there has been:

- *free and prior informed consent of the community and the host community, where there is one, including freedom from harassment or coercion from any source;*
- *full negotiation with and participation of the community to be relocated and the host community, where there is one, following appropriate and extensive background study on the implications of relocation for livelihoods and culture;*
- *full and fair compensation of the community for loss of assets and economic opportunity;*
- *an assessment of the potential alternative opportunities at the site of relocation;*
- *due consideration to the provision of alternative land of equal value and equal*

income generating opportunity to the land lost; and

- *verification that these conditions have been met.*

These principles reflect a much closer position to one that respects the human rights of community members. In its current, final form, the recommendations on resettlement fall far short of respecting human rights. The concept of free and prior informed consent is crucial for respecting people's rights to housing and an adequate standard of living.

Chapter 8-page 188, Protecting and Promoting Human Rights

As discussed above, the discussion about the protection and promotion of human rights is a very narrowly focused discussion. It primarily discusses human rights abuses as meaning violent response to expression of dissent and labor rights violations. This is a very limited concept of human rights. While there is a reference to rights based development gaining currency within civil society, there is no real understanding expressed of economic, social and cultural rights as being human rights. This is a substantial limitation of this section.

Within the recommendations at page 195 of the report are included the following points:

MMSD

- *company adherence to the Voluntary Principles on Human Rights and Security;*
- *third-party monitoring and verification of company practices concerning human rights;*
- *international organization and company lobbying of governments to adhere to some form of human rights code, including relevant ILO Conventions and global agreements between companies and unions;*

We submit that Voluntary Principles are insufficient and recommend that there should be some form of binding agreement for mining companies which requires respect for human rights. We commend the addition of the recommendation of third party monitoring. We submit that there is no need to have governments adhere to a human rights code, but rather abide by their international legal obligations which include human rights obligations. We commend the addition of ILO Conventions among the international legal obligations which governments, and companies, should abide by.

Chapter 9-Local Communities and Mines

We commend the acknowledgement in the report of the imbalance/ difference of power between mining companies and communities (page 199).

MMSD

Power differentials can leave a sense of helplessness when communities confront the potential for change induced by large, powerful external companies.

We note however that this is substantially weakened from the draft report. The two following statements which clearly addressed this issue have been deleted.

MMSD

"The powers of the community to negotiate and to influence or control developments and activities in their vicinity should not be undermined by the presence of a mining operation. This is often not the case."(page 5 of chapter 9 draft report)

And

MMSD

Given that one of the central challenges is likely to be the imbalance in power between the company and community, this could be exacerbated by even a well intentioned company taking on more responsibilities at the community

level.” (page 5 of chapter 9 of draft report)

“Who gets to make decisions, and thus whose values will hold sway?” (page 6 of chapter 9 of draft report)

We are concerned that there is a resiling from the clear recognition of the difference in power between communities and mining companies and the effects that this will have on negotiations and decisions.

We commend the recognition of people’s basic human rights on page 199 of the chapter which include economic, social and cultural rights rather than being limited to civil and political rights.

MMSD

These may include the right to control and use land; to clean water, a safe environment, and a livelihood; to be free from intimidation and violence; and to be fairly compensated for loss. Such rights may be enshrined in the national law or based on and expressed through a range of international human rights instruments and agreements. (See Chapter 8). Moreover, all groups have a right to development, and the interests of the most vulnerable groups – the poor and the marginalized – need to be identified and protected.

We are concerned by the deletion of a recognition of the right to self determination of communities and indigenous peoples which include a right to traditional ways/ cultures. In the draft report it stated

MMSD

Moreover, all groups have a rights to development and self determination, As such, sustainable development must identify and protect the interests of the most vulnerable groups-the poor and the marginalized.(page 6 Chapter 9 of the draft report)

There seems to be a clear dilution of the significance of communities deciding what they want and don’t want. Whereas in the draft report there was a recognition of this, the final report has moved from this position.

MMSD

As noted in Chapter 7, losses suffered by communities in homes, land, or access to other sources of livelihood should be compensated. However, there are many problems with compensation systems. They may, for example, address property values recognized by the legal system much better than they deal with informal occupation of land or the loss of traditional subsistence livelihoods. Many actors now recognize that cash for people with little prior experience of cash economies may leave them worse off in the long run, as it may lead to social tension or investments that yield few long-term gains.

We note that while there is further reference to cash and relocation as being the means by which communities are compensated for loss of land and housing (page 201), the discussion does not come from the perspective of the right to an adequate standard of living or right to self determination which would acknowledge the need for respect for and continuation of traditional ways of life.

MMSD

Mining often provides local communities with jobs, which may enable those in subsistence to join the cash economy. ... Counter to this, however, modern mines tend to have much higher levels of productivity than older mines, employing small but highly skilled work forces.(page 201)

We also note the acknowledgement of limits of jobs created as the sector becomes more technically advanced and reliant on highly skilled workers.

In the section on “Social” impacts of mining we note the weakening of language about the effects of mining on inequalities within communities. The final report states at page 202,

MMSD

If the revenues from mining are not equitably shared, this aggravates inequalities within communities.

In the draft report it stated

MMSD

In general, mining aggravates inequalities within communities.

Further in the section on relocation the final report states at page 202

MMSD

The displacement of settled communities can be a significant cause of resentment and conflict associated with large-scale mineral development. Communities may lose their land, and thus their livelihoods, disrupting also community institutions and power relations. Entire communities may be forced to shift into purpose-built settlements, into areas without adequate resources. They may be left near the mine, where they may bear the brunt of pollution and contamination. Involuntary resettlement can be particularly disastrous for indigenous communities with strong cultural and spiritual ties to the lands who may find it difficult to survive when these are broken.

While we commend the content of this section on relocation, we note with concern the softening of the language from the draft report which stated at page 10, chapter 9

MMSD

The displacement of settled communities is a significant cause of resentment and conflict associated with large-scale mineral development. Entire communities may be uprooted and forced to shift..."

We commend the inclusion of the section on the effects of migration of workers into local communities. (page 202 of the report)

The discussion about the health of local communities (page 203) is limited in that it does not discuss it in terms of a right to health. It is a very brief discussion and does not refer to the longer term effects on communities who may be affected by mines. It focuses on local communities rather than recognizing the substantial effects that pollution of rivers or the sea may have on communities which are located a long way away from the mine itself. We submit that there

should be independent monitoring of the health effects on communities and that communities should be consulted about the type of development projects which are built. All too frequently, mining companies invest in building a health clinic which appears to meet communities needs, but then provide no staff for it and do not make it a long lasting development project. (The mine San Martin in Honduras suffers from health projects which are inappropriate for the health needs of the communities) The communities located close to the San Andres mine in Honduras complain of increased skin and respiratory disease but no studies have been done to ascertain what health effects the mine is having on local communities.

We note that mental health effects are not referred to in the discussion. These health effects can be huge and mining companies rarely recognize the importance of mental health. For example constant blasting to uncover further ore can create feelings of anxiety and insecurity in local communities. (These health effects are present in the Azacualpa community in Honduras.)

We commend the inclusion of alcoholism as an effect of mining activity which directly effects the health of community members and can contribute to higher levels of domestic violence. (page 204)

We note the observation that mining operations can contribute to gender inequality. It further states at page 206

MMSD

This is not to say that women do not benefit from mining. The provision of services such as water and electricity in occupational communities will reduce the time spent on chores such as walking long distances in search of potable water or firewood for fuel.

We disagree that mining operations assist in women's access to water. It is true that generally the collection of water is women's work, but rather than assisting with women's right to water, in fact mines through their extensive use of water frequently dry up water sources, thus making water more scarce. This means women have to walk further to collect water, and to wash clothes and bathe. In the Valle de Siria in Honduras the use of water by the gold mine has meant that

women now have to walk 2 kilometers to wash clothes. A recognition of the problems of use of water by mines is included at page 207, which we commend. The link between women's right to water and environmental effects should be drawn however.

MMSD

A new relationship is beginning to emerge, based on recognition of the rights of communities and the need for community participation in decision-making. (page 207)

We commend the emphasis given in the report on the importance of communities being involved in decision-making on issues that affect them.

MMSD

Traditionally, companies have provided health services to employees and their families, such as hospitals and health care centres with modern equipment and professional, often expatriate, staff. Particularly in poor communities, such infrastructure has generally reflected an inadequate understanding of local needs and expectations, as well as a lack of consideration for its ability to be sustained after the mine closes. (page 207)

We note the discussion (page 33) of the report which acknowledges the traditional approach of companies in constructing clinics with expatriate staff, rather than responding to the health needs as expressed by the community.

The Right to Free and Informed Consent

The report begins its section on "Community Participation in Decision-Making" (Chapter 9, Page 222) by listing the benefits that industry will gain from allowing local communities to participate in the process. We recommend that this section also acknowledge that participation and consultation with the objective of achieving consent and good faith negotiation are requirements of international law—not just helpful ways of creating mutually respectful relationships. Human rights law recognizes that indigenous

peoples have the right to some measure of self-government with regard to their social and political institutions and in determining the direction and nature of their economic, social, and cultural development. Article 7(1) of ILO Convention 169⁸ provides that, "The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social, and cultural development." Building upon these principles, Article 30 of the Draft Declaration on the Rights of Indigenous Peoples⁹ acknowledges that the state must obtain the free and informed consent of the community prior to the approval of any project affecting its lands.

Although the language of these laws is somewhat vague, and though they do not grant communities a right to veto development policies, it is clear that free and informed consent requires that communities not only be informed of policies but also that they play a role in the formal decision making processes.

It states

MMSD

Moving towards participation rather than consultation will ultimately mean that local communities are directly involved in the decision-making process through, for instance, representation on the Board of Directors. This may not be an immediate possibility, but it should be a longer-term goal.

The MMSD report encourages participation but states that incorporating local communities into the decision-making processes is only a long-term goal. We submit that—according to international human rights standards—this is unacceptable. Consultation without participation in decision making is essentially meaningless.

We commend the MMSD for noting that communities sometimes feel powerless in these negotiations, that the sessions should be conducted with utmost sensitivity and understanding, and that industries should help build community capacity to negotiate in such settings. However,

it should be noted that not only do communities feel powerless, but actual knowledge and power differences between companies and local communities frequently mean that rights of the local community can be sacrificed for profits the community does not enjoy. Many affected communities can't anticipate the possible impacts of mining, and local leaders are not skilled negotiators, preferring to focus on the potential benefits rather than the unknown negative impacts. Many do not feel they have the right to negotiate, and are unaware of the contamination and other adverse effects likely to follow. We therefore suggest that the report further expand on its acknowledgement of the real knowledge and power differences, and more explicitly state how negotiations will be conducted so as to minimize the adverse effects of the differences. In particular, in order for consent to be free and informed, the consultation process should require that communities be made aware of harms such as contamination, water pollution, and increased costs of living, which other mines have caused.

We submit that the recommendations at the end of the chapter, are commendable and thorough, but there is no way of ensuring compliance with them. This is a major flaw as the recommendations can be only recommendations to companies. Whether any of the recommendations are implemented is at the will of the companies.

We note with concern that the section which states what companies need to do, included at page 46 of chapter 9 of the draft report has been deleted. This stated

MMSD

Companies need to:

- *respect the rights of communities, including the right to information, to representation and engagement in processes, and to development and self-determination-particularly in countries where policies and practices are not always consistent with the respect of citizens' rights;*
- *understand and respect the culture and customs of the local community, which cultural awareness training for employees can help;*
- *create mechanisms for transferring resources*

back into local communities; and

- *commit resources and be willing to make changes.*

This has a clearer rights perspective which has been eliminated in the final report.

The final recommendations focus on a Community Sustainable Development Plan which may or may not be appropriate in addressing the importance of community involvement and decision making in relation to mining.

Chapter 10-Right to water

We note that there is no real discussion of water within a human rights framework. We submit that the report lacks this element in its discussion of riverine tailings, waste disposal generally and mine closure. The International Covenant on Economic, Social and Cultural Rights includes right to water within Article 11 of the Covenant, the right to an adequate standard of living which includes both right to water and food. The meaning of this right has been elucidated in Agenda 21 arising out of the United Nations Rio conference. At this conference the priority of providing adequate drinking water to all was recognized. Chapter 18 of Agenda 21 states

“18.8. Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization. To this end, water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perennality of the resource, in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems. Beyond these requirements, however, water users should be charged appropriately.”

A recognition of this basic priority and the protection of ecosystems is not explicit within the MMSD report. The report would have benefitted from the discussion around water within Agenda 21.

The United Nations Committee on Economic, Social and Cultural Rights has recently made a General Comment on the Right to Water. In paragraph 3 of the Comment, it states that “The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in Article 11, paragraph 1 (see General Comment no. 6 (1995).” They also state in paragraph 6 that “Priority in the allocation of water must be given to the right to water for personal and domestic use.”

This General Comment will obviously impact on the obligations of states when regulating mining companies and their use of water.

Chapter 14

Under the section titled International Conventions on page 339 of the chapter, the report states that

MMSD

Although conventions are meant to be legally binding, most have no mechanism for ensuring compliance.

This statement is incorrect. If a nation ratifies a Convention then it is legally bound to comply with its obligations under that Convention. Most Conventions have treaty monitoring bodies such as the Committee on Economic, Social and Cultural Rights which meets 2-3 times a year in Geneva. This Committee reviews each countries’ compliance with its obligations under the Convention every 5 years. While it is correct to say that there are no sanctions for lack of compliance it is incorrect to state there is no mechanism for ensuring compliance. Conventions are not supposed to be implemented only through national legislation but can be made to have domestic effect through legislation, policy change and other government activity.

Furthermore we submit that additional conventions/ declarations are vitally relevant to mining and sustainable development such as:

- ☞ *Universal Declaration on Human Rights* (1947)
- ☞ *International Covenant on Economic, Social and Cultural Rights* (1966)
- ☞ *International Covenant on Civil and Political Rights*¹⁰ (1966)

These regulate human rights issues such as right to water, to housing, to health and to freedom of expression.

Conclusion

There are serious concerns about the way in which the MMSD report addresses human rights issues in mining. It is contradictory in its approach to human rights, in some chapters acknowledging the breadth and indivisibility of human rights including economic, social, cultural, civil and political rights, and in others seeing only civil and political rights as human rights. This reflects a limited understanding of human rights belying the entire report and it fundamentally undermines the report. Specific issues of concern are the lack of using international treaties, agreements and documents to discuss key concepts such as the use of water, right to housing and forced evictions, indigenous people’s rights and workers’ rights. While in some instance international covenants are referred to, this is done in a sporadic, partial way. Some of the discussion is useful, particularly the discussion around land issues. An area of great concern is that the recommendations around forced eviction, or involuntary displacement are weak and have been weakened further between draft and final report. The report seems to assume that resettlement of communities will continue to occur regardless of whether communities freely consent to it. This clearly violates community members’ human rights. A further major concern is that any good recommendations arising out of the report will not be enforceable, but subject to the will of each mining company. No binding international agreement is suggested to ensure that transnational mining companies do not continue to violate human rights. While the report makes some attempt to discuss the various issues surrounding sustainable development and mining, it fails to truly incorporate human rights standards throughout.

Notes

1 The description of the Global Mining Initiative is based on the Conference Documents for the Global Mining Campaign, A Survey of the Mining Landscape: Situation Analysis. www.globalminingcampaign.org

2 The website on the Global Mining Initiative <http://www.globalmining.com/index.asp>, states: *The Initiative brings together many of the world's largest mining and minerals companies. This leadership exercise aims to ensure that an industry which is essential to the well-being of a changing world is responsive to global needs and challenges.*

The Initiative will include a number of activities leading up to a global conference on mining and sustainable development in May 2002. This conference will be a significant contribution to the events that will mark the 10th anniversary of the Rio Earth Summit. The objective is to reach a clearer definition and understanding of the positive part the mining and minerals industry can play in making the transition to sustainable patterns of economic development. (http://www.globalmining.com/home/gm_frame.asp) *The companies most closely involved in the initiative are members of the Mining and Minerals Working Group of the World Business Council for Sustainable Development (WBSCD)*

3 http://www.iiied.org/mmsd/what_is_mmsd.html

4 http://www.iiied.org/mmsd/what_is_mmsd.html

5 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). <http://www.unhchr.ch/udhr/lang/eng.htm>

6 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

7 C176 Safety and Health in Mines Convention, 1995 Date of entry into force: 05:06:1998, <http://ilolex.ilo.ch:1567/cgi-lex/convde.pl?query=C176&query0=176&submit=Display>

8 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991. <http://ilolex.ilo.ch:1567/cgi-lex/convde.pl?query=C169&query0=169&submit=Display>

9 Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994).

10 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.



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