



## CAN THE OECD GUIDELINES PROTECT HUMAN RIGHTS ON THE GROUND? A CASE STUDY

The Evictions at Mufulira by First Quantum Minerals / Mopani Copper Mines

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Produced by:

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**The Umuchinshi Initiative** is a group of law students at the University of Toronto who are concerned about the impact Canadian mines are having on local communities in the developing world. The Umuchinshi Initiative derives its name from the Bemba word for "respect".

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## 1. EXECUTIVE SUMMARY

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Despite their revision in 2000, there have been relatively few examples of the successful use of the framework provided by the OECD Guidelines for Multinational Enterprises (“OECD Guidelines” or “Guidelines”) to solve real problems on the ground. It is therefore not surprising that when a 2001 complaint regarding evictions of subsistence farmers from the land of Mopani Copper Mines—a Canadian/Swiss owned mine located in Zambia—was resolved to the satisfaction of all parties, it became a frequently cited case study of how the Guidelines could and should work.

Yet seven years later, there is cause to revisit this much-touted success story. Despite the initial appearance of a successful resolution, the facts on the ground indicate that it was anything but. Most crucially, though directly contrary both to the agreed-upon resolution and the OECD Guidelines themselves, the eviction of subsistence farmers from mine land began again in July of 2006 and continues to the present with devastating economic and social consequences for individuals involved. Further, farmers who have not been evicted are subject to a land licensing scheme that prevents full realization of their human rights.

Key in this failure has been the general lack of follow up by all parties concerned, including the Canadian National Contact Point (“NCP”). Not only has this lack of continued monitoring failed to resolve the fundamental grievance, but potentially worse, has led to the mistaken impression that the Guidelines have been successful in a case where they were not.

The purpose of this case study is threefold. It aims to:

- **Correct the record** on what is actually occurring in Mufulira, Zambia by highlighting actions of the mine that contravene international human rights standards and the OECD guidelines;
- **Critique** the Canadian NCP and the OECD secretariat for their failure to follow up in this specific instance before declaring success and before using this case to promote the Guidelines.
- **Provide the context** necessary to fully understand the nature of both the original complaint and the continuing problem.

## 2. CONTEXT: THE MAKINGS OF A ZAMBIAN 'SQUATTER'

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While it is technically correct to refer to the farmers who occupy the land legally titled to the mine as 'squatters,' it is also deeply misleading. It is impossible to adequately understand the current problem of farmers on untitled land without some knowledge of the history that created the problem.

Land has always been a deeply political issue in Zambia. Colonial policies dating back to the late 19<sup>th</sup> century effectively removed all rights in economically viable land from native Africans and vested them instead in white colonialists.<sup>1</sup> Further, within the Copperbelt itself, colonial policies specifically resisted the formation of permanent settlements for the Africans who worked the mines, which led to the establishment of the first squatter communities in the Copperbelt in the 1920s.<sup>2</sup>

The post-independence government of Kenneth Kunda responded to the colonial legacy largely through socialist policies, which included the vesting of all Crown land in the State and the nationalization of all of Zambia's mines.<sup>3</sup> And while the problem of informal settlements was acknowledged and policies put in place to rectify it, informal settlements continued to grow throughout the two and a half decades of Kunda's tenure.<sup>4</sup>

At the same time, Zambia's state-owned copper companies began to play an increasingly important and often quasi-governmental role in Zambian society. Mines were important social providers, especially in the area around Mufulira, providing free education, subsidized housing and food, health services, electricity, water and transport to miners and their families.<sup>5</sup> Likewise, state-owned mining companies were given control of vast tracts of land in and around various mine sites. Indeed, in 1999, Zambia's state-owned mining company was the second largest land holder in Zambia after the state itself.<sup>6</sup>

The term  
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In the 1990s, social, political and economic factors combined to create the land crisis that exists in Zambia today. The election of the broadly pro-free market government in 1991 coupled with pressure to liberalize Zambia's economy brought to bear by international donors, the World Bank and the International Monetary Fund ("IMF") led to the hasty privatization of Zambia's copper mines. Historic lows in copper prices, a weak Zambian economy and conditions for the rapid sale of the mines set by the World Bank and the IMF placed the government in a very weak bargaining position, which allowed private corporations to effectively choose which assets and liabilities they would assume and which ones they would not.<sup>7</sup> In particular, land

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<sup>1</sup> Taylor Brown, "Contestation, confusion and corruption: Market-based land reform in Zambia" in Sandra Evers, Marja Spierenburg & Harry Wels eds. *Competing Jurisdictions: Settling Land Claims in Africa* (Leiden, Holland: Brill Academic Publishers, 2005) 79 at 83.

<sup>2</sup> Elena L. Berger, *Labour, Race and Colonial Rule: The Copperbelt from 1924 to Independence* (Oxford: Clarendon Press, 1974) at 41; Mitsuo Ogura, "Rural-Urban Migration in Zambia and Migrant Ties to Home Villages" (1991) 29 *The Developing Economies* 145.

<sup>3</sup> John Kangwa, "Zambia: 'Having a Place of Your Own' in Kitwe" in Robert Home & Hilary Lim eds., *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean* (London: Cavendish Publishing, 2004) 121 at 125.

<sup>4</sup> A.G. Tipple, "Self-Help Housing Policies in a Zambian Mining Town" (1976) 13 *Urban Studies* 167.

<sup>5</sup> Patricia Feeney, "The Human Rights Implications of Zambia's Privatisation Programme" in Michael K. Addo ed. *Human Rights Standards and the Responsibility of Transnational Corporations* 323 at 342; see also Alastair Fraser & John Lungu, *For Whom the Windfalls?: Winners & losers in the privatisation of Zambia's copper mines* (Lusaka: Civil Society Trade Network of Zambia, 2007) at 8 online: [www.minewatchzambia.com](http://www.minewatchzambia.com).

<sup>6</sup> Feeney, *supra* note 4 at 344.

<sup>7</sup> *For Whom the Windfalls?* *supra* note 5 at 15-18

was transferred to private corporations despite the fact that much of this land contains both formal and informal settlements, including communities of resettled retired miners, farmers who had licensed land from state-owned mines, as well as more traditional 'squatters'.<sup>8</sup>

The immediate affects of privatization included massive job losses,<sup>9</sup> which, in turn, caused huge numbers of former miners to take up subsistence farming on unoccupied land much of which was now owned by private mining companies.<sup>10</sup> Further, the problems of the landless were exacerbated by the loss of publicly owned mines as social providers.<sup>11</sup>

While the exact numbers of squatters living on mine land is unknown, in 1997, it was estimated to be in the tens of thousands.<sup>12</sup>

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<sup>8</sup> Kangwa, *supra* note 3 at 123; Feeney, *supra* note 5 at 344-345; *For Whom the Windfalls*, *supra* note 5 at 2.

<sup>9</sup> Employment dropped from 56,582 in 1991 to 31,000 at the time of privatization in 1997 to 19,145 in 2001, see *For Whom the Windfalls?* *ibid.* at 21.

<sup>10</sup> Kangwa, *supra* note 3 at 123.

<sup>11</sup> *Ibid.* at 122.

<sup>12</sup> Michelo Hansungule, Patricia Feeney & Robin Palmer *Report on Land Tenure Insecurity on the Zambian Copperbelt* (Oxfam GB, 1998), online: <http://www.oxfam.org.uk/resources/learning/landrights/south.html> at 41.

### 3. WHEN SUCCESS BECOMES A FAILURE: A HISTORY OF THE CASE

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In July of 2001, Oxfam-Canada and a Zambian NGO, Development Education Community Project (“DECOP”), lodged a complaint against Mopani Copper Mines—a mine jointly owned by Canada’s First Quantum Minerals and Switzerland’s Glencore International.<sup>13</sup> The complaint concerned Mopani’s eviction of longstanding informal communities of subsistence farmers near the town of Mufulira, Zambia. The evictions were taking place despite the severe economic, social and psychological hardships that such evictions would impose on an already vulnerable group. In particular, the complaint highlighted how the evictions violated the OECD Guidelines in three main ways: first, by breaching the human rights of local Zambians contrary to chapter II, paragraph 2; second, by failing to foster confidence and trust between the companies and the societies in which they operate under chapter II, paragraph 7; and third, by failing to communicate and consult with communities on environmental, health and safety policies as outlined in chapter V, paragraph 2(b) (see Annex A).<sup>14</sup>

At first, the  
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...

The outcome of the complaint seemed promising, and it first appeared that the Guidelines were working as intended. The Canadian NCP arranged for face to face meetings between the local NGO and the company, and an agreement was reached between Mopani and the NGO that included three key assurances: first, all evictions would stop; second, Mopani, together with DECOP and local government, would work towards resettlement of the farmers on land that they could legally own; and third, there would be continued dialogue between DECOP, Mopani and the local government.

Over the past six years, the Canadian NCP and the OECD Secretariat have frequently and consistently cited the First Quantum/Mopani case as the paradigmatic example of how the Guidelines are supposed to work and proof that they are having their intended effect.<sup>15</sup> In particular, in 2005 then-Secretary General of the OECD Donald Johnston wrote a chapter in a book on Corporate Social Responsibility that notes the successful resolution of the situation in Mufulira, Zambia.<sup>16</sup> These assertions, in turn, have been adopted

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<sup>13</sup> For the original complaint, see: OECD Watch, *Guide to the OECD Guidelines for Multinational Enterprises’ Complaint Procedure*, online: [http://www.oecdwatch.org/docs/OWguide\\_guidelines.pdf](http://www.oecdwatch.org/docs/OWguide_guidelines.pdf) at p. 28.

<sup>14</sup> Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Corporations*, Doc. No. 80761 2000 (Paris: OECD, 2000) online at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>. [OECD Guidelines]

<sup>15</sup> As recently as October 2007, the former Secretary-General of the OECD, Donald Johnston gave a presentation that specifically referred to the case in Mufulira Zambia as an OECD guideline success story, Donald Johnston (Address to The Charter and Human Rights at Work Conference, at the University of Western Ontario, October 2007); see also OECD, “Human Rights, Alternative Dispute Resolution and the OECD Guidelines for Multinational Enterprises” (Briefing note for the participants at the Workshop on Accountability and Dispute Resolution, Kennedy School of Government, Harvard University, April 2007) online: <http://www.oecd.org/dataoecd/42/11/38297552.pdf>; OECD *Guidelines for Multinational Corporations, Specific Instances Considered by National Contact Points* June 2006, online: <http://www.oecd.org/dataoecd/15/43/33914891.pdf>; Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Annual Report 2002* online: [http://www.ncp-pcn.gc.ca/annual\\_2002-en.asp](http://www.ncp-pcn.gc.ca/annual_2002-en.asp); Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises, *Record of Specific Instances and Statements*, online: <http://www.ncp-pcn.gc.ca/ncpannual-en.asp>; Kathryn Gordon, OECD (Address to the “Governance and Sustainability – New challenges for the state, business and civil society conference”, Institute for Ecological Economy Research, Berlin) online: [http://www.ioew.de/governance/english/veranstaltungen/Int\\_Tagung/Gordon.pdf](http://www.ioew.de/governance/english/veranstaltungen/Int_Tagung/Gordon.pdf).

<sup>16</sup> Donald Johnston, “Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises” in ed. Ramon Mullerat, *Corporate Social Responsibility: The Corporate Governance of the 21<sup>st</sup> Century* (Kluwer Law International, 2005).

by third parties, and references to the *Zambian case study* are plentiful in both academic and NGO literature.<sup>17</sup>

Unfortunately, while these assertions reflect the state of affairs as they existed at the close of the specific complaint process in 2002, they do not adequately track the developments that have occurred since. This in turn has perpetuated misinformation regarding both the actual result of the OECD complaint in this specific instance, as well creating a false perception of the effectiveness of the complaints process more generally.

The events of the past six years stand in direct contradiction to the statements made by various OECD and NCP officials, both at the time of the apparent “resolution” and in the years since. Whatever the intentions of the various parties may have been at the time, all of the key points of the agreement have since been violated by Mopani Copper Mines Plc, and the fundamental concerns that gave rise to the complaint in the first place remain unaddressed. Mopani continues to insist upon its legal rights to the land, has restarted forced evictions and has instituted a land licensing scheme that not only fails to address the fundamental root of the problem but also serves to entrench poverty. Both the OECD Guidelines and the human rights of the farmers continue to be breached. As such, what has constantly been held up as a shining example of the potential of the OECD Guidelines should in fact be seen as a failure.

**Initial Agreement between DECOP and Mopani Copper Mines:**

1. An end to evictions.
2. A move toward resettlement and land ownership.
3. Continuing dialogue between DECOP, Mopani and local government.

**All three key points have been breached by Mopani Copper Mines**

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<sup>17</sup> See e.g., Elisa Morgera, “An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy and Outstanding Questions in the Lead Up to the 2006 Review” (2006) 18 *Georgetown International Environmental Law Review* 751; Transparency International, *Using the OECD Guidelines to Tackle Corruption*, Working Paper #03/2008 online: [www.transparency.org/content/download/32236/493584](http://www.transparency.org/content/download/32236/493584)

## 4. CONTINUED BREACHES OF HUMAN RIGHTS AND THE OECD GUIDELINES

Since the 'resolution' of the first complaint, serious breaches of the OECD Guidelines persist. The two areas of greatest concern are, first, the continued eviction of subsistence farmers from informal communities located on mine-owned land; and second, the practice of issuing of annual land licences to farmers located on mine land in a manner that perpetuates insecurity and poverty.

### HUMAN RIGHTS ISSUE #1: EVICTIONS

Despite an original agreement to halt all evictions, Mopani officials confirmed at a meeting with DECOP in July 2006 that the company was evicting farmers to make way for the re-opening of one mineshaft and the installation of another. At the time, it was estimated that these evictions would affect approximately 120 families, representing some 600 individuals.<sup>18</sup> Mopani has continued to issue eviction notices, and to evict farmers over the last two years. It is expected that evictions will continue.<sup>19</sup>

No arrangements have been made for those who have been and will be evicted. According to DECOP, while the agreement brokered by the NCP spoke of potential resettlement of farmers on alternate land, Mopani and the local government have been unable to agree on who should pay for the resettlement process, the land or the land-titling process.<sup>20</sup>

The consequences of eviction are severe, and potentially catastrophic. According to the World Bank:

involuntary settlement, if unmitigated, often gives rise to severe economic, social and environmental risks: productive systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environments where their productive skills may be less applicable and the competition for resources greater; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost.<sup>21</sup>

In Zambia, land is the prerequisite for all aspects of human development. Farmers rely upon the land to gain the basic necessities of life. The eviction of subsistence farmers is therefore linked to extreme impoverishment, loss of community and loss of livelihood. Loss of land greatly threatens food security, thereby increasing risks of starvation and malnutrition. These risks, in turn, threaten other areas of well-being by posing risks to health and human-security. Finally, forced displacement tears apart the existing social fabric of communities by fragmenting established social structures and interfering with informal and familial networks that act as a buffer to other vulnerabilities.<sup>22</sup>

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<sup>18</sup> This number is based on a list of names provided by the community in response to inquiries by Development Education and Community Project (DECOP) in July of 2006.

<sup>19</sup> Interview with Edward Lange, Executive Director DECOP (March 2008)

<sup>20</sup> DECOP met with Mopani most recently in November of 2007. Mopani has recently created a corporate affairs position at Kitwe, but has not provided answers to any of DECOP's questions, appear to have no mandate to speak on behalf of Mopani and have proven difficult to engage with. Interview with Edward Lange, Executive Director of DECOP (March 2008)

<sup>21</sup> Theodore E. Downing, "Avoiding New Poverty: Mining-Induced Displacement and Resettlement" (2002) 58 *Mining, Minerals and Sustainable Development* (Report commissioned by the International Institute for Environment and Development (IIED))

<sup>22</sup> Michael M. Cernea, "Impoverishment Risks and Reconstruction: A Model for Population Displacement and Resettlement" in Michael M. Cernea and Christopher McDowell eds. *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC, World Bank 2000) at 22.

Evictions always affect the poorest and most vulnerable the most, and the squatters of Zambia are among poorest and most vulnerable people in the world,<sup>23</sup> with all of their income deriving from subsistence farming. The land that they occupy and the crops that can be grown on it represent their most important resource and is literally their only safeguard against starvation and destitution.

### Evictions as Breaches of International Human Rights and the OECD Guidelines:

The OECD Guidelines state that enterprises should “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.<sup>24</sup> Zambia has ratified all of the major international human rights treaties, including both the International Covenant on Economic Social and Cultural Rights (“ICESCR”) and the International Covenant on Civil and Political Rights (“ICCPR”). Therefore any act by Mopani that breaches international human rights standards, is also a breach of the OECD guidelines.

According to the United Nations Committee on Economic, Social and Cultural Rights, (the Committee) forced evictions are a *prima facie* incompatible with the ICESCR.<sup>25</sup> In the case of Mufulira, the harms resulting from evictions noted above translate into breaches of numerous human rights, including most notably the right to life, the right to an adequate standard of living, the right to adequate food, clothing and housing, and the right to be free from hunger.<sup>26</sup> Further, because of the foundational character of land rights, these evictions may also lead to breaches of the right to health, the right to education and the right to employment.<sup>27</sup> It should be noted that the Committee has specifically stated that the right to housing includes the protection of informal settlements against forced eviction.<sup>28</sup>

### HUMAN RIGHTS ISSUE #2: LICENCES<sup>29</sup>

In response to the original OECD Guideline complaint, Mopani began to issue annual licences to individuals authorizing them to farm on land located in the areas of Kampo Kesa and Misambo. While on its face this move seemed to indicate a respectful compromise, these licences have the effect of entrenching poverty and breaching international human rights standards.

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<sup>23</sup> For example, health – already an area of concern in Zambia – becomes a particularly acute problem for squatters who have reduced access to health care, no access to clean drinking water, low health care literacy, and low levels of sanitation. Life expectancy is low, maternal and perinatal mortality rates are high, and malaria and HIV/AIDS are decimating whole populations, see e.g. World Health Organisation *Zambia, 2007* online: <http://www.who.int/countries/zmb/en/>; World Health Organisation, *Malaria Country Profiles* online: <http://www.afro.who.int/malaria/country-profile/zambia.pdf>; and World Health Organisation, *Zambia, 2007, HIV/AIDS*, online: [http://www.who.int/hiv/HIVCP\\_ZMB.pdf](http://www.who.int/hiv/HIVCP_ZMB.pdf); see also Rebecca Cook et al, *Reproductive Health and Human Rights* (New York: Clarendon Press, 2003) at p.417.

<sup>24</sup> OECD Guidelines *supra* note 14 at ch. II para.2.2.

<sup>25</sup> General Comment 7

<sup>26</sup> *International Convention on Economic Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, art 2 (entered into force 3 January 1976) arts. 6, & 11-13. [ICESCR]; see also General Comment # 12, noting that private enterprises have the responsibility to refrain from acting in ways that lead to breaches of the right to food, Committee on Economic, Social and Cultural Rights, *General Comment #12, The right to adequate food (art.11)* 20<sup>th</sup> Sess. UN Doc. E/C.12/1999/5 at para. 20.

<sup>27</sup> ICESCR, *ibid*.

<sup>28</sup> Committee on Economic, Social and Cultural Rights, *General Comment #4, The right to adequate housing (art. 11.1)*, 6<sup>th</sup> Sess. UN Doc. E/1992/23.

<sup>29</sup> The following is based on a copy of a Mopani license obtained from a farmer located near Mufulira. The license is on file with the author.

### **Giving with one hand, taking with the other – the restrictive nature of the licences:**

On the first page of the licence, it appears to allocate a plot of land that can be farmed for a one year period, but makes this offer subject to a number of terms and conditions. It is these terms conditions that render the agreement essentially meaningless. The material conditions are as follows:

**Condition # 2:** *"Mopani Copper Mines Plc. reserves the right to the unrestricted entry and use of the said piece of land for any purpose"*

This condition serves to entrench insecurity by allowing the company to access and use the land supposedly granted. There are no limitations on what the company can do on the land. This makes a licensee vulnerable to having their land taken away without notice at any time and for any reason.

**Condition #3:** *"the licensee shall not undertake any improvements on the piece of land other than for cultivation of crops during the season for which the licence is given from July of the current year to June of the following year. All are expected to vacate the mine land after harvesting their crop at the end of June"*

The short-term nature of the licence prevents farmers from using food security strategies to guard against starvation. In particular, while the staple crop of cassava is ready to be harvested after as little as eight months, it is common practice to leave some in the ground for up to three years to ensure that there will be enough food even in case of drought in subsequent years.

**Condition #4:** *"renewal of any licence shall be at the sole discretion of Mopani Copper Mines Plc Mufulira Mine Site at a fee to be determined by the Company."*

With no right of return after the one-year period, the company can refuse to renew licences for any reason whatsoever and without providing notice.

**Condition #5:** *"Erection of permanent structures shall not be permitted and the Company reserves the right to destroy such structures or any other developments without any compensation."*

Some communities on mining land are relatively established with long-term houses already existing on the land. This is especially true in the area of Corner Bar/Misambo, where the homes that have been built are permanent. This condition fails to consider what should be done when structures and other improvements already exist, as well as failing to consider the social consequences of prohibiting home building.

**Condition #1:** *"Further, it is a condition of this offer that the licensee waives the right of claims for damage against Mopani Copper Mines Plc for:*

- a. Any damage to crops emanating from environmental pollution(including Smelter fumes).*
- b. Any damage to crops arising from any Officer or employee of Mopani Copper Mines Plc undertaking their normal duties."*

Condition 10 is particularly troubling as it takes away rights from farmers in the one thing that they actually own—their crops. Read together with condition 2, the crops of these farmers—which represent their only means of subsistence—remain entirely insecure.

These conditions ensure that no meaningful rights are conferred to the farmers whatsoever. Even if the licences did confer meaningful rights, they would do so only on an annual basis, and with no guarantee of renewal, which in and of itself results in a lack long-term security. The chronic insecurity created by the licensing scheme has adverse corollary effects on other areas of the occupants' lives and serves to both retard development and entrench impoverishment.

### **Licences as Breaches of International Human Rights and the OECD Guidelines:**

By creating a licensing regime that concretizes land insecurity, Mopani is effectively preventing the realization of the human rights of the squatters, and therefore is in breach of the OECD Guidelines.

Secure land tenure has been called "arguably the most important human right of those who need that land to survive,"<sup>30</sup> and remains one of the most important indicators of human development in the developing world. It acts as a prerequisite before other basic needs can be secured—including most notably access to education, health care and potable water. The Zambian government, which is ultimately responsible for supplying clean water and electricity, building schools, and providing health care clinics, simply will not invest in communities that do not have secure rights to the land in which they occupy. Similarly non-governmental organisations, which often step in to attempt to provide basic services when the government cannot, will not allocate scarce resources to a community that is at constant risk of eviction. As a direct result, land licencees are effectively barred from ever being provided even with the most basic services, and therefore prevented from the progressive attainment of the human rights that they currently do not enjoy.

Further, the insecurity faced by the farmers makes it impossible for them to invest in themselves. Short term leases prevent farmers from planting longer term crops, such as guava, avocado, mango, and papaya, and prevent them from leaving cassava crops in the ground for multiple years to guard against starvation in years of drought. The licences also prohibit farmers from building semi-permanent houses on the land in which they farm thereby preventing them from investing in adequate housing for themselves and their family. Even in communities where such housing already exists, insecurity makes it unlikely that they will invest in improving or repairing the houses in which they currently live.

Mopani is issuing licences that effectively prohibit the progressive realization of a number of human rights including the right to life, the right to an adequate standard of living, the right to adequate food, clothing and housing, the right to be free from hunger, the right to health, the right to education and the right to employment.<sup>31</sup> As such, Mopani is failing to abide by chapter II, paragraph 2, which requires multinational enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".<sup>32</sup>

### **Further concerns:**

There are two further problems with the licence framework. First, licences have been granted to only a small fraction of the actual number of people occupying the land. For instance, in July of 2006, the community of Lwansobe indicated that approximately 50 households had been granted licences, while

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<sup>30</sup> Liz Alden Wiley *Land Rights Reform and Governance in Africa* (New York: United Nations Development Program, 2006) at 17.

<sup>31</sup> *International Convention on Economic Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, art 2 (entered into force 3 January 1976) arts. 6, & 11-13. [ICESCR]; see also General Comment #12 at para. 20, noting that private enterprises have the responsibility to refrain from acting in ways that lead to breaches of the right to food.

<sup>32</sup> OECD Guidelines, *supra* note 14.

approximately 200 other households continue to farm mining land without any formal agreement with the company. Thus even if these licences did confer actual rights to licencees, there are a large number of squatters that remain outside this framework.

Second, because there is a general lack of understanding of the law on the part of the community, the issuing of licences has done nothing to clarify the legal situation with the farmers and has, in some cases, muddied the water considerably. Community members have a poor grasp of legal concepts and have a hard time understanding the technicalities of land rights. Concepts such as lease, licence, title and even rights are often poorly understood. It is unrealistic to think that the farmers understood the nature of the licence or its conditions.

## **5. CONCLUSIONS AND RECOMMENDATIONS**

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The story of Mopani's squatters is a story about many things. It is the story of local farmers that continue have their human rights breached in contravention of the OECD guidelines. It is a story of how the Guidelines' complaints mechanism has had a limited impact on safeguarding the human rights of those who most require it.

Yet potentially worse, it is a story of a collective failure to follow-up before declaring success. It is particularly concerning that the Canadian NCP as well as OECD officials—right up to the very top of the organization—have used the case of Mopani's squatters to promote the Guidelines without attempting to verify whether or not the Guidelines had actually been effective on the ground.

Overall, this story suggests that the NCP complaints process is flawed. In particular, it demonstrates that for the Guidelines to mean something, a diligent monitoring and follow-up mechanism is required. It also suggests that the NCP and the OECD should turn their attention from promoting the Guidelines to attempting to assess the efficacy of the entire framework provided by the OECD Guidelines for multinational enterprises.

### **RECOMMENDATIONS**

#### **To First Quantum / Glencore International / Mopani Copper Mines**

1. Immediately halt evictions and return to the original agreed-upon framework by initiating and sustaining a dialogue with communities, NGOs and local governments and by working towards a long term solution
2. Negotiate with local NGO's, communities and local governments for a long term land solution for those who informally live and farm on Mopani land. Reduce displacement to only what is absolutely required; ensure that any involuntary displacement complies with best practices, including the World Bank's

#### **To the Canadian National Contact Point**

1. Follow up on all passed cases to ensure that the information provided about the resolution of specific instances is an accurate reflection of what actually occurs on the ground.
2. Follow up with all "successful resolutions" to ensure that all agreed-upon measures to remedy a breach of the OECD Guidelines are actually implemented.

#### **To the OECD Secretariat**

1. Follow up on all passed cases to ensure that the information provided about the resolution of specific instances is an accurate reflection of what actually occurs on the ground.
2. Follow up with all "successful resolutions" to ensure that all agreed-upon measures to remedy a breach of the OECD Guidelines are actually implemented.
3. When promoting the Guidelines, ensure that all information is accurate and up-to-date by liaising with local communities and NGOs originally involved in bringing the complaint.
4. Specifically correct the record on the First Quantum/Mopani case

## ANNEX A – SELECTED EXCERPT FROM THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES<sup>33</sup>

### II. General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

...

2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

...

7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

### V. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

...

2. ...

b) Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

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<sup>33</sup> For the full OECD Guidelines, see online: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.