

THE RIGHT TO ADEQUATE FOOD AND THE COMPLIANCE OF NORWAY WITH ITS EXTRATERRITORIAL OBLIGATIONS (ETOs) ON ESCR

**Parallel Report in Response to the 5th Periodic Report of
Norway on the Implementation of the International
Covenant on Economic, Social and Cultural Rights**





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Left cover photo: Chikweti Forests of Niassa, Mozambique, © FIAN

Right cover photo: The Marlin Mine, Guatemala, © Tom Henning Bratlie, FIAN

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THE RIGHT TO ADEQUATE FOOD AND THE COMPLIANCE OF NORWAY WITH ITS EXTRATERRITORIAL OBLIGATIONS (ETOs) ON ESCR

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INTRODUCTION

Traditionally, states' obligations have often referred only to the human rights of people living in their own territory. However, this does not mean that states do not have to pay attention to the right to food and other human rights of people living in other countries. Especially in times of globalisation, international economic and political relations have intensified considerably.¹

The Committee employs the term "international obligations" to refer to what scholars often call ETOs, i.e. concerning what duties States parties may owe to persons located in places other than their own territory. The textual departure point for such obligations is Article 2(1), which requires States to take steps, individually and through international cooperation, to

¹ A. Paasch et al. (2007): *Trade Policies and Hunger: The impact of trade liberalisation on the Right to Food of rice farming communities in Ghana, Honduras and Indonesia*. FIAN, Heidelberg.

progressively realise the rights, which is supported and complemented by other articles in the International Covenant on Economic, Social and Cultural Rights² such as Articles 11, 15, 22 and 23.

According to the Maastricht Principles³, the state is required to respect, protect and fulfil ESCRs in all situations to which its jurisdiction extends, which include the following two main categories of ETOs:

- State obligations relating to conduct within or beyond its territory: Obligations binding upon a state relating to its conduct, within or beyond its territory, that has effects on the enjoyment of ESCRs outside of that state's territory.
- State obligations of a global character: Obligations of a global character set out in the Charter of the United Nations and human rights instruments⁴ to take action, separately, and jointly through international cooperation, to realise ESCRs universally.

This report focuses on two cases related to Norway's compliance with its ETOs.

First, the report will discuss the Government Pension Fund Global (GPF) as a major international actor with encompassing obligations. An analysis of the GPF investment in the Marlin gold mine, owned by Canadian Goldcorp Inc., in Guatemala will be highlighted.

The second case study focuses on 'Opplysningsvesenets fond' (OVF), a financial

² *The International Covenant on Economic, Social and Cultural Rights* is hereafter referred to as 'the Covenant'.

³ *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* [online] 29 February 2012. Available at:

www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 (accessed 15th October 2012).

⁴ Including ICESCR, CRC, CEDAW.

capital and real estate fund established to benefit the Norwegian Church as directed by the Norwegian Constitution and through the OVF Act. Whether OVF is owned by the Norwegian government or the Norwegian Church is debated.⁵ For the purpose of this report, OVF is regarded as a non-State actor with strong influence and partial control from the State. An analysis of Global Solidarity Forest Fund's (GSFF) investment in Chikweti Forests of Niassa, Mozambique, will be highlighted. OVF is one of the co-founders of GSFF.

A set of questions and recommendations will be presented at the end.

Methodology & Sources

The main motivation of this report is to contribute to the Committee's analysis of the ETOs of Norway in the area of economic, social and cultural rights. FIAN is confident in work carried out by the Committee and requests the Committee to raise the concerns stated in this report in their dialogue with the Norwegian government. As more State resources are allocated to development cooperation through business and investment it is vital to ensure the compliance of States' obligations beyond Norway's borders.

This report draws on a number of legal sources, including General Comments, concluding observations, Maastricht Principles, Commentary to the Maastricht Principles and other academic sources. A comprehensive legal discussion of the ETOs, based on jurisprudence and complemented by other international treaties

and the founding Maastricht Principles can be found in the commentary written by De Schutter, et al.⁶

The sources of each case study will be presented in their respective sections of analysis.

A method closer to the social sciences was applied and a qualitative perspective presented. The case studies were chosen on the background of FIAN's prior expertise and engagement.

In terms of the discussion of the Marlin Mine in Guatemala, FIAN, through its vast network, has been involved in the case for a number of years. The International Secretariat of FIAN has been visiting the mining area on a regular basis since 2004 and worked with partner organisations in Guatemala for fact-finding⁷. FIAN Norway has been involved in the issues surrounding the Marlin Mine since 2010 and visited the Mine in January 2012.

FIAN Norway has also met with the Council on Ethics⁸, sent letter to Norges Bank Investment Management⁹ and presented a petition to the Ministry of Foreign

⁶ De Schutter et al. (2012): 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Human Rights Quarterly* 2012.

⁷ APRODEV, CIDSE, CIFCA, FIAN, La Vía Campesina, El Derecho a la Alimentación y la Situación de Defensoras y Defensores de Derechos Humanos, Agosto 2011, www.fian.org/fileadmin/media/publications/2011_09_Guatemala_DaA_Defensores.pdf

⁸ Sept 17th 2010. Meeting between FIAN International, FIAN Norway and the Council on Ethics to discuss the Marlin mine.

⁹ Letter May 12th 2011 requesting NBIM to support the Shareholders Resolution submitted to Goldcorp Inc. on March 16th 2011, regarding the implementation of precautionary measures. The letter was supported by 36 Europe-based civil society organisations and networks. NBIM never responded to the letter.

The petition can be found at: www.fian.org/fileadmin/media/publications/2011.05.13_Petition_Guatemala_Marlin_Mine_-_Precautionary_measures.pdf

⁵ OVF website, www.ovf.no/Om-OVF/Overordnet/Eierskap (accessed 12th September 2013) and Speech by Minister of Government Administration, Reform and Church Affairs Rigmor Aasrud on 31th July 2013. www.regjeringen.no/nb/dep/fad/aktuelt/taler_og_artikler/minister/taler-og-artikler-av-fornyings-og-kirke/2013/opplysningsvesenets-fond--mellom-bors-og.html?id=733051

Affairs¹⁰ addressing our concern regarding Norway's investment in Goldcorp Inc. In addition, Bishop Ramazzini from Guatemala visited Norway in March 2012 to discuss GPFG's investment in Goldcorp Inc. with both the Norwegian government and the opposition¹¹. He also met with the Council on Ethics. Several Norwegian NGOs, including FIAN Norway, have addressed GPFG's investment in Goldcorp Inc. through seminars and media.

This long-term commitment has made FIAN able to understand the situation in and around the Marlin Mine. However, sources also include the Goldcorp Inc. website and the human rights impact assessment report conducted on behalf of Goldcorp Inc. Another important source has been Norwegian newspaper articles and articles written by the Norwegian Church Aid Alliance.

The case study on OVF's investment in Niassa, Mozambique, has also been chosen for FIAN intrinsic knowledge of the case. FIAN International was contacted by the Mozambican National Peasants' Organisation, União Nacional de Camponeses (UNAC). Mozambican authorities have also published results from their investigation of the case. However, the main source in this case has been a report by FIAN International, published in September 2012¹². This report is largely based on an

investigation carried out by UNAC the results of which have been published in the report *Estudo de Caso sobre o Impacto da Aquisição de Terras em Grande escala para a Produção de Monoculturas (Eucalipto e Pinho) pela Chikweti Forests of Niassa* in May 2012. The information was gathered through individual and focus group interviews with members of local communities in the districts of Lago, Lichinga and Sanga, as well as through interviews with other stakeholders, including authorities at provincial and district levels, the company Chikweti Forests of Niassa, Malonda Foundation and civil society organisations (CSOs): União Provincial dos Camponeses de Niassa (UPCN), Rede das Organizações para o Ambiente e Desenvolvimento Sustentável (ROADS), União dos Camponeses e Associações de Cooperativas (UCA) e Associação Rural de Ajuda Mútua (ORAM). The investigation also included the analysis of all relevant documents, especially relevant laws and regulations.

Further information was gathered during a field visit by FIAN International to Niassa in May/June 2012. Additional research has been done by FIAN Netherlands and the Transnational Institute (TNI), FIAN Norway and FIAN Sweden.

The FIAN report provides an analysis and an overview of the issues in Niassa and submitted recommendations to the Mozambique Government and the investors. In addition, three representatives from UNAC, both national and provincial,

¹⁰ June 17th 2013. Meeting with State Secretary Hilde Singsaas to hand over 1092 signatures demanding GPFG to disinvest from Goldcorp Inc.

¹¹ News presented by the Norwegian Church Aid. March 19th 2012. www.kirkensnodhjelp.no/Aktuelt/Nyhetsarkiv/aktivist-biskop-pa-besok/ (accessed 10th September 2013.)

¹² FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique*. Available from www.fian.org/fileadmin/media/publications/PR_-_2012.10.16_-_Tree_plantations_Niassa_Mozambique.pdf.

The draft Niassa report was sent to all companies via email and regular mail on 14th August 2012, including to OVF. FIAN received

a response per email, signed by the Chairman of the Boards of GSFF and Chikweti, Nils Grafstrom, on 5th September 2012, with comments inserted into the draft report. The comments were analysed and the companies' differing views on the project and its impacts were mentioned in the text or in footnotes as the company's opinion, referring to the companies' response to FIAN. FIAN did not receive a specific reply from OVF. For any information on this information exchange you can contact FIAN International Secretariat.

visited FIAN Norway in early October 2012 and a dialogue meeting was held between the UNAC representatives and OVF. A possible weakness of the sources related to the Niassa case is that no independent human rights assessment has been undertaken.

CASE STUDY I ON THE OBLIGATION TO RESPECT: THE NORWEGIAN GOVERNMENT PENSION FUND (GPF) AND GOLDCORP INC.'S MARLIN MINE IN GUATEMALA

At the time of writing the Norwegian Government Pension Fund (Statens Pensjonsfond – Utland, SPU or GPF), commonly known as the petroleum fund, is valued at around 4600 billion NOK, investing in over 8000 companies worldwide.¹³ The Sovereign Wealth Fund Institute ranks the fund to be the world's largest sovereign fund.¹⁴ By investing in virtually every country in the world the Fund minimises risk and ensures long term returns on investment. The Norwegian Ministry of Finance regularly transfers petroleum revenue to the fund. The capital is invested abroad, to avoid overheating the Norwegian economy and to shield it from the effects of oil price fluctuations. It also serves as a tool to manage the financial challenges of an ageing population and an expected drop in petroleum revenue.¹⁵

¹³ Information retrieved from the NBIM website, www.nbim.no (accessed 10th September 2013).

¹⁴ SWFI website: www.swfinstitute.org/fund-rankings/ (accessed 27th August 2013).

¹⁵ NBIM website: www.nbim.no/en/About-us/Government-Pension-Fund-Global/ (accessed 27th August 2013).

Norges Bank Investment Management (NBIM) is mandated by Act of Parliament to manage the GPF portfolio.¹⁶

The Council on Ethics for the Government Pension Fund Global (hereafter referred to as 'the Council on Ethics') is to provide evaluation on whether or not investment in specified companies is inconsistent with the established ethical guidelines. The ethical guidelines were established in 2004, and include both the mechanism for excluding companies from the Fund's investment universe and they define the mandate and work of the Council on Ethics.¹⁷ However, the exclusion mechanism has been in place since 2001.¹⁸ The guidelines define the mandate of the Council on Ethics' ability to exclude companies and this has since arguably been its most notable function. The Norwegian Ministry of Finance makes decisions on the exclusion of companies from the Fund's investment universe based on the Council on Ethics' recommendations as well as independent investigations by the Ministry itself.¹⁹

A company can be excluded from the Fund if it is responsible for, or contributes to, "serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation; (...) other particularly serious violations of fundamental ethical norms."²⁰

¹⁶ See: www.nbim.no/en/About-us/governance-model/government-pension-fund-act/ (accessed 10th September 2013).

¹⁷ Council on Ethics, Norwegian Government: www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277 (accessed 10th September 2013).

¹⁸ Norwegian Ministry of Finance (2007): *History*. Available at: www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/History.html?id=445813 (accessed 15th March 2013).

¹⁹ See www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council.html?id=434879.

²⁰ Article 3.3.a-e of the Ethical Guidelines.

The government sees itself as a “responsible investor” and wants the Fund “to encourage companies to respect fundamental ethical standards”. It states that the Fund’s ethical guidelines will eschew investments in companies that are in “gross breach of fundamental ethical norms”. For a sovereign wealth fund to have an organ such as GPF’s Council on Ethics is highly commendable. The Norwegian GPF is already one step ahead of many of its international counterparts

Since 2001 a number of companies have been excluded, most because of their role in weapons production, some because of the risk that the investment would contribute to serious human rights violations or environment damage.²¹ The government reviewed the Fund’s ethical guidelines in 2008 and has introduced some new measures, such as excluding tobacco producers from the portfolio, introducing a “watch list” of companies that are in the “grey zone” in terms of possible exclusion and establishing an environmental programme aimed at promoting investments such as climate-friendly energy. These changes are all positive but numerous problems remain, especially regarding compliance of ESCRs.

Currently the Council on Ethics consists of five commissioners and a standing Secretariat of seven employees, with the mandate to “monitor the Fund’s portfolio with the aim of identifying companies that are contributing to or responsible for unethical behaviour or production”.²² Keeping in mind that the GPF has investments in more than 8000 companies worldwide, FIAN argues the need for the Norwegian

Government to commit more resources to the Council on Ethics to hold NBIM accountable for their investments. Furthermore, the process of observation and exclusion of companies must be more efficient and transparent.

Goldcorp Inc., the Marlin Mine & Human Rights Issues

Goldcorp Inc. is one of the largest, and fastest growing, gold producing multinational companies in the world with more than 16 000 employees and with a considerable focus on Latin America.²³ The GPF owned about 0.65 per cent of Goldcorp Inc.’s shares as of 31.12.2012, equivalent to around 1.1 billion NOK.²⁴

It is not difficult to understand why GPF has chosen to invest in Goldcorp Inc. from a financial point of view. Goldcorp Inc. remains one of the fastest growing gold mining companies in the world, predicting a gold production for 2012 of up to 70 tons with low cost production and low political risk. It is a relatively safe investment with gold prices increasing by 428 % between 2002 and 2012.²⁵ In 2009, the GPF made around 203 million NOK on its relatively marginal ownership.²⁶

²¹ A complete list of companies excluded, including the reasons for the exclusions, can be found on the Norwegian Ministry of Finance website: www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122 (accessed 2nd October 2012).

²² Section 4.2 of Council Mandate.

²³ Goldcorp Inc. Inc www.GoldcorpInc.com/English/About-Us/default.aspx (accessed 10th September 2013).

²⁴ NBIM (2012): *Government Pension Fund Global – Holding of equities at 31 December 2012*. Available at: www.nbim.no/Global/Documents/Holdings/EQ_holdings_SPU_Sorted_12%20oppdatert.pdf (accessed 12th September 2013).

²⁵ Goldcorp Inc. (2012): *Corporate Update October 2012*. Available at: www.GoldcorpInc.com/files/GoldcorpInc_Corporate%20Update_Oct_v001_m91257.pdf (accessed 10th October 2012).

²⁶ K. Rønneberg (2009): ‘Oljefondet tjener fett på omstridt gullgruve’ *Aftenposten* [online] 28th September. Available at: www.aftenposten.no/nyheter/uriks/Oljefondet-tjener-fett-pa-omstridt-gullgruve-5586309.html (accessed 7th October 2012).

Montana Exploradora, a subsidiary of Goldcorp Inc., has operated the Marlin Mine since October 2005 after initial exploration in the early 2000s. The method by which Montana extracts the gold and silver is a combination of open pit and underground technology. Gold and silver are removed by using cyanide. This process leaves waste products of tailings, or the leach residue, and waste rock, which is then stored behind a dam.²⁷

Resistance from local indigenous people and allegations of human rights violations has been present from the outset.²⁸ In 2004-2005, when the inhabitants of the village Sololá heard that the mining companies were starting operations, approximately 2000 individuals blocked the road demanding that the Guatemalan government withdrew the mining licenses.²⁹ The government responded by sending 1,500 police officers and 300 soldiers to clear the road, which ended in the death of a villager and several injured police officers.³⁰ Before Montana commenced their mining operations, the local communities in the area were able to voice their opinions through a traditional “consulta”. Such a

consultation is in accordance with ILO Convention 169, ratified by Guatemala in 1996, protecting indigenous peoples’ rights as they have a right to be heard regarding natural resource extraction, affecting their rights. Over 25 “consultas” were held, with participation of 500,000 people and the result has been staggering – 98-99 per cent have voted against Goldcorp Inc.’s mining operations.³¹ Despite this massive resistance to mining by the Maya, Guatemalan authorities did nothing to halt the mining operations. The consultations were ignored.

Once the Mine was up and running, local communities, complained of health issues due to environmental problems, mostly related to the drinking water, but also about massive cracks that appeared in the walls of houses. COPAE (Pastoral Commission Peace and Ecology), a partner organisation of the Norwegian Church Aid, has taken water samples for several years and measured the content of heavy metals in the water. They have found amounts that are eight to ten times higher than the World Bank standards for opencast mining.³² Physicians for Human Rights, from the University of Michigan, have also found that people living closer to the mines have higher concentrations of toxins in their blood.³³ COPAE has also regularly published reports on their findings³⁴, which

²⁷ On Common Ground Consultants Inc. (2010): *Human Rights Assessment of Goldcorp Inc.’s Marlin Mine – Executive Summary*. May 2010. Available at: www.hria-guatemala.com/en/docs/Human%20Rights/OCG_HRA_exec_summary.pdf (accessed 2nd October 2012).

²⁸ See summary human rights issues in UN General Assembly (7 June 2011): *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya (A/HRC/18/35/Add.3)*

²⁹ Norwegian Church Aid Alliance (2009): *Mayagull betaler vår pensjon* [online] 29th September. Available at www.kirkensnodhjelp.no/Aktuelt/Nyhetsarkiv/Politisk-nyhetsbrev/Mayagull-betaler-var-pensjon/ (accessed 4th October 2012).

³⁰ Norwegian Church Alliance (2009): *Krever innsyn i omstridt gruedrift* [online] 29th September. Available at: www.kirkensnodhjelp.no/Aktuelt/Nyhetsarkiv/Krever-innsyn-i-omstridt-gruedrift/ (accessed 4th October 2012).

³¹ S. Imai, L. Mehranvar and J. Sander (2007). *Breaching Indigenous Law: Canadian Mining in Guatemala*. *Indigenous Law Journal*/Volume 6/Issue 1/2007

Canadian Mining in Guatemala Pg. 114
http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1267902_code1019085.pdf?abstractid=1267902&mirid=1

³² Ibid.

³³ Basu, N. & Hu, H. (May 2010): *Toxic Metals and Indigenous Peoples Near the Marlin Mine in Western Guatemala – Potential Exposures and Impacts on Health*. University of Michigan
https://s3.amazonaws.com/PHR_Reports/guatemala-toxic-metals.pdf (accessed 13 September 2013).

³⁴ COPAE: *Reports on Marlin Mine*. Available at: www.copaeguatemala.org/TODO%20NUEVO/

have been supported by the Centre for Ocean and Aquaculture at the Guatemalan University of San Carlos who have pursued independent monitoring of the drinking water.³⁵ An on-site investigation by the Norwegian University of Life Sciences further supports previous findings regarding heavy water pollution of the river system. They conclude that there is “a strong indication” that the wastewater storage reservoir is leaking as an explanation of the high heavy metal concentrations.³⁶ Mayans who use the river system as their primary source of drinking water have experienced serious health problems since Goldcorp Inc.’s mining operations started. It has been reported that children have had severe skin diseases, which have even caused death in some instances, and hair loss.³⁷ In Goldcorp Inc.’s annual monitoring report on environmental and social performance, the company claims that a local doctor claimed that skin diseases “were caused by poor hygiene and not contamination of any kind”³⁸, contrary to community and doctor testimonies.³⁹

[EJES%20DE%20TRABAJO/Estudios.html](#)

(accessed on 5th March 2013).

³⁵ A. Ramazzini (2012): *Problems created by the Goldcorp Inc. Marlin mine in San Marcos* (translated by Natasha de Silva) [online] 11th March. Available at:

www.guatemalalSolidarity.org.uk/content/problems-created-Goldcorp-Inc.-marlin-mine-san-marcos (accessed 5th October 2012).

³⁶ A. R. Almås and González (2011):

Investigation of Arsenic and other trace elements concentrations in sediments and water samples collected from rivers near the Goldcorp Inc. Marlin Mine project, in North West Guatemala. Department of Plant and Environmental Sciences, Norwegian University of Life Sciences, Ås.

³⁷ Basu, N. & Hu, H. (May 2010): *Toxic Metals and Indigenous Peoples Near the Marlin Mine in Western Guatemala – Potential Exposures and Impacts on Health.* University of Michigan https://s3.amazonaws.com/PHR_Reports/guatemala-toxic-metals.pdf (accessed 13 September 2013), p. 12/13.

³⁸ Goldcorp Inc. Inc (2009): *Environmental and Social Performance – Annual Monitoring Report (AMR): Montana Exploradora de*

In addition to the health problems and the lack of community consultation and participation, people living close to the Marlin Mine have experienced other environmental problems. Firstly, people living close to the mine have complained of large structural cracks appearing in their homes, affecting the quality attribute of their houses. More than one hundred houses have suffered damages since the mining operations began.⁴⁰ COPAE, with the support from the American human rights organisation Unitarian Universalist Service Committee (UUSC), monitored 33 houses for a period of two years. A team of qualified engineers eliminated other possible causes of the damages:

*Investigating the soil vibrations, caused by the blasting and the heavy truck traffic from the mine, we realized the significant relationship between the two of them. The cracks are mostly produced in the walls facing the source of vibrations.*⁴¹

Goldcorp Inc. has stated that the cracks in the houses have appeared from the inhabitants playing loud music.⁴²

In 2008, the Swedish pension fund, AP Funds, along with Canadian funds, visited Guatemala to investigate allegations of

Guatemala, S. A., Marlin Mine, Reporting Period 2008. P.28. Available at: www.Goldcorp.com/Theme/Goldcorp/Inc./files/docs_projects/marlin/Marlin_Mine_2008_AMR.pdf (accessed 8th October 2012).

³⁹ Mining Watch Canada (2009): *Cracked Houses in San Miguel Ixtahuacan, Guatemala: The Marlin Mine Influence* [online] 11th November. Available at:

www.miningwatch.ca/cracked-houses-san-miguel-ixtahuacan-guatemala-marlin-mine-influence (accessed 10th October 2012).

⁴⁰ Ibid

⁴¹ Ibid, p.2.

⁴² K. Rønneberg (2009): ‘Oljefondet tjener fett på omstridt gullgruve’ *Aftenposten* [online] 28th September. Available at: www.aftenposten.no/nyheter/uriks/Oljefondet-tjener-fett-pa-omstridt-gullgruve-5586309.html (accessed 7th October 2012).

human rights abuse.⁴³ They concluded that it could be very likely that violations were occurring and engaged the Canadian consultancy firm, On Common Ground Consultants (OCG), to pursue an independent human rights impact assessment of the Marlin Mine on behalf of Goldcorp Inc. The consequent OCG report uses a human rights based approach and supports a number of the allegations made by the local community.⁴⁴ Its conclusions also led to a drastic initial response by the Inter-American Human Rights Commission (IACHR).⁴⁵ In addition, James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples visited the Marlin Mine, along with an expert committee from the International Labor Organization, and declared that the government had granted the license to mine without the free and informed consent of the affected communities.⁴⁶

The IACHR granted Precautionary Measures to be introduced to the local communities, pushing for a temporary suspension of the Marlin Mine as a reaction to the OCG human rights assessment. To support the implementation of the Precautionary Measures regarding the temporary suspension of the Marlin Mine, a petition

was also signed by 36 Europe-based civil society organisations and networks.⁴⁷ The petition is directed to the Swedish and Norwegian public pension funds that hold shares in Goldcorp Inc. Despite the mounting evidence of human rights infringements the IACHR has requested an amendment to the precautionary measures and the request to temporarily suspend operations at the Marlin mine was lifted in December 2011.⁴⁸

A Human Rights Assessment

The human rights assessment performed by the OCG used a human rights framework, and despite the lack of information in several instances, concluded that Goldcorp Inc. committed several breaches of human rights. The OCG report used questions and indicators developed by the Danish Institute of Human Rights to assess Montana's compliance with international human rights standards.⁴⁹

On the issue of consultation and participation, the report concludes that Montana failed to involve the Guatemalan government in the process, as required by ILO 169, thus failing to respect indigenous people's rights on adequate consultation.⁵⁰ Regarding the issue of water quality, the OCG consultants concluded that Goldcorp

⁴³See report from Swedish Pension Fund: www.ap4.se/etikradet/Etikradet.aspx?id=671 (Accessed 12th September 2013).

⁴⁴ On Common Ground Consultants Inc. (2010): *Human Rights Assessment of Goldcorp Inc.'s Marlin Mine – Executive Summary*. May 2010. Available at: www.hria-guatemala.com/en/docs/Human%20Rights/OCG_HRA_exec_summary.pdf (accessed 2nd October 2012).

⁴⁵ See IACHR Precautionary Measures Decisions www.oas.org/en/iachr/decisions/precautionary.asp (accessed 10th September 2013).

⁴⁶ J. Anaya (2011): *Report on natural resource extraction and the Marlin Mine in Guatemala*. United Nations Special Rapporteur on the Rights of Indigenous Peoples. Available at: <http://unsr.jamesanaya.org/notes/report-on-natural-resource-extraction-and-the-marlin-mine-in-guatemala> (accessed 18th October 2012).

⁴⁷ See petition at <http://GoldcorpInc.outofguatemala.com/2011/05/13/36-european-civil-society-organisations-and-networks-ask-swedish-and-norwegian-pension-funds-to-support-shareholder-resolution>.

⁴⁸ Goldcorp Inc. website at www.GoldcorpInc.com/English/Unrivalled-Assets/Mines-and-Projects/Central-and-South-America/Operations/Marlin/Interamerican-Commission-on-Human-Rights/default.aspx (accessed 23rd August 2013).

⁴⁹ On Common Ground Consultants Inc. (2010): *Human Rights Assessment of Goldcorp Inc.'s Marlin Mine – Executive Summary*. May 2010. Available at: www.hria-guatemala.com/en/docs/Human%20Rights/OCG_HRA_exec_summary.pdf (accessed 2nd October 2012). P.16.

⁵⁰ Ibid, p.192.

Inc. has not infringed on the right to water, but they still highlight that Goldcorp Inc. should engage independent monitoring and complete a full water census. The report also states that there is not sufficient information to conclude whether the rights to health and adequate food have been violated.⁵¹

In regards to the damaged houses, the report echoes the findings by the COPAE/UUSC. They conclude “by failing to identify the risks from blasting and heavy traffic, Montana failed to respect the right to adequate housing and the right to own property”.⁵² More importantly, OCG recognises that “all other reasonable explanations” for the damages to houses can be eliminated.⁵³ They further urge Goldcorp Inc. to repair the cracked houses and develop a plan for repair, rebuild or compensation for the damages as well as consulting with affected families.⁵⁴

Additionally to the environmental and consultation issues, the report raises the issue of labour rights for the workers at the Marlin Mine. Although they recognize Montana’s efforts to employ locals, they emphasize that the Guatemalan minimum wage is not a “living wage” and is not in coherence with the right to just and favourable remuneration as well as the right to adequate food, housing and standard of living.⁵⁵ The OCG consultants go even further by highlighting that Montana, and thus Goldcorp Inc., has violated the right to freedom of association because employees who have attempted to form a union have been dismissed or intimidated by the management.⁵⁶

Finally, the report has assessed Montana’s land acquisition from a human rights perspective. The company has purchased over 600 parcels of land within 20 square kilo-

metres from the Marlin Mine. Importantly, OCG states that

*[...] there is a pattern of allegations about coercion and pressure in the land sales that would undermine the voluntary nature of the transactions and would infringe upon the right to own property.*⁵⁷

They further states that the land acquisition procedures have failed to respect the rights of indigenous peoples.⁵⁸ However, their subsequent conclusion is quite profound as they urge Goldcorp Inc. to adopt a moratorium on all land acquisitions, “pending effective State involvement in consultation with local communities.”⁵⁹

The Danish pension fund, Sam Pension, sold their shares in Goldcorp Inc. in early 2012 citing the continued pollution from the Marlin Mine.⁶⁰

The Council on Ethics has acknowledged that Goldcorp Inc. “has been on the radar”.⁶¹ However, it is not public information whether the Council on Ethics is investigating a company or not. Furthermore, excluding a company from GPFG investments is the last resort as the fund gives the company ample opportunity to change behaviour. The Council on Ethics also has an observation list with companies who are at the risk of being excluded, but where more information is needed. Potentially, the Observation List could be an important tool for the Council on Ethics to apply pressure to companies to change behaviour and avoid exclusion. In 2009,

⁵⁷ Ibid, p.21.

⁵⁸ Ibid, p.21.

⁵⁹ Ibid, p.22.

⁶⁰ Responsible Investor (2012): *RI Governance, March 1: Danish pension fund divests mining firm over pollution*. Available at: www.responsible-investor.com/home/searchresults/281770b77895971a14b78ddf5e8cb391/ (accessed 17th March 2013).

⁶¹ K. Rønneberg (2009): ‘Holder øye med selskapet’ *Aftenposten* [online] 28th September. Available at: <http://old.aftenposten.no/nyheter/uriks/article3293209.ece> (accessed 7th October 2012).

⁵¹ Ibid, p.195.

⁵² Ibid, p.15.

⁵³ Ibid, p.15.

⁵⁴ Ibid, p.16.

⁵⁵ Ibid, p.18

⁵⁶ Ibid, p.18.

the Norwegian Ministry of Finance stated that Goldcorp Inc. may be included in the Observation List.⁶² This has, however, not happened so far. The Council on Ethics has a limited mandate, which only involve gross human rights violations. They often rely on third party actors for information about a particular case or company. In the case of Goldcorp Inc., FIAN and other NGOs have provided information to the Council on Ethics.

As cited above, Principle 13 of the Maastricht Principles obligates all States who have ratified the ICESCR to avoid causing harm. More specifically, “States must desist from actions and omissions that create a real risk of nullifying or impairing the enjoyment of ESC rights extra-territorially”.⁶³ As matters stand, the Norwegian State is contributing to causing harm by investing in Goldcorp Inc. Clause (3), section 4, of the Council on Ethics’ Guidelines regarding its mandate, “the Council gives advice on the extent to which an investment may be in violation of Norway’s obligations under international law”.⁶⁴ Furthermore, Principle 20 echoes Principle 13 as it obligates states to “refrain from conduct which nullifies or impairs the enjoyment and exercise of ESCRs of persons outside their territories”.

Furthermore, the UN Human Rights Office of the High Commissioner has recently argued that the UN Guiding Principles on Business and Human Rights⁶⁵ apply to

both all shareholders, irrespective of the size of the investment:

*In conclusion, institutional investors would be expected to seek to prevent or mitigate human rights risks identified in relation to shareholdings – including minority shareholdings. The Guiding Principles set out that the appropriate action in response to the identified risk depends on the degree of its leverage, where a number of options should be considered with a view to use or enhance leverage, to effect change in terms of ending harmful practice and mitigating risks of human rights abuse. If efforts in this regard are not successful, the Guiding Principles stipulate that the institutional investor should consider ending the relationship.*⁶⁶

In compliance of its extraterritorial human rights obligations, the Norwegian state, represented in this case by the GPFG should withdraw its investment in Goldcorp Inc., considering the surmountable evidence of serious human rights breaches and risks.

GPFG and Norway’s ETOs: Time for Change?

United Nations Special Rapporteur on the right to food, Dr. Olivier De Schutter, has presented to the Human Rights Council (HRC) *Guiding principles on human rights impact assessment of trade and investment agreements*.⁶⁷ Most importantly, De Schutter’s report recognises the duty of all States to prepare a human rights impact assessment prior to investing or trading.

⁶² A. Vinding (2009): Kirkens Nødhjelp om Marlingruven – Finansdepartementet må sette gullgruven på observasjonslisten. *VG Nett* [online] 29th September. Available at: www.vg.no/nyheter/utenriks/artikkel.php?artid=574042 (accessed 15th October 2012).

⁶³ See *Maastricht Principles* (2012).

⁶⁴ See the Guidelines: http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277 (accessed 10th September 2013).

⁶⁵ www.business-humanrights.org/Documents/UNGuidingPrinciples

⁶⁶ Office of the High Commissioner for Human Rights (26 April 2013): ‘Subject: The issue of applicability of the Guiding Principles on Business and Human Rights to minority shareholders’. The letter was a responds to a request by the OECD Watch Secretariat in the Netherlands.

⁶⁷ Human Rights Council (2011): *Report of the Special Rapporteur on the right to food, Olivier De Schutter – Addendum: Guiding principles on human rights impact assessments of trade and investment agreements* (A/HRC/19/59/Add.5). 19th Session 2011, 19th December 2011.

Principle 14 of the Maastricht Principles echoes the obligation to carry out impact assessments stating that:

States must conduct prior assessment, with public participation of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessments must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.

In this line, according to international standards, FIAN argues that a human rights impact assessment⁶⁸ should be required by the GPFG, prior to investing, in order for Norway to safeguard its ETOs. Such an assessment should be guided by a human rights based approach and should meet the minimum conditions of independence, transparency, inclusive participation, expertise and funding as well as status.⁶⁹ This screening process would complement the exclusions made by the Council on Ethics at the moment of deciding on the specific investment. Moreover, regular *ex post* impact assessments should also be carried out. Such impact assessments should serve as a basis for the adoption of corrective measures for cases in which negative impacts on human rights were not identified initially, but appear while the project is executed.

FIAN welcomes the initiative by the Norwegian Government to mandate the Strategy Council for the GPFG⁷⁰ to

develop a strategy for responsible investment and see this is golden opportunity to make human rights impact assessments mandatory prior to investments.

As the world's leading sovereign investor, the Norwegian government should make Principle 14 an underlying principle for its investments. For Norway to meet its extraterritorial obligation to Principle 14, the state should make a certified human rights impact assessment mandatory, prior to investment, as well as carry out periodical impact assessments, a posteriori, to correct possible overcoming risks and breaches of human rights in the frame of its investments. This way, Norway could lead by example, as the GPFG is a highly respected international investor. As being part of GPFG's investment universe is seen positive for a company, this could change the standard of pension funds' investments, but also target corporations, over time.

Questions suggested for the Committee on Economic, Social and Cultural Rights to pose to the Norwegian Government:

- The Council on Ethics has in its mandate to initiate investigations, and eventually recommend exclusions of companies committing serious human rights violations. What process is required in order for the Council on Ethics to launch an investigation into possible human rights infringements by a particular company?⁷¹
- To what extent has the Norwegian Government, through the Council on Ethics, scrutinised Goldcorp

⁶⁸ To read more on human rights impacts assessments in international human rights standards, see the Maastricht Commentary, on principle 14.

⁶⁹ Human Rights Council (2011): *Report of the Special Rapporteur on the right to food, Olivier de Schutter – Addendum: Guiding principles on human rights impact assessments of trade and investment agreements* (A/HRC/19/59/Add.5). 19th Session 2011, 19th December 2011. P. 9-10.

⁷⁰ <http://www.regjeringen.no/en/dep/fin/news/news/2013/strategy-council-to-look-at->

[responsible-.html?id=712024](#) (accessed 11th September 2013).

⁷¹ See the mandate of the Council on Ethics at: www.regjeringen.no/en/sub/styret-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277, accessed 23rd August 2013.

Inc.'s impact on human rights after receiving indications that serious human rights breaches have taken place?

- To what extent is the Council on Ethics able to meet its mandate when it comes to human rights, in view of the size of the GPF?G?
- To what extent is a company's human rights record and policy part of the due diligence consideration prior to an investment?
- Does the Norwegian Government consider all GPF?G's investments to be subject to ETOs and the UN Guiding Principles on Business and Human Rights?
- Does the Government consider that the human rights assessment of companies considered for exclusion from the GPF?G investment universe to be adequate?
- Does the Government consider breaches of ESCRs, such as the right to adequate food, to be potentially serious or systematic human rights violations?

leading up to an investment decision.

- Improve monitoring mechanisms in respect of human rights in projects run by companies in which the Fund invests.

We suggest the committee consider the following recommendations:

- Encourage the Council on Ethics to assess the human rights impact of the Marlin Mine, and particularly of the role of Goldcorp Inc.
- Evaluate the strength of the current mandate in accordance with the extraterritorial human rights obligations of Norway.
- Allocate more resources to the Council on Ethics and strengthen its capacity to implement its current mandate with regards to human rights.
- Include human rights impact assessments in the internal process

CASE STUDY II ON THE OBLIGATION TO PROTECT: OPPLYSNINGS- VESENETS FOND INVESTING IN NIASSA, MOZAMBIQUE

Opplysningsvesenets fond (OVF) is an independent legal endowment that holds financial capital and real estate to the benefit of the Norwegian Church. §106 of the Norwegian Constitution and the OVF Act of 1996 dictate the role of OVF as a benefactor to the Norwegian Church. Although its ownership has been disputed as to who owns the fund – either the Norwegian State or the Church⁷² – it continues to be administered by the Ministry of Government Administration, Reform and Church Affairs. The Government also appoints three out of five members of the OVF board.⁷³ The Ministry has also claimed that they own OVF in the past, but the Church Council has disagreed with this conclusion as they see this is a political choice rather than from a purely legal perspective.⁷⁴ For the purpose of this

⁷² OVF website, www.ovf.no/Om-OVF/Overordnet/Eierskap (accessed 12th September 2013) and Speech by Minister of Government Administration, Reform and Church Affairs Rigmor Aasrud on 31th July 2013. www.regjeringen.no/nb/dep/fad/aktuelt/taler_og_artikler/minister/taler-og-artikler-av-fornyings-og-kirke/2013/opplysningsvesenets-fond--mellom-bors-og.html?id=733051

⁷³ Norwegian Government, 27th November 2012

⁷⁴ OVF website at www.OVF.no/Om-OVF/Overordnet/Eierskap (accessed 27th August 2013).

report, OVF is regarded as a non-State actor with strong influence and partial control from the State. FIAN argues that its actions fall within Norway's ETOs as set forward in the Maastricht Principles. Principle 9 on the Scope of Jurisdiction is the primary principle reflecting the obligations of Norway in this case study. Norway has the obligation to respect, protect and meet ESCRs in situations over which it "exercises authority" and "is in a position to exercise decisive influence". In this case, Norway not only has an obligation to respect, but also to *protect* ESCRs beyond its borders as the Norwegian state exercises authority over OVF. OVF co-founded the Global Solidarity Forest Fund (GSFF), along with the Diocese of Västerås (Sweden) in 2006. Several investors are involved in GSFF such as, the Dutch pension fund Strichting Pensionenfonds ABP, owning 54.5 per cent, the OVF and the Diocese of Västerås owning 5 per cent respectively. The Anglican Diocese of Niassa is also a local minority owner of GSFF's investments.⁷⁵

The fund has four forestry subsidiaries in Mozambique: Chikweti Forests of Niassa, Tectona Forests of Zambezia, Ntacia Florestas de Zambezia and Florestal de Masangulo.⁷⁶ The fund itself is managed by Global Solidarity Fund International (GSFI), which again is co-owned between OVF, the Lutheran Church of Sweden and the Diocese of Västerås.

Besides providing an annual return of 13 per cent on investments to the fund's owners, the GSFF was set up to contribute to poverty alleviation through forest plantations.⁷⁷ Thus, its original purpose was to be an "ethical investment fund".

⁷⁵ GSFF website at <http://gsff.se/en/>.

⁷⁶ Ibid.

⁷⁷ GSFF (2007): *Global Solidarity Forest Fund - Memorandum of Investment*. Available at: www.3ignet.org/resourcecenter/resourcePDFs/2007FebGSFFMemInv.pdf (accessed 18th September 2012). P.2. See also: <http://OVF.no/Finansforvaltning/Etiske->

Mozambique and forestry

Niassa is located in the north of Mozambique and represents the country's largest province at around 12.9 million hectares, but with a small population of around 1 million people. Large forests occupy the area, and combined with the low population density, the government of Mozambique is promoting large-scale tree plantations⁷⁸. Foreign investment in Mozambique has boomed during the last decade with an especially steep increase in the forest sector. According to Oakland Institute, around 1 million ha were acquired by foreign investors, 73 per cent of which for projects in the forestry sector.⁷⁹ Investment in rural areas in Mozambique is needed and these investments (public and, to some extent and under adequate conditions, private) can, if properly designed and implemented, contribute to the realisation of the ESCR of the people living in these areas, in accordance with the obligation to meet human rights. More specifically, Principle 29 of the *Maastricht Principles* highlights the obligation to create an international enabling environment that is conducive to the fulfilment of ESCRs.

The Mozambican constitution establishes that land is owned by the state. Land cannot be sold or mortgaged, but the use and benefit of the land is the right of all Mozambicans. The state determines the use of land, and grants land titles to collective or single persons for these ends. In this context, the constitution specifically

[investeringer/Etiske-positiv-investeringer/Skogsinvesteringer-i-Mosambik](#)

⁷⁸ FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg. [www.fian.org/fileadmin/media/publications/PR-2012.10.16-](http://www.fian.org/fileadmin/media/publications/PR-2012.10.16-Tree-plantations-Niassa-Mozambique.pdf)

[Tree plantations Niassa Mozambique.pdf](#) (accessed 10th September 2013).

⁷⁹ Oakland Institute (2011): *Understanding Land Investment Deals in Africa: Mozambique*. The Oakland Institute, Oakland.

recognises rights that have been acquired through heritage or occupation of land.⁸⁰ Land tenure is regulated by the Land Law of 1997, which has internationally been recognised as one of the most progressive with respect to land rights for rural communities.⁸¹ The right to use and benefit land⁸² can be obtained by individuals and communities who occupy land based on customary practices, nationals who have used the land in good faith for at least ten years and other groups or individuals who can apply for a DUAT title. Article 13 of the Law also states that

*The application for a title for the right of land use and benefit shall include a statement by the local administrative authorities, preceded by consultation with the respective communities, for the purpose of confirming that the area is free and has no occupants.*⁸³

This is applicable to foreign investors who want to invest in Mozambique, but not for communities who occupy land based on customary tenure. They have permanent rights and do not need a DUAT title. The law explicitly determines that the absence of land title or registration must not harm the benefit and use of land.⁸⁴ Despite these protective provisions, large-scale land acquisitions have been problematic in relation to the provision above regarding local community consultations.

⁸⁰ *Constituição da República de Moçambique, Arts. 109-111.*

⁸¹ FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg, p. 2.

⁸² *Direito de Uso e Aproveitamento da Terra, DUAT.*

⁸³ Assembly of the Republic of Mozambique (1997): *Land Law 1997*. Maputo. Translated by Adrian Frey. Available at:

www.doingbusiness.org/~media/FDPKM/Doing%20Business/Documents/Law-Library/Mozambique-Land-Law-Legislation.pdf (accessed 19th September 2012).

⁸⁴ Land Law, Arts. 13-14.

Chikweti Forests of Niassa

Chikweti Forests of Niassa (hereafter referred to as Chikweti) is a forestry company and subsidiary to the GSFF. The stated objective of Chikweti is to manage 140 000 hectares (ha) of so-called “degraded forest land”. The memorandum of investment establishes the objective to plant fast-growing pine and eucalyptus on 68,500 ha. The remaining land was to be set aside as “protected or responsibly managed ecosystems”.⁸⁵ In the short term, Chikweti is targeting the domestic and regional construction market, but aims for their products to be sold for export in the medium to long term. Besides, Chikweti also aims that its plantations be certified by the Forest Stewardship Council (FSC).⁸⁶

According to information received by the company by September 2012, Chikweti had established around 13 500 ha of tree plantations and held preliminary DUAT titles for around 35,500 ha, while waiting for the approval of additional DUAT titles for another 10,000 ha, bringing the total up to 45 371 ha.⁸⁷

The plantation ran into problems at an early stage. Quickly, communities in the districts of Lago and Sanga, complained that tree plantations were expanded upon land without agreement from the local communities. This triggered an aggressive response among locals who uprooted some 60 000 pine trees in April 2011.⁸⁸

⁸⁵ GSFF (2007): *Global Solidarity Forest Fund – Memorandum of Investment*. Available at: www.3ignet.org/resourcecenter/resourcePDFs/2007FebGSFFMemInv.pdf (accessed 18th September 2012). P.3.

⁸⁶ Ibid.

⁸⁷ FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg. P. 17, based on a written communication by Chikweti to FIAN received on 5 September 2012.

⁸⁸ Ibid. See also União Nacional de Camponeses – UNAC (2012): *Estudo de Caso sobre o Impacto da Aquisição de Terras em Grande*

In response to the initial complaints, and prior to the local uprising in 2011, the Mozambican Ministry of Agriculture (MINAG) and the National Directorate of Lands and Forests (DNTF) initiated an investigation into Chikweti’s operations and expansion in September 2010. Importantly, the MINAG/DNTF report⁸⁹ confirmed the complaints expressed by the local communities on a number of issues related to land tenure rights, the right to adequate food, the right to water, community consultation and participation. Complaints over labour rights have also come forward by the local communities in Niassa. In reference to the limited scope of this paper, land tenure rights, labour rights, and the community consultations will be discussed.

Land tenure rights and the right to adequate food

One of the most problematic aspects of Chikweti’s operations and plantation expansion has been related to their land acquisition. The MINAG/DNTF report, from late 2010, found that the company has obtained DUATs for about 30 000 hectares, but was still occupying another 32 000 hectares illegally.⁹⁰ In addition, the report states that Chikweti had invaded land used by people from the local communities by planting trees on productive farmland and too close to houses. This has led to a partial loss of access to farmland by local communities as it has made it very

escala para a Produção de Monoculturas (Eucalipto e Pinho) pela Chikweti Forests of Niassa, May 2012, p. 22-23.

⁸⁹ As cited by FIAN International, *ibid.*

⁹⁰ República de Moçambique/Ministério da Agricultura - MINAG/ Direcção Nacional de Terras e Florestas - DNTF (2010): *Relatório de trabalho de campo realizado no âmbito do cumprimento das decisões de S. Excia. O Senhor Primeiro Ministro na sua visita à Província do Niassa*, September 2010, cited by FIAN International, 2012, p. 22.

difficult to continue agricultural production.⁹¹

Chikweti has promised to only plant trees on unused and idle land. Chikweti occupied lands left fallow, although fallow land is used in the cycle of traditional farming in the area. The national farmers' organisation UNAC (*Uniao Nacional de Camponeses*) denies there is such a thing as unused land in Mozambique and lands are left fallow due to the traditional way of farming. Another method used by farmers is 'slash and burn'. This method cannot be practiced as long as Chikweti plants trees right next to the fields due to the risk of fires taking over the plantations.

In addition to Chikweti's illegal occupation of land the company also started some of its operations before acquiring the DUATs as required Mozambican land law.⁹²

This illegal acquisition of land represents an infringement on the right to food of the affected communities. In fact, the ability to individually or communally cultivate land (on the basis of ownership or other form of tenure) is part of the basic content of the right to adequate food which must be respected, protected and fulfilled by States according to General Comment No. 12. More importantly, OVF and the other investors should uphold international human rights and a national legal framework.

Chikweti has negatively impacted on the right to adequate standard of living and left people food insecure by occupying fertile land used for food production by planting trees. Farmers have also had to move their

production to fields far from their homes. This affects their ability to upkeep the previous level of food production.

The right to adequate food has also been jeopardised by Chikweti's tree plantations. Locals complain that they can no longer use the forests for gathering firewood for cooking or producing coal. Chikweti has also been accused of large scale felling of native forests by local government.⁹³

Moreover, after Chikweti established the tree plantations, the local communities of Lichinga, Lago and Sanga have experienced being food insecure. Niassa's population relies on agriculture for survival and in these three communities; agriculture is the most important source of income.

Labour rights

Chikweti and OVF, claim that creation of jobs is their main contribution to the development of the area.⁹⁴ According to Chikweti Forests, it was the main employer in the tree plantation sector in Niassa in 2011 with around 3000 employed. However, since then the workforce at Chikweti Forests has been reduced drastically to a total of 900.⁹⁵

Local communities have complained about several aspects related to employment at Chikweti Forests. Although Chikweti is following Mozambican law, workers have complained about short-term contracts and delayed payments of salary. Further, they are paid only minimum salary which amounts to only US\$43 per month after

⁹¹ FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg. P. 17, based on testimonies of members of peasant communities in the project areas, p. 18-20.

⁹² MINAG/DNTF, p. 26, 30 and Justiça Ambiental & UNAC (2011): *Lords of the Land – Preliminary Analysis of the Phenomenon of Land Grabbing in Mozambique*. Maputo, p. 51.

⁹³ DNTF/MINAG, pp. 30, 37, 41 and UNAC, p. 25. FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg.

⁹⁴ OVF meeting, 21st September 2012.

⁹⁵ OVF meeting, 21st September 2012.

However, in written communication by Chikweti to FIAN received on 5 September, they speak of 1,100 workers.

tax.⁹⁶ Chikweti states that working opportunities creates alternative livelihood in the area. However, the loss of access to land has negatively impacted livelihoods and access to food and the number of jobs and working conditions created by Chikweti do not compensate for lost livelihoods with agriculture.⁹⁷

Several peasants have given up working on their own fields in order to work on Chikweti's plantations. This also affects their access to food as harvesting at the tree plantations often coincide with the beginning of the farming season. Many workers are unaware of the fact that their work relation with Chikweti is only for a short period of time. Overall, the number and kinds of jobs created by the tree plantations do not make up for what communities give up and do not compensate for what they produced on their own farms.⁹⁸ The disruption of livelihoods of local peasants and the fact that Chikweti's plantations do not create alternative livelihoods puts at risk the right to adequate food of local communities.⁹⁹

⁹⁶ Overbeek, W., Kröger, M., Gerber, J-F. (2012): *An overview of industrial tree plantations in the global South – Conflicts, trends and resistance struggles*. EJOLT Report No. 3, June 2012. Available at: <http://adoptnativetree.com/wp-content/uploads/EJOLTplantations.pdf> (accessed 1st October 2012).

⁹⁷ R. Waterhouse, G. Lauriciano and S. Norfolk (2010): *Social analysis of selected projects – Issues Note & Case Studies: Large-Scale Land Acquisition for Agricultural Production, Mozambique*. The Open University. Draft March 2010, p. 33. Available at: www.open.ac.uk/technology/mozambique/pics/d128185.pdf (accessed 1st October 2012).

⁹⁸ R. Waterhouse, G. Lauriciano and S. Norfolk (2010): *Social analysis of selected projects – Issues Note & Case Studies: Large-Scale Land Acquisition for Agricultural Production, Mozambique*. The Open University. Draft March 2010, p. 33.

⁹⁹ FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg, p. 20-23.

OVF has stated that they would like short contracts to end as to make their work with Chikweti more sustainable in order for job creation to have a positive effect on development in Niassa.¹⁰⁰

Community consultation and participation

The Mozambican Land Law of 1997 recognises the right of local communities to participate in the management of resources, but also in the process of titling (Article 24). Article 13(3) states that a title application must include a statement confirming that the land is free and has no occupants. A consultation, led by the local authorities, with the respective communities has to precede such a statement. Chikweti did not follow this requirement, since the company held its own consultations without the local administration. The local administrator of Lago district even went as far as to accusing Chikweti of intentionally falsifying consultations.¹⁰¹ In other cases, only one consultation meeting was held to discuss the land tenure rights to several tracts of land belonging to several different communities. This was reported through several different districts in the area. Furthermore, in some place the company only consulted with a few community leaders and community members have claimed that Chikweti bribed leaders or offered them jobs at the plantations if they ceded their land.¹⁰²

The company promised to contribute to community development by building needed infrastructure in several villages, but local people accuse Chikweti of never living up to these promises once the tree plantations had been established. The

¹⁰⁰ OVF meeting, 21st September 2012.

¹⁰¹ UNAC, p. 31.

¹⁰² UNAC, as cited in FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg.

Mozambican MINAG/ DNTF investigation raised serious doubts about how informed community members were who supposedly took part in the consultation process carried out by Chikweti.¹⁰³

Norway's ETOs, OVF and the way forward

As mentioned above, the Maastricht Principles define the Scope of Jurisdiction of ETOs to situations where a State “exercises authority or effective control” and where a State “is in a position to exercise decisive influence”.¹⁰⁴ The Norwegian State can extend such influence on OVF.

The OVF investment portfolio is to benefit the Norwegian State Church and the State is empowered in the OVF by selecting the majority of OVF's board members. The State also controls OVF as far as Parliament regulates its existence through the Norwegian Constitution and OVF Act of 1996. Thus, the State of Norway has human rights obligations to uphold in Niassa.

In relation to the Maastricht Principles, Norway is obliged to respect and protect the rights under the ICESCR. This includes Article 11 which recognises the right to an adequate standard of living, including adequate food. It is clear that OVF's investment in Chikweti's is not in coherence with this obligation.

Chikweti Forests of Niassa has denied all the allegations against them and claimed that all land was acquired legally and that the company never occupied land that was not agreed upon with the respective communities. The company also claimed they have received a letter from the Mozambican authorities which clarifies the allegations in regards to illegally occupied land, made in the MINAG/DNTF report, as a mistake and that this sets aside all

previous allegations against Chikweti.¹⁰⁵ So far, this letter has not been shared.

First and foremost, the owners of GSFF have responded to the criticism by replacing the management of GSFF and its subsidiaries during 2011.¹⁰⁶

OVF has proved its ability to be an ethical investor, highlighted by the promise to sell their shares in Statoil if they go ahead with their oil sand project in Canada. They also voted against the project at Statoil's Annual General Meeting, upon recommendation from NGOs such as Greenpeace and WWF.¹⁰⁷

OVF has admitted that they have not found any documentation of land acquisition approval through community consultations and that there are clear indications that Chikweti has occupied fertile agricultural land for tree plantations. An OVF representative explains further that he believes Chikweti has chopped down native forests in order to plant trees for commercial purposes, while he further states that OVF is satisfied with the new GSFF management and that OVF will stay committed to the their original contract of a 15-year investment.¹⁰⁸

Although OVF has met the allegations and confirmed their authenticity as proved before, OVF does not seem ready to instigate

¹⁰⁵ FIAN International (2012): *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique* (FIAN International for the Hands off the Land Alliance). Heidelberg, p. 41, FN 117, based on a written communication to FIAN, received on 5 September 2012.

¹⁰⁶ Information retrieved from GSFF website. The GSFF website has been minimised considerably since the writing of this report, but a screenshot of the older version of the website has been stored by FIAN.

¹⁰⁷ Information retrieved from www.OVF.no/Finansforvaltning/Fra-ord-til-handling (accessed 27th August 2013).

¹⁰⁸ Future in Our Hands (2012): *Kirkefondet legger seg flate* [online] 16th June. Available at: www.framtiden.no/201206165657/aktuelt/etisk-e-investeringer/kirkefond-legger-seg-flate.html (accessed 5th October 2012).

¹⁰³ DNTF/MINAG, p. 38.

¹⁰⁴ Principle 9 (a) and (c).

any form of remedy or compensation for the communities and individuals who have had their right to food violated. The OVF has stated that the fund can only look towards the future and make sure that the new management have improved the situation. An OVF representative has argued that it is not possible to do anything else for the affected communities, as the previous management has not documented their actions and allegations cannot be proven.¹⁰⁹ A state has the obligation to take the necessary measures to ensure that non-State actors do not impair the enjoyment of ESCRs¹¹⁰ of individuals in another state. Principle 27 obligations States to cooperate to ensure that non-State actors do not impair the enjoyment of ESCRs. Due to the international nature of GSFF, co-owned by funds from several countries, Principle 27 is of key importance protecting the rights of the people in Niassa. Through State cooperation, Norway could enable the prevention of human rights abuses in Niassa, but as well as facilitate effective remedy for those already affected, according to ETO Maastricht Principles 37 and 38 on effective remedies and reparation. Keep in mind, Principle 25 justifies the bases for protection of ESCRs if Norway chooses to influence the activity of OVF. In this case, there is a “reasonable link between the State concerned and the conduct it seeks to regulate” (Principle 25.d). Thus, in this case the State of Norway has failed to meet obligations to regulate the ESCRs extra-territorially.

In conclusion, Norway has not been able to uphold its ETOs to protect ESCRs.

Secondly, Opplysningsvesenets fond (OVF), is an institution through which the Norwegian Government has the potential to influence and regulate in order to uphold its obligations to protect ESCRs abroad.

Questions for the Norwegian Government:

- Who is accountable for the OVF’s investments given their complicated State/non-State ownership structure?
- Which measures will the Norwegian Government adopt to prevent similar cases taking place in the future?
- How can the Norwegian Government ensure that the communities affected are compensated, restituted or rehabilitated adequately and that such violations are not repeated?

Specific recommendations for the Norwegian Government could include:

- Regulate funds investing in land abroad to ensure compliance with the obligation to protect ESCR.
- Adopt effective mechanisms allowing victims of ETOs violations by Norwegian non-state actors abroad to prevent violation or to achieve adequate remedy in the case violations that have occurred.
- Adopt all necessary measures to ensure the protection of the right to food and standard of living for the Niassa communities.

¹⁰⁹ OVF meeting, 21st September 2012.

¹¹⁰ Principle 24.

CONCLUSIONS & RECOMMENDATIONS

Based on the Maastricht principles of states' extraterritorial human rights obligations¹¹¹, this report argues that Norwegian government must be held accountable for violations of the right to food taking place in Guatemala and Mozambique. In presenting this report, FIAN Norway seeks the assistance of the UN Committee on Economic, Social and Cultural Rights in doing holding Norway accountable.

The report covers two case studies; one concerned with the obligation to respect Economic, Social, Cultural rights (ESCR) and another with the obligation to protect, with particular focus on the right to adequate food.

a) Concerning the obligation to respect

The Norwegian Government Pension Fund (GPF) is valued at around 4600 billion NOK, investing in over 8000 companies worldwide. The Sovereign Wealth Fund Institute ranks the fund to be the world's largest sovereign fund¹¹². The Norwegian government has established ethical guidelines for investments undertaken by the Pension fund. These guidelines include both a mechanism for excluding companies from the GPF's investment universe and they define the mandate and work of the Council on Ethics. The Norwegian Ministry of Finance makes decisions on the exclusion of companies from the GPF's investment universe based on recommendations made by the Council on Ethics. Norges Bank Investment Manage-

ment (NBIM) manages the Norwegian Government Pension Fund Global.

GPF is one of the minority investor in the company Goldcorp Inc.¹¹³ This company owns the Marlin mine in San Miguel and Sipacapa, Guatemala. This report makes references to a wide range of documents which confirm violations of human rights, including the right to food, have taken place due to Goldcorp Inc.'s mining activities.

b) Concerning the obligation to protect

Opplysningsvesenets fond (OVF) is an independent legal endowment that holds financial capital and real estate for the benefit of the Norwegian Church. OVF is an institution which the Norwegian government has the opportunity to influence and regulate in order that the government may uphold its obligations to protect ESCRs abroad. In 2012 FIAN carried out an international fact finding mission to Niassa, Mozambique, documenting violations of the right to food. Farmers from the area, representatives of UNAC (the main peasant organization in Mozambique) and FIAN met with OVF in Oslo in 2012. OVF has reviewed the allegations by the affected communities and confirmed their authenticity. However, OVF does not seem ready to instigate any form of remedy or compensation for the communities and individuals who have had their right to food violated.

¹¹¹ www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf. Accessed 08.09.2013.

¹¹² www.nbim.no/no/. Accessed 18.05.2013.

¹¹³ <http://www.fian.org/what-we-do/case-work/guatemala-marlin-mine/> Accessed 18.05.2013; www.fian.org/library/publication/detail/el-derecho-a-la-alimentacion-y-la-situacion-de-defensoras-y-defensores-de-derechos-humanos-en-guat/

1. Goldcorp Inc. and GPFG investments

Questions suggested for the Committee on Economic, Social and Cultural Rights to pose to the Norwegian Government:

- The Council on Ethics has in its mandate to initiate investigations, and eventually recommend exclusions of companies committing serious human rights violations. What process is required in order for the Council on Ethics to launch an investigation into possible human rights infringements by a particular company?¹¹⁴
- To what extent has the Norwegian Government, through the Council on Ethics, scrutinised Goldcorp Inc.'s impact on human rights after receiving indications that serious human rights breaches have taken place?
- To what extent is the Council on Ethics able to meet its mandate when it comes to human rights, in view of the size of the GPFG?
- To what extent is a company's human rights record and policy part of the due diligence consideration prior to an investment?
- Does the Norwegian Government consider all GPFG's investments to be subject to ETOs and the UN Guiding Principles on Business and Human Rights?
- Does the Government consider that the human rights assessment of companies considered for exclu-

sion from the GPFG investment universe to be adequate?

- Does the Government consider breaches of ESCRs, such as the right to adequate food, to be potentially serious or systematic human rights violations?

We suggest the committee consider the following recommendations:

- Encourage the Council on Ethics to assess the human rights impact of the Marlin Mine, and particularly of the role of Goldcorp Inc.
- Evaluate the strength of the current mandate in accordance with the extraterritorial human rights obligations of Norway.
- Allocate more resources to the Council on Ethics and strengthen its capacity to implement its current mandate with regards to human rights.
- Include human rights impact assessments in the internal process leading up to an investment decision.
- Improve monitoring mechanisms in respect of human rights in projects run by companies in which the Fund invests.

¹¹⁴See the mandate of the Council on Ethics at: www.regjeringen.no/en/sub/styret-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277, accessed 23rd August 2013.

2. The OVF in Niassa, Mozambique

Secondly, Opplysningsvesenets fond (OVF), is an institution through which the Norwegian Government has the potential to influence and regulate in order to uphold its obligations to protect ESCRs abroad.

Questions for the Norwegian Government:

- Who is accountable for the OVF's investments given their complicated State/non-State ownership structure?
- Which measures will the Norwegian Government adopt to prevent similar cases taking place in the future?
- How can the Norwegian Government ensure that the communities affected are compensated, restituted or rehabilitated adequately and that such violations are not repeated?

Specific recommendations for the Norwegian Government could include:

- Regulate funds investing in land abroad to ensure compliance with the obligation to protect ESCR.
- Adopt effective mechanisms allowing victims of ETOs violations by Norwegian non-state actors abroad to prevent violation or to achieve adequate remedy in the case violations that have occurred.
- Adopt all necessary measures to ensure the protection of the right to food and standard of living for the Niassa communities.

RESOURCES

Case Study I – The Marlin Mine

FIAN International. *Action Case Guatemala – Goldmining destroys access to water and violates indigenous rights* [online]. Available at: www.fian.org/cases/cases2/action-case-guatemala-how-goldmining-can-destroy-access-to-water-and-violate-indigenous-rights (accessed 10th October 2012).

Goldcorp Inc. *Marlin – Interamerican Commission of Human Rights* [online]. Available at: www.Goldcorp.com/English/Unrivaled-Assets/Mines-and-Projects/Central-and-South-America/Operations/Marlin/Interamerican-Commission-on-Human-Rights/default.aspx (accessed 10th October 2012).

Goldcorp Inc. *Out of Guatemala (2011): '36 European Civil Society Organisations and Networks Ask Swedish and Norwegian Pension Funds to Support Shareholder Resolution'* [online] 13 May. Available at: <http://Goldcorp.Inc.outofguatemala.com/2011/05/13/36-european-civil-society-organisations-and-networks-ask-swedish-and-norwegian-pension-funds-to-support-shareholder-resolution/> (accessed 7th

NBIM (Norges Bank Investment Management) *About us: Government Pension Fund Global* [online] Available at: www.nbim.no/en/About-us/Government-Pension-Fund-Global/ (accessed 2nd October 2012).

NBIM (Norges Bank Investment Management) *Market value* [online] Available at: www.nbim.no/en/Investments/Market-Value/ (02.10.2012).

Norwegian Church Alliance [Kirkens Nødhjelp] (2009b): *Krever innsyn i*

omstridt gruvedrift [online] 29th September. Available at: www.kirkensnodhjelp.no/Aktuelt/Nyhetsarkiv/Krever-innsyn-i-omstridt-gruvedrift/ (accessed 4th October 2012).

Rønneberg, K. (2009b): 'Holder øye med selskapet' *Aftenposten* [online] 28th September. Available at: <http://old.aftenposten.no/nyheter/uriks/article3293209.ece> (accessed 7th October 2012).

República de Moçambique/Ministério da Agricultura/Direcção Nacional de Terras e Florestas (2010): *Relatório de trabalho de campo realizado no âmbito do cumprimento das decisões de S. Excia. O Senhor Primeiro Ministro na sua visita à Província do Niassa*, September 2010.

Available at: <http://www.open.ac.uk/technology/mozambique/sites/www.open.ac.uk.technology.mozambique/files/pics/d128205.pdf> (accessed on 29th August 2013).

UNAC (2012): *Estudo de Caso sobre o Impacto da Aquisição de Terras em Grande escala para a Produção de Monoculturas (Eucalipto e Pinho) pela Chikweti Forests of Niassa*, May 2012.

Case Study II – Niassa

Committee on Economic, Social and Cultural Rights (1999): *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12th May 1999.

Available at:

www.unhcr.org/refworld/docid/4538838c11.html (accessed 26th September 2012).

GSFF (Global Solidarity Forest Fund). *Investments: Subsidiaries* [website].

Available at:

<http://gsff.se/en/investments/subsidiaries> (accessed 18th September 2012).

Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht: Independent experts, September 2012).

Norwegian Government (2012): ‘Nytt styre for Opplysningsvesenets fonds [New board for Opplysningsvesenets fond]’ [press release]

www.regjeringen.no/en/dep/fad/press-centre/press-releases/2012/nytt-styre-for-opplysningsvesenets-fond.html?id=708605 (18.03.2013).

Opplysningsvesenets fond (2012):

Eierskap [website]. Available at:

www.OVF.no/Om-OVF/Overordnet/Eierskap (27th September 2012).

Opplysningsvesenets fond (2012): *Fra ord til handling* [website]. Available at:

www.OVF.no/Finansforvaltning/Fra-ord-til-handling, accessed 27th September 2012.

Opplysningsvesenets fond, FIAN Norway, Future in Our Hands and Norwegian Church Aid Alliance (2012): *Dialogue with civil society* [meeting] (Oslo: Personal communication, 21st September 2012).

General Assembly (1948): *Universal Declaration of Human Rights*, UN General Assembly resolution 217A (III), U.N. Doc A/810 at 71.



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