

Human Rights Impact Assessment of the Tampakan Copper-Gold Project

Brigitte Hamm · Anne Schax · Christian Scheper



Institute for Development and Peace (INEF), commissioned by MISEREOR (German Catholic Bishops' Organization for Development Cooperation) and Fastenopfer (Swiss Catholic Lenten Fund), in collaboration with Bread for All



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Photos included in this study show the everyday life and
present natural environment of people likely to be affected
by the proposed Tampakan mine.

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Preface by the Editors

May 2013. At the time of writing this editorial, a sad “accident” has gained world-wide public attention: the collapse of another garment factory in Bangladesh. Hundreds of workers lost their lives, and many more were seriously injured. Some might not be able to work again in the industry. How are they going to earn a living? We have repeatedly heard about factories collapsing or burning down in Bangladesh and Pakistan over the last couple of years. In most of these cases, profit has reigned over the human rights of the workers. And government authorities in the home countries of the factories have turned a blind eye on such business-related human rights abuses. They have been unable, or unwilling, to meet their duty of protecting people’s human rights.

Business-related human rights abuses are by no means limited to the garment and textile industries. They are found in many other sectors, too. The extractive industries are at the top of the list. According to a study by former UN Special Representative on Business and Human Rights John Ruggie, it is within this sector that most human rights complaints against business companies are registered. In the experience of MISEREOR, the German Catholic Bishops’ Organization for Development Cooperation, the Swiss Catholic Lenten Fund (Fastenopfer) as well as the Swiss protestant development organization Bread for All, mining is one of the main - if not THE main - hotspot in the field of business and human rights. For a long time, all three organizations have been supporting partners in many countries in Africa, Asia and Oceania and in Latin America in their struggles against business-related human rights abuses. It is the common, daily and sad experience of these partners that the human rights of indigenous and other local communities as well as the rights of workers are very often severely violated in the context of large-scale mining projects. Transnational companies are rarely held accountable for such abuses, due to weak or bad governance in the host countries of their activities and due to major regulatory gaps in their home countries with respect to the extraterritorial activities of these companies.

Partners have raised severe human rights concerns related to the Tampakan Copper-Gold Mine proposed by Sagittarius Mines Inc. (SMI) and its shareholders Xstrata Copper, Indophil Resources NL and Tampakan Group of Companies. Located in Southern Mindanao, occupying four ancestral domains of indigenous B’laan communities, it would be the biggest open-pit mine in the Philippines and one of the biggest world-wide if realised. Approximately 5,000 people would have to be relocated to make room for the mine. Whereas some of them hope for better housing and living conditions, many others fear for their future and that of future generations, as the present basis of their livelihoods and culture would be destroyed. Moreover, being located in a very sensitive natural environment, the planned open-pit mine would require the destruction of large pristine forests and pose an additional serious risk to water supply and quality for consumers and farmers in the entire region around the planned site. Among others, the human rights to self-determination of indigenous peoples, to food, water, health, life and physical integrity are at stake. The potential victims are indigenous people who have already been neglected and marginalized before by the local and national government units, for example with respect to the right to education and health.

As yet, the mine is in the exploration stage. But already, it appears to be dividing communities and people. Conflict is escalating, even within families. Military and paramilitary groups are being sent to the region to protect foreign investment. The conflict is becoming more violent and has already cost lives – on both sides. The sad human rights record of the Philippines also shows that human rights defenders are easily criminalized, threatened or even extrajudicially executed, in particular when they are engaged in a struggle for land rights and against large-scale investments or powerful landlords.

What can be done? Countries all over the world need investment and business activities to develop. Business is doing a lot of good, but it must be guaranteed that economic development primarily benefits the population, not

just a few companies, a small elite within the country and consumers from industrialized countries. The UN Guiding Principles on Business and Human Rights unanimously endorsed in the UN Human Rights Council in 2011 can be one helpful tool on the way to achieving this goal. Governments, companies, including Xstrata, and NGOs, including partner organizations from the Philippines, participated in the discussions leading to their endorsement. The Guiding Principles confirm the duty of states to protect people from human rights abuses, including by private actors. They also underline the responsibility of private companies themselves to respect human rights in all activities along their supply chain. They advise governments and companies what they can do and what remedies need to be in place for victims. One tool they recommend is a comprehensive Human Rights Impact Assessment. However, neither the Philippine government nor the companies involved have so far undertaken such an assessment.

This is why the editors of this study responded positively to the invitation of our partner organisations in the Philippines to commission a HRIA to an independent research institute that is well reputed and experienced in the field of business and human rights. While we provided the financial resources to this project, facilitated contacts to our partners and joined a fact-finding mission to the Philippines, the study itself was conducted and written by the Institute for Peace and Development (INEP) in full autonomy and independence. It was our clear and explicit wish that not only the negative but also the possible positive impacts be considered. The objective was a balanced, nuanced and scientifically solid HRIA that takes into account



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Preface by the Commission on Human Rights of the Philippines

The Philippines experienced far-reaching political, social and economic transformations during the last decades, which have overall enabled improvements in the realization of human rights. Nevertheless, the country also continues to face challenges it needs to master in order to meet its duties under international law. Particularly the indigenous peoples and other vulnerable groups in the Philippines depend on the state to realize all their human rights. In order to further support the strengthening of human rights throughout the Philippines, the Constitution of 1987 established the Commission on Human Rights of the Philippines (CHRP) as a state-funded, independent institution. Our main activities are research, investigation, prevention, monitoring of policies and programs as well as education and advocacy work. We aim to create a society in which every citizen can enjoy his or her human rights and fundamental freedoms.

The UN Guiding Principles on Business and Human Rights which the UN Human Rights Council endorsed in June 2011 have placed the activities of private enterprises with regard to their human rights impacts high on the international agenda. The Guiding Principles constitute a landmark in the contemporary human rights history and they form the most important international benchmark for human rights in the context of transnational enterprises. They complement the traditional focus on state duties to respect, protect and fulfill human rights by emphasizing the human rights responsibilities of businesses with regard to their activities. Thereby, the concept of “due diligence” gives general guidance to companies of how to meet their responsibility for human rights.

Particularly from a human rights perspective it is paramount to ensure that in the course of economic progress and sustainable growth no citizen is left behind or suffers from adverse consequences. The area of resource extraction and the effects such projects have on the realization of human rights have been a particular focus of our work since the Philippines is characterized by an abundance of natural resources. Furthermore, the government aims to foster economic development through the attraction of foreign investments in this area. Based on the Edinburgh Declaration of October 2010 of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), the CHRP takes an active role in Philippine society to promote the adherence to the UN Guiding Principles. In line with these developments, we

are also very pleased to announce that we will assume the chairmanship of the ICC Working Group on Business and Human Rights from August 2013 until 2015.

The Guiding Principles also point to the importance of assessing (possible) human rights impacts, particularly for large-scale projects. As part of our work, the CHRP actively promotes the conduct of Human Rights Impact Assessments (HRIA), as we consider these as crucial tools to shape business conduct in a manner conducive to human rights. Accordingly, the planned Tampakan Copper-Gold Mine by Sagittarius Mines Inc. has also gained our attention since a project of such magnitude combined with processes such as resettlement of indigenous communities bears significant human rights risks. At the same time, the engagement of the mining company in local development also holds chances to improve the economic situation in the area. Thus, we strongly welcome this HRIA report published by INEF, MISEREOR, the Swiss Catholic Lenten Fund and Bread for All.

We view the HRIA as an important step to better understand the influence the mining project has on the human rights situation of involved communities. The assessment may also serve as important guidance for future projects. The HRIA is a valuable human rights tool to guide businesses in upholding respect for human rights in every step of their work process, and to establish effective remedies. The HRIA likewise provides guidance for the state to protect human rights by asking to enforce regulation. Indeed, it is a tool that draws attention from all stakeholders to uphold the primacy of human rights in our specific line of work beneficial to the larger community.

Accordingly, we have supported the undertaking in any possible way to facilitate the work of the research team. We welcome the co-operation which emerged from this project and look forward to a deepening and strengthening of this relationship. We also aim to include the present report in our work and to build on the insights won. ■

Loretta Ann P. Rosales



Chairperson of the CHRP

25 May 2013



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We thank all interview partners for their time and willingness to provide essential information for this study. We also thank all commentators for critical feedback on draft versions of the report and our external reviewers from the Commission on Human Rights of the Philippines and the German Institute for Human Rights for sharing their expertise and giving highly valuable input. Our thanks also go to the Danish Institute for Human Rights for making available their Human Rights Compliance Assessment Tool. Furthermore, we thank Cesar H. Villanueva, an independent consultant on peace and conflict transformation from the Philippines, for his contribution to the HRIA, in particular to chapters 6.3 and 7.7 on the security situation in the Tampakan area. Finally, we thank Balay Mindanaw Foundation Inc. for their logistical support

Updated Version July 2013

This updated version is based on public presentations of the original study in the Philippines on June 25th 2013 in General Santos City, South Cotabato, and June 27th 2013 in Manila. Many important issues were raised at these hearings that are relevant for future HRIAs. Therefore, we decided to post a summary of these issues on our website (<http://www.inef.uni-due>). In addition, we made one modification on page 39 of this report. ■

All views and conclusions expressed in this study are those of the authors and do not necessarily represent the views of the editing organizations.

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Abbreviations

AFP	Armed Forces of the Philippines	EIARC	Environmental Impact Assessment Review Committee
AI	Amnesty International	EIS	Environmental Impact Statement
ARMM	Autonomous Region of Muslim Mindanao	EMB	Environmental Management Bureau
CADC	Certificate of Ancestral Domain Claim	ESCR-Asia	Economic, Social and Cultural Rights-Asia
CADT	Certificate of Ancestral Domain Title	ESIA	Environmental and Social Impact Assessment
CAF	Citizens Armed Forces	FH	Freedom House
CAFGU	Citizens Armed Forces Geographical Units	FIDH	International Federation for Human Rights (Fédération internationale des ligues des droits de l'Homme)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	FPIC	Free, Prior and Informed Consent
CESCR	Committee on Economic, Social and Cultural Rights	FTAA	Financial and Technical Assistance Agreement
CHRP	Commission on Human Rights of the Philippines	GDP	Gross Domestic Product
CIA	Central Intelligence Agency	HDI	Human Development Index
DENR	Department of Environment and Natural Resources	HIA	Health Impact Assessment
ECOSOC	Economic and Social Council	HRCA	Human Rights Compliance Assessment
ECC	Environmental Compliance Certificate	HRIA	Human Rights Impact Assessment
		HRW	Human Rights Watch

ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights	PA	Principle Agreement
ICCPR	International Covenant on Civil and Political Rights	PAHRA	Philippine Alliance of Human Rights Advocates
ICESCR	International Covenant on Economic, Social and Cultural Rights	PHP	Philippine Pesos
ICMM	International Council of Mining and Metals	PPP	Purchasing Power Parity
IEC	Information, Education, Communication	RAP	Resettlement Action Plan
IFC	International Finance Corporation	SMI	Sagittarius Mines Inc.
ILO	International Labour Organization	SOCCSKARGEN	South Cotabato, Cotabato, Sultan Kudarat, Sarangani, General Santos City
INEF	Institut für Entwicklung und Frieden (Institute for Development and Peace)	Tampakan Project	Tampakan Copper-Gold Project
IPRA	Indigenous Peoples Rights Act	UDHR	Universal Declaration of Human Rights
KITACO Task Force	Kiblawan, Tampakan, Columbio Task Force	UN	United Nations
LGC	Local Government Code	UNDP	United Nations Development Programme
LGU	Local Government Unit	UNESCO	United Nations Educational, Scientific and Cultural Organization
MGB	Mines and Geosciences Bureau	UNHRC	United Nations Human Rights Council
MoA	Memorandum of Agreement	UNHRCCom	United Nations Human Rights Committee
NCIP	National Commission on Indigenous Peoples	UNICEF	United Nations Children's Fund
NCP	National Contact Point	UNPFII	United Nations Permanent Forum on Indigenous Issues
NEDA	National Economic and Development Authority	UPR	Universal Periodic Review
NGO	Nongovernmental Organization	USD	United States Dollar
NNC	National Nutrition Council	WHO	World Health Organization
NPA	New People's Army	WMC	Western Mining Corporation
OECD	Organisation for Economic Cooperation and Development		
OHCHR	Office of the High Commissioner for Human Rights		

Executive Summary

If realized, the Tampakan Copper-Gold Mine would be the largest open-pit mine in the Philippines and one of the largest of its kind worldwide. Project preparations already began in the early 1990s, but the project still is in its exploration phase. The project proponent, Sagittarius Mines Inc. (SMI), envisages a start of operations in 2019.

Three main motivations lie behind this report. Firstly, research and experience in many areas of the world have shown that the extractive sector is the industry which has been most linked to adverse human rights impacts. Secondly, the project is situated in an area which is not only characterized by a very distinct and sometimes hazardous natural environment but is also affected by political and oftentimes violent conflicts. Thirdly, neither Philippine government authorities nor the company have carried out or commissioned an HRIA so far.

Although the design and application of HRIAs in relation to private business is still a rather novel undertaking, it has found high resonance in the mining industry because extractive operations often have a significant potential to affect human rights. Existing approaches to HRIAs differ substantially in scope and purpose. The purpose of this HRIA is to focus on the perspective of the most vulnerable groups. Thus, it is inevitable that the human rights approach is normatively oriented. The report does not offer a comprehensive analysis of all impacts of the Tampakan Project. Instead, its focus is on expected impacts on those whose human rights could be most severely affected.

The report is based on a desk study and a three-week field trip to the Philippines, where data was gathered through qualitative interviews. Interview partners included affected communities, company representatives, local and national civil society organizations, as well as government authorities. By evaluating this data we shed light on the main human rights issues linked to the Tampakan Project. The choice of our interview partners reflects our human rights approach. While our interviewees have both positive and negative attitudes towards the Tampakan Project, they do not constitute a representative sample of the population in the area. Instead, our goal is to make sure that we include those people who have serious concerns with regard to their human rights situation and to analyze their hopes and fears and complement this information with desk research and the views of other stakeholders and experts.

HRIA Concept and Method

The report examines key developments related to the project that are already affecting human rights conditions. We follow a qualitative, interpretative research approach which allows for a holistic analysis. Here, holistic means that the assessment goes beyond a narrow analysis of the direct impacts of company activities on human rights and instead includes a wider context analysis, with a view to the role of state and private actors and relevant conflict dynamics. Furthermore, our assessment does not investigate singular cases of potential human rights violations but represents



Photo: Bobby Timonera

an aggregated analysis that focuses firstly on the conditions required to allow for the realization of human rights, especially for the most vulnerable groups and secondly on compliance with duties and responsibilities by state agencies and companies involved. Furthermore, based on the volatile security situation in the context of Tampuan, we integrate a conflict-sensitive view on project-related processes that impact on the human rights situation.

Our analysis follows three main steps:

1. *Setting a normative framework for analysis*; this involves desk research on potential international, sector-related and company-specific standards in order to select the most relevant benchmarks for assessment.
2. *Data collection and interviews*; this phase involves desk research on the national and regional context and qualitative group interviews with affected communities, especially those whose human rights will be most likely affected. These are parts of the indigenous communities on the proposed project site as well as farmers and irrigators who are dependent on fresh water from this area. Interviews with these groups are open and narrative in style to allow interviewees to emphasize those aspects that are of most concern to them. With other stakeholders, such as SMI, government officials and civil society representatives, interviews are semi-structured and partly conducted in focus groups. Interviews with community members are kept anonymous, and no statements are linked to particular persons in the report, except for government officials whom we interviewed in their public function. For the elaboration of research questions and the evaluation of interview data, two existing HRIA tools served as important guides: the Human Rights Compliance Assessment Tool by the Danish Institute for Human Rights and the HRIA tool by Nomogaia, a US-based NGO focusing on HRIAs for business projects.
3. *Evaluation, interpretation and consultation*; this phase evaluates the collected data against the background of the normative framework. One key element is the prioritization of issues with regard to their human rights relevance. Furthermore, this phase involves consultation with key stakeholders on a draft report, which informs a final revision process.

Business and Human Rights:

The Institutional Framework

Most important are the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Guidance is also provided by the UN Guiding Principles on Business and

Human Rights. They rest on three pillars: the state duty to protect, the corporate responsibility to respect, and access to remedy for victims of human rights violations.

Moreover, the OECD Guidelines for Multinational Enterprises serve as instruction. Since their fifth revision in 2011, the Guidelines have included explicit recommendations on human rights. Operational orientation is also given by the International Finance Corporation (IFC) Performance Standards which do not follow a human rights approach but are in many aspects in line with the UN Guiding Principles.

The Voluntary Principles on Security and Human Rights provide further specific standards for extractive industries with a focus on companies' security arrangements. Finally, SMI commits itself to the Xstrata plc Sustainable Development Framework. This offers a useful orientation on the company's own normative commitments. We find that the company endorses most of the above-mentioned international guidelines and an additional list of standards which reflect the company's comprehensive self-commitment to respect all relevant human rights. The challenge apparently lies in fully implementing these commitments in practice in a very complex and volatile environment.

Country and Regional Context

Regions XI and XII in Southern Mindanao, where the Tampuan Project is situated, are inhabited by about 2.06 million people with diverse ethnical backgrounds and a variety of languages and dialects. Those communities which are most directly affected by the Tampuan Project belong to the B'laan tribe, an indigenous group inhabiting the proposed mining area. The federal system of the Philippines provides a relatively high autonomy to the so-called Local Government Units (LGU), which comprise barangays (villages or districts), cities, municipal and provincial governments.

Agriculture constitutes the main pillar of the affected regional economies. The presence of natural resources, such as copper, nickel, gold, chromite and marble, is expected to lead to a growing extractive sector. At national level, however, the growth rate of the mining sector did not extend in 2011 and contributed only 1% to national GDP.

Human Rights Situation

With regard to its human rights record, the Philippines has made substantial progress during the last two decades. However, serious problems remain. Regarding economic, social and cultural rights, discrepancies in the realization of human rights continue to exist between urban and rural areas as well as between different population groups. Here indigenous communities are usually most severely

affected by poor social conditions. According to reports by human rights organizations, several civil and political rights are routinely infringed upon or violated on a larger scale. UN reports are confirming this. Many of the severe violations can be traced back to state parties, which points to weaknesses in democratic governance structures and a lack of accountability and control of state bodies. Furthermore, grave violations, such as extrajudicial killings, are concentrated in areas where national and transnational companies have become involved in conflicts over land and natural resources.

Legal and Administrative Context

An increasing number of legal provisions on mining have evolved in the Philippines in the last decades. Yet, there are tensions between different regulating mechanisms. The most important legal basis for foreign companies to exploit raw materials is the Mining Act of 1995 (Republic Act No. 7942). It introduced fundamental economic incentives for foreign investors. The Act also includes basic social responsibilities, especially regarding indigenous communities.

Today, the Mining Act is subject to political controversies, most severely with regard to environmental sustainability, the level of protection of affected communities, and the amount of tax revenues. A further controversy concerns the relationship between the Mining Act and the Indigenous Peoples Rights Act (IPRA) of 1997. The latter emphasizes that indigenous communities have priority rights within their ancestral domains. In contrast, the Mining Act grants the state the prerogative to also exploit natural resources on indigenous lands. So far, it has not been clearly established how IPRA is to be weighed against the Mining Act.

Another factor central to the legal context of the Tampakan Project is provided by autonomous administrations in the affected provinces. In 2010, the Province of South Cotabato adopted an Environmental Code which includes a ban on open-pit mining. At the time of writing, the ban is still in place and prohibits the continuation of the Tampakan Project.

Company & Project

The project is situated between the municipalities of Tampakan in South Cotabato and Kiblawan in Davao del Sur, about 50 km north of General Santos City, a mountain area that is predominantly characterized by rainforest as well as small-scale and subsistence farming. Lowlands, with pineapple and other fruit plantations, will also be affected, even if they are not part of the mine site. The project seeks to exploit one of the world's largest undeveloped copper-gold deposits. It is estimated that the mine would yield an aver-

age of 375,000 tons of copper and 360,000 ounces of gold per annum over 17 years. About 5,000 people – approximately 1,000 households – inhabit the area affected and will require resettlement. The majority of these inhabitants belong to indigenous communities.

SMI is the Philippine company executing the operations. The ownership of SMI is divided between several shareholders to varying degrees. A 40% controlling equity interest is held by two Australia-based companies, Xstrata Copper and Indophil Resources NL, while a non-controlling equity interest is held by the Tampakan Group of Companies. As Xstrata Copper holds 62.5% of the 40% controlling equity interest, the company has the main decision-making power and, therefore, also bears a major responsibility to effect the required responses to potentially negative human rights impacts. This responsibility also falls to the Swiss/UK-based Xstrata plc since Xstrata Copper is integrated into the Xstrata plc structure. Other companies involved naturally also bear responsibility for SMI's conduct, albeit to varying degrees. Whether the recent merger of Xstrata and Glencore will have any legal consequences with regard to the Tampakan Project cannot be determined at the time of writing this HRIA.

The first project activities already started in the early 1990s, when the Philippine subsidiary of the Western Mining Company (WMC) began its explorations in the Tampakan area. A Financial and Technical Assistance Agreement (FTAA) was granted by the Philippine government in 1995. It authorized WMC to conduct large-scale exploration, development and commercial exploitation. In 2001, the Department of Environment and Natural Resources (DENR) approved the transferal of the FTAA from WMC to SMI. In 2002 Indophil Resources NL, from Australia, acquired stakes in the project, while the following year, Xstrata Copper entered into an Option Agreement with Indophil Resources NL, enabling Xstrata Copper to gain its share of controlling equity interest and thereby management control of SMI in 2007.

Key Challenges in the Tampakan Context

Indigenous Rights and the Mining Industry

A key area of concern regarding the Tampakan Project is the situation of indigenous communities and the effects mining projects have on their lives. Indigenous communities of the Philippines have retained traditional habits to various degrees. For instance, traditional governing structures in indigenous communities usually differ from the modern nation-state system. The traditional economic activities of these communities usually differ from those of the population's majority, too. The most important law to secure the right of indigenous communities to self-deter-

mination, including the right to their traditional lands, is the IPRA. It mandates that indigenous communities have to give their free, prior and informed consent (FPIC) when any new projects are likely to significantly affect their territory; IPRA also incorporates the indigenous concept of land ownership. Furthermore, Departmental Administrative Order No. 2 of DENR allows indigenous communities to receive titles of ownership to their land, which has been granted to areas affected by the Tampakan Project as well.

The differences in conceptions of land ownership between indigenous and non-indigenous cultures and communities constitute one of the main sources of conflict in relation to mining projects. Mining companies require large sections of land for their operations, which have very often been the homes of the indigenous communities. Resettlement of communities is the consequence, a process through which indigenous communities are removed from the land that constitutes the basis of their livelihoods and an important component of their culture. A further source of conflict is a large information asymmetry between mining companies and indigenous communities. The National Commission on Indigenous Peoples (NCIP) is the government body which should protect and represent the interests of the indigenous communities in the Philippines. However, it does not have the capacity necessary to adequately fulfill its task. As a consequence, there is a high level of frustration among indigenous communities and a glaring imbalance between indigenous and non-indigenous political interest representation.

As a result of these challenges and disagreements, indigenous communities have engaged in protests against planned mining projects and have at times also employed violent means. Often, these protests have been forcefully suppressed, adding to resentments against mining projects and creating a tense environment prone to further escalation of conflict.

Nevertheless, indigenous groups also carry strong hopes that mining projects will bring employment and development, especially where communities are neglected by public services and development programs.

Environmental Impacts

Potential negative environmental effects of mining projects range from the destruction of forests over soil erosion and air pollution to a loss of biodiversity. Such developments often have significant negative impacts on populations living in the surrounding area, but effects may also be more far-reaching.

Interviewees emphasize their fear of water shortages and water pollution if the Tampakan Project becomes

operational. This fear is based on various assessments identifying potential negative consequences that mining can have for the environment, also in the Tampakan case. SMI is introducing mitigation measures, which are to prevent such negative effects.

Security Situation

The security situation surrounding the Tampakan Project is precarious and, hence, the safety of the population in the region is at risk. Various brigades of the Armed Forces of the Philippines have been deployed in the area, mainly as counter-insurgency forces against the communist party's militant wing – the New People's Army (NPA), which has committed attacks in the region. Increasingly, the military is tasked to protect mine sites from attacks related to the NPA and other armed groups in many regions of the Philippines, an issue which has also affected the Tampakan Project. The KITACO Task Force is the second official armed force operating in the area. It consists of personnel from the military and from the paramilitary Citizens Armed Forces Geographical Units (CAFGU). It was created by the three municipalities of Kiblawan, Tampakan, and Columbio as part of the project "KITACO Growth Area" to increase peace and security and foster development as well as private investments.

The armed personnel present in the Tampakan area have greatly influenced the atmosphere in the region. In several interviews, the effect of a feeling of greater security thanks to the armed forces' presence was confirmed. However, some indigenous communities reported that the patrolling of soldiers around the communities induced fear because they partly perceived the troops not as their protectors but as a threat to their security since they had been deployed to protect foreign investments. The involvement of the KITACO Task Force in several killings of mining opponents and their family members further fuels concerns as interviewees attribute the conduct to the allegiance of the Task Force to SMI, which also contributes to their financing. Moreover, some members of the indigenous communities have resorted to violence in their opposition to the Tampakan Project. The consequences of these antagonistic dynamics are far-reaching. The conditions foster the militarization of the area, as violence begets violence and tensions heighten. Such circumstances easily lead to the violation of, amongst others, the human rights to life, liberty and security of person.

Human Rights in Focus: Analyzing Core Subjects

The core subjects of this analytical part are: 'Information and Participation', 'Grievance Mechanisms', 'Livelihoods', 'Health', 'Education', 'Culture', and 'Security'.

Information and Participation

There are no comprehensive information policies by LGUs and national government authorities with regard to the Tampakan Project. Among government officials, there is a strong recourse to and dependency on information provided by the company. The national government authorities are not actively engaged in information processes.

On the municipal level, there is little data available on how LGUs provide information and possibilities for participation in the context of the Tampakan Project. It seems that such policies are very limited and not systematic. Neither do people interviewed consider information by the municipality as objective and trustworthy. This perception is increased by the fact that the Mayors of both Tampakan and Kiblawan have sent petitions in support of the mine to the President of the Philippines, which – in the view of most interviewees – puts the impartiality of information by these authorities into question. The Mayor of Tampakan is also a sub-contractor of SMI, so there is a conflict between his public function and his private interests, which increases distrust.

On the provincial level, we find that the Governor of South Cotabato actively promotes the view that a more balanced information policy is required to give public authorities and communities the possibility to evaluate the Tampakan Project. The Governor had organized a large public meeting in Koronadal in 2011 which was attended by several thousand people and in which both company and critics were able to present their views on the project and on related risks. However, this was the only public meeting in which some of the presenters were not funded by or otherwise associated with the mining company.

The company itself has presented a comprehensive stakeholder engagement program and provides information in public meetings. However, it is a particular aim of these meetings to reach social acceptance for the project. This raises the question how independent and balanced the information is and how rules for consent in good faith will be followed. We therefore question to what extent meetings allowed for a balanced presentation and discussion of risks and opportunities related to the project. When comparing the company statements in the Environmental and Social Impact Assessment (ESIA) and recent Sustainability Reports with the views of interviewees, we gain a rather mixed picture, and several uncertainties on the level and quality of information and possibilities for participation remain. Different perceptions exist among communities regarding the adequacy of information provided. While some people feel well-informed, others complain about a lack of information provided by SMI and/or government authorities. It seems that the character of parts of the stakeholder

engagement was unfamiliar to many participants and did not clearly convey to local stakeholders how they could make their voices heard. Critical irrigators complain that their questions regarding water-related risks had not been answered by SMI. Other interviewees emphasize that the form and content of SMI meetings were unsatisfying. We also encountered discontent with the fact that questions by stakeholders were collected by representatives of the company but no answers were provided at these assemblies. Public statements by SMI on its information policy contradict these views.

Free, Prior and Informed Consent by Indigenous Communities

Besides general mechanisms for information and public participation, the Tampakan Project requires an FPIC by affected indigenous communities for each new phase which includes a different quality of impact on the ancestral domains. So far, the main step, for which the first FPIC process was needed, was the beginning of the exploration phase, before the Principal Agreements in the 1990s were reached. The critical step that is due by the time of writing concerns the consent for the operational phase.

While NCIP confirms that all Principal Agreements with indigenous communities in the 1990s were based on FPIC processes, transparency of these processes is very low. Furthermore, as interviewees explain, the first FPIC processes did not entail any information on the potential consequences of open-pit mining. Although the company had not yet decided on a method at that time, full information would also have included the goal and purpose of the exploration phase. A lack of documentation of the first FPIC process and the apparent limitation of concrete information on the purpose of the exploration phase raise doubts whether we can qualify the consent – assuming it was given by all communities affected – as informed.

Another FPIC process will have to be conducted with regard to the operational phase of the project in the near future. We cannot assess the quality of this process at the time of writing. However, we see a fundamental contradiction between the notion of ‘free’ consent and the fact that basic educational and health services in the area are now being provided by the company and depend on the future of the project. To fulfill its contractual responsibility, the company has in fact taken over state functions by offering basic services and thus ensuring the realization of social, economic and cultural rights. While the development programs have direct positive effects for health and education, the risk that the realization of specific human rights is highly dependent on the future of the mine would have to be mitigated before free consent is possible.



Photo: Bobby Timonera

Grievance Mechanisms

State capacities to handle judicial complaints based on the rule of law are very weak. Furthermore, non-judicial or quasi-judicial complaints mechanisms anchored in NCIP or CHRP are underdeveloped. CHRP has a mandate to further develop such mechanisms, but in order to achieve this, there is a need to give much more weight to this institution through funding and expertise.

The focus of our analysis rested on the private grievance mechanisms established by SMI, which cannot replace the state system but which are at least present and can deliver important functions. However, their assessment is challenging and essential questions remain. The main reason for this is that information provided by interviewees does not correspond to information given by the company. Furthermore, a central grievance mechanism was only established by SMI in 2012.

Against this background, we can only draw preliminary conclusions. We employ the levels of legitimacy, accessibility, predictability, equitability, rights-compatibility, transparency, and dialogue & engagement as evaluation criteria. Given the long time that SMI has been active in the area without a formal grievance mechanism and the level of frustration that is voiced in interviews about possibilities to seek and receive responses to queries and complaints from SMI, we conclude that at the time of writing there is a dysfunction in the grievance system following the assessment criteria. However, its quality might positively change with the newly established system.

Livelihoods

The Tampakan Project has already influenced people's livelihoods in various ways. Here, we focus on those aspects that have been brought forward in interviews. These are potential and actual economic gains, employment opportunities, food and water, land and resettlement as well as infrastructure.

SMI has already employed a number of people from local communities, has initiated job programs and contributes to public initiatives which are to support households. Furthermore, SMI has already directly contributed to community development. With regard to their economic situation, some of the B'laan people interviewed reported that the company had widened their employment opportunities through scholarships, allowing them to gain secondary education and job training.

During the operational phase, the project plans furthermore foresee regular royalties to host barangays, and, above all, the government will gain from tax income. However, we cannot assess to what extent particular groups will benefit from this in terms of the realization of their human rights. Significant tax reductions, enshrined in law for the mining sector and aiming to attract Foreign Direct Investment, might also considerably limit government income from the mining sector.

Parts of the local population could also benefit from higher incomes and being able to afford more or better food. However, it is uncertain which groups and how many will enjoy sustained advantages from this, given that sus-

tainable job opportunities for the local population will be limited. Furthermore, at present, a prime source of food in the area is subsistence farming, which primarily depends on available land. Experience from other large-scale extractive industries projects all over the world also show that, in fact, prices for the local population rise due to an increase in demand, effected by the influx of large numbers of people (workers from outside, people looking for jobs, delivery of services etc.) into the area.

Possible future economic developments associated with the Tampakan Project predominantly constitute human rights risks for the most vulnerable groups. While improvements in the local infrastructure and job opportunities are likely positive effects, sustainable job opportunities for the local population are rather limited. If the project proceeds, about 6,000 jobs are expected to be created, but only during the construction phase (for about three years). Beyond this, about 1,790 jobs are projected for the operational phase (for about 17 years). Some interviewees doubt the sustainability of employment opportunities and are worried about the prospects for the next generations after the closure of the mine.

Serious negative impacts are to be expected regarding the preservation of current indigenous livelihoods. Resettlement as well as environmental degradation could deprive them of their sources of food, traditional medicine and water supplies; the basis of their culture may be no longer accessible to them. These negative impacts are also potential sources for a rise in the amount of violent incidents where affected communities seek an outlet for their discontent and frustration. The escalation threshold in the area is already at a low point.

The Tampakan Project may also impact on the realization of the rights to food and water, particularly for the indigenous population in the area and for farmers in the lowlands. The major risk is seen in the access to clean water during the operational phase of the mine and the potential pollution of local streams through waste particles coming from the mine, leading to crop failures. Siltation of streams, rivers and lakes in the lowlands as a consequence of water shortage is mentioned as a further threat. Interviewees, especially local irrigators, highlight their high dependency on the company in terms of clean water supply once the project would be operational. Interview partners also point to the fact that even now, water sources become scarce in times of drought and that a further decrease in water levels would hence have dramatic effects. Farmers see their livelihoods at risk through possible water shortages or contamination.

SMI responds to water-related concerns by pointing to the measures to mitigate any possible negative effects outlined in their Environmental Impact Statement (EIS)

and their ESIA. With regard to water supply, SMI states that modern methods would result in a significant reduction of fresh water usage as 70% of the project's needs would be met with recycled water. However, the problem that mitigation measures could fail and water pollution could occur is not considered as a possible effect of the mine. A concern voiced by irrigators in response to mitigation plans by SMI pertains to the location of the freshwater dam. Interviewees point out that to them, the planned location – close to the mine and its waste storage facilities – seems unsuitable. Instead, the dam should be relocated closer to the tributaries.

Health

The presence of SMI presents both risks and opportunities for the human right to the highest attainable health standards for affected communities. Our interviews confirm that local residents welcome the improvements in healthcare services provided by the company, yet fear detrimental effects through environmental damage once the project commences. The responses provided by SMI do not seem to allay such fears and also lack information on issues crucial to the communities, especially the potential indirect effects of the mine on their health, caused by consequences for agricultural production and sufficient food and water supply.

Furthermore, basic health services by SMI bear the danger of relieving the local, provincial and national government of their human rights duties. The private provision of basic health services might also be unsustainable as it is dependent on the future of the mine and SMI's corporate strategies. Furthermore, the provision of health services through SMI could undermine scope for a free consent in the context of the upcoming FPIC process. First and foremost, dependency on the company for the delivery of services to meet basic needs points to a severe government failure that impedes the realization of human rights.

Education

SMI's services play an important role in the provision of education in the area. This presents a great opportunity for communities as more students are enabled to receive an education and adults improve their qualifications. Furthermore, erecting schools constitutes an asset that would still be advantageous to the communities once the project has been completed. Increased levels of education may offer students more and better chances on the job market and are likely to thus also support the provision of good education to the next generation.

However, there are also several risks inherent in the education programs. In particular, the communities would heavily depend on the presence and support of SMI. Thus,

risks are comparable to what we find in the field of health. They particularly involve the long-term status of SMI's education programs. Here, plans are to be made by the LGUs regarding the continuation of these programs after SMI completes or withdraws from the Tampakan Project. If a departure of SMI were to cause an end to the programs installed through their funding, unemployment of teachers, school drop-outs of former scholarship recipients, lack of teaching material, an overall deterioration of the quantity and quality of education as well as rising social discontent could ensue.

Furthermore, other areas of social and economic development have to evolve alongside the education sector. The students who are now gaining a better education and job qualification also need suitable opportunities on the job market to ensure that disillusionment and discontent do not abrogate progress made through education. This issue points again to the responsibilities of the LGUs as they have a duty to align the public education system with other state policies, such as employment and economic development.

Culture

If the project proceeds, there will be a high risk of cultural loss and violations of cultural rights of the indigenous people affected by the mine. Thousands of members of the B'laan communities would be relocated and thereby lose their land, which interviewees describe as the backbone of their everyday routines, their religious traditions, and their source of food.

With very few exceptions, interviewees emphasize that the traditional linkage to their ancestral domains is essential for their lives. The persistent way in which interviewees referred to the belief that they might be able to stay on their land partly reflected an anxiety to be relocated outside the ancestral domains, but it also illustrated a lack of concrete information on the actual effects of an open-pit mine of this size once it was operational. However, a few interviewees explained that they would accept a loss of their land if SMI were to offer appropriate compensation and allocate comparable new land.

Interviews revealed that fears about the violation of the integrity of sacred places, especially burial grounds, had already led to violent conflicts in the B'laan area. According to B'laan belief, the deceased members of a community need to be protected in their resting places. Nevertheless, a few interviewees emphasized that even sacred places could be compensated for, but they would require a higher amount of compensation. Some interview partners also proposed that SMI could relocate the burial grounds. Most interviewees, however, explained that there is no possibility to relocate or otherwise compensate for the cultural loss

linked to sacred places. Moreover, they complained that the social cohesion between and within communities would most probably further diminish, once relocation took place.

Security

The militarization of the area and the conduct of parts of the regular and paramilitary armed forces have led to serious human rights violations and created a climate of insecurity among parts of the indigenous communities in the Tampakan area. Thus, the indigenous communities as well as employees and contractors of SMI have to fear for their lives. Not only are their human rights threatened, but resentments between groups of people and individuals are fuelled, too. First and foremost, responsibility for (potential) human rights violations deriving from this lies with the state. Also, the NPA and some indigenous community members are contributing to an increase in violence and thereby to a violation and abuse of human rights in the area. Furthermore, the indigenous communities endure high psychological pressure caused by attacks from armed opposition groups and by the continuous presence of state-controlled armed forces. These negative dynamics have already led to the violation of the human rights to life, liberty and security of person, and provoke violent backlashes. Additionally, other human rights, such as the right to food and the right to practice one's culture are, infringed upon. It is the state that bears the chief responsibility for these conditions since it is neglecting its duty to ensure that the human rights of all citizens are realized and that the conduct of its troops is compatible with human rights standards.

Identifying Key Problems and Shortcomings

Considering the positive impacts and hopes that people have in the mine in concert with areas of risk, we find five main predicaments for human rights:

Key Predicaments	
1.	Incoherent Information and Lack of Meaningful Participation (Deficiency of FPIC I)
2.	Dependency of Basic Services on the Future of the Project (Deficiency of FPIC II)
3.	Imbalanced Power Relationship Between SMI and Affected Communities
4.	Insufficiency of Established Grievance Mechanisms
5.	Accumulating Grievances and Triggers of Violent Conflict

Conclusion

The overall finding of the assessment is that the Tampakan Mining Project has significant impacts on the human rights situation in the area. The context conditions in the region are precarious with regard to a project of such magnitude. The project is embedded in a context which is characterized by a combination of prevailing poverty, a high level of marginalization and discrimination against indigenous groups, especially in terms of basic services, government failure to meet its human rights duties, and an overall volatile conflict situation which is interrelated with other factors mentioned. This amounts to a scenario in which a responsibly operated open-pit mine of such large scale does not seem feasible. Philippine government authorities bear the major responsibility for this fragile situation in the Tampakan area.

Taking the standards laid down in international human rights treaties as criteria, it is obvious that the Philippine government is violating its human rights obligations at all three levels of respect, protect and fulfill. Furthermore, failures at the different levels intermingle and mutually reinforce each other. They are particularly drastic with regard to the right to life and to economic, social and cultural rights of indigenous communities. Due to an absence of effective development policies and the delivery of social services in the indigenous communities in the Tampakan area, basic rights fulfillment in these communities now depends on a private company and follows its terms and conditions. Furthermore,

there are strong impediments to the realization of the rights of indigenous peoples to self-determination and to FPIC.

SMI and its major shareholders, Xstrata Copper and Indophil Resources NL, as well as Xstrata plc (now Xstrata-Glencore) also bear responsibility. Taking normative guidance on a more operational basis as a starting point, one can state that many of SMI's activities are in formal compliance with international standards. However, taking a more principled and comprehensive human rights approach by following the UN Guiding Principles, we conclude that human rights predicaments remain. Based on the concept of corporate human rights due diligence, an analysis of the country context needs to be the first step in any new company activity. Our analysis has identified essential flaws in the level to which SMI has taken the volatile context into account seriously enough. The volatile situation vis-à-vis the scope and reach of influence, power and information advantages of SMI leads to imbalances between the project proponent, government actors, and people affected, which are of such a high degree that the possibility to conduct large-scale open-pit mining in a way that is responsible from a human rights perspective does not seem feasible in Tampakan in the current situation.

Violent incidents and the potential for further violent conflicts interact with and add to these imbalances. Regular armed forces and paramilitaries deployed in the area have intensified frictions between those who have hopes in gaining from a potential mine and those who oppose the project. Thus, the prospect of the mine and the company's presence have triggered dynamics of militarization and the escalation of violence in the region.

Against the backdrop of this conclusion, further considerations can be made with regard to the extraterritorial dimensions of this project. Xstrata Copper and Xstrata plc as the controlling corporate units in this context bear a considerable responsibility for the human rights predicaments identified in this report. The UN Guiding Principles emphasize that it is crucial to what extent the leverage of a company allows for addressing human rights impacts. Given the high level control of SMI by Xstrata Copper and Xstrata plc, one can assume a high leverage of both companies.

The governments of Switzerland/ UK (Xstrata plc) and Australia (Indophil) need to consider their duties as well. Although the prime duties lie with the Philippine government as the host state, there is a strong imperative for the home state governments to assess and make use of their influence in order to improve the human rights situation in the interest of the most vulnerable groups affected by the project. It is beyond the scope of this report to assess this influence. We recommend this to be a subject of a further and separate assessment. ■



Photo: Strohscheldt/MISEREOR

1. Introduction

The Tampakan Copper-Gold Mine, if realized, would be the largest open-pit mine in the Philippines and one of the largest of its kind worldwide. Project preparations already began in the early 1990s, but the project still is in its exploration phase. The project proponent, Sagittarius Mines Inc. (SMI), a Philippine company which runs the project on behalf of its shareholders *Xstrata Copper*, *Indophil Resources NL* and *Tampakan Group of Companies*, envisages a start of operations in 2019.

Three main factors motivated the initiation of this *Human Rights Impact Assessment* (HRIA) as they make this mining project particularly precarious from a human rights perspective. Firstly, research and experience in many areas of the world have shown that the extractive sector is the industry which has been most linked to adverse human rights impacts (UN Human Rights Council [UNHRC] 2008a: 9). While some see mining as an opportunity to boost economic growth and development, others consider it to be unsustainable and destructive for the population and the environment, leading to manifold human rights violations. Especially open-pit mining has often been criticized for its devastating effects on nature and people in affected areas. In the Republic of the Philippines, which is rich in ores and other natural resources, this controversy has led to various political struggles around mining. Such controversies have also characterized the situation in the proposed mining area in Tampakan. Many hope the project will bring sustainable economic gains. But the mining plans include the removal of large sections of pristine rainforest as well as the resettlement of approximately 5,000 people¹ who mostly belong to the B'laan tribe, indigenous communities inhabiting the forested highlands and depending to a large degree on their land. It is not only their source of food and medicine but also an essential part of their cultural identity. Besides the indigenous population in the area, other communities situated close to the mine site also fear to be affected by the operation. These especially include rice farmers and irrigators who operate existing irrigation systems in the lowlands of the Tampakan region. They depend on fresh water supply from the envisaged mining area and fear pollution and depletion of water sources through the mine.

Secondly, the location of the mining project poses specific risks of adverse human rights effects. The project is situated in southern Mindanao, an area which is not only characterized by a very distinct and sometimes hazardous

natural environment, including active volcanoes, underground stratovolcanoes, and a frequent occurrence of typhoons and earthquakes, but is also affected by political and oftentimes violent conflicts (cf. *Chapter 4*). This situation has recently escalated as several cases of killings of indigenous people by the military and fatal ambushes against security forces occurred. The civilian victims had publicly opposed the mining project or were family members of activists against the mine. Some of the activists have also become involved in criminal and violent activities which have contributed to an intensification of political struggles and a further militarization in the region. This volatile situation therefore calls for a sensitive approach to any larger business project, especially a controversial mining project. It also renders an assessment of the human rights situation crucial and demands a conflict-sensitive perspective.

This is closely linked to the third factor that led to this study. So far, SMI itself has not carried out an HRIA. The company conducted an elaborate Environmental Impact Statement (EIS) and an Environmental and Social Impact Assessment (ESIA), including a Health Impact Study. It is also carrying out further assessments at the time of writing. Company publications have addressed many issues of importance to the project area and also implicitly addressed several human rights concerns, such as the right to sufficient and clean water. Yet, an explicit focus on the human rights situation and possible implications of the project from a human rights perspective is lacking. This report intends to fill this gap.

1.1 HRIA in Context: Evolving Standards on Business and Human Rights

The *UN Guiding Principles on Business and Human Rights*, endorsed by the UNHRC in June 2011, provide the first internationally accepted guidance on how to prevent and address “the risk of adverse impacts on human rights linked to business activity” (UNHRC n. d.). The Guiding Principles are based on the policy framework developed by the former UN Special Representative on Business and Human Rights, John Ruggie, presented in 2008 (UNHRC 2008a).

Against the background of the internationally recognized demand for addressing human rights risks in business contexts and the endorsement of the UN Guiding Principles, a debate on the necessity to develop tools and methods to identify potential and actual impacts of business activities on human rights has evolved during the last years.

¹ Number according to operating company (SMI n.d.(b)).

While HRIAs have long been discussed in the context of state policies, their design and application in relation to private business is a rather novel undertaking. In the last years, various guidelines and tools have emerged in this field. International organizations, large corporations and civil society organizations have begun to develop distinct approaches to HRIAs (cf. Hamm & Scheper 2012).

Particularly in the mining industry, HRIAs have found resonance because mining operations often involve aspects which are expected to have negative effects on human rights, such as resettlement of communities or environmental degradation. Scientists, civil society organizations, consultancies, mining companies and mining industry associations have begun to give guidance and create instruments specifically designed to deal with the human rights impacts of mining projects.

However, existing approaches to HRIAs differ substantially in scope and purpose. It is therefore important to delineate the goal and approach followed in this report. HRIA instruments in the business context are often developed primarily as management tools. They focus on the company's viewpoint and on how to integrate human rights into business processes. While this is an important endeavor, we follow a different approach. First, closely linked to the UN Guiding Principles, we consider it crucial not to limit the assessment to the perspective of the company, but to take the complexity of the local and regional context into account, especially dynamics of violent conflicts, and to integrate both the role of the state and of the company. Second, the purpose of this HRIA is to focus on the perspective of the most vulnerable groups. It is inevitable that this human rights approach is normatively oriented. It does not offer a comprehensive analysis of all impacts of the Tampakan Project since not all positive or negative impacts of the project are relevant from a human rights perspective. Thus, it is not the goal of this assessment to provide a comprehensive account of the company's position or of all possible attitudes towards the project. The report asks which human rights impacts the planned project has or could have on communities affected – especially the most vulnerable groups – and which aspects might trigger or aggravate existing conflicts in the area.

The report is based on a desk study and a three-week field trip to the Philippines where data was gathered through qualitative interviews. Interview partners included affected communities, company representatives, local and national civil society organizations, local and national government authorities, as well as the Commission on Human Rights of the Philippines (CHRP). The selection of interview partners in affected communities reflects our human rights approach: While interviewees have both positive and neg-

ative attitudes towards the Tampakan Project, they do not constitute a representative average of the population in the area. The goal is to include those individuals who have serious concerns with regard to their human rights situation and are in a particularly vulnerable position towards the project proponent. By evaluating this data we seek to shed light on the main human rights issues linked to the Tampakan Project.

1.2 Structure of the Report

In *Chapter 2*, we outline our approach to this HRIA and our methodology in more detail. *Chapter 3* then presents the international normative human rights framework against which we analyze the situation. We then introduce the context in which the project is situated. Starting off from a brief general background of the Philippines and Mindanao in *Chapter 4*, we describe basic characteristics and controversies of mining in the Philippines in general and the Tampakan Project in particular in *Chapter 5*. *Chapter 6* introduces three key challenges which affect the Tampakan Project, namely the relationship between indigenous rights and mining in the Philippines, environmental impacts of mining projects, and the security situation surrounding the Tampakan area. *Chapter 7* then discusses human rights conditions in detail. We divide this analysis into seven sections, focusing on 1) information and participation, including Free, Prior, Informed Consent by indigenous communities; 2) grievance mechanisms; 3) livelihoods; 4) health; 5) education; 6) culture; and 7) security. Drawing on both desk and interview-based research, the relevant characteristics of the project environment, the project itself, the role of the government, steps already taken by the company as well as possible future risks and opportunities posed by the project are investigated in regard to their effects on the human rights situation in the affected area. Core subjects 1) and 2) represent central process rights. These rights aim to empower affected people and play a cross-cutting role for the other themes. Also, conflict potentials are treated in all issue themes as they form an important lens for understanding the dynamics linked to the project. *Chapter 8* links the results drawn from the preceding analysis and fleshes out the main human rights aspects and predicaments. In *Chapter 9*, we draw the principal conclusions.

1.3 Limitations

As human rights are always embedded in a complex and historically grown social setting, it is extremely challeng-

ing to determine how a specific project may affect them. Accordingly, in this study, we do not claim to present a fully exhaustive picture. Instead, we set out to identify the most pressing issues which preoccupy the affected communities, and to assess these by incorporating different views and evaluations of the situation. Yet, the complexity of the issues does not constitute the only restraint we experienced. The HRIA was carried out in approximately eight months, including the field trip to the Philippines. In order to gain a complete picture of the context, the history, the different relationships, the variety of cultural traditions and the stakes of the different actors involved in and relevant to the project, this is of course a limited timeframe. Hence, choices also had to be made in regard to our interview partners, as not every community could be visited. In line with our human rights approach, we have chosen to focus on those who seem to be most vulnerable or fear to be most severely affected in negative ways by the project. Yet, through group interviews including representatives from different

communities, we have gained insights into a wide variety of perspectives. In terms of transparency, the report is limited by our decision to keep interviewees anonymous – except for public authorities whom we have interviewed in their official state functions. The security situation at and in close proximity to the mine site further limited our research. As there was the worry of violent clashes at the time of our stay, site visits and inspections had to be limited to a minimum.

Despite these constraints, we are convinced that this HRIA provides essential insights into the human rights situation surrounding the Tampakan Project as well as the dynamics the project presently has and may have in the future, which impact the realization of human rights. Hence, conclusions and recommendations provided at the end of this study offer guidance. It is important to note that we regard this only as a starting point for further human rights- and conflict-related documentation – particularly if the mining project is continued. Even if it is not continued, major human rights challenges will remain to be addressed. ■

2. HRIA Concept and Method

HRIAs are conducted to reveal the impacts policies, corporate activities or a particular project have on people's human rights conditions, meaning the status quo and the future possibilities to realize human rights of affected people. There are various approaches to conduct impact assessments and to measure the extent to which human rights are realized (Landman 2006). In the following, we present our understanding of impact assessments in general and of HRIAs in particular, what we intend to cover in this study and how we approach this goal.

2.1 A Process-Oriented Approach to Impact Assessments

We can distinguish between various approaches to impact assessments. Often, they are understood as means to prove the existence or non-existence of impacts. The assumption then is that a fully objective measurement of outcomes and/or impacts of a given intervention is possible. It usually involves a very lengthy, longitudinal study and a process of comparing a control group to an impacted sample group. In the case of the Tampakan Project, this study would require an assessment starting in the early 1990s, when activities of the Australian-based company Western Mining Corporation (WMC) began in the area. Therefore, such an approach

does not constitute a feasible option for this HRIA. We instead chose an approach which focuses on interpreting processes in a given context. The report concentrates on understanding key developments related to the project that are already affecting human rights conditions and likely impacts in the future. This allows for a much shorter time period of study and accepts the researchers' limitations in attributing impacts solely to the particular project. In the Tampakan context, various human rights-related issues would exist without company influence, but as these issues interact with the mining project, they can be neither neglected nor clearly separated from the project. The assessment therefore does not attempt to artificially isolate the company's impacts but interprets the latter in a given complex setting.

2.2 HRIA Concept in the Business Context

Instead of investigating potential human rights violations on a case-by-case basis, our assessment represents an aggregated analysis and focuses on two aspects: 1) on the conditions required to allow for the realization of human rights and 2) on compliance with duties and responsibilities by the state and the companies involved. Our interpretive, process-oriented approach attempts to establish to what

extent the Tampakan Project leads to a “more” or a “less” of human rights fulfillment. Although this leaves uncertainties with regard to *individual* cases of actual or potential rights violations, it allows us to clearly point out human rights predicaments as well as duties and responsibilities of the main actors involved.

We identify human rights impacts in a qualitative way, cataloguing key issue themes and classifying needs for improvement. One intention of the assessment is to identify current and possible future impacts – in case the project plans are realized. Impacts of the Tampakan Project might also be indirect. One of the most important analytical fields in the Tampakan context is the characterization of violent conflicts and potentials for further escalation. These are part of a broader, historically grown context, and therefore the company currently implementing the venture cannot solely be blamed for their existence. However, SMI and other companies involved have to take them into account in their planning to act with due diligence as part of their responsibility to respect human rights. We will further elaborate on this requirement in the following section.

Another important element of our approach is to give room to different and even conflicting voices and to offer a comprehensive picture of what this project might bring about in the future for the communities affected. The reason is that human rights impacts are difficult to isolate as they are always interdependent, and different human rights may conflict with each other. In this vein, it is also important to emphasize that human rights violations cannot be compensated through positive, voluntary activities by the company in other fields (UNHRC 2008a: 17). We therefore do not document all activities and impacts of the company in the area, but we concentrate on the most vulnerable groups for which human rights infringements are most likely to occur.

Moreover, the timing of the study also influences the analysis. Our assessment takes place before any actual mining operations have commenced; therefore we cannot give a full-fledged picture of human rights impacts that the potential future mining operations could have. However, we are in a situation where company activities linked to explorations and preparations of the intended Tampakan Project have been carried out for about 20 years. Therefore, our assessment is primarily ex ante, including *ex post* elements where impacts are already visible. Against this background, we emphasize that the assessment constitutes a qualified portrayal of the situation at a particular point in time. Ideally, however, it is one component in a potentially longer and/or more in-depth assessment and monitoring process of the Tampakan Project. Such an assessment would best be carried out by an independent local or national organiza-

tion throughout the whole project life-cycle. The UN Guiding Principles on Business and Human Rights accordingly refer to the fact that human rights due diligence requires *ex ante* investigations, but also a monitoring during the implementation of a project or a business relationship.

2.3 Assessment Procedure

Against the background of our approach, one key methodological element is the identification of human rights-related issues of the mining project and their potential impact on the realization of human rights in the project region. This process is based on a transparent use of data and lines of argumentation so that a critical review of our conclusions is possible. We proceed with the assessment in a three-fold process.

2.3.1 Normative Framework for Assessment

The framework against which our data is assessed builds on the most appropriate and applicable documents of the international human rights regime. First of all, we refer to international human rights treaties, above all the *International Covenant on Civil and Political Rights* (ICCPR) as well as the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Central documents in respect to private corporations are the UN Guiding Principles on Business and Human Rights and the OECD *Guidelines for Multinational Enterprises*. For operational guidance, we also refer to the *Performance Standards* of the International Finance Corporation (IFC). The *Voluntary Principles on Security and Human Rights* provide further specific standards for extractive industries with a focus on companies' security arrangements. Finally, SMI commits itself to the Xstrata plc corporate Sustainable Development Framework. This offers a useful orientation on the company's own normative commitments (cf. *Chapter 3*).

2.3.2 Data Collection and Interviews

The process of data collection includes a pre-selection of core subjects based on the normative framework and a literature review on human rights issues in mining areas in general, the Tampakan region as well as available information on the project. Based on this, we derive major human rights at stake. These presumptions are then confirmed or revised through interviews and document analysis. The data collection phase included a three-week visit to the project area. In this phase, 27 interviews were conducted which were predominantly group interviews. Partly, these

were smaller expert groups, and partly larger community groups of 15-60 people. All interviews were carried out in a qualitative manner. In community meetings, interviews were conducted as open, narrative processes in order to learn about the general views, hopes and fears of people affected. The open interview style allowed us to identify the topics most relevant to people affected. As it was not possible to conduct interviews in all affected communities, the focus in our selection of interviewees rested on those groups whose human rights would most likely be affected by the project, those who have voiced serious concerns with regard to their human rights situation and those who are in a particularly vulnerable position vis-à-vis the project proponent.² From recurring issues in the interviews, we partly derived our structure of analysis in *Chapter 7*. Where interviewees were chosen because of their professional involvement, i.e. government officials and SMI representatives, interviews were semi-structured, based on focus questions (for a list of interviews see Annex II). Except for public officials, we keep the identity of our interviewees anonymous throughout the report for their protection.

Initial focus questions were developed based on the literature review on the project and on human rights impact assessments in the context of business projects. We used the *Human Rights Compliance Assessment* (HRCA) tool by the Danish Institute for Human Rights, and the *Human Rights Impact Assessment Approach* by NomoGaia, a U.S.-based non-profit organization specialized in the field of HRIA. We identified both instruments as offering helpful experience and guidance in comparable sectors, but found that none of the tools were directly applicable to the Tampakan context and the specific conditions of our study.³ We therefore decided to use the HRCA as an internal checklist for designing qualitative interview questions. In addition, we matched our questions with particular rights areas as developed by NomoGaia, according to topics most relevant based on our desk study of the Tampakan Project. As a result of this process, nine key focus topics, each with sub-questions for particular rights areas, were chosen to

structure the interviews (in case of semi-structured expert interviews) or were used to evaluate information given (in open interviews):

1	General information on interviewee;
2	Personal understanding/knowledge of the Tampakan Project;
3	Interactions between interviewee and SMI/ the Tampakan Project;
4	Effects on interviewee by project-related activities as of today;
5	Action by interviewee in respect to the Tampakan Project;
6	Local or national government involvement that has affected or is related to interviewee;
7	Perceived changes with regard to the security situation;
8	Expected changes for interviewee in the future;
9	Expectations, hopes and concerns with regard to future government and company activities.

2.3.3 Evaluation, Interpretation and Consultation

This phase involves the re-evaluation of the key issues identified in the previous phase according to the data collected and guided by the normative framework and the observations made in the area.⁴ One key element of the evaluation phase is a prioritization of issues and concerns that are relevant in the current state of the project. We focus on those human rights aspects which can be clearly identified at this stage of project activities. This means that potential human rights problems in the future, if the project proceeds as planned, might be more severe in comparison. Furthermore, this final phase involves a stakeholder consultation on a draft report in order to check back facts and receive recommendations for revision. For practical reasons, we decided to limit this consultation to five key stakeholders: the project proponent (SMI), one major political opponent on the national level (Tampakan Forum), one opponent on the local level (Social Action Center Marbel), CHRP and

² However, it has to be noted that the manner of data collection and the nature of the data do not allow a systematic disaggregation of impacts in terms of gender and age differences.

³ While the HRCA offers a wide range of concrete questions, it has been developed primarily for companies which assess their own activities. Affected communities can, however, have an entirely different perspective and may lack information on details of company activities. Also, due to context specificity, it would have been inadequate to assess aspects through an ordinal scale of the tool's multiple-choice design due to the complicated context with its various conflict potentials.

⁴ Phases two and three are presented here as separate in order to offer analytical clarity. Yet, in practice, these phases are closely inter-related in a circular process.

the German Institute for Human Rights. The feedback then informs the revision process. A final report is presented in the Philippines and in Switzerland for a further

opening of stakeholder consultation and public debate. In the Philippines, this stage is closely coordinated with CHRP. ■

3. Business and Human Rights: The Institutional Framework

The international human rights system is based on the state duties to respect, protect and fulfill human rights. The state is the prime focus in the human rights perspective. State duties derive from the *Universal Declaration of Human Rights* (UDHR) and succeeding, internationally binding treaties, most importantly the ICCPR and the ICESCR.

The UN Guiding Principles on Business and Human Rights are the main international foundation for HRIAs in the context of business projects. The Principles constitute the first internationally recognized guidance on how to address “the risk of adverse impacts on human rights linked to business activity” (UNHRC n. d.). The Principles stand alongside other internationally recognized standards. They re-endorse and specify the state duty and complement it by taking the role of transnational enterprises into account. In the following, we provide a brief overview of the Guiding Principles and complementing international guidelines which together constitute the normative framework underlying this HRIA.

3.1 The UN Guiding Principles on Business and Human Rights

The Guiding Principles are grounded in the policy framework “*Protect, Respect and Remedy*” developed by the former UN Special Representative for Business and Human Rights, John Ruggie. In his interim and final reports, the Special Representative underlines the primary obligation of the state to protect human rights as laid down in the international human rights regime. The first pillar of the policy framework hence describes the *state duty* to protect human rights. In order to further specify state duties under the conditions of economic globalization, the Special Representative elaborates on particular areas in which states shall contribute to a global economy guided and limited by human rights norms. Following Ruggie, governments shall strive to achieve greater policy coherence and effectiveness; they shall ensure respect for human rights in all business activities through an appropriate legislation,

regulation and access to remedies, and foster a corporate culture that respects human rights at home and abroad; they shall devise innovative policies to guide companies operating in conflict-affected areas; and they shall further examine the issue of extraterritorial impacts of companies headquartered in their territory.

The aspect of extraterritoriality has been widely debated. Since human rights duties have always been inherently linked to the state and its territorial borders, the transnational character of corporate activities forms a fundamental challenge to national governance and its impacts on human rights. Several international legal scholars and experts therefore interpret international law as to imply extraterritorial state obligations to protect human rights in cases where the home state of a transnational corporation has an influence on the corporation’s conduct abroad. They provide meaningful arguments for a legal obligation of governments to intervene and prevent companies based in their territory from causing human rights harm in other countries in cases where they are able to exert such influence. The *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* are increasingly gaining recognition as a standard in this regard. Although Ruggie does not explicitly support the view of a transnational legal obligation, he emphasizes strong policy reasons for states to prevent human rights infringements by companies abroad and to promote responsible conduct beyond their own borders.

The second pillar of John Ruggie’s policy framework constitutes a novelty in the international human rights framework. It emphasizes the *corporate responsibility* to respect human rights under the conditions of economic globalization. This distinct role of corporations in the framework reflects the power and impact of transnational corporate activities. One of the central claims is that all business shall be conducted with due diligence with regard to human rights impacts. This demand includes three aspects: 1) investigating the human rights situation in a country, 2) assessing possible negative impacts the



Photo: Bobby Timonera

business activity might have in this country context; 3) assessing potential complicity with negative impacts through business relations with other companies and state actors (cf. Hamm & Scheper 2012). The notion of due diligence therefore constitutes a central normative foundation of the HRIA presented here. It is important to emphasize that relevant impacts do not need to be solely caused by the project at hand. The central question is whether the company has leverage regarding direct or indirect impacts in the specific context.

The third pillar emphasizes the imperative of effective *access to remedy* for victims of human rights violations. Both the state duty to protect and the corporate responsibility to respect human rights include aspects of this third pillar as it comprises the requirement of grievance mechanisms for business-related human rights abuse at the state and at company levels which lead to adequate forms of remedy through “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.” (Office of the High Commissioner for Human Rights [OHCHR] 2011: 22)

The framework “Protect, Respect, and Remedy” and the UN

Guiding Principles mark the “end of the beginning” (OHCHR 2011: 5) of a fundamental revision of the international human rights protection system that has evolved throughout the last decades.

We refer to further international guidelines and corporate standards which provide useful orientation in the Tampakan context below.

3.2 The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are recommendations for responsible business conduct adopted by the OECD member states and eleven adhering states. They apply to the worldwide activities of companies headquartered in those states. In 2011, the Guidelines were revised for the fifth time since their first adoption in 1976. The revised version includes explicit and comprehensive recommendations on human rights. Although the Guidelines are voluntary for companies, all national governments within the OECD and the adhering signatories have agreed to promote them. With regard to the substance of human rights, the OECD Guidelines are in line with the UN Guid-

ing Principles. Yet, while the Guiding Principles constitute a framework with a specific focus on human rights, the OECD Guidelines include a wider spectrum of topics and also entail some more detailed requirements on an operational level. As one of the central demands of the OECD Guidelines, states are required to establish *National Contact Points* (NCPs) which shall offer information and an effective and independent complaint mechanism. Through the NCPs, anyone can raise complaints when companies are in breach of the Guidelines. Although the current lack of effectiveness of most NCPs has been much criticized by civil society organizations, their potential importance as grievance mechanisms with regard to transnational business activities is widely recognized.⁵

3.3 Relevant Sector-specific and Operational Guidance for Extractive Industries

3.3.1 Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights were created primarily as guidance for extractive and energy companies. Their aim is to balance corporate security arrangements and human rights concerns typically raised in relation to these sectors. The Principles are a set of non-binding rules that have been developed by a tripartite multi-stakeholder initiative. As of February 2013, 8 states, 12 non-governmental organizations (NGOs), 22 companies and 5 organizations with observer status participated in the Principles.⁶ They include provisions on:

1. consultations between companies, host governments and communities;
2. a proportionate use of force;
3. company engagement for the protection of human rights by their security contractors;
4. monitoring of progress regarding investigations into human rights allegations;
5. appropriate provisions on these matters in contracts;
6. review of the background of private security firms companies intend to employ.

Xstrata plc became a member in 2012. SMI also refers to the Principles as central guidance in its company policies

for the Tampakan Project and actively promotes them by offering trainings to its security personnel.

3.3.2 International Finance Corporation Performance Standards

The IFC Performance Standards offer guidance in the field of social and environmental impacts of business projects. They have significant influence on large projects worldwide and constitute an international benchmark, especially as many private banks have adopted them as part of their commitment to the so-called Equator Principles, an international initiative for sustainable project finance. The Performance Standards comprise eight key areas:

1. Assessment and management of environmental and social risks and impacts;
2. Labor and working conditions;
3. Resource efficiency and pollution prevention;
4. Community health, safety and security;
5. Land acquisition and involuntary resettlement;
6. Biodiversity conservation and sustainable management of living natural resources;
7. Indigenous peoples;
8. Cultural heritage.

Since their revision in 2012, they have been more comprehensive and also include important human rights aspects. Criticisms have been raised as they do not fully apply a human rights perspective and lag behind the UN Guiding Principles (cf. Center for International Environmental Law, Bretton Woods Project, International Accountability Project & World Resources Institute 2010). However, as the Performance Standards have been developed in close co-operation with business and have undergone a profound testing and feedback phase, they can provide additional operational guidance for the HRIA presented here.

The guidelines and standards described above are among the most prominent instruments developed to regulate transnational business activities with regard to social and environmental performance. Although not all guidelines follow a specific human rights approach, they include critical aspects relevant to human rights. We therefore partly derive duties and responsibilities of involved states and companies on an operational level from these standards where they offer more detailed guidance for the Tampakan context than more general human rights treaties and principles.

3.3.3 Corporate Standards

Besides internationally recognized standards and guidelines, corporate ethical and sustainability standards offer further guidance for assessing a company's conduct. SMI

⁵ Almost half of the complaints received by NCPs were related to the extractive sector. By March 2012, 62 complaints had been raised in reference to extractive industries (Institute for Human Rights and Business & OECD NCP Norway 2012: 4).

⁶ From March 14, 2013, Switzerland has taken over the chairmanship of the Principles for one year (Schweizerische Eidgenossenschaft 2013).

explicitly commits itself to the Xstrata Sustainable Development Framework. This comprises

- The International Council on Mining and Metals (ICMM) sustainability principles and guidelines
- The UN Global Compact
- UN Declaration of Human Rights
- Voluntary Principles on Security and Human Rights
- ISO 31000, ISO 14001 and OHSAS 18001.
- ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
- OECD Guidelines for Multinational Enterprises (cf. Xstrata plc 2012a).

The company's standards lack a reference to the International Bill of Human Rights, which comprises not only the UN Declaration of Human Rights but also the ICCPR and the ICESCR. This explicit reference by the corporation is also required by the OECD Guidelines for Multinational Enterprises

(OECD 2011: 32). However, with regard to the corporate commitment to human rights, we can highlight the importance of the ICMM sustainability principles and guidelines. These ten principles include fundamental statements that underline the company's commitment to human rights, including civil and political as well as social, economic and cultural rights. Particularly important for our context is Standard 3, which states that the company shall "uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities." Furthermore, for our HRIA, it is important that the corporation commits itself to fundamental process standards, especially transparency and independent verification of published reports and data. Standard 10 thus states: "Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders." ■

4. Country and Regional Profile

This chapter provides background information on the Philippines and specifically the Mindanao regions the project is situated in. The affected areas are located in Region XI and Region XII. We then proceed with an overview of the status of human rights in the Philippines. The aim is to enable a better understanding of the context of the Tampakan Project.

4.1 Geography and Demographics

The Republic of the Philippines is an archipelago in south-eastern Asia consisting of over 7,000 islands of which circa 2,000 are inhabited. The two main islands – representing 66% of the Philippine's landmass – are Luzon in the north and Mindanao in the south.

The population of the Philippines reached approximately 104 million in July 2012, with a growth rate of 1.87% per annum. The two official languages are Filipino – based on the language Tagalog – and English. However, other languages and dialects, such as Cebuano, are also spoken, which pertain but are not exclusive to different ethnic groups (CIA 2013).⁷ The main religion in the Philippines is Catholicism (82.9%); Islam accounts for 5%, while other beliefs are also present (CIA 2013, 2000 census).

Region XI, also called Davao Region or Southern Mindanao, is situated in the southeast of Mindanao and consists of four provinces of which one, Davao del Sur, is envisaged to host several installations of the Tampakan mine.⁸ Follow-

ing data provided by the National Nutrition Council of the Philippines (NNC), the population of Region XI amounted to approximately 4.16 million people with diverse ethnic and cultural backgrounds as of August 2007. In total, there are about 18 ethnic groups living in Region XI and speaking a variety of languages and dialects (NNC 2011a).

Region XII, or SOCCSKSARGEN – an abbreviation of the four provinces South Cotabato, Cotabato, Sultan Kudarat, Sarangani, and General Santos City – is situated directly to the west of Region XI. As of May 2010, the population of the region had reached 4.11 million persons with equally diverse ethnic and cultural backgrounds as in Region XI. The provinces affected by the Tampakan Project – South Cotabato, Sultan Kudarat and Sarangani – had a combined population of 2.06 million people in 2010 (NNC 2011b).

4.2 State System and Governance

The Philippines is a democratic, multiparty republic based on the Constitution of the Republic of the Philippines of 1987. The government is situated in the capital of Ma-

⁷ The main groups constitute the Tagalog (28.1% of the population), and the Cebuano (13.1%) (CIA 2013; 2000 census).

⁸ These include a power station, a filter plant and a port in the municipality of Malalag. Furthermore, the pipeline required to transport materials to this site will affect the region.

Figure 1:

The Philippines
in Southeast Asia

Figure 2:

Islands of
the Philippines

Source: Fischer-Weltmanach

nila, and the president holds both the positions of head of state and government and is also Commander in Chief of the armed forces. Since 30 June 2010 Benigno Aquino, chairman of the Liberal Party, has filled this position. The Filipino parliament consists of two chambers – the House of Representatives with 286 members and the Senate with 24 members. At the time of writing, the next mid-term elections for both chambers and several other public offices are scheduled for May 2013 (International Foundation for Electoral Systems 2010).

The Philippines is characterized by a decentralized government structure. Different types of subunits are created through the *Local Government Code* of 1991 (Republic Act No. 7160). The Philippine state is divided into 18 administrative regions, which are further classified into Local Government Units (LGUs). According to the National Statistical Coordination Board (2013), as of March 2013, the LGUs included 80 provinces and 140 cities, 1,494 municipalities and 42,026 barangays, the smallest administrative division.

The autonomy of LGUs is limited through general supervision exercised by the central government or the next higher unit respectively. The tasks LGUs are responsible for include the provision of social services, management of social and economic development or the creation and implementation of infrastructure projects (United Nations Economic & Social Commission for Asia & the Pacific n.d.: 4-6).

4.3 Economy

In 2011, the GDP amounted to 213.1 billion USD (official exchange rate) with a real growth rate of 3.7%. The Philippine economy is characterized by a booming service sector. Simultaneously, a large part of the population still depends on subsistence farming. Besides the service sector, the electronic industry and tourism have become increasingly important. The presence of natural resources, such as copper, nickel, gold, chromite and marble, is expected to

lead to a growing extractive sector. According to the government's development plan, the extraction of resources as well as accompanying foreign investments are expected to increase the economic growth rate (IBON 2011: 5). The mining sector, however, though deemed to have high economic potential, could not extend its growth rate in 2011. The sector contributed only 1% to the national GDP in 2011, and stagnated at this level during the first three quarters of 2012 (Mines and Geosciences Bureau [MGB] 2013).

Agriculture constitutes the main pillar of the affected regional economies. Bananas, rice, corn, coconut, pineapple, cut flowers and fish are the most important products (NNC 2011a; 2011b). Forestry is a further sector the two regions, particularly Region XII, rely on. In 2007, agriculture, fishery and forestry accounted for approximately 42% of the region's economy and for the economic growth in 2006 and 2007 – 6.6% and 6.7% respectively (NNC 2011b). Such specific information was not available for Region XI.

4.4 Human Rights in the Philippines

This section provides a basic overview of the status of human rights in the Philippines. Firstly, we summarize the status of economic, social and cultural rights. In a second step, we discuss the civil and political rights record of the country. Lastly, we will also take a short look at the rights of indigenous peoples as listed in various human rights reports. The latter will be considered in more detail in subsequent chapters. For the documentation of the human rights situation in the Philippines, we mainly draw on reports prepared in the context of the Universal Periodic Review (UPR) of the UNHRC, with the first cycle in 2008 and the second in 2012, as well as on civil society publications (UNHRC 2012a, UNHRC 2012b).

When Ferdinand Marcos was driven out of office by the peaceful protests of hundreds of thousands of Filipino people in 1986, the country was in a disastrous political and economic state. Since then, the political and socioeconomic situation in the Philippines has improved dramatically, with positive impacts for the country's overall human rights performance as well. Nevertheless, major challenges for the realization and further improvement of all human rights remain.

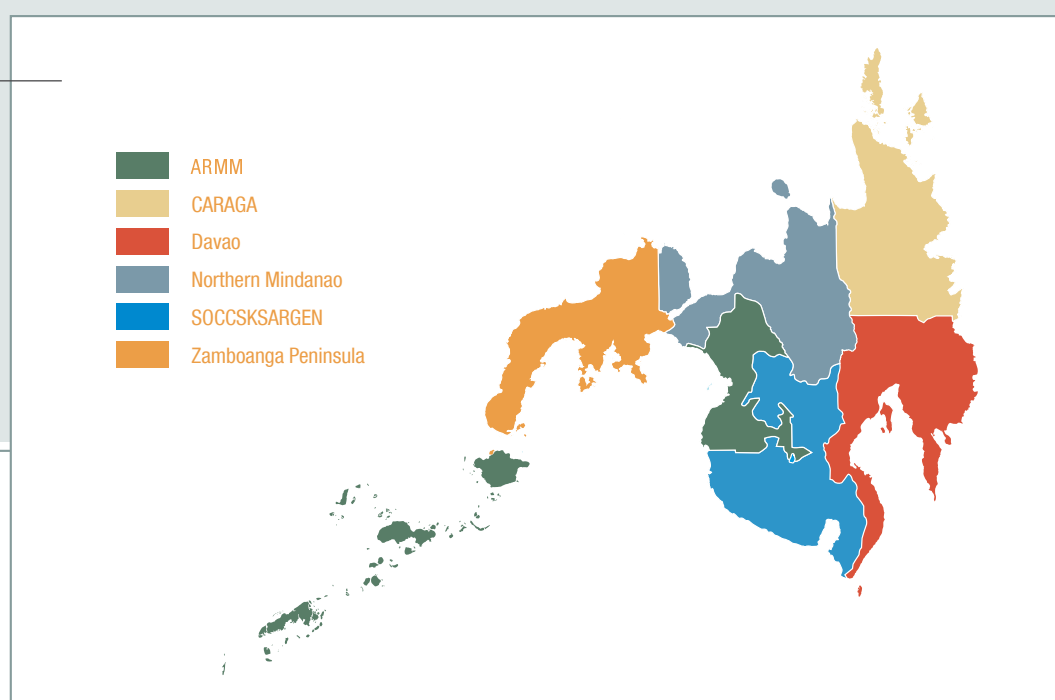
4.4.1 Economic, Social and Cultural Rights

The Philippines has been a member of the ICESCR since 1974. A Philippine NGO Network Report of 2008, which was facilitated by the Philippine Human Rights Information Center and Urban Poor Associates, describes the country

as relatively efficient in enacting laws related to economic, social and cultural rights. However, the statement sees shortcomings in resources and promotion, limited application and implementation as well as monitoring and evaluation of these laws. Up to now, the Philippines has not entered the Optional Protocol to the treaty allowing for individual or group complaints against the government in case of non-compliance with the treaty. Moreover, one major concern in the Concluding Observations of the Committee on Economic, Social and Cultural Rights (CESCR) in 2008 in response to the state report of 2007 is the lack of an explicit mandate of CHRP for economic, social and cultural rights.⁹ Following the Vienna Declaration of the World Conference on Human Rights in 1993 and the Manila Declaration of National Human Rights Institutions in 1995, CHRP is now also covering economic, social and cultural rights. However, an official extension and institutionalization of the Commission's mandate is still lacking.

Steady economic growth has led to an increase in the average living standard in the Philippines since the end of the Marcos regime (CIA 2013). As documented in the Human Development Reports of the United Nations Development Programme (UNDP), the Philippines' rank in the Human Development Index (HDI) also points to a positive socioeconomic development. In its country profile, UNDP (2013) states that “[b]etween 1980 and 2012 Philippines's HDI rose by 0.4% annually from 0.561 to 0.654 today, which gives the country a rank of 114 out of 187 countries with comparable data.” Together with other countries in the region, the Philippines belongs to the group of countries with a medium HDI value. However, comparing the positive value for the Philippines with the overall growth rate of 18% of the average HDI worldwide, the Philippines' increase is small. This is also reflected in a rather weak realization of economic and social human rights as expressed by the CESCR in the Concluding Observations of 2008. One repeated grievance refers to the realization of the rights to work and to just and favorable conditions of work. They seem to be pinched by a minimum wage that has remained below the official rate of a decent standard of living. Also, occupational health and safety measures are continuously considered lax because of a lack of independent monitoring (UNHRC 2012a: 9). Furthermore, the low national spending on social services, the large number of persons working in the informal sector as well as the precarious situation of pregnant women and young mothers in the workplace are serious concerns. Much of the criticism

⁹ CHRP had been established as an offspring of the 1987 Constitution with the overall task to follow-up the gross human rights violations that had been committed under martial law (CHRP 2009).



Source: Rural Bankers Association of the Philippines, 2010

brought forward by the Committee is also expressed in recent submissions of civil society organizations for the UPR 2012 (UNHRC 2012a).

In respect to the rights to social security and to an adequate standard of living, criticism exists that “[...] Filipino producers have been unable to grow and prosper under globalization policies that eschew trade protection and investment support. The share of manufacturing in GDP and the share of agriculture have fallen, which has deprived millions of people the opportunity for decent work, livelihoods and means of subsistence.” (UNHRC 2012a: 9) Furthermore, between 2008 and 2011, the price of subsidized rice is said to have increased by 48% (UNHRC 2012a: 10). Especially women and children are seen as being severely affected by the lack of adequate access to food (UNHRC 2012a: 10).

Reports by civil society organizations address the right to food in more detail. Thus, the transnational human rights organization on the right to food, FIAN, writes that more than 12 million people in the Philippines suffer from hunger (FIAN 2008: 35). A survey of the Food and Nutrition Research Institute revealed that in 2003, five million preschool and school-age children were underweight (FIAN 2008: 21). FIAN sees one important reason for this critical situation in the incomplete agrarian reform, especially in Mindanao, which left many families without land (FIAN 2008: 15). One further important reason for the lack of access to food are the high unemployment and underemployment rates.

Other organizations criticize the policies of the government to reduce poverty. Thus CHRP, referring to

Recommendation 14 of the first UPR in 2008, criticizes that respective “[...] policies intended to help vulnerable groups which include indigenous persons were poorly implemented.” The Commission therefore calls “[...] for a household survey for indigenous communities to determine performance in the supply of needs and services.” (UNHRC 2012a: 3) Following the IBON Foundation of the Philippines, the perceived improvement of the poverty situation “[...] was due to changes in poverty methodologies and the lowering of the poverty threshold rather than any real poverty reduction.” (IBON in UNHRC 2012a: 9)

Conflicting views between the government and civil society organizations also exist in respect to the realization of the right to health. According to the World Health Organization (WHO), the Philippines spent 3.6% of its GDP on health care in 2010, which amounts to a per capita spending of less than 100 USD (WHO 2012a, 2012b). This is far below the regional mean, which amounted to approximately 600 USD per capita in 2010 (average exchange rate) (WHO 2012b). Following UNDP (2013), the percentage of GDP spent for health was even lower in 2012 and accounted for only 1.3%. The WHO also points to discrepancies in healthcare coverage between rural and urban areas as well as poor and wealthy patients (WHO 2012b). Particularly affected by these gaps are indigenous communities throughout the Philippines (United States Department of State 2011: 31). According to civil society organizations, the infant mortality rate is one of the highest in Southeast Asia (UNHRC 2012a: 9).

Looking only at the literacy rate, at 92.6% for all adults over 15 years and above 95% for young adults (15-24 years old) (CIA 2013), one may assume that the right to education is fulfilled to a large extent. The high literacy rate reflects the high rate of enrollment and completion of elementary school (approximately 90% of eligible children between 2005 and 2010) (United Nations Children's Fund [UNICEF] n.d.). However, these levels drop for secondary school education. Here, only 55% of the eligible boys and 66% of the eligible girls were enrolled between 2007 and 2010.¹⁰ Besides a decrease in enrollment for secondary education, a main point of criticism is that not all groups in society enjoy equal access to education. According to an estimate of NGOs, "[...] up to 70 percent of indigenous youth left or never attended school because of discrimination they experienced." (United States Department of State 2011: 31; emphasis added) In addition, access to public schools is often difficult for population groups living in remote areas – an issue which again affects primarily indigenous communities. Problems with access to education become further aggravated because of shortages in personnel and other resources (UNHRC 2012a: 10).

This data reveals that the current realization of economic and social rights in the Philippines is not satisfactory. Against this background, it remains an open question in how far the "[a]ggressive advancement of economic, social and cultural rights" that the Filipino government proclaims in its national report submitted to the UNHRC for the second stage of the UPR in 2012 (UNHRC 2012b) and the Philippine Development Plan for 2011-2016 as an operationalization of the President's Social Contract will improve the realization of economic, social and cultural rights.

4.4.2 Civil and Political Rights

Despite considerable progress during the past decades, specifically with regard to the accession to international human rights treaties, many human rights problems also remain in the realm of civil and political rights. Based on the review of several recent reports by the Philippine government and relevant international and nongovernmental human rights organizations, the following paragraphs presents the main findings.

In its National Report submitted to the UNHRC as part of the UPR in March of 2012, the Filipino government focuses primarily on legal and institutional changes. The report states that through several initiatives, such as the 16-point agenda known as the Social Contract, human rights are embedded more firmly in institutions, access to justice is being facilitated, women's and children's rights are strengthened and security forces are more thoroughly trained in human

rights, just to mention a few examples. Furthermore, the government highlights its efforts to halt extrajudicial killings and torture through better monitoring, improved judicial procedures and inter-agency cooperation. Further emphasis rests on the progress the Philippines made in the international realm through their accession to several international human rights treaties.¹¹ The government acknowledges that continuous work is required to fully mainstream human rights and ensure their enforcement. It identifies the full engagement of the private sector in these efforts as a key challenge (UNHRC 2012b).

UNHRC and the United Nations Human Rights Committee (UNHRC), which is the treaty body to the ICCPR, as well as NGOs, such as Amnesty International (AI), Freedom House (FH) and Human Rights Watch (HRW), have also assessed the status of human rights in the Philippines. In general, the reports of these organizations point out that progress has been made regarding the protection and enforcement of social and political human rights. The peace talks established with the two main armed political groups in the country and accession to several international human rights treaties constitute major positive developments (AI 2011a: 16; UNHRC 2012: 1-2). The organizations also acknowledge that the Philippines is a well-functioning democracy, where some rights, such as freedom of religion or academic freedom, are widely respected (FH 2012). Furthermore, the Philippines is attested an overall well-functioning civil society. Yet civil and political rights still are not fully realized. Most pressing are gaps regarding the freedom of the press and freedom of opinion, particularly for activists, as well as the right to privacy. Furthermore, the rights of minorities, such as indigenous communities, are not fully enforced and respected throughout the Philippines (FH 2012).

Strong criticism is leveled against the Philippines in all reports because of the weakness of the rule of law. This deficiency is caused by widespread corruption, a lack of legal structures and of forceful implementation of existing laws, weak accountability mechanisms, particularly in the security forces, and a backlog of more than 800,000 cases in the court system (HRW 2012: 7-8; FH 2012). These shortcomings have – according to reports studied – inhibited the enforcement of human rights throughout the country.

¹⁰ Regarding the status of education in the Tapanan region, we only had access to current information on Region XII. It appears that elementary education reached the majority of children (72.99%) in the school year 2007/2008, while only 39.86% were enrolled in secondary schools (NNC 2011b).

¹¹ These include the Rome Statute and the Convention Relating to the Status of Stateless Persons. A list of Treaties and Instruments the Philippines is a Member to can be found in Annex I.

In a Joint Civil Society Report for the second cycle of the UPR, which was facilitated by the Philippine Alliance of Human Rights Advocates (PAHRA), civil society organizations further criticize that a culture of impunity pervades in the Philippines, which is mainly caused by “the militarist and punitive approach in addressing the root causes of insurgency, weak exercise of command responsibility and poor implementation of laws.” (PAHRA 2011: 2) Government and security forces are hence identified as the main actors responsible for human rights violations and the lack of their prosecution. The weaknesses of the judicial and security sectors lead to a continuation of human rights violations such as unlawful arrests, the employment of child soldiers, enforced disappearances and extrajudicial killings. Particularly the continued occurrence of extrajudicial killings and the involvement of state forces have been repeatedly denounced. Already in 2008, the report of Philip Alston, then Special Rapporteur on extrajudicial, summary or arbitrary executions, states that human rights defenders, trade unionists and land-reform advocates, but also journalists and peasants, are the primary targets in these killings. Alston further points out that the New People’s Army (NPA) – the militant wing of the Communist Party – is only one of the perpetrator groups and not, as claimed by the military, the sole aggressor. Importantly, it is highlighted that the military is involved in a large number of cases, yet officers “consistently and unequivocally reject the overwhelming evidence regarding the true extent of the problem.” (UNHRC 2008b: 13) In the same vein, AI argues that the military should exercise full control over state-sponsored militias or disarm them, as they have reportedly been involved in numerous human rights violations (AI 2012: 4). The Aquino Administration pledged to eliminate extrajudicial killings and bring justice to the victims; yet a recent review of HRW highlights that although the number of killings has subsided, investigations regarding the military’s responsibility have stalled and no convictions ensued in 2012 (HRW 2013: 2). The report further points out that extrajudicial killings have also been attributed to “government-backed paramilitary forces”, such as Citizens Armed Forces Geographical Units (CAFGU)¹² and that, despite these allegations, the government has not initiated a down-scaling of these forces but instead further authorized them to also protect mining investments (HRW 2013: 3). CHRP voices similar criticisms and admonishes that the human rights training of security forces requires a review regarding its efficacy (UNHRC 2012c: 2).

¹² CAFGU are to support the Philippine military in times of need (war, invasion, rebellion, assistance in relief and rescue operations, protection of essential government or private utilities). For CAFGU’s role with regard to the Tampakan Project, cf. Chapter 6.3.



Photo: Bobby Timonera

A recent fact-finding mission of the International Federation for Human Rights (FIDH) further confirms the severity of extrajudicial killings and attacks on human rights activists. The organization emphasizes that particularly those activists advocating environmental, land or indigenous rights “in areas where conflict over land and natural resources has been aggravated by activities of national and transnational companies engaged in acquisition of land for mining and/or agro-industry” are exposed to threats and, sometimes, lethal violence (FIDH 2012). Further compounding these human rights infringements and violations is the institutional weakness of CHRP, which lacks fiscal autonomy and the overall means and capacities to manage the demands and complaints of Philippine society (UNHRC 2012c: 15-17; UNHRC 2012: 2, 4).

4.4.3 Human Rights of Indigenous People

Problems that have been discussed referring to the realization of economic, social and cultural rights as well as civil and political rights in the Philippines especially affect so-called vulnerable groups, among them indigenous communities. Accordingly, many reports on the human rights situation of indigenous communities point to ongoing discrimination “[...] especially in relation to education, health, and employment, with limited access to basic services.” (UNHRC 2012a: 12) Moreover, the cultural rights of indigenous communities, which are specifically elaborated in

the UN Declaration on the Rights of Indigenous Peoples of 2008, are also jeopardized. Although not legally binding, this document offers clarification in respect to two major concerns, namely the right to self-determination and, related to this, the right of indigenous peoples to free, prior and informed consent (FPIC). Regarding indigenous peoples, the right to self-determination addresses their right to autonomy or self-government in matters relating to indigenous peoples' internal and local affairs. The right to self-determination also covers the right to freely determine the political status and freely pursue the economic, social and cultural development of indigenous communities (Article 3 and 4 of the Declaration). Various articles of the Declaration emphasize the specific relationship of indigenous peoples to their traditionally owned lands and their right to maintain and strengthen their distinctive, spiritual relationship with their lands. This includes the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use (Article 26, 2). The right to FPIC allows an indigenous community to give or withhold consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use.

While the UN Declaration is not legally binding, in the Philippines, the rights of indigenous peoples are anchored as national law in the *Indigenous Peoples Rights Act* (IPRA) of 1997 (Republic Act No. 8371). Thus, indigenous communities have a claim vis-à-vis the state to ensure FPIC. However, in practice, the rights to self-determination and to FPIC are denied in manifold ways, whereby violations often occur in the context of efforts by private enterprises to make use of indigenous territories, especially mining projects (UNHRC 2012a: 11f). Consequently, CHRP states in its submission to the UPR of 2012 that the expansion of mining concessions asks for more vigilance against violations of the human rights of indigenous communities (UNHRC 2012a: 3). In this context, the Concluding Observations of the CESCR of 2008 point to the need for effective legal protection of the human rights of indigenous peoples: "The Committee urges the State party to fully implement the 1997 [...] IPRA, in particular by ensuring the effective enjoyment by indigenous peoples of their rights to ancestral domains, lands and natural resources, and avoiding that economic activities, especially mining, carried out on indigenous territories adversely affect the protection of the rights recognized to indigenous peoples under the Act." (CESCR 2008: 4 (16)) In addition, critics claim that FPIC certificates had been manipulated by companies, as in the case of the Canadian enterprise TVI-Pacific Inc. in Zamboanga del Norte, Mindanao (Range 2008: 4). Nevertheless, such fraudulent certificates had been ac-

cepted by the responsible governmental institution, the National Commission on Indigenous Peoples (NCIP). Thus, ESCR-Asia comes to the conclusion that "[t]he safeguard of indigenous peoples' free prior informed consent (FPIC) has been abused" and "the FPIC of IPs [indigenous peoples] have been obtained fraudulently and manipulatively, being reduced to nil." (ESCR-Asia 2008: 3) Furthermore, military operations that are supposed to protect mining projects in the territories of indigenous communities pose additional human rights challenges. Critics claim that operations have often led to forced evictions, to extrajudicial killings of indigenous persons and also to sexual violence and exploitation of indigenous women and girls by the military. According to the submissions, the military has often legitimized its operations by tagging indigenous communities as supporters of the NPA (UNHRC 2012a: 12).

4.4.4 Summary

The overview illustrates that although the Philippines has made substantial progress in the enforcement of human rights during the past two decades, serious problems remain in most areas. Regarding economic, social and cultural rights, discrepancies in the realization of human rights continue to exist between urban and rural areas as well as between different population groups. Here, indigenous communities are usually most severely affected by poor economic and social conditions. Several civil and political rights are routinely infringed upon or violated on a larger scale. Crucially, many of the severe violations can be traced back to state parties themselves, which points to weaknesses in democratic governance structures and a lack of accountability and mutual control between state bodies. Furthermore, FIDH emphasized that grave violations, such as extrajudicial killings, are concentrated in areas where national and transnational companies have become involved in conflicts over land and natural resources. Following from these analyses, all reports reviewed ask the Filipino government to strengthen its human rights agenda, mainstream human rights across sectors, provide effective training, accede to further international treaties and implement those already ratified effectively. AI and HRW furthermore urge the government to issue a standing invitation to all UN Special Procedures mandate holders and to expedite the visits of those who already requested visits (AI 2011b, HRW 2011).¹³ ■

¹³ These include the Working Group on Enforced or Involuntary Disappearances (issued in 2006), the Special Rapporteurs on Freedom of Opinion and Expression (2004), Countering Terrorism (2005), Human Rights Defenders (2008), and Internally Displaced Persons (2009).

5. Mining in Tampakan: Context, Project Profile and Stakeholders

The Philippines is characterized by an abundance of natural resources, which include mineral deposits of gold, copper, iron, chromite, nickel, cobalt and platinum (Philippine Mining Almanac 2011-2013). Although these deposits exist and more and more projects are starting up to extract these, mining only accounted for 1% of the national GDP and only 0.6% of jobs in 2011 (MGB 2013). The Gross Production Value, which includes all types of official mining conducted in the Philippines, came to a total of 163.2 billion PHP (approx. 3.9 billion USD) in 2011. In the same year the state collected roughly 22 billion PHP (approx. 535 million USD) in taxes and fees (MGB 2013).

For the past decades, the sector has been proclaimed as a major pillar in the state's economic and social development by the government (cf. IBON 2011). Accordingly, the extraction and exploitation of resources has been encouraged through government programs, which particularly aim at the facilitation of foreign investments through fiscal incentives, such as duty-free import of capital equipment and an exemption from the export tax, duty imposts and fees (Philippine Trade and Investment Center London 2013).

However, not only have hopes for economic gains for the state not materialized, but mining projects have also come into conflict with ideas of environmental sustainability and traditional land use. As a result, a large public debate regarding the preferred form of social and economic development has ensued. Opponents of an expansion of the mining industry, especially the Catholic Church, argue that sustainable social development cannot be achieved through large-scale mining projects in their current form. Other critics argue that large-scale mining endangers the food security of the Philippines, fails to create the promised jobs but increases poverty, and exacerbates conflicts (Goodland and Wicks 2008: x-xi). Hence, opponents argue for approaches which conserve the environment and protect the rights of affected communities. These different conceptions of the preferable road to development for the Philippines have also resulted in legal disputes, which are further elaborated on below.

Controversies on how mining should be managed to foster socio economic development also explicitly refer to negative effects mining oftentimes has on the protection and enforcement of human rights. The UNHRC found that of worldwide 320 alleged human rights abuses publicly voiced against private companies between 2005 and

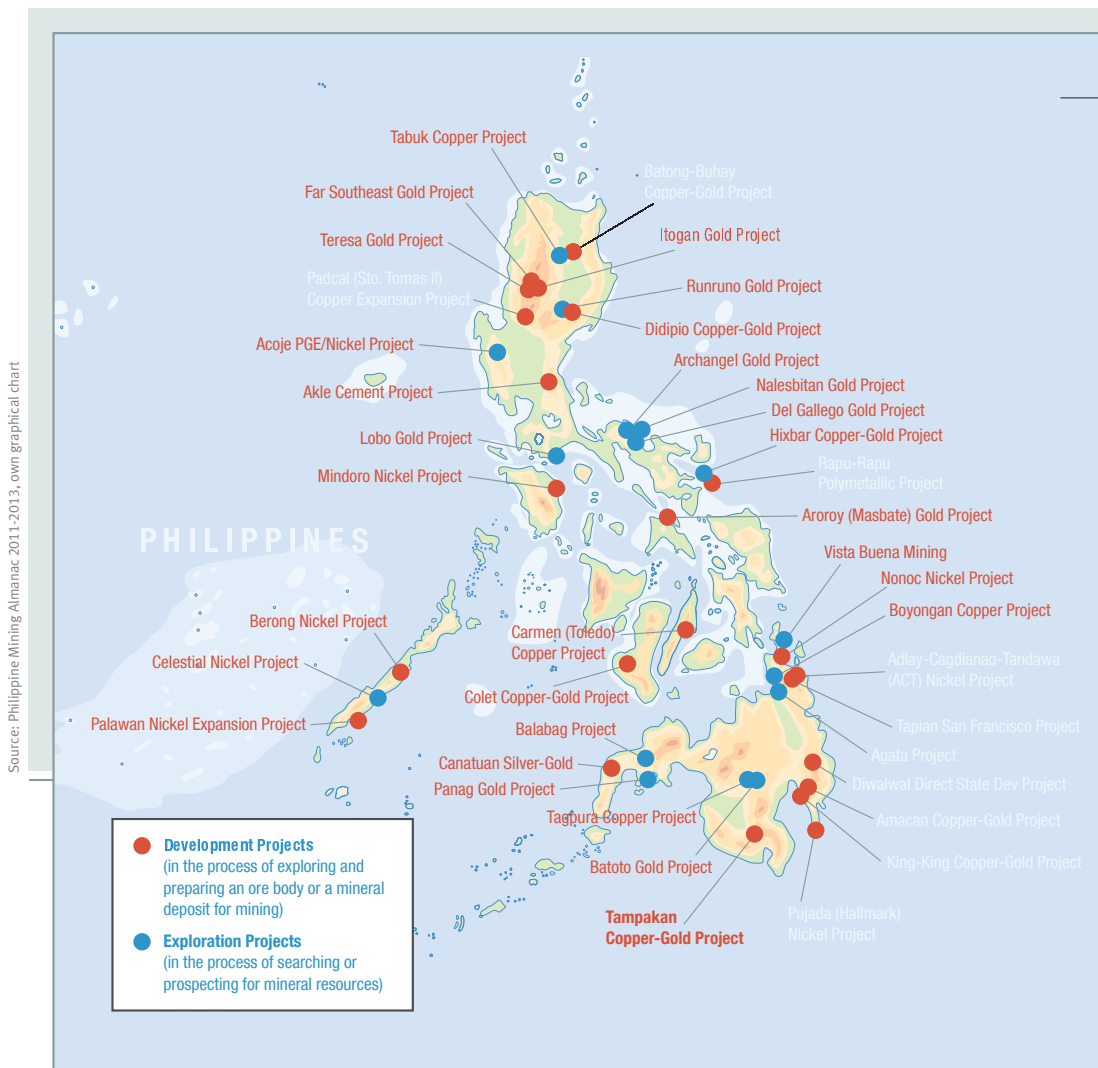
2008, 28% concern extractive industries (UNHRC 2008a: 9). Affected human rights include a wide range of labor rights, but also the rights to physical and mental health, to an adequate standard of living, the right to self-determination and even the right to life, liberty and security of person (UNHRC 2008a: 13-14). Violations pertaining to these and other human rights have also been reported in the Philippines (cf. Chapter 4).

The above paragraphs illustrate that mining and the mining industry have become an issue of high political importance in the Philippines. In the following, we present the legal framework relevant to the Tampakan Project. In a second step, we present information on the project itself, the companies involved and the main stakeholders connected to the mine.

5.1 Legal and Administrative Context of the Tampakan Project

As mining has gained in importance for the Philippines, an increasing number of legal provisions have evolved which shape the administrative procedures for the development and implementation of mining projects. Yet between these different regulating mechanisms, tensions also exist which cause further conflicts.

The most important legal basis for foreign companies to exploit raw materials in the Philippines is the *Mining Act* of 1995 (Republic Act No. 7942). It introduced fundamental economic incentives for foreign investors. The Act includes basic social responsibilities, like minimum expenditures for rehabilitation and community development, especially regarding indigenous communities (Tan 2006: 187). Furthermore, it states that all mineral resources within the territory of the Philippines belong to the state, that the state undertakes the management of these resources, and thereby is to protect the rights of indigenous communities to their land as set out in Article XII, Section 5 of the Constitution of the Philippines (Mining Act 1995: Ch II., Sec. 4). The Mining Act also provides a dispute resolution mechanism since it sets out the composition and mandate of a Panel of Arbitrators (Chapter XIII, Section 77). The panel, composed of three members¹⁴, has jurisdiction over, for example, disputes involving mining rights, mineral agreements or permits as well as disputes between



surface owners, occupants and claimholders/concessionaires. The panel is required to pronounce its decisions on a case within 30 working days. The parties to a case may appeal the decision. Regarding the Tampak Project, interviewees did not express awareness of this mechanism provided by the Mining Act.

The Mining Act moreover stipulates who may obtain mining rights and the types of agreements regulating mining projects.¹⁵ Various types of agreements also exist to regulate the outsourcing of mining operations, namely Mineral Production Sharing Agreements, Co-production Agreements, Joint Venture Agreements or Financial and Technical Assistance Agreements (FTAA) (Sommer & Anghag, 2012: 10). As the Tampak Project is regulated by an FTAA between SMI and the government, a quick overview of the main features of this type is provided here. An FTAA has to be approved by the President and allows for 100% foreign ownership. Furthermore, the project area is allowed to be larger than for other types of agreements, namely

up to 81,000 ha onshore and 324,000 ha offshore (Sommer & Anghag, 2012: 11). Areas exempt from any mining activity include, but are not limited to, land near cemeteries, plantations or crops without the written consent of the government agency or private entity concerned (Ch.III Sec. 19, para. b). Furthermore, old growth forests, watershed areas and other natural habitats as defined by law (Ch.III Sec. 19, para. f) or areas covered by small-scale miners

¹⁴ Two of the three members must be members of the Philippine bar "in good standing" and one must be a mining engineer or a professional "in a related field" (Republic Act No. 7942, Ch. XIII, Sec. 77).

¹⁵ Persons eligible for large-scale mining rights include any citizen of the Philippines with the capacity to enter into a contract, corporations et cetera which are duly registered and of which at least 60% of their capital is owned by Filipino citizens as well as a legally organized foreign-owned corporation "shall be deemed a qualified person for purposes of granting an exploration permit, financial or technical assistance agreement or mineral processing permit" (Republic Act No. 7942, 1995: Ch.I., Sec.II, para. aq).

(Ch.III Sec. 19, para. e) are excluded, as well as land of indigenous peoples without their prior consent (Ch.III, Sec. 16). While these are important concerns and conditions, the design of an FTAA would ask for a more consequent alignment with the state duty to protect the human rights of people possibly affected by a mine.

The Mining Act was subject to a legal dispute from 1997 to 2004. An indigenous community of the B'laan tribe filed a complaint against the FTAA of WMC for the Tampakan Project, claiming that the Constitution does not allow more than 40% foreign ownership of natural resources (Article XII, Section 2). In 2004 the Supreme Court agreed, yet reversed this decision after a motion from WMC and considerable pressure from national industry groups and various chambers of commerce worldwide (Tan 2006).

Further controversy surrounds the Mining Act as a tool to foster socio economic development. Critics, most fiercely the Catholic Church, argue that the legal provisions of the Mining Act neglect environmental protection and sustainable social development. The Aquino Administration envisages mining as an important pillar of the national economy, yet aware of the arguments leveled against the Mining Act and particular mining projects, proclaimed its policy of 'responsible mining' in Executive Order No. 79 of July 2012. This concept is to signify that environmental and social safeguards are guaranteed. Discontent with mining projects in the Philippines has, however, not ceased and continues to focus on the Mining Act. More far-reaching responses to criticisms have been offered by members of the House of Representatives. Since 2010, three proposals for alternative mining bills have been introduced, which were consolidated into the *Alternative Minerals Management Bill* by the House Committee on Natural Resources. The bill seeks to ensure that resource extraction follows sustainability standards, that the rights and interests of affected communities are better protected and that the involvement of the public and private security sectors in mining operations underlie stricter control. The proposal has gained widespread support amongst NGOs and the Catholic Church (Friends of the Earth International 2013). Yet criticisms are also brought forward. The Chamber of Mines, for example, argues that the bill would hurt the mining sector, lead to widespread unemployment and bring to an end the socioeconomic development programs enabled through funds provided by mining companies. Instead, a stricter enforcement of the Mining Act and an alignment of existing legal provisions is called for (Chamber of Mines of the Philippines 2012).

A further issue besetting the Mining Act has been its relationship with IPRA. The latter emphasizes that indigenous communities have the right to the exploitation of natural

resources within their ancestral domains while the Mining Act grants the state this prerogative. So far, it has not been clearly established how IPRA is to be weighed against the Mining Act (cf. *Chapter 6.1*). This conflict between the Mining Act and IPRA is reflected in the mining contracts issued by the government, for example in its FTAA's.

Legal provisions which also affect mining operations are environmental laws that limit access to particular areas, such as protected habitats, or prescribe particular rules of procedure. The Constitution, for example, grants the population the right to "a balanced and healthful ecology" (1987: Article II, Section 16). Following from this provision, citizens have the power to claim this right in court if they deem a project to be in violation of this law. This legal remedy has been enshrined as a *Writ of Kalikasan* in the Environmental Rules of Procedure.

Mining projects in the Philippines are furthermore shaped by an array of different actors involved in decision-making. Next to the national government, the LGUs, including provinces, municipalities and barangays, as well as indigenous communities affected by a specific project, also have to give their consent and establish their own terms of engagement with the mining company. The agreements entered into between the company and the respective party predominantly take the form of Principal Agreements (PAs) or Memoranda of Agreement (MoA). These set out the terms applying to the company's presence in the area.¹⁶ As the project evolves, PAs/MoA also have to be renewed to allow for adaptations. In the case of the Tampakan Project, SMI states that such renewals take place every three years.

Furthermore, LGUs have the authority to pass laws in their areas of competence, which may affect mining projects (Republic Act No. 7160 1991: Section 2a.). In 2010, the Province of South Cotabato adopted an Environmental Code which includes a ban on open-pit mining. This ban also applies to the Tampakan Project. The *Environmental Code* has become subject to debates. Critics argue that an LGU cannot enact a prohibition which moves beyond higher, national laws. National legislation does not specify which forms mining projects may or may not take. Despite this argument, the ban initially constituted a reason for the Environmental Management Bureau (EMB) not to grant SMI its *Environmental Compliance Certificate* (ECC) – a document which attests that the project will not have detrimental effects on the environment. Although the ban in South Cotabato has not been lifted, EMB in a more re-

¹⁶ Details regarding the sharing of revenues, the engagement of the company in community development and the specific permissions granted to the company are, hence, agreed upon.

cent decision granted SMI the Certificate in February 2013, albeit under certain conditions (cf. Philstar 20 February 2013).¹⁷ The issue of the open-pit ban passed by an LGU provides one example of conflicts between different levels of governance. Municipalities also have to be included in the development of the project if their area of influence is affected. For the Tampakan Project, this requirement has presented difficulties too as boundary disputes currently exist between several municipalities in the area.

5.2 Company & Project

The Tampakan Project is situated in the south of Mindanao, about 50 km north of General Santos City. The project seeks to exploit one of the world's largest undeveloped copper-gold deposits. It is estimated that the mine would yield an average of 375,000 tons of copper and 360,000 ounces of gold per annum over 17 years (SMI n.d.(a)). In the following, we introduce the companies behind the project, the project's history, structure, and current status as well as the main stakeholders.

5.2.1 Project Proponents

SMI is the Philippine company executing the operations. The ownership of SMI is divided between several shareholders to varying degrees. The shareholders are Xstrata Copper, which is part of Xstrata plc, Indophil Resources NL and the Tampakan Group of Companies. As of May 2013, a merger between Xstrata plc and Glencore International plc has been completed, creating "one of the world's largest global diversified natural resource companies" (Glencore Xstrata 2013). The changes this merger may create for the Tampakan Project can, however, not be included in this study.

The shareholders of SMI hold different amounts of voting power, which stems from the different types of interest the companies own. A distinction has to be made between 'controlling equity interest' and 'non-controlling equity interest'. This arrangement signifies that not all shares correspond to equal votes. Registered shares are cheaper but hold the same voting power as the more expensive unregistered shares.¹⁸ As this system also affects the Tampakan Project, we provide a brief overview of the companies involved and their share of the operating company SMI below.

Xstrata plc is one of the world's largest mining and metal companies, active in over 20 countries with over 70,000 employees. It is listed on the Swiss and the London Stock Exchanges and is headquartered in Switzerland.¹⁹ Following expansions, a decentralized managing structure

was put into place. Xstrata plc is, hence, subdivided into commodity business units according to thematic foci, including Xstrata Coal, Xstrata Copper and Xstrata Technology (Xstrata plc 2012a). Xstrata Copper, headquartered in Australia, is, according to its website, "the fourth largest copper producer" worldwide (Xstrata Copper 2013a). It was created in 2004 and has since then operated in, for example, Northern Queensland, Australia, in Catamarca Province, Argentina and in the Las Bambas district in southern Peru. In regard to the Tampakan Project, Xstrata Copper holds 62.5% of the 40% controlling equity of its Philippine-based affiliate SMI. This arrangement means that the roles of Xstrata Copper and Xstrata plc concerning the Tampakan Project have to be distinguished. Xstrata Copper holds the majority of decision-making power in the project. It manages the project through SMI and is, therefore, more closely involved in all activities pertaining to the project (Xstrata Copper 2013b).

While in the corporate structure Xstrata plc is apparently further away from SMI, Xstrata is an integrated company and constitutes the sum of its business units. Hence, Xstrata plc and Xstrata Copper are closely connected, which is, for example, illustrated by the overlap in personnel between the two bodies.²⁰ Xstrata plc also provides strategic direction to its business units²¹ as well as standards, such as its *17 Sustainable Development Standards*, which are interpreted and endorsed by Xstrata Copper in the Tampakan Project (SMI 2009: 9). The tight entanglement of Xstrata plc and Xstrata Copper illustrates that responsibility, though to varying degrees, can be assigned to both parties regarding developments of the Tampakan Project.

Furthermore, Indophil Resources NL, the Australian joint venture partner of Xstrata Copper, holds a 37.5 % share of

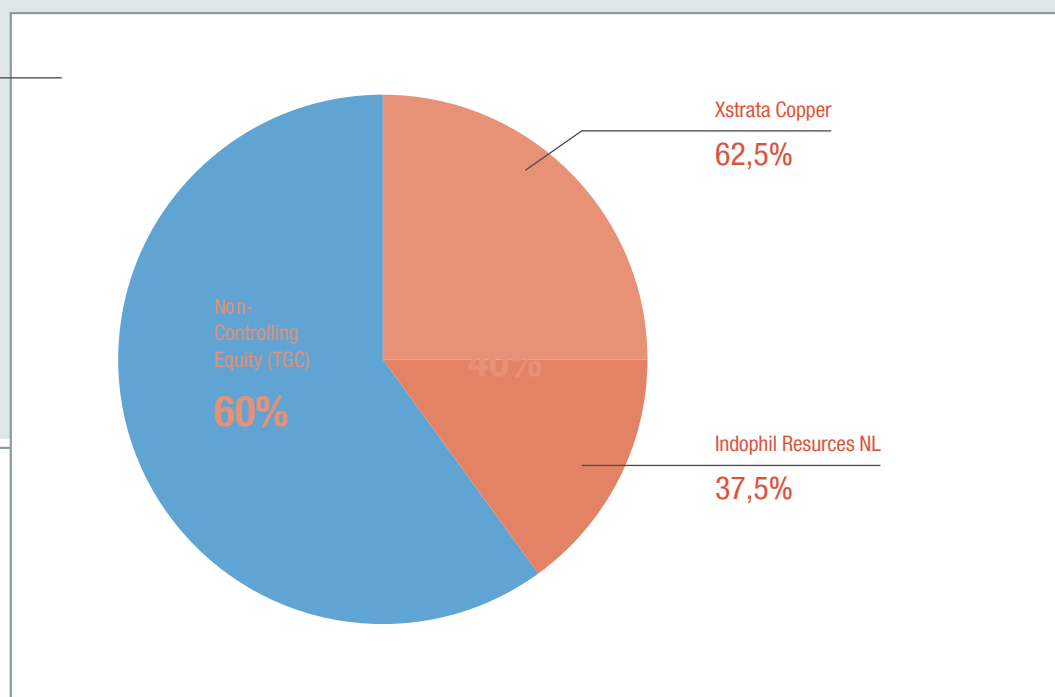
¹⁷ Cf. Chapter 5.2.2.2

¹⁸ An example: If a company has an equity of 1,000€ and issues nine unregistered shares at 100€ and ten registered shares at 10€, the holder of the ten shares at 10€ controls the company.

¹⁹ Xstrata plc is about to merge with Glencore International plc, a multinational commodity trading and mining company. The effects of this merger for the Tampakan Project cannot be foreseen at the time of writing.

²⁰ Charlie Sartain, for instance, is the Chief Executive of Xstrata Copper and a member of Xstrata plc's Executive Committee.

²¹ For example, Xstrata plc introduces its *Health Safety Environment Community Management Standards* with the following statement: "The Xstrata plc Board (the Board) establishes the strategic direction of the Group which the Executive Management Team then implements. The Group operates a decentralised management model with authority delegated to Commodity Business Boards for Xstrata Alloys, Xstrata Coal, Xstrata Copper and Xstrata Zinc" (Xstrata plc 2004:2).



the project's controlling equity. Xstrata Copper is connected to Indophil as well, as the company belongs to Indophil's main 20 shareholders (Indophil Resources NL 2013a).

Lastly, the Tampakan Group of Companies holds 60% non-controlling equity of the project. The group consists of the Tampakan Mining Corporation and the Southcot Mining Corporation.

As becomes clear from the presentation of this corporate structure, although ownership is largely in the hand of national mining corporations, voting- and decision-making power – controlling equity through the ownership of registered shares – is in the hands of the foreign companies Xstrata Copper and Indophil Resources NL.

This distribution of power between different shareholders also has implications for the sharing of responsibilities regarding the conduct of SMI and possible human rights impacts. As pointed out in the Guiding Principles, businesses should prevent and mitigate possible negative human rights impacts caused by the company. The primary responsibility for such consequences hence lies with SMI. The Principles further stipulate that also negative impacts which can be directly linked to the operation, products or services of a company's business relationship with another entity should be prevented or mitigated. The extent to which companies are required to address such matters relies to a large extent on their leverage – “the ability to effect change in the wrongful practices of an entity that causes a harm” (OHCHR 2011: 18). As Xstrata Copper stands behind SMI and holds the main decision-making power, it is also Xstrata Copper's

responsibility to effect the required responses to potentially negative human rights impacts. This responsibility also falls to Xstrata plc since Xstrata Copper is integrated into the Xstrata plc structure. Following from the explanation above, the other involved companies naturally also bear responsibility for SMI's conduct, although to varying degrees.

5.2.2 The Tampakan Project

5.2.2.1 Project History

In November of 1990, the Philippine subsidiary of WMC began its explorations in the Tampakan area following an invitation by the Tampakan Group of Companies. The exploration was based on an Option Agreement between the parties, and indicated the presence of a major copper-gold resource. Subsequently, WMC entered into a Consent Agreement with Tampakan Group of Companies to enable its application for an FTAA with the Philippine government. The FTAA was granted in 1995, shortly after the Mining Act entered into law. It authorized WMC to conduct large-scale exploration, development and commercial exploitation. The permit has been granted for 50 years – to be renewed after the first 25 years – and stipulates an investment of 50 million USD.

In the years that followed, WMC faced opposition regarding its project. One of the most prominent examples was a court case brought against WMC and the Philippine government before the Supreme Court by the La Bugal-B'laan Indigenous Peoples in 1997. Simultaneously, in the late

1990s, WMC entered into agreements with involved groups. A basis was laid with the indigenous communities first through Heads of Agreements and later through PAs and MoA, which provide more detailed plans and determine the tasks and responsibilities of the signatories. PAs were also concluded with the three affected municipalities (Tampakan, Columbio, Kiblawan), barangays and settlers (Davis 1998: 239). The question whether the indigenous communities whose land has been affected by the agreement have consented to the project, as stipulated by the Guidelines on Free, Prior and Informed Consent laid out in IPRA in 1997, cannot be answered conclusively. Indigenous communities, SMI and NCIP confirmed in interviews that a process to gain their approval was conducted by WMC and granted in the end. Other sources, such as the former Special Rapporteur on the rights of indigenous peoples, Rodolfo Stavenhagen, report that indigenous communities claim that their leaders were tricked into signing by authorities and did not fully understand the implications of their agreement (United Nations Commission on Human Rights 2003: 15).

In 2001, the Department of Environment and Natural Resources (DENR) approved the transferal of the FTAA from WMC to SMI, which at the time was primarily owned by Filipino citizens and corporations (Goodland & Wicks 2008: 110). In 2002 Indophil Recourses NL acquired stakes in the project, while the following year, Xstrata Copper entered into an Option Agreement with Indophil Resources NL, which enabled Xstrata Copper to gain its 62.5% share of controlling equity interest and thereby management control of SMI in 2007 (SMI n.d.(c)).

Throughout the last decades, the Agreements entered into by WMC and involved parties were renewed; this has happened mostly according to the prescribed schedule, which, according to interviews with SMI, is every three years. Linked to this, SMI has begun to foster communal development, as prescribed in these agreements, through various programs (cf. *Chapter 7*).

Furthermore, several studies and assessments have been conducted by SMI to enable the continuation of the project. Research and modeling led to the evaluation of four mining options of which one exclusively relied on block cave mining, two combined block cave mining with open pits of different sizes and one foresaw only an open pit (Indophil Resources NL 2013b). Indophil states on its homepage that further studies carried out by Xstrata Copper saw the economically most preferable option in a single large open pit, which has subsequently been presented as the only viable option without further public explanations. As already mentioned above, in response to this choice of method, the provincial government of South Cotabato issued a ban on open-pit mining, which led to a delay in

the issuance of the ECC by the EMB. Several studies have also been commissioned by SMI to assess the various potential effects and to adapt the design of the project. For the actual mining site, SMI conducted several Feasibility Studies, an Environmental and Social Impact Assessment (ESIA, Hansen Bailey 2011) and an Environmental Impact Statement (EIS, AECOM 2011). Further studies have been conducted, such as a Health Impact Assessment and an evaluation of the off-site infrastructure of the project, yet have not been published. SMI also informed us that a Cultural Heritage Study is currently being carried out. Several Tampakan Copper-Gold Project Sustainability Reports (SMI 2007, 2008, 2009, 2010, 2011, 2012) ensure that updated information on the project and company programs are also available to the public.

In addition to SMI's research and presentation of the project, exploration activities have continued in the proposed project area and have been accompanied by a build-up of infrastructure. The continuation of the project has furthermore triggered various disputes and conflicts as different opinions on the desirability and form of the project plans collide (cf. *Chapter 6.3*).

5.2.2.2 Current Status

The ECC was granted to SMI in early 2013, enabling a continuation of project activities. Yet media reports state that conditions have been attached to the Certificate to ensure the safeguarding of community health, welfare and the environment (cf. Philstar 20 February 2013).²² Part of these conditions is also the attainment of FPIC from the indigenous communities, a step SMI is currently working on in cooperation with NCIP (SMI 2013: 53; cf. *Chapter 7.1*). Following the fulfillment of the conditions and the submission of other necessary government permits, the project may enter into its operational phase. However, the ban on open-pit mining still exists in South Cotabato.

5.2.2.3 Project Location & Design

The project area is situated between Tampakan in South Cotabato and Kiblawan in Davao del Sur. It straddles the jurisdiction of two regions, four provinces, four municipalities and nine barangays. The area is predominantly characterized by rainforest. About 5,000 people – approximately 1,000 households – inhabit the affected area and

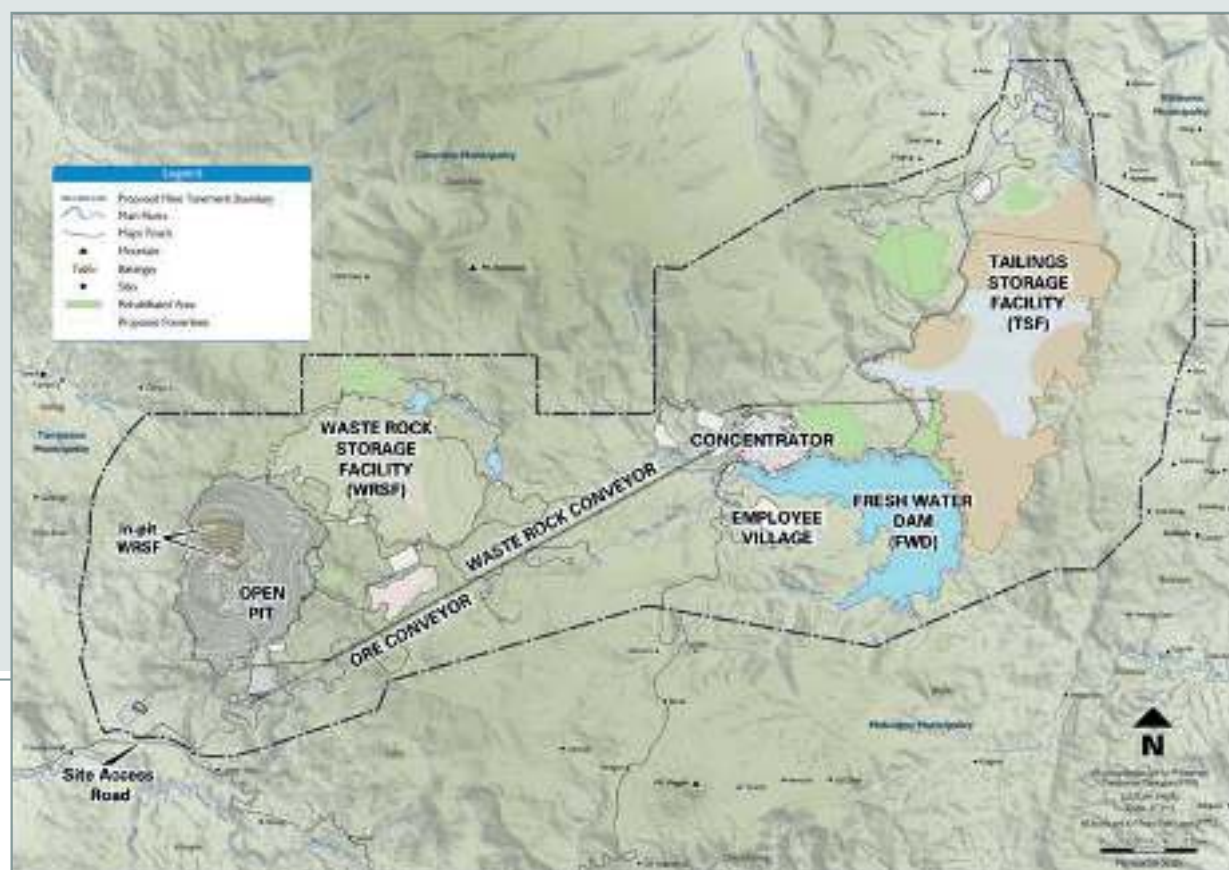
²² The DENR lists, amongst others, the following conditions: The project should not cover areas where mining is prohibited; the feasibility of the project should be made public; social acceptability should be ensured; all required government permits and clearances should be submitted; environmental standards, particularly those pertaining to waste and water management, should be fulfilled (for further information cf. DENR 2013).

will require resettlement. The majority of these inhabitants belong to indigenous communities (SMI 2013: 52; AECOM 2011: 3.4-3).

If operations of the project commence, the mine site would be characterized by an array of facilities and infrastructure. Here we only provide a rudimentary picture; more details can be reviewed in information provided by SMI (through the company's website, the Environmental Impact Statement, and annual Sustainability Reports).

Figure 6 illustrates the expanse of the project site and the main facilities. The area covered by the FTAA amounts to 23,571 ha (Indophil Resources NL 2013c). Xstrata Copper estimates that the final mine area would cover approxi-

mately 10,000 ha (SMI 2013: 11). The open pit would reach an extent of 500 ha and a depth of 785 m while the top-soil stockpile would cover an area of 5 ha and the pit ore stockpile 49 ha (AECOM 2011: 2-9). The employee village would be located within the project site and accommodate approximately 7,200 workers during construction and 1,800 workers during the operational phase (AECOM 2011: 2-11). Furthermore, the project would incorporate additional infrastructure outside the proposed mine site, such as a coal-fired power station, a filter plant, a port and a pipeline from the mine site to the port. These installations are subject to separate assessments, which we could not access and, hence, not incorporate in this study.



Source: Hansen Bailey 2011

5.2.2.4 Stakeholder Mapping

The (potential) effects of the project are multiple and impact the Philippines at large but also particular groups in society. Simultaneously, various groups of actors are involved in the project itself. All agents connected to the project can be considered stakeholders as each develops particular

interests in the undertaking and is affected by it. In this section we understand the term 'stakeholder' in a more narrow way suitable for the focus of this study. In line with our human rights perspective, we list those actors below who are involved or (potentially) affected by the project in terms of significant human rights impacts.

1. Most affected groups in society

- a. **Indigenous communities within or close to the proposed project site** (11 B'laan communities: Bongmal, Kimlawis, Bololsalo, Tacub, Fulo Bato, Danleg, S'bangken, Malabod, Blaan, Salnaong and Datal Saub; mostly affected by the project through required re-settlement and company programs)
- b. **Farmers and irrigators living in the vicinity of the proposed project site** (this group would be most severely affected in case of water degradation or shortages as well as siltation caused by the mining project)

2. Operating mining company (SMI) and shareholders (Xstrata Copper (Xstrata plc), Indophil Resources NL, Tampakan Group of Companies)

3. National Level

a. Government

- i. National Government Administration
 - ii. Department of Environment and Natural Resources (prime government agency responsible for the management of natural resources [formulation and implementation of government policies etc.])
Environmental Management Bureau (national authority responsible for environmental impact assessments; grants the ECC)
Mines and Geosciences Bureau (specialized mining agency within DENR)
 - iii. National Commission on Indigenous Peoples (protects and promotes the interests of the affected indigenous communities; supports indigenous communities in their involvement with the mining project)
 - iv. Department of Agriculture (promotes agriculture; supports interests of farmers affected by the project)
- b. **Commission on Human Rights of the Philippines** (state-funded independent institution working for the protection and realization of human rights)

4. Regional / Local Level

a. Government

- i. Government Units
 1. Provinces (South Cotabato, Sultan Kudarat, Sarangani, Davao del Sur)
 2. Municipalities (Tampakan, Kiblawan, Columbio, Malungon)
 3. Barangays (Tampakan: Danlag, Pula Bato, Tablu; Kiblawan: Kimlawis, Tacub, Bololsalo; Columbio: Datal Blao; Malungon: Malabod, Blaan)
- ii. Regional Offices of NCIP
- iii. Regional Offices of the National Irrigation Administration

b. Regional Offices of CHRP

5. Civil society organizations, interest groups and associations

- a. Tampakan Forum (an NGO network working on mining and particularly on the Tampakan Project; predominantly on a national level; two international associates)
- b. Catholic Church (lobbies against the current mining policy, mobilizes society, distributes information)
 - i. Catholic Bishops, in particular bishops of the Dioceses Kidapawan, Marbel and Digos and the respective Social Action Centers
- c. Irrigators Associations (lobby for the interests of local irrigators and farmers, operate predominantly on a local level)

6. Armed forces

- a. Philippine Military (deployed as counter-insurgency forces; also tasked to protect foreign investments)
- b. Civilian Armed Forces Geographical Units (reservists mobilized to support military operations, protect foreign investments; are under the command of the Philippine Military)
- c. KITACO Task Force (Kiblawan/Tampakan/Columbio Task Force; combination of military and CAFGU; part of the KITACO Growth Area Project, tasked to augment peace and security and to protect private investments under command of the military)

While other actors also have stakes in the project, the actors listed here have been most central to the assessment of the project from a human rights perspective. The different stakeholders have particular interests in the project and seek to advance these, which may cause conflicts as opposing views collide. It is the view of the authors of this study that all stakeholders also have – albeit to varying degrees – some leverage to contribute to a de-escalation of conflicts.

In the following, we briefly lay out the conflict potential deriving from contrasting interests and needs among stakeholders. It has to be kept in mind that this short characterization can only paint a rudimentary picture since interests and needs are not always clear-cut and also evolve over time. Nevertheless, the basic dynamics affecting the Tampakan Project can be discerned.

The national government constitutes one important player with the dominant interest of facilitating responsible mining projects to support the economic development of the country, although differing views exist in specific departments. The national government's interest to attract foreign direct investment, in particular with regard to the mining sector, aligns with the main interest of SMI and its shareholders to operationalize the project since the

company has already invested heavily. Many actors on the level of the LGUs – politicians as well as citizens of the local communities – would also welcome the continuation of the project because they already benefit and expect further economic opportunities and social development programs introduced or supported by SMI. On the other hand, the provincial government of South Cotabato has pronounced its opposition to the project through the open-pit ban enshrined in the Environmental Code. The reason for the ban is the fear of environmental degradation and, particularly, concern that the water sources of the whole province may be threatened.

Although individual opinions may differ, the majority of representatives of the Catholic Church, including the Catholic Bishops' Conference of the Philippines, have taken a strong anti-mining position. Based on the experience with many other mining projects in the Philippines, the Church, a very powerful player in the Philippines, fears environmental degradation and social disruption, particularly for the indigenous population.

The indigenous communities constitute a particular group of stakeholders in the Tampakan Project. Within the indigenous groups, diverging views exist on the desirability of the Tampakan Project, which has led to conflicts between and even within communities. While on the one hand the project is opposed due to the effects it has on indigenous communities' lives and the risks linked to it, on the other hand the economic and social improvements enabled by SMI are welcomed predominantly by those who benefit from them. All communities, however, seek

the fulfillment of their basic needs, which include access to health care, education or employment. The absence of the state to provide such basic services in the first place is one of the main triggers for the divisions between and within indigenous groups.

The existence of such different interests fuels the potential for contention and possibly violent conflict in the area. The situation is strained since convictions and even basic needs lie at the heart of the controversies surrounding the Tampakan Project and because actors on both sides seek to garner further support and, therefore, mobilize civil society. Moreover, the presence of state-controlled armed forces and militias in the area, tasked inter alia with the protection of private investments, further exacerbates tensions. It has to be noted in this respect that a power asymmetry characterizes the relationship between proponents and opponents of the project, although such lines are not clear-cut or static. The opponents of the project are primarily members of the indigenous communities and civil society groups, while a large mining company and its shareholders as well as the national government and most LGUs support the project. This asymmetry may have implications for the dynamics in the project area; it mandates in any case that actors, particularly the state and SMI, are particularly conflict-sensitive in order to avoid the escalation of conflicts. Conflicting views are also reflected in a vivid public debate on whether, under the existing legal conditions, "responsible" mining is at all possible in the Philippines, or whether framework conditions have to be amended in the first place. ■

6. Key Challenges in the Tampakan Context

6.1 Indigenous Rights and the Mining Industry

One key area of concern regarding the Tampakan Project is the situation of indigenous communities and the effects mining projects have on their lives. In the following, we outline the status of the communities in the Philippines, and concerns in respect to mining operations in general and the Tampakan Project in particular.

The Philippines are home to approximately 42 indigenous peoples (Gobrin & Andin 2002: 2). The majority lives on the islands of Northern Luzon (33%) and Mindanao (61%) (UNDP 2010: 1). On Mindanao, the Lumad constitute the main group. About 18 different tribes are subsumed under this

generic term. One of them is the B'laan tribe, inhabiting the area affected by the Tampakan Project (Molintas 2004: 273).

Although they have been more and more influenced by the way of life of the majority population, indigenous communities of the Philippines have retained their traditional habits to various degrees (Gobrin & Andin 2002: 2-3). The nature of governing adhered to by the indigenous communities, for example, distinguishes itself from the modern nation-state system (Molintas 2004: 272); in the case of the B'laan communities, the traditional leadership structure is based mostly on bloodlines and leaders carry the title of *fulong* and *bong fulong*.

The traditional economic activities of the indigenous communities also usually differ from those of the popula-

tion's majority. To a large extent, indigenous groups rely on a subsistence economy, which includes hunting, gathering, fishing as well as upland farming. Yet today, many also participate in the dominant economic structures of the state, e. g. by selling their products on the local markets. This is the case in Tampakan, too.

The traditional concept of land ownership indigenous communities adhere to endorses collectivism. Indigenous groups view land “as granted and entrusted by one Creator for everyone to harness, cultivate, sustain, and live on.” (Molintas 2004: 275) As this approach stands in contrast to the position taken by the majority of the population, laws have been enacted to safeguard the land rights of the indigenous communities. For example, DENR passed *Departmental Administrative Order No. 2*, which allows indigenous communities to receive *Certificates of Land Claims*, *Certificates of Ancestral Domain Claims (CADC)* and *Certificates of Ancestral Domain Title (CADT)* as a form of ownership. Although permitting indigenous peoples the right to gain official ownership, the notions underpinning *Departmental Administrative Order No. 2* rest on the concept of the nation-state and, hence, the indigenous communities depend on the state as the sole legitimate party to grant or deny ownership over lands (Molintas 2004: 288). In the case of the Tampakan Project, the B'laan communities have also secured their ownership of the area. Three CADTs and one CADC are affected by the mining project (Hansen Bailey 2011: 38).

The most important law to secure the right of indigenous communities to self-determination, including the right to their traditional land, is the already mentioned IPRA. It incorporates the indigenous concept of ownership and acknowledges that such ancestral domains are collectively owned by all generations of a community. It also mandates that indigenous communities have to give their consent (FPIC, cf. *Chapter 7.1*) when any new projects are likely to significantly affect their territory. Following IPRA, NCIP has the political responsibility for the concerns of indigenous communities and also for the execution of an FPIC process. The Commission operates on both national and regional levels. Its creation has been widely welcomed as an important step in the protection of indigenous rights in the Philippines. However, the extent to which the Commission has been equipped with the required capacities to fulfill the multitude of tasks assigned to it has also been questioned.

IPRA has been critiqued on different accounts. Firstly, the process to gain a title to land is extremely difficult and expensive, all the more so for non-literate communities where public information is not readily available and financial means to follow through with such a process are scarce.



Photo: Strotscheidt/MISEREOR

Secondly, the Act stands in contrast to other laws, such as the Mining Act of 1995. The Mining Act grants far-reaching rights over indigenous lands to the state which in turn grants this land to corporations. This signifies that even if indigenous communities have secured their claim to a particular area, mining corporations may still gain the permission of the state to operate on their land. Although IPRA demands that the companies acquire the permission of the communities, the conflict between the laws puts into question the extent to which the traditional ties of indigenous communities to their land are respected.

Besides legal controversies surrounding the relation between indigenous communities and the mining industry, several other issues and conflicts exist. Although disputes between the indigenous communities and the mining industry also occurred in the past, the new focus on large-scale mining has intensified conflicts (Holden 2005: 423). As mentioned above, different conceptions of land ownership constitute one of the main points of disagreement. Since mining companies require huge sections of land for their operations and have begun to focus on previously unexplored hinterlands – usually the homes of the indigenous communities – ancestral domains have come under pressure. Resettlement of these communities is the consequence, a process through which indigenous communities are removed from the land which constitutes the basis of their livelihoods and an important component of their culture (Gobrin & Andin 2002: 3). Holden (2005: 472) also

shows that resettlement has at times worsened the overall situation of indigenous communities, leaving them as poor urban migrants with few prospects.

According to company information, approximately 5,000 people living in 1,000 households will have to be resettled in the case of the Tampakan Project. IPRA declares that to instigate a resettlement process, indigenous people have to first give their consent without outside pressures. Here however, a further issue comes to the fore, namely the “informational asymmetry existing between mining project proponents and indigenous peoples” (Holden 2005: 425). Problems arising from such asymmetry are further intensified by parallel structures of representation that exist in the B’laan communities. Thus, the traditional *fulong* leadership has been complemented and partly substituted by a system of chieftains and tribal councils instituted through IPRA as part of a process to approve indigenous communities’ ownership of their lands. While at times these positions of leadership overlap, this is not the case in every community. Furthermore, the composition of tribal councils varies. While tribal chieftains are always members of the respective tribal council, this is not always the case for *fulongs* and *bong fulongs*.

In its relation with indigenous communities, SMI focuses on the chieftains and tribal councils. The existence of these parallel structures has led to frustrations and the feeling of misrepresentation among parts of the indigenous communities. In addition, SMI has established a third structure of representatives, namely so-called resettlement committees to represent communities in dialogues and negotiations on relocation issues. These resettlement committees are based neither on the *fulong/bong fulong* nor on the chieftain system. Their members are elected by up to 15 household units to represent these vis-à-vis SMI. Some interviewees, among them tribal chieftains, have complained that they do not feel represented by these committees, which now decide on core aspects of their future lives.

A further point of conflict between indigenous communities and the mining industry concerns the environmental degradation caused by mining activities. Soil erosion, pollution or accompanying logging activities pose a threat to biodiversity and, particularly for the indigenous communities, to their source of food, traditional medicine and an integral part of their culture (Goodland & Wicks 2008: 121).

Following from these challenges and disagreements, indigenous communities have engaged in protests against planned mining projects and at times also employed violent means. Often, these protests have been forcefully suppressed, fostering further resentments against mining projects, and creating a tense environment prone to further escalations (Holden 2005: 427-428; cf. Gobrin & Andin

2002 for examples). It becomes clear that the relationship between mining companies, the state, and indigenous communities is prone to disagreements and conflicts, based on diverging needs, interests, goals and conceptions as well as on conflicting laws.

In the case of the Tampakan Project all the above-mentioned problems are present and have affected the relationship between SMI and the involved B’laan groups. The presence of these issues has served as a trigger for several disputes and conflicts (cf. Chapter 6.3).

6.2 Environmental Impacts

A second focus in the debates surrounding mining highlights the negative environmental impacts usually accompanying mining projects. These range from the destruction of forests to soil erosion, air pollution and a loss of biodiversity. Such developments often have significant negative impacts on populations living in the surrounding area, but effects may also be more far-reaching. Assessments of the consequences mining may have for the environment abound and have also been conducted for the Tampakan Project (cf. Goodland and Wicks 2008). SMI itself has commissioned several comprehensive studies, which have focused on the possible environmental effects of the project. In its EIS, SMI introduces mitigation measures which are to prevent such negative effects from materializing. While the installations are planned to be constructed according to highest international standards, the report on mine waste management included in the ESIA points out that for the Tailings Storage Facility, for example, the highest level of protection is required because a failure of the installation would be accompanied by a “high potential for loss of life and high environmental damage” (Klohn Crippen Berger 2011: 42). This illustrates that SMI incorporates high levels of protection to mitigate risks, but it has to be considered that a residual risk remains. A failure of the mitigation techniques would, according to the report, pose serious threats to the communities in the area regarding environmental impacts. In this section we focus on the impacts the Tampakan Project may have on the water sources in its vicinity since interviewees have repeatedly voiced their fear of negative effects through the project. For this evaluation, we draw on three assessments which differ in terms of their foci and conclusions, namely SMI’s EIS, the study ‘To Mine or Not to Mine’ by Godilano²³,

²³ Dr. Esteban Godilano works as a Senior Technical Adviser for the Philippine Department of Agriculture and is a board member of the Climate Change Congress of the Philippines.



Photo: Bobby Timonera

and Goodland²⁴ and Wicks²⁵ work on the Tampakan Project for the UK-based Working Group on Mining in the Philippines²⁶.

In its EIS, SMI focuses on the integrity of water catchment areas, which characterize the envisaged location of the mining project. “A catchment is an area where water is collected by the natural landscape. In a catchment, all rain and run-off water eventually flows to a creek, river, lake or ocean, or into the groundwater system.” (Sydney Catchment Authority 2011) It is from these sources that the population living in the vicinity of the Tampakan Project satisfies its needs for water. Accordingly, jeopardizing the integrity of a catchment area and water systems connected to it can have severe consequences for the entire area and thus for the right to water. SMI identifies six catchments within the project site of which portions may be subject to direct impact²⁷ of the mining project: the Altayan, Taplan, Dalul, Mal, Mainit and Manteo catchments. Two major catchments may be indirectly impacted²⁸, namely where the Mal River merges into the Padada River and where the Altayan/Taplan River connects to the Marbel River. The Dalul, Mainit and Manteo catchments are the minor catchments, which may be indirectly affected (AECOM 2011: 2-5).

In order to ensure the continued integrity of these water systems and their utility to the surrounding communities, SMI asserts that all possible measures have been and will be taken to avert negative influences.²⁹ Assessments and

project models by SMI indicate that neither the quality nor the quantity of the water bodies will be jeopardized. However, the failure of the mitigation measures, which is not considered a possibility by SMI, may have devastating effects, and therefore causes fear among those who would be affected.

²⁴ Dr. Robert Goodland is an environmental scientist. He worked as an adviser to the World Bank from 1978 until 2001 and as technical director of the independent Extractive Industry Review of the World Bank Group's oil, gas and mining portfolio (2001-2004). He was furthermore elected President of the International Association for Impact Assessments.

²⁵ Clive Wicks has served as vice chair of the Commission on Environmental, Economic and Social Policy of the International Union for Conservation of Nature. He has also worked with the environmental movement, mostly the World Wide Fund For Nature, for many years.

²⁶ The Working Group was established in 2007 and is shared by the Right Honorable Clare Short MP, the UK's former Minister of International Development.

²⁷ Direct impact occurs in areas where project facilities or project operations are to be located (AECOM 2011: 2-5).

²⁸ Indirect impact occurs in areas “immediately outside the coverage of the project facilities and operations” (AECOM 2011: 2-5).

²⁹ These include estimates on water usage of the project and the surrounding communities as well as project installations such as a fresh water dam and water treatment facilities (SMI 2011).

Figure 7: Watersheds around the proposed Tampakan Mine



Source: Godilano 2012:13, own graphical chart

In his assessment of the Tampakan Project, Godilano (2012) focuses on larger, interconnected bodies of water, so-called watersheds. “A watershed is an area of land that drains all the streams and rainfall to a common outlet such as the outflow of a reservoir, mouth of a bay, or any point along a stream channel.” (United States Geological Survey 2013) Although the terminology on watersheds and catchments is not clearly standardized, a common differentiation is that a catchment constitutes a smaller unit of a watershed. With regard to watersheds in the Philippines, it has to be noted that Chapter III of the Mining Act excludes watersheds from mining applications. However, the area around the proposed mine site has not yet been declared a watershed area.

Godilano points out that three watersheds straddle the area the mine is to be situated in – Catisan Allah Watershed (742,858 ha), Marbel Watershed (122,659 ha) and Padada River Watershed (120,213 ha) (Godilano 2012: 7). These watersheds lie within a network of rivers and streams and serve the surrounding communities. According to his assessment, negative consequences, such as possible water contamination, increased siltation or decreases in water levels may impact large sections of the water system beyond the mine site (much larger than indicated by SMI) and, hence, may also affect larger sections of the population. The presence of the mine is therefore feared to pose unmanageable risks (Godilano 2012: 5). Catherine Abon, a

geologist from the University of the Philippines National Institute of Geological Sciences and member of Advocates of Science and Technology for Peace, posed that the Tampakan Project “would not only pollute [rivers] but will eventually (destroy) the sources of ground water in the mountains” (in MindaNews 29 August 2010).

Robert Goodland and Clive Wicks focus on both larger systems and specific bodies of water in their assessment of the environmental impacts of the Tampakan Project. According to their analysis, the catchment surrounding Mount Matutum – only 12km away – and five major rivers close to the proposed mine site (Mateo, Taplan, Padada, Alip and Buayan) all constitute important water sources for the population in the region. Goodland and Wicks point out that the “Padada River alone is a primary water source for over 33,000 hectares of irrigated lowland farms” (2008: 107). Lake Buluan (approx. 4,954 ha) and the connected Liguasan Marsh are also an essential water source close to the mining site, which “supports 42,000 jobs in 27,000 households (...) through fish production” (2008: 107). Following their assessment of the mining project, Goodland and Wicks see high risks in the progression of the mining project for these water sources. Importantly, they assert that such degradation would be irreversible and could extend all the way “along the coasts of the Davao Gulf” (2008: 114). While this study stems from 2008 and, hence, was conducted before SMI’s own assessments, Goodland

and Wicks have continued to voice criticisms regarding potential environmental impacts of the project (cf. Goodland & Wicks 2012).

From these three risk assessments, it can be concluded that a variety of views exist regarding the consequences for water sources in the area surrounding the Tampakan Project. It can nevertheless be deduced from the different studies that it is paramount that SMI's mitigation measures work effectively and to be aware that a residual risk remains. In case of technical failures, consequences for communities could be devastating in the wider area around the project site, and several human rights, particularly the rights to food and water, would be threatened. Interviews with the National Irrigators' Administration at the regional level, one local Irrigators' Association and various community members (especially in the area of Lake Buluan, in the South-West of Tampakan and around Davao del Sur) have illustrated that fears of such impacts exist among the population affected in the region.

6.3 Security Context

In this section, we investigate the security situation in the area of the proposed mine site. We understand security here predominantly as physical security. Analyzing potentially violent conflicts in relation to a mining project constitutes an important part of an HRIA since violent clashes are linked to human rights and have often become associated with the presence of the extractive industry (cf. Jenkins 2004: 24-26; Davis & Franks 2011: 2). Furthermore, in the area surrounding the Tampakan Project, violent incidents have taken place, and interviewees have repeatedly voiced their concern that the situation could escalate. Whereas the potential for conflict, triggered or aggravated by the project, is examined throughout this HRIA, this section focuses on the general security situation in the area of the proposed mining project and the principal actors involved. This allows for a better understanding of the social and political context the project is to be situated in.

In the following, we therefore introduce the most relevant aspects of the security context in the Tampakan area as well as the actors who impact on the security situation around the proposed mine site. The security context of the Tampakan Project is shaped by conflicts which erupted before the mining project established its presence, and by volatile dynamics arising through the project's development. These 'old' and 'new' factors also interact and at times fuel each other, which facilitates the escalation of violence. In this section, we introduce the different

players and their impacts in the following way: first, the militant wing of the Communist Party is introduced; second, the role of the indigenous communities and particularly those members who employ violence is analyzed; third, the presence of state-controlled armed forces and its effects on the security situation is presented; fourth, the role of SMI and its conduct regarding the security situation is scrutinized.

One important actor in Mindanao is the New People's Army (NPA), the armed wing of the Communist Party of the Philippines, which was already active in and near the area before the Tampakan Project started. The goal the NPA seeks to achieve is the overthrow of the national government by means of guerilla tactics (BBC 2012). NPA units are present predominantly in rural areas throughout the Philippines and are estimated to command approximately 10,000 members. Estimates put the number of deaths perpetrated by the NPA at leastwise 40,000 (BBC 2012). Peace talks between the government and the NPA resumed in Oslo in 2011, yet an agreement has not been reached at this point (BBC 2012). The insurgents carry out guerrilla attacks on Philippine military and police forces while companies and landowners who refuse to pay 'revolutionary taxes' have likewise suffered attacks. Kidnappings, extortions and killings are also part of the NPA's insurgency strategy. Throughout the presence of the Tampakan Project in the area, the NPA has furthermore been publicly linked to violent incidents related to the project. In 2008 for example, the NPA burned down SMI's base camp. Correspondingly, violent opponents of the exploration activities have repeatedly been labeled as members of the NPA, which in turn has been used by state forces as an argument to employ strong measures against them. Moreover, local experts have informed us that the NPA is capitalizing on the resentment felt primarily by indigenous community members towards SMI to recruit new members. Accordingly, the presence of the NPA increases the violence perpetrated against the mine, while at the same time its presence serves as an argument for national security forces to employ counter-insurgency-methods in the area.

A second factor important for the security context is the use of violence by members of the indigenous communities. One aspect here is the occurrence of clan wars in indigenous communities. Interviewees recounted violent incidents perpetrated by groups opposing one another, creating a climate of fear. Indigenous community members have also employed violence to express their opposition to the Tampakan Project, although it has to be clearly noted that protest against the mine by the indigenous communities primarily relies on peaceful means. Several conditions may contribute to the choice of violent means. The conflict

over land use and resettlement terms between indigenous groups and the mining company may constitute a possible reason. According to interviews, discontent and propensity for violence was further fueled by incidents such as the destruction of burial grounds. Moreover, grievances resulting from the lack of social services available to indigenous communities may also be a cause for the resort to violent means. Furthermore, the power asymmetry between indigenous communities on the one hand and on the other the presence of a large company may foster the use of violence. Some opponents also feel that their opinions are not being heard or considered. The use of violent means by indigenous community members perpetuates insecurity and serves to support the argument that the presence of armed forces is required to contain such acts. It also facilitates the framing of these activists as insurgents and threats.

As already mentioned above, state-controlled armed forces have been deployed in the Tampakan area to foster security. Three groups of armed personnel have to be distinguished. Brigades of the Armed Forces of the Philippines (AFP) constitute the first category of armed personnel. They have been stationed in the area as counter-insurgency forces against the NPA. Increasingly, the military is being tasked to protect mine sites, including the Tampakan Project area, from attacks related to the NPA as well as indigenous opponents.

Since the beginning of 2011, the Philippine military has been operating under the new 'Internal Peace and Security Plan (Bayanihan)'. As part of this plan, a paradigm shift in the military is envisaged to move from 'defeating the enemy' to 'winning the peace'. To this end, a stronger involvement of other stakeholders, including civil society, in AFP initiatives, the professionalization of the military, and a larger contribution to peace-building are envisaged (cf. AFP 2010). Interviewees confirmed that integrative steps have been taken by the military in the project area including concerts and sport events. Interviews also revealed that a dialogue between local stakeholders and the military has ensued following several violent incidences between the armed forces and members of indigenous communities. In such meetings, the overall form of the military's presence has been discussed. Attempts are being made to accordingly align local concerns with the military's duties. However, at the time of writing, Bayanihan has yet to be fully implemented in practice.

The KITACO Task Force is the second official armed group operating in the area. It consists of personnel from the military and from the Citizens Armed Forces Geographical Units (CAFGU). It was created by the three municipalities (Kiblawan, Tampakan, Columbio) as part of a project called "KITACO Growth Area" to increase peace and security. This

endeavor seeks to foster cooperation between the municipalities to improve their overall development as well as peace and security. The goal is to "develop KITACO as a preferred area of investment" (MoA 2008: 1.1.6.).

The units of the CAFGU constitute paramilitary forces, established through Executive Order 264 (1987), and are the geographically organized reservists of the Citizens Armed Forces (CAF). The CAF consist of reservists³⁰, but also of officers of the AFP or enlisted men on inactive status. The CAF are to support the military in times of need, such as war, rebellions or relief and rescue operations. The tasks of supporting the socioeconomic development and the maintenance of essential government or private utilities have also been added to the CAF's mission (Republic Act No. 7077: Article III, Sec. 7). According to interviews, four detachments of CAFGU, each with about 15 personnel, operated in the Tampakan area until recently which has at the moment been downsized to two detachments.

SMI has been connected to the financing of both the KITACO Task Force and CAFGU. For the KITACO Task Force, it cannot be clearly established to what extent financial contributions are made by SMI since funds are channeled through the KITACO Growth Area project, managed by the LGUs. Following the project's MoA, SMI contributes 1,000,000 PHP (approx. 24,000 USD) annually to the KITACO Secretariat and 400,000 PHP (approx. 9,600 USD) annually to support and implement project plans (MoA 2008: 1). Recent media reports have also stated that SMI provides significant funds to CAFGU. Mayor Diamante of Kiblawan confirmed in a congressional hearing that such support is provided while SMI responded that LGUs allocate the funds independently, which SMI only provides per request (Rappler 23 February 2013). The exact amount cited in media articles varies, yet numbers range between 150,000 PHP (approx. 3,600 USD) and 850,000 PHP (approx. 20,600 USD) per month for a total of around 60 CAFGUs as well as additional funds for gasoline (cf. Rappler 23 February 2013; MindaNews 24 February 2013).

Following from the involvement of SMI with the armed groups, several interviewees stated that they perceive both CAFGU and the KITACO Task Force as the company's allies. The involvement of SMI with state-controlled armed forces, particularly the provision of financial contributions, has also been criticized on a national level by Members of Congress (cf. Rappler 23 February 2013).

The presence of armed personnel has greatly influenced the atmosphere in the Tampakan area. Importantly, indigenous communities often do not distinguish between the

³⁰ 'Reservists' are "all able-bodied citizens" (Executive Order 264: Sec. 1).

different types of actors, as this is difficult due to a possible overlap in memberships (i.e. military and CAFGU personnel are part of KITACO etc.). Accordingly, various tasks or manners of operation are not attributed to particular groups but to *the* armed forces. In several interviews, the effect of a feeling of higher security because of the armed forces' presence was confirmed because previously no state-controlled security actors were present around the communities. However, some indigenous communities reported that the patrolling of soldiers around the communities induced fear. One reason for this development lies in the fact that everyone who is publicly opposing the Tampakan Project could become a potential target (cf. *Chapter 7.7*).

One striking factor in the security situation with regard to state-controlled actors is the almost complete absence of police in the area. Consequently, the military often takes over tasks usually carried out by police forces, such as arresting persons for whom warrants have been issued. The main reason for this conduct mentioned in interviews was that police forces did not dare to enter remote communities and did not feel adequately equipped to handle the dynamics in the area.

Another factor which influences the security situation around the proposed mine site concerns the presence of the company and its influence on the security situation in the Tampakan area. The company responds to the volatile security situation through company policies. A number of initiatives are to mitigate conflicts and lower security risks. For instance, SMI has conducted several risks assessments to develop an approach to manage human rights-related security issues (SMI 2013: 31). Specific training, for example on the company's approach to human rights and its Code of Conduct as well as cultural awareness training, is provided for all employees and contractors (SMI 2013: 31). A number of employees, SMI's security personnel, the AFP, police officers as well as the KITACO Task Force and the CAFGU have furthermore received instructions on the Voluntary Principles on Security and Human Rights (SMI 2013: 31-33; Xstrata plc 2012b; SMI Interview). In Kimlawis, the company also supported the construction of the police sub-station in 2012 (SMI 2013: 31).

Besides these security-related policies and activities, the company itself intensifies the presence of armed personnel in the area through the employment of a security company to protect installations and personnel. In 2012, SMI suffered three attacks aimed against staff and contractors resulting in three fatalities (SMI 2013: 30). Currently, the Philippine company Catena Security Inc., part of Global Security Solutions Inc., is commissioned to secure the mine site. According to SMI, the hiring of a security company follows an elaborate screening process to ensure its

suitability. SMI also informed us that at the time of the interviews the guards protecting the site were not patrolling the property but instead remained at a small camp in the middle of the project area. They are partly armed and undergo human rights awareness training based on the Voluntary Principles on Security and Human Rights. We received no information on the prerequisites that have to be met to authorize the use of force by the security company, which may pose problems if violent incidents occur. In our interviews, no complaints were raised against the private security contractor.

The review of the developments regarding the security conditions surrounding the Tampakan Project reveals that an intricate web of antagonistic dynamics has developed which is prone to further escalation. A militarization of the area has occurred which creates a climate of insecurity and high risks for human rights violations, which are further analyzed in *Chapter 7.7*. While conflicts already existed before the mining companies entered the scene, the presence of the Tampakan Project has served to foster resentments and the readiness to employ violence among parts of the population, thereby further fueling conflict potential. The recent steps taken by local agents and the military may mitigate conflicts and the potential for escalation, yet their effectiveness cannot be evaluated at this point. ■



Photo: Paasch/MISEREOR

7. Human Rights in Focus: Analyzing Core Subjects

To ensure that the most relevant topics regarding human rights impacts receive sufficient attention, we chose to organize this analytical part in accordance with the issues identified in our desk study and mentioned most in interviews. We found that several themes resurfaced in each open interview. The topics of high importance for the affected communities and other involved stakeholders are the following: issues related to information and participation for affected communities and their opportunities to raise questions; the effects the project may have on the fulfillment of the communities' basic needs, which included the personal economic situations, livelihoods and consequences for health and education; and the significance and repercussions of the Tampakan Project for indigenous culture in the area.

We divided these subjects into six categories treated separately in the remainder of this chapter, although overlaps of course exist. The core subjects derived are: 'Information and Participation', 'Grievance Mechanisms', 'Livelihoods', 'Health', 'Education' and 'Culture'. For each theme, we focus on the relevant human rights, the conduct and activities related to the core subject in the affected area of the Tampakan Project by SMI and – where applicable – the state, and we evaluate these developments with regard to risks and opportunities for the realization of human rights.

Following this summary of our data and our first interpretation, the cross-cutting analysis is provided in *Chapter 8*, where we take the interconnectedness of core subjects into account, link these subjects to the potential for (violent) conflict and present key human rights deficiencies that follow from this.

7.1 Information and Participation

7.1.1 Defining the Subject Area

Information and participation are cross-cutting themes which are central to a human rights perspective. They are also complex and interconnected with other topics; yet here, we treat them as an isolated issue and focus on the actual information policies of actors involved. Although the state has a prime duty to provide its constituency with information, we did not come across any comprehensive information

policies by LGUs and national government officials with regard to the Tampakan Project. Among government officials, there is a strong recourse to and dependency on information provided by the company. We will therefore concentrate on SMI's information policy in this section, but revisit the state and company responsibilities in *Chapter 8*.

Information policies may also affect existing conflict potentials. Perceived (or actual) misinformation provided by the company or by government officials, or a lack of information, creates a feeling of powerlessness for the affected population. It also reflects high levels of dependency on the company and uncertainty regarding the future. Thus, there is a high risk of increasing frustrations which may contribute to a context in which community members choose alternative and potentially violent ways to express their opposition.

We can distinguish three different elements of information policy that are relevant in this context. We refer to mere information where communication is primarily flowing from the company or the state to people affected. Consultation is also primarily company-led but includes an expectation of feedback, allowing the company to understand people's views. Finally, participation focuses on a bottom-up flow of communication and action, allowing people to actively engage with state authorities and/or the company and project plans.

In the remainder of this section, we first explain central elements of the normative framework for people's right to participate. Then we elaborate on how information, consultation and participation have been organized by SMI and, where applicable, public authorities, and evaluate perceptions of the information policies by interviewees.

7.1.2 Rights at Stake

Information and participation are both anchored as human rights in international treaties and are understood as preconditions for a self-determined life in dignity. A right to actively participate in shaping the political and societal life that goes beyond the right to vote derives from the Universal Declaration of Human Rights and from various human rights treaties (Hamm 2004: 17) and UN soft-law instruments, as summarized in the table below. Moreover, the enabling role of information as the 'right to know' is emphasized for realizing other human rights.

Furthermore, access to information for affected people and comprehensive disclosure of the possible impacts of

Rights/Source	Content/Elaboration
Universal Declaration of Human Rights (UDHR), Article 19	Right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers;
International Covenant on Civil and Political Rights (ICCPR), Article 19	Right to freedom of expression; freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;
ICCPR, Article 25a	Right to take part in the conduct of public affairs, directly or through freely chosen representatives;
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 7b; 8; 14(2a, 2f)	Right to participation in respect to diverse concerns in the context of public policy planning and decision making at the international, the government and community level;
Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Food and Agriculture Organization of the United Nations 2012)	Describe participation and consultation in all phases of land transfers and investment projects.

business activities are part of corporate human rights due diligence as laid down in the UN Guiding Principles on Business and Human Rights. The Principles ask for meaningful consultation with potentially affected groups and other stakeholders. Enterprises should also track the effectiveness and adequacy of the responses they offer to affected stakeholders by drawing on their feedback. Companies are to demonstrate their respect for human rights in practice by means of communication, transparency and accountability (OHCHR 2011, Principles 17; 18b; 20b; 21). On the level of operational guidance, the IFC Performance Standards also include obligations for disclosure and dissemination of project-related information as a precondition for effective community engagement and ongoing reporting to affected communities (IFC Performance Standards 1; 7). IFC Performance Standard 1 further emphasizes that – besides disclosure and information – consultation and participation are necessary to comply with the standard (IFC Performance Standards 1; 25).

On the national level, the Philippine Constitution (Article III, Section 7) confirms the right to access to information. The Local Government Code of 1991 also contains the duty of state bodies to provide information and offer ways of participation. These provisions set the standard on how the national government should deal with Local Government

Units and its constituents regarding any matters that will affect them. Chapter 4, Section 34 asks LGUs to “promote the establishment and operation of people’s and non-governmental organizations to become active partners in the pursuit of local autonomy”.

The right to information and participation of indigenous peoples is particularly emphasized in the human rights context. It is pooled in the concept of FPIC, which, for the Philippine context, is laid down in IPRA.

7.1.3 Status Quo and Project-related Activities

7.1.3.1 Public Authorities’ Information and Participation Policies

On the municipal level, there is little data available on how LGUs provide information and possibilities for participation in the context of the Tampakan Project. It seems that such policies are not systematic and rather limited. The Mayors of the municipalities of Tampakan and Kiblawan explained in interviews that they had been actively informing communities in their respective municipalities. However, interview partners at NCIP argued that LGUs failed to give sufficient weight to providing indigenous communities in their territory with necessary information. Other interviews with community members revealed that many people do



Photo: Noé/MISEREOR

not consider information by the municipality as objective and trustworthy. This perception has increased as both Mayors have also sent petitions in support of the mine to the President of the Philippines, which calls the impartiality of information into question. In Tampakan, this mistrust is also caused by the fact that the current Mayor of Tampakan, Leonardo Escobillo, owns a company that is one of SMI's local contractors. Although the Mayor did not reveal this to the research team when asked about the existence of local contractors, it was confirmed by several interviewees, including SMI. This double role of Mayor Escobillo leads to a conflict of interest – the pursuance of private business interests on the one hand and the representation of public interests on the other. This, however, led neither the Mayor nor SMI to abstain from this contract.

On the provincial level, the Governor of South Cotabato actively promotes the view that a more balanced information policy is required to give public authorities and communities the possibility to evaluate the Tampakan Project. Thus, already on September 23, 2011, he convened a public meeting in Koronadal, which was attended by several thousand people and in which both company and critics were able to present their views and findings on the project and on related risks. However, this was the only public meeting in which some of the presenters were neither funded by nor associated with the mining company. The Governor furthermore informed us that he considers an independent environmental impact assessment to be important to balance the company-led provision of informa-

tion. Due to the concept of decentralized governance, the national government authorities are not actively engaged in information processes.

As a political opponent of current Philippine mining policies, the Catholic Church has taken over an active role in providing information in Tampakan, especially through its Social Action Centers. For instance, together with a Philippine NGO and indigenous communities, these centers developed a large three-dimensional map of the area which included the planned final stage of the open pit. Church representatives presented the map during the above-mentioned meeting in South Cotabato. Several interviewees reported that it was this presentation which made them understand the magnitude of the project. They emphasized that for them, the Church would be the most important source of information on the project. However, some interviewees voiced their concern that the Church might also provide misinformation and seek to arouse public unrest, as it is a political opponent of the Philippine mining policy.

7.1.3.2 SMI's Stakeholder Engagement Program

Although both WMC and later SMI have been actively engaged in the project region for several years and stakeholder consultations already occurred in the 1990s, this section focuses on SMI's Stakeholder Engagement Program since 2009 because information on concrete policies before this point in time are not accessible. SMI has presented a comprehensive stakeholder engagement program. It "was designed and undertaken to satisfy the Philippine regu-

latory requirements [...] relating to the preparation of an EIS³¹ and the ECC approval process” (Hansen Bailey 2011: 63). For the design of this program, international standards were “[...] considered where relevant” (Hansen Bailey 2011: 63). It is important to note that it is a particular aim of the meetings conducted as part of the program to reach legal compliance and social acceptance for the project. This raises the question how independent and balanced the information given will be and how rules for consent in good faith will be followed. We question whether meetings allowed for a balanced presentation and discussion of risks and opportunities related to the project. In the following, we first present the basic steps of the stakeholder program; second, we evaluate the program following our interviews with community members; and third, we present our conclusion from a human rights perspective.

The three phases of stakeholder engagement:

According to the ESIA (2011), SMI distinguishes between three phases of stakeholder engagement:

1. **Planning:** This includes the identification of all possible stakeholders, ranging from government agencies, civil society organizations, local community based organizations and institutions, communities affected, to business groups, as well as local media.
2. **Issue scoping:** This step involves an Information, Education and Communication (IEC) campaign with 46 stakeholder meetings covering 94 key stakeholder groups from September to November 2009; more than 1,500 people were consulted. Consultation meetings with indigenous communities were carried out by specialists in the local language (Hansen Bailey 2011: 66). The aim was to formally announce the commencement of the EIS process to stakeholders, and to inform about key components and issues of the project as well as to collect stakeholders’ concerns.

In November 2009, EIS public scoping meetings were held in all four municipalities of the proposed project site (Tampakan, Malungon, Columbio, Kiblawan). Here the stakeholders of the IEC campaign were invited again, as well as representatives of government authorities of the EMB and the *Environmental Impact Assessment Review Committee* (EIARC). Information was delivered on the project components (including schedule), environmental issues (including impact assessment) as well as the EIS and stakeholder engagement. Stakeholders’ questions in these meetings related to a wide range of issues.

3. **Issue response and feedback:** The aim of this third phase was to respond to issues raised by stakeholders, including feedback on the findings of Phase 2. A total of 714 stakeholder issues were recorded and sorted into six so-called “key issue themes” (Hansen Bailey 2011: 69). 293 of the questions raised were classified as directly relating to the key issue theme EIS and are summarized in the ESIA. The remaining 421 questions are, however, not publicly documented by SMI.

As part of phase 3, AECOM, the consultancy hired by SMI to implement the stakeholder engagement plan, conducted further stakeholder consultations on social and environmental issues important for various documents of SMI (Social Impact Assessment; Social Development and Management Program) in February 2010. Moreover, a Forest Use Assessment was carried out in October 2009 and a Downstream Water Users Survey between November 2009 and April 2010. The latter included 293 users within the areas of water catchments in close proximity to the project site (Hansen Bailey 2011: 69).

Further queries by community members can be submitted on an ongoing basis. According to SMI (2013: 50), 8,340 stakeholder inquiries were resolved or followed up in 2012. The “Stakeholder Consultation, Communication, Consent and Convergence Network” (C-net) serves as a network to record and respond to queries. It is supported by an online tool which stakeholders can use to submit queries via SMS and email. 3,173 queries were submitted online in 2012, of which 100% were responded to (cf. SMI 2013: 50).

Furthermore, the Stakeholder Education Program has reached approximately 15,600 people, including project presentations, tours to key facilities and – with selected 600 people – to other mine sites and a dam site in the Philippines and in Canada (cf. SMI 2013).

According to the ESIA and other company publications, SMI conducted separate consultations with stakeholders on

- resettlement in a “Resettlement Consultation Program”;
- FPIC;
- health issues through a Health Impact Assessment (HIA) that was conducted by SMI in co-operation with health agencies and local community stakeholders;
- initiatives relating to community development programs (SMI 2013: 51pp).

The company’s website and Sustainable Development Reports are additional means of information, and a consultation plan is to be implemented during the construction and operation phase (Hansen Bailey 2011: 70).

³¹ An Environmental Impact Statement is a mandatory prerequisite to gain an ECC.

7.1.3.3 Public Perception and Critique

When comparing the company statements in the ESIA document and recent Sustainability Reports with the views of interviewees, we gain a rather mixed picture. Different perceptions and evaluations exist among communities regarding the adequacy of the information provided. While tribal chieftains as well as people in the Barangay Danlag felt well-informed to a large degree, many other local stakeholders – other indigenous communities, farmers and irrigators – complained about a lack of information provided by SMI. It seems that the character of stakeholder engagement – predominantly consultation and scoping meetings – was unfamiliar to participants and did not clearly convey to local stakeholders how they could make their voices heard. Irrigators in particular complained that their questions regarding water-related risks had not been answered by SMI. Also, interviewees repeatedly emphasized that the form and content of SMI meetings were unsatisfying. Often, we encountered discontent with the fact that questions by stakeholders were collected by representatives of the company, but no answers were provided. No interviewees mentioned the use of on-line queries via C-net, and it did not become clear to what extent they were aware of such an option.

Even after having attended SMI information meetings, many people did not feel they really understood the meaning and scope of open-pit mining. Several interviewees emphasized that the first time they understood the magnitude of the Tampakan Project was during the public meeting organized by the Governor of South Cotabato. In this meeting, the three-dimensional map was presented to the public by Church representatives.

Some interviewees also assumed that SMI meetings were not intended to offer truthful information but rather to seek local agreement with the mining plans. It was emphasized in several interviews that meetings took place in rather noble hotels, which were perceived by some as an intimidating environment. For example, two petitions of irrigators' associations to support the project were signed in Koronadal City in October 2012 during a visit to the proposed mining site and a meeting in the city. This fostered the feeling among some interviewees that these meetings primarily served as ways to mobilize support for the project and to collect signed petitions. Also, interviewees stated that these meetings sought legitimization for the company rather than providing transparency for people affected.

Several interviewees especially highlighted one meeting in March 2012 concerning the company's resettlement plan. The role of the meeting remained unclear to these interviewees, and it was not translated into B'laan language. The meeting seems to have triggered further unrest because it coincided with the increase of military presence

in the region. People assumed a correlation between these instances and felt pressured into supporting the mine. Another incident that was reported by several interviewees caused discontent and concerns. According to these reports, employees invited children into an SMI information tent at a central village place while their parents had not been notified in advance. To interviewees, it was alarming that the minors were asked to sign in for the attendance of meetings and to add their parents' names. People were afraid that their signature might be abused or that the meetings might be misrepresented in SMI documents as proof of people's consent. Although these examples reported by interviewees are anecdotal, they represent general feelings of uncertainty, mistrust and misinformation conveyed in interviews in various forms.

7.1.3.4 Ambiguities and Open Questions

SMI acquired its interest in the Tampakan Project in 2001 (Hansen Bailey 2011: Executive Summary: 3). However, we are not able to document SMI's activities in respect to information and participation of affected groups between this time and 2009. Nevertheless, looking at how SMI's Stakeholder Engagement Program has been implemented since 2009, as documented in the ESIA (Hansen Bailey 2011), it has been very comprehensive in following the rules of the Philippine government as well as the IFC Performance Standards. Nevertheless, important questions remain in regard to the extent to which consultation and possibilities for active participation have been 'meaningful'.

The first ambiguity refers to the appropriate representation of people affected during public meetings. According to IFC Performance Standard 1, the company is asked to make "every reasonable effort" to ensure that community representatives such as the tribal chieftains do represent the views of the affected communities and "faithfully communicate the results of consultations to their constituents". In the case of the Tampakan Project, the most vulnerable groups are the indigenous communities. SMI has therefore developed a mandatory Cultural Awareness Training for all employees and contractors (cf. SMI 2013: 31). However, interviews revealed very controversial attitudes as to what extent the representation of the B'laan communities solely by their tribal chieftains, which was assumed by SMI, was in line with B'laan customs and traditions. In Chapter 6.1, we have already mentioned the traditional tribal leader system based on *fulongs* and a *bong fulongs*. Up to now, SMI has focused on the tribal chieftains (see also Chapter 7.6). Furthermore, the IEC stakeholder list only includes tribal councils and no other community members (Hansen Bailey 2011: 67). In light of the company's goal to engage with communities, this limitation seems problematic. In an interview, we were told

that SMI was increasingly becoming aware of this problem. Several passages in the ESIA also require further clarification in respect to non-indigenous communities. While the assessment mentions 94 ‘key stakeholder’ groups, it does not reveal who exactly these 94 groups are. The stakeholder list is precise in respect to government units, but the list of stakeholders summarized as *Civic and Community Organization/Academe* is aggregated and intransparent. It is not replicable to us on which basis NGOs were selected.

The second unclarity refers to the adequacy of involvement of people affected: How did people’s questions and concerns influence SMI project plans, and how did the company respond to these concerns? Scoping and consultation are to be distinguished from participation: The former two are both primarily directed towards information gathering for the company, and neither necessarily includes the active involvement of people affected. While SMI offers a detailed explanation of the stakeholder engagement plan and its implementation in the ESIA, this plan in fact seems to be limited to scoping and consultation; participation is only mentioned in the information brochure attached to the ESIA. A meaningful participation process would involve an open and interactive procedure, which, following the details in the ESIA and interviews with people affected, did not take place.

Linked to the question of participation is the manner in which SMI responds to people’s questions and concerns. According to the ESIA, issue scoping meetings were recorded and responded to (Hansen Bailey 2011: 66). Interviews, however, revealed that many participants considered the response by SMI to be unsatisfying or non-existent. People complained that during the meetings, no direct answers were given and that they did not receive any information later either, although this had been promised. While answers may be provided in printed publications and on the company website (in English only), this would not constitute appropriate channels to reach affected people. Also, interviewees stated that SMI’s responses did not remove major doubts voiced regarding future risk mitigation. As the ESIA only lists those aspects raised in Issue Scoping meetings which directly refer to the EIS, it was not possible for the research team to assess the concerns and responses regarding other themes, namely land access and resettlement, FPIC, project benefits, corporate (e. g. ownership) and off-site infrastructure.

7.1.4 Free, Prior and Informed Consent

Especially under the conditions of economic globalization, the rights of indigenous communities, including their right

Box 1: Elements of Free, Prior and Informed Consent

to FPIC, have gained prominence, particularly because time and again national development goals have been in conflict with indigenous communities' interests and rights. This holds especially true for the exploitation of natural resources because much of today's unexploited ores lie under indigenous lands (Holden 2005; cf. Chapter 6.1). Because of this possibly conflict-laden situation, the extractive industry has also been under special scrutiny in debates on business and human rights.

Based on the UN Declaration on the Rights of Indigenous Peoples, fundamental procedures of how FPIC should be performed have been proposed by the UN Permanent Forum on Indigenous Issues (UNPFII) (see Box 1, p. 37). They may be taken as benchmarks when looking at the FPIC in the context of the Tampakan Project.

7.1.4.1 FPIC in the Philippines

FPIC was legally inscribed as a formal procedure by IPRA in 1997. For the mining sector, FPIC is necessary to gain a mining tenement from the MGB. It is also the precondition to reach a Memorandum of Agreement (MoA) or a Principal Agreement (PA) with an indigenous community (cf. *Chapter 5.1*). FPIC in the Philippines has been further regulated by an Administrative Order, the FPIC Guidelines of 2006, which have recently been revised (Maderazo 2011). The Revised FPIC Guidelines came into force in 2012.³² In respect to the upcoming FPIC for the Tampakan Project, two major changes referring to the practical FPIC process may be relevant. First, the guidelines of 2006 demand either a voting process by raising hands or the judgment of elders/leaders. In contrast, the guidelines of 2012 request that consensus for a particular project among all community members shall be reached and conveyed through the traditional community leaders. Second, while the guidelines of 2006 require only the consent by people in the area of the ancestral domain that is directly affected by a mining project, now all communities in the whole ancestral domain need to be included.

7.1.4.1 FPIC for the Tampakan Project

So far, the main step which required the first FPIC process was the beginning of the exploration phase, before the PAs were reached in the 1990s. The upcoming next FPIC concerns consent to the operational phase.

Consent to the Exploration Phase:

When WMC began its activities in the 1990s, IPRA was not yet in force. Nevertheless, it seems as if WMC put a lot of effort into gaining the trust of the traditional indigenous leaders (Davis 1998). Davis (1998), at the time of his article responsible for WMC's *Indigenous Peoples Policy*,

reports that the company supported the highland B'laan communities to receive official claims to their land (CADC, Davis 1998: 239). This of course was also in the interest of WMC as such CADCs formed the basis to reach Heads of Agreements and Principal Agreements with several B'laan communities³³ (Hansen Bailey 2011: 80). The chieftains, NCIP and SMI reported in interviews that WMC conducted an FPIC process to reach these PAs, yet the form of this process was not relayed. Once SMI acquired their interest in the Tampakan Project, the company took over not only the FTAA, but also these PAs. When they expired, SMI renegotiated the terms of the agreements with the tribal councils of these communities. According to NCIP, all these renegotiated agreements are based on FPICs. While NCIP confirmed the documentation of these consents, other interview partners explained that the Commission denied them access to these documents. The non-transparency of the FPIC process poses a major problem as it calls into question the independence of the process and full compliance with all legal provisions.

Moreover, interviews revealed that – as the first FPIC only referred to the exploration phase – no concrete information on the open-pit mining method was given to the communities. Considering the definition given in Box 1, however, not only the nature, size, pace, reversibility and scope of any proposed project or activity need to be explained, but also the reasons or purpose of the project and/or activity. Hence, information should have been provided on the method of open-pit mining and alternative options under consideration. The lack of (accessible) documentation of the first FPIC processes and the apparent limitation of concrete information that was provided during that time raises doubts whether we can qualify the consent – assumed that it was given by all communities affected – as informed.

Consent to the Operational Phase:

Another FPIC process will have to be conducted with regard to the operational phase of the project, presumably in the near future. For several reasons, the history of project activities by WMC and SMI is important for the present situation and the pending FPIC. The presence of the

³² The following comparison of the FPIC 2012 guidelines with those of 2006 is based predominantly on an email exchange with Atty. Mario E. Maderazo, Advocacy and Legal Officer for the Anti-Mining Campaign Project of the Philippine MISEREOR Partnership, Inc. as well as on interviews with NCIP.

³³ These were the councils of both Danlag and S'bangken in 1997, of Fulobato and Bong Mal in 1998, and of Salnaong in 2004 (ESIA 2011: 80). Tribal chieftains, however, emphasized in an interview that as of today, there would only be a Heads of Agreement, no Principal Agreement, in Salnaong.

companies has already triggered changes and conflicts linked to mining plans for many years now, including in high-land B'laan communities. It seems that because of different views towards the mine distance and mistrust between communities have grown. Some interviewees have raised suspicion of corruption and perceived that SMI is treating communities differently according to their attitude towards the mine. Furthermore, in the PAs, one important obligation of the corporations towards the B'laan communities is engagement in community development. Through the programs implemented by SMI to fulfill this responsibility, the company has taken over state functions by offering basic services. This signifies that SMI has come to replace the state in ensuring the realization of particular social, economic and cultural rights, whereby the government had never met the respective state duties before the companies entered the area (cf. *Chapters 7.3-7.5*). Hence, there is an increasing dependency on the social services of SMI. This raises the question to what extent the FPIC process is really free.

Against the background of the given situation, the upcoming FPIC process for the operational phase should also be critically observed with regard to some key inquiries. First, it remains crucial who of the indigenous communities is actually included in information processes and how this is ensured and documented. Second, while the role of NCIP during the FPIC process is laid down in the respective guidelines, it remains an open question how the commission will be able to fulfill this role. The regional office seems to be ill-equipped for representing indigenous interests in the context of the FPIC process, which has been confirmed by NCIP and other government officials at the national level as well. The NCIP regional office also explained in an interview that they did not have the funding to carry out the census for the resettlement plan and therefore were financed by SMI. This of course raises questions in respect to the independence of NCIP at the regional level. However, as the FPIC process has not started at the time of writing, this cannot be conclusively assessed.

The third question refers to the procedure of the FPIC. As SMI already applied for the FPIC in 2011, both NCIP Regional Office 12 as well as SMI emphasized that the guidelines of 2006 are still applicable. However – even if the formal compliance with administrative rules may not require this – we would consider use of the more rigorous 2012 guidelines by SMI a matter of their human rights responsibility as laid down in the UN Guiding Principles for Business and Human Rights. In spite of the reluctance to apply the more comprehensive FPIC guidelines of 2012, it should be noted positively that SMI has mandated an external expert team to hold capability-building workshops for the B'laan to increase their

power of negotiation for new agreements with the company. Given the public critique and remaining ambiguities, we rate the information policies and especially the FPIC process as deficient. The efforts of the company to receive approvals from people affected and the remaining mistrust and uncertainties among communities illustrate the complexities and difficulties of meaningful consultation and participation. We consider the lack of efforts by government authorities and by the company to offer balanced information to communities to be a critical point in this respect. Furthermore, the imbalances of power between the project proponent on the one hand and municipal governments, NCIP, and people affected on the other, as well as a high dependency of people on the company's provision of basic services render the conduct of a proper FPIC hardly feasible under the presently given conditions.

7.2 Grievance Mechanisms

7.2.1 Defining the Subject Area

The focus on grievance mechanisms can be directly derived from the UN Guiding Principles. It is crucial that both the state and the company itself establish functioning grievance systems because these enable affected people to channel their information on negative effects or even human rights violations of a project and to allow companies to respond to and mitigate these effects. One has to distinguish official judicial mechanisms based on the rule of law from public non- or quasi-judicial mechanisms and from private project-level grievance mechanisms. The latter are the weakest, and they cannot replace a functioning judicial system. They can be a very effective and pragmatic way of addressing grievances, but as they are company-led, there is always the risk of a lack of accountability towards people affected and of the inappropriateness of mitigation measures.

With regard to judicial remedies, the context analysis has shown that the Philippine judicial system lacks efficiency and, hence, may not be able to effectively handle cases in a timely manner once they occur. This has also repeatedly led to political and legal debates, especially about extrajudicial killings occurring in the Philippines.³⁴ We cannot assess in detail the options for legal remedy and their effectiveness in the context of the Tampakan Project in this report.

³⁴ The Supreme Court of the Philippines has already reacted to the weaknesses in the legal system by establishing additional prerogative constitutional rights for individuals seeking remedy in cases of abuses of constitutional rights (Writ of Amparo, a legacy of the Spanish legal system) and in cases of harmful environmental damage (Writ of Kalikasan) (see e.g. Supreme Court of the Philippines 2007).

Furthermore, it is crucial to note that, as an independent body, CHRP should also establish non-legal or quasi-legal mechanisms for people to complain about alleged human rights abuses in the context of business projects. The Commission has already investigated other business projects and given recommendations in the past. This is an important role which should be further strengthened. It requires not only a clear mandate but also a sufficient

level of expertise and funding on the national as well as the regional levels.

The UN Guiding Principles provide minimum quality criteria for project-level grievance mechanisms. We refer to these in order to assess the situation in Tampakan. Seven criteria need to be fulfilled to be able to speak of a functioning project-level grievance mechanism as envisaged by the Guiding Principles:

Legitimacy	“enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes” (OHCHR 2011: 11).
Predictability	“providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation” (OHCHR 2011: 15).
Rights-compatibility	“ensuring that outcomes and remedies accord with internationally recognized human rights” (OHCHR 2011: 18).
Dialogue and engagement	“consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances” (OHCHR 2011: 22).

In the following, we focus on non-judicial project-level grievance mechanisms established by the company. Although these cannot replace a functioning judicial system and are therefore insufficient from a human rights perspective, they are at least in place in Tampakan and are being further developed by SMI to address project-related grievances and concerns.

7.2.2 Status Quo and Project-related Activities

SMI began its activities in the project area without the existence of a coordinated, centralized grievance mechanism. Although various employees in multiple departments were dealing with complaints, no clear, central grievance process was established. According to company information, SMI has recently built up a grievance policy based on the IFC Performance Standards. While the company provided us with a presentation on the grievance mechanism and its main goals and features, community members interviewed were not aware of such a mechanism. Thus, at the

time of writing, we cannot say whether the mechanism is fully operational.

The process as presented by SMI includes the following main aspects:

- a single point of collection of complaints is established;
- a resolving officer is appointed for each complaint;
- a Community Mediation Superintendent operates the mechanism and assists the resolving officers;
- a Community Engagement Team addresses concerns among community members where possible, and facilitates the community complaints;
- each complaint is to be handled within a clear timeframe of 28 days for simple complaints and 90 days for more complex complaints;
- “certain types of complaints” are referred to existing community mechanisms.

According to the 2012 Sustainability Report, four locations currently serve as “receiving sites” (SMI 2013: 52). Also, a grievance field team “immediately captures and records [a complaint] in a database for response.” (SMI 2013: 52). The company organizes regular follow-ups with community members to ensure that inquiries have been appropriately resolved (ibid.). The company received 296 formal community complaints in 2012 of which 213 were resolved, 76 were referred to third parties and seven are ongoing for resolution (SMI 2013: 52). However, while there is information on the general subject areas of these complaints, no further information is available on specific queries or problems and how these were resolved, neither by third parties nor by the company.

Taking company and community interview information as a basis, we assume that the criteria set by the UN Guiding Principles are only partially met so far.

1. Legitimacy

Among community members, we found a high level of mistrust in information provided by SMI. As people were not aware of a particular grievance mechanism, they drew their expectations towards grievance processes from their experience of SMI scoping meetings. Several interviewees mentioned that in these meetings they did not see the purpose of raising complaints as they would not receive any helpful response. In scoping meetings, questions and concerns were only collected, and no direct response was offered which led to frustration among participants. Judging by these perceptions by interviewees, we would evaluate the legitimacy as insufficient at the time of writing.

2. Accessibility

According to SMI information, there is a high level of accessibility. SMI has established a presence in various communities and the four receiving sites for complaints. The security situation, however, might aggravate the

ease of access as SMI employees may not be able to safely enter the mountain areas. Also, due to the fact that people interviewed were not even aware of particular sites and ways to raise complaints, accessibility cannot be properly assessed in this report.

3. Predictability

A clear timeframe for the handling of complaints has been set by SMI, which constitutes an essential part of predictability. However, we see the need for clearer criteria to establish under which conditions complaints are chosen to enter the formal process or are rejected. SMI also emphasizes its pro-active approach of solving problems before they become a formal complaint, which can be a more efficient and time-saving method. But it is unclear at which point SMI then deems a complaint sufficiently severe to enter the formal process. The company does not provide criteria for this.

4. Equitability

The fact that interviewees had very different levels of information regarding their options to contact SMI raises reasonable doubts whether this criterion is fulfilled at the time of writing.

5. Rights-compatibility

As we have no detailed information on resolved issues so far, we are not able to assess the rights-compatibility at the time of writing. SMI publishes numbers on resolved issues, but we do not have access to details on how complaints are resolved and whether this is done in a rights-compatible way.

6. Transparency

According to company information, there is a clear and published procedure for the handling of complaints. This would fulfill the requirement of transparency. However, the lack of reference to such processes by interviewees indicates that either their transparency is insufficient or the process has not yet been fully established. Furthermore, there is no public record of specific complaints and how they were resolved.

7. Dialogue and engagement

As dialogue and use of community mechanisms are part of the company’s approach to resolving grievances, this criterion is partially met. However, the grievance mechanism has been established by SMI in a top-down management process without input from communities or any form of mutual exchange on how such mechanism should be designed. This constitutes a significant shortcoming and may undermine the legitimacy of the process once fully implemented.

In sum, given the very recent establishment of the central grievance system and a lack of reference to this in interviews, it is impossible to properly evaluate the overall

effectiveness of the non-judicial grievance mechanism at the time of writing. Also, some cases that were mentioned in interviews in which people already launched complaints (e.g. regarding the estimated value of lost crops) were not yet resolved. Given the long time that SMI has been active in the area without a formal grievance mechanism and the level of frustration among interviewees about possibilities to seek response to queries and complaints from SMI, we conclude that, at the time of writing, there is a dysfunction in the company's grievance system. However, this might change with the newly established system. It is important to acknowledge that the company established a central grievance mechanism in 2012. Although the mechanism is not fully functional yet, it is an essential step which reflects the company's endeavor to follow the UN Guiding Principles. It is of high importance that the grievance mechanism increases its transparency and effectiveness in the near future. In particular, affected communities should be much better informed about their possibilities to complain, about specific complaints in the past and how they were resolved, and about the formal criteria which the company follows in cases of complaints.

7.3 Livelihoods

7.3.1 Defining the Subject Area

The term 'livelihood' is usually used in a broad sense, describing the command that a person or a family has over its income, including aspects of physical capabilities, knowledge and information, cultural resources, social networks et cetera. In this section, we focus only on particular aspects that have been brought forward in interviews. These are potential and actual economic gains, employment opportunities, food and water, land and resettlement as well as infrastructure.

7.3.2 Rights at Stake

The demand for adequate livelihood opportunities can be derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR). Especially the right to self-determination emphasizes that an individual or a family shall not be deprived of their means of subsistence. This includes the right to choose adequate forms of work. Also, the availability of adequate food and water has been emphasized as a human right. As General Comment No. 12 by the CESCR (United Nations Economic and Social Council (ECOSOC) 1999, § 6) asserts, "the right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and

economic access at all times to adequate food or means for its procurement." The human right to water is defined in General Comment No. 15: The right to water "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." (ECOSOC 2003, § 2)

Rights/ Source	Content/Elaboration
ICESCR, Article 6. 1	Right to work: "includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

7.3.3 Status Quo and Project-related Activities

The livelihoods of many people in and around the proposed mining area depend on small-scale and subsistence farming. As mentioned in *Chapter 6.1*, the indigenous communities in particular rely on their surrounding natural environment to farm, gather, hunt and fish. The area is particularly rich in fruits, vegetables and rice production. Employment opportunities are mostly short-term and seasonal (National Economic and Development Authority 2010). Larger scale agro-industries also play an important role. The major agricultural products are rubber, pineapples, bananas, coffee, and coconuts. Mining has become a focal point in the state's pursuance of economic development, yet significant growth rates and employment have not been recorded (cf. Chapter 5).

The Tampakan Project has already influenced people's livelihoods in various ways. Although the project is still in

its exploration phase, SMI has already hired several employees. As of December 2012, SMI's workforce counted 377 employees, while an additional 946 contractors were commissioned. 41% of the employees stem from Tapanakan, Kiblawan, Columbio and Malungon, and 53 employees were members of the B'laan communities (SMI 2013: 39). In the region affected by the project, SMI has furthermore initiated programs and contributes to state initiatives which are to support households (SMI 2013: 48). One example is a contribution of 1 million PHP (about 24,000 USD) in three years to the production of a particular species of banana (Abaca), which is characterized by its high commercial value. Through increased production facilitated by the project, farmers could increase their income (SMI 2013: 37).

Furthermore, SMI is already directly contributing to community development. So far, these contributions have primarily been channeled to municipal governments. Further direct contributions have been made to tribal chieftains based on the PAs. Interviewees in indigenous communities partly complained that tribal chieftains would not use payments in appropriate ways for community development.

With regard to their economic situation, some of the B'laan people interviewed reported that the company had already widened their employment opportunities through scholarships, allowing them to gain secondary education and job training. Some B'laan had already been employed by SMI during the pre-operational phase, but they lost their jobs when the activities they were employed for stopped.

Other interviewees emphasized limitations in their agricultural production and food supplies due to the presence of the military and the overall security situation. The military partly prevented indigenous inhabitants from entering the forest, and some interviewees also reported that they were afraid to go the long way to their fields as military personnel would follow them (cf. *Chapter 6.3*).

7.3.4 Risks and Opportunities

Since the project is not yet operational, most livelihood impacts are not yet visible today. Views on risks and opportunities are therefore mostly based on company estimations and peoples' anticipations, hopes and fears. The following aspects highlight the central issues taken from company reports and interviews with people affected.

7.3.4.1 Economic Benefits for Local Communities

During the operational phase, the project plans foresee regular royalties to host barangays. Current company plans estimate a share of 338.5 million USD to local communities and 338.5 million USD to indigenous communities over the project life cycle (Hansen Bailey 2011). How these re-



Photo: Bobby Timonera

sources are planned to be managed and distributed is not known at this point in time. Government revenues at different levels would amount to approximately 5.3 billion USD over the project life. Estimated direct spending on goods and services in the area of about 700 million USD during the construction phase and 780 million USD during the operational phase will bring further economic benefits. Several organizations and politicians view the contributions to communities over the complete project cycle as rather limited compared to the magnitude of the project, and have, therefore, filed a complaint against the Mining Act at the Supreme Court. The complaint argues that taxes and income for the government are too low and are not in line with the Philippine Constitution. The case is still pending at the time of writing this report.

7.3.4.2 Employment

According to company estimations, about 6,000 jobs would be created during the construction phase (for about three years) and about 1,790 jobs during the operational phase (for about 17 years) (Hansen Bailey 2011). Among interview partners, the expectation of job creation differed widely. While some anticipated about 10,000 new jobs (this corresponds to SMI's estimations only for a brief peak phase during constructions), others said they would not expect any noteworthy employment opportunities for their community; among them were representatives of local legislative councils on barangay and city levels.

Some members of the indigenous communities were also confident that the mine would bring future employment opportunities for people in the area. The PAs and MoA

between communities and SMI stipulate that the company will give priority to employment in mineral development and utilization (except for matters of security) to competent and qualified long-term inhabitants. Other interviewees raised doubts about such expectations. These were based on the belief that good jobs would be given to more qualified outsiders who would come to the area. Interviewees were also divided with regard to the number and kinds of jobs that would be created for the local population.

Furthermore, people raised their concerns about the sustainability of employment opportunities deriving from the mine in the operational phase. As operational activities would last for about 17 years, they were afraid that their families' 'third generation' would be deprived of job opportunities because their land would be unusable then and mining jobs would not be available anymore. Another problem raised was the present lack of planning certainty, as the probability of resettlement in some near future would impede longer-term plans regarding the cultivation of land.

7.3.4.3 Food and Water

Access to food and safe drinking water has been internationally acknowledged as basic human rights. The Tampakan Project may impact on the realization of these rights, particularly for the indigenous population in the area, in various ways. An opportunity may arise for the local population (or parts of it) through possible higher incomes, pointed out above. Consequently, they may have the chance to afford more services in general and more or better food in particular.³⁵ However, it is uncertain whether these jobs will be available to members of the indigenous community and if so, how many will benefit from this opportunity. Also, the number of anticipated long-term jobs which could increase average income is very limited. Therefore, the sustainable effects on the quality of food will probably be marginal. Furthermore, at present, a prime source of food in the area is subsistence farming, which primarily depends on available land. We will therefore further refer to land and resettlement below.

Moreover, higher employment and income rates can also have a reverse effect on the availability of food for some groups, which has been documented in several mining and infrastructure projects. For example, a study conducted for several smaller Tanzanian mining projects found that through amplified economic activities in the areas, the circulation of money increased and thereby also triggered a rising of prices (Hagi 1996, in Kitula 2006: 411-412). It is to be expected that similar consequences may ensue in the Tampakan region, which in turn may compound the possibilities of the local population to afford food. The availability and affordability of food is hence an issue which has to be

revisited and where close observation is required by the local governments and the company.

Agricultural production is an important aspect of concern to many local communities as farming remains an integral part of the local and regional economy. Here the main issue raised is water supply. As explained in *Chapter 6*, water catchments are located in the area in and around the mine. The major economic risk is seen in the consumption of clean water by operation and the potential pollution of local streams through waste particles coming from the mine, leading to crop shortages. Interviewees highlighted their high dependency on the company in terms of clean water supply once the project would be operational. In cases of water shortages and/or contamination, farmers see the risk of losing their livelihoods. Officials from the national Ministry of Agriculture accordingly emphasized their reluctance towards the Tampakan Project as no economic gains are expected for farmers in the area. Water pollution is also feared at Lake Buluan, a 4,954 ha large body of water which constitutes the drainage area of the Koronadal Valley and is an important source of jobs and food. In our interviews with members of the City Council of the municipality of Lutayan, interviewees emphasized their fear of water pollution and increased siltation through the mine.³⁶ If the concerns of our interviewees were to materialize, pollution as well as a decrease in water levels would have significant impacts on the population's livelihoods.³⁷ It may then be no longer possible for them to earn a living or produce sufficient food.

SMI responds to water-related concerns by pointing to its Environmental Impact Statement (EIS) and the measures described therein to mitigate any possible negative effects. The company, however, does not publicly consider the danger that such mitigation measures may fail and water pollution may occur. This points to a disregard of possible technical failures transpiring and neglects the concerns of communities. With regard to water supply, SMI states that modern methods would result in a significant reduction of fresh water usage as 70% of the project's needs would be met with recycled water. The mine would hence "operate

³⁵ It has been empirically ascertained that there is a correlation between level of income and average quality of diet. A review of cross-sectional studies focused on the relation between socio-economic status and quality of diet confirmed "that higher-quality diets are, in general, consumed by better educated and more affluent people" (Darmon & Drewnowski 2008: 1112).

³⁶ It is important to note that these interviewees were not aware of SMI's studies and mitigation plans, which also indicates that SMI's information policy is incomplete.

³⁷ Only one interviewee claimed that the issue of clean and sufficient water supply did not constitute an issue for the municipality of Kiblawan (Source: Interview with Mayor Diamante of Kiblawan).

without significantly impacting the amount of water currently used by the local community” (SMI 2011: 57). Here, SMI explicitly refers to the current levels of water usage. However, it has to be taken into account that water consumption in the area may rise overall. This may be due to, amongst other factors, in-migration triggered by employment opportunities, or independently of the mine, e.g. by rising water needs caused by climate change.

A concern voiced by some irrigators in response to mitigation plans by SMI pertains to the location of the freshwater dam as they point out that the planned location – close to the mine and its waste storage facilities – seems unsuitable to them. Instead, the dam should be relocated closer to the tributaries. Interview partners also stated the fact that already, water sources were becoming scarce in times of drought, and that a further decrease in water levels would hence have dramatic effects. Another point of criticism by irrigators was that, if the project was realized, the private company would manage the distribution of water, which would result in an increasing dependence of affected communities on SMI.

7.3.4.4 Land and Resettlement

Another aspect closely linked to livelihoods and the availability of food and water concerns access to productive resources, namely agricultural production, fishing, hunting and gathering. Especially the indigenous population in the area affected by the project still depends to a large extent on subsistence agriculture as well as on gathering in the local forests for their food. Since large sections of the

indigenous population are to be resettled to make room for the mining project, people fear that their new land will be less fertile or suitable for their crops and that they will lack access to their hunting and gathering grounds or viable alternatives.

SMI representatives emphasized that people who were to be resettled would actively participate in the selection of new land. In order to achieve this aim, SMI is currently developing a draft “Resettlement Action Plan”. Consultations and representation of community members are organized through so-called Resettlement Councils and a Resettlement Oversight Committee. So far, general community understanding of resettlement is rather low, according to interviews. Also, the structure of the Resettlement Councils is widely disputed among community members, as they are seen as conflicting with B’laan tradition of representation (cf. *Chapter 7.6*). At the time of writing this report, agreements on the valuation of land and crops as well as agreements on the actual resettlement sites have not been reached. Thus, according to SMI, the so-called “livelihood package” that people will receive could not be fully developed either, also because of a lack of security for SMI personnel in the area. As one precondition for resettlement consultations, indigenous land has to be officially registered. According to interviews with indigenous communities, this process led to conflicts within and between communities and partly triggered a higher military presence in the area. A community vote among those people affected by resettlement shall be conducted following the FPIC process in 2013 (cf. *Chapter 7.1*).



Photo: Bobby Timonera



Photo: Bobby Timonera

Amongst the people who are to be resettled, some interviewees were confident that their economic situation would improve or at least stay the same after resettlement, as the land they would be resettled to should be economically comparable to their current land, but they expected to receive better houses. Other interviewees, especially from Bong Mal, emphasized their close linkages to their ancestral land and their concern that a resettlement would deprive them of the opportunity to make a living through fishing and hunting. Hence the fear exists that the continuance of their livelihoods may be in danger. As mentioned in the paragraphs above, this could adversely affect the community's right to food.³⁸ Interviewees from Bong Mal also referred to the problem that long-term planning with regard to their land would be very difficult now that people would probably be resettled in the near future. Furthermore, interviewees emphasized that they would consider resettlement as a loss of their cultural and social identity as a group due to their connection with and dependence on their land (cf. *Chapter 7.6*). Another cultural aspect mentioned in relation to resettlement concerns the issue that the resettled indigenous groups may be targets of discrimination in non-indigenous host communities. Conflicts may also increase between indigenous communities if plans proceed which foresee the resettlement of one community into an area inhabited by another group between which tensions traditionally exist. Given the volatile nature of the security environment (cf. *Chapter 6.3*), violence will be a likely consequence of these antagonistic dynamics.

A further point concerning land use is constituted by the possible long-term effects the Tampakan Project may have on the environment. While some interviewees feared that even after the completion of the mining activities, their land would not be usable again, others were confident that a re-

habilitation of their land could be achieved. SMI assessed the long-term effects of the project on the land and developed a plan for the decommissioning of the mine, which will be updated continuously throughout the project's lifespan. In its current state, it foresees that 73% of the mine site will have a post-mining land-use capability similar to pre-mining conditions, 22% of the mine site will be used for ongoing mine waste storage and water management, and 5% (the freshwater dam) will remain a source of water supply to the communities (AECOM 2011: 9-4). These results are to be achieved through continuous water treatment, rehabilitation programs and proper securing, storing and/or covering of waste materials (AECOM 2011: 9-3). According to DENR, SMI is to set up contingent and trust funds to "address future concerns for mine rehabilitation, wastes and tailings, and final decommissioning" (DENR 2013).

7.3.4.5 Infrastructure

As part of the preconstruction phase, SMI has contracted local companies to build and maintain a basic road through the mining area. In principle, people interviewed welcomed an improvement of infrastructure in the area, also because it improves access to local markets. However, some interviewees complained that burial grounds were destroyed during construction works. Also, interviewees from Salnaong emphasized that more roads had been promised by the company which had not been built yet.³⁹

The analysis in this section illustrates that present and possible future economic developments associated with the Tampakan Project predominantly constitute serious human rights risks for the most vulnerable groups. While improvements in the local infrastructure and job opportunities are likely positive effects, serious negative impacts are to be expected regarding the preservation of current indigenous livelihoods. Resettlement as well as destruction of the environment may deprive them of their sources of food, medicine and water supplies, while the basis of their culture may no longer be accessible to them either. These negative impacts are also potential sources for violent episodes since discontent and frustration of affected communities may require an outlet and the escalation threshold in the area is already at a low point.

³⁸ The right to health could also be negatively impacted, firstly because of the connection between adequate nutrition (the right to food) and health, but also because the indigenous communities still rely on natural remedies (e.g. traditional medicine), cf. *Chapter 7.4*.

³⁹ One of the companies which conducted the construction work is owned by Mayor Escobillo of Tampakan, which poses the risk of potential conflicts between public and private business interests).

7.4 Health

7.4.1 Defining the Subject Area

The issue of health has been identified as one very crucial aspect regarding the human rights situation surrounding the Tampakan Project. This has several reasons: firstly, a copper-gold mine poses health risks in itself – noise, air, water and soil pollution are possible side effects of the business activity and may jeopardize the surrounding communities' health. Secondly, resettlements and mining activities may affect food and water sources of the communities, which could impact the health status of these communities.⁴⁰ Lastly, the issue of health constituted a central issue for our interviewees because the provision of basic services, including health care, has been a major concern for the affected indigenous communities for decades. In the following paragraphs, we therefore examine the relationship between the human right to health, health-care and the mining project.

7.4.2 Rights at Stake

Health constitutes a basic human right. It stipulates that states and the international community have the duty to ensure the well-being of each citizen. Health is not only a right in itself but is also intrinsically connected to other human rights, which are either a precondition for its fulfillment – such as the rights to food and water – or are preconditioned by the realization of the right to health, such as the right to work. The main legal basis for the human right to health is found in Article 12 of the ICESCR. The article obliges states to provide their citizens with the highest attainable standard of physical and mental health. Like all rights, the right to health is to be implemented without discrimination and with particular consideration of vulnerable groups and minorities. Other treaties, such as the *Convention on the Rights of the Child*, and international declarations also pronounce the importance of this right and the state's obligation to respect, protect and fulfill it.

7.4.3 Status Quo and Project-related Activities

An overview of the situation regarding health in the Philippines on a national as well as on a regional level has already been provided in *Chapter 4*. Although little official information was available to us regarding the specific sta-

⁴⁰ Although the rights to food and water constitute independent human rights, they are subsumed in this section so as not to go beyond the scope of this paper. They are, however, considered as central issues in this analysis.

Rights/ Source	Content/Elaboration
UDHR, Article 21.2	Right to equal access to public service.
UDHR, Article 25	Right to a standard of living adequate for the health and well-being of himself and of his family.
Convention on the Rights of the Child, Article 24	Right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health & responsibility of the state to provide for this.

tus of healthcare or the state of health in the communities affected by the Tampakan Project, several characteristics in the project area are of great concern to the research team. Firstly, as mentioned in *Chapter 6.2*, the area to be affected by the Tampakan Project is characterized by several water catchments on which the surrounding communities depend for the realization of their social and economic needs for water. Secondly, especially the indigenous communities still depend on their land to ensure their food security and, hence, their well-being. Furthermore, as interviewees pointed out, the communities also rely heavily on traditional medicine for which they depend on the integrity of their natural environment. Lastly, research has confirmed that there is a lack of state services providing adequate medical care in the indigenous communities. This accounts for the fact that healthcare and the availability of adequate facilities constitute one of the main concerns and one reason why many have welcomed SMI and the Tampakan Project.

The FTAA WMC entered into with the Philippine government states that the mining company has to present and execute a developing plan “setting out the manner in which

the Contractor intends to contribute to the development of the host and neighboring communities” (FTAA 1995: 31). As SMI took over WMC’s contracts, the company created a plan to foster regional development. Improving healthcare constitutes one component of SMI’s community engagement.⁴¹ In its 2011 and 2012 Sustainability Reports, SMI reaffirms its commitment to regional development and lists accomplishments in multiple areas, such as immunization, nutrition or health training and workshops. Particularly children and mothers have been targeted in these programs (SMI 2011: 44). For these and other projects, SMI invested 1,926,456 PHP (approx. 47,000 USD) in 2011 for the municipalities of Kiblawan, Tampakan, Columbio and Malungon through ‘Voluntary Social Involvement Programs’ and its agreements with each municipality (SMI 2011: 71-75). The company also contributes to province-wide projects, such as the ‘Essential Health Care Program’ in South Cotabato, for which SMI provided oral hygiene kits for 40,000 pre-school and elementary students (SMI 2013: 48). Several people confirmed in interviews that SMI is active in providing health services in the area, and Mayor Diamante of Kiblawan, for example, emphasized the financial support (approximately 600,000 PHP) the company contributes to the sector in her municipality.⁴² The initiatives stated above do point to an overall potential for improvement of the status of health in the project region but also to the high demand caused by the lack of state programs.

7.4.4 Risks and Opportunities

Since ‘health’ is a very complex matter, a variety of factors have to be considered when assessing the effects the Tampakan Project has or may have on the overall status of health in the project area. The following paragraphs concentrate on the most important points as identified by desk research and stakeholder interviews.

The first point concerns the provision of adequate healthcare. Interviews with local government officials and community members have demonstrated that this is one of the main expectations placed in SMI. In its 2012 Sustainability Report, SMI confirms that its aim is to improve the status of health for the involved communities to enhance their development (SMI 2013: 47). However, although SMI states that it seeks to avoid the communities’ dependency on the company, the absence of LGU-led services before SMI’s presence nevertheless points to the danger of reliance on private services. Without the company’s presence, initiatives and programs may be cancelled, which may lead to a deterioration of the overall health of communities. If SMI terminates the project, services will end within a year, according to company information.⁴³ The dependence on



Photo: Bobby Timonera

SMI to fund basic public services signifies that SMI has taken over the tasks of the government. As interviewees seemed aware of this dependency, the question arises to what extent their (potential) consent to the project can be characterized as ‘free’, since their options may make them inclined to vote in favor of the project simply to receive basic healthcare services (cf. *Chapter 7.1*).

A second issue connected to the human right to health is constituted by the availability of adequate food and clean water in the proposed mining area. Both matters, although human rights on their own, are also integral to the realization of the right to health. Since this study already addressed crucial issues relating to the availability of food and water in *Chapter 7.3*, only a few remarks are added here.

The opportunity of communities to purchase better food as a result of employment and higher incomes may be conducive to the overall health status of the population since a better diet can positively influence one’s health. SMI emphasizes this opportunity, stating that through higher incomes generated by the mining project, locals will “be better able to invest in their families’ health, including being able to purchase more nutritious foods and seek treatment” (SMI 2011: 49). The possibility that this opportunity may not be available to members of the indigenous communities or that even adverse effects on their food security, and consequently their health, may emerge, has already been discussed above. A disruption of food production for

⁴¹ SMI also established programs for its workforce which focus on the improvement of health, such as vaccinations or check-ups (SMI 2013: 44). The focus in this analysis, however, rests rather on the initiatives affecting entire communities in the vicinity of the project.

⁴² No independent data is, however, available to corroborate SMI’s activities in detail and to assess their quality.

⁴³ In case the mining project fails to gain the necessary permissions or has to end prematurely for other reasons, SMI informed us that its programs will continue for one more year.

indigenous communities, possible rises in food prices and consequently a lower nutritional intake could seriously affect the health of persons affected and infringe on their human right to health. Little response has been provided by SMI regarding such matters. Furthermore, the possible pollution or depletion of essential water sources poses a risk to affected communities (cf. *Chapters 6.2 & 7.3*). In this regard, interviewees also criticized that they would depend on the well-functioning of SMI's mitigation techniques and responsible corporate conduct. SMI responds that its adherence to high standards mitigates the risk of water degradation so that the Tampakan Project would operate "without any significant adverse impacts on local water supplies, including those used for agriculture" (SMI 2013: 59). The adequate supply of food and water, and consequently the overall health status of affected communities, may hence be positively or negatively impacted through the Tampakan Project.

A last issue to be raised in relation to the human right to health pertains to environmental problems which may occur as a result of the project. Landslides and floods have been mentioned as possible consequences, triggered by mining activities, previous logging and the volcanic topography (Goodland & Wicks 2008: 121). It is, however, beyond the scope of this assessment to determine the probability of these impacts.

Moreover, long-term effects constitute an issue. The production of polluted waste materials, for example, may affect the population's overall health status. SMI has issued several responses regarding these concerns. A *Health Impact Assessment*, commissioned by SMI and executed by JTA International – an Australian-based health consulting and project management company, examined the effects the project may have on the health status and well-being of affected communities in advance. The actual report is not publicly available. Thus, it was not possible to check the findings, methodology and basis for the assessment. We can only document SMI's report, which states that the project "is not expected to have significant health impacts on local communities" (SMI 2013: 54). In relation to possible environmental degradation and related health threats, the EIS offers the most detailed response. Here, SMI asserts that the installations of the project will prevent any detrimental effects on the environment and, by extension, on the health of communities. While the installations are planned to be constructed according to highest international standards, the report on mine waste management included in the ESIA points out that for the Tailings Storage Facility, for example, the highest level of protection is required because a failure of the installation would be accompanied by a "high potential for loss of life and high

environmental damage" (Klohn Crippen Berger 2011: 42). Since a residual risk always remains, a malfunctioning of the operation could, accordingly, have devastating effects on the surrounding communities. The possibility that such failures occur is not publicly considered by SMI, which points to a disregard of possible technical failures and neglects the concerns of affected communities.

The presence of SMI hence presents both risks and opportunities for the status of health and healthcare and the realization of the human right to health for affected communities. Our interviews confirmed that local residents welcome the improvements in health care services, yet fear detrimental effects through environmental damage once the project commences. The responses provided by SMI do not seem to allay such fears and also lack information on issues crucial to the communities, predominantly the effects on their health through consequences for agricultural production. Furthermore, our interviews illustrated that the LGUs, which carry the responsibility to provide their constituencies with information regarding such large-scale projects, are neglecting this task, leaving the indigenous communities in particular with scarce knowledge of potential future changes.

7.5 Education

7.5.1 Defining the Subject Area

Education may not appear to be a straightforward choice as a crucial issue in a HRIA for a copper-gold mine. However, it is an important precondition to realize other relevant human rights, such as the rights to participation or development. Without at least elementary education, citizens lack integral capacities to effectively partake in society. In addition, the presence of indigenous communities in the affected area signifies that special attention is required to ensure that, firstly, indigenous community members have equal access to education, while, secondly, they retain the opportunity to follow their own cultural practices regarding education. Hence, the human right to education is also central to this study. In addition, our interviews revealed that education in the project region is closely tied to the presence of the mining company.

7.5.2 Rights at Stake

The ICESCR proclaims in Article 13 that everyone has a right to education and that the state is obliged to at least provide free elementary education to all its citizens without discrimination or prejudice. As it is further stipulated that

elementary education is compulsory, the state is given the strong responsibility to ensure that all children have access to and also make use of elementary education.

Rights/ Source	Content/Elaboration
UDHR, Article 26: 1	Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.
Convention on the Rights of the Child, Article 28	Everyone has the right to education. Elementary education shall be compulsory and free for all.

7.5.3 Status Quo and Project-related Activities

Chapter 4 provided basic information on the levels of education throughout the Philippines and in the main regions affected in particular. From this, it becomes clear that education levels nationwide are quite high; however not all potential students have access to education, nor are there always sufficient resources – such as teachers and learning materials. Detailed official information on the status of education in the areas possibly affected by the Tampakan Project was not accessible for this research. SMI states in a presentation given at the Asian Forum on Corporate Social Responsibility that 35% of the adults in the communities in the proposed mining area have not attended school (Jolson 2012). Interviews conducted for this study illustrate that particularly the indigenous communities lack access to education since, for example, few schools are available to them. As for the issue of health and healthcare, this points to the weak presence of the state in the region, the neglect of the indigenous population and a violation of the human right to education by the government. The shortage

of obtainable adequate data regarding the availability and quality of education offered in the region affected prevents the assessment of the extent to which the human right to education is being realized at the moment.

According to the FTAA entered into between the Philippine government and WMC – taken over by SMI in 2001 – the mining company has to support local development. Within this program, and as part of its “Corporate Social Involvement”, SMI has provided funds to foster education programs in the affected communities (SMI 2013: 47). Interviewees confirmed that the company financed the construction of school buildings in areas accessible for indigenous children, provided funds out of which teachers are now hired as well as scholarships to enable children to attend school or college (cf. also SMI 2013).

In its Sustainability Reports of 2011 and 2012, SMI states that its scholarship program has, for instance, supported 24,963 students since 2008 (SMI 2011: 71-75). The company also supports government programs, such as the class dormitory project in Sarangani (SMI 2013: 47). Interviews with indigenous community members have furthermore underlined that the support provided by SMI has been essential to the educational success of the communities’ children. A few interviewees also mentioned that, besides scholarships for education, SMI provides vocational training to adults to improve their prospects on the job market.

The data above provides a first glimpse of SMI’s activities in the area of education and allows for the conclusion that the schooling of many indigenous children has improved through SMI’s programs. Critique nevertheless exists regarding the distribution of funds.

7.5.4 Risks and Opportunities

The following paragraphs discuss the (possible) long-term effects of the Tampakan Project on education in the affected region. Here, several issues arise which need to be taken into account in future plans.

The fact that SMI plays such an important role in the provision of education in the area presents a great opportunity for communities as more students are enabled to receive an education and adults upgrade their qualifications. The building of schools furthermore constitutes an asset that will still be advantageous to the communities once the project has been completed. Increased levels of education may offer students more chances in the job market and will increase prospects for the next generation to receive a better education.

However, several risks inherent in the education programs may create negative consequences if not mitigated successfully. Firstly, regarding educational activities, it was

criticized in interviews that the foundation active in each community to decide on the use of funds is not staffed with a majority of indigenous community members.⁴⁴ This signifies that decisions taken regarding the allocation of resources, for example, do not always follow the assessment of the communities themselves.

Secondly, similar to health programs (cf. *Chapter 7.4*), a high dependency of the communities on the presence and support of SMI evolves. This risk particularly involves the long-term status of SMI's education programs. Here, firstly, plans are to be made regarding the continuation of these programs after SMI has completed or withdrawn from the Tampakan Project. If a departure of SMI causes an end to the programs installed through their funding, unemployment of teachers, school drop-outs of former scholarship recipients, lack of learning materials, an overall deterioration of the quantity and quality of education as well as rising social discontent could ensue.⁴⁵ Accordingly, it is of immense importance that the local governments benefitting from SMI's contribution now develop long-term plans to not return to the former status quo. This issue relates back to the fact that the support through SMI bears the danger of relieving the local, regional and national government of its function to provide education to its citizens. Involving private companies in the provision of services has become a standard means of governments to serve their people, yet if without the company the state is incapable of providing such services, such a dependency points to critical governance issues.

Thirdly, other areas of social and economic development have to evolve alongside the education sectors. The students who are now gaining a better education and job qualification also need suitable opportunities on the job market to ensure that disillusionment and discontent do not abrogate the progress made through education. LGUs have a duty here to align the public education system with other state policies, such as employment and economic development.

A further issue regarding education concerns the provision of information on the education programs. Although SMI publishes details on the type of programs and the number of community members benefitting from these, it does not become clear how the programs are set-up or how one can become eligible for support. Neither could interviewees recall being informed about such matters in the

meetings and gatherings conducted by SMI in individual communities. The process hence lacks transparency, and either SMI or the respective LGU – depending on who is responsible for a specific program – should instigate reform to prevent the emergence of disruptions and discontent in the communities affected. Again, this issue points to the responsibilities of the LGUs whose duty it is to inform their constituencies about public services. Interviewees did not refer to any information program initiated by the LGUs, which indicates that such campaigns either do not exist or are not very visible.

Consequently, SMI is in the position to improve the fulfillment of the human right to education through its provision of funds and programs. However, the risks outlined above illustrate that communities concerned require a fair chance to participate in the development and implementation of these programs, and that programs have to be implemented carefully and with a view on long-term consequences. Furthermore, LGUs have the duty to ensure that SMI's support is implemented in a sustainable manner for long-term positive gains.

7.6 Culture

7.6.1 Defining the Subject Area

Culture is a very general term that refers to traditions, social fabric, daily practices, and ways of life. Thus, cultural rights typically cannot be separated from other rights. Often, they are closely linked to other social rights such as education and health rights but also to economic rights, for instance, where traditional ways of subsistence farming, hunting and fishing or traditional forms of labor division are concerned. In this section, we limit our view to indigenous cultures because they are protected by particular rights and because indigenous lifestyles are particularly vulnerable in this respect. Their distinct minority cultural traditions conflict with mainstream society (cf. *Chapter 6.1*) and are most severely affected as the proposed mining site primarily falls into ancestral domains.

7.6.2 Rights at Stake

Cultural rights can be derived from both the International Covenant on Economic, Social and Cultural Rights as well as the International Covenant on Civil and Political Rights. Culture is considered an essential element of the notion of a self-determined life. Minorities are particularly protected with regard to their right to keep a culture distinct from the majority population. The latter may “consist in a way of life which is closely associated with territory and use of

⁴⁴ A foundation is staffed with three tribal community members, two NCIP employees, one member of the MGB, three SMI officials and three board of trustees community members.

⁴⁵ As mentioned before, in case the mining project fails to gain the necessary permissions or has to end prematurely for other reasons, SMI's programs will continue for one more year.

its resources. This may particularly be true of members of indigenous communities constituting a minority” (OHCHR 1994, § 3.2) and may “include traditional activities as fishing and hunting” (OHCHR 1994, § 7).

Rights/ Source	Content/Elaboration
ICESCR, Art. 15, 1a)	Right to take part in cultural life.

7.6.3 Status Quo and Project-related Activities

Usually, distinct cultural impacts are hard to grasp. Nevertheless, cultural aspects are often at the heart of subjective perceptions of rights abuses and injustices, and they have been the source of many conflicts between members of B’laan and non-B’laan communities in the Tampakan Project area, as WMC had already asserted (Davis 1998: 238).

The difficulty in assessing cultural impacts lies in their character, which is always subject to historical roots and change. Logging activities and non-B’laan settlements of farmers around the mountains, for example, had already led to transformations of traditional, more or less nomadic lifestyles among the indigenous population, long before WMC came into the area. Today, for instance, members of the B’laan tribes do not only rely on subsistence farming anymore. Some also take part in markets in the lowlands. So, depicting the indigenous communities in the Tampakan area as living in a completely isolated culture would be idealizing and misleading. However, when WMC came into the area, the company noticed a need for a high cultural sensitivity. This also led WMC to act cautiously in designing written agreements in the form of a two-step model of, first, Heads of Agreements and then, second, Principal Agreements. As Davis (1998: 239) explains:

“To provide some security to the local communities and allay their fears after their previous negative experiences with government and logging companies, WMC agreed to B’laan requests for written agreements. These Heads of Agreement were an opportunity for both the B’laan community and WMC to understand more about each other and provided a basis on which a mutual understanding and a positive working relationship could grow.”

Apparently, already since the times of logging companies and also during the WMC phase, various influences have had an impact on the social and cultural life of the B’laan population. This has led to various problems and also violence in the area throughout the last decades.

One problem arises from different customs of land ownership and, linked to this, possibilities to purchase or lease land. Misunderstandings and fraud have occurred in the area in regard to non-indigenous people trying to purchase ancestral land (Davis 1998). Such attempts might have increased in Tampakan as the mine promises profitable land. As some interviewees indicated, various illegal purchasing activities are taking place around the proposed mine area today.

Other sources of conflict are disruptions in the traditional leadership structures of the B’laans based on fulongs and bong fulongs (cf. Chapter 6.1). IPRA and the need to communicate with indigenous communities in official matters have led to an attempt to ‘harmonize’ leadership structures, considering chieftains as the only valid leaders, which, however, constitutes a break with the traditional political structure of the tribes rather than a harmonization. This parallel system has led to frustrations and the feeling of misrepresentation among parts of the B’laan communities. In addition, SMI has established a third structure of representatives for Resettlement Councils (cf. Chapter 7.1).

The high value that sacred places hold for the B’laan and the fear of cultural loss further increase the potential for violent conflicts. This has already escalated in some cases and led to abuses of human rights. Interviewees reported a case in which the military intentionally burned down a sacred B’laan house of prayer. Another house of prayer, visited by the research team, had been plundered and desecrated by the military. Also, in a further reported case, B’laan members were using guns trying to defend a burial ground from company personnel attempting to erect border stones which – according to B’laan customs and belief – would have desecrated the grounds.

7.6.4 Risks and Opportunities

If the project proceeds, there will be a high risk of further cultural loss. Thousands of members of the B’laan com-

munities would be relocated and thereby lose their land, which was described to the research team as the central backbone of their everyday routines, their religious traditions, and their source of food.

With very few exceptions, interviewees emphasized that the traditional linkage to their ancestral domains is essential for their lives. Chieftains from Bong Mal and Sal-naong, for instance, explained that they would generally agree to the mining project as long as it would be ensured that they would not have to be resettled outside their ancestral domains. The persistent way in which interviewees referred to the belief that they might be able to stay on their land partly reflected an anxiety to be relocated outside the ancestral domains, but it also illustrated a lack of concrete information on the actual effects of the open-pit mine once it would be operational (cf. *Chapter 7.1*). These effects would mean an essential loss of cultural heritage. It is obvious that the right to a particular culture would probably be violated once the project is operational as it is planned. Only few interviewees saw this differently and explained that they would accept a loss of their land. They emphasized that SMI would have to offer appropriate compensation for their loss and allocate comparable new land.

Linked to the ancestral domains there is also the concept of cultural heritage, especially sacred burial grounds. It became obvious in interviews that the fear of violations of the integrity of burial grounds has already led to violent conflicts in the B'laan area. People explained that, according to B'laan belief, the deceased members of a community need to be protected in their resting places. A few interviewees emphasized that even sacred places could be compensated for, but they would require a higher amount.⁴⁶ Some interview partners also proposed that SMI could relocate the burial grounds. Most interviewees, however, explained that there is no possibility to relocate or otherwise compensate for the cultural loss linked to sacred places.

Moreover, the social cohesion between and within communities would most probably further diminish once relocation took place. As people will be relocated to different areas, fundamental changes in the community structure are inevitable. Although SMI seeks to establish relocation sites in close dialogue with the affected people, interviewees made clear that fundamental uncertainties and fears remain regarding the future of community life. This is also due to the fact that so far, communal life is characterised by the practices and everyday routines of a life in the mountain

areas, including movements within the ancestral domains. At the time of writing, SMI is conducting a *Cultural Heritage Study*. The purpose of this exercise is to determine the presence of sacred places and possible ways to deal with these in a culturally sensitive and acceptable way. This study constitutes an essential aspect of the corporate responsibility to respect human rights. Following international norms on good business conduct and corporate respect for human rights as laid down in the Guiding Principles, such a study should have taken place as one of the first steps. It should have been completed before the company became active in the area in order to understand the cultural conditions and contexts in which company activities would be embedded, and to help prevent cases of desecration and violence like those described above.

The main argument presented here emphasizes the importance to develop the mining project in a culturally sensitive manner and to allow for a meaningful participation of the indigenous communities regarding matters essential to their lives. As part of the indigenous peoples' right to culture, it is of particular importance that state and company respect and support the processes followed in indigenous communities to reach decisions on developments affecting them. This is not to signify that cultural changes through the presence of the Tampakan Project are inherently negative for the indigenous communities or that any such changes should be prevented.

7.7 Security

7.7.1 Defining the Subject Area

The occurrence of violent clashes and the presence of conflicts pose significant risks to the realization or even constitute a violation of human rights. In *Chapter 6.3*, the security context and the main actors impacting on the security situation in the project area were introduced. This section takes a closer look at the human rights impacts these circumstances cause.

7.7.2 Rights at Stake

The prevalence of insecurity and the occurrence of violent incidents can pose risks for multiple human rights. First and foremost, the right to life, as set out in the UDHR and also in the ICCPR, may be threatened or violated as killings occur. Likewise, the insecurity and fear engendered by violence may seriously influence the possibility for affected people to lead their lives in dignity and to participate in the usual everyday life of a community. The inability to follow one's

⁴⁶ One of these interviewees had already moved down from the mountains to a dominantly non-B'laan village and therefore might have a view on the social and cultural ties of the land differing from that of people who live up in the remote forests.

routines can cause further infringements on economic, social or cultural rights. Particularly women and children are often strongly affected by these negative human rights impacts. The effects triggered by the prevalence of insecurity and violence are also usually long-lasting since the rebuilding of community life requires time.

7.7.3 Status Quo and Project-related Activities

A number of killings have been committed in the proposed project area in recent years. The perpetrators were personnel of the state-controlled armed forces, the NPA, as well as members of indigenous communities who oppose the mining project.⁴⁷ The victims were employees or contractors of SMI and members of indigenous communities. In 2012, SMI suffered three attacks which resulted in three fatalities (SMI 2013: 30). According to media reports, the victims were security personnel and the attacks were carried out by members of B’laan communities and the NPA (Rappler 27 July 2012). Three drill contractors as well as a land acquisition officer employed by SMI were murdered in 2011 (Rappler 27 July 2012). These incidents violate the right to life of the victims and, moreover, foster insecurity in the area and complicate constructive dialogue between indigenous communities and SMI.

Furthermore, the conduct of state forces in the Tampakan area has led to the violation and infringement of a number of human rights. A case which increased the climate of insecurity in the region was the killing of Juvy Capion and her

Rights/Source	Content/Elaboration
UDHR, Article 13	Right to freedom of movement
ICESCR, Art. 15, 1a)	Right to take part in cultural life

two sons. According to the military, the attack occurred in pursuance of Juvy Capion’s husband Daguil Capion – a prominent armed opponent of the Tampakan Project charged with murder. Yet, witnesses attested that Daguil Capion was not present at the house when the attack occurred and all victims were defenseless. In response to this misconduct, the AFP brigade involved in the attack was replaced and court-martial proceedings have been initiated.⁴⁸ The killing of defenseless civilians by state forces is a grave violation of the human right to life and highlights the severe failure of the state to fully control its armed forces and to enforce human rights standards effectively.

Another killing occurred in January of 2013. Kitari Capion, a brother of Daguil Capion, was shot by KITACO forces. The exact course of events is, however, debated at the time of writing. While, according to media reports, Daguil Capion claims that the attack was conducted after he and his brother had arranged their surrender with a military officer and were waiting for their response, a military spokesperson argues that the forces were conducting a patrol in the area and were first fired upon by Daguil Capion’s group of (Inquirer News 31 January 2013).



Photo: Bobby Timoner

⁴⁷ It has to be noted that the indigenous community members on Mindanao who resort to violence are at times members of the NPA. At the same time, they are often labeled as insurgents of the NPA even if they act independently. It is not always possible to clearly establish affiliations from the outside.

⁴⁸ The father of Juvy Capion, supported by the Philippine human rights group Karapatan, has also filed criminal charges against several soldiers involved in the shooting (Davao Today 10 March 2013).

These attacks and killings have intensified communities' mistrust of armed forces and particularly of the KITACO Task Force. Interviewees attributed the continued occurrence of such incidences to the allegiance that forces feel towards SMI. Accordingly, the constant presence of armed personnel and the occurrence of violent incidents have greatly increased distress among communities, and through the killings, the right to life has been violated. Several interviewees argued that they perceive the troops not as their protectors but as a threat to their security since they are deployed to protect a foreign investment.

Women fear assaults in particular. One group of women from Bongmal explained that they were regularly followed by armed personnel wherever they went and, since the distance to their fields was long, they no longer dared to walk there. This signifies that the presence of state-controlled armed forces also encumbers freedom of movement and the economic activities of the indigenous communities. Additionally, their right to food as well as their right to culture may be infringed upon as community members refrain from certain traditional economic or cultural activities. By contrast, as mentioned in Chapter 6.3, others also emphasized their increased sense of safety through the deployment of armed forces because previously no state-controlled security forces had been present around their communities.

The analysis illustrates that the militarization of the area and the conduct of specific groups has caused serious human rights violations and created a climate of insecurity. The indigenous communities as well as employees and

contractors of SMI have to fear for their lives since violent attacks are committed against both sides. The occurrence of killings violates the right to life and also fuels further resentments. The primary responsibility for these violations lies with the Philippine state and its security forces; yet members of the indigenous communities who resort to violence as well as the NPA are also responsible for the occurrence of such abuses. Furthermore, the indigenous communities endure high psychological pressure. Many fear the attacks of state-controlled armed forces and continuously feel targeted and watched. Such circumstances violate the human right to life, liberty and security of person, they destroy communities and provoke violent backlashes. Additionally, other human rights are also infringed upon as mentioned above with regard to the right to food and the right to practice one's own culture.

A point to be emphasized in this regard is the fact that agents of the state are perceived as threats by some community members and infringe on human rights. This is particularly critical because, first of all, it is the duty of the national, regional and local governments to ensure that the human rights of all citizens are realized while, secondly, the different levels of government deploy and control the military, the KITACO Task Force and CAFGU. Hence neither the national government nor the LGUs are successfully fulfilling their responsibilities towards their constituents. The fact that the rights of vulnerable groups are being infringed upon further highlights the precariousness of the situation and the failure of the state to adequately care for its citizens. ■

| 8. Identifying Key Problems and Shortcomings

In *Chapter 7*, we presented the main data based on literature research as well as on interviews from a human rights perspective and structured the chapter according to relevant subject areas – information and participation, grievance mechanisms, livelihoods, health, education, culture and security. While information and participation as well as grievance mechanisms refer to the actual process of how SMI pursues its interest to proceed with the Tampakan Project and how state authorities handle challenges that arise in the context of the project, the areas of livelihoods, health, education, culture and security refer to aspects in which affected communities experience or expect the most severe consequences.

The assessment identifies both positive and negative impacts of the Tampakan Project. While the report does not elaborate on all potential positive impacts as only few of them affect human rights, it emphasizes potentials in the field of economic gains, health and educational services. With regard to economic gains, some interviewees have strong hopes for employment opportunities and monetary gains for communities. In respect to educational and health services, there are apparent benefits for those who receive scholarships and job trainings. Also, direct health services are organized by the company. Both aspects are relevant for the realization of educational and health rights. Three aspects severely limit the expectation of economic

opportunities. First, there is a clear constraint to sustainable job creation as the bulk of employment opportunities only refers to the construction phase and thus would only last up to three years. Second, it is doubtful that the most vulnerable groups, especially indigenous groups, could benefit from these employment opportunities in the long run. Even if job assignments give priority to long-term inhabitants, which would also create employment for indigenous people, this will only be short- to mid-term employment. It also constitutes a complete break with current ways to create livelihoods, which might not be fully available again after the mine is closed, due to the destruction of arable land. Third, compared to the magnitude of the project, tax and revenue for the Philippine state seem rather limited, which is also reflected in current public demands for a reform of existing tax provisions of the Mining Act.

With regard to health and educational services, the major problem is that these services are provided by the company instead of the state. The sustainability of basic services thus depends on the future of the mine and on corporate decisions. Furthermore, this dependency of basic services undermines the possibility of a free consent to the mine by indigenous communities.

Considering the positive impacts and hopes that people have in the mine, there is a need to assess them in concert with various areas of risk which we draw from combining the above analysis in the following. It is important to note that human rights violations – if they occur due to mining operations – cannot be compensated for by positive contributions in other areas.

We link the core subject areas and derive five significant predicaments for human rights:

Key Predicaments	
2	Dependency of Basic Services on the Future of the Project (Deficiency of FPIC II);
4	Insufficiency of Established Grievance Mechanisms;

8.1 Incoherent Information and Lack of Meaningful Participation (Deficiency of FPIC I)

The overall provision of information by the companies which have been involved so far (WMC/SMI) lacks coherence and completeness. Even where information is provided, it is obviously not channeled in an appropriate manner allowing all recipients to comprehend the full magnitude of the project and potential alternative options. As our interviews illustrated, levels of knowledge about the mining project, its components and consequences varied significantly. No community member interviewed was fully aware of the meaning and scope of current project plans and possible options for communities affected to influence the project design. For instance, several interviewees emphasized that no comprehensive information on open-pit mining had been provided in the first FPIC phase. Also, several tribal chieftains proclaimed the goal to remain in their ancestral domain despite the presence of the mine, which illustrates that they were not aware of the scale of open-pit mining and its impacts on the environment. Accordingly, consent given by communities in the first FPIC phase – which lacks documentation – has not been based on a comprehensively informed opinion.

Furthermore, community members are concerned about the long-term impacts of the project on their community and feel that their questions were not adequately addressed by SMI. Interviews indicate that at least parts of the affected communities face existential fears caused by the planning uncertainty the Tampakan Project yields. Detrimental effects on the environment, food and water insecurity, destruction of cultural heritage and disruptions of the social fabric are possible risks that communities face, as became clear in interviews. If these consequences were to materialize, the current livelihoods of those affected could be destroyed. Interviewees also pointed out that future generations may not have any livelihood opportunities in the area. The availability of jobs now may compensate for the loss of arable land, but these jobs will vanish once the project is completed, and a return to previous ways of living may not be possible; sustainable solutions are not on the horizon. Hence the prospect of the mine has triggered existential concerns among parts of the population for over a decade. As the mining company is also the decisive provider of information on risks and technical details of the project, the credibility and capacity of its information policy to allay people's fears is limited.

A further problem we see in this regard is the level of public participation. This concerns the manner of engagement of SMI with local inhabitants and the latter's possibilities

to actively participate in decisions that fundamentally impact on their future. Citizens affected were able to express their concerns, yet direct reactions by SMI did not follow, according to interviews. This signifies that even if SMI incorporates feedback gathered in meetings with community members, no mutual exchange between the different stakeholders has evolved. We have a clear contradiction between information provided by the company on their involvement of community members and information we gathered in interviews. Interviewees in several communities emphasized that they had voiced questions and concerns in SMI's scoping meetings but received no adequate response, which caused resentments against SMI. Our data cannot resolve this contradiction. However, the public perception of at least part of the population indicates a deficiency in the possibilities for meaningful participation. The company employs a top-down approach in its activities and, accordingly, inhibits the establishment of effective feedback-cycles. This lack of meaningful involvement in the processes infringes on the human right to participation and thereby increases conflict potential where community members seek other channels to voice their concerns or their opposition, including violence.

8.2 Dependency of Basic Services on the Future of the Project (Deficiency of FPIC II)

A further problem is the degree to which the decisions in the upcoming FPIC process can be considered as free. 'Free' signifies that no coercion, intimidation or manipulation is employed to influence the decision-making process. In the case of the Tampakan Project, the dependence affected communities have developed on SMI to provide basic services denies them a meaningful choice regarding the future of the mining project. Communities affected are very aware that the provision of basic public services, especially health and education, depends on the future of the mine. Their freedom of choice is restricted because a decision against the mine is very likely to entail the termination of basic health and educational services and, hence, an infringement on human rights.

Allocating responsibility for this shortcoming is complex. First and foremost, it is a failure of the state not to provide the services necessary to meet basic needs. With such conduct, state organs can exacerbate a lack of 'free' consent as the dependence on company support becomes visible to the communities. Since SMI is required to foster local development and basic services have been lacking for decades, the provision of educational and health services

appears to be most urgent and the best starting-point for SMI to engage with communities. If the Philippine state had fulfilled its duties adequately, SMI's support to community development could have taken a different, less existential form.

However, SMI also bears responsibility. The company is required to adequately assess the local context. Such an analysis should have revealed that through the provision of these services the company acts as a substitute for the state and creates a high dependency situation. Although SMI is correct in its observation that the provision of development, education and health services is urgently needed, a more sustainable and responsible path should have been taken. For instance, the creation of educational and health funds which could be sustained independently of the future of the mine would have created less dependency on SMI. Proper community development should avoid the dependency of human rights-related basic services on the company and offer a sustainable solution for communities. The policies of both company and state exhibit significant shortcomings in this respect, which impact negatively on the possibility to create an environment in which a free consent would be possible. The dependency of human rights-related basic services on the future of the mine thus constitutes an obstacle to a meaningful FPIC. It undermines the upcoming FPIC process, even if the latter might formally comply with Philippine law.

8.3 Imbalanced Power Relationship between SMI and Affected Communities

Closely linked to the first two, the third predicament concerns the distribution of power between different stakeholders involved in the Tampakan Project. As the data illustrates, the legal framework for a mining project of such magnitude is ambiguous, the region in which the project is located is characterized by a weak infrastructure, and government agencies involved are ill-equipped. These insufficiencies signify that the conditions with regard to communities and state authorities required for handling a transnational enterprise and a project of this magnitude in a responsible and sustainable way are currently not fulfilled in the Tampakan area. No adequate control mechanisms exist or can be enforced to ensure that international and national standards are adhered to by SMI. LGUs that have the political will to protect human rights in their constituencies see themselves in a difficult position. The ban on open-pit mining in South Cotabato clearly faces strong political power and influence by SMI and the mining industry.

Regarding the company, the question remains how it has dealt with the intensity and amount of political and administrative shortcomings in the project context. The prospect of economic growth despite existing governance gaps has put further pressure on public institutions in order to act in the company's interest. Even though SMI provides money and expertise so that the formal processes necessary for the mining operations become possible, public institutions are not in a position to offer an administrative surrounding that would ensure a balancing of public and private interests. Thus, while formally democratic processes are taking place (information, public consultations, provision of public goods and services), they proceed according to the company's terms and with the clear intention to pursue a private business interest in continuing the mining project, rather than to create space for balanced public deliberation.

The effects of the current situation are predominantly felt by the most vulnerable groups. The indigenous communities lack options to determine basic aspects of their lives. Besides fundamental democratic flaws, this powerlessness combined with the fragile security situation also leads to a high risk of escalating violence. These conditions should have led the company to either put much more effort in comprehensive context analyses and the development of appropriate strategies (especially on security, administration, culture, information, participation, grievance) prior to any exploration activities in the area or abstain from the project. The UN Guiding Principles confirm the necessity to appropriately assess the context of any business activity and the potential impacts business activities might have in this context as essential steps of the due diligence process.

8.4 Insufficiency of Established Grievance Mechanisms

The analysis leads to the conclusion that the third pillar of the UN Policy Framework 'Protect, Respect and Remedy' is not sufficiently developed in the Tampakan Project. State capacities to handle judicial complaints based on the rule of law are weak, as became clear in Chapter 4. Furthermore, non-judicial or quasi-judicial complaints mechanisms anchored in NCIP or CHRP are underdeveloped. CHRP has a mandate to further develop such mechanisms, but in order to achieve this there is a need to give much more weight to this institution through funding and expertise. The focus of our analysis rested on the private grievance mechanisms established by SMI, which can fulfill important functions, but cannot replace the state system. The company designed an ambitious program, yet it is not clear to what degree the

mechanism is actually being implemented at time of writing. Furthermore, the grievance mechanism was designed without meaningful participation of communities, according to interviews. In contrast to this, the former UN Special Representative on Business and Human Rights emphasizes that such instruments should be created through a fair and even dialogue between the parties concerned to ensure their appropriateness and acceptance. Also, there is a lack of transparency in terms of specific complaints that were raised, how these were resolved and what the criteria are under which SMI treats complaints. Accordingly, the current state of SMI's program suggests that the company-based grievance mechanism is not in full compliance with the requirements established by the UN Special Representative. At the time of writing, however, it has to be acknowledged that many changes toward a more elaborate grievance system are underway, according to SMI (2013).

8.5 Accumulating Grievances and Triggers of Violent Conflict

The assessment has demonstrated a close connection between the overall security situation and conflict potentials posed by the mining project. The area the project is to be situated in is already colored by the presence of violent conflict in the region. Further potential for conflict is present due to social inequalities, prevailing poverty, discrimination of minorities and the failure of the government to address these issues. In this context, a large mining project, which on the one hand fosters hope for immense economic gains, yet on the other hand poses existential threats to marginalized groups, polarizes communities and fuels conflict potential and the use of violence. This effect can already be observed in Tampakan.

A further exacerbation of the security situation is posed by the presence of military and paramilitary forces. As interviews illustrated, these forces are predominantly associated with the mining project. Most interviewees who expressed a positive attitude towards the Tampakan Project also declared their support of the military, while opposition to the mine is targeted against the military, and vice versa. Since the armed forces constitute the sole representatives of the state in the mountain areas, resistance against the mine tends to be construed as directed against state authority and, therefore, is labeled as insurgency. This in turn is used to publically legitimate the increased use of force against mining opponents. Such dynamics lead to repeating and escalating cycles of violence. The killings that occurred in the area clearly violate human rights, most fundamentally the right to life. ■

9. Conclusion

The fundamental reference framework of this HRIA is the UN human rights system, accentuating both state obligations as well as a corporate responsibility for human rights. Our focus is on the most vulnerable persons and groups who are excluded from mainstream society and discriminated against. The study emphasizes impacts currently exerted by the project but also considers potential future effects expected by stakeholders. Data gathered was analyzed according to major subject areas which play a significant role in the assessment of the project's human rights impacts.

Against the background of our normative human rights framework, this HRIA has pointed at various moments of government deficiencies referring to the human rights of people possibly affected by the Tampakan Project. We can observe a context which is characterized by a combination of government failures, prevailing poverty, a high level of marginalization and discrimination against indigenous groups, especially in terms of basic services, and a generally volatile conflict situation.

Our overall finding is that the Tampakan Project has significant impacts on the human rights situation in the area. The context conditions in Tampakan are precarious with regard to such a project. This brings about a situation in which a responsible open-pit mine of this magnitude does not seem feasible.

We consider the Philippine state as bearing the primary responsibility for the fragile situation in the Tampakan area, while also SMI and, as the mother company, Xstrata carry strong responsibility.

The Philippine government has entered the major relevant human rights treaties and thus has to be held accountable also in respect to its policies referring to this mining project. The government has duties to respect, protect and fulfill the human rights of persons and groups within its jurisdiction. 'Respect' means that state institutions shall refrain from any action which infringes on human rights; 'protect' entails that the government and other state institutions protect individuals and groups from violations of their human rights by non-state actors, for example companies, by means of respective policies and jurisdiction; 'fulfill' implies that governments must realize the full enjoyment of all human rights to persons within their jurisdiction. The Philippine government is violating its obligations at all three levels. Failures at these different levels intermingle and reinforce each other. The malfunction in fulfilling human rights is particularly drastic with regard to economic, social and cultural rights of indigenous communities. Due to an absence of national development policies

and social services for indigenous communities in the Tampakan area, basic rights fulfillment in these communities now depends on private services. Furthermore, following IPRA, the Philippine government is committed to the rights of indigenous peoples to self-determination and to FPIC. However, in practice, these rights are violated in manifold ways. In particular, the resources and mandates of central institutions for these rights, including NCIP and CHRP, have proven to be insufficient. They lack funding and capacities and should be empowered in a manner allowing them to adequately fulfill their tasks.

Regarding the state duties to respect and to protect human rights in the context of mining projects, one major concern is that the national government gives priority to economic interests over the human rights of potentially affected people. Such conflict of interest has already been criticized by the CESCR in relation to the contradictions between the Mining Act and IPRA. It also shows in the Executive Order 79 of July 2012, which tries to lever out the Environmental Code of the provincial government of South Cotabato that includes a ban on open-pit mining, because of the endangerment of the right to water. Furthermore, the government is violating its obligations to respect and protect the human rights of people affected through the misconduct of parts of its military units deployed in the area.

With regard to the intricate situation in the Tampakan area and ongoing opposition to the mine, the government should consider establishing more balanced and independent services. One possible first step in this respect would be to commission a neutral mediator in order to bring LGUs, SMI and mining opponents into a negotiation at eye level. This task could be completed by the establishment of a permanent office of an ombudsperson that offers a centralized, independent means for people to channel queries and complaints and thus allow for the complementation of existing project-level grievance mechanisms that are partly affected by mistrust against the project proponent. A further potential step would be to commission an independent environmental impact assessment in order to additionally balance publicly available information, which at present is not required under the law.

In addition to and complementing the state duties, enterprises, especially transnational corporations, have a responsibility to respect human rights. The UN Guiding Principles for Business and Human Rights are the benchmark against which this corporate responsibility for human rights should be assessed in practice. They ask companies to carry out human rights due diligence in order to identi-

fy, prevent, mitigate and account for adverse human rights impacts of their business activities. Thereby, at least three areas must be considered by a company, namely the human rights situation in the country, possible negative human rights impacts of a planned business activity in this country context, as well as possible complicity through business relations with other companies and state actors (UNHRC 2008c: 17).

Taking normative guidance on a more operational basis as a starting point, we can state that many of SMI's activities are in formal compliance with international standards. Especially in respect to environmental standards, the company offers comprehensive information, although critics also point to major shortcomings in this field. However, taking a principled and comprehensive human rights approach by following the UN Guiding Principles, we conclude that human rights predicaments remain. Based on the concept of corporate human rights due diligence, the analysis of the country context needs to be the first step of any new company activity. The assessment has identified essential flaws in the level to which SMI has seriously taken the volatile context into account by analyzing and adapting to social, political and cultural conditions as well as potential risks from the outset. Above all, the situation of indigenous communities in the Tampakan area would have asked for an HRIA delivered by the company as well as a cultural heritage study before major business activities started. The volatile situation vis-à-vis the scope and reach of influence, power and experience of SMI leads to imbalances between the project proponent, government actors, and people affected which are of such high degree that we would more generally question the possibility to conduct large-scale open-pit mining in a way that is responsible from a human rights perspective in Tampakan in the current situation. This imbalance, resulting in negative dynamics, frictions and new dependencies, is also illustrated by various efforts of SMI to gain social acceptance, which have only been partially successful; it is furthermore reflected by the high engagement with educational and health services. These are positive and important services, and they can contribute to a higher degree of human rights realization in these fields, but they also increase the dependency of people affected on the company that hardly allows for a meaningful stakeholder engagement and a free, prior and informed consent by indigenous communities. It should be the government that delivers such basic services to all on a non-discriminatory basis.

Given this clash of project plans with the context conditions, the potential for violent conflicts interacts with and adds to these dynamics. We have elaborated on the interrelations of this factor with other predicaments throughout

the study. Though formal compliance by SMI with the requirement to carefully choose their private security services and offering human rights training on the Voluntary Principles on Security and Human Rights, also to members of state-controlled armed forces, the prospect of the project and the company's presence have triggered dynamics of militarization in the region and the escalation of violence. The armed forces have intensified frictions between those who have hopes in gaining from a potential mine and those who oppose the project. The people most severely suffering from this situation are the most vulnerable groups among the indigenous population.

Against this background of a malfunctioning state human rights protection system and a deficient substitution by corporate arrangements, one needs to further consider the extraterritorial dimensions of this project. Xstrata Copper and Xstrata plc as the controlling corporate units in this context carry responsibility for the current human rights predicaments. While Xstrata plc provides the corporate ethical standards and governance strategies, Xstrata Copper is the controlling company of SMI. The UN Guiding Principles emphasize that it is crucial to what extent the leverage of a company allows for addressing human rights impacts. Given the high level of control of SMI by Xstrata plc and Xstrata Copper, we can assume a high leverage for both company units. This is also reflected by public statements by Xstrata plc on the Tampakan Project, confirming willingness to take over responsibility. Both Xstrata plc and SMI have committed themselves to the UN Guiding Principles on Business and Human Rights. We therefore conclude that further action to address the human rights risks in Tampakan is not only demanded from the perspective of internationally recognized norms, but also follows from the companies' own corporate philosophies and self-commitments.

This leads us to the role of the home state governments of the companies involved. It should be emphasized that the governments of Switzerland/ UK (Xstrata plc) and Australia (Indophil Resources NL, Xstrata Copper) have to consider their share of responsibility and the need for them to address the companies' conduct. The prime duties lie with the Philippine government as the host state. However, there is a strong imperative for the home state governments of the involved companies to ensure that companies headquartered in their countries comply with internationally recognized human rights standards wherever they operate. It is beyond the scope of this report to determine this influence and extraterritorial obligations, but we recommend this as a further assessment. ■

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11. Annex

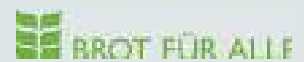
11.1 Annex I

The Philippines are party to the following core Human Rights Treaties, Conventions and relevant instruments:

The Philippines have not yet signed or ratified the following core Human Rights Treaties, Conventions and relevant instruments:

11.2 Annex II – List of Interviews

	Organization/ Position/Function of interviewee(s)	
1	Tampakan Forum (Manila)	19/11/12
2	Representatives of SMI (Manila Office)	21/11/12
3	Representatives of CHRP (Manila)	22/11/12
4	Most Reverend Dinualda D. Gutierrez, Bishop of the Diocese of Marbel	23/11/12
5	Representatives of the Social Action Centers of the Dioceses of Marbel, Digos & Kidapawan	23/11/12
6	National Irrigators Association (Davao del Sur Office)	24/11/12
7	Members of B'laan community of Bongmal	25/11/12
8	Vice-Governor of South Cotabato (Mr. Tolosa) and members of Legislative Council South Cotabato	26/11/12
9	Vice Mayor of Tampakan (Mr. Leysa)	26/11/12
10	Representatives of the Military (10th ID/1002nd Brigade)	26/11/12
11	Governor of South Cotabato (Mr. Pingoy)	27/11/12
12	Mayor of Tampakan (Mr. Escobillo)	27/11/12
13	Governor of Davao del Sur (Mr. Cagas)	28/11/12
14	Mayor of Kiblawan (Ms. Diamante)	28/11/12
15	Tribal Chieftains and further members of communities of Bongmal, Danlag, S'Bangken, Salnaong; including regional representative of CHRP	29/11/12
16	Basic Ecclesial Community (Brgy. Taplan)	30/11/12
17	Irrigators Association (Brgy. Taplan)	30/11/12
18	Representative of Lagao Parish, General Santos	30/11/12
19	Members of B'laan community of Danlag	01/12/12
20	Sr. Susan O. Bolanio (OND Hesed Foundation)	02/12/12
21	Mayor of Koronadal (Mr. Miguel)	03/12/12
22	Representatives of SMI (Mindanao Office)	03/12/12
23	Representatives of Lutayan Municipality	04/12/12
24	Representative of NCIP (National Office)	06/12/12
25	Secretary of the Department of Agriculture, Proceso Alcala	06/12/12
26	Secretary of the DENR, Ramon Paje	06/12/12
27	Representatives of the Environmental Management Bureau (Attorneys Cuma & Matias)	07/12/12



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