

Human Rights Based Approach to Mining on Aboriginal Land

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Sustainable development is not just a goal of companies but is the basis for the survival and future of Indigenous people. Where human rights principles form the basis of a relationship between mining companies and Indigenous communities, then, by necessity it is a sustainable relationship.

Summary

The human rights principles that are relevant to developing a sustainable relationship between Indigenous people and mining companies are:

- racial equality and non-discrimination (guaranteed under article 26 ICCPR and article 1 and 5 of ICERD);
- the right to free prior and informed consent (also known as effective participation guaranteed under the right to equality and self determination);
- the right to the enjoyment of culture (article 27 ICCPR);
- self-determination (article 1 of ICCPR and ICESCR) , and;
- the right to development

Mining companies committed to incorporating human rights into policy and practice, must move beyond the constraints of regulatory regimes which are inconsistent with these principles and develop a relationship with Indigenous people based on rights.

Companies whose policies and practices are consistent with human rights standards will:

- Respect and protect the cultural and political integrity of Indigenous people;
- Recognize Indigenous people's rights to their land and its resources;
- Obtain the free, prior and informed consent of Indigenous people in relation to access and use of their land and its resources;
- Where project agreed to, negotiate with Indigenous people to ensure their full participation in the project, including agreements on sharing the benefits of the project with the Indigenous people concerned;
- Ensure rights-based benchmarks are used to measure and monitor practices.

Equality and Non-Discrimination

Racial equality is enshrined in the main international treaties on human rights: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CROC), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Australian government has

voluntarily joined all these treaties, committing Australia to ensuring the treaties' standards are met in this country.

The standard of equality required at international law is very high. There are two elements to the definition of racial discrimination, which together, contravene the notion of equality;

- First, a distinction, exclusion restriction or preference based on race is required; **and**
- Second, the distinction based on race must nullify or impair the recognition and enjoyment of human rights by a particular racial group.

In other words, racial discrimination does not occur simply because one racial group is treated differently to another, but rather because that differential treatment has the effect of impairing or nullifying the enjoyment by that group of their fundamental rights.

This may appear to be a technical distinction but it is fundamental to the way in which discrimination laws operate within Australia today. If discrimination is simply differential treatment on the basis of race, then equality is achieved through applying all laws identically to each individual, without recognising that the effect of those laws has a differential impact on ethnic groups. If however, equality is about ensuring that racial groups have equal enjoyment and access to the benefits of society and participate equally in determining its future, then differential treatment may not necessarily imply discrimination and may even be **required** to **achieve** equality. The former approach to equality, adopted and promulgated by the present government, is known as formal equality. The latter approach is known as substantive equality, and is the approach adopted at international law.

Of particular relevance to the relationship of mining companies to Indigenous people is differential treatment that aims to protect and maintain the distinct cultural and political integrity of Indigenous people. This is required under a substantive equality approach. This differential treatment should not be confused with special measures or affirmative action which are essentially measures aimed at overcoming past discrimination.

The treaty committee bodies, which assist in monitoring and implementing each treaties' provisions, have elaborated the requirements to enable Indigenous people to maintain their distinctive cultures. These requirements form part of states obligations to guarantee equality and non-discrimination before the law. The Committee on the Elimination of Racial Discrimination (CERD Committee), has confirmed, in General Recommendation 23 on Indigenous people, that the Convention's obligations require States to:

- a) recognize and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;

- c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d) ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- e) ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages.
- f) recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands and territories and resources and, where they have been deprived of their informed consent, to take steps to return these lands and territories. Only where this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.¹

An important development in the international jurisprudence on equality has been the development of the rights to **‘effective participation’** as integral to racial equality. This right emanates from Article 5(c) of ICERD which requires equal participation in public life and is listed at (d) in the Committee’s General Recommendation on Indigenous Peoples outlined above.

Thus equality is not only about a comparison of standards between racial groups, it is also about the way in which decisions are made that affect the rights of Indigenous people. Indigenous people must not only participate in that process they must lead that process and determine its course. They must give their informed consent to that process.

The Committee on the Elimination of Racial Discrimination also recognizes the importance of **land** to Indigenous people as listed in the General Recommendation at (f) above. In Australia in 1992 in the Mabo decision, the High Court found that the failure to give recognition to the relationship Indigenous people have with their land was racially discriminatory. However, it has become clear that native title does not give the same level of protection to Indigenous title to land as that given to non-Indigenous title to land. The legislation that controls the native title process, the Native Title Act, is racially discriminatory in many significant ways. It is therefore important that companies interacting with Indigenous people go beyond those legal parameters which are inconsistent with the human right of Indigenous people to equality.

Cultural Rights

While it can be seen that the right of Indigenous people to maintain their culture is protected under the notion of substantive equality, a further guarantee of cultural rights is Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which provides that:

¹ General Recommendation 23, CERD Committee, 1997

Members in ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

There has been significant resistance from Indigenous groups to their rights being equated with the rights of cultural minorities within a particular State. Indigenous people, as the first peoples of a territory, with a specific history and relationship to that territory including one of forced colonization, have distinct rights in the context of cultural, social, economic and political protection. While Indigenous people are entitled to the protection of minority group rights these rights are not exhaustive of Indigenous peoples' rights.

The Human Rights Committee, which monitors States' performance under ICCPR, has interpreted the notion of 'culture' under Article 27 broadly, observing 'that culture manifests itself in many forms including a particular way of life associated with the **use of land and resources**, especially in the case of Indigenous peoples.

The level of protection that Article 27 gives to Indigenous culture under threat by development and economic activity has also been considered by the Committee, which has indicated that the State is under an obligation to ensure that such activity has, at most, only a limited impact on the way of life of persons belonging to a minority.

The Committee will consider, in any complaint before it, whether the State has weighed up the interests of the group with the benefits of the proposed economic activity. Large scale activities, particularly involving the exploitation of natural resources, could constitute a violation of Article 27.

In assessing activities in the light of Article 27, State parties must take into account the cumulative impact of past and current activities on the minority group in question. Whereas different activities themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of a group to enjoy their own culture.

Finally the Committee will consider whether the State has undertaken measures to ensure the 'effective participation' of members of minority communities in decisions that affect them.

Again, as with the CERD Committee, the Human Rights Committee can be seen to be relying on effective participation as a means of ensuring that cultural rights are being protected.

Self-Determination

The right of self-determination is Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia is a party to both of these covenants and is bound to act in compliance with their terms. Common Article 1 reads as follows².

² For a commentary on these provisions see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* 1999, HREOC Sydney 2000, pp 89- 97.

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 1 states that self-determination is a right of 'all peoples'. The right of Indigenous people to self-determination is the recognition that Indigenous people are socially culturally and politically constituted as a people.

Article 3 of the draft Declaration on the Rights of Indigenous Peoples seeks to declare that Indigenous peoples are in fact a 'peoples' within the meaning of the term. It states:

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

While there are a range of other articles in the draft Declaration that elaborate on the dimensions of this right to self-determination, the following two articles have been of particular importance in international negotiations defining the scope of Indigenous self-determination.

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

There are two main areas of debate about the application of the provisions of the international covenants to Indigenous peoples. First, is whether Indigenous peoples are entitled to a right of self-determination. Second, if they are, what is the content of that right and what are the limitations on its exercise (or put simply, what is Indigenous self-determination?)

a) Do Indigenous peoples have a right to self-determination?

There have been three main processes involving government decision making at the international level which have sought to grapple with the issue of whether Indigenous peoples have a right to self-determination over the past twenty five years. Two of these processes – the Organisation of American States negotiations on a proposed American Declaration on the Rights of Indigenous Peoples and the International Labour Organisation’s negotiation of Convention No. 169 – have delayed answering the question by using a disclaimer that the use of the term ‘peoples’ in the declaration or convention respectively shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Nevertheless the conceptual underpinnings of the principle of self-determination pervade the understanding of Indigenous rights in ILO Convention 169.

ILO Convention 169 requires that

- governments develop, ‘with the participation of the peoples concerned, coordinated and systematic action to protect the rights of Indigenous peoples and to guarantee respect for their integrity. Such action shall include measures for... promoting the full realisation of the social, economic and cultural rights of (Indigenous) peoples with respect for their social and cultural identity, their customs and traditions and their institutions’;³
- in applying the provisions of the Convention, ‘Governments shall consult the peoples concerned,... whenever consideration is being given to legislative or administrative measures which affect them directly’;⁴ and
- ‘the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use; and to exercise control, to the extent possible, over their own economic, social and cultural development.’⁵

The third process directly considering this issue is the negotiations on the draft Declaration on the Rights of Indigenous Peoples. Political recognition of the application of self-determination to Indigenous peoples by the governments of the world remains forthcoming in this process.

By contrast, there have been two main developments through the independent, expert bodies of the United Nations that suggest that Indigenous peoples *do* have a right to self-determination.

First, recent practice by the United Nations Human Rights Committee and the United Nations Committee on Economic, Social and Cultural Rights (i.e., the two committees that operate under and interpret the standards in the two international covenants) clearly identifies self-determination as a right held by Indigenous peoples, including in Australia. This can be seen from the following concluding observations and jurisprudence of the committees.

³ ILO Convention 169, Article 2.

⁴ ILO Convention 169, Article 6.

⁵ ILO Convention 169, Article 7.

Human Rights Committee (HRC)

- *Concluding observations on Australia*, UN Doc CCPR/CO/69/AUS, which states at para 10 that ‘The State party should take the necessary steps in order to secure for the Indigenous inhabitants a stronger role in decision making over their traditional lands and natural resources (article 1, para 2)’. The List of Issues of the Committee (UN Doc: CCPR/C/69/L/AUS, 25/04/2000, Issue 4) had asked ‘What is the policy of Australia in relation to the applicability to the Indigenous peoples in Australia of the right of self-determination of all peoples?’
- *Concluding observations on Canada*, Un Doc: CCPR/C/79/Add.105, 7/4/99, paras 7,8.
- *Concluding Observations on Norway*, UN Doc: CCPR/C/79/Add.112, 05/11/99, paras 10 and 17, which provides (at para 17) that ‘the Committee expects Norway to report on the Sami people's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that article’.
- *Concluding observations on Sweden*, UN Doc: CCPR/CO/74/SWE, 24/4/2002, para 15;
- *Lubicon Lake Band v Canada* (1990) Un Doc: CCPR/C/38/D/167/1984; and
- *Marshall (Mikmaq Tribal Society)* (1991) UN Doc: CCPR/C/43/D/205/1986.

Committee on Economic, Social and Cultural Rights (CESCR)

- List of Issues: Australia, UN Doc: E/C.12/Q/AUSTRAL/1, 23/05/2000, Issue 3: ‘What are the issues relating to the rights of indigenous Australians to self-determination, and how have these issues impeded the full realization of their economic, social and cultural rights?’
- *Concluding observations on Canada*, UN Doc: E/C.12/1/Add.31, 10/12/98 (see also CESCR, List of issues: Canada, UN Doc: E/C.12/Q/CAN/1, 10 June 1998, Issue 23);
- *Concluding observations on Columbia*, UN Doc: E/C.12/1/Add.74, 30/11/2001, paras 12, 33.

The second development which lends support to the position that Indigenous peoples constitute a ‘peoples’ under international law is in relation to the categorisation of Indigenous peoples as distinct in status from minorities. This has taken place through a variety of studies and processes within the United Nations over the past thirty years.

There have been five major reports prepared by Special Rapporteurs to the Sub-Commission on the Protection and Promotion of Minorities that have considered these issues.⁶ These are the reports by the Special Rapporteurs Critescu (1976), Capotorti (1979), Gros Espiell (1980), Deschenes (1985) and Cobo (1987).

The distinction confirmed in these reports can be summarised as follows.

1. The rights of persons belonging to minorities have developed by focusing on individual rights and in a way that does not recognise a collective status as ‘peoples’. International law has not recognised a right to self-determination for minorities.

⁶ For an overview of these reports see: Venne, S, *ibid*, pp 75-82.

2. By contrast, the rights of Indigenous peoples have developed in a way that recognises that they are distinct from minorities and that a key reason for this is that they possess a collective status.
3. This leads to the irresistible conclusion that Indigenous peoples are in fact 'peoples' within the context of Article 1 of the international covenants. Some UN studies have concluded as such.
4. This conclusion has also been reached by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, i.e. the two committees operating under the international covenants.
5. Based on these factors, the contention that Indigenous peoples constitute a 'peoples' and possess the necessary collective identity to be recognised as enjoying a right to self-determination can no longer be challenged with any legitimacy or credibility.
6. The ongoing debates over Article 3 of the draft Declaration, the Organisation of American States draft Declaration and the provisions of ILO Convention 169 indicate, however, that States have not yet accepted this conclusion.

b) What is Indigenous self-determination?

So what is Indigenous self-determination? And does international law place any limitations on its exercise and if so, what are they? These questions are explored in chapter 2 of the *Social Justice Report 2002* and summarised as follows.

1. Essential to the exercise of self-determination is choice, participation and control. The essential requirement for self-determination is that the outcome corresponds to the free and voluntary choice of the people concerned
2. Respect for distinct cultural values and diversity is fundamental to the notion of self-determination.
3. The protection of self-determination requires the recognition of the collective political identity of indigenous nations and peoples. It also requires official recognition of their representatives and institutions.
4. Respect for Indigenous peoples' relationship to land and resources is an integral component of self-determination, from an economic, social, political and cultural dimension. As an exercise of this control development on Indigenous land must not take place without the free, prior and informed consent of the Indigenous peoples concerned.
5. In a democracy, Indigenous peoples right to self-determination is not necessarily safeguarded or respected by a reliance on majority rule. Self-determination raises the issue of representativeness and participation within the democratic principle.

6. Ultimately, the maintenance of the territorial integrity of the State is linked to respect for self-determination. Numerous UN declarations, such as the Friendly Relations Declaration, limit the exercise of self-determination so that it does not threaten territorial integrity or political unity of States so long as those states conduct themselves in compliance with the principles of equal rights and self-determination of peoples and are representative.
7. Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.
8. Self-determination is not self-executing, unilateral or absolute in its application and is a process of engagement and negotiation.

An international conference of experts was convened by UNESCO in 1998 to consider the role of self-determination in preventing conflict and contributing to peace and security. It developed the following description of self-determination.

[Self-determination is] an ongoing process of choice for the achievement of human security and fulfilment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.⁷

Development

The Declaration on the Right to Development, adopted by the United Nations (UN) General Assembly in 1986, has been accepted by all government including Australia. This declaration confirms:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

'Development' in this context does not simply mean 'economic growth', but is better understood as 'sustainable human development', which requires creating an

⁷ UNESCO, 'Conclusions and recommendations of the conference' in van Walt van Praag, M (Ed.), *The implementation of the right to self-determination as a contribution to conflict prevention*, UNESCO Centre of Catalonia, Barcelona 1999, p19.

environment in which people can develop their full potential and lead productive, creative lives in accordance with their needs and interests. Companies need to accommodate Indigenous rights to enjoy economic benefits of their land consistent with the right to development.

The UN General Assembly, by consensus, including Australia, recently emphasised the link between development and human rights, in outlining a program towards sustainable development, noting the interdependence of economic development, social development and environmental protection.

The rights to development and self-determination, while distinct, have an important inter-relatedness for the situation of Indigenous people in Australia. The Declaration on the Right to Development explains:

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Development and self-determination require Indigenous people to have meaningful control over, and involvement in, decisions regarding their own future. The 2001 meeting of the UN's Working Group on Indigenous Populations noted:

[a] general call for Governments to honour the treaties they were bound by and for the speedy adoption of the draft United Nations declaration on the rights of indigenous people. The failure of Governments to implement national legislation, international treaties or court decision in favour of indigenous peoples' ownership over land or resources was mentioned by several participants. All noted that this effectively denied indigenous people their right to development⁸

Principles

Emerging out of these international human rights norms are some clear principles guiding the way in which policies regarding the treatment of Indigenous people should be formulated. The following four principles are fundamental to a rights based approach to company practice and policy formulation in Australia.

- 1 Human rights principles require that the cultural and political integrity of Indigenous people be respected and protected. This is achieved not only through the principle of self-determination but also through the notion of equality. The CERD Committee's General Recommendation 23 on Indigenous people confirms this principle
2. Human rights principles require recognition of Indigenous people's rights to control their land and the resources on it.
3. Human rights principles recognise that Indigenous people are entitled to effectively participate in decisions that affect them and their rights under international law. The principle of effective participation requires that decisions

⁸ Report on the Working Group's meeting, prepared for UN Sub-Commission on the Promotion and Protection of Human Rights, (UN document E/CN.4/Sub.2/2001/17, 9 August 2001), para 42.

that effect the rights of Indigenous people not be taken without their informed consent.

- 3 Protecting rights is not the same as balancing interests. This point was clearly made by the CERD Committee in relation to the dialogue with the Australian government over the NTA amendments and Australia's heritage legislation. The Committee made the point that a relationship of equality is not one in which Indigenous people take their place, as just another interest group, among a vast range of non-Indigenous interest groups that might be affected by native title or other Indigenous issues. Rather it is one where Indigenous interests are protected to the same extent as each and every other interest. At a policy level, a program which affects the rights of Indigenous people must be negotiated with the Indigenous people it directly affects obtaining their informed consent to its implementation.
- 4 An important principle emerging from international law is that the enjoyment of human rights should be progressively realised. This principle requires companies to establish benchmarks for the realisation of rights and evaluate the merit of programs and policies against these benchmarks.

The legislative regimes within Australia aimed at protecting Indigenous people's rights fall far short of human rights standards. In this context it is extremely important that company practice and policy formulation not be constrained by or contained within Australia's legislative regimes.

GLOSSARY

37A glossary of the abbreviations and acronyms used in this document is set out below.

CERD	Committee on the Elimination of Racial Discrimination , <i>Decision 2: Australia</i> CERD's <i>Decision 2(54) on Australia</i> ⁹ , <i>General Rec XXIII</i> CERD's <i>General Recommendation XXIII: Indigenous Peoples</i> , (1997) in <i>Compilation</i> at p192
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights ¹⁰
ICERD	International Convention on the Elimination of all forms of Racial Discrimination ¹¹
NTA	<i>Native Title Act 1993</i> (Commonwealth)
UN	United Nations
UNGA	United Nations General Assembly
<i>Vienna Declaration</i>	<i>Vienna Declaration and Programme of Action</i> ¹²

⁹ UN document A/54/18, para 12, 18 March 1999.

¹⁰ 999 UNTS 171 (Australia joined 1980).

¹¹ 660 UNTS 195 (Australia joined 1975).

¹² UN doc A/CONF.157/23, 25 June 1993, endorsed by UNGA resolution on 20 December 1993 (UN doc A/RES/48/121, para 2).